

State of Oregon
Department of Environmental Quality

Memorandum

Date: March 30, 2012

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item J, Action item - Rulemaking: Water quality certification procedures for Klamath River project rulemaking
April 25-27, 2012 EQC meeting

Why this is important Existing rules are not clear about how DEQ would evaluate a dam removal project should DEQ need to certify whether 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 attachment A.

Background and need for rulemaking The U.S. Secretary of Interior will determine whether four dams on the Klamath River should be removed, 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 dam removal entity 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 that the J.C. Boyle dam should be removed, the state of Oregon will be asked to concur with that decision. DEQ counsel recommends that a clear state regulatory pathway for future state permitting and 401 certification is important to the state's determining whether to concur with a removal decision. The initial timing of this rulemaking was based on the expectation that the determination and request for state concurrence would occur in spring 2012. The Secretarial decision has since been delayed until related congressional action.

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 will comply with water quality standards for the Klamath River. DEQ's current certification rules do not specify how DEQ would evaluate a project like dam removal that, when it occurs, will cause some short-term water quality impacts but may result in long-term water quality and fish protection benefits.

Please 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 makes the findings specified in the rule. 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 DEQ conclude that dam removal activities will not cause an exceedance of water quality standards beyond the period for meeting standards specified in the time schedule. That conclusion would be based on information provided by the applicant, DEQ's evaluation and public comment. The time schedule would be included in the water quality certification.

DEQ would place conditions in the certification to protect water quality to the maximum extent practicable during the dam removal and to ensure that the expected long-term water quality and fish habitat improvements outweigh the 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 and a dam removal entity applies for certification.

The proposed rule would 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 whether the dam should be removed and does not affect that decision.

Please see the issue paper provided in attachment D for additional information.

Commission authority The commission has the authority to take this action under ORS 468.020, 468B.030, 468B.035 and 468B.048

Key issues The primary issue in developing this rule was to determine the regulatory mechanism by which DEQ could determine whether to certify a dam removal project that may cause some short-term water quality impacts. DEQ and the stakeholders DEQ consulted agree that there should be a regulatory pathway to allow the project to proceed if DEQ concludes that the long-term water quality benefits will outweigh any short-term impacts. Through discussions with legal counsel, other states and EPA, DEQ determined that it can legally provide a time

schedule in the certification by which water quality standards must be met. DEQ finds this is the best approach for this type of restoration project, where the water quality impacts are not from an NPDES-permitted point source. The proposed rule clarifies DEQ's authority and intent to use a time schedule should a certification for the Klamath dam removal be requested and should DEQ decide it will grant the certification based on the findings specified in the rule.

The advisory committee discussed several issues relevant to the Klamath Hydroelectric Settlement Agreement, future decisions regarding the removal of the dam and DEQ's Section 401 certification process. DEQ and the advisory committee considered the following issues in considering options and developing the proposed rule:

1. The Section 401 application, based on a detailed plan for removal with specific mitigation measures, will be submitted only after a decision has been made to remove the J.C. Boyle Dam.
2. Technical issues regarding detailed plans to minimize or mitigate water quality impacts 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 Klamath Hydroelectric Settlement Agreement, which includes provisions for the potential removal of the J.C. Boyle Dam, is a contentious issue in the Klamath Basin.
6. This rulemaking will facilitate the administrative process related to DEQ's interactions with the dam removal entity, which is the designated entity with the responsibility to remove the dams. That entity has not been selected yet.
7. The governor supports the Klamath Hydroelectric Settlement Agreement and may need to rely on this rule to support the state's concurrence.
8. DEQ is not responsible for deciding whether or not to remove the dams. Rather, DEQ's rule 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 the U.S. Department of Interior decides the J.C. Boyle Dam should be removed.

Public outreach DEQ assembled a local advisory committee that included federal and state agencies, an environmental group, a fishing association 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. Please see the issue paper provided in attachment D 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 commission adopts the proposed rule amendment, DEQ will file the rule with the Oregon Secretary of State. Because EPA approval is not required, the rule will be effective as of the Secretary of State filing date.

Attachments

- A. Proposed rules (redline)
- B. Public comment and agency responses
- C. Hearing Officer's report
- D. Issue Paper: Water Quality Certification Procedures for Klamath River Restoration Project
- E. Relationship to Federal Requirements questions
- F. Statement of Need and Fiscal and Economic Impact
- G. Land use evaluation statement

Approved:

Division: _____

Section: _____

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DEPARTMENT OF ENVIRONMENTAL QUALITY

WATER POLLUTION

DIVISION 41

WATER QUALITY STANDARDS: BENEFICIAL USES, POLICIES, AND CRITERIA FOR OREGON

Basin-Specific Criteria (Klamath)

340-041-0185

Water Quality Standards and Policies for this Basin

(1) pH (hydrogen ion concentration). pH values may not fall outside the following ranges:

(a) Fresh waters except Cascade lakes: pH values may not fall outside the range of 6.5-9.0. When greater than 25 percent of ambient measurements taken between June and September are greater than pH 8.7, and as resources are available according to priorities set by the Department, the Department will determine whether the values higher than 8.7 are anthropogenic or natural in origin;

(b) Cascade lakes above 5,000 feet altitude: pH values may not fall outside the range of 6.0 to 8.5.

(2) Temperature. From June 1 to September 30, no NPDES point source that discharges to the portion of the Klamath River designated for cool water species may cause the temperature of the water body to increase more than 0.3°C above the natural background after mixing with 25% of the stream flow. Natural background for the Klamath River means the temperature of the Klamath River at the outflow from Upper Klamath Lake plus any natural warming or cooling that occurs downstream. This criterion supersedes OAR 340-041-0028(9)(a) during the specified time period for NPDES permitted point sources.

(3) Total Dissolved Solids. Guide concentrations listed below may not be exceeded unless otherwise specifically authorized by DEQ upon such conditions as it may deem necessary to carry out the general intent of this plan and to protect the beneficial uses set forth in OAR 340-041-0180: main stem Klamath River from Klamath Lake to the Oregon-California Border (river miles 255 to 208.5): The specific conductance may not exceed 400 micro-ohms at 77°F when measured at the Oregon-California Border (river mile 208.5).

(4) Minimum Design Criteria for Treatment and Control of Sewage Wastes:

(a) During periods of low streams flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 20 mg/l of BOD and 20 of suspended solids or equivalent control;

(b) During the period of high stream flows (approximately November 1 to April 30): A minimum of secondary treatment or equivalent control and unless otherwise specifically authorized by the Department, operation of all waste treatment and control facilities to maximum practicable efficient and effectiveness so as to minimize waste discharge to public waters.

(5) Time Schedule for Dam Removal.

(a) DEQ may issue a 401 Water Quality Certification for the federal license or permit authorizing the removal of J.C. Boyle Dam on the Klamath River that includes a time schedule for compliance with water quality standards, if DEQ makes the following findings:

(A) The dam removal and its associated water quality impacts will be of limited duration;

(B) The dam removal and related restoration activities will provide a net ecological benefit;

(C) The dam removal will be performed in a manner minimizing, to the maximum extent practicable, adverse impacts to water quality, threatened and endangered species, and beneficial uses of the Klamath River; and

(D) The dam removal, by the end of a specified time schedule, is not expected to cause an exceedance of a water quality standard set forth in this Division.

(b) Any 401 Water Quality Certification issued by DEQ for removal of J.C. Boyle Dam must:

(A) Be based on an application, evaluation, and public participation complying with OAR Chapter 340 Division 48; and

(B) Contain conditions ensuring that the dam removal:

(i) will be performed in accordance with interim milestones and a time schedule specified in the certification;

(ii) will be performed in a manner that, to the maximum practicable extent, minimizes adverse impacts to water quality, threatened and endangered species, and beneficial uses of the Klamath River (including the use of best practices and interim and post-removal protection, mitigation, and monitoring measures); and (iii) will not cause an exceedance of a water quality standard set forth in this Division by the end of the maximum period for meeting standards specified in the certification.

Stat. Auth.: ORS 468.020, 468B.030, 468B.035 & 468B.048

Stats. Implemented: ORS 468B.030, 468B.035 & 468B.048

Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 1-2007, f. & cert. ef. 3-14-07

Summary of public comment and agency response

Title of rulemaking: Water Quality Certification Procedures for Klamath River
Restoration Project

Prepared by: Steve Kirk

Date: Feb. 23, 2012

Comment period DEQ held a public comment period Nov.16 through Dec. 15, 2011. DEQ held a public hearing Dec. 6, 2011, in Klamath Falls. Two people attended, no one presented oral comments and one person submitted written comments prior to the hearing.

Organization of comments and responses Summaries of individual comments and DEQ's responses are provided below, and summarized in categories. Those who provided each comment are referenced by number. A list of commenters and their reference numbers follows the summary of comments and responses.

| Summary of comments and agency responses | |
|---|--|
| Comment 1 | Removal of J.C. Boyle Dam would cause many legal and financial problems. Oregon should keep JC Boyle Dam intact. (C-1) |
| Response | DEQ's rule is separate from the federal government's decision on whether or not to remove the dam and does not affect that decision. The purpose of the proposed rule is to clarify DEQ's policy and procedures for evaluating whether the proposed dam removal complies with water quality standards, and for issuing a water quality certification should we receive an application. As described in the issue paper supporting this rulemaking, a Clean Water Act Section 401 certification is required for any federal permit or license that may result in a discharge to waters of the state. DEQ expects that such a permit may be required if the federal government decides that the dam will be removed. |
| Comment 2 | Please remove J.C. Boyle Dam on the Klamath River. (C-2, C-3) |
| Response | See the response to comment 1 above. |
| Comment 3 | Consider not only the factors you mentioned, but the direct effect on temperature on all of those, and consider that although summer can have small amounts of water come through, the heat of the water being released may be quite short of DO because of its heat load and the relative BOD by the nature of the aquatic life behind the dam being artificially warmed by the deepness of the thermal bath before the dam. (C-4) |

| | |
|------------------|--|
| Response | DEQ agrees that it will need to evaluate the impacts of the dam removal on water temperature and dissolved oxygen. The rule requires DEQ to consider such information at the time it develops and issues its water quality certification. At that time, DEQ will evaluate whether data and information support a conclusion that there will be long-term water quality benefits from the dam removal. |
| Comment 4 | Both PCFFA, and our sister organization, the Institute for Fisheries Resources (IFR), strongly support the proposed rule in its current proposed form. There is no doubt that removal of J.C. Boyle Dam will have some adverse short-term water quality impacts, particularly with the release of some of the sediments currently retained behind the dam. The proposed rule, however, makes it clear that if such impacts are of a short duration, and that restoration of the river will demonstrably provide “a net ecological benefit” in the longer-term, and that anticipated adverse impacts will be minimized to the maximum extent practicable, that such a 401 Certification would be given. This is a very common-sense criteria, and we fully support that approach. (C-5) |
| Response | DEQ acknowledges this comment and support for the proposed rule. |

| List of commenters and reference numbers | | | | |
|---|---------------------|--|--|-------------------------|
| Reference Number | Name | Organization | Address | Date on comments |
| C-1 | James R. Ottoman | Citizen | 3910 Mazama Drive Klamath Falls, OR 97632 | Dec 6, 2011 |
| C-2 | Greeley Wells | Citizen | 5253 Carberry Creek Rd Jacksonville, OR 97530-9308 | Nov 1, 2011 |
| C-3 | Stuart Phillips | Citizen | Email only | Nov 1, 2011 |
| C-4 | Christiana Thompson | Citizen | Email only | Nov 28, 2011 |
| C-5 | Glen Spain | Pacific Coast Federation of Fishermen's Associations | P.O. Box 11170 Eugene, OR 97440-3370 | Dec 14, 2011 |

State of Oregon
Department of Environmental Quality

Memorandum

Presiding Officer's Report

Date: Jan. 10, 2012

To: Environmental Quality Commission

From: Eric Nigg

Subject: Presiding Officer's Report for Rulemaking Hearing
Title of Proposal: Water Quality Certification Procedures for
Klamath River Restoration Project

Hearing date and time: Dec. 6, 2011, 6 p.m.

Hearing location: College Union, Oregon Institute of Technology, Klamath Falls

DEQ convened the hearing at 6 p.m. and closed it at 6:14 p.m. DEQ staff invited participants to sign registration forms if they wished to present comments, and advised them that DEQ was recording the hearing. Eric Nigg explained the rulemaking proposal and procedures for the hearing.

Two people attended, no one testified and one person, James Ottoman, submitted written comments to the presiding officer prior to the hearing.



Issue Paper: Water Quality Certification Procedures for Klamath River Restoration Project

By: Steve Kirk and Debra Sturdevant

March 2012



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Chapter 1. Introduction and Background

Introduction

The Klamath Hydroelectric Settlement Agreement (KHSA), negotiated by Klamath River stakeholders includes the removal of the J.C. Boyle Dam. The Department of Environmental Quality is proposing a rule outlining policy and procedures for evaluating whether to certify the dam removal under section 401 of the Clean Water Act if an application is submitted. To certify the project, DEQ must be able to conclude that the project will comply with Oregon's water quality standards. This issue paper provides background information, discusses the basis and rationale for the proposed rule, and describes the process DEQ used to develop the proposed rule.

Background

The Secretary of Interior is anticipated to determine whether or not to remove the J.C. Boyle Dam in spring or summer 2012. If the determination is affirmative, the state has 60 days to concur. The KHSA states: "each State shall consider, in its discretion and independent judgment, whether: (i) significant impacts identified in its environmental review can be avoided or mitigated as provided under state law; and (ii) Facilities Removal will be completed within the State Cost Cap.

Dam removal activities often result in short-term degradation of water quality but provide long-term water quality and/or fish habitat improvements. In the Klamath River, dam removal is expected to result in the release of sediments with potential associated exceedances of water quality criteria, including dissolved oxygen, pH and turbidity for a limited time, according to the draft environmental impact statement prepared by the U.S. Department of Interior Bureau of Reclamation (September 2011). However, the proposed dam removal is expected to benefit water quality and cold-water fish, according to the draft environmental impact statement. If the project meets this objective, it would meet the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Purpose and Need for Rulemaking

The purpose of the proposed rule is to clarify DEQ's policy and procedures for evaluating whether or not to certify that the dam removal will comply with water quality standards. The Secretary of Interior will decide whether or not the J.C. Boyle dam should be removed as part of Klamath River restoration efforts. DEQ's current rules are not clear as to how DEQ would evaluate a project, such as dam removal, that is expected to result in some unavoidable short term water quality impacts in order to realize long term water quality and fish habitat (beneficial use) improvements. The proposed rule clarifies DEQ's intent and authority to provide a time schedule in the Section 401 certification, which will allow time for the project to comply with water quality standards, if certain findings are made. The proposed rule would require DEQ to protect water quality to the maximum extent practicable during dam removal. It is also intended to facilitate state concurrence by demonstrating a regulatory pathway to ensure water quality compliance, should the U.S. Secretary of Interior determine that the dam should be removed.

Objectives

The objectives of the proposed rule are to protect water quality to the maximum extent practicable during removal of the J.C. Boyle Dam on the Klamath River, ensure that long term ecological benefits outweigh short term impacts, and that long term water quality improvements occur in a timely manner. The proposed rule facilitates DEQ's ability to include conditions in the Section 401 certification to ensure that these objectives are met.

Process

DEQ formed and consulted with a local advisory committee while developing these rules. The committee provided input on the options evaluation and the proposed rule language. The committee's scope did not include discussing dam removal or the specific water quality conditions to be included in a future Section 401 certification for the project. See Chapter 4 below for more information about the advisory committee discussions. DEQ also informed statewide environmental stakeholder groups about the rule development.

DEQ had multiple discussions with neighboring states and EPA to learn about possible regulatory pathways to dam removal and to evaluate the options. DEQ sought to understand how California is addressing the regulatory issues and concurrence because the Klamath settlement includes dam removals in both Oregon and California. DEQ's recommended rule is consistent with California's proposed approach.

This rulemaking used Oregon's standard public notice and comment process and provided a 45 day public comment period and a public hearing. Stakeholders could also attend the public advisory committee meetings, and follow DEQ's website updates.

Chapter 2. Approaches Used for Other Dam Removal Projects

Several dam removal projects in Oregon, Washington and California have been completed or are in the process of developing regulatory approaches in order to achieve long-term river and fisheries restoration. The following is a summary of projects and approaches used to facilitate Section 401 certification.

Powerdale Dam, Hood River, OR – The Section 401 certification was based, among other things, on compliance with the water quality turbidity standard that allows limited duration exceedances. The project was not expected to cause other water quality standards exceedances.

Marmot Dam, Sandy River, OR – The Section 401 water quality certification relied on compliance with the turbidity and anti-degradation standards, and was not expected to cause other water quality standards exceedances.

Elwah and Condit Dams, Washington - The Washington Department of Ecology used three approaches to facilitate Section 401 certification for these two projects: a habitat restoration provision (WAC 173-201A-300(3)), a short-term modification provision (WAC 173-201A-410(3)), and an existing compliance schedule rule (WAC173-201A-510).

The Department of Ecology adopted the habitat restoration and short-term modification rules in 2003 to facilitate issuing section 401 certifications for the Elwha and Condit Dam removal projects. Ecology submitted these rules to EPA for review and approval. In 2007, EPA declined to take action on the habitat restoration provision, finding that the provision was not a "water quality standard" as defined under the Clean Water Act. In 2008, EPA declined to take action on the short-term modification provision for the same reason. EPA suggested in a subsequent communications that Washington could use the rule as "another appropriate requirement of state law" in Section 401 certifications. In 2005, EPA declined to take action on the compliance schedule rule as a water quality standard. Following this 10-year process, Ecology used the existing compliance schedule rule to issue Section 401 certification for the Condit project.

Copco 1&2 and Iron Gate Dams, California North Coast Regional Water Quality Control Board
The board is developing plan amendments to address aquatic system restoration and its role as a water quality protection tool. The proposed restoration policy includes:

- A definition of aquatic system restoration,
- New or revised prohibitions designed to support aquatic system restoration,
- Criteria for exempting certain aquatic system restoration projects from prohibitions and permitting temporary exceedances of certain water quality objectives, and
- Implementation guidelines for aquatic system restoration project construction and a strategy to coordinate the review and approval of such projects with other resource protection agencies.

As of the time of this document preparation, EPA Region 9 is not expected to regard California's proposed restoration policy as a water quality standard, which would obviate the need for EPA approval.

Chapter 3. Approaches Considered

Introduction

DEQ identified the following approaches for evaluating the removal of the J.C. Boyle Dam under Section 401 of the Clean Water Act: compliance schedules, variances or a project-specific restoration rule. DEQ's objective is to allow unavoidable limited-duration exceedances of some water quality standards during the dam removal process if we conclude that the project will result in long-term water quality and fish use benefits. Existing rules do not clearly address this circumstance.

DEQ determined that a narrow, targeted rule would be the best regulatory path after considering whether the rule should apply to dam removal statewide. DEQ decided to develop the rule specifically for removal of the J.C. Boyle Dam for the following reasons:

1. A short timeline. The state expects to be asked to concur or not concur with the Secretarial Determination regarding removal of the dam in the spring or summer of 2012, or soon thereafter. A rule applicable statewide would require a more comprehensive effort including considerations for the variety of situations that could arise throughout the state.
2. A narrow application provides more certainty about the circumstances under which the provision will be applied and how it will work.

Compliance Schedule Options

1. Use Existing Compliance Rules

DEQ has an existing compliance schedule rule and other provisions that provide some implementation timing flexibility for certain sources and parameters:

OAR 340-041-0061(16) Compliance schedules. In a permit issued under OAR 340, division 045 or in a water quality certification under OAR 340, division 48, the department may include compliance schedules for the implementation of effluent limits derived from water quality criteria in this division. A compliance schedule in an NPDES permit is allowed only for water quality based effluent limits that are newly applicable to the permit and must comply with provisions in 40 CFR § 122.47 (including the requirement that water quality criteria must be achieved as soon as possible).

OAR 340-041-0028 (12) (h) (B), in part, Implementation of the Temperature Criteria: Each plan must include a description of best management practices, measures, effluent trading, and control technologies (including eliminating the heat impact on the stream) that the nonpoint source intends to use to reduce its temperature effect, a monitoring plan, and a compliance schedule for undertaking each measure.

OAR 340-041-0036, in part, Turbidity Criteria:

Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

1. Emergency activities: Approval coordinated by the Department with the Oregon Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare.

Advantages: Using the existing compliance rule has the following advantages:

- DEQ could interpret this rule to authorize the agency to certify the project with a compliance schedule or conditions in the certification related to temperature or turbidity.
- Would not require rulemaking.

Disadvantages: Using the existing compliance rule has the following disadvantages:

- Potential argument that compliance schedules should not be used to allow water quality exceedances. OAR 340-041-0061(16) most clearly applies to point sources in NPDES context; its application to nonpoint sources is unclear. Discharges during dam removal are not considered a point source and will not likely require an NPDES permit.
- The project is expected to have short term water quality standards exceedances for parameters other than temperature or turbidity that are not specifically addressed by current rules.

2. Amend Rules to Allow Compliance Schedule for Klamath Dam Removal 401 Certification

DEQ also considered amending the existing compliance schedule rule to clarify that a compliance schedule could be included in a Section 401 certification for the Klamath River dam removal. The existing compliance schedule rule clearly authorizes the use of compliance schedules for NPDES permits. Under this option the rules would be amended to clarify that a compliance schedule could also be used in Section 401 certifications for dam removal projects and that they would include specific conditions and requirements, work schedule, milestones and date when water quality standards will be met. These conditions and requirements, as part of the Section 401 certification, would become conditions of the federal permit regulating the dam removal (e.g. U.S. Army Corps of Engineers permit issued under the Clean Water Act Section 404).

The evaluation and conditions of the Section 401 certification for removal of the J.C. Boyle Dam would include:

- The time period during which water quality standards may be exceeded and a description of the expected exceedances
- A demonstration of the net ecological benefit
- Conditions specifying any additional actions the project will take to minimize the spatial and temporal adverse impacts to water quality, threatened and endangered species, and beneficial uses
- Reasonable assurance that water quality standards will be met by the end of the compliance schedule

Advantages: The rule would apply to a range of restoration or dam removal projects.

Disadvantages: Recent litigation has challenged DEQ's use of compliance schedules in NPDES permits. DEQ entered into an agreement with the litigants and developed guidance regarding the implementation of compliance schedules in NPDES permits. Revising the existing compliance schedule was not anticipated in the compliance schedule settlement agreement discussions.

- Using the term “compliance schedule” and trying to include the concept for 401 certifications in the same rule could create confusion. While the general purpose is the same, the procedures and findings for implementing the provision in a 401 would be somewhat different than they are for NPDES permits.
- While EPA approved DEQ's compliance schedule rule for NPDES permits as a water quality standard, EPA does not consider a time schedule rule for 401 certifications to be a water quality standard that they would need to approve.

Variance Rule Options

DEQ may grant variances to point sources for one of six criteria specified in both federal and state water quality standards regulations. Because the dam removal project is not a permitted point source and because none of the six criteria for allowing a variance clearly fit the dam removal circumstance, DEQ concludes that the agency should not rely on the state's existing variance rule to certify the Klamath dam removal.

DEQ considered the following options to allow a variance to be used for a dam removal certification:

- Amend the existing variance rule
- Adopt a Klamath-specific variance rule

1. Amend the Existing Variance Authorizing Rule

DEQ considered how the existing rule could be expanded to apply to a dam removal project, which is considered a nonpoint source and requires a Section 401 certification rather than an NPDES permit. The amendments would need to authorize DEQ to grant variances for non-permitted sources and include restoration as a reason to justify a variance, based on a finding that the project will cause unavoidable short term standards exceedances, but will result in long term water quality and use protection improvements. Under this option, the variance for the Klamath dam removal project would be granted through a second, separate action at the time of Section 401 certification and would require EPA approval.

Advantages: DEQ would expect EPA to review the proposed rule as a water quality standard and the rule may apply to other restoration projects.

Disadvantages:

- If DEQ pursued expanding the existing variance provision to include nonpoint restoration projects requiring a Section 401 certification, EPA would likely need to approve both the amended rule and the project-specific variance. This approval process

would extend considerably the timeline and introduce additional uncertainty to the dam removal administrative process.

- The amended variance rule would require EPA approval for dam removal, which would expand EPA's role in the Section 401 certification process, which is the state's authority.

2. Adopt a Water Body Variance or Temporary Standard

DEQ considered whether a variance would be the appropriate regulatory tool for dam removal. However, this approach would require two rulemakings. First, DEQ would need to revise the variance procedures rule to clarify that variances can be granted for dam removal. Then, a second rulemaking would be required at the time of project certification to adopt a Klamath dam removal variance that specifies the requirements and conditions for the project. Both rules would require EPA approval.

DEQ also considered the option of identifying a temporary standard for the Klamath River. DEQ would specify a limited time period, during which the underlying beneficial uses and water quality standards would be unattainable and temporary standards would be applicable. This approach requires a justification as to why the current standards are not expected to be attainable during this time and a description of why the temporary uses and criteria are the best that will be attainable.

Advantages:

- Provides a project-specific variance or temporary standards for all affected parameters.
- Requires one rulemaking.

Disadvantages:

- A water body variance or temporary standard would require EPA approval, which would add significant time to the process.
- This option may require more specific and quantitative information on the nature and duration of water quality standards exceedances at the time of the rulemaking, which is not likely to be available in the near term. In the absence of this information, additional DEQ action and EPA oversight may be required at the time of certification. This would add costs and even more importantly, unacceptable uncertainty.
- The information needed to support such an approach has not been developed, including a decision by the Secretary of the Interior that the dam removal should occur. As such, this approach could be premature.

Klamath-Specific Restoration Rule

This option is a project-specific restoration rule that states DEQ's authority and procedures for including a time schedule in a future water quality certification for the removal of the J.C. Boyle Dam. The schedule would provide time for the project to comply with water quality standards following the removal of the J.C. Boyle Dam and would clarify that DEQ could issue a 401 certification notwithstanding temporary water quality standards exceedances under the following conditions:

- The expected exceedances will be for a limited duration
- The project will provide net ecological benefits
- The project minimizes adverse impacts, to the maximum extent practicable, to water quality, threatened and endangered species and beneficial uses
- The project will not cause water quality exceedances past the end of the predetermined duration
- Conditions will be placed in the Section 401 certification.

Advantages:

- Authorizes DEQ to certify the project under section 401 and place conditions in the certification to minimize temporal and spatial water quality impacts during the process of dam removal in order to ensure timely recovery of water quality and use protection following removal.
- Provides the regulatory tool DEQ needs to ensure that the project will meet Oregon's water quality standards and to minimize water quality impacts from the project.
- Would be administratively efficient and relatively low cost for DEQ because the rule would be adopted in 2012 and would then be implemented through the Section 401 certification.
- This provision will not require EPA approval.
- This approach will allow DEQ to complete the rulemaking in the near term prior to state concurrence on the project.

Disadvantages:

- This rule is not expected to be considered a water quality standard by EPA as defined by the Clean Water Act, and as such, does not require EPA approval. DEQ's 401 certification would have a stronger basis if it was based on a regulatory provision considered to be a water quality standard and approved as such.

Chapter 4. Summary of Advisory Committee Discussion

DEQ formed a local advisory committee that met three times, May 16, June 7, and Aug. 31, 2011, to discuss rulemaking objectives, options and draft rule language. The committee membership is shown in the table below. The committee input on technical and policy issues is summarized below.

| Member | Representing |
|------------------|--|
| Dennis Linthicum | Klamath County Board of Commissioners |
| Ted Wise | Oregon Dept. of Fish and Wildlife |
| Ron Larson | U.S. Fish and Wildlife Service |
| Renee Snyder | U.S. Bureau of Land Management |
| Jason Cameron | U.S. Bureau of Reclamation |
| Erica Terence | Klamath Riverkeeper |
| Glen Spain | Pacific Coast Federation of Fishermen's Associations |
| Larry Dunsmoor | Klamath Tribes |

Technical Issues

The committee discussed several technical issues relevant to the KHSR and future decisions that will be made 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.

- The draft Environmental Impact Report/Environmental Impact Statement for estimating water quality impacts of removing the J.C. Boyle Dam was released for public comment after the advisory committee adjourned.
- The Section 401 application process with a final detailed plan for removal will be completed only after a decision has been made to remove the J.C. Boyle Dam.
- The technical issues will have to be evaluated during the Section 401 certification process. This rule does not preclude any technical evaluation but just specifies the findings that DEQ must make at the time of Section 401 certification.
- Committee members generally agreed with the DEQ's stated objective to allow short term impacts in order to facilitate restoration and achieve long term river improvements.
- Committee members generally agreed with the objective of minimizing water quality impacts during the dam removal process to the maximum extent practical.

Policy Issues

Policy issues considered and discussed by the advisory committee included:

- The KHSA, which includes provisions for the potential removal of the J.C. Boyle Dam, is a contentious issue in the Klamath Basin.
- Siskiyou County is strongly opposed to the proposed removal of the four dams on the Klamath River.
- The Dam Removal Entity should experience efficiencies as a result of this rulemaking since it will facilitate the administrative process.
- The governor supports the KHSA and may need to rely on the rulemaking as part of the state concurrence.
- 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 ensure that short term water quality impacts do not present an obstacle to dam removal, if that is the ultimate decision.
- DEQ should make a finding whether the long term benefits outweigh the short term impacts when evaluating the certification.

Chapter 5. Recommendation

Summary of DEQ Recommendation

Based on a review of the available approaches and input from the advisory committee, other states and EPA, DEQ recommends adoption of a Klamath-specific restoration rule that clearly allows DEQ to include a time schedule in the 401 certification if certain findings are made (as described in section 3). The purpose of the time schedule is to provide time for recovery of 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. 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 KHSA.

Proposed Rule

Basin-Specific Criteria (Klamath)

340-041-0185

Water Quality Standards and Policies for this Basin

(5) Time Schedule for Dam Removal.

(a) DEQ may issue a 401 Water Quality Certification for the federal license or permit authorizing the removal of J.C. Boyle Dam on the Klamath River that includes a time schedule for compliance with water quality standards, if DEQ makes the following findings:

(A) The dam removal and its associated water quality impacts will be of limited duration;

(B) The dam removal and related restoration activities will provide a net ecological benefit;

(C) The dam removal will be performed in a manner minimizing, to the maximum extent practicable, adverse impacts to water quality, threatened and endangered species, and beneficial uses of the Klamath River; and

(D) The dam removal, by the end of a specified time schedule, is not expected to cause an exceedance of a water quality standard set forth in this Division.

(b) Any 401 Water Quality Certification issued by DEQ for removal of J.C. Boyle Dam must:

(A) Be based on an application, evaluation, and public participation complying with OAR Chapter 340 Division 48; and

(B) Contain conditions ensuring that the dam removal:

(i) will be performed in accordance with interim milestones and a time schedule specified in the certification;

(ii) will be performed in a manner that, to the maximum practicable extent, minimizes adverse impacts to water quality, threatened and endangered species, and beneficial uses of the Klamath River (including the use of best practices and interim and post-removal protection, mitigation, and monitoring measures); and

(iii) will not cause an exceedance of a water quality standard set forth in this Division by the end of the maximum period for meeting standards specified in the certification.

Stat. Auth.: ORS 468.020, 468B.030, 468B.035 & 468B.048

Stats. Implemented: ORS 468B.030, 468B.035 & 468B.048

Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 1-2007, f. & cert. ef. 3-14-07

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Relationship to Federal Requirements

RULE FOR KLAMATH RIVER RESTORATION TIME SCHEDULE

Answers to the following questions identify how the proposed rulemaking relates to federal requirements and the justification for differing from, or adding to, federal requirements. This statement is required by OAR 340-011-0029(1).

1. Is the proposed rulemaking different from, or in addition to, applicable federal requirements? If so, what are the differences or additions?

While contained in the division of Oregon's Administrative Rules addressing water quality standards, the proposed rule for Klamath River Restoration Time Schedule is not considered a water quality standard as defined under the federal Clean Water Act and will not differ from, or add to, federal requirements.

2. If the proposal differs from, or is in addition to, applicable federal requirements, explain the reasons for the difference or addition (including as appropriate, the public health, environmental, scientific, economic, technological, administrative or other reasons).

N/A

3. If the proposal differs from, or is in addition to, applicable federal requirements, did DEQ consider alternatives to the difference or addition? If so, describe the alternatives and the reason(s) they were not pursued.

N/A

DEPARTMENT OF ENVIRONMENTAL QUALITY
Chapter 340
Proposed Rulemaking
STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT

Rule For Klamath River Restoration Time Schedule
Fiscal and Economic Impacts

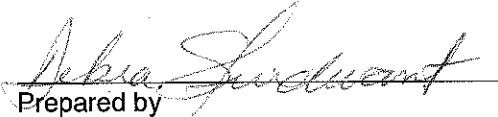
This form accompanies a Notice of Proposed Rulemaking

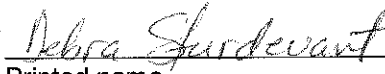
| | |
|---|---|
| Title of Proposed Rulemaking | Rule for Klamath River Restoration Time Schedule. Add a new section to OAR 340-041-0185 (water quality standards for Klamath Basin) |
| Statutory Authority or other Legal Authority | ORS 468.020, 468B.030, 468B.035 & 468B.048 |
| Statutes Implemented | ORS 468B.030, 468B.035 & 468B.048 |
| Need for the Rule(s) | The proposed rule is needed so that DEQ may evaluate and, if appropriate, issue a 401 certification for the removal of the JC Boyle Dam on the Klamath River, should the U.S. Secretary of Interior determine that the dam should be removed. The rule allows DEQ to include a time schedule for compliance with water quality standards in the water quality certification if specified findings are made because the dam removal is a restoration project that will have long term water quality and aquatic life benefits. |
| Documents Relied Upon for Rulemaking | <i>Klamath River Restoration Rulemaking Issue Paper</i> , Oregon Department of Environmental Quality, Water Quality Standards and Assessment Section and Eastern Region. This document is available on DEQ's water quality website or by contacting Steve Kirk, Oregon DEQ, Water Quality Division, Bend, OR 97701, (541) 633-2023 or by email at kirk.steve@deq.state.or.us . |
| Requests for Other Options | Pursuant to ORS 183.335(2)(b)(G), DEQ requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing and negative economic impact of the rule on business. |
| Fiscal and Economic Impact, Statement of Cost Compliance | |
| Overview | The goal of the proposed rule is to protect water quality to the maximum extent practicable during removal of the JC Boyle Dam on the Klamath River, should the U.S. Secretary of Interior determine that the dam should be removed. The rule clarifies DEQ's authority and intent to include a time schedule for compliance with water quality standards in the water quality certification should DEQ determine to certify the project under section 401 of the Clean Water Act. The dam removal activities contemplated in the |

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| | <p>Klamath River are expected to result in short-term degradation of water quality but provide long-term water quality and fish habitat improvements. The Klamath dam removal will result in the release of sediments and will likely cause exceedances of water quality criteria for dissolved oxygen, pH and turbidity for a limited period of time. The proposed rule will enable DEQ to certify the project despite temporary exceedances of water quality standards during removal of JC Boyle dam if certain findings are made and a time schedule for compliance is included as a condition of the 401 certification. DEQ must conclude that the proposed dam removal will benefit water quality and aquatic life in the long term. The proposed rule also requires DEQ to find that the project will minimize water quality impacts to the maximum practicable extent during the dam removal process and include requirements to that end as a condition of the section 401 Water Quality Certification.</p> | |
| Impacts on the General Public | <p>DEQ does not expect the rulemaking will result in direct costs or benefits to the general public. The rule will not impact the decision about whether or not the dam will be removed and will not affect dam removal costs..</p> | |
| Impacts to Small Business (50 or fewer employees – ORS183.310(10)) | <p>DEQ does not expect adverse impacts to small businesses from this rule.</p> | |
| Cost of Compliance on Small Business (50 or fewer employees – ORS183.310(10)) | a) Estimated number of small businesses subject to the proposed rule | Small businesses are not subject to this rule. |
| | b) Types of businesses and industries with small businesses subject to the proposed rule | |
| | c) Projected reporting, recordkeeping and other administrative activities required by small businesses for compliance with the proposed rule, including costs of professional services | |
| | d) The equipment, supplies, labor, and increased administration required by small businesses for compliance with the proposed rule | |
| | e) A description of the manner in which DEQ involved small businesses in the development of this | The Rulemaking Advisory Committee includes representation from Klamath County Commissioners and the Pacific Coast Federation of Fishing Associations. |

| | |
|---|--|
| | rulemaking |
| Impacts on Large Business (all businesses that are not "small businesses" under ORS183.310(10)) | Large businesses are not subject to this rule and DEQ does not expect there to be an impact to business. |
| Impacts on Local Government | DEQ does not expect impacts to local governments. |
| Impacts on State Agencies other than DEQ | DEQ does not anticipate fiscal or economic impacts to other state agencies with this rulemaking. The clarity provided by the rule will improve the ability of any other state agency to review a draft § 401 certification in a timely manner. |
| Impacts on DEQ | DEQ is granted the authority under the Clean Water Act and state law to issue a 401 certification for any project that requires a federal 404 permit, including the J.C. Boyle dam removal. The proposed Klamath River Restoration rule will facilitate DEQ's administrative process associated with a large scale restoration project to ultimately achieve beneficial uses, which is currently not addressed by our existing rules. By providing clarity to DEQ's 401 process for this situation, the proposed rule is expected to reduce the administrative cost of this action and may also minimize administrative appeals or legal action. Therefore, DEQ anticipates that the proposed rule will result in fewer demands on agency staff resources. |
| Assumptions | DEQ assumes that the best available information which DEQ has relied on to develop this rule is reasonably true and accurate. DEQ assumes that it is in the interest of the public to expend public and private resources on actions that will result in measurable environmental benefits. |
| Housing Costs | DEQ has determined that this proposed rulemaking will have <u>no effect</u> on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel. |
| Administrative Rule Advisory Committee | DEQ convened a seven-member Advisory Committee to provide input on impacts of proposed rule options. The Committee met three times from May to August 2011. The last of these meetings included a discussion of the draft fiscal impact statement. DEQ documented discussions in minutes for each meeting and summarized comments received from the workgroup in the draft Issue Paper. The advisory found the draft fiscal statement to be a reasonable and accurate assessment of the impacts. |

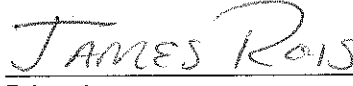
| | Members | |
|--|--|------------------|
| | Representing: | Full Name |
| | Klamath County Commissioners | Dennis Linthicum |
| | US Fish and Wildlife Service | Ron Larson |
| | Bureau of Land Management | Renee Snyder |
| | Klamath Riverkeeper | Erica Terrence |
| | Oregon Fish and Wildlife Department | Ted Wise |
| | Pacific Coast Federation of Fishermen's Associations | Glen Spain |
| | US Bureau of Reclamation | Jason Cameron |
| | | |
| | | |
| | | |


Prepared by


Printed name

 10/11/11
Date


Approved by DEQ Budget Office

 10/11/11
Printed name

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
Land Use Evaluation Statement

Rulemaking Proposal
For

RULE FOR KLAMATH RIVER RESTORATION TIME SCHEDULE

1. Explain the purpose of the proposed rules.

The goal of the proposed rule is to protect water quality to the maximum extent practical during removal of the J.C. Boyle Dam on the Klamath River, and enable river restoration to proceed, should the U.S. Secretary of Interior determine that the dam should be removed.

2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination Program?

Yes X No

a. If yes, identify existing program/rule/activity:

Water quality certification of federal permits or licenses [OAR 340-018-0030(5)(h)].

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?

Yes X No _____ (if no, explain):

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

N/A

3. If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures DEQ will use to ensure compliance and compatibility.

N/A