

**Luster, Tom**

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**From:** Saunders, Steve  
**Sent:** Saturday, November 21, 1998 3:52 PM  
**To:** Selby, Melodie; Barwin, Robert F.; Glynn, John; Nuechterlein, Carl  
**Cc:** White, Megan; Moore, Bill; Ehlers, Paula; Luster, Tom; Lavigne, Ronald (ATG)  
**Subject:** 401 and 402

Okay, here's my take on this. I'd suggest, because the focus has evolved from antidegradation and general standards issues to primarily stormwater and the BMP manual, that Melodie and Bill take over the lead on this. I'll be glad to continue to coordinate if appropriate, but the stormwater expertise is obviously more in Melodie's shop than mine. Feel free to send comments on the attached summary to me, and I'll discuss with Melodie how to handle from here. Thanks



401-402.DOC

**AR 033728**

WATER QUALITY PROGRAM  
Relationship between Clean Water Act Sections 401 and 402

Background: Permitting activities by both the SEA and WQP programs on several large, complex projects have identified a difference in the way the two programs are currently interpreting and applying the requirements of Clean Water Act Sections 401 and 402, and the State's Surface Water Quality Standards (WAC 173-201A). The primary focus of this difference has been on the adequacy of stormwater treatment requirements contained in NPDES stormwater permits issued under section 402 and those specified in the stormwater BMP manual.

SEA program staff have suggested that the relationship between 401 and 402 is hierarchical: that a higher burden of proof is required prior to certifying under section 401 that a project meets water quality standards. WQP management believes these sections are complementary, not hierarchical, and should be harmonized, not duplicative.

A secondary issue is the use of 401 certifications to establish additional requirements beyond those identified in the stormwater BMP manual for sites that are not covered under the 402 stormwater permits.

Analysis: 401 staff have suggested that the inability of the 402 stormwater permits to ensure compliance with the Water Quality Standards (WQS) necessitates the identification and imposition of additional controls prior to the issuance of a 401 certification. Of particular concern to 401 staff are the limitations of the stormwater BMP manual that is referenced in the 402 stormwater permits, and the necessity of certifying a project's compliance for the life of the project. This contrasts with the 402 stormwater permits which are of limited duration (five years for general permits, construction period only for individual stormwater construction permits).

The WQP believes that the use of the BMP manual and other limitations with the compliance requirements of the 402 stormwater permits are not inconsistent with the WQS. In particular, WAC 173-201A-160 (3)(b) and (d) supports the use of BMP's to meet water quality criteria, and supports the adaptive management approach of the 402 stormwater permits to require additional BMP's in the future if current BMP's do not meet criteria. Furthermore, the CWA requires that permits issued under section 402 be updated and renewed every five years. This provides for permit coverage for the life of the project, or at least as long as a discharge is occurring and a permit is required.

The authorities granted under sections 401 and 402 seem specifically to avoid a hierarchical situation. Section 401 references compliance with section 301, 302, 303, 306 and 307, but is silent on compliance with section 402. The recent Ninth Circuit Court of Appeals decision in Oregon Natural Desert Assoc. vs. Dombeck regarding 401 authority not extending to certain nonpoint source activities suggests that 401 authority should be limited to that clearly provided for under the CWA. Similarly, the only exceptions provided for under section 402 are sections 318 and 404, but not 401. However, section 402 (p) does provide very clear authority regarding the regulation of stormwater discharges.

Finally, the WQP believes it is sound public policy to avoid this type of potential duplication of authority. Such duplication not only ties up already limited staff resources, but having one program override or further condition the permitting decisions of another program will only cause additional confusion for permittees.

**AR 033729**

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Recommendation: The Water Quality Program recommends that Ecology consider 401 and 402 actions as complementary, and harmonize the two processes. 401 certifications would normally not be used to require further analyses or additional controls on projects and activities that are or will be regulated under 402 permits. 402 permits for stormwater will continue to be strengthened through updates in the BMP manual and modifying the permit conditions as appropriate to reflect information obtained from the monitoring requirements contained in the current stormwater permits.

Ecology will need to clarify the relationship of section 401 certifications and the stormwater manual. An argument could be made that requirements of WAC 173-201A-160(3) regarding BMP's (and hence indirectly the BMP manual), plus the need for additional actions if criteria are not met, are adequate to support issuance of the certification. However, some staff in both programs are uncomfortable with this interpretation, and instead favor using the 401 process to require additional controls over and above the BMP's identified in the manual. The agency's position on this issue will in part depend on the following: 1) what assurances we have provided regulated interests regarding the adequacy of the manual for meeting standards, 2) the availability of additional controls to ensure compliance over and above those identified in the BMP manual, and 3) our willingness to commit additional resources to this type of action.

**AR 033730**

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