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**Date:** Jan. 10, 2020

**To:** Environmental Quality Commission

**From:** Richard Whitman, Director

**Subject:** Item E: Oregon’s Environmental Protection Act (Informational)  
Jan. 23-24, 2020, EQC meeting

**Why this is important** House Bill 2250 (2019) established an “anti-backsliding” Environmental Protection Act for Oregon. DEQ and the commission have specific obligations to track and consider taking action when federal actions may result in significant weakening of environmental laws in place on Jan. 19, 2017.

**Background of House Bill 2250 (2019)** During the 2019 Legislative Session, the Governor’s Office introduced House Bill 2250 and Governor Brown signed the bill into law in May 2019. The bill requires DEQ and the Oregon Health Authority to regularly assess final changes to federal environmental and public health law to determine whether it results or will result in federal standards or requirements that are significantly less protective of public health, the environment or natural resources than baseline federal standards. In the bill, “federal environmental law” is limited to the Clean Air Act, Water Pollution Control Act, commonly known as the Clean Water Act, or the Safe Drinking Water Act.

When a final change is made that would be significantly less protective than the laws and rules in place on Jan. 19, 2017, DEQ must promptly inform the EQC and recommend actions necessary to continue state implementation of standards and requirements that are at least as protective of public health, the environment or natural resources as the baseline standards. OHA is the regulatory body for the state’s Safe Drinking Water Act, and has a similar obligation to ensure Oregon’s public health is protected.

**EQC involvement** DEQ presented the first update at the Nov. 14-15, 2019, EQC meeting and the commissioners provided feedback on the format of the tracking document and reports. DEQ will present an update on federal actions subject to the provisions of House Bill 2250 at each regular commission meeting. If a qualifying change has occurred, DEQ will include a detailed report on the impacts of that change and make recommendations for EQC action as needed.

**Attachments** A. DEQ tracking of federal environmental actions, since November 2019  
B. WOTUS Report  
C. SAFE Report

Item E: Oregon's Environmental Protection Act  
Jan. 23-24, 2020, EQC meeting  
Page 2 of 2

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**Oregon Environmental Protection Act: Summary Tracker**  
*This document intended for DEQ staff use and is informational only*

**Air Quality:** *Clean Air Act*

*Note: Topics in bold have been updated since the last report to the EQC. Topics with an asterisk (\*\*) are new to this document.*

<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
Hazardous Air Pollutants	For many years, EPA’s policy was that a major source remains subject to major source requirements even if it reduces its emissions after MACT is applied (“Once In, Always In”). EPA has proposed a rule to replace this policy to allow the source to reclassify as an area source after it reduces its emissions below the threshold.	Comment period closed on Nov. 1, 2019.
GHG Emissions from Power plants  <i>Formerly Clean Power Plan, now Affordable Clean Energy Plan</i>	EPA released the final ACE Rule in June 2019. The final rule: <ul style="list-style-type: none"> <li>• Repealed the Clean Power Plan, which was aimed at lowering emissions from the power sector;</li> <li>• Created a new rule for energy efficiency measures that individual sources will need to install;</li> <li>• Updated the foundational implementing rules for existing source emissions guidelines under Clean Air Act Section 111(d), which were promulgated in 1975.</li> </ul>	The new rule became effective Sept. 6, 2019.  <i>EQC received a report Nov 14, 2019.</i>  Note: There is pending litigation associated with this rule.

<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
New Source Review: Project Emissions Accounting	The current New Source Review accounting process studied whether a modification by itself would result in significant emissions increases at Step 1, with no consideration of other decreases. In August 2019, EPA issued a proposed rule that would allow emission decreases from a proposed project at an existing major stationary source to be accounted for at Step 1 of the New Source Review applicability process.	A comment period for the proposed rule ended Oct. 8, 2019.
GHG Vehicle Emission Standards/California's Waiver	EPA and NHTSA release a final rule in which NHTSA determines that California's GHG standards and Zero Emission Vehicle program are preempted under Energy Policy and Conservation Act. EPA additionally withdrew California's waiver to set its own greenhouse gas emissions standards.	<p>EPA published the final rule Sep. 27, 2019, and will be effective Nov. 26, 2019.</p> <p><i>EQC will receive a report January 23, 2020.</i></p> <p>Note: There is pending litigation associated with this rule.</p>
National Vehicle Fuel Efficiency Standards	NHTSA and EPA concurrently propose Safer Affordable Fuel-Efficiency (SAFE) vehicle standards for model years 2021 to 2026, on 8/3/18, to replace the more stringent standards negotiated in 2012 and approved in the 2017 mid-term evaluation.	Comment period closed in October 2018. Waiting on NHTSA and EPA to issue final standards.

<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
Methane Standards for New Oil and Gas Facilities	EPA has published a proposed rollback of methane regulations, which would rescind emissions limits for methane on oil and gas production and processing. It would also cease regulating emissions during transmission and storage of the gas, among other changes.	The comment period will remain open through Nov. 25, 2019. A public hearing took place Oct. 17, 2019.
Mercury and Air Toxics Standards (MATS)	<p>These standards regulate mercury emissions from power plants. Mercury is a powerful neurotoxin with severe impacts to children’s and fetal brain development. Coal-fired power plants are a significant source of mercury. Though Oregon has only one remaining coal-fired plant, the health benefits of this regulation are significant.</p> <p>On Feb. 7, 2019 EPA proposed to rescind the 2016 supplemental finding that it is “appropriate and necessary” to regulate mercury and other hazardous air pollutants emitted by power plants, after considering the cost of regulation, under the Clean Air Act. This finding is the legal foundation for MATS. EPA also proposed that co-benefits should be given less weight than other benefits during a cost-benefits analysis.</p>	The comment period for the proposed rule was open until April 17, 2019, and 495,808 comments were submitted. The Office of Management and Budget is reviewing the Supplemental Cost Finding and Residual Risk and Technology Review and a final rule is expected soon.
Ozone National Ambient Air Quality Standards	The CAA requires EPA to set national ambient air quality standards, NAAQS, for ozone and five other pollutants considered harmful to public health and the environment (the other pollutants are particulate matter, nitrogen oxides, carbon monoxide, sulfur dioxide and lead). In August 2019, EPA issued the Integrated Review Plan for the Review of the Ozone NAAQS.	The current timeline projects release of a draft ISA public comment in the latter half of 2019, a proposed decision in the spring of 2020 and a final decision in Winter 2020/21.

<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
Greenhouse Gas Emissions from Landfills	EPA issued rule on Aug. 26, 2019, to delay implementation of emission guidelines that apply to existing landfills. This rule conflicts with court-ordered schedule of compliance.	DEQ joined multistate coalition challenging rule Oct. 25, 2019. Also seeking to enforce court order separately.  Note: There is pending litigation associated with this rule.
Greenhouse Gas Emissions from Trucks and Tractor Trailers	EPA adopted the standards in 2016, which were challenged by truck manufacturers. EPA is reconsidering the standards, and the challenge has been held in abeyance for over two years while EPA conducts its review.	EPA decision on whether to repeal the standards.  Note: There is pending litigation associated with this rule.
Limitations on Use of Hydrofluorocarbons as Refrigerant Replacement of Ozone-Depleting Substances	EPA issued guidance in April 2018 reducing limitation on use of hydrofluorocarbons , or HFCs, in what is known as the Significant New Alternatives Policy.  EPA’s guidance eliminated all limitations on use of HFCs as alternatives, exceeding a court decision that limited application of the regulations only to entities that had already switched to using HFCs, but not to entities that had not yet started using HFCs.	DEQ joined multistate coalition to challenge the guidance as an illegally promulgated rule.  Note: There is pending litigation associated with this rule.
Wood Stove Emission Standards	EPA issued proposed rule Jan. 14, 2019, to extend the compliance deadlines when new wood stoves must meet stricter certification standards, to control their particulate emissions.  The standards have also been challenged, and that challenge has been in abeyance pending EPA’s reconsideration of the standards.	Waiting on EPA decision on proposed rules.

<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
<p><b>**Heavy-duty Truck “Glider Kit” Rule</b></p>	<p>In 2017, EPA proposed a repeal of the emissions requirements for gliders. In 2018, the EPA announced that it would not enforce the annual cap of 300 gliders per manufacturer until at least 2019. It last withdrew that announcement.</p> <p>On Dec 5, 2019, EPA’s Office of Inspector General released a report finding that the agency did not develop the required cost benefit analysis to assess air quality impacts on children’s health for the proposed Glider Repeal Rule. The agency has agreed to do this analysis should it take any further action on the proposed rule repeal.</p>	<p>Waiting on EPA decision on proposed rules.</p>

**Water Quality:** *Water Pollution Control Act and Safe Drinking Water Act*

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<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
<b>Waters of the United States</b>	<p>The Clean Water Rule defines which streams and wetlands the Clean Water Act protects. It extends Clean Water Act protection to rivers and streams where jurisdiction was previously unclear. In 2018, EPA and Army Corps proposed repealing the rule and returning to the pre-2015 regulations, while they developed a new definition of “waters of the United States (WOTUS).”</p> <p>The proposed rule revisions would have a potentially significant effect on implementation of Clean Water Act programs and implications for state programmatic activities that seek to maintain adequate protections for our water quality resources.</p>	<p>EPA and Army Corps published the final rule repealing the Clean Water Rule and the reinstatement of the pre-2015 regulations on Oct. 22, 2019, effective Dec. 23, 2019.</p> <p><i>EQC will receive a report Jan 23, 2020.</i></p> <p>DEQ provided comments on the proposed new WOTUS definition April 11, 2019.</p> <p>A final rule for a new WOTUS definition is expected in early 2020.</p>
401 Certifications Rulemaking	<p>Pursuant to a Presidential Executive Order, EPA proposed substantial revisions to the federal regulations governing state’s issuance of 401 certifications for federally licensed or permitted projects.</p> <p>The proposed revisions would substantially affect states’ ability to issue meaningful certifications that ensure protection of the state’s water quality.</p>	<p>Rule proposed on Aug. 8, 2019, a comment period for the proposed rule ended Oct. 21, 2019.</p>



<b>Topic</b>	<b>Brief Description</b>	<b>Next Important Action</b>
<b>**Power Plant Effluent Limits</b>	<p>Steam power plant wastewater discharges include arsenic, lead, mercury, selenium, chromium, and cadmium, but current regulations do not contemplate these toxic metals. EPA finalized limitation guidelines in 2016, but there has been extensive litigation surrounding the rule and the later delayed implementation of the rule.</p> <p>EPA has proposed a rule revising the 2015 technology-based effluent limitations guidelines and standards. The proposal contains some exemptions for “high flow” facilities, low utilization boilers, and boilers retiring by 2028.</p>	A comment period on these proposed rules is currently open and will run through Jan 21, 2020.



# Oregon Environmental Protection Act

## Report to EQC:

### Waters of the United States

*HB 2250 of 2019 requires DEQ to regularly assess final change to federal environmental law to determine whether it results or will result in federal standards or requirements that are significantly less protective of public health, the environment or natural resources than baseline federal standards. When that occurs, DEQ must promptly inform the Environmental Quality Commission and recommend actions necessary to continue state implementation of standards and requirements that are at least as protective of public health, the environment or natural resources as the baseline standards.*

#### **Brief Summary**

EPA and the US Army Corps of Engineers have completed the first phase of a 'repeal and replace' approach towards changing the federal definition of 'Waters of the United States' (WOTUS). Federal action published in October 2019 repeals the 2015 Obama Administration WOTUS rule. EPA and the Corps are expected to finalize a rulemaking establishing an amended WOTUS definition in early 2020.

#### **Background**

The federal WOTUS definition established in regulations implementing Clean Water Act is vitally important to the nation's ecological and economic well-being. It sets a baseline for how water quality programs are implemented by state and federal agencies.

In 2015, EPA established a new WOTUS rule addressing definitional ambiguity that had caused significant legal uncertainty regarding which wetlands and waterways are subject to federal jurisdiction under the Clean Water Act. The State of Oregon supported this 2015 WOTUS revision final rule because it was based on extensive science and considered the practical and ecological realities of hydrology, seasonality and interconnected waters.

This 2015 rule was subsequently the subject of extensive litigation. A Trump Administration Executive Order issued in 2017 directs federal agencies to review the WOTUS rule. As a result, EPA initiated two rulemaking processes: one to repeal the 2015 WOTUS rule, and a second to promulgate a new WOTUS definition. The definition determines which waters and wetlands are protected by various Clean Water Act programs.

#### **Final Action**

EPA and the US Army Corp of Engineers published a final rule in October 2019 repealing the 2015 Clean Water Rule: Definition of "Waters of the United States" ("2015 Rule"), which amended portions of the Code of Federal Regulations (CFR), and restores the prior regulatory definition. With this final rule, the regulations defining the scope of federal Clean Water Act jurisdiction revert to the regulations promulgated in 1986/1988 as they existed before the amendments promulgated in the 2015 Rule.

Based on the key considerations described below, DEQ finds that the final rule to repeal the Obama era rule re-establishes a definition that causes considerable legal uncertainty about WOTUS jurisdiction. Ultimately, DEQ finds the current regulatory definition to be less protective of public health, the environment or natural resources than baseline federal standards, as defined in HB 2250 of 2019, and recognize that anticipated\* federal actions could further jeopardize environmental protections based on WOTUS/CWA.

[\*Note: Concurrent to the above action, EPA and the US Army Corps of Engineers proposed revisions to federal definition of Waters of the United States on 2/14/19. The public comment period for their proposed revisions closed in April 2019, and a final rule is pending - anticipated in 2020.]

### **Key Considerations**

This final rule repealing the 2015 WOTUS rule - reverting to the 1986/1988 WOTUS definition for federal water protections – re-establishes a lack of definitional clarity that the 2015 regulation sought to fix and thereby perpetuates practical implementation challenges.

Numerous legal challenges to the repeal are already underway in various jurisdictions. Courts have decided to stay the effect of the decision in some states, meaning that the 2015 rule will remain in effect until court rulings are decided.

A coalition of 14 states, including Oregon, filed suit on Dec. 20 in the U.S. District Court for the Southern District of New York taking the position that the federal action to repeal the 2015 WOTUS regulation violated the Administrative Procedure Act and the Clean Water Act. In addition, a coalition of environmental groups filed a case in October 2019 with the U.S. District Court for the District of South Carolina asking the court to undo the Trump administration’s “arbitrary and unlawful attempt to repeal the protections of the Clean Water Rule.”

With regards to pending revisions to the WOTUS definition, the state of Oregon submitted comments to the EPA and the Corps asserting the state’s position that any rule that replaces the 2015 rule must accomplish the same objectives as the 2015 rulemaking: protecting the chemical, physical and biological integrity of Oregon’s and our nation’s waters. A more restrictive definition of CWA jurisdictional authority would leave many wetlands and streams vulnerable to pollution from sources that may include industrial facilities, runoff from nonpoint source related activities and urban storm water. It could constrain pollution prevention efforts by the Environmental Protection Agency (EPA) for rivers, streams, and lakes. The Army Corps of Engineers (Army Corps), which manages the permitting program for dredge and fill work affecting wetlands would be significantly curtailed, reducing the number of wetlands covered by the permit consideration, opening them up to development and sacrificing wetlands’ flood control and water quality capabilities.

In December 2019, EPA’s Science Advisory Board released a draft report that identifies flaws in the proposed rule revising the definition of “waters of the United States.” The board concluded that “The proposed definition of WOTUS is not fully consistent with established EPA recognized science, may not fully meet the key objectives of the CWA...and is subject to a lack of clarity for implementation. The departure of the proposed Rule from EPA recognized science threatens to weaken protection of

*This report is prepared as required by HB 2250 of 2019.*

the nation's waters...These changes are proposed without a fully supportable scientific basis, while potentially introducing substantial new risks to human and environmental health."

### **Impacts to Oregon**

The impact of the final action repealing the 2015 rule is returning to the definitional ambiguity that had caused significant legal uncertainty regarding federal jurisdiction under the Clean Water Act and originally necessitated additional rulemaking. This ambiguity could be short-lived however, since new rule revisions to the federal definition of Waters of the United States are expected in early 2020.

These revisions are expected to limit the definition of "waters of the United States" as compared with the 2015 Clean Water Rule by excluding ephemeral waters that flow in response to rain and reducing the amount of protected wetlands. The proposed revisions would have a potentially significant effect on implementation of Clean Water Act programs and implications for State of Oregon activities that seek to maintain adequate protections for our water quality resources. The State of Oregon submitted public comments on these proposed revisions in April 2019.

**Recommendation for EQC Consideration:**  Guidance  Legislative  Rulemaking  Litigation  *Other*  
In light of anticipated further federal rule action to promulgate revisions to the WOTUS definition, and pending litigation in response to this final action to repeal the Obama-era WOTUS definition, DEQ recommends no further immediate action at this time. DEQ has been coordinating with ODFW, DLCD, ODA, ODF, DSL, and DOJ in submitting comments for proposed WOTUS rulemaking, and will continue to facilitate a coordinated response for potential action in response to pending rule announcements.

*This report is prepared as required by HB 2250 of 2019.*



# Oregon Environmental Protection Act

## Report to EQC: EPA and NHTSA Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks

### Brief Summary

The Environmental Protection Agency (EPA) and the Department of Transportation's National Highway Transportation Safety Administration (NHTSA) proposed rules to rollback fuel economy and greenhouse gas emission standards for automobiles and light duty trucks and to withdraw California's waiver to establish and implement its own motor vehicle emission standards.

### Background

The federal Clean Air Act preempts all states, except for California, from establishing their own motor vehicle emission standards. Section 177 of the Act allows states to adopt California's emission standards if they choose to do so. Oregon, including 12 other states, (Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, and Washington) and the District of Columbia have adopted California's emission standards. These governments comprise more than one-third of the new car market. Oregon has been a Section 177 state since 2005, as it recognized the need to address pollution from vehicles.

Since 2012, the Obama Administration, the State of California, and the major automakers have agreed on a single national program that regulates greenhouse gas and fuel efficiency standards from all light duty vehicles with stringent emission standards. This harmonized standard provided regulatory certainty for automakers and lowered costs to consumers for the last seven years. In August 2018, the Trump Administration proposed rules to freeze the federal light duty vehicle GHG standards for model years 2020 through 2026 leading to an increase of 3.8 billion tons of CO<sub>2</sub>eq through 2050.

### Final Action

On September 27, 2019, EPA and NHTSA published a final rule in the federal register, which determined that California's GHG standards and Zero Emission Vehicle program are preempted under the Energy Policy and Conservation Act and revoked California's waiver to set more stringent vehicle emission standards, specifically regarding its program's greenhouse gas emission standards and Zero Emission Vehicle (ZEV) program. That rule became effective November 26, 2019. However, EPA and NHTSA have not yet finalized its proposed rule to rollback the national fuel economy and greenhouse gas emission standards, and it is unknown when the agencies will finalize the rule. It is also unclear whether the revocation impacts current model years or those beginning in 2021.

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DEQ finds that if EPA and NHTSA finalize the rule, it will be significantly less protective of public health, the environment or natural resources than baseline federal standards, as defined in HB 2250 of 2019.

### **Key Considerations**

The revocation of California's waiver is unprecedented, as no administration has ever revoked a state's authority to regulate its own air quality in the past. It affects not only California but also the other 13 Section 177 states that have adopted California's standards. The action affects states' ability to enforce its tailpipe GHG standards and also interferes with its ability to enforce the zero-emission vehicle (ZEV) mandate, which requires automakers to manufacture and deliver a certain percentage of zero emission vehicles to ZEV states. In response, Oregon and 22 other states have filed a lawsuit suing the federal administration over its revocation of California's waiver.

Additionally, the federal government and California misalignment has raised concerns by the automakers regarding the regulatory uncertainty of potentially having two different standards and having to manufacture two different automobiles for the US market. The uncertainty also impacts the manufacturers' investment in research and technology.

### **Impacts to Oregon**

Oregon has an aggressive long-term GHG emission reduction goal: 80% below 1990 levels by 2050. The transportation sector is the single largest source of GHG emissions – comprising nearly 40% of statewide emissions and rising. To meet Oregon's climate goals, the approximately 30 million tons of GHG reductions that come from the low and zero emission components of the California standards through 2035 is critical. While these standards focus on reducing GHGs, they also decrease criteria pollutants, such as ozone and air toxics which Oregon relies on to meet the National Ambient Air Quality Standards and state air toxics benchmarks.

**Recommendation for EQC Consideration:**  Guidance  Legislative  Rulemaking  Litigation  Other  
DEQ recommends the following:

- The agency and commission provide technical support to the Attorney General and Department of Justice in their pursuit of litigation challenging the revocation of California's waiver.
- The agency continue to implement the ZEV mandate to provide regulatory certainty and ensure the associated environmental and public health benefits are realized in Oregon.
- The agency report back to the commission when EPA and NHTSA finalize their revised emissions standards.

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