

COMMON QUESTIONS:

# LOCAL GOVERNMENT WETLAND PROTECTION PROGRAMS



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## PREFACE

This guide is designed for local government officials, land trust staff, state and local officials, developers and others interested in implementing local government wetland protection and restoration programs. It addresses frequently asked questions concerning such programs and provides recommendations for establishing local programs. A selected bibliography and list of web sites provide the reader with more information concerning specific subjects.

The guide was prepared for the Association of State Wetland Managers, Inc. (ASWM) by Jon Kusler with the assistance of Sharon Weaver. It is based upon the author's experience with local government wetland protection efforts over a twenty year period and a series of studies and publications. See Kusler, J. 1983. Our National Wetland Heritage, A Protection Guidebook. Environmental Law Institute, Washington, D.C.; Kusler J. and T. Opheim. 1996. Our National Wetland Heritage, A Protection Guidebook, Second Edition. Environmental Law Institute, Washington, D.C.; and Kusler, J. et al, Wetlands and Water Resources, A Guide for Local Governments.

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*Cover photo of West Eugene, Oregon Wetland Map from website  
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*Photo on page 9 by Volunteer. West Eugene Wetlands Education  
<http://www.wewetlands.org/volunteer.htm>*

## COMMON QUESTIONS: LOCAL GOVERNMENT WETLAND PROTECTION PROGRAMS

### Why should a local government adopt a wetland protection and restoration program?

A. A local government can benefit from a wetland protection and restoration program in many ways. Such programs can:

- Reduce water quality problems,
- Help protect municipal water supplies,
- Reduce stormwater water quality and quantity problems,
- Reduce flood, erosion, earthquake losses (liquefaction)
- Provide outdoor recreation opportunities for bird watching, canoeing, kayaking, and fishing,
- Provide research and educational opportunities for local schools, and
- Help allocate lands throughout the community to their most suitable uses.

Until 2000, most wetlands were partly protected by the regulatory permitting requirements of the federal Section 404 program. Wetland fills or drainage were also subject to state wetland regulations for coastal wetlands in all states and for freshwater wetlands including some isolated wetlands in about one half of the states. However, in January, 2000, the U.S. Supreme Court in a decision, *SWANCC*, held that the federal Section 404 program does not apply to wetlands based solely upon their use by migratory birds. This means that many wetlands, particularly isolated wetlands, are unprotected unless states or local governments adopt wetland protection programs. Less than one half of the states have adopted effective wetland protection programs for freshwater wetlands.



*Isolated wetland*

### How can local governments assist state and federal agencies protect and restore wetlands?

A. Many local governments are assisting states and federal agencies to protect and restore wetlands although such efforts are not a wholly satisfactory alternative to adoption of their own, independent protection efforts. Local governments have aided states and federal agencies by requesting the U.S. Army Corps of Engineers (Corps) and state wetland regulatory agencies submit landowner applications for federal or state wetland permits to local conservation commissions, the local zoning administrator, or other local officials for comment prior to issuance. The Corps and states often provide considerable weight to these comments. In this way, local governments can influence federal or state permitting although there is no guarantee that the federal or state agencies will follow local recommendations.

Local governments can help state and federal agencies in other ways as well by educating landowners concerning state and federal protection and restoration programs, mapping wetlands, identifying restoration priorities, and acquiring selected wetlands. They can help state and federal enforcement efforts by monitoring wetlands and reporting violations to federal and state regulatory agencies.

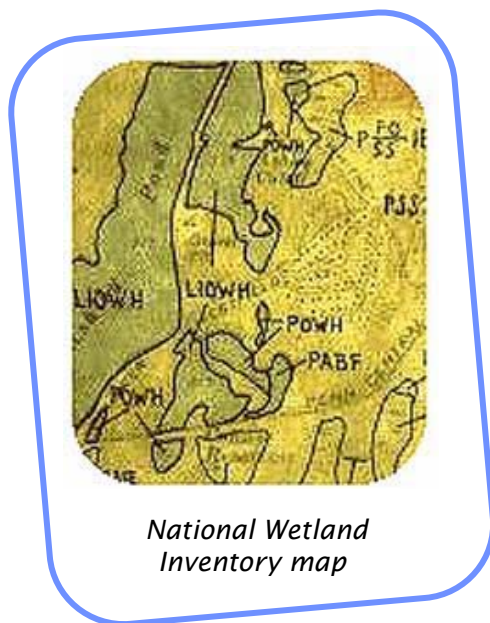
### **What wetland protection and restoration techniques are available to a community?**

A. Communities typically have a broad range of tools available for protecting and restoring wetlands.

- Mapping wetlands for public information and education, planning, regulatory, and other purposes,
- Incorporating wetland maps and policies into comprehensive and master planning programs for lands and waters, and watersheds,
- Protecting and restoring wetlands on local government lands such as parks, greenways, and forest areas,
- Adopting wetland protection regulations for private lands (zoning, subdivision control, building codes, other regulations),
- Adopting local real estate tax incentives for wetlands,
- Acquiring fee or conservation easement interests in selected wetlands,
- Constructing boardwalks and other interpretative facilities in wetlands, and
- Restoring and constructing wetlands for pollution control, storm water, parks, recreation, tourism and other purposes.

### **Are many local governments regulating wetlands?**

A. An estimated 4,000 to 6,000 local governments have adopted local wetland protection regulations. Regulations take several forms. Many communities have adopted separate wetland protection ordinances in states authorizing or requiring such regulations. Other communities have mapped wetlands as “conservancy”, “critical area” or “sensitive land” zones as part of broader zoning efforts. This is the most common approach. These include particularly large number of communities in Massachusetts, Connecticut, Rhode Island, New Hampshire, Maine, Vermont, New York, Maryland, Pennsylvania, Virginia, Florida, Wisconsin, Minnesota, Michigan, Illinois, Washington State, Oregon, and California. Smaller numbers of communities in other states such as Colorado, Texas, Montana, Alaska, and Wyoming have adopted wetland regulations as independent ordinances or as part of floodplain zoning or stream protection. Some additional local governments in other states have adopted floodplain zoning or broader zoning, subdivision control, and special ordinances which provide some measure of protection for wetlands.



Many communities in recent years have supplemented regulations with wetland mapping, construction of wetland boardwalks and trails as part of open space and recreation programs, bioengineering for stream banks, and construction of wetlands for treatment of domestic wastes and stormwater management. Land trusts have played important roles in many of these efforts. See Common Questions: Lands Trusts and Wetlands in this series of guides.

### **What types of wetland protection regulations have local governments adopted?**

A. Local governments have adopted several types of regulations to protect and manage wetlands:

- Special wetland protection ordinances (e.g., communities in Virginia, Massachusetts, Maine, New York),
- Zoning regulations with wetland conservancy, sensitive area, or other protection zones (e.g., many communities through the Nation (see above),
- Large lot residential zoning for wetland areas to provide buildable upland spaces on each lot,
- Subdivision regulations which require protection of wetlands and encourage dedication of wetlands as open space or for stormwater management purposes,
- Sanitary codes which prohibit the use of septic tanks and soil absorption fields in areas with high ground water and tight soils, and
- Other special codes which partially protect wetlands (along with serving other objectives):
  - Floodplain and floodway protection regulations,
  - River protection regulations,
  - Tree cutting and other vegetation cutting regulations,
  - Stormwater ordinances, and
  - Building codes.

### **Should local governments establish expert regulatory boards or advisory committees for wetlands?**

A. Often this is a good idea. Evaluation of wetland permit applications requires hydrologic, botanical, biological and other types of expertise which local government staff often lacks, particularly in rural areas. Such expertise is particularly needed if compensatory mitigation is allowed in wetland permitting. To help address this problem, state legislators in some states like Massachusetts have authorized local governments to establish conservation commissions or similar appointed expert bodies to administer wetland and water regulations. Many local governments have done so. In other states, local governments with large numbers of wetlands have also, in some instances, created special committees as part of planning boards or local councils to make recommendations to regulatory bodies concerning proposed wetland regulatory permits. Other local governments do not rely on internal expertise but request technical help from federal and state agencies on difficult permit applications. Others shift much of the information gathering and analysis burden to landowners and developers and their consultants who are required to carry out studies in applying for permits to alter wetlands.

## **How do local wetland regulations differ from state and federal regulations?**

A. Local regulations differ in a number of ways:

- Federal and state wetland regulations typically pertain only to selected wetlands or to wetlands and waters. Many local regulations are adopted to serve broad, multiobjective land and water management goals and are part of a larger, comprehensive planning and land management programs which apply community-wide. They are often part of larger efforts to protect “conservancy areas”, “critical areas”, “sensitive areas”, and “open space” which also apply to steep slopes, prime agricultural lands, hazard areas and other priority open spaces,
- Local regulations typically involve adoption of wetland maps as well as written regulations. Some state regulations also involve prior mapping. The Corps regulations and many state regulations do not include mapping, and
- Local regulations are often more restrictive in nature than state or federal regulations and only allow open space uses unless a variance or special exception is issued.

## **Do local governments have sufficiently broad zoning and other statutory powers to adopt wetland protection regulations?**

A. Courts have broadly upheld local efforts to regulate wetlands, floodplains and other sensitive lands pursuant to state zoning, subdivision control, building code and other regulatory statutes. Local governments do not need specific wetland regulatory language in an enabling statute to adopt such regulations. However, local wetland regulations adopted pursuant to broader statutes do have limitations. Broader zoning enabling acts often contain partial exemptions for agricultural and certain other activities which may damage wetlands. Local government regulatory powers are also limited to local government and private lands within municipal borders (except for some extraterritorial subdivision and zoning authority). Local regulatory powers do not usually apply to federal and state lands including lands under state waters in some instances. Local governments cannot adopt point source pollution control regulations in most states due to state preemption nor can they regulate certain types of projects in navigable waters.

In New Jersey wetland regulation is at the state level and local governments are not permitted to regulate wetlands.

## **May local governments adopt wetland regulations which are more restrictive than those of state and federal agencies?**

A. Yes. Subject to the limitations described above, local governments can be more restrictive than state and federal regulations. Local governments can typically regulate all types and sizes of wetlands in a community and are not limited to particular wetland types and sizes as are state regulations in some states and the federal Section 404 program. They can very tightly control uses through conservancy zoning. They can establish wetland buffer requirements for lands adjacent to wetlands. Local governments can (in most instances) regulate drainage as well as fills in wetlands.

**Does issuance of a state or federal wetland permit “preempt” local denial of a wetland permit?**

A. No, the issuance of a state or federal permit does not affect the legal validity of local denial of a permit. Nor does denial or issuance of a local permit affect state or federal denial or issuance.

**Do local governments need to adopt lengthy, complicated wetland regulations to provide effective protection of wetlands?**

A. No. The vast majority of local wetland regulatory ordinances are quite simple. With such an approach:

- The local government adopts National Wetland Inventory (NWI), state, or other wetland map as a wetland or conservation “overlay” zone as part of local zoning. These maps are then filed with other zoning maps if adopted as part of zoning. Landowners may be provided with the option prior to ordinance adoption or as part of ordinance administration to submit evidence contesting any wetland boundary and suggesting where the boundary is in fact located.
- The local government simultaneously adopts written regulations for wetland areas designated on these wetland regulatory maps as an amendment to zoning regulations or as special wetland regulations. The written regulations may take the form of “wetland”, “conservancy zone”, “sensitive area”, “critical area” or other open space regulations. Regulations typically set forth permitted and prohibited uses. Regulations may allow additional uses as variance or special exceptions if no economic use is otherwise possible for entire parcels, impact reduction measures are taken, and (in some ordinances) compensation measures are undertaken.
- The local government may also amend its subdivision regulations to prohibit subdivision of wetland areas and to insure “a buildable site on each lot. It may also amend its sanitary code to prohibit septic tank/soil absorption fields in wetland areas although this is often unnecessary because most codes now prohibit septic tank/soil absorption fields in areas of high ground water or tight soils.

**What sorts of uses are typically allowed? Prohibited in local wetland regulatory programs?**

A. Permitted uses typically include recreation (birdwatching, canoeing, kayaking), harvesting of timber and wild crops, fishing, hunting, boardwalks, and other open space uses.

Prohibited uses often include fills, drainage, and other activities which will substantially damage or destroy wetlands. However, some prohibited uses may also be allowed by special exception or variance if no economic use is otherwise possible for entire parcels of land and landowners undertake impact reduction and compensation measures.



*Local governments can regulate drainage*

## **What steps do local governments typically follow in adopting wetland regulations?**

A. Local governments with existing zoning conservation zone provisions have in some instances simply amended their zoning maps and conservation zone designations to include wetland provisions and maps. Other local governments have utilized more extensive procedures in formulating and implementing wetland programs which may include many or all of the following steps:

1. The planning board or local town, city or county council appoints a wetland regulatory committee or work group.
2. The committee or work group makes recommendations for mapping and develops a draft wetland ordinance.
3. Wetland mapping is carried out (or existing NWI or other maps are compiled) by a consultant, state or federal agency, the work group, the community planning department, etc.
4. The committee or work group presents the maps and draft ordinance to the planning board and city, town, or county council.
5. One or more public hearings may be held on the maps and proposed regulations.
6. The planning board may adopt the maps and policies as part of the community master plan.
7. The city, town, or county council formally adopts the maps and draft ordinance or ordinances as zoning, subdivision control, or other regulations.
8. The maps and regulations are formally published.
9. The municipal zoning administrator and other community staff administer and enforce the regulations.

## **Do communities need to determine the functions and values of individual wetlands for local regulatory purpose?**

A. No. A small number of communities (e.g., Juneau, Alaska) have evaluated the functions and values of wetlands throughout the community and comparatively ranked wetlands as part of community planning or wetland “advance identification” or special area management programs. However, the efforts to rate and rank wetlands based upon functions alone have proven to be of limited use in determining development versus preservation potential of wetlands unless supplemented with other information for several reasons. First, most assessments have been expensive and time-consuming but not very accurate. Second, assessments are often quickly out of date due to the dynamic nature of wetlands and anthropogenic changes in watershed hydrology. Third, development controls for a wetland area need to depend not only upon wetland functions and values but natural hazards including flooding and depth of organic soils and efforts. Fourth, development controls also need to depend upon a broad variety of extraneous factors such as existing and proposed land uses, roads and sewers, utility lines, and other infrastructure.



On the other hand, rapid assessment of wetland functions can help suggest the most significant wetlands in a community and can help target acquisition and restoration efforts. It can assist overall planning and zoning if combined with other information. A number of communities such as Juneau, Alaska and West Eugene, Oregon have found such inventories to be useful when used in a larger context.

### **Have courts supported tight local wetland regulations?**

A. Yes, courts have broadly supported local conservancy zoning and other local regulations providing the regulations do not prohibit all economic, non nuisance-like uses of entire parcels of land.



### **May local government amend floodplain regulations to better protect wetlands?**

A. Yes. More than 18,000 communities have adopted floodplain regulations. These regulations apply to virtually all coastal and estuarine wetlands and wetlands adjacent to major lakes and rivers but not more isolated wetlands. Some of these local floodplain regulations prohibit all fills or development in wetlands and provide considerable protection for wetlands. However, many other regulations allow fills in outer floodplain areas including wetlands. Amendments are needed to prohibit fills and drainage in wetland and other sensitive areas. Variances may be provided where

landowners will be deprived of all economic use of entire parcels and the proposed activity will not have nuisance impact on other lands such as increasing erosion or flood hazards. Including wetland protection standards in floodplain regulations will not, of course, protect wetlands outside of floodplains but it will protect many coastal and estuarine, lake fringe, and river fringe wetlands.

### **Do local governments need to adopt a comprehensive plan prior to regulating wetlands?**

A. Special state wetland enabling acts authorizing local adoption of wetland regulations (e.g. Massachusetts, Connecticut, Maine) do not require prior comprehensive planning. However, many broad state zoning statutes require that broader zoning regulations be in “accordance with a comprehensive plan”. Does this require prior wetland planning? No court has required that a community adopt a prior comprehensive wetland plan prior to adopting wetland zoning, subdivision control, building code or other regulations. Some courts have, in recent years, demanded broader community comprehensive plans prior to zoning but there has been no mention of specific needs for wetland regulations alone.

Even if not required, community adoption of a comprehensive plan and master plan which incorporate wetland maps can help guide private and public development away from wetlands, help support the rationality of wetland regulations and strengthen the legal basis for wetland and other regulations.

## **How can local governments gain landowner support for wetland regulations?**

A. Local governments can gain landowner support for regulations through several types of measures:

- Reduce local real estate taxes for wetlands.
- Reduce road, sewer, and water levees for wetlands.
- Work with local land trusts to provide wetland landowners who donate wetlands or conservation easements in wetlands with income and estate tax benefits.
- Acquire wetlands from landowners.
- Map wetlands to help provide landowners with certainty and predictability. Also provide appeal procedures in regulations which allow landowners to contest delineations they feel are unreasonable.
- Provide variance or special exception procedures in regulations where regulations will prevent all economic use of lands.
- Undertake landowner education efforts in conjunction with local schools and land trusts and federal and state agencies with regard to wetland functions and values, how wetlands can benefit landowners, and how wetlands are to be managed.
- Help landowners seek financial help from federal and state sources to ease the regulatory burden such as enrollment of wetlands in the Wetland Reserve Program.
- Carry out Wetland Fests, Birding Festivals to develop landowner and community support for wetland protection and provide local economic incentives (expenditures within the community).

## **Can local governments reduce real estate taxes for regulated wetlands?**

A. In general, they may reduce real estate taxes under existing statutes because the development potential and fair market value of these wetlands subject to regulation are usually considerably reduced. Many states have also adopted statutes specifically lowering real estate taxes on wetlands.

## **Where can a local government obtain a model zoning ordinance for wetland areas?**

A. Some states with wetland regulatory programs have published model or draft ordinances for use by local communities (e.g. Wisconsin, Minnesota, Virginia, Maryland, and Pennsylvania). Sometimes these drafts are part of larger wetland regulatory guidebooks for local governments. See, for example, Maryland and Pennsylvania.

Several publications also set forth model regulations. See, for example, J. Kusler, [Our National Wetland Heritage](#). Examples of local government regulations can also be found on the web sites of these communities. See, the web sites listed at the end of this guide.

## Where can a local government obtain technical assistance?

A. Help in mapping, assessing wetlands, and drafting local regulations is often available from a state wetland regulatory agency or coastal zone management agency. Help may also be available from federal Corps, U.S. Environmental Protection Agency (EPA), National Oceanic Atmospheric Administration (NOAA), U.S. Fish and Wildlife Service (FWS) and USDA Natural Resources Conservation Service (NRCS) staff. These agencies may also be able to provide guidance on mitigation.

Assistance in evaluating individual regulatory permits may be available from state wetland, floodplain, wildlife, fisheries and other staff. It may be available from federal Corps, EPA, NOAA, FWS and NRCS staff. It may be available from local teachers and consultants.

Wetland maps are available from the FWS and, in some instances, NRCS or NOAA. Wetland maps in some states are also available from state wetland programs.

Guidance with regard to restoration is available from the FWS Partners for Wildlife Program, NRCS Wetland Reserve Program, and EPA Division of Wetlands.

Assistance with acquisition of fee and easement interests is often available from local land trusts.

### Where can I find more information on establishing and implementing a local protection program?

A. We recommend that you take a look at the other guides in this series and the “selected readings” and web sites recommended in those guides for more information pertaining to wetland restoration, construction of boardwalks and trails, the roles of land trusts, ecotourism and wetlands, and other subject.



*Volunteers, West Eugene, Oregon*

## SUGGESTED READINGS

Bartoldus, C. 1999. A Comprehensive Review of Wetland Assessment Procedures: A Guide for Wetland Practitioners. Environmental Concern, Inc., St. Michaels, MD.

Burke, D., E. Meyers, R. Tiner, Jr. and H. Groman. 1988. Protecting Nontidal Wetlands. American Planning Association, Washington, D.C.

Cowles, C., D. Sheldon, and S. Dietz (New England Interstate Water Pollution Control Commission). 1991. Guidance on Developing Local Wetlands Projects, A Case Study of Three Counties and Guidance for Others. U.S. Environmental Protection Agency, Office of Wetlands Protection. Washington, D.C.

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- Washington State Department of Ecology. 1990. Wetland Walks: A Guide to Washington's Public Access Wetlands. Wetland Section. Olympia, Washington. Pub. No. 89-30

Washington State Department of Ecology. 1986. Wetlands Acquisition & Preservation: A Guide for Landowners and Government Agencies. Shorelands & Coastal Zone Management Program, Wetlands Section

World Wildlife Fund. 1992. Statewide Wetland Strategies: A Guide to Protecting and Managing the Resource. Island Press. Washington, D.C.

### SUGGESTED WEB SITES

<http://www.cwp.org/>

Center for Watershed Protection. Many excellent publications listed here.

<http://www.epa.gov/owow/nps/ordinance/>

U.S. Environmental Protection Agency, Model Ordinances to Protect Local Resources. Very useful.

<http://www.smartgrowth.org/Default.asp?res=1024>

Smart Growth Online.

<http://www.lawguru.com/ilawlib/4.htm>

Internet Law Library. Code of Federal Regulations (searchable).

<http://www.aswm.org/>

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<http://www2.eli.org/index.cfm>

Environmental Law Institute

[www.noaa.gov](http://www.noaa.gov)

National Oceanic Atmospheric Administration (NOAA).

<http://www.nmfs.noaa.gov/>

NOAA - National Marine Fisheries Service.

<http://www.sws.org/>

Society of Wetland Scientists.

<http://www.usace.army.mil/>

U.S. Army Corps of Engineers.

<http://thomas.loc.gov/>

The Library of Congress. Thomas Legislative Information on the Internet.

<http://www.pwrc.usgs.gov/wli/>

USDA Natural Resources Conservation Service. Wetland Science Institute.

<http://www.epa.gov/>

U.S. Environmental Protection Agency

<http://www.epa.gov/surf/>

U.S. Environmental Protection Agency, Surf Your Watershed. Wetlands, Oceans and Watersheds

<http://www.epa.gov/OWOW/>

U.S. Environmental Protection Agency. Wetlands, Oceans and Watersheds Publications

<http://www.esri.com/hazards/>

Federal Emergency Management Agency flood maps.

<http://www.fws.gov/>

U.S. Fish and Wildlife Service.

<http://wetlands.fws.gov/>

U. S. Fish and Wildlife Service. National Wetlands Inventory.

<http://ci.fort-worth.tx.us/dem/stormcontacts.htm>

Official web site for the City of Fort Worth, Texas which provides links to local stormwater management programs throughout the nation. Excellent.

<http://www.ci.eugene.or.us/parks/wetlands/plan.htm>

Eugene Parks and Open Space. West Eugene Wetlands Plan. Excellent. Lots of detailed information on the plan, wetland links.

<http://www.csc.noaa.gov/>

NOAA Coastal Services Center. Many helpful links and information.

<http://www.crcw.org/programs/watershedmgmt/scwetlands/scwofficials.html>

Clinton River Watershed Council. Wetland Stewardship for Local Governments. Contains a model ordinance.

<http://www.angelfire.com/in4/earthpages/indianawetlands.html> A Model Wetlands Ordinance for Indiana Communities. However, may be of broader interest.

<http://www.co.cass.mn.us/esd/pdfs/ordinance/WETORD98.pdf>

Cass County Environmental Services. Cass County Wetland Ordinance. Wetland ordinance utilizing wetland functional assessments.

<http://www.fws.gov/partners/>

U.S. Fish and Wildlife Service, Partners for Fish and Wildlife Program.



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