



401 Certification Program Summary **~Georgia~**

Overview

The Georgia Department of Natural Resources (GDNR) operates a wetland regulatory program that is based primarily on 401 water quality certification – using narrative standards — but is also linked to other state authorities (e.g. stormwater, erosion control, and with its Coastal Resources Division). While the state relies on the Corps to defend evaluation of permit applications under the 404(b)(1) guidelines, it uses a variety of authorities creatively to leverage effective protection of aquatic resources.

Definition of Waters of the State

The definition of Waters of the State in Georgia includes wetlands.

“Waters of this state means any waters within the territorial limits of this state and the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state except ponds or lakes not open to the public, whether or not such ponds or lakes are within the lands of one title. (Section 27-1-2.73)ⁱ

The GDNR Environmental Protection Division uses an operational definition that is different from what is in the regulations.

The Georgia Water Quality Control Act provides EPD the authority to regulate “waters of the State.” The Water Quality Control Act defines “waters of the state” as: “[A]ny and all rivers, streams, creeks, branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and all other bodies of surface or subsurface water, natural or artificial, lying within or forming a part of the boundaries of the State which are not entirely confined and retained completely upon the property of a single individual, partnership, or corporation.” The Water Quality Control Act’s regulations further define “waters of the State” to explicitly include wetlands.

Wetlands are more clearly captured in this definition. They are still working to have a definition that better captures isolated wetlands.

Permits 401 Program is Applied to

Georgia certifies all individual 404 and certain Section 10 River and Harbors Act permits, as well as FERC licenses, and Tennessee Valley Authority (TVA) licenses. The TVA licenses that Georgia certifies often deal with dredging of a lake and the state will work in parallel coordination with the TVA. However it is very rare that a TVA project will justify the states coordination.

States 401 Certification Standards (Water Quality and Other)

Water quality standards are the basis for 401 certification review in Georgia. Much of the review is directed by narrative and antidegradation language in the standards rather than strictly numeric criteria. Georgia does not have water quality criteria specific to wetlands, but wetlands are included under waters of the state and thus subject to general water quality criteria. The state is able to look closely at narrative requirements in relation to wetlands.

Wetlands are addressed on a case-by-case basis. Georgia will look at designated classifications in relation to wetlands. Designated uses for all waters and streams are classified in relation to fishing, recreation, wild, scenic, coastal fishing, or drinking water. All waters of the State are classified as fishing unless specifically designated otherwise. Subsequently wetlands are designated as fishing, which includes propagation of fish, shellfish, game and other aquatic life. The broad look at projects under narrative criteria when numeric criteria are limited or not applicable allows Georgia to work collaboratively with applicants and other federal and State agencies to conditions permits, limit impacts when practicable, and achieve a high level of functional mitigation.

For a summary of how water quality standards are employed in Georgia, follow the link here: http://www.caes.uga.edu/applications/publications/files/pdf/B%201242-3_2.PDF

Antidegradation Applications

Georgia does have an antidegradation policy that it applies to wetland-related projects during review. The narrative language specifically can be applied to wetlands.

401 Certification Implementation

Georgia does not waive certification. General conditions are placed on all certifications as well as specific conditions on a case-by-case basis. Denial is extremely rare and is used only when the project proposal can defensibly be shown to violate water quality standards. The number of 401 certifications reviewed per year has been decreasing due to economic slowdown, as represented by less than 50 individual permits per year in the last couple of years versus 80 - 100 individual permits per year previously.

Most actions fall under Nationwide permits (NWP). Georgia sees an average of about 10 NWPs per week, amounting to about 500 NWPs that receive cursory review on annual basis. Activities in Georgia are also authorized by the Corps through Regional General Permits and Letters of Permission. Authorization for the use of these permits is similar to that of NWPs, in that they are for similar types of activities with limited impacts. Certification is authorized for the term of the permit, generally 5 years and is conditioned specific to the activity being authorized.

The way that projects are certified in Georgia is project specific. Recently Georgia worked on a project on a lake that demanded a number of specific features to investigate. This project required a demonstration that mitigation was going to be put into place as part of the project and the state strictly determined the effectiveness of mitigation through the 401 certification. They also included specific lake management plans as part of the certification.

Georgia would deny a certification based on violation of water quality standards. An example would be an irrigation pond for a golf course that impacted a primary trout stream. Recently Georgia issued a denial for an application involving a suite of regional permits that the Corps wanted to move forward under the ARRA stimulus project. The state decided to deny these permits because the reach that the Corps was trying to make was in excess of anything that the state would find acceptable as a regional permit. Although the state denied certification, the Corps implemented the regional permits, which require applicants to seek certification independently from the state.

When projects are proposed that would cause violation of water quality standards, the applicant can usually work with the state to modify the project to avoid denial. According to EPA's Interim 401 Handbook 2010,

“Georgia is one of several states that rely heavily on the pre-application consultation process to provide an opportunity to discuss potential water quality concerns and obtain changes to the proposed project prior to official application for a permit or license and certification. Georgia works to have projects ‘modified to address concerns’ during the application process, so that the main water quality issues are addressed prior to final certification.”ⁱⁱ

Notably, Georgia implements 401 certification to maximize protection by looking broadly at its rules and regulations. The state thinks creatively and effectively about how to leverage the tools that it has to protect its waters. The opening statements in the states water quality standards initiates the need for protection of public health, conservation of fish, wildlife and other beneficial aquatic uses and biological integrity. Georgia uses that language to reach its 401 determinations and to support any appropriate conditioning. Sometimes this language is included on a certification when especially relevant. This point is highlighted in the EPA's Interim 401 Handbook 2010:

“Georgia considers a suite of other state regulations under its review including compliance with the state Erosion and Sedimentation Act for buffer integrity, construction and post-construction stormwater management, and the adequacy of mitigation. In addition, the Georgia water quality certification authority also coordinates with the Coastal Resources Division to insure project compliance with coastal protection regulations.”ⁱⁱⁱ

Further information on how the 401 program is implemented in Georgia can be found here: <http://www.coastalgadnr.org/node/2064>

Coordination of Programs

Coordination with Corps Districts

Georgia has a memorandum of agreement and a joint application process with the Savannah Corps District, which manages the Section 404 regulatory program throughout the state. The Mobile Corps of Engineers District oversees Operations and Planning (O&P) for the Chattahoochee/ Flint and Coosa/Tallapoosa River basins in the western half of the state. Projects promulgated through the Mobile District that require state certification must pass through an independent public notice review process at the state level since no MOA exists between the State of Georgia and the Mobile District. While these projects are few, certification review and determination generally require longer timelines.

Georgia is able to get a final copy of the Corps permit if they request one. The Corps incorporates the State's conditions exactly as the State writes them. Section 401 Certification is generally issued in advance of the Corps Section 404 permit. In instances where the Corps may issue a provisional Section 404 permit, they will incorporate the standard Section 401 boilerplate language, but such provisional permits are inactive until the State actually issues Certification. Should the State add specific conditions the Corps would have to modify the provisional permit; once modified the Section 404 permit would be active.

Georgia has found it to be effective to have a combined Section 404/401 application. The applicant must provide identical applications and documentation to both the Corps and the State. The state does not start the clock for their 401 review until they are satisfied that they have a full set of information. According to the EPA's Interim 401 Handbook 2010,

“While the Savannah Army Corps of Engineers (Corps) District has a self-imposed 120 day timeline for making permit decisions, it has placed no limit on receipt of state certification other than the statutory one year. Should Georgia not issue a §401 certification by the 120-day deadline for §404 permit issuance, the District may issue a provisional permit that is not valid unless the conditions listed on the cover page, such as obtaining §401 certification, are met.”^{iv}

Coordination with other Agencies

Georgia EPD does not have a formal interagency or intra-agency review process, but EPD will consult with and collaborate with both federal and state agencies on concerns such as endangered species, wildlife, and natural heritage inventory—important factors in 401 certifications. According to EPA's Interim 401 Handbook 2010, “In Georgia, coordination between the certifying agency and the state fish and wildlife agencies has led to certification conditions designed to protect state species of concern that are tied to water quality goals in state law.”^v

Coordination with Other Authorities

The Coastal Resources Division is an independent authority in Georgia with its own rules and regulations. In certain cases (for example NOAA federal consistency) the Coastal Resources Division cannot issue their permits unless a 401 certification comes from the State. The coastal zone is defined by tidally influenced waters, below 5.6 mean sea level. They also determine the coastal zone more by vegetation lines, due to rise in sea level. The coastal zone encompasses the two tiers of counties along the coast. The first tier includes 6 counties and the second tier includes an additional 12 counties, reaching beyond the standard 5.6 mean sea level line. Georgia also coordinates with the inventory of National Heritage resource sites. They coordinate with other authorities in the state regarding storm water, sedimentation, buffer variances, mining, dams, and other issues in order to ensure that the final 401 document is complete due to thorough review. They also endeavor to avoid sending the director certifications that are in conflict with others needed for the same project.

Application of 401 Certification to Wetlands that have been declared non-jurisdictional due to the US Supreme Courts decisions in SWANCC

In certain cases Georgia has found mechanisms to recapture non-jurisdictional areas. The State has reached to use state law, beyond the definition of waters of the state, to work with other permits under erosion and sedimentation as well as mitigation for impacts in non-jurisdictional areas. However, if a single property holds isolated waters, Georgia is not able to capture those waters. The state has had more success related to Rapanos related areas over SWANCC related areas, in using its definition of waters of the state to recapture. The State is able to require mitigation even when the Corps does not require it in non-jurisdictional waters.

Project Analysis/Integration of 404(b)(1) Guidelines

Georgia does seek to avoid and minimize impacts as part of their review process. This action does not carry a great deal of weight as a separate effort as there is not a mechanism built into the water quality standards that requires that level of review. The narrative criteria built into the states review does state that they cannot allow degradation of the states waters, as laid out in the antidegradation policy. The state does have some leverage, but it is not as specific as the Corps guidelines, so the state will often parrot the language of the Corps to minimize its impacts. Since this mechanism is built into the Corps review in their 404(b)(1) guidelines and the state feels that the language is sufficient, the state will often rely on the Corps to provide this level of review and information, since the state does not have regulations that are as rigorous. If a project is not able to achieve minimization, additional mitigation will often be substituted. The tactics that the state employs work more as bargaining chips than regulatory nuts and bolts. Georgia does, however, require water dependency analysis.

Mitigation Requirements

Mitigation in Georgia follows new federal guidelines almost completely. Through the 2008 mitigation rule, the Federal/State IRT in Georgia is the national leader in developing and

managing a highly successful entrepreneurial mitigation banking program. Additionally, the in-lieu-fee program is undergoing strategic redevelopment for compliance with the new rule. Recently Georgia EPD has reached agreement with the Corps to use authorized mitigation banks to meet mitigation requirements under the Georgia Erosion and Sedimentation Act for projects which need state required mitigation but may not need 404/401 authorization.

Monitoring and Enforcement Approaches

Georgia does not enforce 401 certifications directly, however, all conditions of the certifications have to have a nexus to enforceable state law. This ensures that any enforcement taken is a result of statutes being violated, not a direct response to a violation of the 401 certification. Because the 401 certification program in Georgia is not statutory, the state cannot take enforcement actions as violation of 401 conditions but rather can respond as violations of water quality standards or other state laws or regulations. The 401 program will coordinate with the state justice office when required for enforcement of violations to specific regulations.

Staffing

There are two full-time employees and an additional two employees who work part-time on 401 water quality certifications through the Georgia Department of Transportation (DOT) and other federal transportation pass through monies. Recent funding through the US EPA wetlands grant program has allowed Georgia to establish a new wetlands management program and hire a program manager.

Tracking Techniques/Databases

Georgia maintains rudimentary excel spread sheets to track projects. They intend to have a more thorough and updated database eventually to utilize GIS Arc Explorer 24 and to include projects in the coastal counties that currently are not tracked.

Program fees

Georgia does not have a fee structure for 401 certifications.

Important Court Cases

In the early 1990s Georgia certified the construction of a Norfolk Southern RR piggyback transfer yard. While locally unpopular due to proximity to neighborhoods and potential historical sites, the courts upheld the certification finding that the project complied with regulations.

Another case involved a challenge to a regional water supply reservoir. The point of legal contention was a question of existing uses versus designated uses. At that time the court found that there was no statutory evidence in Georgia to differentiate the two. Despite the favorable

ruling, EPD chose to clarify existing uses versus designated uses in its water quality standards through rulemaking.

Overall Comments

Georgia feels that it is understaffed and that this situation challenges their work. The state is interested in obtaining additional funding to further build their program and its capacity. The new director of the Environmental Protection Division, Georgia Department of Natural Resources has an intense interest in developing the wetlands program and sees it as a significant management tool for the state. They are hoping to be able to keep momentum in this direction.

Georgia has received funding from EPA to use for developing narrative water quality standards specific to wetlands. This would provide greater leverage for Georgia to be able to protect wetlands. Georgia is thankful that the EPA has been focusing interest in 401 certification capacity building programs.

ⁱ ECOS Report, <http://www.ecos.org/section/publications>

ⁱⁱ http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf (p 28)

ⁱⁱⁱ http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf(p 21)

^{iv} http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf (p. 12)

^v http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf(p 19)