



## **401 Certification Program Summary** **~North Carolina~**

### **Overview**

North Carolina operates a robust 401 certification program for protection of wetlands and other surface waters. The North Carolina Department of Environment and Natural Resources (NCDENR) relies on state water quality standards – including wetland provisions – and associated regulations to provide comments on Section 404/Section 10 permits issued by the U.S. Army Corps of Engineers (“Corps”). The Corps also reviews all applications independently. North Carolina generally depends upon the Corps to carry out review under the 404(b)(1) Guidelines, while state 401 certification comments focus on water quality issues— including stormwater. The state has an active program to enforce violations of water quality standards and certification conditions.

### **Definition of Waters of the State**

North Carolina’s definition of Waters of the State includes all wetlands:

"Waters" means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction. (1987, c. 827, s. 152A; 1989, c. 727, s. 218(103); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991 (Reg. Sess., 1992), c. 1028, s. 1; 1997-443, s. 11A.119(a).) =>G.S. 143-212 Definitions: (6)<sup>i</sup>

### **Permits Requiring 401 Certification**

North Carolina certifies 404 permits (90% of certifications issued), Section 10 permits (8% of certifications issued), and FERC permits (2% of certifications issued).

### **States 401 Certification Standards (Water Quality and Other)**

Water Quality Standards are the primary basis for all decisions made regarding conditioning permits in North Carolina. North Carolina has Water Quality Standards specific to wetlands. They currently have narrative standards and plan to have numeric standards in the future once the required research can be completed. These can be found here:

<http://h2o.enr.state.nc.us/admin/rules/documents/rb080104.pdf> The general Water Quality Standards can be found here: [http://h2o.enr.state.nc.us/basinwide/documents/Chapter5\\_012.pdf](http://h2o.enr.state.nc.us/basinwide/documents/Chapter5_012.pdf)

Turbidity standards are used for streams. In FERC permits, the dissolved oxygen (DO) is involved, which triggers some numeric standards, total suspended solids (TSS), and metal standards. The state also will often use the chlorophyll a, pH standard, and storm water management requirements in conditioning permits. Another common standard that is employed is temperature in relation to trout waters.

North Carolina has a definition of wetlands in their regulations.

## **Wetland Definition**

15A North Carolina Administrative Code 2B .0202 Definitions provides the following definition of a wetland: “(71) Wetlands are "waters" as defined by G.S. 143-212(6) and are areas that are inundated or saturated by an accumulation of surface or ground water 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. Wetlands classified as waters of the state are restricted to waters of the United States as defined by 33 CFR 328.3 and 40 CFR 230.3.”

## **Description of Designated Uses and Existing Uses**

Wetland specific designated and existing uses are included in North Carolina’s Standards (see numbers 1-6 in the Standards on page 2).

GENERAL DESIGNATED USES: [http://aswm.org/pdf\\_lib/wwqs/north\\_carolina.pdf](http://aswm.org/pdf_lib/wwqs/north_carolina.pdf)

## **Antidegradation Applications**

The 404 program is jointly administered by the U.S. Army Corps of Engineers and the Environmental Protection Agency. The Corps is responsible for the day-to-day administration and permit review and EPA provides program oversight. The fundamental rationale of the program is that no discharge of dredged or fill material should be permitted if there is a practicable alternative that would be less damaging to our aquatic resources or if significant degradation would occur to the nation’s waters. Permit review and issuance follows a sequence process that encourages avoidance of impacts, followed by minimizing impacts and, finally, requiring mitigation for unavoidable impacts to the aquatic environment. This sequence is described in the guidelines at Section 404(b)(1) of the Clean Water Act. To date, the word “*degrade*” or “*degradation*,” much like “*significant*” as used in other environmental rules, has not been clearly defined.

ANTIDEGRADATION POLICY: <http://ncrules.state.nc.us/ncac/title%2015a%20-%20environment%20and%20natural%20resources/chapter%2002%20-%20environmental%20management/subchapter%20b/15a%20ncac%2002b%20.0201.html>

## **401 Certification Implementation**

North Carolina does not waive certification as a general practice. They mostly certify, and deny on very rare occasions, only when the project as proposed will violate state water quality standards. Instead of denying projects, the state prefers to work with the applicant to facilitate changes to their proposal so that it can be certified. They will also return an application to the applicants instead of denying it.

If the 401 review process reveals the submitted application materials are woefully incomplete, the application package may be returned, and the applicant will have to re-apply and pay another fee. This could be if they do not minimize impacts or meet the 401 rules in general, or if they do not include enough mitigation. The state can ask for any information that they need. In general the state gives the applicant more tries on projects with extenuating circumstances, they are more forgiving and if they ask a couple of times and still don't get what they need/clearly did not do enough pre-planning, a denial may be in order. North Carolina has only denied one permit in the last 5 years, and that was a case in which the applicant wanted a denial in order to avoid the expensive costs of working in a wetland, instead wanted to go to court with the case that the state would not let them. The North Carolina 401 certification program has prescribed itself a 60 day clock to issue a certification after they define the application as complete. This is one of the shortest clocks of any agency in the state.

In terms of Nationwide permits, North Carolina denied the permits related to cranberry and coal mines, NWP 3 and NWP12. 401 Certification requests below written thresholds do not require written concurrence and/or an application fee. 401 Certification requests equal to or above written thresholds require an application and an application fee. The statewide annual impact of Nationwide permits can have big cumulative impacts on land and stormwater and so it is important to carefully process them. In addition, the experience with reviewing them prepares the staff to be able to handle a nationwide permit with significant impact. One example that requires an application to go through the 401 certification program is if the project impacts streams in a buffered basin. North Carolina has the right to elevate any project to an individual certification if they think it is appropriate and the Corps complies with this. In general, there have been occasions in which the state has been accused of overreaching, and they try not to overtly do so.

Traditionally, North Carolina reviews about 1500 - 2000 individual and nationwide permits per year, of which less than 10 percent are individual permit requests. This past year the combined total is much lower at around 1200.

“North Carolina has developed a list of assessment formulas and general certification conditions relating to project impacts, buffers, violation sites, storm water, surface water classifications, dams and ponds, wetlands and others that are reviewed for applicability to each project, so that all projects are held to the same standards and undergo the appropriate level of scrutiny.”<sup>ii</sup>  
“North Carolina maintains a list of issues, evaluation tools and standard conditions including re-opener and deed notification provisions that are reviewed during every §401 certification evaluation.<sup>145</sup> In fact, North Carolina includes a re-opener clause on almost all certifications

issued. North Carolina §401 staff have also noted several applicants who indicated they saw the deed notification and realized they needed a certification.”<sup>iii</sup>

Further information on North Carolina’s implementation of 401 Certification can be found here: [http://portal.ncdenr.org/c/document\\_library/get\\_file?folderId=285750&name=DLFE-8521.pdf](http://portal.ncdenr.org/c/document_library/get_file?folderId=285750&name=DLFE-8521.pdf)

### **Coordination of Programs**

#### **Coordination with Corps Districts**

There is only one Corps district in North Carolina, the Wilmington District (with four regional Corps field offices). The Corps will attach the state’s certification and conditions to the permit. They adopt the state’s conditions. The state does not automatically receive a copy of the final permit, but the Corps does offer this to the state and sometimes they request a copy and other times they do not. Technically, the Corps needs to wait for the state’s certification before sending a permit to the applicant in the case of individual permits. In the case of Nationwide permits, more often the Corps will issue the permit and the 401 certification will come significantly after. The Corps will issue a permit and say, certification is coming. The state will often add stormwater requirements, requirements related to impacts to surface waters, minimal requirements for treatment of stormwater. The state has a wonderful relationship with the Corps. The state has a shell letter that they send during the comment period to Corp acting as a commenting agency.

#### **Coordination with other Agencies**

In addition to the Corps, North Carolina coordinates with EPA, U.S. Fish and Wildlife, North Carolina Marine Fisheries, North Carolina Coastal Management Commission, and the North Carolina Wildlife Resource Commission in their 401 certification review. They used to send a copy of their certifications to the National Heritage Program, but have since been asked to stop doing so. The Historic Preservation department within the state seems to interact exclusively with the Corps.

#### **Coordination with Other Authorities**

The NCDENR must also occasionally coordinate with the North Carolina Land Quality Division, although in general the NCDENR focuses on water quality and Land Quality focuses more on land use management practices, with little overlap. There is also some overlap with some of the provisions of the Erosion and Sediment Control Act, one of them being specific to trout buffer.

### **Description of Types of Conditions-including BMPs**

“Some states such as North Carolina and Oregon use the comment period when project proponents are developing their applications for Corps and state permits to give applicants the chance to include in the project description the changes that are likely to be required anyway. The use of Best Management Practices (BMPs) and practices needed for Total Maximum Daily

Load (TMDL) implementation are often added to projects during this stage. BMPs can include such actions as using constructed wetlands or bioretention areas rather than retention ponds for catching nutrients and sediments.”<sup>iv</sup>

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

North Carolina has a specific program in response to SWANCC. Isolated/non-404 permit related wetlands are regulated under North Carolina’s administrative codes. Of all projects about 2% are non-404 permit related and the remaining 98% trigger 401 certification. For the Coastal Zoning Management program, in order to be jurisdictional the water needs to contain 8-10 species of plants and also have a regular tidal influence. The attorneys in North Carolina have analyzed their statutes and determined that a new law is not needed and the existing regulations are enough to cover isolated wetlands and Rapanos waters.

### **Project Analysis**

North Carolina’s rules do talk about minimization but do not speak to avoidance. There are some subtle references toward avoidance but the state leaves this as the responsibility of the Corps. They maintain this distinction between the kind of analysis that the Corps does and what the state does. In the case of individual permits, there is an unwritten policy and agreement between the Department of Water Quality and the Corps that the Corps will implement the 404(b)(1) guidelines exclusively and it is assumed that they do so. For Nationwide permits the state may more aggressively press minimization and avoidance standards since they do some of the more heavy lifting in these cases and it is within their rules to have this ability. This system has not been challenged thus far. Additionally regarding general project analysis, “North Carolina regulations reserve the right to request additional information and conduct on site investigations as deemed necessary by North Carolina Department of Environmental Health and Natural Resources.”<sup>v</sup>

### **Mitigation Requirements**

North Carolina has a mitigation policy that requires a 1:1 ratio for mitigation of intermittent and perennial streams. “North Carolina regulators believe that the mitigation demanded in their §401 certification conditions, specifically the requirement for at least 1:1 restoration or creation for wetland loss, allows the goal of No Net Loss of wetlands to be met at the state level.”<sup>vi</sup> They require higher ratios for stream preservation. There are places where the state requires mitigation that the Corps does not. The state is able to disagree with the Corps if they do not claim mitigation since they mitigate differently. It was established a few years ago that if the Corps says something is a linear wetland, the state cannot say that they think it is a stream. A linear wetland is a swale. There have been many times in which the state and the Corps disagree on whether something is a wetland. The definition is based on bed and bank geomorphic features. The Corps has more of a biological focus. The state and the Corps will sometimes go into the field to analyze together using the state’s format. “In North Carolina mitigation projects must be permanently protected by conservation easements or other similar protections.”<sup>vii</sup> The

way that the state mitigates for streams is similar to how it mitigates for wetlands. An example of how a stream is mitigated is if there is a stream that has become straightened over the years with no trees and with cows, the state will first remove the cows, install a fifty foot fence, wiggle the stream down the valley with fifty foot buffers and plant trees. If a rock structure is needed, they will use J-hooks to keep the channel stable and improve habitat. Enhancement requires only the removal of the cows and planting of trees. The state does not mitigate for ditches, and neither does the Corps in general.

Further information on North Carolina's mitigation policy can be found on pages 4-6 here: [http://portal.ncdenr.org/c/document\\_library/get\\_file?folderId=285750&name=DLFE-8521.pdf](http://portal.ncdenr.org/c/document_library/get_file?folderId=285750&name=DLFE-8521.pdf)

### **Monitoring and Enforcement Approaches**

There is an active enforcement program in North Carolina. "North Carolina enforces violations to their own water quality standards and certification conditions."<sup>viii</sup> They have had an implementation grant for the last 3 years focused on this and allowed the state to hire people specifically for enforcement, which has made the program very active. Currently, enforcement is very systematic, but when the funding is exhausted and the positions are vacated, enforcement will revert to responses to complaints.

The most effective method has been to notify violators of potential fines. Another effective method is voluntary compliance by the violating party without the need to go to court. Penalties can be reduced if parties cooperate. The state coordinates enforcement with the Land Quality program and occasionally with the Corps. Logistically it is often more efficient for the state to do their own enforcement.

### **Staffing**

North Carolina has 35 full time employees that spend 70-100% of their time on 401 certifications (about 30 people spend 100% of their time). Staffing is funded by a few different sources: state appropriations, federal grants, Department of Transportation and other miscellaneous sources such as other state programs. The staff is divided between the central office and the 7 regional offices. The Department of Transportation Employees focus primarily on DOT projects in order to expedite their projects.

### **Tracking Techniques/Databases**

North Carolina uses a tracking system called BINS which involves a Nationwide Information System with a query option. This was developed under contract in North Carolina and works well to store information/documents can be scanned and stored there. Improvements could be made to assist in retrieval of information.

## **Program fees**

Permit fee for §401 certification:

-\$240 for an impact less than 150 feet of stream or 1 acre of wetlands

-\$570 for an impact equal to or greater than 150 feet of stream or 1 acre of wetlands

## **Important Court Cases**

North Carolina encountered a case that went to the state Supreme Court. The case questioned whether wetlands are considered waters of the state. The first two courts decided that their answer was *yes* and the Supreme Court declined involvement. There have also been a number of cases involving cumulative impact and SEPA environmental documentation. The state goes to court about five times a year regarding 401 certification related decisions. Stormwater also comes up a lot, and so far, the state has been successful in upholding their perspective. The court cases did prompt the state to develop its list of Project Specific Conditions in order to document them clearly.

## **Additional Notes regarding 401 Certification in North Carolina**

North Carolina spends a significant amount of time on internal training for staff on wetlands and streams. They are also devoted to working with the Corps to coordinate and maximize coverage of water related issues. They used to have a full time EPA employee on staff and since they have cut that position, it has been harder to be as thorough in relation to EPA. Overall, an important aspect as to how the program functions is that they spend a lot of time coordinating with a lot of people. This supports a sense of solidarity across the different agencies and authorities that support greater protection. For example, if the Corps is understaffed on a project, the state can step in or if a project becomes highly political, the Corps will try to help the state. The Corps has no aquatic insect expertise and will look to the state for this and other specific field data that the state conducts.

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<sup>i</sup> [http://www.ncga.state.nc.us/enactedlegislation/statutes/pdf/bysection/chapter\\_143/gs\\_143-212.pdf](http://www.ncga.state.nc.us/enactedlegislation/statutes/pdf/bysection/chapter_143/gs_143-212.pdf)

<sup>ii</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p. 19

<sup>iii</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p. 28

<sup>iv</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p. 27

<sup>v</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p. 26

<sup>vi</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p. 22

<sup>vii</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p. 24

<sup>viii</sup> [http://www.epa.gov/wetlands/pdf/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf) p.33