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Via Electronic Mail: infoatCRC401@deq.state.or.us

Steve Mrazik
DEQ Northwest Region Office
2020 SW 4th Ave.
Portland, OR 97201

Re: Comments on the Department of Environmental Quality's Notice of the Columbia River Crossing Clean Water Act Section 401 Water Quality Certification Application

Dear Mr. Mrazik:

The Northwest Environmental Defense Center respectfully submits the following comments as the Oregon Department of Environmental Quality (DEQ) begins its review of the impacts the proposed Columbia River Cross project (CRC or Project) will have on the water quality of the Columbia River, the Columbia Slough and other waters of the State. The CRC, as currently proposed, will have significant short-term and long-term negative effects on the water quality of the Columbia River and Columbia Slough and will likely result in violations of Oregon's water quality standards. Consequently, absent significant changes to the project DEQ must deny the requested certification, pursuant to Section 401 of the Clean Water Act (CWA), or, in the alternative, place such restrictions on the activity that will reduce the impact of the development to ensure protection of water quality. In no case, however, may DEQ certify that the proposed project will comply with water quality standards until it has sufficient information to assess the impacts on Oregon's waters.

DISCUSSION

Under Section 401(a) of the CWA, any applicant for an Army Corps permit in Oregon must obtain a certification from DEQ stating that the discharge from the proposed action will comply with several requirements of the CWA, most notably the water quality standards requirement under Section 303. Water quality standards include three elements: (1) one or more designated "uses" of a waterway; (2) numeric and narrative "criteria" specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses; and (3) an antidegradation policy that ensures that uses dating to 1975 are protected and high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Compliance with water quality standards requires protection of all three of these components.

It is the public policy of the state of Oregon to protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses. ORS

468B.015(2). Oregon’s water quality standards specifically require the protection of beneficial uses. The beneficial uses for estuaries and main waters located in the South Coast Basin, set forth under OAR 340-041-0300 (Table 300A; Figures 300A & 300B), include aquatic life, salmon and steelhead spawning, salmon and trout rearing and migration, water contact recreation, wildlife, hunting and fishing, and aesthetic quality. Aquatic species are the most sensitive beneficial uses in a stream, with early life stages being particularly sensitive to changes in water quality. As a result, the impacts to the beneficial uses of aquatic life and fish spawning should determine DEQ’s decision as to whether the CRC moves forward.

I. DEQ Must Ensure the Applicant Provides the Information Necessary to Allow for a Proper Analysis

Pursuant to DEQ’s regulations, at a minimum, the applicant must provide the “information and evaluations as necessary to demonstrate that the activity will comply with” the States’ water quality standards. OAR 340-048-0020(2)(g). In addition, the regulations specifically expect that DEQ will “request any additional information necessary to complete an application or to assist the department in evaluating an activity’s impacts on water quality” and state “[a]n applicant’s failure to complete an application or provide requested additional information within the time specified by the department is grounds for denial of certification.” OAR 340-048-0020(3).

Thus, while it may be obvious, it bears repeating that DEQ must base its final determination of the Project’s impact on water quality on the specifics of the action in question. DEQ has the authority—and duty—to ensure that it has the information it needs to make a well-informed decision when reviewing the impacts of projects such as the CRC. These points carry significant importance in this instance, given the seemingly ever changing nature of the CRC and its design. DEQ must be certain that it evaluates the impact of the actual project design. As many uncertainties remain regarding the Project, it appears that any evaluation based on current information may in fact be premature. DEQ will be wise to conserve its limited agency resources and wait to begin its review of the Project until the project design is finalized and DEQ has obtained all of the information it needs from the applicant.

Moreover, as discussed in more detail below, and as DEQ has made clear in its regulations and guidance documents, it is the applicant that must carry the burden of persuasion and the burden of proof in this review. As a result, the applicant must not only demonstrate that the activity will comply with water quality standards, but it must also provide DEQ with adequate information supporting that position. Stated another way, DEQ must work from the presumption that the activity will violate water quality standards and must require the applicant to prove otherwise and support its conclusion. Thus, the certification must be denied if the project proponent cannot make such a showing *or* if it fails to provide DEQ with sufficient information to support its arguments.

The important role DEQ plays in protecting Oregon’s waters through its oversight of federally licensed projects through Section 401 of the CWA cannot be understated. DEQ therefore can and must use its authority, as outlined in its regulations and guidance, to ensure the Project proponents make the necessary showings that the Project will not degrade Oregon’s waters.

II. Antidegradation

This 401 Certification must confirm that the proposed project will comply with Oregon’s antidegradation policy, which ensures the full protection of all existing and beneficial uses by preventing unnecessary degradation from new sources of pollution and protecting, maintaining and enhancing existing

surface water quality. The federal regulations establish the minimum acceptable antidegradation policy. 40 C.F.R. § 131.12(a). For all waters, this policy mandates that “[e]xisting in stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1); 40 C.F.R. § 131.3(e) (“*Existing uses* are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.”). This level of protection is the absolute floor of water quality. Questions and Answers on: Antidegradation, EPA Office of Water Regulations and Standards, August 1985, at 4. Oregon’s antidegradation policy mirrors the federal language, requiring the protection of “all existing beneficial uses” from “point and nonpoint sources of pollution.” OAR 340-041-0004(1).¹

The Project will result in a combination of point and nonpoint source pollution under state law. As discussed below, the proposed project will likely result in a measurable change in water quality *as compared to water not impacted by anthropogenic sources*. See DEQ, Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications, 16 (March 2001) (emphasis added) (“Antidegradation Policy IMD”). Indeed, the information available regarding the short-term and long-term impacts of the Project on parameters such as turbidity, temperature, and habitat conditions for salmonids leads to the singular conclusion that the Project will negatively affect water quality. As a result, DEQ must ensure that established water quality criteria will not be violated.

How DEQ makes this determination hinges on whether the waters at issue are High Quality Waters or a Water Quality Limited Waters. Under Oregon’s antidegradation rule, when a waterbody is considered High Quality Water, because it is not in violation of water quality criteria, “water quality must be maintained and protected.” OAR 340-041-0004(6). Ensuring compliance with this standard requires that “the discharger/applicant/source must provide assurance that the lowering of water quality will not result in a violation of any water quality standards.” Antidegradation Policy IMD, at 21. This expressly includes the protection of all beneficial uses and existing uses. *Id.* Indeed, DEQ is required to assume the proposed activity will affect water quality, unless the applicant has provided data demonstrating otherwise. Antidegradation Policy, at 16. As DEQ has stated, “[a] reviewer from DEQ may conclude that if a pollutant is in the pollutant stream, then the discharger/applicant/source has the burden of proof to show that there is no consequent lowering of water quality.” *Id.* As DEQ notes, where there is insufficient information to make these determinations, DEQ must request that the applicant submit the necessary information. *Id.*

If, however, the water body is listed on the 303(d)(1) list, as is the case here for several parameters, no additional pollutant loading or stressors can be allowed pursuant to the antidegradation policy. OAR 340-041-0004(7) (“Water quality limited waters may not be further degraded except” in limited circumstances). Thus, the antidegradation policy in this context should more appropriately be called a “non-degradation” policy, as it prohibits degradation. For all other parameters, water quality must be maintained such that beneficial and existing uses are protected. Thus, under either standard, DEQ must ensure that water quality criteria are met and existing and beneficial uses are protected.

¹ Pollution is broadly defined as “contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, including change in temperature . . . or such radioactive or other substance into any waters of the state which either by itself or in connection with any other substance present, will or can reasonably be expected to . . . render such waters harmful, detrimental, or injurious to . . . wildlife, fish or other aquatic life, or the habitat thereof.” OAR 340-041-0002(45).

If, on the other hand, DEQ determines that no water quality criteria will be violated and all existing and beneficial uses will be protected—which is dubious in this situation—before the Department may issue the certification, it must determine whether the lowering of water quality is permissible under one of the enumerated exceptions under the Antidegradation policy. OAR 340-041-0004. Again, this analysis will depend on whether DEQ considers the waterbodies at issue High Quality Waters or a Water Quality Limited Waters. However, while the distinction would require slightly different analyses, the result should be the same—namely, DEQ must deny the certification because the Antidegradation standard will be violated. For example, if DEQ treats the Columbia River and Columbia Slough as High Quality Waters for those parameters not in violation of numeric or narrative criteria, the existing water quality must be maintained. The only exception is that the Environmental Quality Commission “may allow a lowering of water quality in these high quality waters if it finds” that “[n]o other reasonable alternatives exist except to lower water quality; [t]he action is necessary and benefits of the lowered water quality outweigh the environmental costs of the reduced water quality. . . .; [a]ll water quality standards will be met and beneficial uses protected; and [f]ederal threatened and endangered aquatic species will not be adversely affected.” OAR 340-041-0004(6)(a)-(d). Again, given that the final project design has yet to be determined, any determination at this point is premature, but it is likely that the Project will fail to meet any of these exceptions.

First, the alternatives analyses conducted to date fail to address the full range of alternative designs and operational measures that may result in a bridge that will not lower water quality standards. Therefore, DEQ may not reasonably rely on these analyses to support a conclusion on this point. Second, the proposed activity is not “necessary.” Under this standard, the *applicant* must demonstrate that the “same social and economic benefits cannot be achieved with some other approach.” Antidegradation Policy IMD, at 23. From the record available for review by the public, the applicant has failed to provide DEQ with the information necessary to assess this question properly. As a result, DEQ must insist that the Corps or the applicant provide this information (or it must deny the certification). Third, the proposed project will affect existing and beneficial uses and will degrade water quality. Certainly, the Project, as current conceived, will have significant short-term and long-term impacts on the water quality on the Columbia River and Columbia Slough, which are already water quality limited for several parameters. Finally, the proposed action will adversely affect the critically imperiled salmon. The Corps itself has made this threshold determination, pursuant to its obligations under the Endangered Species Act. The certain, direct and indirect impacts of the proposed project will adversely affect many salmon species. DEQ must pay particular attention to applying its antidegradation policy to beneficial uses that are threatened and endangered species, particularly of those stocks where there are very few individuals remaining. Adding risk to the survival of a stock that is extremely close to extinction is tantamount to making an existing use into one that no longer exists.

If, alternatively, DEQ conducts the analysis pursuant to its regulations regarding Water Quality Limited Waters, the result will be the same. Under these regulations, “Water quality limited waters may not be further degraded” with several very limited exceptions that do not apply here. OAR 340-041-0004(7). To begin with, for several parameters no Total Maximum Daily Loads (TMDL), waste load allocations, or reserve capacity have been established through a TMDL analysis for the parameters for which the Columbia is out of compliance. The proposed project *will* both directly and indirectly affect these parameters. As a result, the exemption described in OAR 340-041-0004(9)(a)(D) is inapplicable in many instances.

Next, as described above, the proposed project will unacceptably threaten or impair recognized beneficial uses and will adversely affect federally protected threatened species. OAR 340-041-0004(9)(a)(C). As a result, it is irrelevant whether the action is “necessary” and if the “benefits of the lowered water quality

outweigh the environmental costs of the reduced water quality.” OAR 340-041-0004(9)(a)(B). Even if DEQ had conducted this analysis—and there is no evidence available to the public that it has—as discussed above, the proposed project is not necessary nor do the benefits outweigh the harm. For example, a proper analysis of the available alternatives to the project will demonstrate that the bridge as currently designed is not necessary as there are other alternatives that will meet the stated purpose and need of the project. Further, the proposed project will have significant direct and indirect impacts on the river system and surrounding lands and waters.

II. The Proposed Project Will Violate Oregon’s Numeric and Narrative Water Quality Criteria

Without question the proposed project will have negative impacts on the water quality of the Columbia River and Columbia Slough. As a result, DEQ may not issue a 401 Certification until the project proponent has provided the information necessary to demonstrate that the applicable water quality criteria will be complied with. This, of course includes both numeric and narrative criteria. As a result, DEQ must ensure the applicant provides detailed information addressing each parameter and condition as at issue. If the applicant cannot affirmatively demonstrate that the proposed project will have no additional impairment of beneficial uses that are already substantially impaired and/or on the verge of extinction due to failures to prevent pollution, DEQ cannot certify the Project. Doing so would be inconsistent with the agency’s own regulations.

For example, in addition to the numerous numeric criteria the applicant must address, DEQ must require the applicant to describe why the activities will not violate the criteria mandating that “[t]he creation of . . . conditions that are deleterious to fish or other aquatic life . . . may not be allowed.” OAR 340-041-0007(11). In conducting this analysis, for these and other narrative criteria, DEQ must quantify the pollutant loads allowable in order to ensure that narrative and numeric criteria are not violated and that designated beneficial and existing uses are protected. Otherwise, DEQ cannot make a determination that the proposed activity will constitute an allowable load. The applicant’s failure to provide the information sufficient to make these determinations would justify denying the 401 Certification.

CONCLUSION

DEQ has a responsibility to ensure that any federally permitted action in Oregon complies with Oregon's water quality standards. The CRC will result in significant adverse impacts on the Columbia River, Columbia Slough and the surrounding ecosystem. As a result, DEQ must deny the requested water quality certification, until such time that the project applicant can show, using the most thorough and current scientific evidence available, that the proposed activities will not harm or degrade Oregon’s waters.

Sincerely,



Marla Nelson
Legal Fellow