

## **EPA-REG8-09WPDG**

Project Title: **Enhancing MDEQ 401 Certification and CWA Integration.**

EPA National Priority Area:

- 1) Wetland program planning based on the regulatory core element.**
- 2) Regulation: enhancing wetland protection.**
- 3) Regulation i) improving the effectiveness of compensatory mitigation.**

EPA Regional Priority Areas:

- 1) Evaluation and planning of mitigation in a watershed context**
- 2) Data management.**

Name of Applicant: **Montana Department of Environmental Quality**

Key personnel and contact information:

**Lynda A. Saul, PWS, Wetland Program Coordinator**  
**(406) 444-6652; lsaul@mt.gov**

Geographic Location: **Montana Statewide**

Total project cost and dollars requested:

**\$214,369 Total project cost. \$160,777 EPA funds requested.**

Abstract/project summary:

**This two year project seeks to enhance wetland protection in Montana by strengthening the State's Clean Water Act (CWA) Section 401 Water Quality Certification program for 404 permits. A second objective is to increase coordination and integration of CWA programs at Montana Department of Environmental Quality (MDEQ) to improve the protection of wetland and streams in Montana. The main tasks to be accomplished and final products include: 1) develop formal written guidance for Clean Water Act Section 401 Water Quality Certification conditions for 404 permits, 2) develop more comprehensive conditions to the Corps of Engineers for 5-year re-issuance of Nationwide Permits and for the Yellowstone Special Area Management Plan, 3) evaluate federal and state databases and develop recommendations on databases that could be used or expanded to track 401 certification for 404 permits, and 4) research CWA Section 401 and 404 wetland related complaints and enforcement actions to determine trends and impediments to timely and appropriate enforcement for 401 and 404 violations, and provide recommendations for program improvement and identify outreach opportunities to increase wetland compliance. This proposal is in response to recommendations from a report prepared for MDEQ titled "Increasing Protection for Montana's Wetland and Riparian Areas: Challenges and Opportunities" (ASWM, February 2009). MDEQ management supports the report findings which identify numerous steps to leverage existing authority and strengthen the 401 certification program in Montana and increase Clean Water Act integration at MDEQ.**

## **2. Project Description**

### **a. Description of Project.**

This two year project would respond to several recommendations from the report “Increasing Protection for Montana’s Wetlands and Riparian Areas: Challenges and Opportunities” (ASWM, February 2009) and take steps to integrated wetlands with other aspects of the Clean Water Act at Montana Department of Environmental Quality.

<http://deq.mt.gov/wqinfo/Wetlands/PDFs/JChristieASWMrptFeb09.pdf>

Specifically, complete level 1 recommendations 1, 2, and 5, and research information for level 2 recommendation 5. This project has four outcomes in the form of written documents, new procedures, recommendations, and increased understanding:

- 1) collect institutional knowledge of how DEQ conditions 404 permits and develop formal written guidance for developing CWA Section 401 certification conditions for 404 permits.
- 2) develop more comprehensive conditions to COE for Nationwide Permits and the Yellowstone SAMP for the 5-year national review,
- 3) evaluate databases and develop recommendations on federal or state databases that could be used or expanded to track MDEQ 401 certification for 404 permits, and
- 4) research Section 401, 404 and other wetland related complaints and enforcement actions.

All of these activities are developmental program building activities which would enhance Montana’s ability to protect vulnerable aquatic resources and are outside the scope of existing regulatory requirements. The methodology and approach to this project involve working with the MDEQ’s Water Protection Bureau, Water Quality Planning Bureau, and Enforcement Division, and the COE Montana Regulatory Office and EPA Region 8 to increase the knowledge of CWA permitting, regulation, and enforcement and better integrated wetland into CWA programs. MDEQ Wetland Program staff would be responsible for developing the outcomes and would rely on information in the ASWM report and appendices (for example researching best practices used in other states) as well as other reports such as the Congressional Research Service August 2008 Report for Congress titled “The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments” and EPA OWOW 7/1/08 draft document titled “401 Certification: A Water Quality Protection Tool for Wetlands and Other Waters”. National Research Council “Compensating for Wetland Losses Under the Clean Water Act.”

### **b. Project Tasks.**

#### **Task 1) Develop written guidance for developing Section 401 certification conditions.**

Review existing procedures used by MDEQ Water Management Bureau staff, other Region 8 states/tribes protocols, EPA 401 certification information, and other federal guidance. Research more formal options including Standard Operating Procedures, Best Management Practices and master letters used by other states/tribes and identify options that will work with Montana’s capacity and need. Review and integrate Montana Water Quality Standards information as appropriate. Draft, review, finalize, and seek implementation of written guidance for Section 401 certification conditions.

Task 2) Provide comprehensive written conditions for Nationwide Permits for 5-year review.

Review current state conditions and those associated with the Yellowstone Special Area Management Plan and new proposed conditions from the COE for the 5-year review. Based on guidance developed in Task 1, a comprehensive review of current water quality standards and related water programs, and input from appropriate DEQ staff, develop draft conditions and denials for statewide NWP and Yellowstone Special Area Management Plan NWP to ensure the CWA Section 404 general permits program supports Montana's goals for water resources. Route for review and agency approval. Finalize and respond to COE Federal Register Public Notice by March 2012 deadline.

Task 3) Database recommendations to track Section 401 certifications. Evaluate existing databases and provide recommendations on federal or state databases that could be used or expanded to track Section 401 certification. Review the Corps ORM2 database, STORET, Federal ICIS, Montana Conservation District 310 permit database, and other tools such as Google earth tracking of 310 permits. Research the usefulness of integrating and/or sharing information from multiple water permit programs (401, 310, 318, 404, floodplain). Identify database issues and needs relevant to DEQ Information Technology sections to ensure database support. Provide recommendations for 401 certification tracking database including database costs, long term use and maintenance, potential database benefits, and intended outcomes from improved permit coordination. A database could be developed (or existing database expanded) using future WPDG funding.

Task 4) Research Section 401 and other wetland related DEQ and 404 violations/complaints and compliance/enforcement actions.

One third of the approximately 900 complaints handled by DEQ per year are water related. Review water-related complaint and enforcement data and enforcement procedures; identify DEQ wetland cases and cases referred to COE; and identify trends and impediments to timely and appropriate enforcement for wetlands violations. Research several cases in detail and work with enforcement staff and DEQ and COE/EPA to determine potential options that may be implemented for DEQ to require compliance and improve enforcement when Section 401 certification violations occur. Assess the types of wetland related state water violations to identify common violations and their causes and provide recommendations on training, education and outreach to target the potential violators and minimize future violations.

c. Milestone Schedule. 2 year project. 7/1/10 – 6/30/12

Task 1. 401 certification guidance. (50% of time) 7/1/10 – 6/30/11 (Year 1)

Task 2. NWP conditions. (20% of time) 7/1/11- 3/30/12 (Year 2)

Task 3. Database recommendations. (20% of time) 7/1/11 – 12/31/11 (Year 2)

Task 4. Enforcement review. (10% of time) 1/1/12 - 6/30/12 (Year 2)

MDEQ will complete progress reports as agreed to in Grant Agreement.

d. Project Need. Clean Water Act (CWA) Section 401 water quality certification provides states with a powerful tool to help protect water quality by providing an opportunity to shape the aquatic resource impacts of federally issued permits and licenses. Currently, 49 nationwide permits are issued by the US Army Corps of Engineers to authorize various

types of development projects in wetlands and other water of the United States. Every five years States have an opportunity to review and condition or deny nationwide permits. Due to limited resources, Montana does not have formal guidance or Standard Operating Procedures developed for 401 certification, has not appreciably altered its 401 certification conditions since the SWANC or Rapanos Supreme Court rulings, does not track 401 certification decisions, and does not have water quality standards specifically developed for wetlands to determine CWA compliance and potential enforcement actions. Many states rely on Section 401 certification as their primarily regulatory program for protecting wetlands and other aquatic resources. This project would help Montana develop incremental steps to strengthen the state's wetland and riparian protection program and better integrate CWA programs at MDEQ.

e. National/Regional Priority Area.

This project directly addresses three National Priority areas 1) Wetland program planning based on the regulatory activities including 401 certification core element. 2) Regulation (enhancing wetland protection) and 3) Regulation: improving the effectiveness of compensatory mitigation. This project takes the next steps to develop a more refined 401 certification program which is an important foundation to enhance wetland protection and eventually develop a state comprehensive regulatory strategy and implementation plan. This project improves the effectiveness of compensatory mitigation by developing more comprehensive conditions for 401 certification and researching and determining potential options that may be implemented for MEQ to require compliance and improve enforcement when Section 401 certification violations occur.

This project addresses two Regional Priority areas 1) evaluation and planning of mitigation in a watershed context by improving implementation, monitoring, and performance of the state's 401 certification program. This will help ensure that unavoidable losses of aquatic resources and functions are replaced and that the state's water quality is maintained as a result of federal permits. 2) It also addresses the regional priority of data management by evaluating existing databases and providing recommendations on federal or state databases that could be used or expanded to track Section 401 certification actions. Currently MDEQ does not track its 401 certification responsibilities.

This project directly addresses Montana's Strategic Framework strategic direction #6: research, assess, and provide leadership to develop Montana solutions to protect vulnerable wetlands and other vulnerable aquatic resources. It also addresses #7 Public Policy by tracking, assessing and informing state and national public policy proposals, decisions, and actions that impact wetland and riparian area management, protection, and restoration in Montana.

f. Project Goals and Objectives.

i. Link to EPA Strategic Plan

The project objectives are to enhance the state's ability to protect its wetland and riparian resources, improve water quality, and better integrate CWA programs at MDEQ. Better CWA integration will occur by involving three of DEQ's four Divisions to address the EPA Goal 4 to protect, sustain, or restore the health of people, communities, and

ecosystems using integrated and comprehensive approaches and partnerships. This proposal will also ensure nationwide and other general 404 permits have minimal adverse effects and adequate water quality protection to help achieve EPA's strategic target of "no net loss" of wetlands under the CWA Section 404 regulatory program.

ii. Results of Activities (Outputs)

Outputs that will be delivered from this project include written documents, and new procedures, comments letters, and recommendations. They include: 1) development of formal written guidance for developing CWA Section 401 certification conditions at MDEQ and approach for implementation, 2) development of written comprehensive conditions to the Federal Register/COE for Nationwide Permits and the Yellowstone SAMP for the 5-year review in 2012, 3) development of written recommendations to MDEQ Water Protection Bureau on federal or state databases that could be used or expanded to track MDEQ 401 certification, including estimated resources needed to develop and implement the tracking system, and 4) development of a summary report researching MDEQ's Section 401, 404 enforcement program and recommendations for program improvements including identifying common violations and their causes and provide recommendations on training, education and outreach to target the potential violators and to minimize future violations. Progress will be tracked through quarterly progress reports to EPA.

iii. Anticipated Environmental Improvement (Outcomes)

The results and effects anticipated from undertaking this project include increased coordination and integration of Clean Water Act programs at MDEQ and between staff of the Wetland Program, Water Quality Protection Bureau, Standards Section, and Enforcement Division. Detailed discussions and understandings of each others programs, processes, and goals will need to occur in order to develop the proposal outputs. While many DEQ water programs are making strides in CWA integration, currently, there is little coordination between the Wetland Program and these other MDEQ programs. This research will increase the institutional understanding of regulatory and enforcement programs and increase understanding of how to ensure minimal impacts to water quality from the 404 program. We also anticipate understanding better what is not covered by the 404 program and identify gaps in state protection of wetlands and related water quality threats from wetland impacts.

iv. Established Baseline for Measurement

Regarding the four project tasks, the baselines for measurement include:

- 1) Baseline: no formal written guidance or SOP exists for MDEQ 401 certification.
- 2) Baseline: MDEQ 2007 comments on water quality certification re-issuance of NWP: denied 3 NWP, granted special conditions for 1 NWP, and offered 5 general conditions for NWP.
- 3) Baseline: MDEQ does not track 401 certification decisions.
- 4) Baseline: the MDEQ Wetland Program has not been involved with and does not generally follow complaints or enforcement actions associated with CWA Section 401 or 404.

g. Restoration Demonstration Project Information – Not applicable.

h. Planning Project Information – Not applicable.

i. Staffing Information

Staffing for this project include one half time position for two years for the Montana DEQ Wetland Program Coordinator. This position is currently filled by Lynda Saul, Professional Wetland Science (PWS). Ms. Saul also has a M.S. in Hydrology from University of Montana, a B.S. in Geology from Tulane University, and more than 22 years of experience working for Montana State Government in water resource and natural resource management, including the last 12 years of Wetland Program development. Other MDEQ staff will provide input, review, and coordination on this project described more fully under section 2.k. partnership information.

j. Applicant's Experience

The Montana DEQ was asked by EPA Region 8 to take a leadership role in wetland program development and conservation twelve years ago. The DEQ responded by pursuing EPA Wetland Program Development grant funding annually to meet that request and hired a full time Wetland Program Coordinator. The Wetland Program Coordinator develops the Wetland Program and administers Wetland Program Development Grants. MDEQ added a second wetland staff position in part with EPA Region 8 pilot funding. This proposal further develops and refines the Wetland Program development for the State of Montana by focusing on internal MDEQ program integration. This proposal has the support of MDEQ's Enforcement Division, Water Protection Bureau, and Water Quality Planning Bureau. MDEQ is ready and has the ability to successfully implement the proposed project.

k. Partnership Information

This project will require extensive coordination with: MDEQ Water Protection Bureau (WPB) staff, Jeff Ryan and Chris Romankiewicz., and involvement of WPB Manager, Jenny Chambers; Water Quality Standards manager Bob Bukantis and other Water Quality Planning Bureau staff; and Enforcement Division staff Ed Coleman and Administrator John Arrigo. WPB staff role includes meetings to discuss current 401 certification procedures and related programs to understand NWP conditions and assistance with research on possible database tracking programs. Wetland Program Coordinator will shadow WPB staff and accompany on select field visits to better understand certification and permitting activities and discuss options for more formal guidance, more comprehensive conditions for NWP, and to develop a tracking databases recommendations. Discussions and document review with other water quality staff in MDEQ will ensure re-issuance and implementation of 401 certification minimizes impacts to Montana's waters. COE Montana Regulatory Office and EPA Region 8 Enforcement Division may need to assist with information and understanding. Appropriate MDEQ staff and management will be involved in critically reviewing draft documents and providing comments. Some programs may adopt program changes as a result of this project and rule making may be an option to implement findings from this project.

l. Transfer of Results and Outreach

Internal transfer of results and outreach within MDEQ will be extensive. The project intent is to transfer information, advance the state of knowledge, and improve wetland

protection using permitting, certification, compliance, and enforcement within the MDEQ Wetland Program and other MDEQ water activities and better integrate wetlands into other CWA programs. Outputs will be available on the MDEQ Wetland webpage, sent to Montana Wetland News recipients (approximately 700 individuals), discussed at DEQ, and shared at an Association of State Wetland Managers workshop.

m. Quality Assurance/Quality Control

All Wetland Program Development Grant projects administered by Montana DEQ include QA/QC by the MDEQ Technical and Financial Assistance Bureau, Wetland Program Coordinator. In regard to enhancing MDQE 401 certification and CWA integration, other regulatory agency personnel working with MT DEQ will ensure an additional level of QA/QC.

**3. Budget Narrative**

MDEQ is requesting \$160,777 in funding from EPA for 0.60 FTE/year for the DEQ Wetland Program Coordinator and fiscal staff for a 2-year period starting State Fiscal Year 2010 (July,1 2010) to complete the tasks identified in this proposal. A non-federal contribution of \$53,592 will be documented as in-kind match from a combination of the MDEQ Water Protection Bureau, fiscal staff and management assisting with this project and the Technical and Financial Assistance Bureau Special Administration fund.

Detailed Budget and estimated funding amount for each year and task

Year 1	EPA Request	Match	Year 2	EPA Request	Match
Task 1			Task 2,3,4		
Personal			Personal		
Services	56,501	21,160	Services	56,501	21,995
Consultant	5,000	0	Consultant	5,000	0
Supplies	501	688	Supplies	501	65
Travel	2,153	0	Travel	3,391	0
Other	3,537	335	Other	3,037	233
Indirect	12,313	4485	Indirect	12,342	4631
Total	80,005	26,668	Total	80,772	26,924

Task 1. 401 certification guidance. (50% of time) (Year 1)

Task 2. NWP conditions. (20% of time) (Year 2)

Task 3. Database recommendations. (20% of time) (Year 2)

Task 4. Enforcement review. (10% of time) (Year 2)

In the detailed budget presented above, “other” includes printing, data network, phone, postage and education/training for a nation wide permit course and database course. Consultants include contractual expenses for document review and assistance with written guidance for Section 401 certification conditions and 401 certification database recommendation review.

This budget is a cost effective approach to better develop and integrate wetland protection at MDEQ and develop tools and resources to increase the effectiveness of existing regulatory protection with the State. It builds capacity, institutional knowledge,

and cross program experience at MDEQ. In addition, the outputs and outcomes expected from this project will further prepare the State to increase regulatory protection for wetlands in the future if and when that becomes a viable option.

#### **4. Past Performance**

Montana DEQ manages numerous EPA Region 8 grants. Specific to 104(b)3 Wetland Program Development Grants, MDEQ has successfully received and completed these grants since 1995 with the aim of building a comprehensive Wetland Program for the State of Montana. MDEQ successfully used 104(b)3 funding to lead and collaborative effort involving over 700 Montanans to develop a Wetland Conservation Strategy for Montana which is supported by the Governor. This grant application directly advances the state's Conservation Strategy. MDEQ also administers State and Local government projects funded by these grants and other grants as a coordinated, effective process to build a comprehensive, interrelated program. As required by the EPA Grants, quarterly or biannual progress reports and annual grant reports have been successfully completed for each grant and final grant completion reports have been submitted to EPA. All project accomplishments were reported on time and project tasks were completed within the allotted timeframe. The Wetland Program Coordinator received the 2007 National ELI Wetland Award for State, Tribal and Local Government Program Development for effective program development which is largely attributable to administering the Wetland Program Development Grant program..

#### **5. Optional Attachments**

Please see the attached letters of support and commitment for this proposal.

## Annotated Resume

### Lynda A. Saul

Lynda Saul, PWS, is the State of Montana's Wetland Program Coordinator housed at the Department of Environmental Quality. She leads the state-wide Montana Wetland Council to increase the protection of Montana's wetlands through EPA's core elements of comprehensive state wetlands programs and enhanced coordination. She has built the Wetland Council into an action oriented network involving over 700 participants representing all interests in wetlands issues in Montana. Wetland Program highlights include: mapping, inventory, assessment and net change tracking; coordinated statewide Wetland Program involving federal, state, local, and tribal governments, NGO's and private individuals and businesses; targeted education and outreach to landowners, local decision makers and Realtors; and voluntary and incentive based wetland protection. In 2007, she led the citizens of Montana and the Wetland Council in a year-long strategic planning process to develop a Conservation Strategy for Montana Wetlands. The plan "Priceless Resources: A Strategic Framework for Wetland and Riparian Area Conservation and Restoration in Montana 2008-2012" is supported by the Governor of Montana and the Directors of DNRC, DEQ and DFWP and is being actively implemented in Montana.

In 2006, Saul was appointed to the Governor's Task Force on Riparian Protection and currently serves as Chair. She is the current Vice Chair of the Association of State Wetland Managers and brings a rural western state's perspective to the ASWM board. She serves as MDEQ's representative on the NRCS State Technical Committee, the DFWP Conservation and Restoration Partnership, and numerous other state boards and councils. In 2007 she was a recipient of the Environmental Law Institute National Wetland Award for State, Tribal and Local Program Development for her 10 years of work in building an award winning program in Montana and traveled to Washington DC to receive the award. When in Washington, she discusses wetland protection and management issues with all three of Montana's Congressional Delegation and continues to be active in national policy issues affecting wetlands.

Saul has worked on water issues in Montana since 1986 after completing a B.S. in Geology from Tulane University and a M.S. in Forest Hydrology from the University of Montana. In addition to developing a wetland protection program for Montana, other state-wide work included coordinating the FERC hydropower relicensing of 9 dams on the Madison and Missouri Rivers; negotiating Federal Reserved Water Rights for both Tribal and Federal lands, modeling irrigation use for water supply management, and state-wide watershed planning.

Saul spent 2004 at the EPA Headquarters in Washington, D.C. on a year long job exchange in the Wetland State Strategies and Programs Branch of the Wetlands Division. She returned to her state position in Montana in 2005 as a more effective leader for statewide wetland protection and has doubled the program funding for Montana's Wetland Program.

TO: Lynda Saul, Wetland Program Coordinator

FROM: Jenny Chambers, Water Protection Bureau Chief

DATE: June 23, 2009

SUBJECT: Support and commitment for MDEQ Wetland Grant proposal titled "Enhancing MDEQ 401 Certification and CWA Integration".

---

This memorandum is provided to document support and commitment for the 104(b)3 Wetland Program Development Grant proposal titled "Enhancing MDEQ 401 Certification and CWA Integration".

The Clean Water Act Section 401 water quality certification provides states with a powerful tool to help protect water quality by providing an opportunity to shape the aquatic resource impacts of federally issued permits and licenses. MDEQ's 401 certification program is limited due to the current level of staff and funding and has not appreciably changed in many years. Currently the state's 401 Certification – Dredge and Fill rule describes the process used condition permits, but does not provide guidance, procedures or specific Best Management Practices that are followed. Montana 401 certification relies on successful consensus building with partners during the permit review. The disadvantage in the long term is that institutional knowledge about how to condition permits is not documented and is based on individual staff expertise which may be lost when there is staff turnover in the future.

The Water Protection Bureau supports this proposal and will work with the Wetland Program to understand the 401 certification process and develop written guidance, Standard Operating Procedures and/or master letters to more formally document this program and 401 certification decisions. A review of existing databases and 401 certification tracking needs will also help me manage the work load and determine if the expense and time invested in tracking the 401 certification program is warranted.

The previous tasks will also enable the MDEQ to determine if more comprehensive conditions are needed for the 5-year review on Nationwide Permits. If this grant proposal is accepted, Bureau staff will also help participate in that comprehensive review.

Clean Water Act integration is important to Montana DEQ and this project will help advance our agency goal and better protect Montana's aquatic resources.



Montana Department of  
**ENVIRONMENTAL QUALITY**

Brian Schweitzer, Governor

P. O. Box 200901

Helena, MT 59620-0901

(406) 444-2544

Website: [www.deq.mt.gov](http://www.deq.mt.gov)

U.S. EPA Region 8  
Denver CO

RE: EPA-REG 08 WPDG-2009

Date: June 24, 2009

To whom it may concern,

I am writing this letter to encourage you to fund "Enhancing MDEQ 401 Certification and CWA Integration". This project proposes to accomplish critical "next steps" to improve wetlands protection in the State of Montana, specifically to develop and institutionalize consistent and defensible 401 Certification guidance for use in Montana, and to specifically address wetlands protection in our water quality standards.

We recognize that we can improve how we work together to use the 401 Certification process to improve wetlands and water quality protection in Montana. Often improvement within an agency environment includes providing a clear roadmap in terms of guidance, such as proposed by this project. The timing of the proposed project is fortuitous in that it fits well with Department plans to modify our standards to enhance their effectiveness for wetland protection. The increase in resources that would be provided by funding this project will enhance our commitment to provide water quality standards staff resources for this needed work.

Please contact me if you would like any additional information.

Best regards,

Bob Bukantis  
Supervisor  
Water Quality Standards Section