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## **State Wetland Protection**

*Status, Trends, & Model Approaches*

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

*With support from the  
U.S. Environmental Protection Agency*

2008

# **Appendix: State Profiles**

# North Dakota

## I. Overview

North Dakota is well known for the small, pothole-like, semi-permanent wetlands that cover approximately two-thirds of the state.<sup>1</sup> Estimated to have 4,927,500 acres of wetlands in 1780, acreage has been depleted by approximately 49 percent, although no survey of the resource has been conducted recently.<sup>2</sup> These prairie potholes, an important resource to the people, agriculture, and wildlife of North Dakota, provide habitat, irrigation needs, and hunting grounds, as well as farmland in the dry season.<sup>3</sup> However, the state's small population and expansive area present unique challenges for wetland protection efforts.

North Dakota regulates wetlands primarily through §401 water quality certification under the Clean Water Act (CWA). North Dakota Department of Health's Division of Water Quality (DWQ) is the state's primary permitting agency and is building a bioassessment program to develop wetland-specific state water quality standards.<sup>4</sup> Public and private partnerships also play a role in the state's wetland activities, with a tax incentive program for landowners who actively conserve their wetlands. In addition, the Office of the State Engineer oversees permitting for any drainage of basin that has a drainage area exceeding 80 acres.<sup>5</sup>

## II. Regulatory Programs

### *Wetland definitions and delineation*

In North Dakota, "waters of the state" are defined as:

all waters within the jurisdiction of [the] state including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.<sup>6</sup>

Wetlands are defined in the Administrative Code as "water bodies, including isolated ponds, sloughs, and marshes, [that] are to be considered waters of the state and will be protected under [general water quality standards]."<sup>7</sup>

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<sup>1</sup> Scott Gomes, *A Closer Look: Wetlands*, 60 N.D. Outdoors, 12 (1998), reprinted in US DEP'T OF THE INTERIOR, US GEOLOGICAL SURVEY, available at <http://www.npwrc.usgs.gov/resource/wildlife/closlook/wetlands.htm> (last modified Aug. 3, 2006).

<sup>2</sup> NORTH DAKOTA STATE WATER QUALITY FACTSHEET. THE CLEAN WATER NETWORK (2004), available at <http://www.cwn.org/docs/publications/factsheets/states/nd.pdf>.

<sup>3</sup> Personal communication with Steve Dyke, Conservation Section Supervisor, N.D. Game and Fish Dep't (Dec. 6, 2006).

<sup>4</sup> N.D. CENT. CODE § 61-32-03; Personal communication with Mike Ell, N.D. Dep't of Health, Div. of Water Quality (Nov. 7, 2006).

<sup>5</sup> Personal Communication with Jim Lindseth, State Water Comm'n, Permitting Programs (Apr. 22, 2007).

<sup>6</sup> N.D. CENT. CODE § 61-28-02(11).

<sup>7</sup> N.D. ADMIN. CODE 33-16-02.1-09.

North Dakota delineates wetlands in accordance with the criteria outlined in the U.S. Army Corps of Engineers 1987 *Wetlands Delineation Manual*.<sup>8</sup>

### ***Organization of state agencies***

North Dakota's wetland activities are spread across multiple agencies and divisions.

*North Dakota Department of Health.* The North Dakota Department of Health (NDDOH) – Division of Water Quality (DWQ) conducts §401 certification from its office in Bismarck. The DWQ is also building a bioassessment program to develop wetland-specific water quality standards for North Dakota and to conduct regional wetland quality assessments using a probabilistic sampling design. DWQ employs one full-time equivalent (FTE), comprising one part-time § 401 official and one part-time water quality official. Annual funding for DWQ's wetland-related activities is less than \$20,000, derived from U.S. Environmental Protection Agency (EPA) §106 and §104(3b) grants.<sup>9</sup>

*North Dakota Game and Fish Department.* North Dakota Game and Fish Department (NDGFD) acts as a commenting agency through the §404 process. Comments are submitted in biweekly meetings and through formal letters to the U.S. Army Corps of Engineers' Bismarck office. The NDGFD reviews approximately 300 §404 projects annually for levels of habitat degradation and loss of native grasslands or woody areas that provide habitat to rare or sensitive species. The agency dedicates 1.5 FTEs to this effort and receives additional input from personnel in eight field offices. Staff members that review §404 projects are funded primarily by grants from the U.S. Fish and Wildlife Service (FWS) under the Sport Fish Restoration Act (Dingell-Johnson) and Wildlife Restoration Act (Pitman-Robertson). The annual budget is approximately \$150,000.<sup>10</sup>

*Office of the State Engineer.* The Office of the State Engineer (OSE) oversees permitting for the draining of any water resource, including wetlands, and watershed projects that have an area greater than 80 acres. A permit applicant must first file with the OSE, then await a determination as to whether or not the project will have statewide or interdistrict (water district) significance.<sup>11</sup> If the project is deemed not to have statewide significance, it is sent to the jurisdictional Water Resource District Board, of which there are 60 statewide, to be reviewed. The Water Resource District Board may require conditional criteria for approval of a project that relate to:

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<sup>8</sup> Env'tl. Lab., U.S. ARMY CORPS OF ENG'RS, WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (1987), available at <http://www.mvn.usace.army.mil/ops/regulatory/wlman87.pdf>.

<sup>9</sup> Personal communication with Mike Ell, N.D. Dep't of Health, Div. of Water Quality (Nov. 7, 2006).

<sup>10</sup> Personal communication with Steve Dyke, Conservation Section Supervisor, N.D. Game and Fish Dep't (Dec. 5, 2006).

<sup>11</sup> Statewide or interdistrict significance of wetland or watershed drain determinations are based on six criteria: 1: impacts to property of the state or political subdivisions, or highway authority property; 2: Drainage of sloughs, ponds, or lakes having recognized fish and wildlife values. (based on SWC engineer's discretion); 3: impacts (drainage or partial drainage) to meandered lakes; 4: impacts that will have a substantial effect on another district; 5: Drainage which would convert previously non-contributing areas into contributing areas; 6: For good cause, the state engineer may classify any proposed drainage as having statewide or interdistrict significance, or the state engineer may determine that certain proposed drainage is not of statewide or interdistrict significance. N.D. ADMIN. CODE 89-02-01-09; Personal Communication with Jim Lindseth, State Water Comm'n, Permitting Programs (Apr. 22, 2007).

downstream impacts; impacts on related ponds, sloughs, streams or lakes; impacts on recognized fish and wildlife populations; impacts on interdistrict, interstate, and international land; and other factors unique to the project. If the project is deemed to have statewide or interdistrict significance, it must still undergo review by the District Water Board, which is required to conduct a hearing. It is also subject to “re-review” and informational hearings by the OSE. However, permits are rarely given this determination; typically, permits are granted if the applicant complies with the conditions set during the re-review hearings. Twelve to thirty permits are granted each year; permits are rarely denied.<sup>12,13</sup>

*North Dakota Department of Agriculture.* The North Dakota Department of Agriculture operates a private landowner incentive program called Waterbanks. Waterbanks is funded collectively by the NDGFD, SWC, DWQ, and USFWS and employs 0.5 FTE.<sup>14</sup> The program is idle as of April 2007 due to lack of state funds.<sup>15</sup>

### **§ 401 certification**

North Dakota relies on §401 water quality certification as its primary form of state-level wetlands regulation. The §401 program is administered by the North Dakota Department of Health, Division of Water Quality.<sup>16</sup> However, NDGFD serves as a commenting agency when appropriate, usually when endangered species are involved or potentially involved.<sup>17</sup> Approximately 100 certifications are made each year, including Nationwide Permits (NWP). No certifications are waived, and some permits may be pre-certified with conditions. When permits are initially denied, they are sent back to the permittee with conditions. If the permittee then meets the prescribed conditions, they may re-submit for certification.<sup>18</sup>

In making certification decisions, the NDDOH is primarily concerned with the construction and environmental disturbance requirements pertaining to soils, surface waters, and fill materials. A non-regulatory agency policy document requires that “[f]ragile and sensitive areas such as wetlands, riparian zones, delicate flora, or land resources will be protected against compaction, vegetation loss, and unnecessary damage.”<sup>19</sup> If a project does not meet this and other minimum requirements of the NDDOH, the permit is denied, and necessary conditions are communicated before re-application.<sup>20</sup>

### **Nationwide permits**

As of April 2, 2007, North Dakota had responded to the final notice for reissuance and modification of NWPs.<sup>21</sup> NWPs #8, #24, and #34 were not applicable in North Dakota. All

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<sup>12</sup> Lindseth, *supra* note 5.

<sup>13</sup> N.D. CENT. CODE § 61-28-03.

<sup>14</sup> Personal communication with Judy Carlson, N.D. Dep’t of Agric. (Nov. 9, 2006).

<sup>15</sup> Voicemail message from Judy Carlson, N. D. Dep’t of Agric. (Apr. 23, 2007).

<sup>16</sup> Personal Communication with Michael Sauer, N. D. Dep’t of Health (Apr. 20, 2007).

<sup>17</sup> Dyke, *supra* note 10.

<sup>18</sup> Sauer, *supra* note 16.

<sup>19</sup> N.D. Dep’t of Health, Env’tl. Health Section, *Construction and Environmental Disturbance Requirements*, (acquired 4/20/07).

<sup>20</sup> Sauer, *supra* note 16.

<sup>21</sup> Letter from Michael T. Sauer, Senior Env’tl. Health Scientist, N. D. Dep’t of Health, Env’tl. Health Section, to Daniel E Cimarosti, State Program Manager, US Army Corps of Eng’rs, N.D. Regulatory Office (Apr. 2, 2007).

remaining NWP's were issued §401 certification, with additional conditions placed on 15 NWP's.<sup>22</sup> NDDOH also attaches Construction and Environmental Disturbance Requirements as a condition to all NWP's.<sup>23</sup>

### ***Mitigation***

North Dakota has not adopted regulations, policies, or legislation for wetland mitigation, deferring to the Corps for mitigation under CWA §401/404.

### ***Compliance and enforcement***

Violations to state water quality standard rules are handled by the NDDOH or referred to the Corps and EPA as lead agencies for investigation and resolution.<sup>24</sup>

Complaints of violations to the state's water resource drainage laws may be reported to the applicable Water Resource District Board. Injunctions, criminal penalties, and civil penalties are available for enforcement under the state's drainage requirements.<sup>25</sup> However, in practice, complaints are almost always immediately addressed and resolved without legal proceeding or fines.<sup>26</sup>

### ***Tracking systems***

The North Dakota OSE has a comprehensive database of all drainage applications and permits. This database began in the late 1960's and includes all information found on the permit application. The SWC records all constructed water projects in the state that require permitting, and this includes the restoration of drained wetlands or the construction of new wetlands.<sup>27</sup> North Dakota does not maintain state system for tracking mitigation.

## **III. Water Quality Standards**

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<sup>22</sup> Nationwide Permits which are certified under Section 401 of the Clean Water Act by the State of North Dakota are: 1-7,9-11,14,18,20-22,25,28,30,31,33,36-38,41,43-46,48-50. North Dakota's additional conditions were placed on the following: NWP 19: §401 certification is issued if disposal of soil material is at an upland site. NWP 12, 15, 16, 23, 27, 29, 35 & 47: Projects in Class I rivers, Class IA rivers or classified lakes are denied §401 Water Quality certification. NWP 13: Projects exceeding 200 linear feet in Class I rivers, Class IA rivers and classified lakes are denied §401 Water Quality certification. NWP 17: §401 Water Quality certification is denied. NWP 32: Enforcement actions involving Class I rivers, Class IA rivers, and classified lakes are denied 401 Water Quality certification. NWP's 39 & 42: Projects that result in a loss or relocation of 150 feet or more of stream are denied §401 Water Quality certification. NWP 40: Projects that involve the discharge from tile drains to Class I, Class IA, Class II rivers and classified lakes are denied §401 Water Quality certification. This Department [DOH] will reconsider the application if 1) All reasonable alternative for avoiding these classified water were considered. 2) A Nutrient Management Plan is developed and 3) Water quality monitoring of the drain outlet(s) is proposed. (Taken from April 2, 2007, Letter from Michael T. Sauer, Senior Environmental Health Scientist, North Dakota Department of Health, Environmental Health Section, to Daniel E Cimarosti, State Program Manager, US Army Corps of Engineers, ND Regulatory Office).

<sup>23</sup> N.D. Dep't of Health, Env'tl Health Section, *supra* note 19.

<sup>24</sup> Personal Communication with Michael Sauer, N.D. Dep't of Health (May 2, 2007).

<sup>25</sup> N.D. CENT. CODE § 61-32-07.

<sup>26</sup> Personal Communication with Jim Lindseth, State Water Comm'n, Permitting Programs (Apr. 24, 2007).

<sup>27</sup> Personal Communication with Jim Lindseth, State Water Comm'n, Permitting Programs (May 24, 2007).

The State of North Dakota's numeric water quality standards, designated uses, and anti-degradation policies and procedures are not specific to wetlands. The anti-degradation standards default to open water standards and use degradation categories to assess wetlands.<sup>28</sup> Surface water quality criteria are narrative and biological.<sup>29</sup> As of February 2007, wetland-specific water quality standards are being developed in association with the state's bioassessment program (see *IV. Monitoring and Assessment*).<sup>30</sup>

#### **IV. Monitoring and Assessment**

As of 2007, the North Dakota Wetlands Bioassessment Program is under development by NDDOH. The program, initiated in 1993, was created to develop wetland-specific water quality standards for the state. Specifically, the project is charged with creating "biological community metrics and an Index of Biological Integrity (IBI) for temporary and seasonal depressional wetlands."<sup>31</sup> The end product will be a functional assessment methodology for both streams and wetlands and a rapid assessment and a landscape assessment methodology component for wetlands. Standard operating procedures will apply to all assessment methodologies. The NDDOH plans to use the assessment to characterize both the quantity and quality of wetlands across the state.<sup>32</sup> NDDOH is coordinating the development of the Bioassessment Program with the U.S. Department of Agriculture's National Resource Conservation Service (NRCS), North Dakota State University, and EPA. EPA also provides annual grants that range from \$150,000 to 200,000. Assessment information is already being used in water quality reporting.

#### **V. Restoration**

North Dakota has not initiated a state wetland restoration program.

#### **VI. Public-Private Partnerships**

The Waterbanks Program is a cooperative effort led by the North Dakota Department of Agriculture with support from the NDGFD, SWC, FWS, and NRCS. The program, initiated in 1981, provides landowners with financial incentives to preserve wetlands. The program leases the owner's wetlands for five to ten years and disallows draining, burning, filling or any

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<sup>28</sup> N.D. ADMIN CODE 33-16-02.1-11.

<sup>29</sup> Water quality rules state that "[w]aters of the state having unique or high quality characteristics that may constitute an outstanding state resource shall be maintained and protected." N.D. ADMIN. CODE 33-16-02.1-08. In addition, the wetlands functions usually place them in this category (2, IV), which can be regulated as an outstanding state resource if they are petitioned to have that classification, though that has yet to occur. Personal Communication with Michael Sauer, N. D. Dep't of Health (Apr. 20, 2007).

<sup>30</sup> Ell, *supra* note 9.

<sup>31</sup> See United States Environmental Protection Agency, Wetlands Division, Bioassessment of Wetlands, *Case Study: North Dakota Wetlands Bioassessment Program*, at <http://www.epa.gov/owow/wetlands/bawwg/case/nd.html> (last visited June 28, 2007).

<sup>32</sup> Ell, *supra* note 9.

agricultural activity from taking place on the participating lands.<sup>33</sup> In the past, funding for the program was derived from a combination of federal and state monies and through fund-raising activities. However, state and federal funding was cut in 2006, and so no new contracts were established in 2006. The next state legislature may re-open the funding.<sup>34</sup>

## **VII. Education and Outreach**

North Dakota does not conduct education or outreach related to wetlands.

## **VIII. Coordination with State and Federal Agencies**

State and federal agencies coordinate regularly to discuss §404 permit applications that involve impacts to North Dakota's aquatic resources. NDDOH, NDGFD, USFWS, the Corps, and SWC meet every two weeks to discuss current projects, permits, and wetland issues in the state. NDGFD and FWS also share information on wetland issues weekly.

## **IX. Acronyms and Abbreviations**

CWA – Clean Water Act  
DWQ – Division of Water Quality  
EPA – U.S. Environmental Protection Agency  
FWS – U.S. Fish and Wildlife Service  
MBRT – Mitigation Bank Review Team  
NCRS – Natural Resources Conservation Service  
NDGFD – North Dakota Game and Fish Department  
NDDOH – North Dakota Department of Health  
NWP – Nationwide Permit  
OSE – Office of the State Engineer  
SWC – State Water Commission

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<sup>33</sup> Carlson, *supra* note 14.

<sup>34</sup> *Id.*