



## **401 Certification Program Summary** **~Wisconsin~**

### **Overview**

The Wisconsin Department of Natural Resources (WDNR) administers a comprehensive statewide wetland program, and also has the independent authority to regulate state waterways. Wisconsin relies on a combination of its regulatory authority, and wetland water quality standards that were developed to parallel the Section 404(b)(1) Guidelines, to provide §401 Certification of Corps dredge and fill permits (§404 and Section 10). The state and the Corps work cooperatively through a Regional Programmatic General Permit process, under which the state has significant responsibility for permit review. While the Corps provides an independent notice and review of larger 404 projects, state actions on smaller projects are accepted by the Corps without additional evaluation based on the state §401 Certification. The state also provides §401 certification of other federal licenses and permits, including NPDES permitting and FERC licensing.

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

The Definition of Waters of the State in Wisconsin includes all wetlands:

"Waters of the state" includes those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface or ground water, natural or artificial, public or private, within the state or its jurisdiction."<sup>i</sup>

Wetlands are defined in Wisconsin's regulations as "an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions."<sup>ii</sup>

### **Permits Requiring 401 Certification**

Wisconsin applies the 401 certification program to the COE Rivers and Harbors Act, EPA Section 402, and FERC Hydropower Licensing. It also applies to a variety of other decisions specific to federal permits.

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

WDNR wrote water quality standards specific to wetlands in order to attain greater protection for their resources. They audited the annual number of fills prior to the wetland water quality standards and thereafter realized a significant decline, which demonstrates the influence of these regulations. The standards were adopted in 1991. Prior to 1991, the average annual fill was approximately 1300 acres, dropping to 312 acres after the wetland water quality standards were

adopted. There are now an average of 250 water quality permits processed annually resulting in the fill of an average of 150 acres per year. This number varies based on the number of DOT projects – which are reviewed by the state under an MOA with DOT to assist in avoidance and minimization of impacts. Wisconsin has supplemented the use of their standards by referencing wetland specific uses. Through litigation and challenges to decisions made in Wisconsin, the state has expanded regulatory considerations to include public trust doctrine issues, such as natural beauty, essentially through common law. They have found it helpful to be able to utilize this perspective.

Wisconsin has regulations specific to special natural resources, and wetlands that are adjacent to these resources fall under this category. These wetlands are held to a higher test and there is a more rigorous review of project that may impact them. Their protection is significant for the health of the wetland itself and also to benefit the adjacent exceptional water resource. The state also has a higher standard for 303(d) impaired waters (and the wetlands adjacent to them). There is a special process that was designed by the EPA that includes advanced delineation and prohibits mitigation. There is a much higher likelihood that projects will be denied in these areas as there is a strong incentive to avoid impacts.

Wisconsin's Surface Water Quality Standards can be found here <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=code&jd=ch%20nr%20102> and Wetland Specific Water Quality Standards are referenced in NR 103.03(1), Special Wetlands are referenced in NR103.04, and Determinations & Sequencing are referenced in NR 103.08: here: <http://legis.wisconsin.gov/rsb/code/nr/nr103.pdf>.

Further specifics related to Water Quality Standards can be found here: <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=code&jd=ch%20nr%20105> and here: <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=code&jd=ch%20nr%20106>

Uses & Designated Standards can be found in NR 104 here: <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=code&jd=ch%20nr%20104>

### **Antidegradation Applications**

Wisconsin's Antidegradation rule can be found here: <http://www.dnr.state.wi.us/org/water/wm/wqs/codes/nr207.pdf>

### **401 Certification Implementation**

Wisconsin does not waive certification. They certify projects with conditions or deny them. The state will either send a letter of concurrence with the pre-issued general permit (with general conditions) or do an individual certification with specific conditions. In 2009 and 2010 WDNR

approved approximately 95% of the applications they received, denied about 2% of projects and the remaining 3% of applications were withdrawn by the applicant.

Some applications are withdrawn during the pre-application stage of the process. Wisconsin law allows applicants to request a meeting for preliminary analysis before they apply. This way the applicant can determine the likelihood of compliance and consider alternatives early. This has helped educate applicants in advance so they can avoid unnecessary spending on consulting and engineering. The pre-application process is also very beneficial to the certifying agency as it saves a lot of time and acts as a preventative measure.

Over the years the time it takes Wisconsin to process applications has decreased. Consultants and professionals are now familiar with the requirements. The most challenging part of the process is documentation, and the state helps the applicant through this with pre-application meetings if they do not have a professional consultant. There has been evidence that people are learning that they need to avoid and minimize.

The most common cause for denial is availability of a practical alternative that would better allow the applicant to avoid and minimize impacts, or the likelihood that there would be a significant adverse impact even in conjunction with their alternative to avoid and minimize. Wisconsin incorporates the Corps 404 (b)(1) guidelines into their own regulations and the sequencing laid out in these guidelines (avoidance, minimization, compensatory mitigation) is integral to their decision-making process. The WDNR is frequently contacted by people who are interested in purchasing land with a wetland on it, inquiring about their options. The state is in a position to suggest alternatives at this time. They also have extensive outreach materials and notifications on building permits, and a wetland real estate addendum so that people can identify issues before they purchase to determine ahead of time if the property is right for them.

Regarding Nationwide permits, Wisconsin made an arrangement with the Corps to suspend all of the Nationwide permits, except for Section 10 Waters, and replace them with regional general permits for Wisconsin, covering similar activities. This simplifies the process for everyone. Wisconsin collaborates with the Corps St. Paul District to ensure their concerns are incorporated in the general permits, and they credit the Corps for working with them on this. Wisconsin's certification language is part of the general permit itself. General permits are activated when a project's size is below 2 acres. The state has the option to activate an individual certification process if they have special concerns to address. This way they are able to add additional conditions. With any of the federal general permits the state has the option to send a concurrence letter or instead to do a full individual certification.

In total (including both general and individual permits), Wisconsin receives from 600 – 1000 requests for 401 certification per year, depending in part on economic conditions. Wisconsin sends a concurrence letter on about 74% of the general permits and does individual certifications on about 26%. Generally, 70% of projects are federal and 30% are nonfederal, but this varies from year to year. Wisconsin requires notification of any amount of fill, there is no minimum limit on size.

A link to the Corps Federal General Permits with WI Certification can be found here:  
<http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=681>

## **Coordination of Programs**

### Coordination with Corps Districts

Wisconsin works with 3 different Corps districts including the Detroit district, Rock Island, and (predominantly) with the St. Paul district. There are a few projects on the Great Lakes that may involve the Detroit district, which generally concern beach nourishment. Rock Island is involved in projects on the Mississippi River and the state works well with this district. Coordination on wetland issues is limited to the St. Paul District. The state has an especially productive working relationship with the St. Paul District. In terms of issues or barriers that the state finds in working with the Corps, Wisconsin has found it more challenging to coordinate with the Detroit District regarding Corps construction projects, where there may be less attention given to state standards.

In terms of how the state's conditions are attached to general permits, the water quality certification is automatically a part of the permit. Regarding individual permits, the state will act before the Corps and the applicant will receive separately a permit from the state first and then the Corps.

### Coordination with other Agencies

The WDNR has a memorandum of understanding with the NRCS and the FWS to activate mutual procedures within these major branches to facilitate wetland restoration projects in WI. The MOA and other information can be found at: <http://dnr.wi.gov/wetlands/restorationpermits.html>. Wisconsin has a specific regulatory code to help them work together expeditiously in wetland restoration. Often the state will request several copies of the application to supply to the various resource managers to request comments, inviting the full variety of expertise to direct possible conditioning.

In addition, Wisconsin has a special provision in law with the DOT that allows them to work together on any projects that affect surface water, including wetlands. They have a voluminous cooperative document. Technically the law prohibits certification of DOT projects so the state does not issue a certification, but the DOT is required to comply with substantive requirements of the law. There is not a formal procedure, but the state coordinates with them on federal permits.

### Coordination with Other Authorities

Wisconsin has a regulatory program under WEPA (Wisconsin Environmental Policy) that requires review of potential primary and secondary impacts to wetlands, which can activate water quality standards. The state also has a floodplain zoning ordinance that considers impacts in a way that is similar to 401 certification. Wisconsin also has authority specific to shoreland

zoning and an isolated wetland law that act in conjunction with 401 certification. The state's water quality standards are accessible under all of these regulatory types, not only for 401 certification. This includes storm water management which regulates land disturbance and has the potential to affect hydrology sedimentation. If there is a potential to adversely impact a wetland, the wetland water quality standards are activated. The coastal zone management program tends to rely on the 401 program to protect its waters. The regulatory programs are all encompassing, whether applying to great lakes or marshes.

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

While conditions for individual permits change based on the wetland type, Wisconsin has some standard certification conditions in their general federal permits (see previous link). They also have some standardized BMPs, the list can be found here:

<http://legis.wisconsin.gov/rsb/code/nr/nr151.PDF>

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

Wisconsin does have a program for wetlands that have been declared non-jurisdictional due to SWANCC. Their website indicates “we have a very highly evolved state and local wetland protection program which covers all wetlands, including those that are determined to be “nonfederal” after the decisions in SWANCC, Rapanos and Carabell”<sup>iii</sup>. In cases where there is no federal jurisdiction, the isolated wetlands regulations area activated. About 13 - 30% of the projects they see are isolated wetlands, varying from year to year.

Further information on this program can be found on page 8 here:

<http://dnr.wi.gov/wetlands/documents/OverviewWIREgulatoryProg.pdf>

A link to the Isolated Wetlands General Permit can be found here:

<http://dnr.wi.gov/wetlands/documents/IsolatedWetlandsGeneralPermit.pdf>

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

Wisconsin has incorporated the Corps 404(b)(1) guidelines into their regulations, within their water quality standards. The state does scrutinize the federal review of the steps taken to avoid, minimize and determine practicable alternatives to the project proposed. They use this as a tool to deny or condition a 401 certification. The state also requires water dependency analysis and alternative analysis.

Wisconsin has found it very useful to mirror the 404(b)(1) guidelines. This has created strength to implement protection more rigorously. In addition, they have found it important not to require mitigation. Instead of relying on mitigation, which can be expensive and difficult to implement, Wisconsin strives to maintain sequencing of avoidance and minimization to the maximum extent practicable and no significant adverse wetland impacts.

## **Mitigation Requirements**

Mitigation is generally pre-empted by Wisconsin's solid requirement to avoid and minimize. For Department of Transportation projects, there is a cooperative agreement between the DOT and the DNR to do mandatory mitigation on any of their projects. The DOT has a unique review process, but it always requires mitigation for any impacts.

For additional information regarding mitigation requirements, follow this link:  
<http://dnr.wi.gov/wetlands/mitigation/decisionprocess.html>

## **Monitoring and Enforcement Approaches**

Wisconsin has a formal enforcement program that involves both the state and the Corps. There is a multi-agency enforcement task force, that includes the US Department of Justice, the EPA, the Corps, the Wisconsin Department of Justice and the WDNR. This task force will review and go through and distribute the workload. The WDNR enforces their permits and their water quality standards. The Corps has been expert witness to some of WDNR's cases and vice versa.

"From January 2005 through September 2006 DNR issued 229 after-the-fact permits and 69 notices of violation for non-permitted activities".<sup>iv</sup> Outside of the formal enforcement practice, there are more violations that are resolved voluntarily. The state is working on improving their tracking of these cases.

The only way to enforce water quality standards for wetland violations is through a formal referral process that is processed by the Department of Justice. The Department of Justice can prosecute based on a referral. Wisconsin has recommended acquiring the authority to issue uniform citations to allow them to write citations themselves and streamline the process. There is some NGO support for this initiative.

Further information on enforcement can be found in the report here:  
<http://www.legis.state.wi.us/LAB/reports/07-6Highlights.htm>

## **Staffing**

Wisconsin has about 25 full time employees that work on WDNR Waterway and Wetland Permitting. About 20% of the permits received are related to wetlands. It typically takes more time for staff to process wetland permits and handle wetland violations than other waterway permits/violations. Field staff split their time between waterway and wetlands. The number of FTE has decreased in recent years with a vacancy rate in 2011 of approximately 40%.

## **Tracking Techniques/Databases**

Wisconsin tracks its certifications with the Oracle program. They would like to upgrade this program. This program is beneficial in the way that it allows program staff to add to it and it

will aggregate the information. Wisconsin is working on updating their database so that it is available to the public, enabling anyone to access and check the status of permits.

### **Program fees**

Wisconsin's program fees range between \$50 and \$500, with a supplemental fee of \$2,000 for optional expedited processing. Further details on the program fees can be found here:

<http://www.legis.state.wi.us/rsb/code/nr/nr300.pdf>

### **Important Court Cases**

A summary of case law applicable to water quality certification written by Wisconsin's former staff attorney for the WDNR, Mike Cain, can be found here:

<http://dnr.wi.gov/wetlands/documents/TemplateEnvPlanNR103.pdf>

### **Overall Comments**

Wisconsin has found it very useful to audit its program. The general WDNR Wetland Regulatory Program webpage can be found here: <http://dnr.wi.gov/wetlands/programs.html>

A link to Wisconsin's Water and Sewage regulations can be found here:

<http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=stats&jd=ch%20281>

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<sup>i</sup> <http://legis.wisconsin.gov/rsb/code/nr/nr103.pdf> (p. 17)

<sup>ii</sup> Ibid.

<sup>iii</sup> <http://dnr.wi.gov/wetlands/documents/OverviewWIRegulatoryProg.pdf>

<sup>iv</sup> <http://legis.wisconsin.gov/LAB/reports/07-6Highlights.htm>