

Luster, Tom

From: Lavigne, Ronald (ATG)
Sent: Friday, April 30, 1999 3:45 PM
To: Kenny, Ann; Fitzpatrick, Kevin; Manning, Sandra; Hegy, Terra; Austin, Lisa; Moore, Bill; Selby, Melodie; Luster, Tom; Lund, Perry; McMillan, Andy; Shorin, Bonnie; Ehlers, Paula; Meyers, Doug; 'Lynch, Patty'
Cc: Lavigne, Ronald (ATG); Hellwig, Raymond
Subject: RE: Summary of yesterdays meeting

I have some legal concerns regarding the agreements that were apparently reached at the Wednesday meeting.

1. The state does not always have the option of holding a 401 certification in abeyance because a state waives its ability to issue a 401 certification one year after an application has been made. Nor am I aware of any legal authority to deny a 401 certification without prejudice. If a 402 permit insures compliance with WQSs, than it is legally appropriate for the 401 certification to simply incorporate by reference the requirements of the 402 permit so long as the 402 permit covers all the discharges that would be subject to the 401 certification. However, if the 402 permit does not insure compliance with WQSs for all discharges sought to be covered under the 401 certification than the 401 program has two options: i) issue the 401 certification with whatever additional conditions are necessary to insure compliance with WQSs or ii) deny the 401 certification.

2.a. There is no legal justification for failing to address stormwater impacts from small, medium and some large projects. The 401 certification must insure compliance with WQSs regardless of the size of the project. As a policy matter the state could decide to waive 401 certification for certain sized projects. However, if a 401 certification is issued it must include conditions necessary to insure compliance with WQSs for all discharges, including stormwater discharges, regardless of the size of the project.

2.b. We need more than the so called "presumptive approach" to adequately defend 401 certifications, especially where the presumption makes little sense. We've gotten away with the presumptive approach in the 402 context in large part because the 402 permit process provides 5 year opportunities to revisit the presumption. Consequently, the PCHB had been willing to defer to Ecology's presumption that BMPs will eventually get to compliance with WQSs. We don't have that luxury in the 401 context because 401 certifications, unlike 402 permits, are not reissued every 5 years. Consequently, in drafting a 401 certification, the 401 program must be able to conclude that BMPs will actually result in compliance with WQSs. If this is not the case (and it won't be in many instances) than the 401 certification must include whatever additional conditions are necessary to meet WQSs.

I share some of the concerns with the draft policy and will continue to work with Sandy to fine tune the policy. Nonetheless, the 401 program should be commended for taking on this difficult issue.

ron

-----Original Message-----

From: Kenny, Ann
Sent: Friday, April 30, 1999 11:21 AM
To: Fitzpatrick, Kevin; Manning, Sandra; Hegy, Terra; Austin, Lisa; Moore, Bill; Selby, Melodie; Luster, Tom; Lund, Perry; McMillan, Andy; Shorin, Bonnie; Ehlers, Paula; Meyers, Doug; 'Lynch, Patty'
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Subject: RE: Summary of yesterdays meeting

Sandy, I need to echo Kevin's concerns. The revised documents you sent don't fully reflect what I thought we had agreed to at Wednesday's meeting.

Based on my notes of what we had on the put on the easel, we had agreed to the following:

1. Where there is a 402 permit in place or pending, the 401 permit would defer to the 402 permit. If the 402 permit is out of compliance the 401 would be held in abeyance or denied without prejudice. (This point is more or less accurately presented if we get Kevin's point regarding the municipal stormwater issues.)

2. For 401 permit where there is no 402, we agreed to take a three-tiered approach:

a. Most small, medium and some large projects would not be reviewed for stormwater compliance issues. [We agreed that we would need to very carefully analyze which projects would fall into each category and develop some clear criteria.]