



ENVIRONMENTAL
LAW • INSTITUTE®

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

West Virginia

I. Overview

West Virginia, a mountainous state, contains relatively few wetlands—some 102,000 acres comprising less than one percent of the state’s total land area. The state relies primarily on Clean Water Act §401/§404 to protect its wetland areas.¹ Section 401 water quality certifications are issued by two offices within the West Virginia Department of Environmental Protection (WVDEP): the Division of Mining and Reclamation for all mining-related projects requiring §404 permits, and the Division of Water and Waste Management for all other §404 projects. Finally, the West Virginia Division of Natural Resources conducts various wetland-related activities associated with state wildlife goals and actions, including §401 certification review.

II. Regulatory Programs

Wetland definitions and delineation

West Virginia explicitly includes wetlands in its definition of state waters, which are defined as:

any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction, [including], without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds..., impounding reservoirs, springs, wells, watercourses and wetlands.^{2,3}

Wetlands are defined as “those areas that are inundated or saturated by surface or groundwater 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

West Virginia delineates wetlands in accordance with the criteria outlined in the U.S. Army Corps of Engineers 1987 *Wetlands Delineation Manual*,⁵ although state code also allows for delineation “by accepted methods approved by the West Virginia Division of Natural Resources.”⁶

Organization of state agencies

¹ W. VA. DEP’T OF ENVTL. PROT., PRESERVING OUR WETLANDS, *available at* http://www.wvdep.org/Docs/215_07%20pow%20pm.pdf (last visited July 27, 2007).

² W. VA. CODE ANN. § 22-11-3(23).

³ WVDEP considers the definition of state waters to include isolated waters, and accordingly requires mitigation for impacts to isolated waters that are not covered by the Corps. Personal communication with Lyle Bennett, W. Va. Dep’t of Env’t. Prot. (May 2, 2007).

⁴ W. VA. CODE R. § 47-5A-2(17).

⁵ ENVTL. LAB., WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (U.S. Army Corps of Engineers 1987), *available at* <http://www.mvn.usace.army.mil/ops/regulatory/wlman87.pdf>.

⁶ W. VA. CODE R. § 47-5A-4(2a).

WVDEP oversees §401 water quality certification, although the state's Division of Natural Resources (WVDNR) also participates in §401 review, as well as other various wetland-related, non-regulatory activities.

West Virginia Department of Environmental Protection. WVDEP's Division of Water and Waste Management (DWWM) conducts §401 certification for all non-mining activities that require a federal permit, license, or approval for discharges into waters of the state, including §404 dredge and fill permits and nationwide permits. DWWM conducts certification from the WVDEP's headquarters office in Charleston. Approximately two full-time equivalents (FTEs) work on certification, although other wetland-related activities can include education and outreach and technical assistance. Staff are funded by mostly by state general funds, although application fees are also used to support certification activities.⁷

WVDEP's Division of Mining and Reclamation (DMR) conducts §401 water quality certification for all mining activities requiring a §404 permit. DMR conducts certification from their four regional offices. Approximately four FTEs work on certifications among the four regional offices. Two to five permit writers are located in each regional office and work on water quality certification among other numerous activities. One FTE located in the headquarters office in Charleston is devoted to coordinating mitigation issues, as well as coordinating with other state and federal agencies on various wetland-related issues. An estimated total of two to three FTEs work on wetland activities at DMR. Division activities are funded primarily by federal and state matching funds under the Surface Mining Control and Reclamation Act (overseen by the U.S. Department of Interior's Office of Surface Mining). Application fees and permit fees from §401 certifications and National Pollutant Discharge Elimination System permits are also used to support DMR activities.⁸

West Virginia Division of Natural Resources. WVDNR conducts both regulatory and non-regulatory wetland-related activities. The agency reviews proposed §401 certifications for consistency with state fish and wildlife and water quality goals⁹ and conducts research on various wetland-related topics, e.g., assessing created wetland success, identifying and classifying wetland communities, and monitoring biota. Staff also perform various education and outreach activities.¹⁰

WVDNR staff, approximately two FTEs (with five total staff working on wetland-related activities), are based both in headquarters and regional offices. Funding is provided under multiple federal grants, including the Federal Aid in Wildlife Restoration Act and the Federal Aid in Sport Fish Recreation Act ("Pittman-Robertson" and "Dingell-Johnson," respectively). An additional three to four FTEs are funded in part by U.S. Environmental Protection Agency (EPA) grants for work related to wetlands and water quality. WVDNR's total budget is approximately \$250,000 for all agency activities (wetland-related and non-wetland-related).¹¹

⁷ Personal Communication with Lyle Bennett, W. Va. Dep't of Env'tl. Prot. (Nov. 16, 2005).

⁸ Personal Communication with Ken Politan, W. Va. Dep't of Env'tl. Prot. (Nov. 17, 2005).

⁹ WVDNR review of water quality certifications is guided by a memorandum of agreement with the WVDEP.

¹⁰ Personal Communication with Roger Anderson, W. Va. Div. of Natural Res. (Nov. 28, 2005).

¹¹ *Id.*

§401 certification

State-level wetland regulation is conducted through CWA §401 water quality certification. DMR oversees certification for all mining activities that affect jurisdictional wetlands, while DWWM oversees certification for all other activities. State regulations outline provisions for obtaining individual certifications, including application procedures, public notification, mitigation and monitoring requirements (described further below), and enforcement provisions.¹² The rules authorize WVDEP to impose conditions and also prescribe elements of the decision-making process, which may include consideration of the proposed activity's "impact on water resources, fish and wildlife, recreation, critical habitats, wetlands, and other natural resources under the [state] jurisdiction."¹³

DWWM issues between 25 and 80 individual certifications in any given year,¹⁴ while DMR issues approximately 70 annually.¹⁵ The majority of project applications are ultimately approved (oftentimes after applicants work with state staff to meet state requirements), although certifications are occasionally denied or waived.¹⁶

Nationwide permits

DMR and DWWM conduct regular reviews of the U.S. Army Corps of Engineers' nationwide permits (NWP) and issued conditions and minimal parameters required on the 2002 NWP for §401 certification.¹⁷ As of May 2007, West Virginia was in the process of certifying the 2007 NWP.¹⁸

Mitigation

Compensatory mitigation provisions are outlined in the state's certification rules.^{19,20} Where mitigation is necessary, on-site/in-kind mitigation is the first preference, followed by off-site/in-kind (preferably in the same watershed as the impacts), on-site/out-of-kind, and finally, off-

¹² W. VA. CODE R. § 47-5A.

¹³ *Id.* § 47-5A-3(1).

¹⁴ Bennett, *supra* note 7.

¹⁵ Politan, *supra* note 8.

¹⁶ *Id.*; Bennett, *supra* note 7.

¹⁷ Instances for which an individual certification is required, as well as state conditions for various 2002 NWP, can reviewed at:

http://www.lrh.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=6349&destination=ShowItem. An additional note concerning NWP # 21 for surface coal mining activities: in July 2004, the U.S. District Court for the Southern District of West Virginia struck down the NWP # 21, thus requiring coal companies to seek individual permits. *See Ohio Valley Env'tl. Coalition v. Bulen*, 410 F. Supp. 2d 450 (S.D. W. Va. 2004) *vacated*, 429 F.3d 493 (4th Cir. 2005) (finding that the Corp's issuance of NWP # 21 fell within its authority and vacated the lower court's ruling).

¹⁸ Personal Communication with Ken Politan, W. Va. Dep't of Env'tl. Prot. (May 2, 2007).

¹⁹ *See* W. VA. CODE R. § 47-5A-6.

²⁰ West Virginia also requires mitigation for surface coal mining operations that affect more than 250 acres of watershed. Mitigation for temporary impacts is discretionary. W. VA. CODE § 22-11-7a. It should be noted that this section was recently amended by the 2005 West Virginia Act 110 to remove the mitigation ratio requirement for "isolated waters" and to provide credit for mitigation as a component of a required federal permit. WVDEP now no longer requires applicants to complete five-tenths of an acre of mitigation for every acre of impact to an isolated water, but as a matter of practice still requires mitigation generally for impacts to isolated waters because they are interpreted to be "waters of the state." Personal communication with Lyle Bennett, W. Va. Dep't of Env'tl. Prot. (May 2, 2007).

site/out-of-kind.²¹ The regulations also outline required ratios for impacts to streams, open water wetlands, emergent wetlands, scrub-shrub wetlands, and forested wetlands.²² Acquisition of existing wetlands may be considered in certain instances and requires greater ratios.²³ Finally, the rules allow for in-lieu-fee mitigation and in-kind land donations if no other forms of mitigation are achievable.²⁴ Monitoring is required for all mitigation sites until “success criteria outlined in the restoration plan” have been met, and monitoring reports must be submitted annually “until the project has been determined complete and successful for three concurrent years.”²⁵ Both WVDEP and WVDNR must review and approve mitigation plans.²⁶

Compliance and enforcement

Enforcement of state water quality certification requirements is available under West Virginia’s water quality laws.²⁷ In practice, EPA takes the lead on enforcement under the §404 program.²⁸

Tracking systems

WVDEP maintains a database of permits called the Environment Resource Information System, which includes data on water quality certifications.²⁹

III. Water Quality Standards

West Virginia’s water quality standards (WQS) do not identify criteria specific to wetlands. The state surface WQS are both narrative and numeric in nature and include chemical and biological criteria for water quality.³⁰ The regulations do not identify designated uses or anti-degradation standards for wetlands specifically, defaulting to water use categories³¹ and anti-degradation provisions³² for surface waters. It should also be noted that, in the absence of wetland-specific WQS, WVDEP staff consider impacts on water resources, fish and wildlife, recreation, critical habitats, and state resources for §401 decision-making.³³

²¹ W. VA. CODE R. § 47-5A-6.2.a.

²² *Id.* § 47-5A-6.2.c.

²³ *Id.* § 47-5A-6.2.6.c.

²⁴ *See Id.* § 47-5A-6.2.d. Monies collected for impacts resulting from surface mining operations are deposited into the Stream Restoration Fund and used toward “restoration and enhancement of streams and water resources...which have been impacted by coal mining.” Coal mining-related mitigation fees are assessed at \$200,000 per acre of impact in watersheds larger than 250 acres from the toe of the farthest downstream permanent structure and/or watersheds with a 1/2-acre or greater loss or impact. *Id.* § 47-5A-6.2.d.1. Non-coal mining-related mitigation fees are assessed at \$100 per lineal foot of impacted stream and \$30,000 per acre of replaced wetland. *Id.* § 47-5A-6.2.d.2. A state in-lieu-fee mitigation program for non-coal impacts to aquatic resources was pending authorization as of November 2005. Bennett, *supra* note 7.

²⁵ W. VA. CODE R. § 47-5A-6.3.

²⁶ *Id.* § 47-5A-6.2.c.5.C.

²⁷ *Id.* § 47-5A-8. *See also:* W. VA. CODE §§ 22-1-3(a), 22-11-24, and 22-11-25.

²⁸ Bennett, *supra* note 7.

²⁹ *Id.*; Politan, *supra* note 8.

³⁰ W. VA. CODE R. § 47-2.

³¹ *Id.* § 47-2-6.

³² *Id.* § 47-2-4.

³³ *Id.* § 47-5A-3(1).

IV. Monitoring and Assessment

West Virginia does not operate a formal monitoring and assessment program for wetlands but does for streams. DWWM collects and compiles water quality data for the state's impaired streams listing and for the creation and implementation of total maximum daily load (TMDL) plans. Water quality data and biological information are collected and interpreted for each of the state's 32 watersheds on a five-year rotation.³⁴

The WVDEP also coordinates a citizen stream monitoring program, Save Our Streams. The agency provides training for volunteers on biological sampling and data collection, as well as assessment of physical, chemical, and habitat conditions, and certifies volunteers to become stream monitors. The program also supplies volunteer monitors with basic equipment, reference manuals, and stream assessment survey forms. Certified volunteer stream monitors submit survey forms to the state coordinator for a quality assurance review, and the information becomes part of a statewide database that is used for program reports, public information and outreach, and for assisting other sections of WVDEP with the overall characterization of the state's streams and rivers. Data is also collected on the state's online Volunteer Access Database.³⁵

V. Restoration and Partnerships

West Virginia Department of Environmental Protection does not operate a formal restoration program, but does coordinate to some extent with the U.S. Department of Agriculture Natural Resources Conservation Service and Soil Conservation Districts on restoration activities.³⁶

VI. Education and Outreach

WVDEP does not have a strategic plan or formal program in place for wetlands outreach and education, but does conduct various water education activities, such as Project WET (Water Education for Teachers) and Save Our Streams,³⁷ and provides fact sheets on aquatic resources for the state.³⁸

WVDNR has been involved in multiple, wetland-specific, education and outreach activities, including the development of a wetland course for teachers, the creation of a wetland video on

³⁴ West Virginia Department of Environmental Protection, *Water Quality Monitoring*, at <http://www.wvdep.org/item.cfm?ssid=11&sslid=192> (last visited July 27, 2007).

³⁵ West Virginia Department of Environmental Protection, *WV Save Our Streams*, at <http://www.wvdep.org/item.cfm?ssid=11&sslid=202> (last visited July 27, 2007).

³⁶ Bennett, *supra* note 7.

³⁷ West Virginia Department of Environmental Protection, *Division of Water and Waste Management – Our Mission*, at <http://www.wvdep.org/item.cfm?ssid=11&sslid=155> (last visited July 27, 2007).

³⁸ West Virginia Department of Environmental Protection, *Public Information Office – Our Mission*, at <http://www.wvdep.org/item.cfm?ssid=24&sslid=73> (last visited July 27, 2007).

the value of wetlands and applicable regulations, and the publication of *West Virginia's Wetlands, Uncommon, Valuable Wildlands*.³⁹

VII. Coordination with State and Federal Agencies

WVDEP and WVDNR regularly coordinate on §401 certification review and decision-making, and have a Memorandum of Agreement in place to guide efforts.⁴⁰ WVDEP also coordinates with federal agencies on a regular basis, including the U.S. Army Corps of Engineers, EPA, Natural Resources Conservation Service, and U.S. Fish and Wildlife Service.⁴¹

WVDEP and WVDNR meet quarterly with EPA's Region III on wetland and/or water quality "current events" for the state. Corps, WVDEP, and U.S. Fish and Wildlife Service staff usually attend as well. WVDEP and WVDNR also sit on the EPA Region III-chaired Resource Interagency Steering Committee that addresses multi-state wetland issues.⁴²

VIII. Acronyms and Abbreviations

CWA – Clean Water Act

DMR – Division of Mining and Reclamation

DWWM – Division of Water and Waste Management

EPA – U.S. Environmental Protection Agency

FTE – Full-Time Equivalent

NWP – Nationwide Permits

TMDL – Total Maximum Daily Load

(Project) WET – Water Education for Teachers

WQS – Water Quality Standards

WVDEP – West Virginia Department of Environmental Protection

WVDNR – West Virginia Division of Natural Resources

³⁹ Anderson, *supra* note 10.

⁴⁰ Bennett, *supra* note 7.

⁴¹ *Id.*; Politan, *supra* note 8.

⁴² Anderson, *supra* note 10.