



## **401 Certification Program Summary** **~Idaho~**

### **Overview**

The Idaho Department of Environmental Quality (DEQ) relies on 401 water quality certification as the primary means of reviewing dredge and fill permitting (Corp Section 404 permits), although the state has not developed specific rules for the 401 process. The state's water quality standards do not include wetland specific definitions and requirements, but the DEQ uses antidegradation and beneficial use provisions along with narrative and numeric criteria to evaluate impacts to wetlands and associated waters. The Corps has overall responsibility for review of dredge and fill project, subject to state 401 comments, which are added to the permit or attached. The state also uses water quality standards in certifying NPDES permits and FERC licensees.

### **Definition of Waters of the State**

The definition of Waters of the State in Idaho does not include wetlands implicitly, but all jurisdictional wetlands in the state are interpreted to be included.

“Waters” means all accumulations of water, surface and underground, natural and artificial, public and private or parts thereof, which are wholly or partially within, flow through, or border upon this state except for private waters as defined in section 39-3602, Idaho Code.

### **Permits 401 Program is Applied to**

Idaho certifies 404 permits, 402 permits, and FERC licensing permits.

### **States 401 Certification Standards (Water Quality and Other)**

Idaho utilizes general water quality standards to create conditions for wetlands. In determining application of water quality standards in relation to wetlands in Idaho, a key criterion is connection to surface water. Determination also depends on how the Corps defines jurisdictional waters. Water quality standards play a major role in 401 certifications in Idaho as the state uses them as a basis to certify projects and requires that the applicant comply with the standards. Water quality standards in Idaho are composed of three main components: antidegradation, beneficial uses, and water quality criteria. Further information on Idaho's water quality standards can be found here:

[http://www.deq.idaho.gov/water/data\\_reports/surface\\_water/monitoring/standards.cfm](http://www.deq.idaho.gov/water/data_reports/surface_water/monitoring/standards.cfm)

The standards can also be found in the administrative rules here:

<http://adm.idaho.gov/adminrules/rules/idapa58/0102.pdf>

## **Description of Designated Uses and Existing Uses**

Idaho addresses designated uses in the context of beneficial uses. They define “a designated use as a beneficial use assigned to a specific water body in Idaho water quality rules.”<sup>i</sup> Idaho utilizes a water body identification unit in designating beneficial uses. The current beneficial uses do not easily lend themselves to clear association with wetlands. They are mostly specific to lakes and streams, but all water bodies in the state are protected by beneficial uses, including wetlands. Idaho “presumes most undesignated waters will support cold water aquatic life and either primary or secondary contact recreation. These are termed presumed uses.”<sup>ii</sup> In Idaho designated, existing, and presumed uses must all be protected. More information on this can be found here: [http://www.deq.idaho.gov/water/data\\_reports/surface\\_water/monitoring/beneficial\\_uses.cfm](http://www.deq.idaho.gov/water/data_reports/surface_water/monitoring/beneficial_uses.cfm)

## **Antidegradation Applications**

Idaho’s antidegradation policy is applied to wetlands in the 401 certification process. Antidegradation currently has a more considerable influence in Idaho than it did in the past, partly in response to a law suit by a conservation group that sued EPA for lack of antidegradation implementation. Idaho has not yet successfully designated outstanding resource waters (tier 3) under state law. Idaho submitted antidegradation implementation rules to EPA on April 15, 2011 for review and approval. During the development of this rule, Idaho used interim implementation procedures for antidegradation, applying Tier 1 and Tier 2 antidegradation protection on a parameter by parameter basis. As of March 18, 2011, Idaho began to assign Tier 1 and Tier 2 antidegradation protection on a waterbody by waterbody basis in accordance with Idaho law and the revised water quality standards. Idaho has a considerable interest in the next round of Nationwide Permits, in particular, to see how they will be able to determine whether the permits will comply with their new antidegradation policies. The antidegradation policy for Idaho can be found here: <http://adm.idaho.gov/adminrules/rules/idapa58/0102.pdf>

## **401 Certification Implementation**

An attempt at adopting 401 Certification rules was made in the 1990s, an effort that did not move beyond the agency itself. Idaho certifies about 600 projects per year, about 70% of which are 404 permits. They work on 402 permits in conjunction with EPA and 404 permits in conjunction with the Corps. EPA and the Corps have the authority to make jurisdictional determinations for Idaho regarding these permits.

In general, Idaho is working toward more transparency internally and with the public. To aid in implementation, Idaho recently developed a certification template that includes instructions and a list of common conditions that the 401 Certification staff members in Idaho can choose from. The purpose of this template is to improve consistency across the regions. DEQ generally requires the use of BMPs to reduce the delivery of pollutants to water bodies during project implementation. DEQ does not specify which BMP the applicant should use, but directs the applicant to select, install, maintain and monitor their BMP to ensure compliance with Idaho WQS, and that if there are deficiencies, BMP augmentation or replacement is required.

Idaho generally certifies, or certifies with conditions, and denies certification on very rare occasions, only when the project as proposed will violate State Water Quality Standards. They also might deny a project if the project as proposed does not include enough information, or if the permitted activity is just one piece in a larger scope of activities. They have only denied once or twice in their history of 401 certifications and most often certify with conditions. Idaho does deny some Nationwide permits requiring individual certification instead.

The Department of Environmental Quality in Idaho holds the position that it is better to certify and not waive and they are working to implement this practice statewide, and is attempting to move away from the need for or practice of waiving certifications in general. Waiving certifications has been done as a workload management response. Under this provision, projects that are not perceived to be significant are waived. Idaho has also inadvertently waived certification by missing deadlines. If the Corps does not hear from the state within 60 days, they consider certification waived – the state has found it difficult to complete review within this time frame.

### **Coordination of Programs**

Idaho works very closely with both the Corps and EPA, and generally defers to them.

#### Coordination with Corps Districts

Idaho has a strong relationship with the one Corps district in Idaho, the Walla Walla district. The Corps public notice for individual permits starts the 401 certification process. Idaho does not receive a copy of the final permit so does not know how their comments are ultimately incorporated to specific permits, but the comments are either reiterated in the permit, attached to the permit, or referenced. In most cases, Idaho has been required to issue certification before knowing what would be in the permit itself. Another challenge is ensuring that an applicant recognizes the need for state 401 certification when a provisional permit is issued by the Corps from the Corps. Some applicants do not read or do not understand this provision in the Corps permit and may proceed without 401 certification. Further information on the coordination of programs can be found here:

[http://www.deq.idaho.gov/water/data\\_reports/surface\\_water/monitoring/standards.cfm](http://www.deq.idaho.gov/water/data_reports/surface_water/monitoring/standards.cfm)

#### Coordination with other Agencies

Idaho also has a strong working relationship with EPA on 402 permits. When Idaho certifies 402 permits, EPA incorporates their comments directly into the permit.

#### Coordination with Other Authorities

In certifying FERC licenses, Idaho works directly with the applicant. It generally takes the full year to certify an activity authorized by a FERC license, and when needed, applicants will re-submit their applications when requested by DEQ. The Department of Environmental Quality also coordinates with the Department of Water Resources, which issues stream alteration

permits. While the DEQ has historically reviewed these permits, the Department of Water Resources is not required to incorporate DEQ comments. The stream alteration permits are generally not as strong and stringent according to 401 certification guidelines. Idaho also works with the Idaho Department of Lands regarding placer mining.

### **Application of 401 Certification to Wetlands that have been declared non-jurisdictional due to the US Supreme Courts decisions in SWANCC**

The state is prohibited by Idaho law to regulate waters declared non-jurisdictional. This is indicated in their legislative code. Water Quality Standards do apply in theory, via the broad definition of waters of the state beyond those jurisdictionally designated, but they are not able to be applied this way in practice.

### **Project Analysis**

In general Idaho does not implement alternatives analysis and they do not conduct their own analysis for 404 permits. However, as their antidegradation policy is becoming stronger, alternatives analysis is becoming more prevalent, especially when there will be significant degradation of high quality waters. They are becoming more and more able to require selection of a reasonable alternative as they implement antidegradation more aggressively. If a water body is designated Tier 2, Idaho will require alternatives analysis when the project will result in significant degradation.

### **Mitigation Requirements**

Mitigation is not currently required. As DEQ implements their stronger antidegradation policy, they are building a stronger case for including mitigation requirements in their certifications as well.

### **Monitoring and Enforcement Approaches**

401 Certifications are not enforceable in and of themselves in Idaho, especially since the state rules do not support it. Idaho relies on the federal agencies to handle enforcement, and they have the ability to issue fines for violations. Water quality standards make enforcement more possible, through the monitoring provision. Certifications indicate that monitoring might be required. Idaho maintains that it could document in-stream water quality standards and initiate enforcement actions if the project results in violations of water quality standards. They have issued some notices of violation to applicants that have 404 permits. Idaho tries to work with the permittee directly if a violation is found, to sit down and talk first, and initiate formal enforcement actions only if necessary in order to negotiate satisfactory compliance.

### **Staffing**

There are 6 regional offices in Idaho and one staff person in each regional office. There is also one statewide coordinator and a statewide legal councilor, which makes eight employees who

work on 401 Certifications in the state. No one on the staff is fully dedicated to 401 certification. In 2008 it was estimated that Idaho had 4.5 FTE, which is similar to the current situation.

### **Tracking Techniques/Databases**

Idaho recently implemented a document-management (TRIM) database. This allows the state to enter certifications and metadata that then becomes a searchable database of documents. They will have the ability to search for certifications that occurred in 2010 forward. In addition, Idaho posts their certifications for general permits and Nationwide permits on their website, and is posting individual certifications for Nationwide permits as well.

### **Program fees**

Idaho does not have 401 certification program fees.

### **Important Court Cases**

-In the 1980s there was a court case in Idaho that related to the 401 certification procedural timeline. This was in response to a FERC project at a time when the Department of Environmental Quality had no procedures to notify the public. Some state legislation came out of this that affected state programs, but no official statutes.

-Recently there was a case regarding whether the forest service needs 401 certification. The courts determined that yes, forest service approvals of activities that may result in a discharge to waters of the U.S. need 401 certification.

-Recently there was a case regarding EPA and antidegradation implementation which has led to increased and bolstered antidegradation implementation in the state. This case involved a conservation group that suing EPA for lack of antidegradation implementation in Idaho.

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<sup>i</sup> [http://www.deq.idaho.gov/water/data\\_reports/surface\\_water/monitoring/beneficial\\_uses.cfm](http://www.deq.idaho.gov/water/data_reports/surface_water/monitoring/beneficial_uses.cfm)

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