



401 Certification Program Summary **~Delaware~**

Overview

The Delaware Department of Natural Resources and Environmental Control (DNREC) is responsible for a broad state wetland program, utilizing 401 water quality certification in coordination with state regulation of subaqueous lands, tidal wetlands, and authorities under the Coastal Zone Management program. The Corps of Engineers reviews all dredge and fill permit applications (Section 10/Section 404), while the state typically comments on projects that require other state authorization for consistency. State water quality standards incorporate language that is similar to the 404(b)(1) Guidelines, and recognize a “fishable/swimmable” standard.

Definition of Waters of the State

Delaware’s definition of Waters of the State includes all wetlands:

"Waters of the state" means all the tidal waters under the jurisdiction of the state where the lunar tide regularly ebbs and flows and all intrastate non-tidal waters except for non-tidal waters contained in aquaculture facilities registered with the Department of Agriculture (Section 3-403)ⁱ

Permits Requiring 401 Certification

Delaware certifies 404 permits and Section 10 permits. They recognize the ability to certify FERC licenses and NPDES permits though this has not been done in the state.

States 401 Certification Standards (Water Quality and Other)

Delaware utilizes their general water quality standards to create conditions for wetlands. The regulatory document for the State of Delaware Surface Water Quality Standards is the main reference document used in their 401 certification review. Equally important is Chapter 5 of the Water Pollution Control regulations which governs 401 review. They do have some numeric standards in addition to narrative standards, many of which relate to dredging regarding standards for factors such as sediment and discharge from disposal.

Delaware’s Surface Water Quality Standards can be found here:

<http://www.dnrec.state.de.us/DNREC2000/Divisions/Water/WaterQuality/WQStandard.pdf>

Description of Designated Uses and Existing Uses

Designated uses in Delaware are not specific to wetlands. Delaware divides its waters of the state into regions which are then delineated by designated uses onto a table. If a wetland is adjacent to a water with a delineated designated use, that wetland assumes that respective

designated use. Eco-significance and recreational use are some examples of designated uses that receive a higher level of protection in the state.

Delaware's surface water quality standards can be found in section 4, page 12 here: <http://www.dnrec.state.de.us/DNREC2000/Divisions/Water/WaterQuality/WQStandard.pdf>

Antidegradation Applications

Delaware's antidegradation statement can be found within its surface water quality standards. The statement indicates that Delaware aims to avoid impact to overall environmental quality to the greatest extent possible. The statement is general and provides broad discretion in the state's ability to direct project applicants to avoid, minimize and compensate. One frequently applied aspect of the statement is the fishable/swimmable standard. The antidegradation statement has language similar to the Corps 404(b)(1) guidelines. Delaware relies heavily on its antidegradation statement as a tool to aid in their guidance.

Delaware's Antidegradation Statement can be found in section 5 page 32 here: <http://www.dnrec.state.de.us/DNREC2000/Divisions/Water/WaterQuality/WQStandard.pdf>

401 Certification Implementation

Delaware does not waive certification. They certify, or certify with conditions, and deny on very rare occasions, such as when the project as proposed will violate State Water Quality Standards. Delaware has not denied any applications in the last couple of years. It is much more common to work with the applicant to modify a project. They would deny on the grounds of inappropriate location, not minimizing or avoiding impact, or if the applicant were not using a design that was protective of the environment.

Delaware's website indicates that "a project specific application for Water Quality Certification is generally required for all projects requiring an Individual Permit from the U.S. Army Corps of Engineers, as well as for certain projects that qualify for a Corps Nationwide Permit but are located in environmentally sensitive areas. Applicants can use the same WSLs Joint Application Form for projects that require this type of Water Quality Certification review."ⁱⁱ

Delaware received 44 individual water quality certification applications over the last two years. Some of these come from Nationwide permits that require a determination of critical resource according to the National Heritage and Endangered Species Program. If critical resource status is determined, the applicant must submit an application for 401 certification. Certifications are not a huge part of Delaware's Department of Natural Resource's overall program. Delaware issued 401 certification for the majority of the Nationwide Permits, denied a few, and conditioned others to require individual 401 certification. They would prefer to review all of the nationwide permits but are limited by workload to review only the nationwide permits in environmentally sensitive areas. Most land developers in Delaware design around the need to get an individual permit. There are just a few projects that require critical resource review for the presence of rare or threatened species, estuarine resources, wild and scenic areas, etc.

Delaware utilizes a range of possible conditions on a case by case basis. Some examples of conditions that are used frequently include a monitoring requirement, time of year adjustments, mitigation, and conditions to restore temporary impacts, but conditions are tailored specifically to each project. Delaware currently has an EPA grant to review their 401 program and try to incorporate further assessment methodologies, identify gaps, and work toward greater efficiency. The Environmental Law Institute is also reviewing the 401 program in the state with a focus on isolated wetlands.

Coordination of Programs

Coordination with Corps Districts

Delaware coordinates 401 certification with one Corps district - the Philadelphia district. The Philadelphia district references in their permit the need to obtain 401 and Coastal Zone Management review. They incorporate by reference the 401 conditions and Coastal Zone Management comments. Sometimes the Corp will wait for the 401 certification and Coastal Zone Management comments before issuing the permit, but more than 50% of the time the Corps will issue a provisional permit and incorporate 401 and Coastal Zone Management by reference. Sometimes the Corps sends a copy of the final permit with the attached conditions to the Department of Natural Resources, but this practice is inconsistent.

Coordination with other Agencies

The water quality certifications that Delaware issues are generally involved in projects that also need other state permits. Therefore, the review becomes a blend of all aspects. This provides Delaware with the potential for a greater geographic reach to review projects in certain areas where they would not otherwise have authorization. A major goal for the State is to utilize this potential more fully to maximize protection.

For projects that include critical resource waters/natural heritage sites, the Fish and Wildlife Service — Natural Heritage and Endangered Species Program is pulled into the review. This has been a major success point for the program, particularly regarding headwaters and dredging.

In the past, the National Marine Fisheries were involved more than they are now, but they are still included in some very large projects.

Coordination with Other Authorities

The same factors that trigger 401 review also trigger Coastal Zone Management consistency determination review as the entire state is in a coastal zone overlap.

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

Currently, Delaware does not have a program for wetlands that have been declared non-jurisdictional due to the SWANCC decision but they have discussed several options for

legislation to be aimed at this purpose. The state is able to extend their jurisdiction to include most intermittent waters, but not ephemeral waters. They also have difficulty protecting non-tidal wetlands. Delaware is trying to expand 401 certification to cover these areas, possibly by incorporating this intent within the next round of Nationwide permits. Nonprofit organizations in the State strongly advocate for this as well.

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

Delaware integrates analysis that very closely parallels the 404 (b)(1) guidelines. They have the authority to do full blown alternatives analysis and they do require it on large projects and utilize it with discretion on smaller projects. They include requirements for avoidance, minimization, and compensatory mitigation. They do have a water dependency test, which is a critical aspect of their tidal wetlands protection program, but is not part of 401 review. Alternatives analysis has worked most effectively on large Delaware DOT projects.

Mitigation Requirements

Delaware does not currently have a written mitigation policy but this is a high priority for future development. They do refer to federal guidance regarding ratios. The state is more flexible than the Corps districts in terms of what kinds of mitigation they accept. For example, they are not as strict on in-kind compensatory mitigation as is the Corps. They try to look more holistically at watersheds.

Monitoring and Enforcement Approaches

Delaware does not have its own enforcement program and defers to the Corps and EPA for projects not requiring a state permit. The state does work with the environmental protection officer to investigate complaints. If a violation is found in a project that can only be reached through 401 certification, they will stay involved throughout the enforcement process. But in general, enforcement in the state is divided between the Corps and EPA. The Corps has responsibility in the northern two counties and in section 10 waters in Sussex County. The rest of the 404 permits are enforced by EPA. There is only one EPA employee designated to handle enforcement in what is the largest county/under the most development pressure in the state. Resources for Corps enforcement are also currently limited. There used to be semiannual surveillance flights, but currently enforcement is complaint driven.

The most successful enforcement technique for the state has been voluntary compliance. Delaware does not have the ability to issue administrative penalties; if they want to take enforcement action, they have to go through civil or criminal action in court, requiring an attorney from the Department of Justice, which is expensive and time consuming. The states most pressing goal is usually to get the site restored and over 90% of violations are corrected using voluntary compliance without requiring litigation. They have discussed and are hoping to add the ability to use administrative penalties in their program. While they have a good track record for correcting violations that occur, they would like to encourage a higher level of protection by deterring people from the beginning with potential fines.

Staffing

Delaware has 1 full time manager, 5 scientists, and 2 administrative staff. Staff size has been reduced, but they currently have approval to hire a second manager. None of the employees are completely dedicated to 401 certification and instead, each employee spends about 5% of their time on 401 certification.

Tracking Techniques/Databases

Delaware has a tracking program that holds all certifications and applications with the ability to query the system.

Program fees

Delaware does not have any fees for 401 certification. They have been trying to update their fee requirements to include a fee for 401 certification for many years and still aim to do so. This must be approved by the state legislature, which makes it difficult to change.

Important Court Cases

Delaware was involved in litigation regarding deepening the Delaware River through a Corps Civil Works project. The public comment period for the permit closed November 13, 2010. The Corps challenged the need to obtain state certification in this situation according to sections of the Clean Water Act that they claim provides rationale against the need for certification. They claim that because the project is federally funded by Congress, individual state authorization is not required. Delaware and New Jersey were both involved in the project. The final decision by the judge was that the Corps does not need any state permits or authorizations to proceed with channel deepening.

Overall Comments

Delaware is researching the amount of cumulative loss as a result of Nationwide permits, consultants who make their own determinations of what is isolated, agriculture and stormwater runoff, in addition to permitted actions, some of which result from jurisdictional determinations by the Corps. The EPA grant that they have is assisting them in this research, allowing them to request data from 2003-2009 from the Corps. From the data that was available, they determined that 90% of the waters of the state were still jurisdictional. They are also working on a separate new mapping effort with the National Wetland Inventory to aid in conservation management by creating a full statewide status map to identify losses. They hope to utilize the 401 program further to improve protection.

ⁱ <http://www.ecos.org/section/publications> (<http://delcode.delaware.gov/title3/c004/index.shtml>)

ⁱⁱ <http://www.wr.dnrec.delaware.gov/Information/Permits/Pages/WetlandsandSubaqueousLandsPermittingInfo.aspx>