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State Wetland Protection

Status, Trends, & Model Approaches

A 50-state study by the
Environmental Law Institute

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U.S. Environmental Protection Agency

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Appendix: State Profiles

Idaho

I. Overview

Idaho has lost approximately 56 percent of its wetlands since the 1780s. Many of the remaining wetlands have been degraded by alterations to hydrology, vegetation, and soil.[1] The state relies primarily on §401 certification under the Clean Water Act (CWA) to regulate impacts to wetlands and has also recently initiated efforts to increase coordination among governmental and non-governmental agencies involved with wetland issues. Between October 2005 and October 2006, with support from the U.S. Environmental Protection Agency (EPA), Boise State University assessed interest among agencies in developing a state wetland conservation program. The Idaho Department of Fish and Game (IDFG) volunteered to lead the initiative because of the importance of wetlands to the agency's species protection efforts. Although wetlands make up only one to two percent of the land mass in Idaho, they are critical for the survival of 80 to 90 percent of the state's species. Idaho also received an EPA grant in October 2006 to assemble a coalition of state agencies, tribes, businesses, citizens, and other stakeholders to generate ideas on wetland program needs and how the state should conserve and manage wetlands.[2,3] Past EPA grants have also supported IDFG's efforts to inventory and assess wetlands throughout the state.[4]

II. Regulatory Programs

Wetland definitions and delineation

Idaho defines "waters of the state" as "[a]ll the accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof which are wholly or partially within, which flow through or border upon the state."[5] The state does not define wetlands separately.

Idaho Department of Environmental Quality (IDEQ), the agency that oversees §401 certification for the state, has not developed formal delineation criteria for wetlands.[6] When parties apply to the Corps and to IDEQ for permission under CWA §404 to alter wetlands, IDEQ relies on the Corps to determine whether the impacted area falls under federal and state jurisdiction.[7]

IDFG has adopted criteria based on the U.S. Fish and Wildlife Service's definition of wetlands and other sources to define wetland habitats and animal assemblages for game and non-game management issues.[8] This departmental framework is used to determine how to spend management dollars on habitat protection and restoration.[9]

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[1] Idaho Department of Fish and Game, *Idaho's Wetlands, at* http://fishandgame.idaho.gov/cdc/ecology/wetlands.cfm (last visited July 19, 2007).
[2] Personal Communication with Walt Poole, Idaho Dep't of Fish and Game (Oct. 30, 2006).
[3] Personal Communication with Chris Murphy, Idaho Dep't of Fish and Game (Apr. 27, 2007).
[4] Personal Communication with Chris Murphy, Idaho Dep't of Fish and Game (Nov. 13, 2006).
[5] IDAHO CODE ANN. § 22-4904(17). See also IDAHO CODE ANN. § 39-103(18) and § 39-3602(31).
[6] Personal Communication with Michael McIntyre, Idaho Dep't of Envtl. Quality (Oct. 30, 2006); Poole, *supra* note 2.
[7] Personal Communication with Michael McIntyre, Idaho Dep't of Envtl. Quality (Nov. 14, 2006).
[8] Murphy, *supra* note 3.
[9] Poole, *supra* note 2.

Wetland-related laws and regulations

The State of Idaho regulates wetlands primarily under §401 of the Clean Water Act. However, wetlands may also be regulated two additional water-related laws: the Idaho Lake Protection Act and the Idaho Stream Channel Protection Act.

§401 certification. Idaho relies on §401 certification to protect wetlands by approving, conditioning, or denying federal §404 and National Pollutant Discharge Elimination System permits. The Idaho Department of Environmental Quality (IDEQ) makes approximately 85-100 certifications per year. Approximately 20 percent of decisions are waived, 70 percent are approved, and 10 percent are denied. The certification process is decentralized; applications are processed in field offices. As of 2006, the department is developing a standardized approach to the §401 decision-making process to make application outcomes more consistent. The standardized approach will likely include both a quantitative methodology and a qualitative assessment.[10]

Idaho Lake Protection Act. Parties that intend to work on or above the lake bed and below the ordinary high water mark must obtain a permit from the Idaho Department of Lands (IDL).[11] Although rare, some areas covered by the Act may include wetlands. IDL staff rely on best professional judgment when reviewing these applications and may require parties to conduct mitigation for impacts to wetlands.[12,13]

Idaho Stream Channel Protection Act. Alterations to stream channels below the ordinary high water mark must be approved by the Idaho Department of Water Resources (IDWR).[14] Approximately one to two percent of applications involve impacts to riparian wetlands. IDWR evaluates these wetland applications using the same criteria as it uses for projects impacting streams.[15] These criteria consider the effect of the alteration on water flows, fish and wildlife habitat, aquatic life, water quality, recreation, and aesthetic beauty of the area.[16]

Organization of state agencies

Idaho Department of Environmental Quality. IDEQ handles regulatory issues regarding wetlands, including §401 certification, compensatory mitigation, and enforcement. IDEQ is based in Boise and maintains field offices in Coeur d'Alene, Lewiston, Boise, Twin Falls, Pocatello, and Idaho Falls. The department employs multiple staff members that spend portions of their time on wetland-related issues, combining to represent approximately one-half of a full-time equivalent (FTE). Staff activities include coordination among state agencies, §401 certification, and compensatory mitigation. The department spends approximately $35,000 to

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[10] McIntyre, *supra* note 6.

[11] IDAHO DEP'T OF ENVTL. QUALITY, PERMIT REQUIREMENTS FOR WORKING IN IDAHO STREAMS, RIVERS, LAKES, AND WETLANDS, *available at* http://www.deq.state.id.us/about/regions/lro_water_permit_requirements.pdf (last visited July 19, 2007).

[12] Personal Communication with Eric Wilson, Idaho Dep't of Lands (Oct. 26, 2006).

[13] IDAHO CODE ANN. § 58-13; IDAHO ADMIN. CODE r. 20.03.04.

[14] IDAHO DEP'T OF ENVTL. Quality, *supra* note 11.

[15] Personal Communication with Ervin Ballou, Idaho Dep't of Water Res. (Oct. 19, 2006).

[16] IDAHO ADMIN. CODE r. 37.03.07.

$45,000 on wetland-related activities annually, derived from the state's general fund for water quality issues.[17]

Idaho Department of Fish and Game. IDFG leads the statewide initiative to establish coordination on wetland issues among a wide variety of stakeholders, including state agencies.[18,19] Other agency wetland-related activities include oversight of wildlife management areas with riparian features and wetlands, inventory and monitoring of wetland species, and an education and outreach program that includes a strong wetland component.[20] The department also partners with other state agencies on wetland conservation prioritization[21] and state lands issues and offers advice on wetland-related issues such as conservation of species that depend on wetlands, restoration, and mitigation.[22,23]

IDFG is also home to the Idaho Conservation Data Center (IDCDC), whose mission is to collect, analyze, maintain, and disseminate scientific information necessary for the management and conservation of Idaho's biological diversity. The IDCDC has conducted inventory, assessment, and monitoring of many wetlands in the state. The agency employs a number of biologists who dedicate a portion of their time to wetland activities.[24] In addition to federal grant money, IDFG spends approximately $200,000 annually on wetlands, funded by charitable donations and license fees. The department is headquartered in Boise and has regional offices in Salmon, Pocatello, Nampa, Coeur d'Alene, Lewiston, and Jerome. There is also sub-regional office in McCall.[25]

Idaho Department of Lands. The Idaho Department of Lands (IDL) administers the Lake Protection Act, which may involve wetlands on rare occasions. The department also handles regulatory functions for surface mining and placer mining. These projects often impact wetlands, and IDL cooperates with the Corps, IDWR, IDEQ, IDFG, and EPA to provide oversight. Parties seeking approval for mining projects that involve filling wetlands must complete both a §404 application and an IDL application. IDL incorporates mitigation and other corrective actions into the project approval.[26]

Nationwide permits

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[17] McIntyre, *supra* note 6.
[18] Poole, *supra* note 2.
[19] Personal Communication with Chris Murphy, Idaho Dep't of Fish and Game (Nov. 28, 2006).
[20] Poole, *supra* note 2.; Murphy *supra* note 3.
[21] Murphy, *supra* note 4.
[22] Poole, *supra* note 2.
[23] Murphy, *supra* note 19.
[24] Murphy, *supra* note 3.
[25] Poole, *supra* note 2.
[26] Wilson, *supra* note 12.

Idaho conditioned a number of the 2002 Nationwide Permits (NWPs).[27] Applicants for conditioned NWPs must obtain a water quality certification from IDEQ if the project impacts a 303(d)-listed stream or a stream with TMDLs. Additionally, NWP #12 (Utility Line Activities) and NWP #14 (Minor Road Crossing) required an individual water quality certification from IDEQ if the project exceeds 250 linear feet in waters of the U.S. [28] IDEQ reviews NWPs every five years.[29] IDEQ's action on the 2007 NWPs could not be reviewed within the reporting period for this publication.

Mitigation

Idaho has not adopted guidelines, policies, or legislation regarding wetland mitigation beyond that required under CWA §404. IDEQ actively participates on a Mitigation Banking Review Team (MBRT) with the Walla Walla Corps District. There are formal guidelines for how the MBRT functions.[30]

Idaho has taken steps to establish an in-lieu-fee aquatic resource mitigation program for Idaho Transportation Department (ITD) projects. The proposed program is described in a draft memorandum of understanding (MOU) entitled *Memorandum of Understanding to Establish an Idaho Aquatic Resource Mitigation Program for Idaho Transportation Department Projects*. This MOU establishes an umbrella in-lieu-fee mitigation agreement between the Idaho Fish and Wildlife Foundation, ITD, the Corps, Federal Highway Administration (FHWA), EPA, IDEQ, and IDFG. The MOU establishes a mechanism to compensate for losses or impacts to wetland and stream resources throughout Idaho and establishes the framework for the creation of an Idaho Aquatic Resources Compensation Trust Fund. The Fund establishes a non-exclusive mechanism to mitigate for losses of aquatic resources caused by selected ITD projects.[31]

Compliance and enforcement

Idaho's water quality code establishes authority for IDEQ to issue abatement or corrective action orders,[32] injunctions,[33] criminal prosecution proceedings,[34] civil penalties,[35] and criminal

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[27] The following 2002 NWPs have been conditioned: NWP #3 - Maintenance; NWP #4 - Fish and Wildlife Harvesting; NWP #5 - Scientific Measuring Devices; NWP #6 - Survey Activities; NWP #7 - Outfall Structures and Maintenance; NWP #12 - Utility Line Activities; NWP #13 - Bank Stabilization; NWP #14 - Minor Road Crossings; NWP #15 - U.S. Coast Guard Approved Bridges; NWP #16 - Return Water from Upland Contained Disposal Areas; NWP #17 - Hydropower Projects; NWP #18 - Minor Discharges; NWP #19 - Minor Dredging; NWP 20 Oil Spill Cleanup; NWP #21 - Surface Coal Mining Activities; NWP #22 - Removal of Vessels; NWP #23 - Approved Categorical Exclusions; NWP #25 - Structural Discharges; NWP #27 - Stream and Wetland Restoration Activities; NWP #29 - Single-Family Housing; NWP #30 - Moist Soil Management for Wildlife; NWP #31 - Maintenance of Existing Flood Control Practices; NWP #32 - Completed Enforcement Actions; NWP #33 - Temporary Construction, Access and Dewatering; NWP #34 - Cranberry Production Activities; NWP #36 - Boat Ramps; NWP #37 - Emergency Watershed Protection and Rehabilitation; NWP #38 - Cleanup of Hazardous and Toxic Waste; NWP #39 - Residential, Commercial, and Industrial Developments; NWP #40 - Agricultural Activities; NWP #41 - Reshaping Existing Drainage Ditches; NWP #42 - Recreational Facilities; NWP #43 - Stormwater Management Facilities; and NWP #44 - Mining Activities.

[28] U.S. ARMY CORPS OF ENGINEERS, NATIONWIDE PERMITS FOR IDAHO, WALLA WALLA DISTRICT(2003), *available at* http://www.nww.usace.army.mil/html/offices/op/rf/nwp-ww/nwp02rev.pdf#search=%22nationwide%20permit%20idaho%22.

[29] McIntyre, *supra* note 7.

[30] *Id.*

[31] Murphy, *supra* note 3.

[32] IDAHO CODE ANN. § 39-108(3)(a)(iv)-(v).

penalties.[36] However, the state generally defers to the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency for wetland-related enforcement and compliance.

Tracking systems
IDEQ keeps records on elements of §401 certifications, including the location of project sites, the result of the application, conditions on certifications, and the primary contact.[37]

III. Water Quality Standards

Idaho has not adopted wetland-specific water quality standards. Wetlands are included under the narrative standard for "waters of the state." Point discharges must obtain certification from EPA (Idaho does not administer NPDES). The §401 certification review process applies the state's narrative water quality standards. Wetland functions to which the water quality standards and designated uses apply include general aesthetics, wildlife habitat, aquatic life, and water quality/pollution prevention.[38]

IV. Monitoring and Assessment

Monitoring and assessment for wetlands
IDFG conducts inventory, monitoring, and assessment of wetlands across the state to identify habitat issues that affect game and non-game species.[39,40] The department usually uses the Montana Department of Transportation's Wetland Assessment Method as a Level II Rapid Assessment Method. However, the department recognizes the need to examine the strengths and weaknesses of this method for Idaho. IDFG, along with the Idaho Soil Conservation Commission (ISCC), also uses an assessment methodology developed by federal agencies for assessing functional condition and monitoring riparian wetlands. Finally, the U.S. Fish and Wildlife Service's National Wetland Inventory and wetland ecological systems maps are commonly used for spatial analyses.[41]

The IDFG Conservation Data Center (IDCDC) also conducts field inventories of wetlands. Over the past ten years, IDCDC has received a series of EPA Wetland Program Development Grants to inventory and assess wetlands throughout the state. As of 2007, they had covered about 60 percent of the state with the funding provided by these grants. There currently are no plans to apply for additional grants to complete the inventory of the rest of the state, although the funding

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[33] IDAHO CODE ANN. § 39-108(8).
[34] IDAHO CODE ANN. § 39-117.
[35] IDAHO CODE ANN. § 39-117(3)(b). The statutory limits on civil penalties are $10,000 per day per violation or $1,000 per day for ongoing violations.
[36] IDAHO CODE ANN. § 39-117. The statutory limit on criminal penalties is the larger of either $10,000 per violation or $1,000 per day for ongoing violations.
[37] McIntyre, *supra* note 7.
[38] *Id.*
[39] Poole, *supra* note 2.
[40] Murphy, *supra* note 3.
[41] *Id.*

will expire at the beginning of 2007.[42] The inventories identify wetlands of relatively high ecological integrity, and hence high conservation value. The conservation and restoration values of inventoried wetlands are prioritized for development of watershed-based Wetland Conservation Strategies. These strategies have been used by groups such as The Nature Conservancy and land trusts to identify priorities for easements and acquisitions. They have also been used by restoration ecologists at IDFG and private consulting firms to identify high quality reference wetlands. Finally, IDFG uses the strategies to improve land management practices in wildlife management areas.[43]

As of April 2007, IDCDC had recently received a Wetland Program Development Grant to develop a GIS model that predicts wetland condition and general function across landscapes. The model will be developed by using reference wetlands, statistical analysis, and field assessments to validate the final product. This will result in a prototype Landscape-scale Wetland Assessment Tool (Level 1) useful for land management and planning.[44]

IDCDC maintains several databases with wetland inventory information, including a conservation site database, a plant community occurrence database, a vegetation database, and rare plant and animal occurrence databases.[45]

Monitoring and assessment for streams

Idaho has adopted a functional assessment methodology for streams, large rivers, lakes, and reservoirs.[46] The methodology is used for developing the state's 303(d) list, 305(b) report, and water quality standards.

V. Restoration

IDFG conducts restoration on wildlife management areas, which can include wetlands. The department measures restoration success by evaluating progress toward goals like species response, bank stability, vegetation diversity, soil stability, soil saturation, and stability for flood events.[47,48] IDFG also provides technical support to private landowners specifically for restoration or mitigation. IDFG regional and district offices also coordinate with various partners working on wetland restoration by providing technical and volunteer support.[49,50]

VI. Public-Private Partnerships

[42] Murphy, *supra* note 3.
[43] Murphy, *supra* note 4.
[44] Murphy, *supra* note 3.
[45] Murphy, *supra* note 4.
[46] McIntyre, *supra* note 7.
[47] Poole, *supra* note 2.
[48] Murphy, *supra* note 3.
[49] Poole, *supra* note 2.
[50] Murphy, *supra* note 3.

In addition to offering technical advice to private landowners on restoration projects, IDFG coordinates with corporations on land management projects. The department works with private power companies to ensure that dams do not impact anadromous fish or water quality. The department also works with ranches and farms to protect streams from agricultural impacts. These are voluntary initiatives on the part of corporations.[51]

VII. Education and Outreach

IDFG's outreach and education program has a strong wetland component. The program provides materials for K-12 teachers, maintains adjunct faculty positions at local universities, and conducts presentations and events for the general public, citizen groups, and organizations focusing on the importance of protecting wetland resources. The education and outreach division often conducts market penetration assessments to determine the success of efforts.[52]

VIII. Coordination with State and Federal Agencies

IDFG's IDCDC wrote the *Idaho Wetland Conservation Prioritization Plan* as part of the Idaho State Parks and Recreation Department's *State Comprehensive Outdoor Recreation and Tourism Plan (SCORTP).* In order to be eligible for federal Land and Water Conservation Funds, states must address wetlands as an important recreation and natural resource in their SCORTP.[53] This plan used data from the IDCDC wetland inventory and assessment.[54]

IDFG coordinates with IDL on state land issues, which sometimes include wetlands; with IDWR on water rights, stream channel restoration, and impacts to streams; with ITD on wetland mitigation; and with IDEQ on §401 certification (IDFG sometimes offers input on decisions).[55,56]

IDFG is also party to memoranda of understanding/agreement on land management issues with federal partners, including the Corps, Bureau of Land Management (BLM), USDA Forest Service, Bureau of Reclamation, Natural Resources Conservation Service (NRCS), and U.S. Fish and Wildlife Service. There is a focus on riparian areas, which cover hundreds of thousands of acres and include wetlands.[57]

IDEQ and IDFG participate in water quality meetings that touch on wetland issues with the Corps, EPA, BLM, and USDA Forest Service; however, these take place relatively

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[51] Poole, *supra* note 2..
[52] *Id.*
[53] LISA HAHN ET AL., IDAHO WETLAND CONSERVATION PRIORITIZATION PLAN (Idaho Conservation Data Center 2006),*available at* http://www.idahoparks.org/assets/content/docs/SCORTP/SCORTP_wetlands.pdf#search=%22idaho%20wetlands%20conservation%20plan%22.
[54] Murphy, *supra* note 4.
[55] Poole, *supra* note 2.
[56] Murphy, *supra* note 3.
[57] Poole, *supra* note 2.

infrequently.[58] Additionally, IDEQ and IDFG are also part of a natural resource group that includes the Corps, EPA, BLM, USDA Forest Service, National Oceanic and Atmospheric Administration, and NRCS. This group meets bi-monthly to discuss issues that could impact member agencies, such as endangered salmon and steelhead and other riparian issues.[59]

IX. Acronyms and Abbreviations

CREP – Conservation Reserve Enhancement Program
Corps – U.S. Army Corps of Engineers
CWA – Clean Water Act
IDCDC – Idaho Conservation Data Center
IDEQ – Idaho Department of Environmental Quality
IDGF – Idaho Department of Game and Fish
IDL – Idaho Department of Lands
IDWR – Idaho Department of Water Resources
ITD – Idaho Transportation Department
EPA – U.S. Environmental Protection Agency
FSA – USDA Farm Service Agency
FTE – Full-time Equivalent
MBRT – Mitigation Banking Review Team
NAWCA – North American Wetland Conservation Act
NAWMA – North American Waterfowl Management Act
NEPA – National Environmental Protection Act
NPDES – National Pollution Discharge Elimination System
NRCS – USDA Natural Resources Conservation Service
NWPs – Nationwide Permits
USDA – United States Department of Agriculture
WQS – Water Quality Standards
WRP – Wetlands Reserve Program

[58] McIntyre, *supra* note 5.
[59] Poole, *supra* note 2.