

Wetlands and 401 Certification

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Section 401 of the Clean Water Act

- Gives the authority to grant, deny, or condition certification of Federal permits or licenses
- These include CWA 402 and 404 permits, FERC hydropower licenses, some Rivers & Harbors Act Section 9 and 10 permits.

401 Certification

- Insures compliance with provisions of the CWA for discharges to waters of the U.S.
- Compliance dependent upon development of WQ standards

401 Certification as a Tool

- For Tribes w/o a wetlands regulatory program, 401 certification can be a valuable tool

Limitations of 401 Certification

- Limited to activities where there is CWA jurisdiction
- More effective when combined with other management programs

Role of WQ Standards in the 401 process

3 Primary Components of WQ Standards

1. Designated Uses
2. Criteria to protect those uses
3. Antidegradation Policy

1. Designating Wetlands as Surface Waters of the Tribe

- The term “wetlands” should be included as part of the definition of surface waters
- Clarifies that activities that affect wetlands are subject to the same or similar analysis as other water bodies

Designating Uses for Waters

- Protection of Public Health & Welfare
- Drinking Water
- Propagation of Fish & Wildlife
- Recreation
- Agriculture
- Industrial, and other purposes (including cultural)

Designating Uses for Wetlands

- **Identify Wetlands & Different Wetland Types**
- **Identify Wetland Functions & Values***
 - Groundwater Recharge/Discharge
 - Flood Flow Attenuation
 - Sediment Stabilization
 - Sediment/Toxic Retention
 - Nutrient Removal/Transformation
 - Wildlife Diversity/Abundance
 - Aquatic Diversity/Abundance
 - Native Plant Species Richness
 - Recreation
 - Education
 - Cultural/Cultural Resource Values*

**Monitoring & Assessment Programs as important tool for data collection to designate uses*

Use Classification for Wetlands

- All existing uses:
 - Uses that existed in 1975 (CWA)
 - Current uses
 - Potential Uses
 - ❖ Propagation of Aquatic life and wildlife
 - ❖ Recreation (in/on water, hiking, camping, birding, botanizing)
 - ❖ Traditional resource harvest & management of plants & animals
 - ❖ Support critical (or “most sensitive” use)

2. Developing Water Quality Criteria

2 Different Kinds:

- Narrative Criteria to protect designated or existing uses (water quality goals),
or
- Pollutant-specific numerical criteria (measurable benchmarks)

Water Quality Criteria

- Chemical
 - metals, bacteria, toxic contaminants, ph, nutrients
- Physical
 - temperature, sediment, flow
- Biological
 - “biocriteria” biotic conditions (e.g., aquatic life, wildlife, native plant species composition or richness) as compared to a reference site

** For wetlands, the focus is typically on establishing Biological and Physical Criteria, though they may contribute importantly to maintaining downstream chemical conditions in receiving waters*

Developing WQ Criteria for Wetlands

■ Narrative General Criteria:

All waters shall be free from

General statements of attainable or attained conditions of biological integrity & water quality

- ❖ *Can be applied to a category of wetlands, or*
- ❖ *for a given use designation for wetlands.*

■ Numeric Biological &/or Physical Criteria:

- Human Health
- Aquatic Life
- Species composition

3. Antidegradation Policy

- Identify existing uses and the level of WQ necessary to protect those uses;
- If quality of the water is higher than necessary to support the use(s), that quality shall be maintained unless there are overriding economic or social needs to lower that quality; and
- No degradation of waters designated as outstanding resource waters (ORWs).
 - ORWs support exceptional conditions & are recognized as significant sites
 - ❖ *Ramsar convention sites, Wildlife refuges, Wild & Scenic rivers, estuarine sanctuaries, significant shell-fish beds, etc.*

Tribal Treatment as a State (TAS)

- Tribes apply to EPA for TAS to administer CWA program
- EPA reviews and approves application based on information provided & comments received from other agencies
- When EPA authorizes a Tribe to administer the WQS program (delegates authority), the Tribe is also authorized to administer the 401 WQ certification program

Tribes in R10 who have EPA Approved TAS & WQS

- Confederated Tribes of the Chehalis Reservation (WA)
- Kalispell Indian Community (WA)
- Lummi Nation (WA)
- Makah Indian Nation (WA)
- Port Gamble S'Klallam Tribe (WA)
- Puyallup Tribe of Indians (WA)
- Spokane Tribe of Indians (WA)
- Confederated Tribes of the Umatilla Reservation (OR)
- Confederated Tribes of the Warm Springs Reservation (OR)

Tribes with EPA Approved TAS Applications Only

- Tulalip Tribes (WA)
- Coeur d'Alene Tribe (ID)
- Shoshone-Bannock Tribes (ID)
- Swinomish Indians of the Swinomish Reservation (WA)

* *Each of the above & previously listed tribes have the authority to administer WQS program and 401 WQ certification program*

Tribes with Federal WQS Promulgated by EPA

- Confederated Tribes of the Colville Reservation (WA)

(EPA handles 401 WQ Certification of 404 permits in this case)

Tribes That Have Submitted TAS Application to EPA for Review

- Confederated Tribes and Bands of the Yakama Indian Reservation (WA)

(EPA handles 401 WQ Certification of 404 permits in this case)

R10 Tribes for which EPA handles 401 WQ Certifications in AK, ID & OR (10 total)

- **Metlakatla (AK) (though total of 229 Federally Recognized Tribes in AK)**
- **Kootenai (ID)**
- **Nez Perce (ID)**
- **Burns Paiute (OR)**
- **Coquille Indian Tribe (OR)**
- **Coos, Lower Umpqua, Siuslaw Confederate Tribes (OR)**
- **Coquille Indian Tribe (OR)**
- **Grand Ronde (OR)**
- **Klamath (OR)**
- **Siletz (OR)**

R10 Tribes for which EPA handles 401 WQ Certifications Cont. (18 total in WA)

- Cowlitz
- Hoh
- Jamestown S'Klallam
- Lower Elwha Klallam
- Muckleshoot
- Nisqually
- Nooksack
- Quileute
- Quinault
- Samish
- Sauk-Suiattle
- Snoqualmie
- Squaxin Island
- Stillaguamish
- Suquamish
- Upper Skagit

Implementation of 401 Cert Program

- Waive 401 Certification
- Issue 401 Certification
- Deny 401 Certification
- Condition 401 Certification

401 Certification Process on Tribal Lands

- **For Tribes w/ EPA approved standards, Tribes typically are responsible for 401 WQ certifications (*EPA is available to assist with template & program development*)**
- **For Tribes w/o approved standards, EPA issues public notice* and 401 certification (not the state)**
- **Different degrees of coordination for tribal vs. non-tribal projects**

**Our notice requesting comments is attached to Corps individual 404 permit application public notice (30 day comment period)*

Non-Tribal Projects on Tribal Lands

- Same procedures as with Tribal Projects on Tribal Lands &
- EPA issues public notice & coordinates w/ the affected Tribe to develop conditions for 401 WQ Certifications
- EPA can condition 401 WQ certification to protect downstream water quality, implement BMPs to avoid, minimize and mitigate project impacts to water quality and designated beneficial uses, & require monitoring

EPA Certification of Tribal Projects on Tribal Lands

- EPA has 180 days to provide 401 certification upon Corps issuance of individual 404 permit or authorization under Nationwide Permit (can extend up to 1-year if necessary)
- 401 certification can cover both project and compensatory mitigation areas
- 401 certification can address both construction and ongoing operation impacts to water quality
- 401 certification can re-enforce 402 Stormwater requirements
- 401 certification will use/apply federally approved Water Quality Standards
 - *These can include the narrative or numeric criteria of State or Tribal standards applicable to the receiving water affected by the federally permitted project*

EPA Role in 401 WQ Certification on Tribal Lands (Nationwide Permits)

- EPA will issue, condition or deny a 401 WQ Certification on Tribal lands for each Corps 404 individual permit, for Tribes w/o program authority.
- EPA will also issue, condition or deny individual 401 WQ certs for Corps NWP's for which EPA either conditioned or denied 401 Certification in 2007.
 - *A few examples of these include:*
 - ❖ 8 – Oil & Gas structures on outer continental shelf
 - ❖ 13 – Bank Stabilization
 - ❖ 14 – Linear Transportation Projects
 - ❖ 21- Surface Coal Mining
 - ❖ 43 – Stormwater Management Facilities

EPA 401 Certification Example:

Wapato Dam on Yakama Indian Reservation

- General Conditions
- Specific Conditions
- Conditions Necessary to Assure Compliance with EPA approved WQ Standards for the Yakima River
 - Specific Water Quality Standards
 - BMPs (incorporated conditions from other reports & requirements)
 - ❖ *Biological Assessment report*
 - ❖ *Environmental Assessment report*
 - ❖ *Tribes Hydraulic Permit*
 - ❖ *Erosion and Sediment Control Plan*
 - Water Quality Sampling & Monitoring
 - Construction Best Management Practices
 - Emergency/Contingency Measures