



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

April 13, 2020

Submitted via online web portal

Angela Zeigenfuse
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
Portal: <http://wq.ecology.commentinput.com/?id=G5P9T>

Re: Lower Snake and Lower Columbia River Dams Clean Water Act 401 Water Quality Certifications

Dear Ms. Zeigenfuse,

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) Department of Natural Resources (“DNR”) to support and recommend that the State of Washington, Department of Ecology (“Ecology”) issue Clean Water Act (CWA) 401 certifications for eight federal dams on the Lower Columbia and Lower Snake rivers to protect and assure compliance with the State of Washington’s water quality standards. Ecology has an obligation to ensure that the operation of these dams meets Washington’s water quality standards. Ecology also has, and should take, the opportunity to ensure the operation of these dams continues to meet such standards in the face of the crisis of climate change.

The Yakama Nation’s history, culture, and the lives of our People are intertwined with Nch'i-Wa'na (the Columbia River), and the salmon, fish, plants, and animals that rely on its waters. The Yakama Nation reserved rights in these resources in its Treaty of 1855 with the United States (12. Stat. 951). Protecting the waters of the Columbia River and its tributaries is critical to the protection of our Treaty-reserved resources and rights, and ultimately to the health and welfare of our communities.

Although Yakama Nation supports the U.S. Army Corps of Engineers (“Corps”) efforts to date in fulfilling its CWA obligations in operating the Federal Columbia River Hydropower System (“FCRPS”), the Yakama Nation has serious concerns about the impacts of climate change on the Columbia River ecosystem, and the combined impacts of dam operations and climate change. Yakama Nation calls on Ecology to implement its CWA Section 401 authorities to ensure the fulfillment of the objectives of applicable federal and State laws despite the impacts of climate change.

Background

Yakama Nation understands that on March 18, 2020 the United States Environmental Protection Agency (“EPA”) requested Ecology CWA Section 401 certification for the following draft permits:

- Ice Harbor Lock and Dam, NPDES Permit No. WA0026816
- Lower Monumental Lock and Dam, NPDES Permit No. WA0026808
- Little Goose Lock and Dam, NPDES Permit No. WA0026786
- Lower Granite Lock and Dam, NPDES Permit No. WA0026794
- Bonneville Project, NPDES Permit No. WA0026778
- The Dalles Lock and Dam, NPDES Permit No. WA0026701
- John Day Project, NPDES Permit No. WA0026832
- McNary Lock and Dam, NPDES Permit No. WA0026824

The United States Army Corps of Engineers (Corps) operates the dams, and federal water quality statutes and regulations do not allow the discharge of pollutants to waters of the state without permit coverage.

Under CWA Section 401, Congress allows states to protect their waterways from the impacts of federally permitted activities, like dams, that discharge into state waters.¹ Before a federal agency can issue a permit for any activity that involves a discharge into a navigable water, the federal agency must obtain a state CWA Section 401 certification (a “401 certification”). The state’s 401 certification can contain any conditions necessary to ensure that the applicant for the federal permit will not violate the state’s water quality standards, or other laws, and those conditions “shall become” part of the resulting federal license.²

Washington’s CWA Section 401 certification authority reaches all water quality impacts of federally permitted dams.³ The United States Supreme Court held that, under Section 401, the existence of any discharge at a federally permitted dam gives Washington the authority to address all of that dam’s impacts to water quality and designated beneficial uses of the waterway.⁴ This includes, without limitation, temperature and dissolved oxygen in the reservoirs, spill over the dams, and total dissolved gas.

EPA may take the position that Washington’s review and 401 certifications are constrained to oil pollution, cooling water, and other pollutants discharged through point sources at the dams. However, “the conditions a state may require [in 401 certification] are

¹ *S.D. Warren Co. v. Maine Bd. Of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

² 33 U.S.C. § 1341.

³ *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707–08 (1994) (explaining that states may regulate the impacts of a project as a whole under Section 401, so long as a discharge is involved). The fact that the § 401 certifications at issue were triggered by federal NPDES permits, rather than FERC licenses, has no bearing on the scope of Ecology’s authority under § 401. *Cf. Or. Nat. Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1097–98 (9th Cir. 1998) (explaining that § 401 certifications can impose far-reaching protections for water quality, provided a discharge triggers the state’s § 401 authority).

⁴ *Id.*

not confined to the discharge itself . . .”⁵ The Supreme Court specifically held that Clean Water Act § 401(d) refers to the “compliance of the applicant, not the discharge,” with water quality standards.⁶ Moreover, issuing comprehensive 401 certifications for the Corps’ dams and reservoirs would be consistent with Ecology’s treatment of other federally permitted dams in Washington⁷—including Columbia River dams operated by public utility districts.⁸ Accordingly, Ecology has the legal authority and obligation to ensure, through the pending 401 certifications, that the applicant’s activities—here, the dams and reservoirs—meet Washington water quality standards.

Comments & Recommendations

Ecology should require compliance with State water quality standards to protect salmon, pacific lamprey, sturgeon, Southern Resident orcas, and other species from the combined impacts of dam operations and climate change. Ecology should include 401 certification requirements regarding Temperature Total Maximum Daily Load (“TMDL”) and Total Dissolved Gas (“TDG”), as well as general conditions to support and evaluate conditions implementation.

A. *TMDL Conditions*

As demonstrated by empirical evidence and EPA modeling, the presence and operation of individual and multiple dams combines to warm the Columbia and Snake Rivers to unsafe levels for designated beneficial uses.⁹ Temperatures are also increasing over historical levels due to the impacts of climate change.¹⁰ During the summer, the rivers are frequently so warm that salmon are unable to migrate upriver to spawn.¹¹ When river temperatures exceed 20°C for several days at a time—as happens with increasing frequency due to climate change¹²—salmon have difficulty migrating upstream and begin succumbing to stress and disease.¹³ According to the Fish Passage Center, “[U]nder a climate change scenario, the long-recognized and largely unaddressed problem of high water temperatures

⁵ Congressional Research Service, *Clean Water Act Section 401: Background and Issues*, p. 3 (2015).

⁶ *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711–12 (1994).

⁷ See generally Ecology, *Water Quality Certifications for Existing Hydropower Dams: Guidance Manual* (March 2005).

⁸ E.g. Ecology Order No. 4219, *401 Certification for Priest Rapids Hydropower Project*, p. 39 (2007); see also, e.g., Ecology Order No. 8981, *401 Certification for Wells Hydropower Project*, p. 22 (2012).

⁹ EPA Region 10, *RBM-10 Columbia River Temperature TMDL-Preliminary Technical Information Presentation to Columbia River Tribes* (August 14, 2018); RMJOC II, *Climate and hydrology datasets for RMJOC Long-term Planning Studies. Second Edition. Part I: Hydroclimate Projections and Analyses* (2018); Fish Passage Center, *Review of April 2016 Draft of NOAA Fisheries Report*, p. 1 (May 4, 2016).

¹⁰ U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (2018).

¹¹ Fish Passage Center, *Requested data summaries and actions regarding sockeye adult fish passage and water temperature issues in the Columbia and Snake rivers* (Oct. 28, 2015).

¹² John Yearsley, *A semi-Lagrangian water temperature model for advection-dominated river systems*, 45 *Water Resources Research*, pp. 15–16 (2009).

¹³ National Marine Fisheries Service, *2015 Adult Sockeye Salmon Passage Report*, pp. 20–22 (2016).

in the [Columbia and Snake rivers] becomes an ever-increasing threat to the survival of salmon.”¹⁴

In the early 2000s, EPA completed a draft Columbia and Snake River Temperature TMDL. The temperature TMDL is a pollution budget designed to protect salmon from hot water in the Columbia and Snake rivers. Notably, EPA’s modeling clearly indicated that the dams increase water temperatures in ways that cause or contribute to water quality standard violations, and EPA concluded that “The majority of the temperature increases (as much as 6 °C) are caused by the larger dams[.]”¹⁵

Although EPA has not issued a final temperature TMDL, CWA Section 401 empowers Washington to implement TMDL requirements as binding permit measures through its 401 certifications.¹⁶ Yakama Nation recommends that Ecology consider the following draft 401 certification conditions to address designated use protection and compliance with narrative and numeric water quality standards given the potentially fatal temperature impacts of dam operations and climate change:

- The load allocations, and any implementation plans, of a temperature TMDL for the Columbia and Snake rivers shall become conditions of the 401 certifications whenever such TMDL or implementation plans are issued by EPA or Washington.
- Pursuant to Washington Administrative Code (“WAC”) 173-201A-510(5), the Corps must, within two years, develop and submit to Ecology a water quality attainment plan (“WQAP”) that provides a detailed strategy and specific implementation measures for achieving compliance with temperature standards in the face of climate change in the reservoirs, fish passage facilities, and tailwaters. Dam removal should be one potential measure analyzed in preparation of the WQAP.
- The WQAP must include a plan for monitoring and evaluation of water quality parameters impacted by the presence and operation of federal dams.
- If Ecology determines, pursuant to WAC 173-201A-510(5)(c) and (d), that the WQAP submitted by the Corps does not ensure compliance with all applicable water quality criteria or provide a reasonable assurance that the dam will not cause or contribute to a violation of the water quality standards, Ecology shall retain the right to revoke or reopen the certification.
- If Ecology determines that the WQAP submitted by the Corps would ensure compliance with the temperature water quality criteria, the Corps must implement

¹⁴ Fish Passage Center, *Review of April 2016 Draft of NOAA Fisheries report 2015 Sockeye Salmon Passage Report*, p. 1 (May 4, 2016).

¹⁵ U.S. EPA, *Preliminary Draft Columbia/Snake Temperature TMDL*, p. 39 (July 2003).

¹⁶ EPA, *Preliminary Draft Columbia/Snake Temperature TMDL*, p. viii (explaining that “TMDLs are not self-implementing. Nor do they impose any binding legal requirements under federal law.”); *see also id.* at vii (stating “the TMDL is implemented through the NPDES Permit Program, **State Water Quality Standards Certification Program**, States Non-point Source Management Program and other appropriate mechanisms.” (emphasis added)).

the measures in the WQAP as soon as possible, but in no case later than five years after Ecology makes the determination required by this section.

- If Ecology reasonably determines that the impacts of climate change render the WQAP submitted by the Corps inadequate to ensure compliance with the temperature water quality criteria, Ecology shall retain the right to reopen the certification.

Implementation of these temperature-related conditions will help ensure the quality of water in the Columbia River will meet State water quality standards and support fish life in the face of the crisis of climate change.

B. Existing & Designated Use Studies

Ecology should include conditions, such as the examples provided below, to inform revised and future 401 certifications. Examples include:

- The Corps shall complete and submit to Ecology a report/study describing:
 - Existing and designated beneficial uses impacted by the dams;
 - Historic impacts of the project on the existing and designated beneficial uses;
 - Anticipated future impacts, and in particular the combined future impacts of climate change and the dams, on the existing and designated beneficial uses.
- The report/study should examine uses that do not currently exist and uses that would be available without the project impacts.
- The report/study should specifically address water quality impacts to high fish consumers like Yakama Nation members.

C. General Conditions

Yakama Nation DNR would recommend that Ecology include general conditions similar to those the agency includes in 401 certifications on Federal Energy Regulatory Commission licenses. For example, Ecology should include a condition that states: “Notwithstanding any other language in the certification, any violation of water quality standards is prohibited.” Ecology should also state that conditions are subject to changes based on new state or federal laws that reflect better understanding of how to protect designated beneficial uses. In addition, Ecology should include reopener language to provide flexibility in the event Ecology needs to review the certifications based on new information to meet water quality standards, TMDLs, and other applicable requirements of State law.

Conclusion

Yakama Nation DNR appreciates the opportunity to provide comments and recommendations to Ecology regarding its 401 certifications of the listed NPDES permits. Please contact me at phil_rigdon@yakama.com with any questions regarding our comments.

Sincerely,



Phil Rigdon, Superintendent
Yakama Nation Department of Natural Resources

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