#### State of Oregon

Department of Environmental Quality Memorandum

**Date:** Day xx, 20xx

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda item xx, Rulemaking: Caption for Water Quality Certification Procedures for Klamath River Restoration Project

April 25, 2012 EQC meeting

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| **Why this is important** | Existing rules are not clear about how DEQ would evaluate the dam removal project should DEQ need to decide whether or not to certify that the project will comply with water quality standards. |
| **DEQ recommendation and EQC motion** | DEQ recommends that the EQC adopt the proposed Klamath-specific rule clarifying DEQ’s 401 certification procedures for a potential dam removal project, as shown in Appendix A. |
| **Background and need for rulemaking** | The U.S. Secretary of Interior will determine whether the federal government will remove 4 dams on the Klamath River, one of which, the J.C. Boyle dam, is in Oregon. If the J.C. Boyle dam is removed under a federal license or permit, the agency responsible for the project will be required to apply for a water quality certification from DEQ under section 401 of the federal Clean Water Act.  If the Secretary of Interior decides to remove the J.C. Boyle dam, the state of Oregon will be asked to concur with that decision. DEQ counsel recommends that a clear state regulatory pathway is important to enabling Oregon’s Governor to concur with a removal decision. The timing of this rulemaking is based on the expectation that the Governor’s concurrence would be requested in spring 2012. The Secretarial decision has since been delayed and we are uncertain when it will be made.  The proposed rule is needed to clarify DEQ’s policy and procedures for evaluating whether to certify that the removal of J.C. Boyle dam on the Klamath River will comply with water quality standards. DEQ’s current certification rules do not specify how DEQ would evaluate a situation like dam removal, which is expected to cause some short term water quality impacts but result in long term water quality and fish protection benefits.  See the issue paper provided in attachment D for additional information. |
| **Effect of rule** | The proposed rule clarifies DEQ’s authority and intent to allow a time schedule for the dam removal project to comply with water quality standards if DEQ can make the findings specified in the rule based on the information provided by the applicant. The purpose of the time schedule is to provide time for recovery of short term water quality impacts associated with dam removal activities at the J.C. Boyle Dam. The proposed rule requires that dam removal activities will not cause a violation of a water quality standard beyond the end of the period for meeting standards that DEQ would specify in the time schedule and include in the Section 401 water quality certification. In addition, the rule specifies the findings that DEQ must make in order to allow the time schedule and certify the dam removal as a restoration project.  Conditions will be placed in DEQ’s certification to protect water quality to the maximum extent practicable during the dam removal process and to ensure that the long term water quality and fish habitat improvements outweigh the expected short term water quality impacts.  DEQ will only use this rule if the Secretary of the Interior decides that the J.C. Boyle Dam should be removed pursuant to the Klamath Hydroelectric Settlement Agreement (KHSA) and a dam removal agency applies for certification.  The proposed rule will benefit state and federal agencies by clarifying regulatory procedures. It is not anticipated that small businesses or local communities will be affected by the proposed rule. This rule is separate from the federal government’s decision on whether or not to remove the dam and does not affect that decision  See the issue paper provided in attachment D for additional information. |
| **Commission authority** | The commission has authority to take this action under ORS 468.020, 468B.030, 468B.035 & 468B.048 |
| **Key issues** | The advisory committee discussed several issues relevant to the KHSA and future decisions regarding the removal of the dam and DEQ’s issuance of the Section 401 certification, if needed. DEQ and the advisory committee considered these issues as part of their evaluation of the rulemaking options.   1. The Section 401 application process, based on a detailed plan for removal, will be completed only after a decision has been made to remove the J.C. Boyle Dam. 2. The technical issues will have to be evaluated during the Section 401 certification process. Detailed scientific information will not be available until this stage of the process. This rule specifies the findings that DEQ must make at the time of Section 401 certification. 3. Committee members agreed with the DEQ’s stated objective to allow short term impacts in order to facilitate restoration if DEQ can make a finding that the project will achieve long term river improvements that outweigh the short term impacts. 4. Committee members generally agreed with the objective of minimizing water quality impacts during the dam removal process to the maximum extent practical. 5. The KHSA, which includes provisions for the potential removal of the J.C. Boyle Dam, is a contentious issue in the Klamath Basin. 6. PacifiCorp and the Dam Removal Entity (DRE) will benefit from this rulemaking since it will facilitate the administrative process. 7. The Governor supports the KHSA and may need to rely on the rulemaking as part of the State Concurrence. 8. DEQ is not responsible for deciding whether or not to remove the dams. Rather, DEQ’s rulemaking is focused on how to protect water quality to the extent feasible through the Section 401 certification process and to ensure that short term water quality impacts do not present an obstacle to dam removal, if that is the ultimate decision. |
| **Public outreach** | DEQ assemble a local advisory committee that included federal and state agencies, an environmental group, a fishing group, and a county commissioner. The committee provided input on the options evaluated, the issue paper, the proposed rule and the fiscal and economic impact statement. See the issue paper provided in attachment C for additional information.  DEQ accepted public comment for 45 days and held a public hearing in Klamath Falls. Two people attended the hearing and five people submitted public comment. Please see the summary of public comment and agency responses in attachment B. |
| **Next steps** | If the proposed rules are adopted, DEQ will file the rule record with the Oregon Secretary of State. |
| **Attachments** | Proposed rules (redline)  Public comment and agency responses  Hearing Officer’s report  Issue Paper |
| **Available upon request** | Relationship to Federal Requirements questions  Statement of Need and Fiscal and Economic Impact  Land use evaluation statement |

Approved:

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Section: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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