



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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U.S. Environmental Protection Agency*

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Appendix: State Profiles

Nebraska

I. Overview

When Nebraska was founded in 1867, the state held nearly three million acres of wetlands, approximately six percent of the landscape. Since that time, Nebraska has lost approximately 35 percent of its original wetland acreage.¹ To address continuing losses, the state created the Wetland Conservation Plan in 1998. Today, two primary state agencies are involved in wetland protection: the Nebraska Department of Environmental Quality (NDEQ) and the Nebraska Game and Parks Commission (NGPC). The state conducts §401 water quality certification under the Clean Water Act (CWA) to regulate impacts to wetlands and has adopted wetland-specific water quality standards. Other state activities include conservation, restoration, education, and outreach; however, limited resources have restricted state activities to some extent.²

II. Regulatory Programs

Wetland definitions and delineation

Nebraska defines “waters of the state” as:

all waters within the jurisdiction of [the] state, including all streams, lakes, ponds, impounded reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state.³

Wetlands are specifically defined as:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.⁴

Nebraska’s Surface Water Quality Standards require wetland delineation according to the U.S. Army Corps of Engineers’ 1987 *Wetlands Delineation Manual*.⁵

Organization of state agencies

Nebraska Department of Environmental Quality. The NDEQ is the primary aquatic resource regulatory agency in the state and is responsible for issuing §401 water quality certifications. Approximately one-half of a full-time equivalent (FTE) handles wetland-related regulation for the state. Staff activities include issuance of §401 certifications, technical support, and administration of state-based funds. The agency’s annual budget for all water quality-related

¹ Thomas E. Dahl, U.S. Fish and Wildlife Service, *Wetlands Losses in the United States 1780’s to 1980’s, Summary of Findings 1780’s to 1980’s*, at <http://www.npwrc.usgs.gov/resource/wetlands/wetloss/findings.htm> (last modified Aug. 3, 2006).

² Personal communication with John Bender, Neb. Dep’t of Env’tl. Quality (June 15, 2005).

³ NEB. REV. STAT § 81-1502 (21).

⁴ NEB. DEPT. OF ENV. QUALITY, tit. 120, Chp. 1 (005).

⁵ NEB. DEPT. OF ENV. QUALITY, tit. 117, Chp. 7 (003).

activities, including staff salaries, mailings, publications, travel, or various other activities, is approximately \$40,000, funded by the U.S. Environmental Protection Agency's §604(b) Water Quality Management Program.⁶

Nebraska Game and Parks Commission. NGPC conducts various non-regulatory wetland activities within the state, including outreach, research, conservation, management, and restoration. Staff may also provide comment on §401 certifications issued by NDEQ. NGPC staffs two FTEs solely for wetland activities, though approximately 30 additional staff members work on a variety of issues which may involve wetlands in some way. The agency's annual budget for private land wetland restoration activities is approximately \$80,000, funded by habitat stamp proceeds. Other wetland activities are funded by multiple sources, including federal and state grants, private conservation organization contributions, and revenue from the sale of hunting and fishing licenses and habitat stamps.⁷

§401 certification

Any actions that require a federal permit, license, or approval that results in a discharge into waters of the state, including §404 individual dredge and fill permits and nationwide permits, require state water quality certification. The state has adopted water quality standards specific to wetlands⁸ and has regulations describing certification issuance procedures.⁹ The number of §401 water quality certifications issued by NDEQ varies from year to year. Projects are generally approved, although some certifications may be issued with conditions. For example, in Fiscal Year 2005, NDEQ issued 3 certifications, 21 conditional certifications, and no denials.¹⁰ Decisions are never waived. NDEQ staff members rely on both quantitative and qualitative assessments for decision-making, as determined by the state's water quality regulations.¹¹

Nationwide permits

NDEQ reviews nationwide permits (NWP), issued by the Corps on a five-year cycle, for compliance with Nebraska's water quality standards.¹² NDEQ may also adopt additional, more stringent conditions for §401 certifications.¹³ For the 2007 NWPs, NDEQ issued project-specific water quality certifications after a mandatory public notice period for NWP activities pertaining to State Resource Waters - Class A, Rainwater Basin Wetlands, and Category I Eastern Nebraska Saline Wetlands of the State (as designated by NDEQ and the Corps), as well as activities falling under NWP #29 (Residential Developments), NWP #39 (Commercial and Institutional Developments), and aspects of NWP #40 (Agricultural Activities).¹⁴

⁶ Personal communication with Terry Hickman, Neb. Dep't of Env'tl. Quality (Aug. 26, 2005).

⁷ Personal communication with Ted LaGrange, Neb. Game and Parks Comm'n (June 10, 2005).

⁸ NEB. DEPT. OF ENV. QUALITY, tit. 117, Chp. 7.

⁹ NEB. DEPT. OF ENV. QUALITY, tit. 120.

¹⁰ Email from Terry Hickman, Nebraska Department of Environmental Quality (June 15, 2007).

¹¹ Bender, *supra* note 2.

¹² Hickman, *supra* note 6.

¹³ *Id.*

¹⁴ Email from Terry Hickman, Nebraska Department of Environmental Quality (June 15, 2007).

Mitigation

The Corps handles most issues related to wetland mitigation; however, both NDEQ and NGPC participate on the state's Mitigation Banking Review Team (MBRT). The MBRT created a draft Standard Operating Procedure to guide wetland mitigation bank development. Other participating MBRT agencies include the Corps, U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), Federal Highway Administration, and Natural Resources Conservation Service (NRCS). The group is also developing stream mitigation guidelines.¹⁵ State statutes give the Nebraska Department of Roads authority to replace and mitigate its impacts to wetlands and establish mitigation banks.¹⁶

Compliance and enforcement

The main enforcement tool for violations to water quality standards in Nebraska is the issuance of a civil penalty (up to \$10,000 per day of violation).¹⁷ There are no enforcement measures specific to wetlands; past violations have been resolved through voluntary compliance.¹⁸ More typically, wetland-related compliance/enforcement issues fall to the U.S. Army Corps of Engineers (for violations to CWA §404), with minor assistance provided by NDEQ.¹⁹

Tracking systems

NDEQ maintains a §401/404 permit-tracking database, but does not track wetland mitigation.

III. Water Quality Standards

Nebraska has developed wetland-specific water quality standards (WQS) and use classifications. WQS are based on narrative, chemical, and biological criteria, and relate to a variety of wetland functions, including flood control, sediment trapping, fish and wildlife habitat, and water quality/pollution control.²⁰ Designated uses include aquatic life, wildlife, agricultural water supply, and aesthetics.²¹ The state has also adopted a water quality anti-degradation policy that applies to all waters of the state, including wetlands.²²

IV. Monitoring and Assessment

Nebraska has not developed monitoring and assessment programs specific to wetlands; however, the state does conduct general surface water quality monitoring. Furthermore, NDEQ routinely

¹⁵ Email from Ted LaGrange, Wetland Program Manager, Nebraska Game and Parks Commission, to Alison Rau, Environmental Law Institute, (July 1, 2005, 16:10:12 EST) (on file with author).

¹⁶ NEB. REV. STAT. § 39-1320(o).

¹⁷ NEB. REV. STAT. § 81-1508.02.

¹⁸ Bender, *supra* note 2.

¹⁹ Email from John Bender, Water Quality Standards Coordinator, Nebraska Department of Environmental Quality, to Alison Rau, Environmental Law Institute, (June 17, 2005, 11:16:37 EST) (on file with author).

²⁰ NEB. DEPT. OF ENV. QUALITY, tit. 117, Chp. 7.

²¹ *Id.*; NEB. REV. STAT. § 81-1501(1) and § 81-1505(1)(2).

²² NEB. DEPT. OF ENV. QUALITY, tit. 117, Chp. 3.

works with the Corps, FWS, and other federal resource agencies to improve mitigation of wetlands and streams.²³

NGPC, in collaboration with Corps' Omaha District and NRCS' Wetland Science Institute, published *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Rainwater Basin Depressional Wetlands in Nebraska* in 2004.²⁴ The Guidebook was developed to facilitate regulatory decision-making in the Rainwater Basin. NGPC has also collaborated with the Rainwater Basin Joint Venture to conduct extensive assessments of Rainwater Basin wetlands. Finally, in 2006, a two-year assessment of Nebraska's southwest playa wetlands was initiated by NGPC and the Rocky Mountain Bird Observatory.²⁵

V. Restoration and Partnerships

NGPC coordinates with NRCS and FWS in helping to implement the USDA's Wetlands Reserve Program. The state contributes funds derived from the sale of habitat stamps and hunting and fishing licenses. State wetland restoration goals, often regionally-specific, revolve around jointly developed USDA program goals.²⁶ NGPC also operates the WILD Nebraska program, which partners with landowners, nongovernmental organizations, joint ventures, and local and state entities to protect and restore wildlife habitat on private lands, including wetlands.²⁷

In addition, over the past decade, NGPC and partners have invested millions of dollars in wetland protection, restoration, and management projects.²⁸ Projects have included acquisition of over 15,000 acres of Wildlife Management Areas with wetlands, restoration of wetlands in several Wildlife Management Areas, and restoration of over 80,000 acres of privately-owned wetlands in Nebraska.

VI. Education and Outreach

²³ Hickman, *supra* note 6.

²⁴ R.G. Stutheit, Gilbert, M.C. Whited, P.M., & Lawrence K.L., *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Rainwater Basin Depressional Wetlands in Nebraska* (2004).

²⁵ Email from Ted LaGrange, Wetland Program Manager, Nebraska Game and Parks Commission (April 12, 2007).

²⁶ LaGrange, *supra* note 15.

²⁷ Nebraska Game and Parks Commission, *WILD Nebraska*, at

<http://www.ngpc.state.ne.us/wildlife/programs/wildnebraska/wildnebraska.asp> (last visited Sept. 07, 2007).

²⁸ The partners include landowners, the Conservation Fund, Ducks Unlimited, National Fish and Wildlife Foundation, National Park Service, Natural Resources Conservation Service, Natural Resources Districts, Nebraska Environmental Trust, Nebraska Department of Environmental Quality, Nebraska Department of Roads, Nebraska Game and Parks Commission, Nebraska Game and Parks Foundation, Pheasants Forever, Platte River Basin Environments, Rainwater Basin Joint Venture, Saline Wetland Conservation Partnership, Sandhills Task Force, The Nature Conservancy, Todd Valley Wetland Foundation, U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, U.S. Department of Agriculture, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and many others. Email from Ted LaGrange, Nebraska Game and Parks Commission.

NGPC conducts various wetland-related education and outreach activities for landowners, school groups, hunters and fishers, and other outdoor groups.²⁹ The agency has also published the *Guide to Nebraska's Wetlands and Their Conservation Needs*.³⁰ The guide includes information on wetlands, wetland conservation programs, and Nebraska's regional wetland complexes. In addition to the guide, NGPC produced a *Wetlands of Nebraska* video and wetlands edition of *Trail Tales* magazine for kids.³¹

VII. Coordination with State and Federal Agencies

NGPC coordinates regularly and is party to memoranda of agreement with multiple federal and local partners, including FWS, Ducks Unlimited, the Rainwater Basin Joint Venture, the Playa Lakes Joint Venture, the Upper Mississippi River Joint Venture, the Saline Wetlands Conservation Partnership, the Sandhills Task Force, the Platte River Partnership, and NRCS, among others.³² NDEQ also regularly participates in meetings with many federal agencies on regulatory issues.³³

VIII. Acronyms and Abbreviations

CWA – Clean Water Act
EPA – U.S. Environmental Protection Agency
FTE – Full-Time Equivalent
FWS – U.S. Fish and Wildlife Service
MBRT – Mitigation Banking Review Team
NDEQ – Nebraska Department of Environmental Quality
NGPC – Nebraska Game and Parks Commission
NRCS – Natural Resources Conservation Service
NWP – Nationwide Permits
USDA – U.S. Department of Agriculture
WQS – Water Quality Standards

²⁹ LaGrange, *supra* note 7.

³⁰ Nebraska Game and Parks Commission, *Guide to Nebraska's Wetlands and Their Conservation Needs*, available at <http://www.ngpc.state.ne.us/wildlife/programs/wetlands/wetlandsguide.pdf> (last visited Sept. 7, 2007).

³¹ Email from Ted LaGrange, Nebraska Game and Parks Commission (April 12, 2007).

³² LaGrange, *supra* note 15.

³³ LaGrange, *supra* note 7.