



401 Certification State Summary ~Tennessee~

Overview

The Tennessee Department of Environment and Conservation (TDEC) uses the 401 certification process in coordination with its own regulatory authority – the Aquatic Resource Alteration Permit – to regulate dredge and fill activities permitted by the Corps (Section 10/404). In the 401 certification process, Tennessee reviews applications to assure compliance with state water quality standards, including a detailed antidegradation policy implementation process. State permits with conditions are provided to the Corps, which adopts the state certification by reference. The Corps and the TDEC share responsibility for compliance and enforcement. The TDEC also certifies hydropower projects requiring FERC licenses.

Definition of Waters of the State

The definition of Waters of the State in Tennessee addresses nearly all wetlands. The only waters that are not covered by this definition are isolated contained waters, such as a farm pond on a high dry hillside. In Tennessee wetlands are Waters of the State even if they are not adjacent to or abutting other protected waters as long as they are hydrologically connected to other waters, either by surface or underground:

“Waters” means any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters (**Part 1-Tennessee Water Quality Control Act of 1977 69-3-103 Part Definitions.(42).**)ⁱ

Permits Requiring 401 Certification

Tennessee certifies 404 permits and some Section 10 permits. One FERC permit has been certified in the history of 401 Certification in Tennessee (only one hydropower development in Tennessee is subject to FERC permitting).

The state of Tennessee issues permits called the Aquatic Resource Alteration Permits (ARAP) that were developed in the mid 1980s under state law via the state Water Quality Control Act. The state’s website explains that, “Physical alterations to properties of waters of the state requires an Aquatic Resource Alteration Permit or a §401 Water Quality Certification.”ⁱⁱ The ARAP allows Tennessee to take on a full suite of federal activities as well as being able to address other activities, such as water withdrawals, that alter the regulated properties of waters of the state. Under Tennessee’s regulatory framework, §401 Certification is a subset of the ARAP permit. More information on the ARAP can be found here:

<http://tennessee.gov/environment/permits/arap.shtml>.

States 401 Certification Standards (Water Quality and Other)

Tennessee analyzes whether projects comply with water quality standards in their review of all projects. The standards are not specific to wetlands but they are applicable to wetlands. The standards Tennessee uses most often are the narrative criteria relating to fish and aquatic life, livestock watering and wildlife, and recreation. They also address contaminants and chemical pollutants where they are relevant when processing §401 Certifications, as in projects where contaminated sediments might be mobilized by a proposed activity. Tennessee's water quality standards can be found here:

<http://www.state.tn.us/sos/rules/1200/1200-04/1200-04-03.pdf>

Description of Designated Uses and Existing Uses

Tennessee applies designated uses to wetlands. The state's "use classifications for surface waters" can be found here: <http://tn.gov/sos/rules/1200/1200-04/1200-04-04.pdf>

Antidegradation Applications

Since a §401 Certification must assure that an activity complies with state water quality standards, and since the antidegradation statement is a part of the state's water quality standards, Tennessee applies its antidegradation policy to all §401 Certifications. This policy became more detailed and more clearly applicable to §401 Certifications in response to litigation that challenged the state's procedure for implementing its antidegradation provisions on an NPDES permit. The antidegradation policy requires applicants to submit an evaluation of alternatives and a social and economic justification for any proposal that would result in degradation of water quality including any significant loss of habitat. If a proposed activity would degrade waters classified as Exceptional Tennessee Waters the applicant must provide a more detailed justification and a more strenuous public participation process. If the waters proposed for degradation are impaired, then no additional degradation may be allowed. Degradation can be rendered *de minimis* through in-system mitigation.

Regarding wetlands specifically, Tennessee has an EPA grant to establish a protocol for assessing the qualitative condition of wetlands (i.e. Tier 1, Tier 2, or Impaired). In addition, they want to better define how much impact can be allowed before triggering antidegradation (i.e., how much of what type of activity constitutes degradation) to assure consistent application of the rules. They also used EPA grants to develop hydrogeomorphic guidebooks specific to most of the HGM classes present in the state. The antidegradation statement can be found on page 20 here: <http://tn.gov/sos/rules/1200/1200-04/1200-04-03.pdf>

401 Certification Implementation

Tennessee does not waive certification. They certify, or certify with conditions, and occasionally deny. The conditions under which Tennessee would deny certification are if the project would cause pollution under the water quality standards, if there were viable alternatives with less impact, if the project were not in compliance with the antidegradation provision, or if the project was not socially or economically necessary. In regard to Nationwide permits, they denied

certification of most of them, and prefer to consider each project on a case-by-case basis. They issue about 1,000 certifications per year (Individual and Nationwide) and deny about 5 certifications per year.

Tennessee does have a library of conditions, including examples such as staging or sequencing of construction, diverting flow, mitigation requirements and monitoring criteria, sediment and erosion control measures, and restrictions on the time of year an activity will be allowed based on nesting or spawning. They are able to reference this list in their review of each project.

Coordination of Programs

Coordination with Corps Districts

Tennessee works with 2 different Corps districts, Nashville and Memphis. Technically the Louisville district is in part of Tennessee but they have an agreement with Nashville so that Nashville coordinates with Tennessee in the Louisville district. Tennessee has a good working relationship with both Corps districts, but coordinates with the Nashville district for the majority of projects. Historically, the Corps implemented projects attempting to channelize rivers and tributaries for flood control and to drain wetlands for conversion to agriculture, especially in west Tennessee. In the 1980s the state fought to stop that practice.

For Nationwide permits, usually the Corps will issue a conditional permit contingent on 401 certification. Occasionally they will not issue the permit until 401 certification is ready. In either case, they adopt the 401 certification by reference. For individual permits, the Corps will not issue the permit until the 401 certification is complete.

Coordination with other Agencies

In addition to the Corps, Tennessee routinely coordinates with the Tennessee Wildlife Resources Agency the U.S. Fish and Wildlife Service, the Tennessee Valley Authority and EPA. They work closely with the state and federal wildlife agencies regarding threatened or endangered species. The Tennessee Department of Transportation provides funding for additional staff in the §401 program to provide closer coordination and review in the planning and permitting of state transportation projects.

Coordination with Other Authorities

The ARAP program is very closely tied in terms of staff and mission to the 401 Certification program. The program is a part of the Division of Water Pollution Control which also includes NPDES permitting, water quality assessment and water quality standards. The division has eight environmental field offices, where employees are able to authorize general permits. In addition, they work closely with staff who work on construction storm water permitting. Construction stormwater permits are not issued until the ARAP/401 Certification decision has been made.

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

The definition of waters of the state is broad enough so that even if there was not a Corps permit to activate 401 certification for a project, ARAP could be activated and in this way, wetlands that have been declared non-jurisdictional can be protected as long as they fall within the broader definition of waters of the state. It is estimated that Tennessee asserts jurisdiction when the Corps does not less than 5% of the time.

Project Analysis

Tennessee requires alternative analysis, avoidance and minimization as part of their permit application and evaluation. Any proposal that would degrade water quality must be found to be socially or economically necessary and must be the alternative that accomplishes project objectives while minimizing adverse water quality impacts. There is no specific test for the water dependency of a proposed activity, although the concept is implicit in the alternative consideration and justification process.

Mitigation Requirements

Information on Mitigation Requirements for Tennessee's ARAP can be found on page 12 here: <http://tennessee.gov/environment/wpc/forms/cn1091guide.pdf> and at <http://www.tn.gov/environment/wpc/publications/pdf/StreamMitigationGuidelines.pdf>

Monitoring and Enforcement Approaches

In Tennessee, the state and the Corps exercise independent responsibility for enforcement. Most often the state takes the lead in enforcement of permits (ARAP, 401, FERC). Sometimes if enforcement is handled by the Corps, the state will be involved as well and vice versa. They do not currently have all the resources they would like and are not able to have regular compliance follow-through on every permit issued. They encounter about ten 401 certification type enforcement cases a year. They first send notices of violation without enforcement orders, fines and penalties, stipulating that if the applicant will work within the guidelines they will be less likely to be fined. If the applicant refuses to do anything, the state will typically go to more forceful enforcement in the form of Director's or Commissioner's Orders requiring corrective action and assessing fines and penalties. They issue around 100 notices of violation for 401 certification a year. Tennessee has approached federal agencies or the US attorney's office in the state to discuss a strategy for enforcement of violation of federal permits and water quality certification conditions. They have a full time federal criminal environmental attorney. Further information about enforcement in Tennessee can be found here:

<http://tennessee.gov/environment/permits/arap.shtml>

Staffing

Tennessee disperses its staffing for 401 certification over the central office (12 staff members) as well as two people in each of the eight field offices throughout the state (16 staff members) for a

total of 28 staff members. However, the full allotment of positions is seldom filled. The field office staff handles compliance, field inspection, pre-application meetings and some authorizations. In the central office, the state transportation agency has funded four FTE positions as part of an initiative to encourage environmental coordination and streamlining for its projects by funding positions for planning of transportation projects specifically.

Tracking Techniques/Databases

Tennessee uses an Oracle tracking system. Much of the information in the permit tracking system is viewable and searchable by the public via the internet. This tool has proven very useful to the state.

Program fees

Tennessee utilizes the following schedule of fees:

Application Fees for §401 Water Quality Certifications and Aquatic Resource Alteration Permits shall be as follows.

- » Projects that affect more than 10 acres or 1000 feet of stream length - \$2,500
- » Projects that affect less than 10 acres or 1000 feet of stream length - \$1,000
- » Watershed District Projects (T.C.A. §69-7-101 et seq.) - \$750
- » Personal Residence or Family Farm - \$50

Permit Annual Maintenance Fees for:

- » Gravel Dredging - \$100
- » Gravel Dredging Personal Residence or Family Farm - \$0ⁱⁱⁱ

Important Court Cases

The most influential court case that occurred in Tennessee was when the state encountered litigation in response to a 402 NPDES permit in the town of Spencer. In this case their antidegradation provisions were challenged. This resulted in the crafting of an implementation procedure for antidegradation.

Tennessee Environmental Council, Nashville Grotto of NSS, Tennessee Scenic Rivers' Association vs. State of Tennessee Department of Environment and Conservation and City of Spencer

ⁱ <http://www.michie.com/tennessee/lpext.dll?f=templates&fn=main-h.htm&cp=>

ⁱⁱ <http://tennessee.gov/environment/permits/arap.shtml>

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