

# Desk Manual for Ecology's Federal Permit Team 401/CZM Review

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Desk Manual for Ecology's Federal Permit Team  
401/CZM Review

Version 1.01: Last Update January 24, 2000

## Introduction – Using this Document

This Desk Manual is to be used by Ecology's Federal Permits Team as guidance on reviewing proposed projects requiring federal permits and making defensible permit decisions about those projects. This manual can also be used by project applicants and other interested parties to better understand how Ecology reviews and makes decisions about proposed projects. Use of this manual should result in consistent review and decision-making among the Team members and better predictability for applicants.

The federal permit review process, by necessity, includes a great deal of flexibility in how the regulatory requirements are implemented. Each proposed project is unique – its place in the landscape, its specific effects on aquatic resources, the particular combination of federal, state, and local requirements it may be subject to, etc. – and therefore, the guidance contained in this manual is a combination of regulatory requirements, guidance provided in other agency documents, and “Best Professional Judgment”. Some of the elements in this manual are specific requirements of law and must be included in all permit review and decision-making. Some elements of the manual are optional or recommended, but should still be considered in all project review and decision-making, unless specific reasons exist to not include them. Any decisions that conflict with guidance in this document should be based on the particulars of a project and on “Best Professional Judgment”, and should be documented as part of the project file.

This manual does not establish new policies or rules – it documents the guidance and procedures used by the Federal Permit Team to review requests for 401 certifications, Coastal Zone Consistency determinations, and related regulatory decisions.

This manual will need to be updated on a regular basis. Changes will be made as regulations change, as Team practices evolve, and as new information about aquatic resource protection becomes available. The document is structured so that individual pages or sections can be removed and replaced as needed.

This manual includes the following main sections:

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- **Chapter 1: Background** – includes the agency’s mission statement and goals, the SEA Program’s mission and goals, the Team’s goals and priorities, as well as a brief discussion of the regulations implemented by the Team.
- **Chapter 2: Application Procedures** – what is needed to start the review process?
- **Chapter 3: Procedural Guidance for Reviewing Proposed Projects** – what procedural steps must be taken to review the various types of proposed projects?
- **Chapter 4: Substantive and Technical Guidance for Reviewing Proposed Projects** – how are projects reviewed for compliance with the various regulatory requirements, for avoidance, minimization, and mitigation of environmental impacts, and for legal defensibility?
- **Chapter 5: Required Conditions** – what conditions are required of all approved projects?
- **Chapter 6: Recommended Conditions** – what conditions are recommended or have been used in the past to ensure compliance for certain types of projects?
- **Policies** – what agency or program policies apply to the Team’s work?
- **Appendices** – this includes agency policies that apply to our 401/CZM review and various form letters or boilerplate used in the Team’s permit review and decision-making.

# Chapter 1: Background

The Federal Permits Team implements Section 401 of the federal Clean Water Act for projects that require federal permits to discharge fill into waters of the U.S. The Team also determines whether these projects are consistent with the requirements of the federal Coastal Zone Management Act.

The Team primarily reviews projects that require Section 10 and Section 404 permits from the Corps of Engineers – these include projects that involve wetland fills, in-water structures, and other similar proposals. The Team also reviews projects that require Section 9 permits from the Coast Guard, such as bridge crossings, and reviews some aspects of hydropower facilities that require a license from the Federal Energy Regulatory Commission (FERC).

Other types of projects requiring these permits are done elsewhere at Ecology – for instance, projects requiring Section 401 certification for NPDES (National Pollutant Discharge Elimination System) permits are done by Ecology’s Water Quality Program. For FERC projects, the Team coordinates with Ecology’s Water Resources Program to establish instream flow requirements along with conditions related to the construction and operation of the facilities.

The state’s decisions on these projects, through either a Section 401 water quality certification or a Coastal Zone Consistency determination, provides an opportunity for the state to coordinate with local and federal jurisdictions to ensure that proposed federal actions meet state aquatic resource protection requirements.

## ***Agency and Program Mission and Goals***

**Department of Ecology Mission** (from December 1998):

“The mission of the Department of Ecology is to protect, preserve, and enhance Washington’s environment, and promote the wise management of our air, land, and water for the benefit of current and future generations.”

**Ecology’s Goals:**

- prevent pollution
- clean up pollution
- support sustainable communities and natural resources

### **Ecology's Strategic Initiatives:**

- meet current and future water needs of people, farms, and fish.
- develop a comprehensive approach to watershed management that covers water quantity, quality, and habitat.
- increase efforts to solve pollution problems from small but numerous sources.

### **Shorelands and Environmental Assistance (SEA) Program Mission (from December 1998):**

“To protect, preserve, and enhance the soil, air, and water resources of the State of Washington by promoting their wise management and use through: citizen education and technical assistance; integrated and collaborative implementation of environmental management and stewardship.”

### **SEA Program Goals:**

- reduce sediment contamination.
- manage the environmental impact of government growth plans and new private party development proposals.
- research and monitor to provide important tools for coastal management.
- educate the public and local governments on coastal hazards and environmental health in the coastal zone.
- protect lives and property by minimizing flood damage and reducing flood hazards.
- protect Washington's shoreland resources.
- manage and protect wetlands.

## ***Federal Permit Team Responsibilities***

The Federal Permit Team reviews projects requiring various federal permits or approvals for compliance with state water quality standards and other aquatic protection regulations. The usual “trigger” for review by the Team is Section 401 of the federal Clean Water Act. The Team also reviews proposed projects for consistency with the state and federal Coastal Zone management Program, and provides a coordinated state response to the federal agencies on behalf of state resource agencies. For some projects, the Team provides a temporary modification of water quality standards as part of its water quality certification. The Team also provides comments and technical assistance on proposed projects during the SEPA review process.

The Team's primary goals are:



- to ensure compliance with the state's aquatic resource protection regulations, including maintaining the chemical, physical, and biological integrity of the state's waterbodies.
- to avoid, minimize, or mitigate for impacts to the state's waterbodies through environmentally appropriate, effective, and defensible permit conditions.
- To ensure that the state's decision as provided to the appropriate federal agency is coordinated among state agencies and is consistent with all applicable state requirements.

The Team reviews several types of federal permits, including:

- Individual Section 404 permits – these permits are for projects that involve placing fill in waters of the U.S. These permits are generally used for projects with large, significant impacts, or for projects that may adversely affect the habitat of endangered species. These projects may be more complex or relatively controversial.
- Nationwide Permits (NWP) – these permits are often used by the Corps to authorize projects with minimal impacts to waters of the U.S. There are a number of specific types of NWPs, each authorizing a specific type of activity. There are currently about 40 different NWPs in effect that cover activities such as placing utility lines, constructing roads, or doing wetland restoration. NWPs, by definition, are to have minor impacts only, and can include either Section 10 or Section 404-authorized activities.
- Section 10 permits – these permits are for proposed projects that will affect navigation. The most common examples are docks, piers, and buoys. If the proposed project includes placing fill, the Corps may review the project for compliance with both Section 10 and Section 404.
- Section 9 permits – these permits are implemented by the Coast Guard for projects that may affect navigation. These are usually for structures above navigable waters, such as bridges and powerlines.
- Letters of Permission (LOP) – these permits are used by the Corps to authorize Section 10 activities with minor adverse impacts. The Corps requests comments from the involved resource agencies, including Ecology, EPA, USFWS and/or NMFS, and any affected tribes, and considers those comments before issuing a permit decision.

## SEPA – State Environmental Policy Act

The Team is responsible for ensuring proposed projects are in compliance with the requirements of the State Environmental Policy Act (SEPA). SEPA is meant to provide information to decision-makers and the public to help determine the environmental impacts of government actions, such as permit issuance, adoption of master plans, and the like. It also provides an opportunity for interested parties to review and comment on proposed projects that may have an environmental impact.

## **SEPA Compliance**

Most projects that the Team reviews are required to go through SEPA. Although SEPA specifically exempts both the 401 certification and the Coastal Zone Consistency determination from going through the SEPA process (in 197-11-800(10) WAC and 197-11-855(3) WAC), SEPA is required for projects that need both exempt and non-exempt permits. Since most 401/CZM projects also require other non-exempt permits, such as an HPA or a shoreline permit, most 401/CZM projects are required to go through SEPA review. In some cases, a SEPA lead agency can adopt the documents done under NEPA (National Environmental Policy Act) as adequate for purposes of SEPA.

The Team should not issue a 401 certification or CZM determination for a project until SEPA is completed, unless the project requires only SEPA-exempt approvals, such as 401 and CZM.

## **SEPA Review and Comments**

The SEPA process often includes a comment period for interested parties to review the available information and comment on its accuracy, completeness, or adequacy. The Team should use the SEPA review process to alert project applicants to likely permit requirements, technical information needed for our review, concerns about project design or operations, significant anticipated impacts of the proposal, or other concerns likely to emerge during the permit review process.

The SEPA Register is available online at Ecology's web page. Team staff should review the Register on a regular basis to ensure that we have early involvement in proposed projects that may require 401 and/or CZM.

## **Section 401 Water Quality Certifications**

Section 401 of the federal Clean Water Act establishes the opportunity for states to approve, condition, or deny proposed projects requiring federal permits that might affect state waters. It provides broad authority for the state to review proposed projects for compliance with state aquatic protection regulations. It is also the primary means for the state to protect against, or mitigate for impacts to wetlands.

Applicants for federal permits for discharges into navigable waters must receive certification from the state that the construction and operation of the proposed project will be in compliance with specific sections of the federal Clean Water Act and with other requirements of state law. The state's approval, known as a water quality certification, is required before the federal agency can issue its final permit for a project. The state may take any of four actions on a certification request:

- certify the proposed project;
- conditionally certify the proposed project;
- deny certification; or,
- waive its certification authority.

Any conditions of the state's certification must be included on the federal permit, if one is issued. If a state denies certification, then the federal permit must be denied. If the state does not make its certification decision within a year, it is considered waived and the federal agency may make its decision without state input.

The Team's review under Section 401 of the Clean Water Act is triggered when proposed projects are required to get permits under the following federal laws:

- Section 404 of the Clean Water Act;
- Section 9 of the Rivers and Harbors Act; and,
- In some cases, licenses required from the Federal Energy Regulatory Commission (FERC) for hydroelectric projects under the Federal Power Act.

In addition, the Team reviews proposed projects requiring a Section 10 permit. In most cases, Ecology does not invoke its 401 authority for these permits, but reviews such projects under Coastal Zone consistency. Other Ecology programs are responsible for reviewing associated permits -- Ecology's Water Quality Program generally reviews projects requiring Section 402 permits, and the Water Resources Program generally reviews projects requiring FERC licenses. The Team may serve as lead reviewer on projects requiring FERC licenses if those projects also require permits under Section 404, or Section 9 or 10.

401 certification review addresses both the construction-related and the operational impacts of the project. For those projects where an NPDES permit will be required for the ongoing discharges, the 401 certification can require that the applicant obtain and comply with an NPDES permit as a condition of 401 compliance.

As a part of 401 review, the Team generally requires, at a minimum, compliance with SEPA, the state Hydraulics Code (i.e., Hydraulic Project Approvals from WDFW), and the local shoreline master program (shoreline permits or exemptions). These permits are part of 401 review largely because of the requirements in state water quality standards for protection of fish and wildlife and shoreline-related characteristic uses.

## Coastal Zone Management Act Consistency Determination

The Team also determines whether proposed projects are consistent with the federal Coastal Zone Management Act (CZM) and state Coastal Zone Management Program. Consistency with the Act requires that an applicant's proposal complies with applicable sections of the federal Clean Water Act (including state water quality standards), the federal Clean Air Act, SEPA, the state Shoreline Management Act, and the Energy Facility Site Evaluation Council criteria.

This determination is required for all proposed projects requiring a federal permit within Washington's 15 coastal counties (Whatcom, Skagit, San Juan, Island, Snohomish, King, Pierce, Thurston, Mason, Kitsap, Jefferson, Clallam, Grays Harbor, Pacific, and Wahkiakum). In select cases, Ecology may require a Coastal Zone Consistency Determination for projects that are outside the coastal zone but that may affect coastal resources. For example, Ecology could determine that a project on the mid-Columbia with the potential to affect salmon needs to be reviewed for consistency with CZM.

## U.S. Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) requires that all federal agencies consult with federal and state wildlife agencies (USFWS, NMFS, and in Washington, WDFW) when considering projects that affect, control, or modify waters of the U.S. The federal agency contemplating the action must give "full consideration" to the recommendations of these wildlife agencies and must include any "justifiable means and measures" as conditions of project approvals.

The FWCA is different than 401 in that the recommendations of the wildlife agencies are just that – recommendations. The federal decision-making agency is not bound by the requests of the wildlife agencies; however, the decision-maker must justify their decision to not include these measures.

Because we generally include HPAs as part of our 401 certifications here in Washington, compliance with FWCA is usually assured. For projects that do not require HPAs, the Federal Permits staff should still work with WDFW as part of our coordinated state response in order to ensure the fish and wildlife concerns are presented to the federal agency. If there are differences

between Ecology and WDFW or other state agencies, these differences should be resolved before forwarding a coordinated state response to the federal agency.

## Coordinated State Response

The Team is also responsible for providing a coordinated state response to the federal permitting agency on behalf of the state resource agencies. The Corps of Engineers requested that the governor of each state designate one agency to coordinate the state's response to proposed Section 10 and 404 permits in order to reduce inconsistencies, contradictions, and conflicts between state agencies. Executive Order #81-18 issued by Governor Spellman and re-authorized by each subsequent governor designated Ecology as that agency. This responsibility includes:

- Consolidating comments received from other state agencies and negotiating a final state position if there are differences between state agencies; and,
- Informing the Corps of Engineers of the state's concurrence with or objection to a proposed Section 10 or 404 permit.

The Team usually coordinates with WDFW on project decisions, and should also coordinate with WDNR and the State Office of Historic Preservation on proposed projects that involve state lands or possible historic or prehistoric sites.

## Short Term Modifications to State Water Quality Standards

For dredging projects and some in-water construction projects, the Team may issue short-term modifications to water quality standards as part of the water quality certification. Projects that will unavoidably violate water quality standards due to construction-related activities must receive a modification before they can begin the activity. Modifications must be issued under the provisions of 173-201A WAC.

## Other Responsibilities

Team members are often involved in developing policies and guidelines for Ecology and other agencies, providing training to other staff and to stakeholders and the interested public, and providing technical assistance. Team members may also serve as hearings officers at public hearings, provide testimony at permit appeals, or serve as the Ecology representative on various

task forces, boards, or workgroups. These responsibilities vary with time and with the types of proposed projects the Team members are reviewing during a given period.

Team members have been involved in developing a wide variety of policy, guidance, and technical issues, including:

- Integrated Streambank Protection Guidelines
- Stormwater Treatment and Detention BMPs
- Levee Vegetation Guidelines
- Nationwide Permit Conditions
- Salmon Restoration Strategies

## ***Regulatory Authority***

The Team carries out its responsibilities by ensuring that proposed projects are consistent with certain state and federal laws, including:

### **State Aquatic Resource Regulations:**

- Chapter 43.21C RCW – State Environmental Policy
- Chapter 70.94 RCW – Clean Air Act
- Chapter 75.20 RCW – Construction Projects in State Waters
- Chapter 90.48 RCW – Water Pollution Control Act
- Chapter 90.58 RCW – Shoreline Management Act (SMA)
- 173-201A WAC – Water Quality Standards for Surface Waters of the State of Washington
- 173-204 WAC – Sediment Management Standards
- 173-225 WAC – Federal Water Pollution Control Act, Establishment of Implementation Procedures of Application for Certification
- 197-11 WAC – State Environmental Policy Act

Note: this list includes the regulations most commonly referenced in 401 review. Projects may also be reviewed for compliance with other state regulations covering water rights, fish habitat protection, floodplain management, solid waste, etc.

### **Federal Regulations:**

- 33 U.S.C. 1341 Federal Water Pollution Control Act (Clean Water Act), Section 401
- Coastal Zone Management Act, Section 307(c)(3)
- 16 U.S.C. 661 *et seq.*, U.S. Fish & Wildlife Coordination Act.

## ***Definitions and Acronyms***

**[NOTE: Please suggest additional terms to include in this section.]**

The following definitions and acronyms are for terms commonly used in the Team's work. Those from RCWs or WACs are cited as such.

**CFR:** Code of Federal Regulations – these are the “WACs” of the federal government.

**Denial without prejudice** – an inability to issue a certification for procedural rather than substantive reasons. This form of denial carries with it no judgment on the technical merits of the proposed activity or on its compliance with water quality standards or other applicable requirements.

**RGL:** Regulatory Guidance Letter – the Corps uses RGLs to establish guidance for their regulatory review. All the currently applicable RGLs are on the Corps' Regulatory Home Page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm>

**Surface waters of the state:** “...includes lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington.” (from 173-201A WAC).

**Wetlands:** “Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” (from the 1987 Corps of Engineers Wetlands Delineation Manual.) A complete definition for purposes of the state water quality standards is contained in 173-201A-020 WAC.

# Chapter 2: Application Procedures

## Overview

There are a number of ways Ecology starts its review of projects requiring 401 certification or CZM determination. The 401 certification and CZM determination processes are triggered by the need for one of the federal permits listed above; however, the Team will often first hear about a proposed project during SEPA review or when we receive a JARPA.

The Team has developed procedures for project application and review that meet the regulatory requirements of federal and state law, and reflect the variety of ways that proposed projects are initiated. The procedures described in this Chapter include several basic requirements of permit review as well as a number of options available for some types of projects or permits.

## ***What Constitutes a Complete Application?***

The Clean Water Act allows certifying agencies to develop application procedures with the various federal agencies. Ecology generally defers to the requirements of the Corps, Coast Guard, or FERC regarding complete applications; however, we may request additional necessary information at any time during our review.

The Corps requires that applications include the following information:

- applicant's name and address
- location of the proposed project
- name of the waterbody to be impacted
- nature of the activity
- description of the type and amount of discharge and of the surface area of wetlands or other waters to be filled
- at least three drawings – a vicinity map, a plan view, and cross sections or elevation drawings of the project

A project application may be considered complete for purposes of the Clean Water Act when the federal agency issues its public notice. However, for proposed projects where Ecology must issue its own public notice (e.g., Nationwide Permits requiring individual certification), we may require additional information before we consider the application complete and before our review time period starts. [See additional information on timing in Chapter 3.]



## **JARPA**

JARPA stands for **Joint Aquatic Resource Permit Application**. It was developed to streamline the permit process by allowing applicants to fill out one application that served the purposes of several federal, state, and local permitting agencies. It also improves consistency and coordination among permitting agencies by allowing them to receive the same information at the same time.

JARPA can currently be used as an application for Corps Section 404 and/or Section 10 permits, Ecology 401 certifications, WDFW HPAs, and local shoreline permits.

## ***Fees and Cost Recovery***

Ecology currently charges no fee for 401 certification or CZM determination.

Some applicants request coverage under Ecology's Coordinated Permit Process (CPP), administered by the Permit Assistance Center (PAC). This process is generally used for major projects requiring numerous permits. The process provides several permitting elements, including:

- it establishes a permit coordinator from the PAC to work with the various permitting agencies;
- it provides a permit review schedule in the form of a contract between Ecology, the other agencies, and the project applicant; and,
- it allows cost recovery of the expenses associated with the coordinated process and related permit appeals. At this time, it does not provide for cost recovery of technical review by agency staff.

Ecology is currently exploring the use of interlocal agreements, interagency memoranda of understanding, and other methods as possible vehicle for cost recovery for various aspects of permit or technical review.

## ***Pre-application Meetings***

The Corps has established a regular schedule of pre-application meetings to provide applicants with early coordinated review of more complex or difficult proposed projects. These "pre-app" meetings are held the third Wednesday of each month at the Corps' Seattle office and are usually attended by the agencies with regulatory oversight or permitting authority for these projects, including U.S. EPA, U.S. Fish & Wildlife Service, National Marine Fisheries Service, Ecology, Washington Department of Fish & Wildlife, and local jurisdictions. The Corps generally notifies

us by mail or by fax several days before the meeting as to which proposed projects will be discussed.

There may be other opportunities for pre-app meetings provided by local jurisdictions or by other lead agencies. As a Federal Permits Team member, you may also convene pre-app meetings when you believe it would help in your review of a proposed project. It is recommended you work closely with other Ecology staff (e.g., Permit Assistance Center, other technical review staff) when scheduling such a meeting to ensure that Ecology can present a coordinated message to the applicant and other involved parties.

The pre-app meeting is often our earliest opportunity to hear about a proposed project and help the applicant avoid or mitigate for impacts, alert applicants to significant issues or concerns, and give advice on what might be needed to get the necessary permits. The meeting should be used to identify any unacceptable or unmitigatable impacts – this will help the applicant avoid spending more time and money on a proposal that will likely not be approved, and will also help us avoid “late hits” on a project.

# Chapter 3: Procedural Guidance for Reviewing Proposed Projects

The procedures used in 401/CZM review are a combination of federal and state requirements along with guidelines developed through past practices.

Ecology has combined a number of permits and approvals into a single 401/CZM review process. The intent is to provide a more streamlined project review for permit applicants – at the end of the 401/CZM process, the applicant and the federal permitting agency should have a single, coordinated decision on behalf of the state. This streamlining, however, has created a process that is difficult to explain and follow in some instances – the various federal, state, and local permits have different timelines, different jurisdictions, sometimes conflicting requirements – and the process may vary by the location of the project and the types of permits required.

This chapter is meant to clarify the primary review processes the Team uses for the majority of proposed projects.

## ***Starting Permit Review***

For most proposed projects, the start of Ecology's 401/CZM review process is triggered by a notice from a federal agency, usually the Corps of Engineers, and sometimes the Coast Guard or FERC. There are two main forms of notice provided by the federal agencies:

- **Public Notice**: this is usually in the form of a joint public notice, in which the federal agency issues its own required notice along with the notice required by the certifying agency (either Ecology, EPA, or a tribe).
- **Pre-Construction Notification (PCN)**: Ecology may also receive a “pre-construction notification” from the federal agency for projects being proposed for coverage under Nationwide Permits or Letters of Permission. These PCNs are sent only to commenting agencies or agencies with jurisdiction, including EPA, USFWS, NMFS, WDFW, and Ecology.

The Team may have already been involved in preliminary review of proposed projects through SEPA comments, review of shoreline permits, or other means.

## Timelines

The table below provides the minimum and maximum allowable times for various aspects of the permit review process.

Type of Permit:	Corps Public Notice and Comment Period:	Ecology Public Notice and Comment Period:	Deadline for Decisions:	Notes:
Individual Certification for 404 Permits	From 15 to 60 days.	Usually the same as Corps (although Ecology's allowable minimum is 20 days).	Up to 1 year from date of Public Notice.	Ecology is allowed up to one year to make a 401 decision per CWA. The Portland District generally allows only 60 days, unless we notify them.
Individual Certification for NWP's in CZM counties	N/A	Minimum of 20 days	Up to 6 months from date of Ecology Public Notice.	This is by agreement with the Corps. We may extend our 401 decision for up to one year if we inform the Corps before the 6-month date.
Individual Certification for NWP's in non-CZM counties	N/A	Minimum of 20 days.	Up to 120 days from date of Ecology Public Notice.	This is by agreement with the Corps. We may extend our 401 decision for up to one year if we inform the Corps before the 120-day date.
Coastal Zone Consistency Determination		Minimum of 20 days.	Up to 6 months from receipt of applicant's consistency statement.	Ecology must provide a 3-month status letter if the determination appears to be inadequate.
Section 10 State				

Type of Permit:	Corps Public Notice and Comment Period:	Ecology Public Notice and Comment Period:	Deadline for Decisions:	Notes:
Response Letters				
Letters of Verification	N/A	N/A	N/A	
Letters of Permission				
Pre-Construction Notification	N/A	N/A	From 5 to 15 days.	Varies by type of NWP.

Some time periods listed in the table above may be extended by the federal agency, Ecology, or the applicant. However, the following time constraints always apply:

- a public comment period must be at least 20 days long.
- the review period of Coastal Zone consistency cannot exceed six months.
- the review period for a water quality certification cannot exceed one year.

Ecology must make its CZM decision within six months and its 401 decision within one year or they will be considered waived. If our review is expected to take longer, there are several options available to Ecology or the applicant:

- Ecology may deny either the 401 or CZM based on inadequate information or on the proposed project not meeting the requirements.
- the applicant may withdraw the 401 and/or CZM application and resubmit it, thus starting the clock over again. This is the generally preferred alternative, as it provides us with more time to provide the necessary review, and the applicant avoids getting a denial of either 401 or CZM.
- Ecology may work with the federal agency to ensure that the conditions we would otherwise have on our 401 are included as conditions of the federal permit. This option is not preferred – the federal agency is required to include 401 conditions on the federal permit, but there is no requirement to include recommended conditions on the federal permit. If this option is selected, it should be discussed well in advance of the applicable deadline and Ecology should have a clear understanding with the federal agency as to what conditions it will include on its permit.

For CZM, if it appears likely that Ecology cannot issue a positive consistency determination within six months, we are required to send the applicant a status letter at the three-month mark, letting them know what the situation is, what additional information is needed, and what alternatives are available to resolve the issue.

In any situation where the six-month or one-year deadline will not be met, the Team should provide written notice to the applicant as early as possible so that the above options may be discussed and decided upon.

## Waivers

Waivers occur automatically when Ecology does not meet one of two strict deadlines:

- Coastal Zone Consistency determinations must be made no later than six months after public notice is issued.
- 401 certifications must be made no later than one year after the public notice is issued.

No exceptions.

## **Public Process – Notice, Comments, and Hearings**

The requirements for 401 certification public notices and public hearings are contained in 173-225 WAC. Ecology is required to mail the notices for 401 certification applications to an established mailing list, and when determined to be in the public interest, to publish the notice in the newspaper, and/or to hold a public hearing.

## Public Notice

173-225 WAC requires Ecology to send a public notice to an established mailing list for all applications for 401 certification. For individual certifications, the Corps sends a joint public notice that includes the Corps' 404 notice along with Ecology's 401 notice. For individual certifications required after the Corps has authorized a project under NWP, the Team is responsible for sending out the notice.

When preparing the public notice, the Team should include the following information:

- a brief description of the project, its impacts, and proposed mitigation
- the applicant (and agent, if applicable)
- a vicinity map, a site plan, and cross sections or elevations
- other permits that apply to the proposal
- a comment period of at least 20 days

A sample public notice is included in the Appendix.

The Team has a mailing list of parties interested in receiving 401 public notices (see the Mailing List section below).

In addition, Ecology may determine that the public notice should be published in local newspapers to provide additional opportunity for public comment. This is generally done for larger or more controversial proposals. The requirements for publication are contained in 173-225 WAC – they generally require that the notice be public twice, once each on the same day of two consecutive weeks in a general circulation newspaper in the area of the proposed project. The applicant is responsible for the costs of publication and must provide an affidavit of publication to Ecology.

## Mailing List

There are several mailing lists used to provide public notice for proposed projects:

- the Corps has a statewide mailing list of several hundred names used for individual 404/401/Section 10/CZM notices;
- the Coast Guard has a mailing list for Section 9 notices; and,
- the Team has a 401/CZM mailing list used when projects covered by the Corps under Nationwide Permits require individual certifications or CZM consistency.

We have an agreement with both the Corps and Coast Guard that they will provide a joint public notice for projects requiring individual 404 or Section 9 permits and an individual 401 or CZM approval. The notices sent out under that agreement include both the federal and state public notice.

For projects that are covered by the Corps under a Nationwide Permit but still require an individual certification and/or CZM statement, the Team has its own mailing list of several hundred names. This mailing list includes names of individuals or organizations requesting 401/CZM notices statewide or just in a particular Ecology region.

The master mailing list is maintained at headquarters by the Environmental Coordination Section secretary. In addition, each regional Team member has the portion of that mailing list of parties requesting notices for their particular region.

The mailing list should be updated on an as-needed basis. Team members should send any changes (additions, deletions, edits) to headquarters so that the centralized list stays accurate and up-to-date, and updated versions of that list should be sent to the regional Team members on a regular basis.

## Public Comments

Public comments are an important part of the Team's review of proposed projects. In many cases, the commenters are familiar with the project site or the environmental issues in a particular area, and can provide significant comments to incorporate into the project review. The Team should ensure that substantive comments about a proposed project are included in decision-making.

We are not required to provide a responsiveness summary as part of the 401/CZM decision; however, the Team should take note of the most significant comments and include documentation in the project file about how those comments were incorporated into the final decision.

In all cases, we must send a copy of the 401/CZM decision to all commenters. This establishes the start of the 30-day period for any appeals (see Appeals section below).

For most proposals, we receive a relatively small number of public comments; however, we may receive several hundred for large or controversial proposals. In those cases, the Team may want to work with Ecology's PIOs to distribute copies of the 401/CZM decision to local libraries or other public offices and inform the public that it is available at those places.

In the future, we may include 401/CZM public notices and decisions on Ecology's Internet site.

## Public Hearings

Under 173-225 WAC, Ecology may hold public hearings on 401/CZM proposals if deemed appropriate. We generally hold hearings for the more complex or controversial proposed projects, usually as joint public hearings with the Corps or with other agencies with jurisdiction.

Ecology's public hearings have specific requirements for record-keeping, having a hearings officer, providing specific information, etc. The Team should contact one of Ecology's hearings officers as early as possible to help set up and run a public hearing. Also, the Team members can request to be trained as hearings officers.

The Corps also has specific requirements for its hearings, and the Team member or Ecology's hearings officer must coordinate with the Corps to ensure both sets of requirements are met.



# ***Record Keeping and Database Management***

## **Permit Database**

The Team maintains a permit database in order to track the progress of individual permit applications, assess the numbers of permits and workload implications of permit review, record the follow-up actions needed on approved projects (e.g., submittal of as-built and monitoring reports), and determine the potential cumulative impacts of multiple projects within a given area. The database is in Microsoft Access software.

The database includes project information such as the names of applicants and their agents or consultants, project locations and descriptions, associated waterbodies, types of permits, total area or size of direct impact to the wetland or waterbody, proposed mitigation, and other information. The Team can use the database to track its work, do searches based on the available data fields, and provide information to agency management or other interested parties.

Currently, the database is accessible only at headquarters. We are working to provide access in the regions, and are also working to develop other capabilities, such as automatically generating certain types of letters on specific dates, alerting Team members to upcoming due dates, etc.

Data entry: Information on projects requiring some type of review or decision from the Team is entered into the database. This includes information on applications and decisions on individual certifications, Nationwide Permits, LOPs, LOVs, state responses, and others.

## **Required Time Period for Keeping Records**

[to be added]

## ***Procedures for Permit Review***

The Team deals with some very complex procedural requirements in its various project reviews. This is primarily due to Ecology's approach of combining different permit reviews into a single process. This approach is meant to simplify and streamline the permit process for applicants – for proposed projects requiring a 401 certification, the Team provides a comprehensive and coordinated review that provides an applicant and the federal agency the final answer on behalf of the state as to whether a project meets local, state, and federal aquatic resource-related requirements. However, getting to this single answer requires the Team to recognize the different procedural requirements of a number of permits and approvals that were developed with different timelines, different jurisdictional applications, and different regulatory authorities.

The tables in the following section provide a brief description of the procedural requirements for the various types of permit reviews.

### **Reviewing Proposed Projects for Individual Section 404/401 Permits**

[description to be added]

<b>Action:</b>	<b>Federal Permits Team:</b>	<b>Federal Agency:</b>	<b>Notes:</b>
Pre-application meeting	Optional	Optional	Usually with Corps as lead agency.
NEPA/SEPA	Probable	Probable	SEPA required unless the project requires SEPA-exempt permits only.
JARPA or other application form	Optional	Lead agency	
Joint Public Notice	Co-lead agency	Co-lead agency	
Public Hearing	Optional	Optional	Usually done jointly with federal agency.
401/CZM decision	Lead agency		
Federal permit decision		Lead agency	

[add flowchart]

## Reviewing Proposed Projects for Coverage Under Nationwide Permits

[add description...]

<b>Action:</b>	<b>Federal Permits Team:</b>	<b>Federal Agency:</b>	<b>Notes:</b>
Pre-application meeting	Optional	Optional	
NEPA/SEPA	Possible	Possible	
JARPA			

[add flowchart]

## Reviewing Proposed Projects for Section 10 Permits

[add description...]

<b>Action:</b>	<b>Federal Permits Team:</b>	<b>Federal Agency:</b>	<b>Notes:</b>

[add flowchart]

## Reviewing Proposed Projects for Coastal Zone Management Consistency

Ecology's review for CZM Consistency begins when the applicant submits a statement of consistency (see CZM Consistency Statement in Appendix). This statement is usually provided to Ecology by the federal agency requiring 401 certification.

In order for Ecology to concur with the applicant's statement of consistency, we must ensure the proposed project complies with applicable sections of the federal Clean Air Act and Clean Water Act, SEPA, and the state Shoreline Management Act. For most projects, compliance with the Clean Air Act is not an issue, unless the project would be located in an area with federal limits on new emission sources. Compliance with the Clean Water Act is generally ensured through issuance of an 401 certification, and sometimes with conditions requiring a 402 permit. Compliance with SEPA requires the project to have gone through the necessary SEPA process, whether it be a DNS from the local jurisdiction or WDFW (for HPAs), a full EIS review, or adoption of NEPA documents by the lead SEPA agency. Compliance with the SMA requires that the project's substantial development permit, conditional use permit, variance, or exemption be received, reviewed, and approved or not appealed by Ecology. If Ecology appeals a shoreline decision, we cannot concur with the CZM consistency statement until the Shoreline Hearings Board renders a decision that approves the shoreline decision.

Ecology cannot add conditions to a CZM consistency determination; however, conditions of the associated permits (e.g., the accompanying 401 certification or shoreline permit) become part of our CZM approval.

<b>Action:</b>	<b>Federal Permits Team:</b>	<b>Federal Agency:</b>	<b>Notes:</b>
Applicant submits consistency statement.	Start of 3-month & 6-month timeline.		
Ecology receives copy of shoreline decision.	Start of 30-day review and if necessary, filing of appeal.		
Ecology makes 401 decision.			

[add flowchart]

## Reviewing Proposed Federal Projects

The Team's process is somewhat different for projects where a federal agency is the applicant...

[add description...]

<b>Action:</b>	<b>Federal Permits Team:</b>	<b>Federal Agency:</b>	<b>Notes:</b>

[add flowchart]

## **Corps Navigation and Maintenance Dredging Projects**

[add description]

<b>Action:</b>	<b>Federal Permits Team:</b>	<b>Federal Agency:</b>	<b>Notes:</b>

[add flowchart]

## **Coast Guard Projects**

Projects requiring a permit from the Coast Guard and review by the Team usually involve bridges crossing navigable waterways. If the proposed project has potential navigation impacts only, it requires a Section 9 Permit. If it includes fill into navigable waters, it generally requires a

Section 10 permit and a Section 404 permit. For Section 9 Permits, the Team usually provides comments to the Coast Guard and reviews the project for CZM compliance.

Action:	Federal Permits Team:	Federal Agency:	Notes:

[add flowchart]

## Reviewing Major Projects

[Team – do we need this as a special category? If so, how would we define a “major project”?]

## Reviewing Emergency Projects

The Corps implements emergency procedures for some projects. An emergency is defined by the Corps in 33 CFR 325.2(e)(4) as “...a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures.” (see Appendix XX – Corps Memos of January 1993 and December 1997).

Some projects falling within the emergency definition require authorization from the Corps and from Ecology if they trigger the 404/401 threshold. Additionally, WDFW requires authorization for emergency work and can issue emergency HPAs, either in writing or verbally. Some emergency projects are exempt from Corps permitting requirements and therefore are not subject to 401 review. The Corps determines whether CFR 323.4(a)(2) applies to these projects:

“Maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.”

However, projects exempted under the above provision generally still require an HPA and compliance with local shoreline master program requirements.

Neither Section 401 of the Clean Water Act nor the state water quality standards includes a definition, exemption, or procedures to treat emergency projects differently than normal projects; however, Ecology is often asked to quickly approve emergency projects, especially during flood season. Our general procedure is to coordinate with the Corps and WDFW either by phone or by fax to ensure that any conditions necessary for the immediate work are included in the Corps' or WDFW's approval, and then review the project after the emergency has passed as an "after-the-fact" 401 certification.

#### General Procedure for Emergency Projects:

- 1) Team staff receives fax or phone call from Corps, describing the emergency, the probable course of action, and the required permit or authorization.
- 2) Based on available information, Team staff requests Corps to include any necessary immediate conditions to avoid, minimize, or mitigate for impacts. If available, request additional time to coordinate with other appropriate staff from Water Quality Program, local jurisdictions, etc., to determine if specific conditions are necessary.

Always request that the Corps include the following language on its authorization:

"This authorization does not include approval for this activity for purposes of Section 401 of the Clean Water Act. The applicant shall contact Ecology as soon as practicable after the emergency has passed to apply for necessary water quality certification. Additional measures may be required by Ecology, including mitigation, monitoring, or removal of all or part of fill material in waters of the state."

- 3) Either the Corps project manager or Team staff should ensure that the appropriate WDFW Habitat Biologist is notified and that their immediate concerns are addressed as part of the Corps authorization. WDFW approval is required for emergency work. WDFW can issue verbal HPAs over the phone.
- 4) Follow-up: when the emergency has passed, Team staff contacts the Corps and/or applicant to determine whether an individual 401 is needed (in some cases, the emergency work may have been authorized under a NWP). If individual 401 is needed, process and review it as described in Reviewing "After-the-Fact" Projects below.

## Reviewing "After-the-Fact" Projects, Violations, and Enforcement Actions

A project constructed in wetlands or other waterbodies without the necessary federal permit may be subject to enforcement by EPA and the Corps, and may be required to obtain an “after-the-fact” permit. Ecology may also issue an independent order under 90.48 RCW requiring removal of the project, mitigation for impacts, or payment of a penalty. We may also review the project for an “after-the-fact” 401 certification if the Corps requires a 404 permit.

In reviewing violations and “after-the-fact” projects, the Team should consider the following elements:

- was the project proponent aware of permit requirements?
- did work continue after the proponent became aware of non-compliance?
- what was the extent of the non-compliance – acres? A few square feet?
- what were the affected functions and values of the wetland or waterbody?
- are other regulatory agencies taking action?

In determining what actions to take, the Team should consider if it is necessary to include measures that allow resolution of the non-compliance along with providing an incentive for future compliance. For example, an “after-the-fact” project may be required to provide a higher mitigation ratio than would otherwise be required since there was no opportunity to review whether avoidance or minimization had occurred.

[enforcement section to be added]

## **Reviewing Proposed Projects for Applicants Not in Compliance with an Existing 401 Certification**

When an applicant is out of compliance with an existing certification, the Team should make all reasonable efforts to bring the applicant back into compliance. The main effort should be focused on correcting the existing non-compliance. We may not be able to deny a new request for certification based solely on non-compliance with an existing certification. However, if the projects are adjacent or in close proximity, or if the new request is directly associated with the previous certification, we may consider holding the new application in abeyance until the non-compliance issues are resolved. In this situation, non-compliance on an existing certification may prevent Ecology from having “reasonable assurance” that the applicant will be in compliance with a subsequent certification. In some cases, if warranted, the request for certification may be denied based on the existing non-compliance.

Resolving non-compliance can take many forms, depending on the particular project. For example, for projects where mitigation standards have not yet been met, additional mitigation can be required, alternative mitigation measures can be proposed and approved, or the existing compliance schedule can be extended. If the applicant has not yet provided required monitoring reports, the non-compliance may be resolved just by submitting the required reports. In some cases, enforcement may be necessary to ensure compliance.



## Coordinating 401/CZM Review with other Processes and Permits

Much of the Team's work involves coordinating our review with the work of other reviewers at the local, state, and federal level. The following table describes some of the basic requirements.

<b>Decision, permit, or approval:</b>	<b>401/CZM coordination:</b>
SEPA	<p>Most projects review for 401/CZM must go through SEPA. A project must comply with SEPA requirements before 401 or CZM can be approved <u>unless</u> the entire proposed project is exempt from SEPA. The SEPA regulations describe both exempt and non-exempt permits – for instance, projects requiring only a 401 and/or CZM are exempt from SEPA; however, if a project requires any non-exempt permits, then the entire project must go through SEPA and we cannot issue our 401 or CZM until SEPA is complete.</p>
HPA	<p>An HPA is not required for 401; however, we generally, we do not issue a 401 until after the HPA is issued for two main reasons:</p> <ul style="list-style-type: none"> <li>- conditions on the HPA are intended to protect fish life. The water quality standards are also based on the protection of fish life. Rather than develop our own fish protection conditions through our 401 review, we generally defer to the HPA and incorporate the HPA conditions as part of the 401.</li> <li>- When a project requires an HPA, WDFW often serves as the lead agency for SEPA. Since we are required to wait for SEPA to be completed before issuing a 401, we generally wait for WDFW to complete the SEPA and its HPA process.</li> </ul> <p>We <u>may</u> issue a 401 before the HPA is issued if SEPA has been completed and we include conditions necessary to protect fish life.</p>

<b>Decision, permit, or approval:</b>	<b>401/CZM coordination:</b>
Shoreline decision (SDP, CUP, exemption)	<p>For proposed projects within shoreline jurisdiction in the 15 coastal counties, Ecology reviews the local shoreline decision to ensure compliance with the Shoreline Management Act and CZMA.</p> <p>For non-CZM counties, we generally wait until the local shoreline decision is made for two main reasons:</p> <ul style="list-style-type: none"> <li>- Shoreline permit conditions may include aquatic resource-related conditions. We usually wait to issue the 401 to ensure that the 401 conditions do not conflict with the requirements of the shoreline decision.</li> <li>- To ensure that we incorporate the decision of the local jurisdiction in our 401 decision.</li> <li>- to ensure that SEPA has been complied with.</li> </ul> <p>In non-CZM counties, we are not <u>required</u> to wait for the shoreline decision; however, it usually results in a better coordinated and more comprehensive decision.</p>
NPDES – construction	
NPDES – individual	

## Other Review Procedures

[Team – what others should go here?]

## Issuing the 401/CZM/State Response

[add description...]

A copy of the 401/CZM decision should be sent to all who commented on it during the public comment period.

## Site Visits and Site Inspections

[add description...]

## Appeals

### Appealing a 401 Certification:

Anyone may appeal a 401 certification. The appeal must be filed with the PCHB and Ecology.

If the applicant appeals the 401, the appeal must be filed within 30 days of issuance. A recent PCHB ruling found that the 30-day appeal period for an Ecology action started on the day that “interested parties are notified”. Therefore, anyone who comments on the proposed 401 should be sent a copy when it is issued. If they do not receive a copy, they can argue that their 30-day appeal period did not start.

### Appealing a CZM Determination:

If Ecology objects to a CZM consistency statement, the applicant may appeal our decision to the Secretary of Commerce in Washington, D.C., within 30 days of our decision. This is the only avenue of appeal cited in federal regulations. Under these federal regulations, there is no avenue of appeal for anyone other than the applicant.

However, because our CZM concurrence or objection is an Ecology decision, applicants and opponents may be able to appeal our decision to the PCHB; however, that possibility has not yet been adequately tested.

# Chapter 4: Substantive and Technical Guidance for Reviewing Proposed Projects

## *The Role of SEPA*

[to be added]

## *Overview of State Water Quality Standards*

[to be added]

## What is “Reasonable Assurance” and How Is It Implemented?

When we issue a 401 certification, we are expected to have “reasonable assurance” that the proposed project will comply with the necessary requirements. “Reasonable assurance” is the term used in the Clean Water Act and in EPA guidance to describe the level of certainty we need to issue a 401 certification. The Pollution Control Hearings Board, in its decision in the Navy Homeport case (*Friends of the Earth v. DOE*, PCHB No. 87-63 [1988]), described the two-step process to arrive at “reasonable assurance”.

- **Step 1:** Determine, through a “preponderance of evidence”, that water quality standards can and will be met, and identify any areas of uncertainty.
- **Step 2:** Address the areas of uncertainty by including measures that will remove or reduce the uncertainty.

In describing this process, the Board recognized that “reasonable assurance” depends in part on predicting future events, and that even with a preponderance of evidence favoring certification, there may be some remaining uncertainty. In the second step of the process, the Board stated that this remaining uncertainty can be dealt with by including monitoring requirements on the certification, to ensure that the project either meets the requirements or if it doesn’t, that steps can be taken to correct the non-compliance.

This standard of “reasonable assurance” is one of the primary reasons the Federal Permits Team requires thorough project review and detailed and specific 401 conditions. It also provides much of the impetus for our coordination with other technical and regulatory experts to reach a comprehensive and defensible permit decision.

The “reasonable assurance” process is further described below.

**“Reasonable Assurance” in Federal Permit Team water quality certification review:**

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For purposes of the Federal Permits Team 401 review, this two-step process should be used in your certification review and as a basis for your decision-making. The steps are:

**Step 1: Determine, through a preponderance of evidence, that applicable regulations can and will be met, and identify any areas of uncertainty.**

You should first consider whether a proposed project can meet the water quality standards and other requirements. For example, will the discharges or activities from a particular project meet the applicable criteria? If a wetland is to be filled, can the lost functions and values be adequately mitigated? Will the proposed stormwater BMPs for a project allow applicable water quality criteria to be met? If a proposal includes work adjacent to a salmon-bearing stream, can BMPs be included that will adequately prevent sediment runoff into the stream?

If you determine that some part of the water quality standards cannot be met, then determine what changes or mitigation elements would be required to allow the proposed project to meet the applicable standards. For example, if a proposed project would result in an increase in stream temperature above the temperature criterion, then it should also include enough mitigation elements (e.g., riparian plantings, stormwater infiltration, covered conveyance pipes, etc.) to remove that impact and reduce temperatures to an allowable level. Or, if a wetland is providing critical groundwater recharge functions or particularly valuable wildlife habitat, then the mitigation proposal should incorporate elements that adequately compensate for those losses, such as a mitigation site that provides for groundwater recharge, habitat, etc., along with adequate performance standards and other necessary elements.

After identifying whether the project can meet the applicable standards, and what measures are necessary for it to do so, also identify the remaining uncertainty or doubt about the success of the proposed project or its mitigation elements in meeting the requirements.

**Step 2: If there is remaining uncertainty that some elements of the proposal may result in non-compliance, identify what elements need to be included in the certification to eliminate all or most of that uncertainty. These elements can include monitoring requirements, contingency plans, compliance inspections, etc.**

Using one of the above examples, what if the 401 certification includes a requirement to plant a riparian area to reduce temperatures, and those plantings are not successful? You may want to include a 401 condition requiring that “as-builts” be sent within 30 days after planting to ensure that the necessary number and types of plantings were placed in the appropriate locations. You may also want to require the plants be watered for the first year or two to help them become established. You may include a performance measure, such as requiring all plants that don’t survive the first year or two be replaced, and that

after 5 years, the riparian area show 80% coverage of native species. All these types of conditions are part of getting to “reasonable assurance”.

There may be some cases in which a proposed project can meet the requirements, but the applicant is not willing or is unable to do what it takes to meet them. In these cases, determine if there are other methods available that provide the elements or mitigation necessary to meet the standards and that the applicant is willing to do. If the applicant is not willing to do what is necessary, we have two options – deny the 401, or issue the 401 with the necessary conditions. In the latter example, the applicant would have to either comply with the 401 conditions or appeal the 401 decision.

## Antidegradation

“Antidegradation” is a basic principle of the water quality standards requiring that existing beneficial uses be maintained and that degradation of water quality not be allowed if it would interfere with those beneficial uses (173-201A-070 WAC). Antidegradation is one of Ecology’s most protective “tools” and our primary means to require mitigation for the loss of wetlands or other waterbodies.

## Characteristic Uses

One of the most important aspects of 401 review is determining whether a proposed project will affect the characteristic uses of a wetland or waterbody. 173-201A WAC includes a number of specific characteristic uses for each classification of waterbody. For example, with regard to salmon use, the specified characteristic uses of Class AA waterbodies include salmonid migration, rearing, spawning, and harvesting, but the specified uses of Class B waterbodies include just salmonid migration, rearing, and harvesting. Refer to 173-201A-030 WAC for the list of characteristic uses specifically covered under each waterbody classification. For wetlands, characteristic uses include those listed above as well as those listed in 173-201A-060(10).

The listed uses under each classification is not a complete list of characteristic uses. Each classification includes the phrase, “characteristic uses shall include, but not be limited to...” Most waterbodies have recognized uses that are not included in the list, or have uses that must be maintained in order for the listed uses to be maintained. For example, maintaining a population of stream macroinvertebrates is not a listed characteristic use, but may be essential in maintaining fish habitat. This example is also reflected in the toxics criteria (173-201A-040 WAC), where levels have been set to protect the most sensitive aquatic biota, which are often macroinvertebrates or other organisms.

Review of proposed projects should include evaluation of whether that project will affect any recognized characteristic use of the waterbody.

## Water Quality Impacts

[add description...]

## Habitat Impacts

RCW 90.48.010 states, “It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, games, fish and other aquatic life... and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state...”

There are two main regulatory areas where the team reviews projects for impacts to habitat – through compliance with wetland requirements and guidance, and through compliance with the fish and wildlife provisions of the HPA.

### Wetland habitat considerations:

[to be provided by Andy / TAG?]

### HPA considerations:

The majority of projects requiring a 401 certification also require an HPA from WDFW. In those cases, we rely on WDFW habitat biologists to develop permit conditions necessary to protect fish life, as required in the water quality standards. For that reason, a project’s HPA must be issued before the 401 certification. Additionally, since these projects also require that the Team provide a coordinated state response to the federal agency, we must ensure that the project meets WDFW’s requirements.

If for some procedural reason (e.g., timing constraints) there is a request for the 401 to be issued before the HPA, the Team should work with the habitat biologist to include all necessary conditions on the 401.

One type of project where an HPA is generally not required is for federal projects done by a federal agency. For example, a Corps dredging project to maintain a navigation channel where the work is done by the Corps’ Navigation Branch generally does not require an HPA. When these projects require a 401 certification, the Team should coordinate with the appropriate

WDFW Habitat Biologist to ensure any necessary fish protection conditions are included on the certification (e.g., allowable time periods for in-water work, measures to prevent or reduce turbidity, etc.). However, when the work on a federal project is done by a private contractor, that contractor must obtain an HPA.

## ***Project Alternatives***

There are three main review mechanisms to evaluate alternatives for proposed projects – the 404(b)(1) analysis, the NEPA analysis, and the SEPA analysis.

404(b)(1): Section 404 of the Clean Water Act requires that the federal agency (usually the Corps) consider whether the proposed project can be built in a way that avoids or minimizes impacts to waterbodies. This review is implemented entirely by the federal agency, and is not part of our 401 review. In some instances, we may comment to the Corps on their analysis or may wait for the Corps to complete its review

NEPA alternatives: for proposed projects requiring an EIS under NEPA, the EIS must include alternatives project designs, locations, or other measures that would avoid or minimize environmental impacts. For proposed projects that require NEPA, the Federal Permits Team may provide comments as part of Ecology's review and comment of the proposal.

SEPA alternatives: SEPA also requires that EISs for proposed projects include alternative designs, locations, or measures to avoid or minimize environmental impacts.

## ***Coordination with NPDES Requirements***

[to be added...]

## ***Projects That Cannot Be Certified***

Ecology must deny 401 for proposed projects if:



- the project would result in a violation of state water quality standards that cannot be mitigated;
- the mitigation proposed is inadequate to ensure water quality standards would be met. This includes considering antidegradation, characteristic or beneficial uses, and meeting narrative and numeric criteria;
- the project would jeopardize the continued existence of state or federal endangered or threatened species, or would result in the unmitigated destruction or adverse modification of critical habitat for such species; or,
- [other?]

Ecology must deny CZM for proposed projects if:

- the project involves impacts as noted above under reasons to deny 401 certification;
- the project is in Washington's 15 coastal counties and does not meet the requirements of the local shoreline Master Plan;
- [other?]

### **303(d)-listed Waters**

Introduction: In many waterbodies, water quality standards are not being met due to various sources of contamination (point, non-point, or natural). Additionally, standard technology-based pollution controls have not been sufficient to allow those water bodies to meet water quality standards. Section 303(d) of the federal Clean Water Act requires states to identify waterbodies where standards are not being met and where characteristic uses of these waterbodies are not being fully supported ("impairment"). These waterbodies are then placed on the state's 303(d) list.

Ecology's current 303(d) list includes over 600 waterbodies. The most common problems identified as limiting beneficial uses were temperature exceedances, low dissolved oxygen, and high fecal coliform levels. Most of these problems are caused by non-point pollution sources such as agriculture, logging, grazing, and failing septic systems.

For waterbodies on that list, the state is required to establish limits on the amount of pollutants that can be discharged to a waterbody so that these impaired uses can recover. These limits are known as "Total Maximum Daily Loads" (TMDLs). TMDLs are generally developed by Ecology, with help from EPA, other agencies, local jurisdictions, and other interested parties. A TMDL is developed for a specific contaminant; therefore, a waterbody with multiple listed contaminants causing impairment can have several TMDLs. TMDLS developed through this process must be approved by EPA.

As of March 1999, Ecology had 210 approved TMDLs on 33 waterbody reaches.

Review of Proposed Projects Affecting 303(d)-listed Waters: Ecology cannot certify a project that would result in further exceedances of listed criteria or would further impair beneficial uses. To review a proposed project for compliance with 303(d) requirements:

- 1) Check the current 303(d) list to determine if the proposed project might affect a listed waterbody. The list is organized by Water Resource Inventory Area (WRIA). If yes –
- 2) Check both the 303(d) list and the 305(b) list to determine if the proposed project might result in further exceedances of listed contaminants or might further impair beneficial uses.
- 3) Determine if project construction or operation can be conditioned to prevent further exceedances or impairment. If during construction, necessary BMPs can be included as certification conditions. If during operation, either include necessary conditions on the certification, or check to see if an NPDES permit will be required for the discharge causing the problem. If so, include conditions on the certification that require the applicant to obtain the necessary NPDES permit, and if possible, specify the baseline conditions needed on the NPDES permit.

## ***Short-Term Water Quality Modifications***

When projects requiring certification are likely to unavoidably exceed the water quality standards for a short period of time, the Team can include a short-term modification as part of the certification.

“Short-term mods” are generally provided during the construction phase of a project if BMPs are not adequate to fully ensure water quality standards will be met. Most dredging certifications include a short-term mod to allow turbidity and dissolved oxygen exceedances during dredging.

In all cases, short-term mods must meet the requirements of WAC 173-201A-110. This section of the WAC includes an allowance for short-term exceedances of turbidity during construction, but only after BMPs are implemented on the project site.

To determine if a short-term mod is needed:

- 1) Determine if the project, as proposed, will result in a short-term exceedance of water quality standards.

- 2) Determine if the project can be changed to avoid the exceedance (e.g., different construction techniques, change the project design, etc.). If so, work with the applicant to incorporate the changes into the proposal and into certification conditions.
- 3) If the project will still exceed standards, determine if all appropriate BMPs are part of the proposal. If there will still be an exceedance, consider issuing a short-term mod.

*Note:* We are not required to issue a short-term mod for a project. If the project can be built without a mod, or if a mod would significantly interfere with a characteristic use of the waterbody, it should not be issued.

To determine what conditions should be on a short-term mod:

- 1) Identify which criteria may be exceeded (e.g., turbidity, dissolved oxygen, etc.). A short-term modification should be issued only for those criteria expected to be exceeded. Do not issue "blanket modifications" that would allow any or all criteria to be exceeded.
- 2) Determine the waterbody's classification (e.g., Class AA, Class B, etc.) and the associated numeric criteria for the specific contaminants.
- 3) Determine an appropriate dilution zone, outside of which the short-term mod does not apply. This will vary by the type of activity, the size and flow of the waterbody, the type of substrate, etc. For example, a dilution zone for dredging sandy material should be much smaller than a dilution zone for dredging fine silt, since the sand should settle out of the water column much more quickly.
- 4) As a general rule, the short-term mod should allow specific criteria to be exceeded only as little as necessary. For instance, if the project is in a Class A waterbody and will result in exceedance of the dissolved oxygen criteria (in freshwater, 8.0 mg/l), the short-term mod should allow dissolved oxygen to go to the Class B level (for freshwater, 6.5 mg/l), unless this would not be practicable. Usually, short-term mods for turbidity do not have an upper level, as long as the criterion is met at the edge of the dilution zone.
- 5) Include monitoring requirements as necessary to ensure the conditions of the mod are met. This generally includes water column sampling within and on the boundary of the dilution zone. Depending on the length of time and the intensity of the activity, sampling could be as often as once an hour to once or twice a day.

## **Wetlands**

Wetlands provide a number of functions and values related to water quality and fish and wildlife habitat...

**Mitigation sequencing:** the mitigation sequence for wetland impacts is:

- avoid the impacts.
- minimize the impacts.
- where impacts cannot be avoided or minimized, provide compensatory mitigation to make up for the loss of wetland functions and values.

As part of Ecology's review of projects involving wetland impacts, the Team should ensure that all appropriate measures have been taken to avoid and minimize impacts, and that compensatory mitigation is provided for the remaining impacts.

Compensatory mitigation can take a number of forms:

- wetland creation
- wetland restoration or enhancement
- wetland preservation
- on-site or off-site mitigation
- in-kind or out-of-kind mitigation
- mitigation banking
- conservation easements and deed restrictions

Ecology has established a number of documents that provide general guidelines for determining impacts to wetland functions and values, how mitigation sequencing is done, and how appropriate compensatory mitigation is developed. Ecology's wetland staff should be consulted on how to incorporate this guidance into Team decisions.

[[add description to be provided by Andy / TAG?]]

## **Determining Wetland Functions and Values**

[add description...]

## **Determining Avoidance and Minimization of Impacts**

[add description...]

## Determining Appropriate Compensatory Mitigation

[add description...]

## ***Sediments***

[more to be provided by Sediment Mgmt. Unit]

The state's Sediment Management Standards (SMS, 173-204 WAC) are considered part of the state's water quality standards, and therefore, must be considered as part of 401 certification review. The SMS include screening methods, allowable sediment contaminant concentrations, sampling, testing, and analysis requirements, and other elements to ensure that sediment quality is maintained or improved.

Currently, Ecology has narrative standards and specific numeric criteria for marine sediments but only narrative standards for freshwater sediments.

## Sediment Impacts

[add description...]

## Sediment Management Standards

[add description...]

## Puget Sound Dredged Disposal Analysis (PSDDA)

[add description...]

## Sediment Testing

[add description...]

## Beneficial Uses of Dredged Material

Ecology encourages the beneficial use of dredged material where feasible and where the use is consistent with water and sediment quality standards. Some examples include the use of clean dredged material for nearshore habitat improvement or underwater capping or contaminated sediments.

## **Contaminated Sediment Cleanup**

[add description...]

## ***Water Rights***

[add description...]

## ***Endangered, Threatened, and Sensitive Animal Species***

[add description...]

## ***Secondary and Cumulative Impacts***

WAC 173-201A-030 (classification of waterbodies) includes a provision that prohibits concentrations of toxic, radioactive, or deleterious materials that would result in singular or cumulative adverse impacts to characteristic uses.

[more...]

## ***Other Applicable State Requirements***

[add description...]

## ***Reviewing Monitoring Reports***

[add description...]

## **Chapter 5: Certification Conditions**

[add description...]

### ***Conditions required on all certifications***

#### **General Conditions/Boilerplate**

All certifications must include statements or conditions that address the following issues:

- [to be added]
- [e.g., Ecology access to the project site and mitigation site]
- 

### ***Conditions required on all certifications involving wetland fills***

All certifications involving wetland fills must include the following statements or conditions:

- [to be added]
- 

See the boilerplate in Appendix XX.



## ***Conditions Required or Recommended Conditions for Types of Projects***

[add description...]

### **Boat Docks and Piers**

**Required**

**Recommended**

### **Boat Ramps**

**Required**

**Recommended**

### **Bulkheads**

**Required**

**Recommended**

### **Dredging**

**Required**

**Recommended**

**Inwater Dredged Material Disposal**

**Required**

**Recommended**

**Marinas**

**Required**

**Recommended**

**Short-Term Water Quality Modification**

**Required**

**Recommended**

**Stormwater Runoff**

**Required**

**Recommended**

**Streambank Restoration/Protection**

**Required**

**Recommended**

**Upland Dredged Material Disposal**

**Required**

**Recommended**

**Wetland Impacts and Mitigation**

**Required**

**Recommended**

## **Appendices**

### ***Policies – Agency, Program, Inter-Program, and Team***

These are policies that have been adopted by the Team, the SEA Program or by Ecology to further clarify the way the Federal Permits Team does its work.

### ***Boilerplate and Form Letters***

Public Notice for Projects Requiring 401 and CZM

Public Notice for Projects Requiring 401 Only

Public Notice for Projects Requiring CZM Only

CZM Consistency Statement

**CERTIFICATION OF CONSISTENCY WITH  
THE WASHINGTON STATE COASTAL ZONE MANAGEMENT PROGRAM  
FOR FEDERALLY LICENSED OR PERMITTED ACTIVITIES**

**Federal Application Number:** \_\_\_\_\_

**Applicant:** \_\_\_\_\_

**Project Description:**

\_\_\_\_\_  
\_\_\_\_\_

(attach site plans, location (county/city), and proximity to waterbody (name))

This action under CZMA§307(c)(3) is for a project that will take place within Washington's coastal zone or which will affect a land use, water use, or natural resource of the coastal zone. *(The coastal zone includes all parts of Clallam, Grays Harbor, Island, Jefferson, King, Kitsap, Mason, Pacific, Pierce, San Juan, Skagit, Snohomish, Thurston, Wahkiakum, and Whatcom counties.)*

The project complies with the following enforceable policies of the Coastal Zone Management Program:

**1. Shoreline Management Act (SMA):**

- Is outside of SMA jurisdiction
- Applied for shoreline permit # \_\_\_\_\_ being reviewed by \_\_\_\_\_
- Has a valid shoreline permit # \_\_\_\_\_ issued by \_\_\_\_\_ on \_\_\_\_\_
- Has received an SMA Exemption # \_\_\_\_\_ issued by \_\_\_\_\_ on \_\_\_\_\_

**2. State Water Quality Requirements:**

- Does not require water quality permits
- Applied for water quality certification
- Has received water quality certification # \_\_\_\_\_ issued on \_\_\_\_\_
- Applied for stormwater permit # \_\_\_\_\_ issued on \_\_\_\_\_
- Has received stormwater permit # \_\_\_\_\_ issued on \_\_\_\_\_

**3. State Air Quality Requirements:**

- Does not require air quality permits
- Applied for Air Quality permit # \_\_\_\_\_ being reviewed by \_\_\_\_\_
- Has an Air Quality permit # \_\_\_\_\_ issued by \_\_\_\_\_ on \_\_\_\_\_

**4. State Environmental Policy Act: SEPA Lead Agency is:** \_\_\_\_\_

- Project is exempt from SEPA
- SEPA checklist submitted  date \_\_\_\_\_

SEPA decision issued/adopted  DNS  MDNS  EIS  Other \_\_\_\_\_ date \_\_\_\_\_  
NEPA decision adopted by  SEPA # \_\_\_\_\_ date \_\_\_\_\_  
lead agency to satisfy SEPA

**Public Notice for this proposed project was provided through:**

- notices mailed to interested parties using \_\_\_\_\_ mailing list on \_\_\_\_\_ (date).  
 publication in \_\_\_\_\_ (newspaper) on \_\_\_\_\_ (dates).  
 other (include dates) \_\_\_\_\_

*Therefore, I certify that this project complies with the enforceable policies of Washington's approved Coastal Zone Management Program and will be conducted in a manner consistent with that program.*

**Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Order for Water Quality Certification and Coastal Zone  
Consistency Determination**

**Order for Water Quality Certification Only**

**Letter of Verification**

**Letter of Inquiry**

**Notice of Correction**