



401 Certification Program Summary **~South Carolina~**

Overview

South Carolina uses 401 Water Quality Certification as a primary authority for conditioning dredge and fill permits (Section 10/Section 404) as well as other federal licenses in a program that is operated jointly between the SC Department of Health and Environmental Control's (DHEC's) Bureau of Water and the Office of Coastal Resource Management (OCRM). Within the Coastal Zone Management area, 401 certification conditions are linked to a state critical area permit. Section 401 certification is also coordinated with state regulations for alteration of navigable waters. Compliance and enforcement remain the responsibility of the Corps.

Definition of Waters of the State

“The South Carolina Pollution Control Act defines waters of the State as lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction.”

Although this definition does not specifically name wetlands as waters of the State, the Department has a legal opinion, which has been upheld in court, that wetlands are included because it does include marshes and all other bodies of water. Water pollution control programs administered by the Department would include activities in wetlands.¹

South Carolina's explanation of “Wetland as Waters of the State” can be found here:

<http://www.scdhec.gov/environment/water/401wetlands.htm>

Permits Subject to Section 401 Program Certification

By state regulation, South Carolina has the authority to certify Federal permits and licenses to include, but not be limited to, Section 404 permits, Section 10 permits and FERC licenses. The state is currently engaged in the review of a 401 certification for a Nuclear Regulatory Commission license. NPDES permits are state-issued, and thus do not receive 401 certification; however, the state did issue 401 certifications for a handful of NPDES permits during a period of time when the Federal government took over these permits.

Stats 401 Certification Standards (Water Quality and Other)

Water quality standards are fundamental to South Carolina's 401 certification program and are thoroughly reviewed in each water quality certification. The state cannot allow certification in

cases that cause or contribute to violation of water quality standards, and requires reasonable assurance that water quality standards will be protected and existing and classified uses will be maintained. The primary focus of 401 water quality certification for impacts in wetlands is on the role wetlands play in the protection of water quality of surface waters and the uses of those waters. The state addresses physical and hydrological impacts on wetlands and water quality to protect existing uses and prevent degradation.ⁱⁱ

South Carolina reviews construction projects to assure that stormwater will not contribute to the impairment of the adjacent water body. The state utilizes narrative and numeric standards associated with the stream to evaluate the potential situation. Regarding shellfish harvesting waters, any projects proposed in those areas have to demonstrate BMPs to ensure that fecal coliform discharged will not exceed the limit for shellfish harvesting. South Carolina is extremely stringent on this standard. Though this does not relate to wetlands per se, wetlands take on the standards of an adjacent water body or tributary. Marinas, community docks and shellfish harvesting are situations in which South Carolina uses water quality standards the most to evaluate how a project may contribute. South Carolina does not have any monitoring or designated uses for wetlands specifically. The state has received a grant to further develop wetland assessment practices.

South Carolina's Water Classifications and Standards can be found here:

<http://www.scdhec.gov/environment/water/regs/r61-68.pdf>

Description of Designated Uses and Existing Uses

There are no specific classifications for wetlands. General numeric and narrative standards are applied. If a water – including a wetland, is not designated or classified in South Carolina, the water body then assumes the use of water for which it is a tributary.

Antidegradation Applications

South Carolina has developed an implementation manual for applying its antidegradation policy to wetlands which has helped them more comprehensively assess wetlands impacts.ⁱⁱⁱ The state cannot certify a project if it causes a violation of water quality standards. If a project proposes use of more than 25 acres and is adjacent to 303(d) listed waters, a stormwater demonstration is required. This demonstration must assure that the project will not cause or contribute to impairment. South Carolina has outstanding resource waters and a tiered system. Wetlands are not named as outstanding resource waters specifically, but can be associated with such waters. South Carolina's antidegradation policy can be found in its standards (61-68) here:

<http://www.scdhec.gov/environment/water/regs/r61-68.pdf>

401 Certification Implementation

Until October of 2010, South Carolina had never waived a 401 certification. In October, severe state budget cuts required the Department to cut staff in the 401 Certification Program. The

reduction in staff also required the Department to reduce the number of certifications and thus, the Department identified categories of 401 applications to be waived.

By State and Federal law, the state can issue, deny or waive a certification, but denials are very rare. Generally, if there are concerns that may lead to a project being denied, staff try to work with the applicant to address the specific concerns such that the project can be certified. If the state finds itself in a position where it cannot certify a project, they will suggest that the applicant withdraw the certification. Typically the applicant will decide to withdraw instead of receive denial. The benefit of this is that a denial has to be appealed in a legal appeals process. Also, once a project is denied, the Corps will not allow the applicant to re-apply unless the project is substantially modified. This process is helpful for applicants who cannot get all the necessary information together within the 401 certification time frame. They can then come back and re-apply once they have the appropriate sampling and documentation. Staff see well over 12 situations like this on a yearly basis. Otherwise they will work to find a condition that will allow them to certify the project.

Regarding Nationwide permit applications, South Carolina has denied some and authorized others with and without conditions.

The number of certifications issued has decreased significantly in the last few years. In 2006 the state issued around 600 while in the last couple of years the numbers have been closer to 300.

A recent example of how projects are conditioned involves a water system/water line replacement project in Greenville County. The Department conditioned the Nationwide permits such that Nationwide #12 would not be certified in South Carolina if it involved more than ten utility line crossings. Many people in the public were concerned about the project and the sensitive nature of the water system. A number of organizations became involved and many conditions were added to the certification to address a wide range of concerns.. For instance the location was identified as a potential bog turtle habitat. Thus, requirements for pre-construction bog turtle surveys with follow-up consultation were added to the certification.

If an endangered species habitat is involved, the state will consult with the Fish and Wildlife service to determine how to best avoid adverse effects. The state also has restrictions for certain dredging windows and prohibit dredge impacts for spawning fish. Another typical condition is a BMP to minimize sediment, grading and sloping to prevent erosion and stabilize. They will also often require a stormwater demonstration to be able to comment on existing uses, typical mitigation and address water quality standards. They will often require a certain number of acres to be preserved, or credits can be purchased from an approved program. The conditions that are standard for all certifications include mitigation, storm water demonstrations, and other conditions are project specific.

“A Brief Guide to Wetland Regulations in South Carolina” can be found here:
<http://www.scdhec.gov/environment/water/docs/401guide.pdf>

Further information on South Carolina's Nationwide Permits can be found here:
<http://www.scdhec.gov/environment/water/401nwpermits.htm>

Coordination of Programs

Coordination with Corps Districts

South Carolina has only one Corps district, the Charleston district. Their offices are in close proximity to each other and they have a good working relationship. When a permit is put out on public notice, if the state sees a mistake, the Corps will put out a new notice. The state's conditions are attached as a separate set of conditions to the permit. The final permit comes electronically to the state. The Charleston Corps issues provisional permits for a number of the Nationwide permits. In these situations, the Corps informs that applicant that they have a provisional permit that is contingent on receiving their State certification.

Coordination with other Agencies

The Office of Coastal Resource Management (OCRM) is an office within the DHEC that administers the Coastal Zone Management Program, and works closely with DHEC's 401 Certification program. The OCRM evaluates projects in the state's 8 coastal counties through a joint process between the OCRM and the 401 certification program. Coastal Zone Management regulations include a state permit as well as a critical area permit. Examples of critical areas are coastal waters, tidelands, islands, beach dune systems and tidal marshes. For projects within the critical area, the 401 certification becomes part of a critical area permit. If a project is outside of a critical area but within the eight coastal counties, the coastal zone consistency certification is included as a part of the 401 certification. DHEC often interacts with other state and federal agencies when issuing 401 Certifications. These agencies include the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration and the SC Department of Natural Resources.

Coordination with other Authorities

South Carolina has a state regulation for construction and navigable waters relating to stream alterations. Navigable waters, for these purposes, are defined as "anything you can float a boat in." Projects on these waters require a state Construction and Navigable Water permit which is issued by the DHEC's Bureau of Water. The Department issues less than 100 of these per year. The regulations also allow the Department to streamline this process by issuing the Permit for Construction in Navigable Waters, or provisions of that permit, within another state permit or certification. In this manner, the 401 certification can be issued with provisions that adhere to the Construction and Navigable water regulations, equivalent of a section 10 regulation to ensure navigability.

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

South Carolina has a legal opinion public document created after the SWANCC decision that utilized provisions in the Pollution Control Act to provide authority to protect wetlands. The SWANCC decision prompted the state to promulgate revisions to the state's 401 Water Quality Certification Regulation (SC Regulation 61-101) in order to develop a permitting program to protect isolated waters that were left without protection following the SWANCC decision.

South Carolina's 401 regulations are specific to federal permits and licenses only. For coastal counties, the regulations are more broadly written and these areas have more of an ability to review wetlands outside of the Corps jurisdiction. In January 2004, after more than a year's worth of effort meeting with stakeholders including accepting and responding to comments, the DHEC's Board approved draft regulations that created a state permitting program to reinstate the authority to regulate discharges to isolated waters that were lost following SWANCC.

In accordance with South Carolina's Administrative Procedures Act, all state regulations must be approved by the South Carolina General Assembly. Thus, in 2004, the regulations approved by the DHEC Board were sent to the SC General Assembly for their approval. This was a controversial regulation that resulted in many hearings at the SC State House and ultimately, the regulations were not approved. This process was very resource intensive and took place over the course of a number of years. DHEC has not attempted any similar since.

Project Analysis

While the 404 (b)(1) guidelines requiring avoidance, minimization and mitigation are not spelled out in the South Carolina 401 regulations, there are a number of provisions requiring demonstration that there are no feasible alternatives and also provisions requiring adherence to federal laws that allow the state to accomplish the goals of the 404 (b)(1) guidelines. Also, the most common grounds for conditioning or denial of a permit is South Carolina not being satisfied that the applicant properly avoided and minimized.

Mitigation Requirements

South Carolina's Corps district has a standard operating procedure for mitigation as well as a calculation sheet that can be used to calculate impacts and credits. The state routinely coordinates with the Corps regarding mitigation, typically mirroring their requirements and sometimes adding further requirements. However, mitigation must follow proper sequencing and is only considered once the impacts have been thoroughly avoided and minimized.

Monitoring and Enforcement Approaches

Enforcement is conducted at the federal level and not by the state itself in South Carolina. The stance they take is that since they are certifying federal permits, the enforcement of those permits should be federal as well. The federal government has often invited the state to participate in

enforcement actions, and it is possible that enforcement coordination was more extensive in the past when the state had greater programmatic resources. South Carolina has not approached federal agencies or the U.S. Attorney's office in South Carolina to discuss a strategy for enforcement of violation of federal permits and Water Quality Certification conditions.

Staffing

The number of staff members has decreased in the past few years. In 2007 the department had 10 positions and currently they have 6 staff members; however, those staff are also engaged in work related to Wetland Program Development Grants and, currently, the National Wetland Condition Assessment effort.

Tracking Techniques/Databases

South Carolina does have an environmental database that tracks all projects. This database is not specific to 401 certifications, however the state does enter all 401 certifications into a GIS database, independent of any other projects.

Program fees

The fee to apply for a private project is \$100 and \$1,000 for a commercial project.

Important Court Cases

South Carolina has seen quite a few court cases at the lower level. The agency board is the first in line to review a project that has been appealed and they do not necessarily uphold staff decisions. Once the board makes a decision, the applicant can file an appeal with the South Carolina Administrative Law Courts (ALC). The appeal process is burdensome and time consuming. While there are on average a dozen or so projects that are appealed to the DHEC Board, there are a smaller number that are then appealed further to the ALC and a much smaller number that are appealed beyond that to the South Carolina Court of Appeals.

A current case in the administrative law court involves the 401 certification for Duke Energy's FERC license to operate the Catawba Wateree Hydroelectric Project. In this case, the DHEC Board denied the staff's 401 certification and the case was then appealed by Duke to the ALC. The ALC ruled that the state waived its certification because it exceeded 365 days. Appeals are ongoing.

The Coastal Zone Management Program had a significant decision handed down by the state Supreme Court in October of 2009, related to isolated wetlands. The decision, referred to as *Spectre v. SCDHEC*, involved isolated wetlands in the South Carolina coast that were outside of the Corps jurisdiction. The property in question was outside of the critical area of the coast and, thus, DHEC's OCRM did not have direct permitting authority over the project. DHEC-OCRM denied the coastal zone consistency certification for the project, finding it inconsistent with the provisions of the Coastal Management Program. *Spectre, LLC* appealed the decision on the

basis that DHEC-OCRM was applying the policies of the CMP as though they were regulations promulgated by the legislature. The case was appealed to the South Carolina Supreme Court and the court affirmed DHEC-OCRM's decision and effectively affirmed DHEC's ability to apply the policies of the CMP to isolated wetlands.

Overall Comments

One item that South Carolina has struggled with is cumulative impact assessment. The state regulations – including those related to the 404(b)(1) guidelines - specify that the need to look at cumulative impacts of any proposed project and for any reasonably foreseeable activity. This has been challenging to capture as it is an ambiguous aspect of the 404(b)(1) guidelines and the state is seeking further clarification on this issue.

ⁱ <http://www.scdhec.gov/environment/water/401wetlands.htm>

ⁱⁱ <http://www.scdhec.gov/environment/water/401wetlands.htm>

ⁱⁱⁱ http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf p. 19