



ENVIRONMENTAL
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State Wetland Protection

Status, Trends, & Model Approaches

*A 50-state study by the
Environmental Law Institute*

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Appendix: State Profiles

Maine

I. Overview

Maine's wetland resources encompass approximately 25 percent of the state's land area, or four times the wetland acreage of the other five New England states combined. Approximately five million acres of the state's wetlands are freshwater and about 150,500 acres are tidal. Jurisdiction is divided between two state agencies: Maine Department of Environmental Protection and the Land Use Regulation Commission. Each agency implements separate but similar laws and regulations that provide protection for wetlands and other aquatic resources.¹

II. Regulatory Programs

Wetland definitions and delineation

Maine defines "waters of the state" as:

any and all surface and subsurface waters that are contained within, flow through, or under or border upon this State or any portion of the State, including the marginal and high seas, except such waters as are confined and retained completely upon the property of one person and do not drain into or connect with any other waters of the State, but not excluding waters susceptible to use in interstate or foreign commerce, or whose use, degradation or destruction would affect interstate or foreign commerce.^{2,3}

The state provides several definitions of wetlands. Maine's Natural Resources Protection Act⁴ (NRPA), regulated by the Maine Department of Environmental Protection, defines coastal wetlands as:

all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland which is subject to tidal action during the highest tide level for the year in which the activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.⁵

NRPA defines a forested wetland as "a freshwater wetland dominated by woody vegetation that is 6 meters tall, or taller."⁶ A floodplain wetland is defined as "lands adjacent to a river, stream or brook that are inundated with floodwater during a 100-year flood event and that under normal circumstances support a prevalence of wetland vegetation typically adapted for life in saturated soils."⁷ Finally, freshwater wetlands are defined as:

freshwater swamps, marshes, bogs and similar areas that are inundated or saturated by surface or groundwater at a frequency and for a duration sufficient to support, and which under normal circumstances

¹ Maine Department of Environmental Protection's Issue Profile, *Maine's Wetlands: Their Functions and Values*, at <http://www.maine.gov/dep/blwq/docstand/ipwetfv2.htm>.

² The state definition of "waters" includes groundwater and so is more inclusive than the federal definition of waters (since the majority of wetlands in the state are connected to either surface or ground waters).

³ ME. REV. STAT. ANN. tit. 38, § 361-A(7).

⁴ *Id.* § 480-A

⁵ *Id.* § 480-B(2).

⁶ *Id.* § 480-B(2-C).

⁷ *Id.* § 480-B(2-D).

do support, a prevalence of wetland vegetation typically adapted for life in saturated soils; and not considered part of a great pond, coastal wetland, river, stream or brook.⁸

The state's wastewater discharge licensing regulations provide a definition for wetlands that corresponds with the federal definition.⁹ Finally, laws pertaining to the areas of the state under the jurisdiction of the Land Use Regulation Commission (LURC) define coastal wetlands, floodplain wetlands, forested wetlands, and freshwater wetlands separately, but the definitions listed are almost identical to their NRPA counterparts. LURC's rules also include a definition for peatlands, which are "[f]reshwater wetlands, typically called bogs or fens, consisting of organic soils at least 16 [inches] deep, predominantly vegetated by ericaceous shrubs (heath family), sedges, and sphagnum moss and usually having a saturated water regime."¹⁰

Maine delineates wetlands consistently with the criteria outlined in the U.S. Army Corps of Engineers' 1987 *Wetlands Delineation Manual*.¹¹

Organization of state agencies

State-level wetland regulation and protection falls under the jurisdiction of two agencies: the Maine Department of Environmental Protection (MDEP) and the Land Use Regulation Commission (LURC). Maine is unique in its jurisdictional approach to wetlands regulation. The MDEP oversees the implementation of wetland-related statutes and regulations in "organized" areas of the state. LURC is charged with implementing land use rules and protections in "unorganized" and "deorganized" areas of the state.¹²

Maine Department of Environmental Protection. There are four divisions within the MDEP that work on wetland-related issues. The Land Resource Regulation Division oversees permitting under NRPA, as well as enforcement, compliance, and mitigation, and is funded mostly by general state appropriations, dedicated fees, and the Coastal Zone Management Program. The Division of Water Resource Regulation is responsible for permitting, compliance, and enforcement related to the state wastewater discharge and National Pollutant Discharge Elimination System (NPDES) programs. This division also issues permits and water quality certifications for dam and hydropower projects. The Division of Environmental Assessment provides scientific information and technical support for the agency's other wetland-related programs, including review and comment for NRPA and LURC permits, §401 water quality certification and NPDES permits, as well as other water quality issues, including bioassessment and monitoring for wetlands throughout the state. This group is funded by both the general state fund and federal agency grants. Finally, the Watershed Management Division oversees

⁸ *Id.* § 480-B(4).

⁹ Maine Department of Environmental Protection Fact Sheet: Wetlands as Waters of the State (Apr. 5, 2004) (on file with author).

¹⁰ Maine Department of Conservation, Maine Land Use Regulation Commission, *The Commission's Rules and Standards, Chapter 10, Land Use Districts and Standards* (April 1, 2004).

¹¹ 06-096-310 ME. CODE R. § 2B.

¹² These are areas defined as "townships [and] plantations that have not received [C]ommission approval...to implement their own land use controls, municipalities that have organized since 1971 but have not received [C]ommission approval...to implement their own land use controls, and all other areas of the State that are not part of an organized municipality except Indian reservations." ME. REV. STAT. ANN. tit. 12, § 206-A.

watershed management and assessment and §319-related activities. Their monies come from both state general funds and federal agencies.¹³

The MDEP has four regional offices, including an office in the state capital of Augusta, which serves as both a regional office and the agency's headquarter office. Many regulatory activities are administered by the Augusta office; however, MDEP's three regional offices also conduct permitting and technical support activities. The regional offices each offer different services, but do generally work with permit applicants to avoid and minimize impacts to protected natural resources. The agency employs approximately 450 staff in total, of which around 35 full-time equivalents (FTEs) work on wetland regulation and about five FTEs are dedicated to wetlands classification, biomonitoring,¹⁴ and watershed management.¹⁵ Major staff activities revolve around permitting, enforcement, monitoring and assessment, §401 water quality certification, outreach and technical support, and mitigation.¹⁶

Land Use Regulation Commission. The Maine Legislature created the Land Use Regulation Commission in 1971 to provide planning and zoning authority for the state's townships, plantations, and unorganized areas. The Commission's jurisdiction encompasses approximately 52 percent of the state's land area, much of which is sparsely populated. With more than 10.4 million acres, LURC's jurisdiction holds the largest contiguous unorganized area in the northeastern United States. Traditionally, development has been concentrated along the "fringe" of the jurisdiction, adjacent to more populous areas where services are more accessible.¹⁷ However, today numerous areas are rapidly developing away from the fringe, and LURC has begun targeting certain areas of growth for "prospective zoning."¹⁸

LURC has a total of 23 FTEs working on wetland-related issues in the agency's Planning Division and Permitting and Compliance Division. Staff activities are wide-ranging and include enforcement and permitting, as well as §401 review for larger projects and outreach and technical support on wetland issues. There are five regional offices, plus a central office located in Augusta. Much of the permitting and technical support activities occur in the regional offices, where staff work directly with applicants to minimize or avoid impacts to wetlands.¹⁹

The annual budget for the entire agency is approximately \$2 million (fiscal year 2007).²⁰ Because wetlands activities are integrated into most agency activities, it is difficult to estimate the amount devoted specifically to wetlands work. Almost all funds for wetland-related work come from the state's general funds. In the past, small federal grants have been awarded

¹³ Personal communication with Judy Gates, Maine Department of Environmental Protection (Mar. 24, 2004).

¹⁴ One FTE is dedicated to wetland monitoring, assessment, and water quality standards/criteria development (plus part of another position as the match for a federal grant). The single position is funded through federal §104(b)(3) funds.

¹⁵ Gates, *supra* note 13.

¹⁶ Personal communication with Judy Gates, Maine Department of Environmental Protection (May 13, 2004).

¹⁷ Land Use Regulation Commission, *About the Commission*, at <http://www.state.me.us/doc/lurc/about.html> (last visited on Aug. 9, 2004).

¹⁸ Personal communication with Marcia Spencer-Famous, Land Use Regulation Commission (Sept. 10, 2004).

¹⁹ Personal communication with Marcia Spencer-Famous, Land Use Regulation Commission (Apr. 14, 2004).

²⁰ Personal communication with Fred Todd, Land Use Regulation Commission (Apr. 25, 2007).

infrequently for specific projects; however, in recent years, no federal grants have been awarded for projects aimed at implementation or development of LURC's wetlands program.²¹

Wetland-related law and regulation

In addition to the protections offered under CWA,²² Maine regulates wetlands under four additional sets of statutes and regulations. The Natural Resources Protection Act,²³ Mandatory Shoreland Zoning Act,²⁴ and Waste Discharge Licensing Program²⁵ are implemented by the MDEP in organized areas of the state. The statute that created LURC²⁶ also outlines the rules and measures for land use regulation in "unorganized" and "deorganized" areas of the state.

Natural Resources Protection Act. The Natural Resources Protection Act (NRPA) guides activities in the state's "protected natural resources." The law requires a permit from MDEP for certain listed activities "located in, on, or over any protected natural resource," or adjacent to "(A) a coastal wetland, great pond, river, stream or brook or significant wildlife habitat contained within a freshwater wetland, or (B) freshwater wetlands consisting of or containing: (1) under normal circumstances at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water, except for artificial ponds or impoundments; or (2) peatlands dominated by shrubs, sedges and sphagnum moss."²⁷ The following activities are covered: (a) dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials; (b) draining or otherwise dewatering; (c) filling, including adding sand or other material to a sand dune; or (d) any construction, repair or alteration of any permanent structure.²⁸ Certain types of activities are also specifically exempted under NRPA.²⁹

Multiple regulations that apply to NRPA's provisions have also been adopted. "Permit By Rule" (PBR) regulations identify activities³⁰ that may be conducted in or adjacent to wetlands and waterbodies and provide standards under which the activities may be conducted. The MDEP must be notified of PBR activities, but do not require an individual permit.³¹ "Wetlands and Waterbodies Protection" rules address the licensing of projects that are not eligible for PBR.

²¹ Personal communication with Fred Todd, Land Use Regulation Commission (Apr. 14, 2004).

²² The state administers §401 water quality certification and National Pollutant Discharge Elimination System permitting. Personal communication with Jeanne DiFranco, Maine Department of Environmental Protection (Aug. 18, 2004).

²³ ME. REV. STAT. ANN. tit. 38, § 480-A.

²⁴ *Id.* §§ 435-449.

²⁵ *Id.* § 413(1).

²⁶ ME. REV. STAT. ANN. tit. 12, § 206-A(2).

²⁷ ME. REV. STAT. ANN. tit. 38, § 480-C(1).

²⁸ *Id.* § 480-C.

²⁹ *Id.* § 480-Q.

³⁰ The following types of activities may be eligible for PBR: activities adjacent to a protected natural resource; placement of permanent intake pipes and water monitoring devices (including drilled wells); replacement of permanent structures; movement of rocks and vegetation; placement of outfall pipes (including ditches and drain tiles); shoreline stabilization using vegetation or riprap; construction of crossings (utility lines, pipes and cables); construction of stream crossings (bridges, culverts and fords); general permits for state transportation facilities; restoration of natural areas (i.e., "undoing" human alteration); fisheries & wildlife habitat creation or enhancement and water quality; improvement projects; piers, wharves and pilings in coastal wetlands; public boat ramps; selected activities in coastal sand dunes; transfers and permit extensions; and one-time renewals of maintenance dredging permits.

³¹ 06-096 -305 CODE ME. R. § 1B.

These rules contain requirements to avoid impacts, to minimize impacts that are determined to be unavoidable, and to compensate for those impacts, when required.³² Regulations have also been adopted for evaluating impacts to existing scenic and aesthetic uses resulting from activities associated with protected natural resources,³³ as well as permitting impacts to significant wildlife habitat³⁴ and sand dune systems.³⁵

Any alterations to freshwater wetlands require a special three-tiered permit review process.³⁶ Part of this process is avoidance and minimization, which requires an alternatives analysis.³⁷ In addition, the state is required to map freshwater wetlands and periodically review and revise the maps.³⁸ The law also allows local municipalities to assume regulatory authority.³⁹

Mandatory Shoreland Zoning Act. The Mandatory Shoreland Zoning Act (MSZA) requires municipalities to adopt zoning and land use control ordinances to protect shoreland areas. Zoning ordinances outline what types of activities can occur in applicable areas.⁴⁰ Shoreland areas lie within 75 feet of the high-water line of a stream or within 250 feet of the normal high-water line of any great pond, river or saltwater body; the upland edge of a coastal wetland; or the upland edge of a freshwater wetland,⁴¹ except as otherwise provided.⁴² Although cities and counties implement the MSZA, MDEP provides guidance and oversight.

Waste discharge licensing. The MDEP also administers the state's waste discharge licensing program. A "discharge" is defined as "any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant to water of the [s]tate." Regulated discharges come from municipal, industrial and commercial sources, overboard discharge systems, spray irrigation, salt/sand piles, disposal of contaminated snow, aquatic pesticide use, and the underground injection control program. A discharge may not lower the quality of any water body below its legal classification and must also conform with Maine's antidegradation policy (described below in *III. Water Quality Standards*).⁴³

Use Regulation. The LURC statute, entitled "Use Regulation,"⁴⁴ replaces the MSZA and NRPA in areas of LURC jurisdiction. In these areas, the Commission is authorized to adopt rules to

³² 06-096 -310 CODE ME. R. §§. 3N(1)-(5).

³³ 06-096-315 CODE ME. R. § 1.

³⁴ 06-096-335 CODE ME.R. § 1.

³⁵ 06-096-355 CODE ME.R. § 1.

³⁶ ME. REV. STAT. ANN. tit. 38, § 480-X.

³⁷ 06-096-310 CODE ME. R. § 9A.

³⁸ Me. Rev. Stat. Ann. tit. 38, § 480-I.

³⁹ *Id.* § 480-F.

⁴⁰ *Id.* § 438-A.

⁴¹ Freshwater wetlands include, for purposes of the MSZA, freshwater swamps, marshes, bogs and similar areas, other than forested wetlands, which are: (a) of ten or more contiguous acres, or of less than ten contiguous acres and adjacent to a surface water body, excluding any river, stream or brook, such that, in a natural state, the combined surface area is in excess of ten acres; and (b) inundated or saturated by surface or ground water at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils. Freshwater wetlands may contain small stream channels or inclusions of land that do not conform to the criteria of this subsection. ME. REV. STAT. ANN. tit. 38, § 436-A(5).

⁴² *Id.* § 435.

⁴³ ME. REV. STAT. ANN. tit. 38, § 413.

⁴⁴ ME. REV. STAT. ANN., *supra* note 25.

interpret and carry out the statute's requirements. These requirements, entitled "Land Use Districts and Standards," relate to land use standards and planning, as well as standards for identifying special management, protection, and development subdistricts, including wetland protection subdistricts, and the allowable land uses and permitting requirements within such subdistricts. Land use standards also include development standards for wetland alterations and guidelines for timber harvesting near rivers, streams, ponds, wetlands, and tidal waters. Permit review and Compensatory mitigation requirements are outlined in the Wetland Compensation Guidance.⁴⁵

Wetland protection subdistricts are regulated in three categories: (a) P-WL1 – surface water bodies and areas meeting the definition of coastal or freshwater wetlands, including wetlands of special significance⁴⁶ and constructed ponds greater than 10 acres in size; (b) P-WL2 – scrub-shrub and other nonforested freshwater wetlands, including constructed ponds less than ten acres in size which are not fed or drained by flowing waters; and (c) P-WL3 – forested freshwater wetlands.⁴⁷ LURC regulates freshwater and coastal wetlands identified by the National Wetlands Inventory. When a project would impact more than one acre of wetlands, however, the rules require the applicant to delineate wetlands on the property, and the delineated wetland is then regulated. Delineation is guided, as required by Maine's rules, by the Corps' 1987 *Wetlands Delineation Manual*.⁴⁸

§401 certification

Section 401 water quality certifications are issued as part of the NRPA permit. Certifications may also be issued as part of a PBR or as part of a permit under LURC's wetland alteration standards, where the water quality certification is implied even if it is not necessary for the project being permitted. A PBR or LURC permit includes a water quality certification, though the permitting action may not legally require a water quality certification.⁴⁹

Approximately 400 NRPA permits are issued with water quality certifications annually, while up to 2500 PBRs are issued each year (though not all PBRs require water quality certifications). LURC issues roughly 80 permits annually. Few §401 water quality certifications are denied outright by MDEP or LURC staff. Usually, permittees work with applicants to avoid or minimize damage, or redesign projects where necessary, relying on best professional judgment to assess and issue water quality certifications. Of those denials that do occur, more than half go to applicants whose projects have already been cited for failing to obtain a permit (known as "after-the-fact" permit applications).⁵⁰

⁴⁵ ME LURC, *Wetland Compensation Guidelines* (Feb. 26, 1998), available at <http://www.maine.gov/tools/whatsnew/attach.php?id=2811&an=1>.

⁴⁶ Wetlands of special significance include: (a) areas enclosed by the normal high water mark of flowing waters, stream channels, and bodies of standing water, except for constructed ponds less than ten acres in size which are not fed or drained by flowing waters; (b) coastal wetlands, together with areas below the high water mark of tidal waters and extending seaward to the limits of the State's jurisdiction; and (c) freshwater wetlands (defined further in the ME. REV. STAT. ANN. tit. 12, § 206-A).

⁴⁷ Personal communication with Marcia Spencer-Famous, Senior Land Use Planner Land Use Regulation Commission (May 18, 2007).

⁴⁸ Maine Department of Conservation, Maine Land Use Regulation Commission, *supra* note 10.

⁴⁹ Gates, *supra* note 16.

⁵⁰ *Id.*

Statewide programmatic general permits

Maine operates under a statewide programmatic general permit (SPGP) and therefore does not have applicable nationwide permits. The current SPGP, effective October 11, 2005 – October 11, 2010, expedites the Corps' review of certain listed activities in Maine's coastal and inland waters and wetlands that are subject to federal jurisdiction.⁵¹ The SPGP does not preclude permit applications for other required permits, e.g., NRPA, LURC, and local permits.

Projects with minimal individual and cumulative effects on the aquatic environment are approved administratively under the SPGP. Projects with the potential for more than minimal effects are subject to individual permit review. All SPGP authorizations are subject to the applicability requirements, procedures, and conditions contained in the SPGP documentation. Project eligibility under the SPGP falls into two categories: non-reporting projects (Category I) and reporting projects requiring screening (Category II). Category I activities do not require a separate Corps permit and are not required to be reported, although the Corps has the discretion to require individual permit review.⁵² Category II activities must be reviewed by state and federal resource agencies and may proceed only after authorization by the Corps.⁵³ Representatives from the Corps and other federal resource agencies (U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and National Marine Fisheries Service) and state agencies review Category II activities, as outlined within the Maine SPGP.⁵⁴

Activities authorized under the SPGP are subject to a set of general requirements and conditions relating to requirements under other permits, applicability of the SPGP, minimization of environmental impacts, discretionary authority of the Corps, work in waters managed under the International Joint Commission or considered National Lands, historic properties, endangered species and essential fish habitat, wild and scenic rivers, navigation, federal liability, procedural elements,⁵⁵ duration of authorization, and previously authorized activities.⁵⁶

⁵¹ U.S. Army Corps of Engineers New England District, Permit No. GP-39, *Department of the Army Programmatic General Permit – State of Maine (2005)*, available at <http://www.nae.usace.army.mil/reg%5Cmeall.pdf>.

⁵² *Id.* (Category I activities consist of projects occupying less than 4,300 square feet of inland waterway and/or wetland fill and secondary impacts, including: projects covered by State Tier One permits with no cumulative impacts over 15,000 square feet in inland wetlands from previous permits, unauthorized work, and/or other state permits; crossing of perennial waterways designated as Essential Fish Habitat (EFH) for Atlantic salmon; and in-stream work of up to 4,300 square feet of fill below ordinary high water in waterways not designated as EFH for Atlantic salmon and performed in accordance with PBR and LURC permit standards.)

⁵³ *Id.* (Category II activities include projects of three acres to 4,300 square feet of inland waterway and/or wetland fill and secondary impacts. This encompasses: all temporary and permanent fill and excavation discharges, except for incidental fallback; in-stream work, including crossings with any discharge of fill below ordinary high water in perennial waterways designated as EFH for Atlantic salmon. Time of year restrictions are determined on a case-by-case basis for Category II activities.)

⁵⁴ *Id.*

⁵⁵ Procedural conditions relate to: cranberry bog development; inspections; maintenance; property rights; modification, suspension, or revocation of a permit; restoration; authorization of special conditions by the Corps; false or incomplete information; abandonment; enforcement; and emergency situations. U.S. Army Corps of Engineers New England District, *supra* note 51.

⁵⁶ U.S. Army Corps of Engineers New England District, *supra* note 51.

Mitigation

Compensatory mitigation on MDEP lands. Wetland compensation is regulated separately by the MDEP and LURC for the lands over which they have jurisdiction. For MDEP lands, the MSRA contains provisions for general mitigation measures, wetland mitigation banking, and in-lieu-fee mitigation, stating that “[the MDEP] may require that compensation include the design, implementation and maintenance of a compensation project or, in lieu of such a project, may allow the applicant to purchase credits from a mitigation bank or to pay a compensation fee.”⁵⁷

The state’s regulations specify that the goal of compensation is to “achieve no net loss of wetland functions and values.”⁵⁸ To this end, the regulations allow for the method, type, and location of compensation to vary. A functional assessment is required in order to better understand the functions of the impacted wetlands. The regulations establish a preference for mitigation to be located on-site or as close as necessary to offset direct impacts. It may, however, be placed off-site where it will satisfy wetland priority needs as established at the local, regional, or state level. The regulations allow for mitigation requirements to be met through restoration, enhancement, preservation, or creation of wetlands, and more than one type of compensation may be allowed for a single project. The rules also establish replacement ratios. The regulations outline compensation standards related to expertise, finances, persistence, monitoring, maintenance, protection, source waters, and implementation, as well as circumstances under which exceptions are granted (these generally apply only for minimal alterations). Considerations for denial are also outlined for projects causing “unreasonable impacts.”⁵⁹

Although NRPA provides some protection for streams, the “Wetlands and Waterbodies Protection” rules were recently updated to incorporate further protection for streams, rivers, and brooks by requiring applicants to avoid and minimize impacts and to provide compensation for unavoidable impacts. The regulation now applies to “the alteration of a coastal wetland, great pond, freshwater wetland, river, stream, or brook...”⁶⁰ The MDEP is presently working on functional assessments and other mitigation measures specific to streams and rivers.⁶¹

Mitigation banking regulations require that banking occur in the same watershed as the impacted wetland. Replacement ratios guide the determination of credits for compensation of proposed projects. Other provisions set functional requirements, limitations, required level of expertise for operation, terms and conditions, and application requirements.⁶²

The state is currently working to establish an in-lieu-fee compensation program. The program has been designed with the assistance of a stakeholder workgroup, and a contractor has been identified to implement the program. As of August 2007, a draft in-lieu fee document was being finalized; state staff expect the program to be authorized in fall 2007.⁶³

⁵⁷ ME. REV. STAT. ANN. tit. 38, § 480Z.

⁵⁸ 06-096-310 CODE ME. R., § 5C.

⁵⁹ *Id.*

⁶⁰ *Id.* § 2A.

⁶¹ Gates, *supra* note 16.

⁶² 06-096-310 CODE ME. R., § 7.

⁶³ Personal communication with Jeff Madore, Maine Department of Environmental Protection (Aug. 15, 2007).

Compensatory mitigation on LURC lands. LURC's rules require that a functional assessment be conducted for projects altering more than 500 square feet of a wetland of special significance, for proposed alterations of more than 20,000 square feet, and for alterations to scrub-shrub or forested wetland. If the functional assessment identifies a loss of wetland function, compensation is required. LURC's *Wetland Compensation Guidelines*, adopted in 1998, are similar to the MDEP's regulations, but are not in a rule. The guidelines allow for method, type, and location of compensation to vary, depending on wetland priority needs as established at the local, regional, or state level. Compensatory mitigation requirements may be met through restoration, enhancement, preservation, or creation of wetlands. Replacement ratios are identical to those set forth by the MDEP. The guidelines similarly set forth compensation standards related to expertise, finances, persistence, monitoring, maintenance, protection, source waters, and implementation. Mitigation banking guidelines require that banking occur in the same watershed as the impacted wetland, and additional banking provisions establish replacement requirements, limitations, required level of expertise for operation, terms and conditions, alternatives analyses, and functional assessments.⁶⁴

Compliance and enforcement

LURC's enforcement provisions are outlined in state law.⁶⁵ State personnel are authorized to conduct investigations of violating activities, site inspections, and examinations where necessary. People found to be in violation are subject to a civil penalty of not more than \$10,000 per day. Additionally, LURC may "institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct, or abate any violation...including proceedings to revoke or suspend any [C]ommission permit or approval." Restoration or other compensatory mitigation actions may also be ordered.⁶⁶ Because LURC staff usually work closely with applicants on permits, the number of enforcement and compliance actions necessary is minimized.⁶⁷

Tracking systems

Both MDEP and LURC have separate permit tracking databases. MDEP's system tracks permit applications back to 1968. There is also a state tracking system for resources regulated under the NRPA, including data on wetland loss, mitigation as it is reported annually, project locations, and impacts, as well as all monitoring and restoration data over a period of five years. A third database tracks compliance and enforcement for the state's resources. Staff inspections and site visits are part of each of the systems. As part of an agency-wide initiative to integrate existing data, efforts are underway to combine these three databases.⁶⁸ LURC's database tracks permits, enforcement actions and progress, and ongoing compliance checks. Commission staff have incorporated the tracking of wetland loss into the database.⁶⁹

III. Water Quality Standards

⁶⁴ Maine Land Use Regulation Commission, *Wetland Compensation Guidelines (1998)*, available at <http://www.maine.gov/tools/whatsnew/attach.php?id=2811&an=1>.

⁶⁵ ME. REV. STAT. ANN. tit. 12, § 685-C(8).

⁶⁶ ME. REV. STAT. ANN. tit. 12, § 206-A.

⁶⁷ Spencer-Famous, *supra* note 19.

⁶⁸ Gates, *supra* note 16.

⁶⁹ Spencer-Famous, *supra* note 19.

Maine has not adopted water quality standards that are specific to wetlands; however, MDEP's Division of Environmental Assessment is currently developing wetland-specific water quality standards and criteria for the state.⁷⁰ At present, the state's water quality standards apply to all "waters of the state," which include wetlands. Standards are narrative, chemical, and biological in nature.⁷¹

The state's antidegradation policy explicitly includes wetlands:

Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected...In making its determination of uses to be protected and maintained, the department shall consider designated uses for that water body and (a) aquatic, estuarine, and marine life present in the water body; (b) wildlife that utilize the water body, (c) habitat, including significant wetlands, within a waterbody supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the waterbody; (d) the use of the waterbody for recreation...; and (e) any other evidence that...demonstrates ecological significance...and...demonstrates historical or social significance.⁷²

IV. Monitoring and Assessment

In 1998, MDEP began development of a biological monitoring and assessment program for freshwater wetlands.⁷³ The program is part of the MDEP's overall water quality assessment program that oversees monitoring and assessment for all state waters and provides scientific and technical assistance to other state environmental programs, as well as non-governmental organizations.⁷⁴ The wetland monitoring program is integrated with the state's river and stream biomonitoring program and conducts basin-wide watershed monitoring and biological assessment throughout the state on a rotating five-year schedule.⁷⁵

MDEP program staff are currently developing biological criteria for freshwater wetlands. Once completed, MDEP plans to incorporate the methodology into the state rules for purposes of CWA §303(d) listing and §305(b) reporting.⁷⁶ Because rule making can be a lengthy process, state staff will likely adopt the methodology as agency policy before it is officially enacted. The methodology may be used for state discharge licensing, stormwater, hydropower licensing, measuring mitigation success, and other regulatory measures.⁷⁷ CWA §104(b)(3) competitive grants for wetlands have supported the wetland biological monitoring and assessment program since 1998.⁷⁸

⁷⁰ Personal communication with Jeanne DiFranco, Maine Department of Environmental Protection (Aug. 18, 2004).

⁷¹ ME. REV. STAT. ANN. tit. 38, § 464.

⁷² *Id.* at 464-F(1).

⁷³ Maine Department of Natural Resources, *Wetland Monitoring and Assessment Program*, at <http://www.maine.gov/dep/blwq/wetlands/monitoring.htm> (last visited Oct. 2, 2007).

⁷⁴ Personal communication with Jeanne DiFranco, Maine Department of Environmental Protection (Mar. 16, 2007).

⁷⁵ *Id.*

⁷⁶ DiFranco, *supra* note 70.

⁷⁷ *Id.*

⁷⁸ *Id.*

V. Restoration and Partnerships

Maine has not instituted a formal restoration program, nor does it formally provide technical support or outreach to private landowners or coordinate with the U.S. Department of Agriculture on restoration programs. However, MDEP staff do assist in field surveys for farmers seeking to install ponds on their property. In addition, the state planning office⁷⁹ does employ a restoration coordinator, to which mitigating parties are directed.⁸⁰

MDEP has also participated in the Corporate Wetlands Restoration Partnership (CWRP), a public-private initiative to restore Maine's environmentally valuable wetlands and other aquatic resources. The Maine CWRP was launched in June 2000 and includes state businesses and environmental organizations in addition to several federal agencies.⁸¹

VI. Education and Outreach

The MDEP has an education and outreach workgroup composed of staff from the Land and Water Resources Regulation Divisions, Division of Environmental Assessment, and Watershed Management Division. The group's latest wetland-related campaigns have been associated with stormwater. In the past, efforts have also focused on general water quality. Efforts are targeted towards agency field personnel, as well as the general public. Finally, MDEP also has a column, *In Our Backyard*, that appears in the state's newspapers and addresses statewide environmental issues, including wetlands.⁸²

Individual staff also conduct numerous wetland-related education and outreach events, such as presentations for scientific/professional meetings, contractors and developers, schools, conservation groups, and others. Department staff also are involved in educational activities such as the Children's Water Festival and the Maine Envirothon.⁸³

LURC does not currently have an education and outreach plan or program in place, but has published informational handouts for the general public describing Commission activities and why they are important. LURC does envision developing a comprehensive program in the future, if funds and staff time are available.⁸⁴

⁷⁹ Maine's State Planning Office provides information, analysis, and guidance to decision-makers. State law instructs the State Planning Office to conduct economic analysis, including economic forecasting, coordinate the development of the state's economy and energy resources with the conservation of its natural resources, provide technical assistance to towns and regions, and provide technical assistance to the Governor and Legislature by undertaking special studies and plans and preparing policy alternatives. Maine State Planning Office, *Maine State Planning Office*, at <http://www.state.me.us/spo/> (last visited March 13, 2007).

⁸⁰ Gates, *supra* note 16.

⁸¹ Maritimes and Northeast Pipeline, *Maine Corporate Wetlands Restoration Partnership*, at <http://www.mnp-usa.com/USA/cwrp.htm> (last visited March 13, 2007).

⁸² Personal communication with Judy Gates, Maine Department of Environmental Protection (Aug. 9, 2004).

⁸³ DiFranco, *supra* note 70.

⁸⁴ Personal communication with Marcia Spencer-Famous, Land Use Regulation Commission (Aug. 11, 2004).

VII. Coordination with State and Federal Agencies

MDEP often works with other state agencies on wetland-related issues. The agency currently holds several memoranda of agreement with other state agencies on permit streamlining, including the state Department of Inland Fisheries and Wildlife, Department of Agriculture, and Department of Transportation, as well as the Maine Forest Service, LURC, and the state's soil and water conservation districts.⁸⁵ Additionally, MDEP dedicates a portion of one FTE, funded by EPA §104(b)(3) funds, to act as a liaison among state agencies coordinating on wetland policy issues. This FTE also facilitates meetings of the Maine Wetland Interagency Team, which consists of representatives from MDEP, LURC, Maine Department of Inland Fisheries and Wildlife, State Planning Office, Maine Department of Conservation, and the Maine Department of Transportation.⁸⁶

Both the MDEP and LURC coordinate regularly with federal agencies such as EPA, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, and National Marine Fisheries Service on permitting, project reviews, and other regulatory issues. Meetings are informal and are generally held several times a year. Site visits are also often conducted jointly.⁸⁷

Maine completed a State Wetland Conservation Plan in December 2001. The plan is being actively implemented by MDEP, LURC, and other state agencies and is revised on a regular basis.⁸⁸

VIII. Acronyms and Abbreviations

CWA – Clean Water Act
CWRP – Corporate Wetlands Restoration Partnership
EPA – U.S. Environmental Protection Agency
FTE – Full-time Equivalent
LURC – Land Use Regulation Commission
MDEP – Maine Department of Environmental Protection
MOA – Memorandum of Agreement
MRSA – Maine Revised Statute Annotated
MSZA – Mandatory Shoreland Zoning Act
NPDES – National Pollutant Discharge Elimination System
NRPA – Natural Resources Protection Act
PBR – Permit By Rule
SPGP – Statewide Programmatic General Permit

⁸⁵ Gates, *supra* note 16.

⁸⁶ DiFranco, *supra* note 70.

⁸⁷ Gates, *supra* note 16; Spencer-Famous, *supra* note 19.

⁸⁸ Gates, *supra* note 16.