



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND, OR 97208-2870

April 10, 2020

SUBJECT: USACE Comments on Washington State Department of Ecology's 23 March 2020 Public Notice requesting comments on EPA's request for Section 401 certification for draft NPDES permits for eight (8) lower Snake River and lower Columbia River dams.

Angela Zeigenfuse
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Dear Ms. Zeigenfuse,

On behalf of the U.S. Army Corps of Engineers ("Corps") Northwestern Division, I submit the following comments on the Washington State Department of Ecology's ("Ecology") 23 March 2020 Public Notice that requested comments on the Environmental Protection Agency's ("EPA") request for Clean Water Act Section 401 Certification for the draft National Pollutant Discharge Elimination System ("NPDES") permits for the Corps' four lower Snake River and four lower Columbia River dams.

The Corps, as the applicant for the subject NPDES permits (and arguably, the Section 401 certification¹), requests a copy of the draft Section 401 Certification prior to Ecology finalizing the Certification in order to allow the Corps an opportunity to review the conditions and/or submit more detailed and specific comments. The Corps is aware that Ecology has afforded other applicants an opportunity to review draft certifications in the past (e.g. Public Utility District No. 1 of Chelan County for the Lake Chelan Hydroelectric Project), and would appreciate having the same opportunity to review this certification. Additionally, the Corps requests to work collaboratively with Ecology on the conditions that you are anticipating including in the Section 401 Certification to ensure that they are implementable.

If Ecology is not able to share the draft Section 401 Certification with the Corps, the Corps submits the following general comments:

1. Given the long-term and ongoing existence and operation of the federal dams, and the minimal effects to water quality from discharges identified in the draft NPDES

¹ Under Section 401(a)(1) of the Clean Water Act, "[a]ny applicant for a Federal...permit to conduct any activity...which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate[.]" 33 U.S.C. § 1341(a)(1).

permits, Ecology should consider expressly waiving certification, in accordance with 40 C.F.R. § 121.16(a). Absent waiver, Ecology should issue a certification without any conditions. EPA's draft NPDES permits have established effluent limitations and other requirements to ensure the Corps will not violate Washington's water quality standards.

2. Conditions (if included in a certification) should be focused on ensuring that the *discharges* do not violate state water quality standards, as opposed to the facilities as a whole. The contents of a certification may include “[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity[.]” 40 C.F.R. § 121.2(a)(4). Similarly, Ecology's 23 March 2020 *Public Notice* acknowledged that “[t]he state certification evaluates whether the *discharge* will comply with the applicable provisions of sections 301, 302, 306, and 307 of the [Clean Water Act] and appropriate requirements of state law.” (emphasis added). That statement is consistent with Executive Order 13868 (April 10, 2019), EPA's associated guidance, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* (June 7, 2019) and EPA's proposed revised regulations for 40 C.F.R. Part 121 (84 FR 44080). Of note, the proposed § 121.3 regulation “Scope of certification” states: “[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements.” (emphasis added).

3. The Corps acknowledges that Ecology has issued 401 certifications for numerous dams in Washington. However, to the Corps' knowledge, all of the 401 certifications have been issued to non-federal applicants for a Federal Energy Regulatory Commission (FERC) license. Licenses issued by FERC under the Federal Power Act allow the construction and operation or continued operation of non-federal dams for 30 to 50 years. The construction and/or operation of the dam and its attendant effects (including water quality effects) will not occur without a license by FERC. The construction and operation of the Corps' dams at issue here were Congressionally-authorized many years ago and do not require additional licensing, permits, or authorizations similar to a FERC relicensing for their continued operation. The federal action here that requires a 401 certification is a NPDES permit, which will authorize discharges of pollutants from discrete point sources. The scope of what a NPDES permit authorizes is much narrower than what a FERC license authorizes.

4. Any conditions should take into account that historic river temperatures in the lower Snake River (pre-dams) would exceed the State's current water quality standard (20°C). The draft NPDES permits and associated Fact Sheets do not identify any increase in temperature from discharges at the discrete point sources at six dams, and only cite to negligible increase at two dams. See Section II.D and Table 10, EPA's March 18, 2020 Lower Snake River Hydroelectric Facilities Fact Sheet.

5. Conditions should not impair the Corps' ability to effectively operate and maintain the dams for the multiple Congressionally-authorized purposes, nor interfere with the Corps' compliance with other laws.

The Corps appreciates the opportunity to submit these comments for consideration in the Section 401 Certification. We look forward to continuing to work closely with Ecology on the Section 401 Certification for the four lower Snake River and four lower Columbia River projects. If you have any questions regarding the comments above, please contact Ms. Patti Williams at 503-808-3897.

Sincerely,

Tony R. Kirk
Chief, PDS Operations Division