

EPA REGION 8

MONTANA

Waters of the State are defined as:

- (a) a body of water, irrigation system, or drainage system, either surface or underground.
(b) The term does not apply to: (i) ponds or lagoons used solely for treating, transporting, or impounding pollutants; or (ii) irrigation waters or land application disposal waters when the waters are used up within the irrigation or land application disposal system and the waters are not returned to state waters.

Wetlands are defined as:

- None identified

State-created Limitations on Regulations:

- State imposes qualified stringency prohibitions
 - Montana has qualified stringency prohibitions that apply to rules implementing water quality and public water supply programs. The statutory language, identical for both programs, provides that the Board of Environmental Review may not adopt an implementing rule that is more stringent than the federal regulations or guidelines that address the same circumstances unless the Board makes a written finding— following a public hearing and comment, and based on record evidence—that the more-stringent state requirement: (1) protects public health or the environment of Montana; (2) can mitigate the harm to public health or the environment; and (3) is achievable under current technology;
 - The Board of Environmental Review may adopt rules implementing water quality law that are more stringent than corresponding draft or final federal regulations, guidelines, or criteria, only if it makes written findings, based on sound scientific or technical evidence in the record, stating that the stricter state requirements are necessary to protect the public health, beneficial use of water, or the environment of Montana.¹

State Programs:

- The State has a Streamside Management Program created under Title 77, Chapter 5, Part 3 of the Montana Annotated Code². The State has promulgated rules to implement its streamside management program at ARM 36.11.3³. The SMP rules regulate certain logging activities within a Streamside Management Zone, defined at ARM 36.11 302 as follows:
 - (1) The slope of the SMZ is measured perpendicular to the stream or lake from the ordinary high water mark to a point 50 feet slope distance from the ordinary high water mark.

¹ ELI, 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, available at <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

² http://leg.mt.gov/bills/mca/title_0770/chapter_0050/part_0030/sections_index.html

³ <http://www.mtrules.org/gateway/Subchapterhome.asp?scn=36%2E11.3>

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- (2) The SMZ width is 50 feet slope distance on each side of streams, lakes, and other bodies of water measured from the ordinary high water mark, in all cases except:
 - (a) where wetlands exist adjacent to the stream, lake, or other body of water, the SMZ extends to include the wetlands;
 - (b) on class 1 and 2 stream segments and lakes where the slope of the SMZ is greater than 35%, the SMZ width is 100 feet, except:
 - (i) where an established road exists between 50 and 100 feet from the ordinary high water mark, the SMZ boundary is located at the top of the road fill; or
 - (ii) where the slope of the SMZ decreases to 15% or less to form a bench that is 50 to 100 feet from the ordinary high water mark and at least 30 feet wide, the SMZ boundary is located at the edge of the bench nearest the stream.
- (3) Where forest practices that are prohibited in the SMZ will be conducted adjacent to the SMZ boundary on a class 1 or class 2 stream segment, the SMZ boundary must be clearly marked prior to conducting such practices.

401 Certification:

- Has adopted CWA §401, giving the state authority to certify, conditionally certify, or decline to certify federal permits

402 NPDES Program:

- Montana has state authority over NPDES program and permits are issued by the Montana Department of Environmental Quality
- EPA issues all permits in Indian country⁴

404 Dredge and Fill Permitting:

- Has not assumed the 404 program;
- Does not have a state dredge and fill program for waters and wetlands
- Relies on federal permitting authority and CWA §401

Water Quality Standards:

- Has EPA-approved water quality standards

⁴ EPA, Montana NPDES Permits (2017) available at <https://www.epa.gov/npdes-permits/montana-npdes-permits>.

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Montana Wetland Program Summary

	YES	NO	UNCLEAR/ UNKNOWN	NOTES
"No Net Loss" Goal	X			In addition, has a formal "Net Gain/Increase" goal
State Dredge and Fill Program for Wetlands		X		
404 Assumption		X		
Isolated Wetland Permitting		X		
State Wetland Permitting Fees	X			
WQS for Wetlands	X			Applies existing WQS to wetlands (not wetland-specific)
Wetland Monitoring & Assessment Program		X		Possibly monitor through other non-wetland monitoring programs

Source: ASWM (2015) Status and Trends Report

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DRAFT WOTUS STATE SUMMARIES

NORTH DAKOTA

Waters of the State are defined as:

- All waters within the limits of the state from the following sources of water supply: waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well-defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground water; all residual waters resulting from beneficial use, and all waters artificially drained; and all waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is any area that does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency more often than once in three years over the latest 30-year period.

Wetlands are defined as:

- None identified

State-created Limitations on Regulations:

- State imposes qualified stringency prohibitions:
 - North Dakota Cent. Code §23-01-04.1: the state department of health may only adopt rules more stringent than federal regulations if, after a public hearing, a written finding is made that federal regulations are not adequate to protect public health and the environment of the state; this law applies to rules adopted pursuant to a number of federal laws including the clean water act⁵

State Programs:

- None identified

401 Certification:

- Has adopted CWA §401, giving the state authority to certify, conditionally certify, or decline to certify federal permits

402 NPDES Program:

- North Dakota has state authority over NPDES program and permits are issued by the North Dakota Department of Health
- EPA issues permits in Indian country⁶

404 Dredge and Fill Permitting:

- Has not assumed the 404 program;

⁵ NCSL, 2014. State Agency Authority to Adopt More Stringent Environmental Standards, available at <http://www.ncsl.org/research/environment-and-natural-resources/state-agency-authority-to-adopt-more-stringent-environmental-standards.aspx>.

⁶ EPA, North Dakota NPDES Permits (2017) available at <https://www.epa.gov/npdes-permits/north-dakota-npdes-permits>.

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- Does not have a state dredge and fill program for waters and wetlands
- Relies on federal permitting authority and CWA §401

Water Quality Standards:

- Has EPA-approved water quality standards

North Dakota Wetland Program Summary

	YES	NO	UNCLEAR/ UNKNOWN	NOTES
"No Net Loss" Goal			X	
State Dredge and Fill Program for Wetlands		X		
404 Assumption		X		
Isolated Wetland Permitting		X		
State Wetland Permitting Fees		X		
WQS for Wetlands	X			Applies existing WQS to wetlands (not wetland-specific)
Wetland Monitoring & Assessment Program		X		Conducts project-specific M&A only

Source: ASWM (2015) Status and Trends Report

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SOUTH DAKOTA

Waters of the State are defined as:

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

Wetlands are defined as:

- None identified

State-created Limitations on Regulations:

- State imposes limitations:
 - South Dakota Codified Laws Ann. §1-40-4.1: No rule on environmental protection, mining, oil, gas and water may be more stringent than any corresponding federal law, rule or regulation⁷.
 - Another South Dakota stringency provision governs the rules pertaining to applications “for a federal license or permit necessary to conduct an activity which may result in a discharge into waters of the state....” It prohibits the Water Management Board from establishing rules for certification that exceed minimum federal requirements.⁸

State Programs:

- None identified

401 Certification:

- Has adopted CWA §401, giving the state authority to certify, conditionally certify, or decline to certify federal permits

402 NPDES Program:

- South Dakota has state authority over NPDES program and issues permits through the South Dakota Department of Environment and Natural Resources;
- EPA issues permits in Indian country⁹

404 Dredge and Fill Permitting:

- Has not assumed the 404 program;
- Does not have a state dredge and fill program for waters and wetlands
- Relies on federal permitting authority and CWA §401

Water Quality Standards:

⁷ ELI, 2013. State Constraints. Available at <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>.

⁸ ELI, 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, available at <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

⁹ EPA, South Dakota NPDES Permits (2017) available at <https://www.epa.gov/npdes-permits/south-carolina-npdes-permits>.

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- Has EPA-approved water quality standards

South Dakota Wetland Program Summary

	YES	NO	UNCLEAR/ UNKNOWN	NOTES
"No Net Loss" Goal		X		
State Dredge and Fill Program for Wetlands		X		
404 Assumption		X		
Isolated Wetland Permitting		X		
State Wetland Permitting Fees			X	
WQS for Wetlands	X			Applies existing WQS to wetlands (not wetland-specific)
Wetland Monitoring & Assessment Program		X		Possibly monitors through other non-wetland monitoring programs

Source: ASWM (2015) Status and Trends Report

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WYOMING

Waters of the State are defined as:

- All surface and groundwater, including waters associated with wetlands, within the state. Any waters within the jurisdiction of Wyoming.

Wetlands are defined as:

- “Wetlands” means those areas in Wyoming having all three (3) essential characteristics: (A) Hydrophytic vegetation; (B) Hydric soils; and (C) Wetland hydrology.
 - (xiv) “Natural wetlands” means those wetlands that occur independently of human manipulation of the landscape;
 - (xv) “Man-made wetlands” means those wetlands that are created intentionally or occur incidental to human activities, and includes any enhancement made to an existing wetland which increases its function or value;
 - (xvi) “Wetland value” means those socially significant attributes of wetlands such as uniqueness, heritage, recreation, aesthetics and a variety of economic values

State-created Limitations on Regulations:

- No limitations identified

State Programs:

- §35-11-310. Notice to drain waters required; exception.
 - (a) Except as provided in subsection (b) of this section, after July 1, 1996, no person shall drain water from a naturally occurring or man-made wetland, or any series thereof, which has an area comprising five (5) acres or more, without first notifying the department that the water which will be drained from the wetland, or any series thereof, will not flood or adversely affect downstream lands. Notification shall include the size and location of the wetland, and whether the wetland is natural or man-made.
 - (b) Subsections (a) and (c) of this section do not apply to disturbances of wetlands resulting from mining operations conducted pursuant to mining permits issued by the department of environmental quality.
 - (c) Any person draining, or causing to be drained, water of a naturally occurring wetland, or any series thereof, which has an area comprising five (5) acres or more, without first notifying the department as required by subsection (a) of this section, shall not be eligible to participate in the mitigation credit banking system as provided by W.S. 35-11-311. Failure to notify the department pursuant to this section does not constitute a violation for purposes of W.S. 35-11-901

401 Certification:

- Has adopted CWA §401, giving the state authority to certify, conditionally certify, or decline to certify federal permits

402 NPDES Program:

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- Wyoming has state authority over NPDES program and issues permits through the Wyoming Department of Environmental Quality¹⁰
- EPA issues permits in Indian country.

404 Dredge and Fill Permitting:

- Has not assumed the 404 program;
- Does not have a state dredge and fill program for waters and wetlands
- Relies on federal permitting authority and CWA §401

Water Quality Standards:

- Has EPA-approved water quality standards

Wyoming Wetland Program Summary

	YES	NO	UNCLEAR/ UNKNOWN	NOTES
“No Net Loss” Goal		X		
State Dredge and Fill Program for Wetlands	X			
404 Assumption		X		
Isolated Wetland Permitting		X		
State Wetland Permitting Fees		X		
WQS for Wetlands	X			Applies existing WQS to wetlands (not wetland-specific)
Wetland Monitoring & Assessment Program		X		Conducts project-specific M&A only

Source: ASWM (2015) Status and Trends Report

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¹⁰ EPA, Wyoming NPDES Permits (2017) available at <https://www.epa.gov/npdes-permits/wyoming-npdes-permits>.

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UTAH

Waters of the State are defined as:

- All streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state; does not include bodies of water confined to and retained within the limits of private property, and which do not develop into or constitute a nuisance, a public health hazard, or a menace to fish or wildlife.

Wetlands are defined as:

- None identified

State-created Limitations on Regulations:

- State imposes qualified stringency prohibitions
 - The Utah Water Quality Board is prohibited from enacting a rule to administer any program under the federal Clean Water Act that is more stringent than the corresponding federal rule, except where specific conditions are satisfied. To enact a more stringent state rule, the Board must: (1) take public comment and hold a hearing; (2) make a written finding based on record evidence that the federal regulations are inadequate to protect public health and the environment in Utah; and (3) issue an accompanying opinion that cites and evaluates the public health and environmental information and studies in the record that form the basis for the Board's conclusion.¹¹
- No municipality or county may designate or treat any land as wetlands unless the United States Army Corps of Engineers or other agency of the federal government has designated the land as wetlands (SB0183)¹²

State Programs:

- Stream Alteration Permit Program: Section 73-3-29 of the Utah Code requires any person, governmental agency, or other organization wishing to alter the bed or banks of a natural stream to obtain written authorization from the State Engineer prior to beginning work.¹³

401 Certification:

- Has adopted CWA §401, giving the state authority to certify, conditionally certify, or decline to certify federal permits

402 NPDES Program:

- Utah has state authority over NPDES program and issues permits through the Utah Department of Environmental Quality;

¹¹ ELI, 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, available at <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

¹² <https://le.utah.gov/~2007/bills/sbillint/SB0183.htm>

¹³ <https://www.waterrights.utah.gov/strmalt/>

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- EPA issues permits in Indian country¹⁴

404 Dredge and Fill Permitting:

- Has not assumed the 404 program
- Does not have a state dredge and fill program for waters and wetlands
- Relies on federal permitting authority and CWA §401

Water Quality Standards:

- Has EPA-approved water quality standards

Utah Wetland Program Summary

	YES	NO	UNCLEAR/ UNKNOWN	NOTES
"No Net Loss" Goal	X			Informal "No Net Loss" goal
State Dredge and Fill Program for Wetlands		X		
404 Assumption		X		
Isolated Wetland Permitting		X		
State Wetland Permitting Fees		X		
WQS for Wetlands	X			Applies existing WQS to wetlands (not wetland-specific)
Wetland Monitoring & Assessment Program		X		Program development in progress (as of 2015)

Source: ASWM (2015) Status and Trends Report

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¹⁴ EPA, Utah NPDES Permits (2017) available at <https://www.epa.gov/npdes-permits/utah-npdes-permits>.

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COLORADO

Waters of the State are defined as:

- Any and all surface and subsurface waters which are contained in or flow in or through this state, but does not include waters in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed¹⁵.

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 conditions¹⁶. (same as CWA definition)

State-created Limitations on Regulations:

- State imposes limitations regarding irrigation flow and agricultural waste:
 - The Colorado Department of Public Health and Environment is prohibited from requiring permits for irrigation flows (or return flows), or permits for various kinds of agricultural waste, except as required by the federal Clean Water Act. Where permits are required, their provisions cannot be more stringent than what is required by the federal Clean Water Act.¹⁷
- CRS 25-8-202(8) (a) The commission may adopt rules more stringent than corresponding enforceable federal requirements only if it is demonstrated at a public hearing, and the commission finds, based on sound scientific or technical evidence in the record, that state rules more stringent than the corresponding federal requirements are necessary to protect the public health, beneficial use of water, or the environment of the state. Those findings shall be accompanied by a statement of basis and purpose referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the commission's conclusion. (b) The existing policies, rules, and regulations of the commission and division shall be applied in conformance with section 25-8-104 and this section.

State Programs:

- Waters of the state are administered by the Colorado Division of Water Resources (DWR)
- Water Quality Control Commission (WQCC) administers the Water Quality Control Act¹⁸

401 Certification:

- Has adopted CWA §401, giving the state authority to certify, conditionally certify, or decline to certify federal permits

¹⁵ Colorado Revised Stat. §25-8-103(19).

¹⁶ ASWM, Colorado State Wetland Program Summary (2015), available at https://www.aswm.org/pdf_lib/state_summaries/colorado_state_wetland_program_summary_101315.pdf.

¹⁷ ELI, 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, available at <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

¹⁸ State of Colorado, 2018. Water Quality Control Commission Regulations, available at <https://www.colorado.gov/pacific/cdphe/water-quality-control-commission-regulations>.

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402 NPDES Program:

- Colorado has state authority over NPDES program; all permits are issued by the Colorado Department of Public Health and Environment, except permits in Indian country and for federal facilities, which are issued by EPA¹⁹.

404 Dredge and Fill Permitting:

- Has not assumed the 404 program;
- Does not have a state dredge and fill program for waters and wetlands
- Relies on federal permitting authority and CWA §401

Water Quality Standards:

- Has EPA-approved water quality standards

Colorado Wetland Program Summary

	YES	NO	UNCLEAR/ UNKNOWN	NOTES
"No Net Loss" Goal	X			Informal "No Net Loss" goal
State Dredge and Fill Program for Wetlands		X		
404 Assumption		X		
Isolated Wetland Permitting		X		
State Wetland Permitting Fees		X		
WQS for Wetlands	X			Wetland-specific WQS
Wetland Monitoring & Assessment Program		X		Conducts project-specific M&A only

Source: ASWM (2015) Status and Trends Report

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¹⁹ EPA, Colorado NPDES Permits (2017) available at <https://www.epa.gov/npdes-permits/colorado-mpdes-permits>.