

Date: Nov. 13, 2020

To: Environmental Quality Commission

From: Richard Whitman, Director
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Subject: Item D: Federal Waters of the U.S. and Clean Water Act Section 401 rules (Informational)
Dec. 3, 2020, EQC special meeting

Why this is important Recently, the U.S. Environmental Protection Agency published substantial revisions to the federal regulations governing both the definition of Waters of the United States (WOTUS) and states' issuance of Clean Water Act Section 401 certifications for federally licensed or permitted projects. These changes to federal law represent a significant departure from previous practices and reduce the historical scope of what waterbodies the federal program applies to. These changes to existing laws curtail the application of multiple federal Clean Water Act (CWA) programs but do not directly affect state requirements protecting water quality. The purpose of this informational item is to outline some of the impacts of the new federal regulations, particularly where the narrowed federal program also limits when the state certifies federal actions as complying with (federally-approved) state water quality standards. This report also outlines some initial steps that DEQ is taking to adapt to these changes.

Background DEQ administers the federal Clean Water Act Section 401 water quality certification program in Oregon. Applicants for federal permits or licenses that authorize actions that may result in discharges to waterbodies are required to get a Section 401 water quality certification from the state. DEQ evaluates projects under Section 401 for both non-federal hydroelectric facilities licensed by the Federal Energy Regulatory Commission, and dredge and fill permits administered by the U.S. Army Corps of Engineers.

A federal Executive Order signed Feb. 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," directed EPA and the Department of the Army to review the definition of WOTUS. On April 21, 2020, EPA and the Army

published the “Navigable Waters Protection Rule” finalizing a revised definition of “waters of the United States” under the Clean Water Act, which became effective June 22, 2020. The new definition creates four categories of regulated waters and includes 12 exemptions. The four categories of WOTUS include:

1. Territorial seas and traditional navigable waters
2. Tributaries of traditional navigable waters
3. Lakes, ponds and impoundments of jurisdictional waters
4. Adjacent wetlands

Waters that are not within these categories are no longer considered a WOTUS. As a result of the new definition, many waterbodies in Oregon are no longer protected by the federal Clean Water Act, including some wetlands, vernal pools, ephemeral streams, and closed basin streams and lakes that do not contribute perennial or intermittent flow to a traditional navigable water.

In response to another Executive Order titled “Promoting Energy Infrastructure and Economic Growth,” EPA published a final rule July 13, 2020, that makes substantive changes to requirements for water quality certification under Clean Water Act Section 401. The new rule became effective Sept. 11, 2020. The final rule addresses almost all aspects of the certification process starting with the required components of the application. The final rule restricts the scope of the state review to “point source discharges into waters of the United States” as opposed to activities related to the proposed project. The rule requires the project applicant to request a pre-filing meeting with the certifying state agency. The rule also allows the federal licensing or permitting agencies, typically FERC and the Army Corps of Engineers, to set a “reasonable period of time” for a state to review, giving the federal agencies broad authority to limit review time. The federal agency can also determine that a state has waived a certification if the certification doesn’t meet procedural requirements. Finally, the rule allows the certifying agency to inspect the facility or activity, prior to operation, to determine whether the discharge from the certified project will violate the certification. Once the certification is incorporated into the federal license or permit, the federal agency is solely responsible for enforcing certification conditions, thus eliminating state oversight of certification conditions.

**DEQ
response**

In response to the federal changes, DEQ staff have been analyzing the impacts and developing approaches and recommendations to ensure protection of state water resources, as directed by the Oregon Environmental Protection Act (House Bill 2250).

The new federal WOTUS definition has resulted in a reduction in the number and types of federal 404 permits for dredge and fill activities, thereby reducing the number of activities and potential discharges DEQ's evaluates and conditions as part of its federal section 401 certification process. Notably, these activities are still prohibited under state law unless permitted by DEQ. Existing state law prohibits causing pollution of any waters of the state or discharging wastes in violation of water quality standards in the absence of authorization from DEQ. DEQ is notifying project applicants for a removal/fill permit when their project may affect water quality. Project developers or their agents may submit a copy of a project application to DEQ for review and evaluation of compliance with state water quality standards to avoid violations of state law, regardless of the federal jurisdictional determination. For projects with no federal jurisdiction, DEQ is issuing Mutual Agreement Orders to applicants, which is substantively similar to the review that would otherwise occur as part of the Section 401 water quality certification.

DEQ staff are drafting templates to expedite application review and issuance of MAOs for activities that would have previously been issued a 404 permit by the Corps and a subsequent 401 certification by DEQ. If the federal Waters of the U.S. regulation remains in effect, DEQ's Section 401 program expects to recommend rulemaking by the commission in 2021 to further develop procedural requirements to certify projects that may impact waters of the state.

**Next steps
and EQC
involvement**

The revisions to both federal regulations are having significant impacts in Oregon, causing confusion in the development community, and threatening to degrade water quality in wetlands, rivers and streams no longer protected by federal law.

In May 2020, Oregon joined a multi-state coalition of 17 states challenging the revised Waters of the U.S. rules. In July 2020, a coalition of 20 states, including Oregon and the District of Columbia filed suit challenging the new Clean Water Act Section 401 rules. Based on the historic and current litigation related to these regulations, it is very likely the revisions to federal definition

of WOTUS and the 401 regulations will remain subject to ongoing litigation with no near term certainty around duration or outcome.

Based on Oregon's more comprehensive water quality laws, DEQ has broad state authority to regulate and protect surface waters that may no longer be under federal jurisdiction, and is evaluating revising its regulations to create a process that ensures that waters of the state remain protected where there are discharges to non-WOTUS surface waters that do not reach a navigable water.

DEQ will continue to develop MAOs for removal/fill projects that have the potential to impact waters of the state to prevent water quality violations for projects without a federal nexus. These MAOs are noticed to the public, to mirror the public notice process that would have otherwise occurred for projects via Section 401 certification.

To address changes to the 401 program, DEQ will continue to coordinate with the United States Army Corps of Engineers and applicants for dredge and fill projects regarding the new requirements of the Section 401 regulations and to maintain a review process that is protective of waters of the state. DEQ is continuing to evaluate how these revisions could affect its approach to certifying FERC licenses for hydroelectric projects.

DEQ will initiate efforts to evaluate and scope a rulemaking effort and will update the commission in early 2021 on potential next steps.

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