



**Navigating Newly Non-WOTUS  
Wetlands: A Study of Six States'  
Wetlands Programs after  
*Sackett v. EPA***

**TENNESSEE SUPPLEMENT**

SEPTEMBER 2024

# TENNESSEE

## I. Overview

Tennessee has roughly 787,000 acres of wetlands.<sup>1</sup> According to the Tennessee Department of Environment and Conservation’s (TDEC’s) Division of Water Resources, the largest present cause of impacts to the state’s wetlands includes “development, such as roads, subdivisions, and commercial centers.”<sup>2</sup> Present-day impacts accompany historical wetland impacts from channelization and leveeing.

The framework of Tennessee’s wetland management and protection approach includes Clean Water Act Section 401 certifications, general water quality standards, and state-level permitting requirements for the alteration of wetlands in the state. Tennessee’s current wetlands program is fairly comprehensive; however, legislation proposed following the Supreme Court’s *Sackett* majority opinion signals that efforts to reduce the protection of state wetlands are occurring.

As of this report, TDEC—the state agency responsible for “managing, protecting, and enhancing the quality of the state’s water resources through voluntary, regulatory, and educational programs”—has not seen any immediate impacts from *Sackett* on its state wetlands program, but estimates that approximately 70% or more of Tennessee’s total wetlands could lose federal protection as a result of *Sackett*.

## II. Legal Framework

### a. Wetland-related Statutes and Regulations

#### i. *Tennessee Water Quality Control Act*

In 1977, the Tennessee General Assembly adopted the Water Quality Control Act (WQCA), “recognizing that the waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state.”<sup>3</sup> The beneficiaries of the public trust “have a right to unpolluted waters,” and the state, as trustee, is obliged to “take all prudent steps to secure, protect, and preserve this right.”<sup>4</sup> “Waters” under the WQCA 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

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<sup>1</sup> TENN. DIV. OF WATER RES., FY2023-2024 SURFACE WATER MONITORING AND ASSESSMENT PROGRAM PLAN 64 (July 2023).

<sup>2</sup> *Id.*

<sup>3</sup> TENN. CODE ANN. § 69-3-102(a) (2024).

<sup>4</sup> *Id.*



single ownership that do no combine or effect a function with natural surface or underground waters.<sup>5</sup>

Though the current statutory definition of “waters” implicitly includes wetlands, the WQCA, as of October 1, 2024, specifically defines a “wetland” as

[a]n area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions; and a type of waters that are not wet weather conveyances, and generally include swamps, marshes, bogs, and similar areas.<sup>6</sup>

The WQCA establishes the legal framework for the regulation of activities that may impact state waters. As such, the WQCA authorizes TDEC to issue permits for water quality impacts to state waters.<sup>7</sup>

*ii. Aquatic Resource Alteration Rule*

Persons seeking to alter a stream, river, lake, or wetland in Tennessee must obtain a water quality permit from TDEC’s Division of Water Resources (DWR) in the form of either an Aquatic Resource Alteration Permit (ARAP) or a Clean Water Act (CWA) Section 401 water quality certification.<sup>8</sup> Types of activities that require a water quality permit include, but are not limited to, “the discharge of dredge[d] or fill material, dredging, stream channel modifications, water withdrawals, wetlands alterations including drainage, and other construction activities which result in the alteration of [state waters].”<sup>9</sup>

The Aquatic Resource Alteration Rule expressly includes “wetlands” as a category of waters of the state and establishes a “no net loss of water resource value” standard for permitting.<sup>10</sup> Under the Rule, a “wetland” is

an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.<sup>11</sup>

A “constructed wetland” under the Aquatic Resource Alteration Rule means

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<sup>5</sup> *Id.* at § 69-3-103(48).

<sup>6</sup> *Id.* at § 69-3-103(50); H.B. 1892, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024).

<sup>7</sup> TENN. CODE ANN. §§ 69-3-103(6), 69-3-107(14) (2024).

<sup>8</sup> *Id.* at §§ 69-3-107, 69-3-108 (2024); TENN. COMP. R. & REGS. 0400-40-07 (2019).

<sup>9</sup> TENN. COMP. R. & REGS. 0400-40-07.01(3) (2019).

<sup>10</sup> *Id.* at 0400-40-07.04(6).

<sup>11</sup> *Id.* at 0400-40-07.03(31).

a wetland intentionally designed, built, and operated on previously nonwetland sites for the primary purpose of wastewater treatment or stormwater retention; such wetlands are not created to provide mitigation for adverse impacts on other wetlands.<sup>12</sup>

The Aquatic Resource Alteration Rule identifies two types of ARAPs: 1) Individual Permits; and 2) General Permits.<sup>13</sup> There are different categories of General Permits, however, all General Permits “authorize alterations to state waters for specific categories of activities that are substantially similar in nature within the state or other specified geographic areas.”<sup>14</sup> Applications for General Permits are not subject to public notice, and authorized impacts under General Permits do not require mitigation.

An Individual Permit does not authorize an activity by a class of persons or the public in general. Instead, it authorizes a “specified person to conduct activities at a specified location.”<sup>15</sup> Individual Permits are subject to a detailed alternatives analysis, public notice, and compensatory mitigation requirements.

Since 2020, TDEC has issued 722 Individual Permits and 6620 General Permits. Minor wetland alteration activities accounted for 631, or approximately 9.5%, of the total 6620 General Permits. TDEC issues approximately 125 minor wetland alteration General Permits per year and has only denied one General Permit with minor wetland impacts since 2001.<sup>16</sup> Only three Individual Permit applications involving wetlands have been denied since 2001.<sup>17</sup> TDEC issues 145 Individual Permits per year, approximately half of which include wetland impacts.<sup>18</sup>

TDEC must issue or deny an ARAP permit within 90 days after receipt of a complete application.<sup>19</sup> The average General Permit application review and issuance time is approximately 4.5 days from the date that TDEC receives a complete application.<sup>20</sup> The average Individual Permit application review and issuance time is 81 days from the date that TDEC receives a complete application.<sup>21</sup>

#### b. Clean Water Act § 401 Certifications

Under Section 401 of the Clean Water Act, applicants for a federal license or permit to conduct any activity which may result in any discharge into navigable waters must receive certification that the proposed discharge complies with state or tribal water quality standards from the state or tribe where the discharge originates.<sup>22</sup> While Tennessee does not have water quality standards that are

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<sup>12</sup> *Id.* at 0400-40-07.03(8).

<sup>13</sup> *Id.* at 0400-40-07.04(1).

<sup>14</sup> *Id.* at 0400-40-07.04(2).

<sup>15</sup> *Id.* at 0400-40-07.03(20).

<sup>16</sup> Personal Communication with Jonathon Burr, Tenn. Dep’t of Env’t & Conservation (July 24, 2024).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> TENN. COMP. R. & REGS. 0400-40-11.03(1)(a); *Aquatic Resource Alteration Rule*, TENN. DEP’T OF ENV’T & CONSERVATION, <https://www.tn.gov/environment/permit-permits/water-permits/1/aquatic-resource-alteration-permit-arap-.html> (last visited Sept. 10, 2024).

<sup>20</sup> Burr, *supra* note 16.

<sup>21</sup> *Id.*

<sup>22</sup> 33 U.S.C. § 1341 (2024).

specific only to wetlands, sections of the state’s general water quality standards (WQS) (*i.e.*, water quality criteria, antidegradation policy, and use classifications for surface waters) apply to state wetlands.<sup>23</sup>

Tennessee uses CWA Section 401 certification to protect wetlands by approving, conditioning, or denying federal permits and licenses, which most frequently applies in the context of CWA Section 404 permits. The Tennessee implementing rules for CWA Section 401 certification are included within the Aquatic Resource Alteration Rule. If a proposed activity that requires a federal license or permit does not also require an ARAP, then the applicant “may obtain a [Section] 401 certification by submitting a copy of the federal application to [DWR] and a request for a [Section] 401 certification.”<sup>24</sup>

If an applicant for a federal license or permit requires Section 401 certification from TDEC and the applicant’s proposed activity *also* requires an ARAP, then the ARAP will serve as TDEC’s Section 401 certification.<sup>25</sup> In these instances, the application will be subject to the ARAP “application and public notice procedures” as required under the Aquatic Resource Alteration Rule.<sup>26</sup> ARAP coverage under a General Permit also serves as Section 401 certification from TDEC.<sup>27</sup>

### c. Organization of State Agencies Involved in Wetlands Regulation

As described above, TDEC’s DWR administers ARAPs and CWA Section 401 certifications. TDEC’s wetlands program is funded through CWA Section 106 grants, fees generated from permits, and penalties and damages collected through WQCA enforcement.<sup>28</sup>

The WQCA also created the Tennessee Board of Water Quality, Oil, & Gas (Board). Among other duties, the Board has the authority to promulgate and enforce rules that it deems necessary for the “prevention, control, and abatement of pollution.”<sup>29</sup> As described more thoroughly below, the Board established a policy of mitigation for wetland and stream water quality impacts.<sup>30</sup>

The Tennessee Department of Agriculture is statutorily authorized to develop forestry best management practices (BMPs), which are “land and water resources conservation measures that prevent, limit, or eliminate water pollution for forest resources management purposes.”<sup>31</sup> BMPs are intended, in part, to prevent nonpoint source pollution to wetlands, which can result from agricultural runoff.<sup>32</sup> Though the Department of Agriculture does not have direct regulatory authority over wetlands, its authority to establish BMPs concerns wetlands. The use of BMPs is not required by law; however, if the operator of forestry activities (*i.e.*, harvesting of timber and

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<sup>23</sup> Personal Communication with Jonathon Burr, Tenn. Dep’t of Env’t & Conservation (Aug. 16, 2024).

<sup>24</sup> TENN. COMP. R. & REGS. 0400-40-07.04(3) (2019).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Burr, *supra* note 23.

<sup>29</sup> TENN. CODE ANN. § 69-3-105 (2024).

<sup>30</sup> *See infra* Section II(e)(i).

<sup>31</sup> TENN. CODE ANN. § 69-3-103(14) (2024).

<sup>32</sup> *See* TENN. DEP’T OF AGRIC., GUIDE TO FORESTRY BEST MANAGEMENT PRACTICES IN TENNESSEE 1 (2023).

construction of roads and trails) “fails or refuses to implement BMPs [established by the Department of Agriculture] *and* water pollution results, the [TDEC Commissioner] may issue a stop work order.”<sup>33</sup>

d. Nationwide Permits

Nationwide Permits

Because the procedural application and notification requirements for ARAPs apply in concert with the CWA Section 401 certifications, TDEC’s common practice is to formally deny many of the CWA Nationwide Permits (NWP) and require § 401 certification for a given project.<sup>34</sup>

For example, in 2021, 16 NWPs went into effect. The U.S. Army Corps of Engineers’ (Corps’) Nashville and Memphis Districts suspended three of the NWPs because the permits applied to certain mariculture activities in marine waters that do not occur within the Districts’ areas of responsibility.<sup>35</sup> TDEC denied certification for the remaining 13 NWPs, and instead elected to require individual 401 certifications for activities authorized by those NWPs.<sup>36</sup>

e. Mitigation

i. *Legal Framework*

Pursuant to its WQCA authority to protect waters of the state from conditions of pollution, the Water Quality, Oil, & Gas Board adopted rules establishing a policy of compensatory mitigation for water quality permits. Permit applicants “who wish to conduct an activity that may impact a stream or wetland shall consider avoidance and minimization of such impacts.”<sup>37</sup> Further, if the proposed impact to a stream or wetland “will result in an appreciable, permanent loss of resource values, mitigation [citation omitted] must be provided to ensure no overall net loss of resource values.”<sup>38</sup>

If mitigation is a required permit condition of a § 401 certification or an ARAP that has no CWA Section 404 requirements, the permittee may be able to satisfy such mitigation requirements through “any combination of permittee-responsible mitigation, in-lieu fee programs [ILFP], mitigation banks, or other mechanisms that are reasonably assured to result in no overall net loss of resource values from existing conditions.”<sup>39</sup> The Aquatic Resource Alteration Rule establishes the following order of priority for mitigation methods: 1) restoration; 2) enhancement; 3)

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<sup>33</sup> TENN. COMP. R. & REGS. 0080-7-3-.01(1)(a) (2001) (detailing, in part, BMP guidelines for wetlands) (emphasis added).

<sup>34</sup> Burr, *supra* note 23.

<sup>35</sup> U.S. ARMY CORPS OF ENG’RS, NASHVILLE & MEMPHIS DISTRICTS, PUB. NOTICE. NO. 21-10 (Mar. 8, 2021) (available at

[https://www.mvm.usace.army.mil/Portals/51/docs/regulatory/publicnotices/Tennessee/NWP\\_ReissuancePN\\_Tennessee\(LRN-2020-00855\\_20210405\\_PN\).pdf](https://www.mvm.usace.army.mil/Portals/51/docs/regulatory/publicnotices/Tennessee/NWP_ReissuancePN_Tennessee(LRN-2020-00855_20210405_PN).pdf)).

<sup>36</sup> *Id.*

<sup>37</sup> TENN. COMP. R. & REGS. 0400-40-07.01(1) (2019).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 0400-40-07.04(7)(a)(2) (2019); Burr, *supra* note 23.

preservation; 4) creation; and 5) other measures.<sup>40</sup> In assessing possible mitigation sites, the DWR “will use a watershed prioritization approach” and the proposed mitigation “shall occur as close to the impact location as practicable.”<sup>41</sup>

U.S. Environmental Protection Agency (EPA) Level III ecoregions may be used to inform site selection prioritization for wetland mitigation.<sup>42</sup> Wetland mitigation requirements are expressed in ratios of either: 1) mitigated acres to impacted acres according to method of mitigation (*e.g.*, restoration, creation and enhancement, or preservation); or 2) best professional judgment ratios subject to TDEC’s approval.<sup>43</sup> Certain *de minimis* impacts to wetlands may be authorized under General Permits without mitigation requirements under the Aquatic Resource Alteration Rule.

Applicants for projects that require both an ARAP/Section 401 certification and a CWA Section 404 permit are able to request a regulatory coordination meeting with TDEC and the Corps.<sup>44</sup> Such interagency coordination meetings allow applicants for complex projects to “receive input from the regulatory agencies related to regulatory project review and potential mitigation requirements.”<sup>45</sup> Regulatory Coordination Meeting (RCM) invitations may be extended to TDEC’s DWR, the Corps, U.S. Fish & Wildlife, TWRA, TDEC’s Division of Natural Areas, and potentially the applicable municipal stormwater entity.<sup>46</sup> Before an RCM is set, project applicants can also apply for a Regulatory Coordination Pre-Application Meeting Request to informally present their project to regulators with such information as “the scope and size of the project, purpose and need for the project, alternatives considered, water resources that will be impacted, and presence of threatened and endangered species or their habitats.”<sup>47</sup>

TDEC serves alongside the Corps’ Nashville and Memphis Districts, TWRA, and EPA on the Interagency Review Team (IRT), which coordinates review of the prospectus and Mitigation Banking Instruments, permitting, and approval of mitigation providers.<sup>48</sup>

As part of the regulated community, the Tennessee Department of Transportation’s Environmental Mitigation Office (TDOT EMO) is also “responsible for providing compensatory mitigation to offset unavoidable stream and wetland impacts from [certain] transportation projects.”<sup>49</sup> The TDOT EMO “is responsible for the design and implementation of compensatory mitigation plans,

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<sup>40</sup> TENN. COMP. R. & REGS. 0400-40-07.04(7)(a)(3) (2019).

<sup>41</sup> *Id.* at 0400-40-07.04(7)(a)(4).

<sup>42</sup> *Id.* at 0400-40-07.04(7)(c)(1).

<sup>43</sup> *Id.* at 0400-40-07.04(7)(c)(2) (requiring no “less than 2:1 for wetland restoration; 4:1 for wetland creation and enhancement; and 10:1 for wetland preservation”).

<sup>44</sup> *Regulatory Coordination Requests*, TENN. DEP’T OF ENV’T & CONSERVATION, <https://www.tn.gov/environment/permit-permits/water-permits/1/aquatic-resource-alteration-permit--arap-/wr-wq-mitigation-pre-application.html> (last visited Aug. 5, 2024).

<sup>45</sup> *Id.*

<sup>46</sup> Personal Communication with Ellen Strupp, Senior Biologist, Goodwyn Mills Cawood (Sept. 6, 2024).

<sup>47</sup> *Regulatory Coordination Requests*, *supra* note 44.

<sup>48</sup> Burr, *supra* note 23.

<sup>49</sup> *Environmental Mitigation Office*, TENN. DEP’T OF TRANSP., <https://www.tn.gov/tdot/environmental-home/transportation-environmental-mitigation-office.html> (last visited Aug. 5, 2024).

as well as ensuring that all mitigation projects are developed and documented in accordance with applicable state and federal regulations and guidance.”<sup>50</sup>

### ii. *On-the-Ground Implementation*

In 2023, 36.5 acres of wetlands were permitted to be filled in with mitigation requirements that generally follow a minimum 2:1 replacement ratio.<sup>51</sup> Most of the mitigation requirements were fulfilled through the purchase of credits from a wetland mitigation bank.<sup>52</sup>

The current wetland mitigation cost in Tennessee is about \$50,000–\$80,000 per mitigation credit, and most mitigation is completed at a 2:1 functional replacement ratio.<sup>53</sup> Thus, mitigation activities usually cost between \$100,000–\$160,000 per acre impacted if purchased from a mitigation bank or ILFP.<sup>54</sup> TDEC reports these costs are comparable to other states.<sup>55</sup>

### f. Tracking Systems

TDEC administers and maintains a public-facing interface (DataViewer) that tracks data related to, among other items: DWR-issued permits, including General and Individual ARAPs; DWR’s activities related to inspections and review of engineering plans; and complaints DWR has investigated.<sup>56</sup>

Section 401 certifications and mitigation requirements are not individually searchable data points on DataViewer;<sup>57</sup> however, website users can inspect copies of permits housed on DataViewer to identify whether the given permit serves as a CWA Section 401 water quality certification or contains compensatory mitigation requirements. This tracking system also “provide[s] a source of wetland impact and mitigation data for use by agencies involved in wetland monitoring and research.”<sup>58</sup>

## III. **Water Quality Standards**

As mentioned above, Tennessee does not have water quality standards (WQS) specific only to wetlands. However, some criteria apply to state wetlands. For example, the regulations governing

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<sup>50</sup> *Id.*

<sup>51</sup> Burr, *supra* note 16 (*e.g.*, replacement ratios of 1:1 may be permitted if high resource-value wetlands are set aside under preservation and deed restrictions).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (\$80,000 is generally the upper limit for high land cost areas); Burr, *supra* note 23 (explaining that, as of the date of this report, the replacement ratio of 2:1 may soon change for lower resource-value, non-WOTUS wetlands. Under a General ARAP, a permittee may fill/alter up to .25 acres of lower resource-value wetlands without mitigation. The permittee under a General ARAP may alter up to .01 acres of moderate quality wetlands.); *Cf.* Strupp, *supra* note 46 (noting that wetland mitigation costs in Tennessee for 2023 were as low as \$40,000 per credit).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (referencing <https://dataviewers.tdec.tn.gov/dataviewers/f?p=2005:1:8150548699350:>).

<sup>57</sup> *Id.*

<sup>58</sup> FY2023-2024 SURFACE WATER MONITORING AND ASSESSMENT PROGRAM PLAN., *supra* note 1, at 64.



“Biological Integrity” criteria for the use of fish and aquatic life (*e.g.*, aquatic biota measured) can apply to wetlands or large rivers “using scientifically defensible methods.”<sup>59</sup>

Because of the diversity of wetlands and their unique characteristics and function, TDEC has found that WQS for wetlands may differ from other surface water standards.<sup>60</sup> For example, WQS that apply to waters including wetlands may rely less on water chemistry parameters, and more on the diversity of vegetation or macroinvertebrate communities.<sup>61</sup> In Tennessee, WQS that apply to wetlands may also differ from WQS that apply to surface waters, because the former rely on additional components of state laws and regulations that do not apply to instream water quality.<sup>62</sup>

#### IV. Monitoring and Assessment

Tennessee has developed the “Tennessee Rapid Assessment Methodology” (TRAM) protocol for state wetland resource value assessment. The TRAM is “based on models developed as part of the hydrogeomorphic approach for assessing wetland function.”<sup>63</sup> DWR explains “TRAM has provided a method to quickly assess existing wetland resource value which has aided in assessing the ecological consequences of §401 and ARAP permitting decisions.”<sup>64</sup> While the state continues to employ TRAM “as a component of wetland conditional assessment,”<sup>65</sup> TDEC is in process of developing a revised TRAM for scoring wetland functional quality.<sup>66</sup> The revised TRAM could be used by consultants to identify wetland resource value.<sup>67</sup>

Additionally, TDEC has received EPA Wetland Program Development Grants in recent years to further develop Tennessee’s wetlands program. These awards, in part, helped fund the identification and cataloging of wetland reference sites. According to Tennessee’s FY2023-2024 Surface Water Monitoring and Assessment Program Plan, outputs DWR successfully delivered under this EPA funding included

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<sup>59</sup> TENN. COMP. R. & REGS. 0400-40-03-.03(3)(m) (2019) (providing “[t]he waters shall not be modified through the addition of pollutants or through physical alteration to the extent that diversity and/or productivity of aquatic biota within the receiving waters are substantially decreased or, in the case of wadeable streams, substantially different from conditions in reference streams in the same ecoregion. The parameters associated with this criterion are the aquatic biota measure. These are responsive variables . . .”).

<sup>60</sup> Personal Communication with Jonathon Burr, Tenn. Dep’t of Env’t & Conservation (Aug. 16, 2024).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Burr, *supra* note 23.

<sup>67</sup> Burr, *supra* note 16.

producing an ecological classification of wetlands in Tennessee based on the Ecological Systems classification and the National Vegetation Classification systems published by NatureServe, developing and populating a database for data collected at wetland reference sites, and selecting and conducting vegetation sampling at reference standard sites representing the diversity of wetland plant communities in Tennessee within Level III EPA Ecoregions across the state. Reference standard sites that were selected targeted globally rare and under[-]sampled wetland types in Tennessee. These data will contribute to the improvement of wetland assessment methods and mitigation targets in Tennessee.<sup>68</sup>

Another result of EPA funding was development of the Tennessee Wetland Program Plan 2019-2025 (TN Wetland Program Plan) based on EPA's Core Elements Framework. The Tennessee Wetland Program Plan's strategic goals for monitoring and assessment include DWR's plan to develop and enhance "wetland identification, classification, and assessment and tracking methods," and advance its "database capacity for delineated and reference wetland locations and data" throughout the state.<sup>69</sup> TDEC also reports that a new wetlands mapping tool is being developed as of the date of this report.<sup>70</sup>

## V. Restoration

### a. Tennessee Department of Environment and Conservation

The WQCA authorizes the TDEC Commissioner to recover damages to the state from any person who violates or otherwise fails to comply with any WQCA rules, regulations, or standards of water quality.<sup>71</sup> The funds recovered through this process are "then applied to restoration projects to offset natural resource damages" through the TDEC-administered Stream and Wetlands Restoration Grant Program.<sup>72</sup> The stated purpose of this program is "to leverage improvement opportunities in selecting and funding projects that best ensure benefits to natural resources with a nexus to those injured and compensated for through enforcement."<sup>73</sup> Nonprofits and state, federal, and municipal agencies/entities are eligible to apply for these funds.<sup>74</sup>

Wetland restoration projects that are eligible for funding under the grant program cannot be used to fulfill compensatory mitigation liabilities or requirements, but could potentially be combined with an independent compensatory mitigation project if obligations for both are separately

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<sup>68</sup> FY2023-2024 SURFACE WATER MONITORING AND ASSESSMENT PROGRAM PLAN., *supra* note 1, at 64.

<sup>69</sup> TENN. DEP'T OF ENV'T & CONSERVATION, TENN. WETLAND PROGRAM PLAN 2019-2025 7 (May 2019).

<sup>70</sup> Personal Communication with Jonathon Burr, Tenn. Dep't of Env't & Conservation (Aug. 22, 2024).

<sup>71</sup> TENN. CODE ANN. § 69-3-116 (2024).

<sup>72</sup> *Stream & Wetland Restoration Grant*, TENN. DIV. OF WATER RES., <https://www.tn.gov/environment/about-tdec/grants/water/stream-wetland-restoration.html> (last visited Aug. 5, 2024).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

satisfied.<sup>75</sup> Funded projects must deliver certain restoration components and demonstrate how the project benefits resources (*e.g.*, how habitat creation, restoration, enhancement, and/or land acquisition benefits surface water quality, fish, birds, and aquatic plant communities, among other resources).<sup>76</sup>

TDEC also maintains a webpage that provides users with a variety of resources detailing available technical and financial resources to carry out voluntary wetland restoration work.<sup>77</sup> Among other programs and initiatives is the Tennessee Wildlife Resources Agency’s (TWRA’s) Farm Wildlife Habitat Program, which “provides free technical assistance to landowners and managers desiring to improve their farmland, woodland, or recreational properties while improving the value to wildlife.”<sup>78</sup> Such technical assistance may extend to improving wetland management.

b. Tennessee Department of Agriculture

The Tennessee Department of Agriculture’s Land and Water Stewardship Section (LWSS) also works to support voluntary watershed restoration projects. As such, LWSS takes a “voluntary approach to funding watershed restoration projects that implement [BMPs] aimed at restoring impaired watersheds and by funding educational projects that raise awareness of nonpoint source pollution locally or statewide.”<sup>79</sup>

c. Tennessee Wildlife Resources Agency

TWRA is authorized under the U.A. Moore Wetlands Acquisition Act to preserve certain wetlands through land acquisition.<sup>80</sup> As of 2023, the Wetlands Acquisition Fund is funded by the state real estate transfer tax at a rate of \$0.0325 per \$100.<sup>81</sup> Under the U.A. Moore Wetlands Acquisition Act, the director of TWRA and the commissioner of agriculture, or their designees, are required to “meet periodically to set the priorities for wetland . . . acquisition, and no two individual tract shall be purchased without the joint consent of the [TWRA Director and Commissioner of Agriculture].”<sup>82</sup>

The TWRA director is authorized to “maintain an inventory of rare and significant biological and geological wetlands and bottomland hardwood forests worthy of protection” under the U.A. Moore Wetlands Acquisitions Act that can include “locations for unique wetlands, scenic wetlands,

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<sup>75</sup> *Id.*

<sup>76</sup> TENN. DEP’T OF ENV’T & CONSERVATION, STREAM & WETLAND RESTORATION GRANT PROG. MANUAL 45 (2024); Burr, *supra* note 70 (explaining that, as of the date of this report, TDEC has awarded three grants thus far and—while wetland creation, restoration, enhancement, and preservation proposals are sought—none of the three awards involved wetlands).

<sup>77</sup> *Technical and Financial Resources Available for Voluntary Wetlands*, TENN. DEP’T OF ENV’T & CONSERVATION, <https://www.tn.gov/environment/program-areas/wr-water-resources/watershed-stewardship/voluntary-wetland-protection-resources/technical-and-financial-resources-for-voluntary-wetlands-protection.html> (last visited Aug. 5, 2024).

<sup>78</sup> *Id.*

<sup>79</sup> *Land and Water Stewardship Section*, TENN. DEP’T OF AGRIC., <https://www.tn.gov/agriculture/farms/conservation.html> (last visited Aug. 5, 2024).

<sup>80</sup> TENN. CODE ANN. § 11-14-401 (2024).

<sup>81</sup> TENN. WILDLIFE RES. AGENCY, FY 2022-23 ANNUAL REPORT 45 (2023).

<sup>82</sup> TENN. CODE ANN. § 11-14-402 (2024).

wetlands which are excellent examples of wildlife habitat, areas exhibiting exceptional ecological values, and bottomland hardwood forests.”<sup>83</sup> As of 2020, the TWRA Wetlands Acquisition Program Coordinator explained that TWRA uses the inventory as a method of information gathering to inform a ranking score on offered lands.<sup>84</sup> Lands that score among the highest under this system are pursued first.

## **VI. Public-Private Partnerships**

Through the wetlands acquisition fund, described above, private landowners can coordinate with TWRA to preserve their wetlands property.

TWRA has also worked with the West Tennessee River Basin Authority (*i.e.*, a statutorily-mandated governmental commission set to expire in 2028), The Nature Conservancy, and local officials to restore former west Tennessee farmland into a natural flood-resilient landscape.<sup>85</sup> This work was funded through “flood resiliency and mitigation grants.”<sup>86</sup> Through this public-private effort, approximately 1,200 acres have been restored to create the Middle Fork Recreation Area, including 250,000 planted hardwood trees, 20 acres of warm-season prairie, over 200 acres of restored shallow-water wetlands, and two miles of restored stream.<sup>87</sup> This area, which may soon become a state park, serves as a project for flood prevention and environmental education.<sup>88</sup>

## **VII. Education and Outreach**

Tennessee does not have formalized educational and outreach programs specifically regarding wetlands; however, TDEC staff periodically speak about the state’s regulatory programs before schools, clubs, environmental groups, and other organizations.<sup>89</sup>

## **VIII. Coordination with State and Federal Agencies**

TDEC and the Corps’ Nashville and Memphis Districts have entered into a Programmatic Agreement (PA) that establishes the coordination and division of responsibilities between the agencies for the administration of CWA Sections 401 and 404.<sup>90</sup> The most recent PA was signed in July 2024, and will remain in effect for 5 years before it will be circulated to all parties for an extension amendment.<sup>91</sup>

As discussed above, TDEC and TWRA both serve on the IRT with the Corps and EPA for mitigation bank and ILFP projects.

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<sup>83</sup> *Id.* at § 11-14-404.

<sup>84</sup> Paul E. Moore & Mark Gudlin, *Restoring Wetlands on the Farm*, TENN. WILDLIFE MAG. (2008) (republished on Jan. 21, 2020) (available at <https://www.tn.gov/twra/twra-outdoors-blog/2020/1/21/restoring-wetlands-on-the-farm.html>).

<sup>85</sup> *Middle Fork Bottoms Recreation Area*, CITY OF THREE, <https://cityofthreeway.org/living-here/middle-fork-bottoms-recreation-area/> (last visited Aug. 5, 2024).

<sup>86</sup> *Id.*

<sup>87</sup> TENN. DEP’T OF ENV’T & CONSERVATION, TDEC 2023 ANNUAL REPORT 4 (2023).

<sup>88</sup> *Middle Fork Bottoms Recreation Area*, *supra* note 85.

<sup>89</sup> Burr, *supra* note 23.

<sup>90</sup> Burr, *supra* note 23.

<sup>91</sup> *Id.*



Additionally, TDEC and the Tennessee Department of Agriculture coordinate and host meetings on “watershed planning”—which necessarily includes wetlands—in the state. The purpose of these meetings is to: “enable coordination of objectives and priorities; build up planning capacity and resources; and align funding and technical support.”<sup>92</sup> TDEC reports that these meetings had been paused because of the COVID-19 pandemic; however, the TDEC Commissioner’s office intends to resume them.<sup>93</sup>

### **IX. How *Sackett* will impact Tennessee’s Wetlands Program**

Because the WQCA’s “waters of the state” definition does not rely on the federal “Waters of the United States” definition, the state wetlands program has not been immediately impacted by the Supreme Court’s 2023 *Sackett* decision. However, approximately 70% or more of Tennessee’s total wetlands could lose federal protection as a result of *Sackett*.<sup>94</sup>

In the 2023-2024 Tennessee Legislative Session, companion bills were introduced that sought to prohibit TDEC from “apply[ing] criteria that w[ould] result in the classification of real property as a wetland, or otherwise regulate real property as a wetland if the real property is not classified and regulated as a wetland under federal law.”<sup>95</sup> This proposed amendment, which did not pass through the Tennessee General Assembly, would have defined “wetlands” in a manner functionally identical to the definition mandated by the *Sackett* Court. The Tennessee Legislature voted in early 2024 to defer the bills to a summer study session led by TDEC.

Complying with the legislative directive to conduct a study session, the TDEC Commissioner assembled a steering committee that, as of the date of this report, is gathering input from a variety of stakeholders, including non-governmental entities, home builders’ associations, and governmental entities. The steering committee meetings and the stakeholder input—solicited through anonymous questionnaire responses—will inform the TDEC Commissioner’s final recommendations to the Tennessee General Assembly.<sup>96</sup> As of the date of this report, the TDEC Commissioner’s recommendations have not yet been submitted to the Tennessee General Assembly.

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<sup>92</sup> *Watershed Planning Coordination*, TENN. DEP’T OF ENV’T & CONSERVATION, <https://www.tn.gov/environment/program-areas/wr-water-resources/nutrient-management-in-tennessee/resources/watershed-planning-coordination.html> (last visited Aug. 8, 2024).

<sup>93</sup> Burr, *supra* note 70.

<sup>94</sup> Burr, *supra* note 16.

<sup>95</sup> S.B. 0631, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 1054, 113th Gen Assemb., Reg. Sess. (Tenn. 2023).

<sup>96</sup> Burr, *supra* note 16.