

VIA ELECTRONIC MAIL ONLY

STATE OF OREGON

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

PORTLAND AUDUBON SOCIETY,
HUMAN ACCESS PROJECT, NEDC,
WILLAMETTE RIVERKEEPER

Petitioner,

v.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY

Respondent.

**Ross Island Sand & Gravel 401 Water
Quality Certification 1999-1500**

**ORDER ON PETITION FOR
RECONSIDERATION**

The Department of Environmental Quality (DEQ) received a petition for reconsideration from Portland Audubon Society, Human Access Project, NEDC and Willamette Riverkeeper (Petitioners) on December 12, 2022, of the October 13, 2022, order of the Oregon Department of Environmental Quality (“Department” or “DEQ”) issuing a Clean Water Act Section 401 Water Quality Certification (“WQC”) to Ross Island Sand & Gravel (“RISG”). As discussed in this order, DEQ has considered the grounds for reconsideration asserted by the Petitioners and denies the request for reconsideration.

A. Background

1. Statutory Background

ORS 468B.035 grants DEQ authority to perform acts to implement the Clean Water Act in Oregon. Through OAR chapter 340, division 48 the Environmental Quality Commission (EQC) has provided processes and procedures for issuing Clean Water Act Section 401 WQCs in Oregon. On October 13, 2022, DEQ issued a Clean Water Act Section 401 WQC to Ross Island Sand & Gravel.

2. Agency Order at Issue

On October 13, 2022, DEQ provided notice to RISG of DEQ’s WQC. Regulations implementing the Oregon Administrative Procedures Act authorize petitions to reconsider only final agency orders. OAR 137-004-0080. An “order” is “any agency action expressed orally or in writing directed to a named person or persons, other than employees, officers or members of an agency.” ORS 183.310(6). Given that DEQ’s October 13, 2022, WQC was directed to RISG,

and expressed in writing the agency's WQC, the October 13, 2022, WQC is a final order subject to a petition for reconsideration.

B. Request for Reconsideration

Pursuant to ORS 183.484(2) and the Attorney General's Uniform and Model Rules at OAR 137-004-0080, a petition for reconsideration of a final order in other than a contested case may be filed with the agency within 60 calendar days after the date of the order. The Environmental Quality Commission (EQC) has adopted and incorporated the Attorney General's Uniform and Model Rules at OAR 340-011-0009. Petitioner's request for reconsideration was filed on December 12, 2022, within 60 days of the date of the letter notice and therefore was properly filed.

Petitioners raised five concerns related to water quality standards for which they believe that the agency should reconsider its decision. Petitioners also claim that the WQC improperly relies on the issuance of a 1200-C permit and that the WQC does not contain sufficient monitoring requirements. The issues raised by Petitioner are listed and addressed below.

1. Petitioners assert that the WQC violates the antidegradation policy.

The issued 401 WQC does not include specific language or conditions related to antidegradation; however, consideration of the antidegradation policy is an essential component of DEQ's internal review. In completing its review DEQ considered that the project proposed is to conduct in-water reclamation activities for shallow water habitat, emergent wetland and riparian habitat. The nature of these activities is for restorative purposes. The antidegradation rule provides that activities that are intended to restore the geomorphology of a water body need not undergo an antidegradation review so long as the department determines that there is a net ecological benefit to the restoration activity and that the applicant has minimized adverse effects to threatened and endangered species.¹ In this case DEQ determined that the habitat created would provide a net ecological benefit and will be completed in compliance with water quality standards. Regarding minimization of effects on threatened and endangered species, RISG is following the Oregon Department of Fish and Wildlife ("ODFW") in-water work timing for fill placed less than -40 CRD. Fill will also be placed using a tremie tube to minimize disturbance during fill placement. The tremie tube bypasses fish depths in the broader water column. The project is not creating a fish passage barrier and will provide shallow water habitat for aquatic species. Given this, a full antidegradation review was not required for this project. Because DEQ's action was consistent with the antidegradation rule DEQ does not grant reconsideration based on this issue.

2. Petitioners assert that the WQC needs to contain conditions related to the narrative water quality criteria at OAR 340-041-0007(9)-(13).

Petitioner's second issue on which reconsideration is requested asserts that the WQC needs additional conditions to ensure compliance with the narrative criteria. There is no requirement that a WQC contain specific conditions related to the narrative criteria if DEQ has not determined that the project has the potential to result in exceedances of the narrative criteria.

¹ OAR 340-041-0004(5)(a)

For example, OAR 340-041-0007(13) is directed to aesthetic conditions and the proposed action, in-water fill placement for purposes of reclamation, will not create aesthetically offensive conditions. Additionally, there are several conditions included in the WQC issued that help ensure that there will not be violations of the narrative criteria. Condition 17(a) states that each fill event needs a record of the source material, type of material, pre-screening for toxics and pH. Only Class A fill is allowed and is representative of native materials suitable for shallow water habitat. Condition 18 requires visual monitoring of Harmful Algal Blooms. Conditions 21 and 22 address fish protection and aquatic life movements. All these conditions help protect against violations of OAR 340-041-0007(9)-(12). DEQ does not grant reconsideration based on this issue.

3. *Petitioners assert that the WQC needs to contain conditions related to the biocriteria water quality standard.*

There is no requirement that a WQC contain specific conditions related to the biocriteria water quality standard if DEQ has not determined that the project has the potential to result in violations of the biocriteria water quality standard. In this case the proposed action may result in temporary reduction of quality of benthic habitat in project area however this is expected to be temporary and to recover after the reclamation is complete, and therefore, would not significantly degrade the waters. For this reason, DEQ did not include conditions in the WQC specific to the biocriteria water quality standard and DEQ does not grant reconsideration based on this issue.

4. *Petitioners assert that DEQ cannot be reasonably assured that the project will comply with the turbidity water quality standard.*

Condition 23 of the WQC contains turbidity monitoring requirements and restrictions specific to the project activity. This condition is aimed at ensuring turbidity compliance when active in-water fill is occurring. Under its prior WQC, RISG has recorded turbidity readings that exceed 10% above natural stream turbidity, but the turbidity level NTU readings and subsequent actions have complied with the turbidity monitoring conditions of the WQC during in-water fill activity. Based on this condition and information, DEQ is reasonably assured that the project will comply with the turbidity water quality standard and DEQ does not grant reconsideration based on this issue.

5. *Petitioners assert that the WQC does not ensure compliance with the temperature water quality standard at OAR 340-041-0028.*

DEQ does not have evidence indicating that this project will result in violations of the temperature standard. DEQ does not grant reconsideration based on this issue.

6. *Petitioners assert that the WQC improperly relies on the issuance of a 1200-C permit.*

NDPES 1200-C permit coverage is referenced in Condition 11 of the WQC. The condition states that the applicant must comply with its 1200-C permit however, the 1200-C

permit covers activity occurring in upland, and the WQC covers fill occurring in-waters. The condition then lists erosion control measures that must be maintained by the Applicant specific to in-water work, in addition to the upland 1200-C permit. Conditions 11-15 in the WQC provide construction related requirements for the project during construction. Because the WQC contains conditions related to erosion control for the in-water work DEQ does not grant reconsideration based on this issue.

7. ***Petitioners assert that the WQC does not contain sufficient monitoring requirements.***

The WQC contains monitoring provisions sufficient to ensure compliance with water quality standards. Turbidity monitoring is required by the WQC any time in-water work is occurring in the project, which includes the lagoon. Turbidity monitoring requirements in WQCs typically require a compliance point upstream of the project area and a representative point downstream of the project area. Due to the method of fill placement by RISG and the irregularity of placement activity due to the requirements of Class A fill, the compliance and representative turbidity monitoring points in the WQC were determined to provide assurance of compliance. Additionally, pH monitoring is required per Condition 24 of the WQC. Given these monitoring requirements, DEQ does not grant reconsideration based on this issue.

Order

For the reasons discussed above Petitioner's request for reconsideration is denied.

DATED this 9th day of February 2023.


Jennifer Wigal (Feb 9, 2023 09:33 PST)

Jennifer Wigal, Water Quality Administrator
Oregon Department of Environmental Quality.

Notice: Pursuant to ORS 183.484 you may petition for judicial review of this order. Any petition for judicial review of this order must be filed within the 60-day time period specified by ORS 183.484.