

## *Washington's Clean Water Act Authority over Federal Dams on the Columbia and Snake Rivers*

### Washington has an historic opportunity to protect water quality and fish in the Columbia and Snake rivers.

The State of Washington can—for the first time ever—require that Bonneville, The Dalles, John Day, McNary, Grand Coulee, and the four lower Snake River dams meet Washington's water quality standards pursuant to § 401 of the Clean Water Act. Because these dams have operated for decades without federal licenses or discharge permits, Washington has had little authority to ensure that the dams provide cool water, adequate spill, and conditions necessary for upstream and downstream salmon migration. Until now.

In 2014 and 2017, the dam operators—the Army Corps and the Bureau of Reclamation—agreed to apply to the U.S. Environmental Protection Agency for Clean Water Act permits to discharge oil. Those applications triggered § 401 certification for Washington. The Environmental Protection Agency is moving quickly to comply with out-going Administrator Scott Pruitt's order to issue all pending Clean Water Act permits within six months.

### What is the problem on the Columbia?

*“The Federal Columbia River Power System remains a system that ‘cries out’ for a new approach and for new thinking if wild Pacific salmon and steelhead, which have been in these waters since well before the arrival of homo sapiens, are to have any reasonable chance of surviving their encounter with modern man.”*

- Judge Michael H. Simon, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 948 (D. Or. 2016).

The Columbia basin's once-mighty salmon runs are struggling to survive. The water quality criterion for salmon migration is 20 degrees Celsius, yet the Columbia and Snake regularly exceed this limit during much of the summer. And river temperatures continue to rise as our climate warms. In addition, not enough water is spilled over hydroelectric dams for successful juvenile salmon outmigration. Snake River sockeye and steelhead are on the verge of extinction—due largely to dams. The decline of Columbia River chinook salmon runs is contributing to the starvation of Puget Sound orcas and recently forced Oregon and Washington to close the Columbia River to salmon fishing.

Under the Endangered Species Act, the federal government has produced numerous recovery plans for Columbia and Snake river salmon, all of which have failed. There is little hope that the Trump Administration will fix the problem. Washington can take a different approach by using its rights under the Clean Water Act to create solutions.

### Why does § 401 certification exist, and how does it work?

Congress enacted § 401 to allow states to protect their waterways from the impacts of federally permitted activities, like dams, that discharge into state waters.<sup>1</sup>

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<sup>1</sup> *S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

Here's how § 401 works: before any federal agency can issue a permit for any activity that involves a discharge into a navigable water, the federal agency must obtain a state § 401 certification.<sup>2</sup> 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, and those conditions "shall become" part of the resulting federal license.<sup>3</sup>

Most § 401 certifications for dams in Washington are triggered by requests for licenses from the Federal Energy Regulatory Commission. However, a Clean Water Act permit issued by the Environmental Protection Agency also triggers Washington's § 401 certification authority over the dams.

#### What is the scope of Washington's § 401 certification authority?

Washington is not limited to regulating oil discharges. The state must ensure that the applicant's activities—here, the dams and reservoirs—meet Washington water quality standards. Washington regularly issues comprehensive [401 Certifications for other federally permitted dams in Washington](#)—including the Columbia River dams operated public utility districts. Thirty years ago, in the landmark case [PUD No. 1 of Jefferson County v. Washington Dept. of Ecology](#), Washington established that its § 401 certification authority reached *all* water quality impacts of federally permitted dams. The United States Supreme Court agreed with Washington that, under § 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. This includes temperature in the reservoirs, spill over the dams, total dissolved gas, and salmon migration.

#### How could Washington use § 401 to protect its water quality and fisheries in the Columbia and Snake rivers?

Washington has far-reaching authority to compel improvements to the configuration and operation of federal dams to improve water quality and fish passage. In previous § 401 certifications, Washington has denied permission to build a dam, required modifications to fish ladders and dams to address hot water, mandated certain reservoir pool heights, addressed total dissolved gas levels, and applied Total Maximum Daily Load requirements.

#### Does Washington have procedures to support a comprehensive review of the lower Columbia and lower Snake river dams' water quality impacts?

Yes. The Washington Department of Ecology frequently prepares this type of § 401 certification for existing dams in Washington. Ecology has a [Guidance Manual](#) for performing § 401 certifications on existing hydropower dams and specific staff experienced in implementing Clean Water Act § 401 for hydropower projects.

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<sup>2</sup> 33 U.S.C. § 1341(a)(1).

<sup>3</sup> 33 U.S.C. § 1341(d).