



ENVIRONMENTAL
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State Wetland Protection

Status, Trends, & Model Approaches

*A 50-state study by the
Environmental Law Institute*

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U.S. Environmental Protection Agency*

2008

Appendix: State Profiles

South Carolina

I. Overview

Approximately 4.5 million acres of wetlands comprise 23 percent South Carolina's land area. Of these 90 percent are freshwater wetlands and 10 percent are coastal wetlands.¹ Wetlands loss in South Carolina is less extensive than in other states. Officials estimate that the state has lost about 27 percent of its wetlands since the mid-1700s.²

Regulatory activities pertaining to wetlands are administered by South Carolina's Department of Health and Environmental Control (SCDHEC). SCDHEC's Office of Ocean and Coastal Resource Management (OCRM), Regulatory Division regulates tideland critical areas through a direct permitting program under the state's Coastal Zone Management Act (CZMA). OCRM also certifies state and/or federal permits that involve freshwater and brackish water wetlands outside the critical areas but within the coastal zone.³ SCDHEC's Office of Environmental Quality Control (OEQC), Bureau of Water regulates waters of the state, including wetlands, and issues §401 certifications under the Clean Water Act (CWA).

II. Regulatory Programs

Wetland definitions and delineation

South Carolina's Pollution Control Act (PCA)⁴ defines "waters of 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."⁵ SCDHEC includes wetlands in the PCA's definition of "waters of the state," an agency policy that has been upheld in court.⁶

Tidelands are defined by the CZMA as:

all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and

¹ S.C. DEP'T OF HEALTH AND ENVTL. CONTROL, A BRIEF GUIDE TO WETLANDS REGULATION IN SOUTH CAROLINA, available at <http://www.scdhec.gov/environment/water/docs/401guide.pdf> (last visited July 20, 2007)

² DEP'T OF HEALTH AND ENVTL. CONTROL, THE FACTS ON WETLANDS, available at <http://www.scdhec.gov/environment/water/docs/fswets.pdf> (last visited July 23, 2007)

³ S.C. CODE ANN REGS. 30-1.

⁴ S.C. CODE ANN. § 48-1 *et seq.*

⁵ S.C. CODE ANN. § 48-1-10(2).

⁶ DEP'T OF HEALTH AND ENVTL. CONTROL, 401 WATER QUALITY CERTIFICATION, available at <http://www.scdhec.net/environment/water/401wetlands.htm> (last visited July 20, 2007).

reproduction. Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system.⁷

The coastal zone includes “all coastal waters and submerged lands seaward to the State’s jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas.”⁸

Wetland delineation criteria for tideland critical areas are found in the CZMA and associated regulations and are delineated by OCRM. Wetland delineation criteria for freshwater wetlands correspond to the criteria in the U.S. Army Corps of Engineers (“Corps”) 1987 *Wetlands Delineation Manual* and are delineated by the Corps.⁹

Wetland-related law and regulation

The CZMA authorizes OCRM to develop, administer and enforce “an overall coastal management program and permitting process” for wetlands that are “continuous to or adjacent to coastal waters and [are] an integral part of an estuarine system.”¹⁰ The OCRM has direct permitting authority for critical areas of the coastal zone through the state’s Critical Area Permitting Program. Critical areas of the coastal zone include coastal waters, tidelands, beach/dune systems and beaches.¹¹

OCRM staff review about 1,000 permit applications per year; between three and five percent are denied. Issued permits are often attached with special conditions that can drastically reduce or otherwise change the scope of the project. Permit decisions begin with a public notice review; once the file is complete, the project manager will consider the request’s consistency with the Coastal Zone Management Act, Coastal Zone Management Plan, and Critical Area Regulations. The review process consists of 15-day public notices for minor activities, such as docks and bulkheads, to 30-day comment periods for major activities, such as marinas, dredging, and bridges. The review contains a decision document that contains all knowledge about a project site, including a geographic review. Applicants may appeal decisions.¹² In addition, OCRM reviews proposed activities in areas outside of the critical area but within the Coastal Zone for consistency with the Coastal Zone Management Program.¹³

OEQC’s Bureau of Water regulates waters of the state, including wetlands, through CWA §401 certification and the state’s PCA.¹⁴

Organization of state agencies

⁷ S.C. CODE ANN. § 48-39-10.

⁸ These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown. S.C. CODE ANN. REGS. 30-1(D)(12).

⁹ Personal communication with Barbara Neale, Dep’t of Health and Env’tl. Control, Office of Ocean and Coastal Res. (Feb. 26, 2007); and Personal Communication with Rheta Geddings, Dep’t of Health and Env’tl. Control, Bureau of Water (Mar. 15, 2007).

¹⁰ S.C. CODE ANN. § 48-39-10(G).

¹¹ S.C. CODE ANN. REGS. §30-1(D)(14).

¹² Personal communication with Curtis Joyner, Dep’t of Health and Env’tl. Control, Office of Ocean and Coastal Res. (Apr. 9, 2007)

¹³ S.C. DEP’T OF HEALTH AND ENVTL. CONTROL, *supra* note 1.

¹⁴ S.C. CODE ANN. § 48-1 *et seq.*

Office of Ocean and Coastal Resource Management, Regulatory Division. SCDHEC's OCRM, Regulatory Division administers South Carolina's Coastal Zone Management Program, regulating tideland critical areas and certifying state and/or federal permits that involve freshwater and brackish water wetlands outside the critical areas but within the coastal zone.¹⁵ The Regulatory Division has two regional offices; the main regional office is located in Charleston. Approximately 30 full-time equivalent (FTE) staff work primarily on reviewing Critical Area Permit applications. OCRM's budget is derived primarily from state appropriations.¹⁶

Office of Environmental Quality Control, Bureau of Water. SCDHEC's OEQC, Bureau of Water issues §401 certifications. The Bureau of Water has twelve regional offices and approximately eight FTEs who work primarily on §401 certification. The Bureau's budget is derived primarily from state appropriations; however, a few additional Bureau of Water staff are funded through U.S. Environmental Protection Agency Wetland Program Development Grants.¹⁷

§401 certification

Any actions that require a federal permit, license, or approval that results in a discharge into waters of the state, including §404 individual dredge and fill permits and nationwide permits outside the coastal zone, require state water quality certification. The state has adopted procedures and criteria for water quality certification¹⁸ and National Pollutant Discharge Elimination System permits decisions (NPDES).¹⁹ Certification addresses physical and hydrological impacts on wetlands and water quality to prevent degradation and maintain existing uses.²⁰ When assessing the water quality impacts of a proposed project, the Bureau of Water uses best professional judgment to consider the following factors: (1) whether the activity is water dependent and the intended purpose of the activity; (2) whether there are feasible alternatives to the activity; and (3) all potential water quality impacts of the project, both direct and indirect, over the life of the project including: (a) impact on existing and classified water uses; (b) physical, chemical, and biological impacts, including cumulative impacts; (c) the effect on circulation patterns and water movement; and (d) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.²¹

Public notice is required of all applications for certification of federal licenses or permits. If 20 or more individual written requests that raise water quality and classified use issues are received during the public comment period, then the Bureau of Water will hold a public informational hearing. SCDHEC then prepares a written assessment on each proposed activity, and a certification is issued if the applicant has demonstrated that the project is consistent with state

¹⁵ S.C. CODE ANN REGS. 30-1.

¹⁶ Personal communication with Barbara Neale, Dep't of Health and Env'tl. Control, Office of Ocean and Coastal Res. (Feb. 26, 2007).

¹⁷ Personal Communication with Rheta Geddings, Dep't of Health and Env'tl. Control, Bureau of Water (Mar. 15, 2007).

¹⁸ S.C. CODE ANN. REGS. 61-101.

¹⁹ BUREAU OF WATER, EXPEDITED REVIEW PROGRAM-STANDARD OPERATING PROCEDURES (2006), *available at* http://www.scdhec.net/environment/water/docs/erf_ExpRevSOPFINAL.pdf.

²⁰ S.C. DEP'T OF HEALTH AND ENVTL. CONTROL, *supra* note 1..

²¹ S.C. CODE ANN. REGS. 61-101.

and federal water quality provisions. Federal §404 Permit from the Corps may not be issued without the associated state issuance of a §401 certification and/or a Coastal Zone Consistency determination.²² The Bureau of Water issues an average of 200-300 certifications per year.²³ Although the vast majority of the applications for certification are approved (approximately 99 percent), project-specific conditions are attached to nearly all permits.²⁴

Nationwide permits

The State of South Carolina has denied four nationwide permits (NWP),²⁵ thus requiring individual water quality certifications and coastal zone consistency determinations prior to the use of these NWPs. Six NWPs²⁶ have been denied in areas of South Carolina defined as the Coastal Management Zone; thus an individual coastal zone consistency determination is required prior to permitted actions. South Carolina's action on the 2007 NWPs could not be reviewed within the reporting period.

SCDHEC has been unsuccessful in its attempt to develop a programmatic general permit with the Corps.²⁷

Mitigation

South Carolina has not adopted mitigation rules for freshwater wetlands. However, the Bureau of Water follows a non-rule standard operating procedure²⁸ developed by South Carolina's Mitigation Banking Review Team (MBRT) that directs the Bureau to consider the qualities of the impact site, as well as the proposed mitigation site, to determine the proper ratio of mitigation. The Bureau of Water is currently updating these standard operating procedures and expects to be finished in late 2007.²⁹

The non-rule policy document *Policies and Procedures of the South Carolina Coastal Management Program* establishes general guidelines for coastal wetland mitigation in the state.³⁰ These guidelines include provisions relating to site selection, drawing submittals, hydrological engineering, soils, vegetation establishment, criteria for evaluating success, contingency planning, implementation schedules, and mitigation ratios.³¹ In addition, OCRM

²² S.C. DEP'T OF HEALTH AND ENVTL. CONTROL, *supra* note 1.

²³ Geddings, *supra* note 17.

²⁴ *Id.*

²⁵ *Id.* NWP 16 – Return Water From Upland Contained Disposal Areas; NWP 17 – Hydropower Projects; NWP 21 – Surface Coal Mining Activities; NWP 34 – Cranberry Production Activities

²⁶ *Id.* NWP 23 – Approved Categorical Exclusions; NWP 24 – State Administered Section 404 program; NWP 28 – Modifications of Existing Marinas; NWP 35 – Maintenance Dredging of Existing Basins; NWP 42 – Recreational Facilities; NWP – 43 Stormwater Management Facilities

²⁷ Geddings, *supra* note 17.

²⁸ US ARMY CORPS OF ENG'RS – CHARLESTON DISTRICT, REGULATORY DIVISION, STANDARD OPERATING PROCEDURES FOR COMPENSATORY MITIGATION (2002), *available at*

<http://www.sac.usace.army.mil/?action=mitigation.home> (follow “2002 Compensatory Mitigation SOP” hyperlink).

²⁹ Geddings, *supra* note 17.

³⁰ OFFICE OF OCEAN AND COASTAL RES. MGMT., S.C. DEP'T OF HEALTH AND ENVTL. CONTROL, POLICIES AND PROCEDURES OF THE SOUTH CAROLINA COASTAL MANAGEMENT PROGRAM-AN EXCERPT OF THE SOUTH CAROLINA COASTAL MANAGEMENT PROGRAM DOCUMENT (1995), *available at*

http://www.scdhec.net/environment/ocrm/regs/docs/OCRM_Policies_Procedures.pdf.

³¹ *Id.*

uses the Corps Charleston District's standard operating procedure for calculating mitigation bank credits.³² A pilot program has been developed for in-lieu fee mitigation, although it is limited to two nonprofit recipients within three defined service areas.³³

The South Carolina Department of Natural Resources (SCDNR), SCDHEC, Corps Charleston District, U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), and U.S. Department of Agriculture serve on an interagency MBRT that meets once a month.³⁴ In 2002, the MBRT published *Joint State/Federal Administrative Procedures for the Establishment and Operation of Mitigation Banks in South Carolina*, which provides guidance on the development and operation of mitigation banks.³⁵ Three mitigation banks are operated by the South Carolina Department of Transportation; the remaining banks are privately operated.³⁶

Compliance and enforcement

The Pollution Control Act includes enforcement provisions such as civil³⁷ and criminal³⁸ penalties.³⁹ These provisions, however, are rarely used. In practice, the Corps takes the lead on corrective action orders pertaining to §401/404-related matters.⁴⁰

The CZMA also authorizes enforcement provisions, including civil⁴¹ and criminal⁴² penalties. OCRM enforcement actions focus on critical area permits and some impacts to freshwater wetlands in the eight coastal counties.⁴³

³² Personal communication with John Hensel, Dep't of Health and Env'tl. Control, Office of Ocean and Coastal Res. Mgmt. (March 14, 2007).

³³ *Id.*

³⁴ Geddings, *supra* note 17.

³⁵ US ARMY CORPS OF ENG'RS – CHARLESTON DISTRICT, REGULATORY DIVISION, *supra* note 28.

³⁶ J. Wayne Hall, US Dep't of Transp. – Federal Highway Admin., *Wetlands Mitigation Program in South Carolina*, Greens Roadside (2001), available at http://www.fhwa.dot.gov/environment/greenerroadsides/sum01_3.htm.

³⁷ S.C. CODE ANN. § 48-1-330. Civil penalties.

Any person violating any of the provisions of this chapter, or any rule or regulation, permit or permit condition, final determination or order of the Department, shall be subject to a civil penalty not to exceed ten thousand dollars per day of such violation.

³⁸ S.C. CODE ANN. § 48-1-340. False statements, representations or certifications; falsifying, tampering with or rendering inaccurate monitoring devices or methods.

Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under this chapter or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall be subject to the civil or criminal provisions contained in this chapter. For the purposes of this section the term "person" shall mean, in addition to the definition contained in § 48-1-10, any responsible corporate officer.

³⁹ S.C. CODE ANN. § 48-1-210.

⁴⁰ Geddings, *supra* note 17.

⁴¹ S.C. CODE ANN. § 48-39-170. Penalties.

(B) Any violation of any provision of this chapter involving five yards square (225 square feet) or less of critical area may be treated as a minor violation, the penalty for which shall be a fine of not less than fifty dollars nor more than two hundred dollars. The enforcement officers of the Natural Resources Enforcement Division of the South Carolina Department of Natural Resources may serve warrants under this provision and otherwise enforce this chapter. The magistrates of this State have jurisdiction over minor violations of this chapter. Each day of noncompliance with any order issued relative to a minor violation or noncompliance with any permit, regulation, standard, or requirement relative to a minor violation shall constitute a separate offense; provided, however, that violations which involve the construction or repair of water control structures shall not be considered minor violations regardless of the area involved.

Tracking systems

Since 1999, OCRM has utilized the Environmental Facilities Information System (EFIS) to track critical area permits and coastal certification decisions, although the database is not yet fully functioning according to state agency staff.⁴⁴ OCRM is working to build the database's tracking capacity and has recently begun tracking proposed impacts, locations of both impacted areas and mitigation activities, restoration methodology, and monitoring reports for both on-site and off-site mitigation projects.

The Bureau of Water also uses EFIS to track §401 certifications and is currently developing a database to track mitigation activities. This new database will include maps of all mitigation sites using Geographic Information Systems. The Bureau of Water requires monitoring reports and site inspections for all mitigation projects.⁴⁵

III. Water Quality Standards

South Carolina's water quality standards (WQS) do not identify criteria specific to wetlands.⁴⁶ Surface WQS, which apply to all waters of the state, are both narrative and numeric in nature and include chemical and biological criteria for water quality.⁴⁷ The regulations do not identify designated uses for wetlands specifically, defaulting to open water designated uses.⁴⁸ Likewise, there are no wetland-specific antidegradation rules; these rules apply to all state waters, which include wetlands.⁴⁹ WQS and open water designated uses relate to wetland fish and wildlife habitat and water quality.⁵⁰

In the absence of wetland-specific WQS, the Bureau of Water has adopted procedures and criteria for water quality certification for Corps permits⁵¹ and NPDES permits.⁵² In November

(C) Any person who is determined to be in violation of any provision of this chapter by the department shall be liable for, and may be assessed by the department for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. Whenever the department determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the department may issue an order requiring such person to comply with such permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by the department; in addition, the department may bring a civil enforcement action under this section as well as seeking an appropriate injunctive relief under Section 48-39-160.

⁴² S.C. CODE ANN. § 48-39-170. Penalties.

(A) Any person violating any provision of this chapter is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than six months or fined not more than five thousand dollars, or both, for the first offense, and imprisoned not more than one year, or fined not more than ten thousand dollars, or both, for each subsequent offense.

⁴³ Neale, *supra* note 16.

⁴⁴ *Id.*; Hensel, *supra* note 32.

⁴⁵ Geddings, *supra* note 17.

⁴⁶ S.C. CODE ANN. REGS. 61-68(C).

⁴⁷ S.C. CODE ANN. REGS. 61-101.

⁴⁸ S.C. CODE ANN. REGS. 61-68(A)(1), 61-68(D).

⁴⁹ S.C. CODE ANN. REGS. 61-68(D).

⁵⁰ S.C. CODE ANN. REGS. 61-101.

⁵¹ *Id.*

2006, the Bureau of Water instituted a pilot program for an Expedited Review Program (ERP) for NPDES permits.⁵³ The Bureau of Water has established standard operating procedures and a fee schedule for the pilot ERP.⁵⁴ The state has adopted procedures and criteria for water quality certification (see §401 certification, above).⁵⁵

IV. Monitoring and Assessment

South Carolina does not operate a formal monitoring and assessment program for wetlands or streams. However, OCRM uses an informal functional assessment methodology that tracks biological criteria for the purpose of monitoring mitigation and enforcing the CZMA. The agency requires site-specific monitoring for all Critical Area Permits that require mitigation. In addition, the interagency MBRT defines monitoring and assessment requirements for mitigation banks.⁵⁶ The Bureau of Water follows standard operating procedures to guide functional assessments of wetland mitigation projects.⁵⁷

V. Restoration and Partnerships

DHEC does not operate a formal restoration program for wetlands or for partnering with private landowners to conserve wetlands. However, as of July 2007, legislation has been proposed that would provide tax breaks to private landowners for protecting riparian buffers.⁵⁸

VI. Education and Outreach

South Carolina's DNR administers two privately-funded wetland-specific education programs that help educators integrate wetland education into their curriculum: Project WET (Water Education for Teachers) and Project Wild.⁵⁹

VII. Coordination with State and Federal Agencies

An interagency team composed of the Corps, SCDHEC, EPA, FWS, National Marine Fisheries Service, SCDNR, and South Carolina Department of Archives and History meets once a month to discuss permitting issues and provide comments on permit applications.⁶⁰

⁵² S.C. CODE ANN. REGS. 61-9.

⁵³ Section 44-1-165 of S.1263.

⁵⁴ BUREAU OF WATER, EXPEDITED REVIEW PROGRAM-STANDARD OPERATING PROCEDURES (2006), available at http://www.scdhec.net/environment/water/docs/erf_ExpRevSOPFINAL.pdf.

⁵⁵ S.C. CODE ANN. REGS. 61-101.

⁵⁶ Hensel, *supra* note 32.

⁵⁷ Geddings, *supra* note 17.

⁵⁸ Neale, *supra* note 16.

⁵⁹ Personal communication with Steve Bates, S.C. Dep't of Natural Res. (April 6, 2007).

⁶⁰ Hensel, *supra* note 32.

SCDHEC also entered into Memorandum of Agreements (MOA) with nearly all other state agencies when the coastal program was being developed. These MOAs relate to broad coastal issues, including those that affect wetlands.⁶¹

VIII. Acronyms

ACOE- Army Corps of Engineers

CWA- Clean Water Act

CZMA – South Carolina Coastal Zone Management Act

EFIS – Environmental Facilities Information System

EPA – U.S. Environmental Protection Agency

EQC – Office of Environmental Quality Control

ERP – Expedited Review Program

FTE – Full-time Equivalent

FWS – U.S. Fish and Wildlife Service

MBRT – Mitigation Banking Review Team

MOA – Memorandum of Agreement

NPDES- National Pollutant Discharge Elimination System

NWP – Nationwide Permits

OCRM – Office of Ocean and Coastal Resource Management

PCA –Pollution Control Act

(Project) WET – Water Education for Teachers

SCDHEC- South Carolina Department of Health and Environmental Control

SCDNR – South Carolina Department of Natural Resources

⁶¹ Neale, *supra* note 16.