



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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OCT - 4 2017

OFFICE OF
WATER AND WATERSHEDS

Ms. Wendy Wiles
Administrator
Environmental Solutions Division

Ms. Lydia Emer
Administrator
Operations Division
Oregon Department of Environmental Quality
700 NE Multnomah Street, Suite 600
Portland, Oregon 97232-4100

Re: July 28, 2017 Submittal of Water Quality Standards which establish the North Fork Smith River System as Outstanding Resource Waters of Oregon

Dear Ms. Wiles and Ms. Emer:

Pursuant to section 303(c) of the Clean Water Act (CWA) and 40 CFR Part 131, the U.S. Environmental Protection Agency approves new water quality standards at OAR 340-041-0004(8)(d) and OAR 340-041-0305(4), and non-substantive editorial changes to OAR 340-041-0004, which were submitted by the Oregon Department of Environmental Quality (DEQ) by letter of July 28, 2017. Notably, Oregon's revisions to its water quality standards establish the waters of the North Fork Smith River system as Outstanding Resource Waters (ORW) of Oregon and identify conditions to protect the water quality and ecological characteristics of those waters.

Details of the submitted water quality standards and the EPA's action are outlined below.

Background

By letter dated July 28, 2017, DEQ submitted new water quality standards at OAR 340-041-0004(8)(d) and OAR 340-041-0305(4) and non-substantive editorial changes to OAR 340-041-0004. These water quality standards and non-substantive changes were adopted by Oregon's Environmental Quality Commission (EQC) on July 13, 2017; became effective under Oregon state law on July 18, 2017; and were certified by the Oregon Attorney General on July 31, 2017, as duly adopted pursuant to state law. Prior to adoption, DEQ provided an opportunity for public comment, including two public hearings, as described in the public notice (Invitation to Comment, North Fork Smith River Outstanding Resource Water Rulemaking 2017, Oregon DEQ, January 13, 2017) and the EQC staff report included with DEQ's submittal (Oregon Environmental Quality Commission Meeting, North Fork Smith River Outstanding Resource Water Rulemaking, July 11-13, 2017).

The new water quality standards and non-substantive changes submitted to the EPA for review are identified in an enclosure to DEQ's submittal letter (nfsmithriver Rules redline.pdf), and are comprised of:

- provisions at OAR 340-041-0004(8)(d) and OAR 340-041-0305(4)(a) identifying the North Fork Smith River, its tributaries, and its associated wetlands as ORWs of Oregon,
- conditions at OAR 340-041-0305(4)(b) through (e) to ensure that the water quality and ecological characteristics of those waters are maintained and protected, and
- minor non-substantive editorial changes to numerous sections within OAR 340-041-0004.

The antidegradation policy of Oregon's water quality standards includes an ORW provision, OAR 340-041-0004(8), which is the State's equivalent of the federal antidegradation policy's Outstanding National Resource Water (ONRW) provision at 40 CFR 131.12(a)(3). The federal ONRW provision is the highest level of protection in the federal antidegradation policy and provides that the water quality of ONRWs is to be maintained and protected. The EPA has interpreted this prohibition on degradation in ONRWs to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs (Water Quality Standards Handbook, EPA-823-B-12-002, section 4.7; and 63 FR 36742, 36785-87). The only exception to this prohibition on degradation in ONRWs is for temporary and short-term changes in the water quality that are consistent with protecting existing uses and meeting water quality criteria that are applicable to the waters (Water Quality Standards Handbook, EPA-823-B-12-002, section 4.7; and 48 FR 51400, 51403).

As explained in documentation supporting Oregon's rule, the waters of the North Fork Smith River offer exceptional clarity; valuable habitat for endangered populations of Coho salmon, several rare plant species and other fish and wildlife; and are valued for recreation. Oregon's adoption of ORW protection adds to several existing protections in the watershed, such as Wilderness, Roadless, and Wild and Scenic River designations and certain restrictions on mineral withdrawal (Issue Paper, Designation of the North Fork Smith River as an Outstanding Resource Water, Oregon Department of Environmental Quality, January 2017; and Petition for Rule Amendments Designating the North Fork River System in Curry County as Outstanding Resource Waters of Oregon, February 23, 2016).

Today's Action

Pursuant to section 303(c) of the CWA and 40 CFR Part 131, the EPA is approving the addition of OAR 340-041-0004(8)(d) and OAR 340-041-0305(4) addressing ORW assignment and protection for the waters of the North Fork Smith River system. The EPA is also approving the minor non-substantive editorial changes to numerous parts of OAR 340-041-0004, specifically 0004(1), 0004(2), 0004(3), 0004(4), 0004(5), 0004(5)(a), 0004(5)(b), 0004(5)(c), 0004(6), 0004(7), 0004(8)(a), 0004(8)(b), 0004(8)(c), 0004(9), 0004(9)(a), 0004(9)(a)(C), 0004(9)(a)(D)(ii), 0004(9)(a)(D)(iii), 0004(9)(a)(D)(iv), 0004(9)(a)(D)(iv)(IV), 0004(9)(b), 0004(9)(c), and 0004(9)(c)(A)(ii).

This action applies only to water bodies in the State of Oregon, and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Accordingly, nothing in this letter shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

Rationale for Today's Action

OAR 340-041-0004(8)(d)

(d) The following are Outstanding Resource Waters of Oregon: The North Fork Smith River and its tributaries and associated wetlands, South Coast Basin. See OAR 340-041-0305(4).

The addition of OAR 340-041-0004(8)(d) to the ORW provision of Oregon's antidegradation policy specifies that the North Fork Smith River, its tributaries, and its associated wetlands are ORWs of Oregon. As explained above in the Background section, Oregon's ORW provision is the State's equivalent of the federal antidegradation policy's ONRW provision at 40 CFR 131.12(a)(3). The EPA approves OAR 340-041-0004(8)(d) as being consistent with 40 CFR 131.12(a)(3), which provides for assigning waters an ONRW level of protection.

OAR 340-041-0305(4) and (4)(a)

(4) Outstanding Resource Waters of Oregon (ORWs)

(a) The North Fork Smith River and its tributaries and associated wetlands. These streams include but are not limited to the North Fork Smith River, Chrome Creek, Spokane Creek, Fall Creek, Cedar Creek, Horse Creek, Packsaddle Creek, Baldface Creek, Taylor Creek, Biscuit Creek, Wimer Creek, McGee Creek, Cabin Creek, Diamond Creek, and the North Fork Diamond Creek.

Similar to OAR 340-041-0004(8)(d), the combination of OAR 340-041-0305(4) and (4)(a) also specifies that the North Fork Smith River, its tributaries, and its associated wetlands are ORWs of Oregon. In doing so, however, OAR 340-041-0305(4)(a) adds a level of specificity by listing the names of certain waters in the North Fork Smith River watershed that are included as ORWs. The EPA also approves OAR 340-041-0305(4) and (4)(a) as being consistent with 40 CFR 131.12(a)(3), which provides for assigning waters an ONRW level of protection.

OAR 340-041-0305(4)(b)

(b) The current high water quality, exceptional ecological values, and existing and designated uses of the ORWs identified in this rule ("these waters") must be maintained and protected except as altered by natural causes.

The EPA approves the provision at OAR 340-041-0305(4)(b) because it is consistent with the requirement at 40 CFR 131.12(a)(3) that the high water quality of ONRWs be maintained and protected, i.e., "Where high quality waters constitute an outstanding National resource, such as waters of...ecological significance, that water quality shall be maintained and protected."

The requirement at OAR 340-041-0305(4)(b) to protect existing and designated uses is also consistent with 40 CFR Part 131. The EPA notes, however, that existing uses and designated uses are to be protected by other provisions of Oregon's water quality standards, independent of the ORW assignment, i.e., by the existing use provision of Oregon's antidegradation policy (OAR 340-041-0004(1)) and the designated uses and water quality criteria applicable to the waters. States are to adopt designated uses

and water quality criteria that protect those designated uses, and protect existing uses, in accordance with 40 CFR 131.10, 131.11, and 131.12, respectively.

The exception for natural causes is consistent with 40 CFR 131.12(a)(3) because water quality that is truly natural is consistent with the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (CWA section 101(a)). "Maintained and protected" at 40 CFR 131.12(a)(3) is intended to protect water quality from degradation due to anthropogenic activities, rather than manage changes that may occur due to natural causes.

OAR 340-041-0305(4)(c), (d), and (e)

(c) No new NPDES discharge or expansion of an existing discharge to these waters may be allowed.

(d) No new NPDES discharge or expansion of an existing discharge to waters upstream of or tributary to these waters may be allowed if such discharge would degrade the water quality within these waters.

(e) No activities may be allowed that would degrade the existing water quality and ecological characteristics and values of these waters.

The provisions at OAR 340-041-0305(4)(c), (d), and (e) specify Oregon's method of ensuring that the water quality of the North Fork Smith River system ORWs is "maintained and protected," by prohibiting discharges and other activities that "would degrade the existing water quality and ecological characteristics and values of these waters." As explained above in the Background section, the EPA has interpreted the prohibition on degradation at 40 CFR 131.12(a)(3) to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs (Water Quality Standards Handbook, EPA-823-B-12-002, section 4.7; and 63 FR 36742; 36785-87). The EPA recognizes an exception to this prohibition on degradation in ONRWs for temporary and short-term changes in water quality, as is also explained above in the Background section. For the reasons discussed above, the EPA approves OAR 340-041-0305(4)(c), (d), and (e) as being consistent with 40 CFR 131.12(a)(3).

Non-substantive Editorial Changes

In addition to the new ORW related provisions, Oregon adopted minor non-substantive editorial changes to the parts of OAR 340-041-0004 that are listed below.

OAR 340-041-0004(1), 0004(2), 0004(3), 0004(4), 0004(5), 0004(5)(a), 0004(5)(b), 0004(5)(c), 0004(6), 0004(7), 0004(8)(a), 0004(8)(b), 0004(8)(c), 0004(9), 0004(9)(a), 0004(9)(a)(C), 0004(9)(a)(D)(ii), 0004(9)(a)(D)(iii), 0004(9)(a)(D)(iv), 0004(9)(a)(D)(iv)(IV), 0004(9)(b), 0004(9)(c), and 0004(9)(c)(A)(ii).

The changes are grammatical in nature, the majority of which simply changed the case of the first letter in words such as commissioner, department, and director (from capital case to lower case). Some other changes abbreviated "Environmental Quality Commission" to "commission," and substituted "paragraph" for "section." A few sentences were reorganized without a change in meaning. The changes are identified in a document included with DEQ's submittal package (nfsmithriver Rules redline.pdf), which is part of the EPA's record for this action.

The EPA approves these non-substantive editorial changes under section 303(c) of the CWA and 40 CFR Part 131. The EPA's approval of these non-substantive editorial changes is to ensure public transparency as to which provisions are effective for purposes of the CWA. The scope of the EPA's action in approving such changes extends only as far as the actual changes themselves. The non-substantive editorial changes in these provisions do not alter the underlying provisions that EPA previously approved and EPA is not acting on the underlying provisions. (What is a New or Revised Water Quality Standard under 303(c)(3), Frequently Asked Questions, October 2012, EPA Publication No. 820F12017).

The EPA looks forward to future work with Oregon on water quality standards pursuant to our responsibilities under the CWA. If you have any questions regarding this letter, please contact me at (206) 553-1755 or Bill Beckwith of my staff at (206) 553-2495.

Sincerely,

A handwritten signature in blue ink that reads "Angela Chung".

Michael J. Lidgard, Acting Director ^{for}
Office of Water and Watersheds

cc: Aron Borok, DEQ - (by email)
Debra Sturdevant, DEQ - (by email)
Jennifer Wigal, DEQ - (by email)