

No. 18-35867, 18-35932, 18-35933

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DESCHUTES RIVER ALLIANCE,
an Oregon nonprofit corporation

Plaintiff-Appellant/ Cross Appellees

v.

PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon corporation, and

CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION

Defendants-Appellees/ Cross Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 3:16-cv-1644-SI
Hon. Michael H. Simon

APPELLANT'S FIRST BRIEF ON CROSS APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26-1 plaintiffs/appellants state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated this June 19, 2020

Law Office of Daniel Galpern

/s/ Daniel M Galpern

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) because this is a civil action arising under the laws of the United States, 33 U.S.C. § 1365(a)(1) (Clean Water Act citizen suit). The relief requested is authorized pursuant to 28 U.S.C. §§ 2201 (declaratory) and 2202 (further relief), and pursuant to 33 U.S.C. §1365(d) (litigation costs). The judgment appealed from disposed of the case, denying Plaintiff's partial motion for summary judgment regarding liability.

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final order and judgment entered August 3, 2018. The appeal was timely filed on October 17, 2018. Plaintiff intends to seek attorney fees and costs for this case, including this appeal, at an appropriate state of the litigation, pursuant to 33 U.S.C. §1365(d).

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and authorities appear in the Addendum to this brief.

ISSUE(S) PRESENTED

1. Whether the district court erred in dismissing plaintiff's motion for partial summary judgment on liability where Plaintiff's submitted evidence and allegations sufficiently demonstrated violations of numeric criteria limitations established in terms and conditions of Defendants' CWA Certification.

2. Whether the district court erred in dismissing plaintiff's motion for partial summary judgment on liability where Plaintiff's evidence sufficed *also* to establish violations of criteria limits that Defendants and the regulating state agency sought to establish in their private interim agreements.

3. Whether the district court erred in dismissing plaintiff's motion for partial summary judgment on liability where Plaintiff's evidence sufficed *also* to establish violations of the minimum water quality criteria limitations provided in state water quality standard regulations.

4. Whether, in interpreting the CWA Certification, the district court erred in treating its Condition S as surplusage not pertinent to other terms limiting Defendants' discharge.

5. Whether, in interpreting the CWA Certification, the district court erred in crediting as enforceable its provisions requiring the identification of management measures that must aim to comply with water quality criteria limitations, but *not* provisions establishing Defendants' liability for violations of those limits themselves.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The matter here under appeal is a Clean Water Act citizen suit enforcement action by a non-profit environmental group against the owners (including the operator) of a hydroelectric project on the Deschutes River in Oregon for violations of federal law protecting water quality.

II. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

This appeal arises from a Clean Water Act (“CWA”) citizen suit by Deschutes River Alliance (“DRA”) against Portland General Electric, Co. (“PGE”) and Confederated Tribes of the Warm Springs Reservation (“Tribe”) alleging that Defendants repeatedly violated the CWA §401 Water Quality Certification for the Pelton Round Butte (“PRB”) Hydroelectric Project (the “Project”). PGE and the Tribe are co-owners of the Project, with PGE serving as its Operator.

In September of 2016, PGE per FRCP 12(b)(1) moved to dismiss arguing, *inter alia*, that the CWA does not authorize citizen enforcement of Certification terms and conditions. ER 260-61. It argued instead that the citizen suit provision applied only to the requirement [for an applicant for a federal license] “to *obtain* a certification but not to enforce any conditions that are included within any certification.” *Id.* The district court rejected PGE’s argument as inconsistent with

the text and purpose of the statute, determining that citizens (including states) may enforce certification conditions that include applicable effluent limitations and other appropriate requirements of state law. *Id.*¹

On March 5, 2018 DRA filed for partial summary judgment under FRCP 56 on PGE and the Tribe's liability for repeated violations of the Project's Water Quality Certification, ECF 65. PGE and the Tribe then cross-filed for summary judgment under FRCP 56. On August 3, 2018, the court dismissed DRA's summary judgment motion and granted that of PGE. ER 37 DRA timely appealed the court's denial of its motion for partial summary judgment as to liability and its dismissal of the case. ER 38 and 43.

¹ For completeness we note as well that on August 14, 2017, this Court denied PGE's petition for interlocutory appeal of the District Court's denial of PGE's motion. We note here as well that the District Court also rejected a motion by the Tribe to dismiss the case on the ground that it was an indispensable party that could not be named due to claimed sovereign immunity. ER 49

III. STATEMENT OF FACTS

The PRB Hydroelectric Project was completed in 1964 with the final construction of Round Butte Dam, the uppermost (and most southern) of the three-dam complex that extends over a twelve-mile stretch of river. The reservoir behind Round Butte Dam, called Lake Billy Chinook (LBC), is the largest reservoir of the Project.

Prior to late 2009, all LBC water passed downstream by the Project was drawn from the bottom of LBC. Over the last decade, PGE and the Tribe developed a “selective water withdrawal tower” (hereinafter, “SWW”) to allow water to be drawn also from the surface of Lake Billy Chinook (hereafter, “LBC”) so as to attract downstream-migrating salmon and steelhead to the SWW’s associated fish collection facility; SWW operations were also supposed to result in Project compliance with water quality standards.

The SWW began operating in December 2009. Contrary to apparent outcomes of earlier PGE model runs, SWW operations have degraded lower Deschutes River water quality. Neither has it, after a decade of use, produced viable returns of anadromous fish. As to the water quality issue, the water is now warmer, and due to increased levels of algal growth caused by increased nutrient concentrations, pH levels in the lower Deschutes River now greatly exceed Deschutes Basin water quality standards.

The lower Deschutes River continues to be water quality limited² with respect to several key parameters, including pH, dissolved oxygen, and temperature.³

Project discharges are constrained by the Clean Water Act (“CWA”) §401 Certification (“Cert”), issued to Defendants by the Oregon Department of Environmental Quality (“DEQ”) in 2002. The Cert’s terms and conditions incorporate a Water Quality Management and Monitoring Plan (“WQMMP”). Those constrain Project discharge at the point of compliance – the outfall of the Reregulating Dam in the lower Deschutes River – with respect to water quality parameters including pH, dissolved oxygen, and temperature.

The Cert and WQMMP variously provide specific numeric and narrative water quality limitations and, particularly in the WQMMP, broadly-worded management guidance (and, even, predictions of performance). As well, both cite to State and Tribal water quality rules in OAR 340-041 and Tribal Ordinance 80 respectively. WQMMP 2.1, 3.1 and 4.1. ER 162, 167, and 170.

With respect to pH, they prohibit discharge outside the range of 6.5 to 8.5 Standard Units and also compel Defendants to devise a pH management plan

² OAR 340-041-0002(70) defines “water quality limited.”

³ See *Oregon's 2012 Integrated Report Assessment Database and 303(d) List* at <https://www.deq.state.or.us/wq/assessment/rpt2012/search.asp#db>

(PHMP) to secure such compliance -- whether in the lower river or the reservoirs created by Project impoundments. The Project's SWW is a designated "facility for compliance" to control pH. WQMMP 4.3. ER 162.

With respect to dissolved oxygen, the DOMP prohibits, during any part of the year, Project discharge at the Reregulating Dam point of compliance where DO concentrations fail to exceed 9.0 mg/l during the entire year. The DOMP designates both the SWW and Reregulating Dam as facilities for compliance. WQMMP 3.2. ER 161. The DOMP designates the Project's SWW and Reregulating Dam as "facilities for compliance" to maintain required levels of dissolved oxygen in Project discharge. WQMMP 3.3. ER 162.

With respect to temperature, the TMP prohibits, when surface waters exceed 50 °F (10 °C) or federally listed Threatened and Endangered species use the river, Project discharge that is "more than 0.25 °F over what would occur at that location in the river if the PRB Project were not in place."⁴ The WQMMP designates the Project's SWW as the "facility for compliance" to limit temperature in Project discharge. WQMMP 2.3. ER 162.

⁴ We refer to this criterion hereafter as "WPT 0.25 °F." Project-related materials sometime refer to NPT (natural thermal potential). We treat the WPT and NPT concepts synonymously in this brief.

In a series of so-called “Interim Agreements” applying, year by year, to 2011, 2012, 2013, 2014, 2015, 2016 and 2017, struck without an opportunity for public comment, PGE (signing also for the Tribe) and DEQ recited their changing understanding of WQMMP Project management expectations and agreed to increasingly lax criteria limitations they would apply to Project discharge over the term of each agreement. ER 68 to 86.

ARGUMENT

The district court rejected DRA’s motion upon its determinations that: (1) The relevant enforceable requirements begin and end with those compelling mere effort to comply, such that actual compliance with applicable water quality criteria limits is not required, and (2) Even if compliance with applicable limits were required, DRA sought to enforce the wrong limits. DRA assigns error to both determinations.

A. Standard of Review

A district court’s decision to grant, partially grant, or deny summary judgment or a summary adjudication motion is reviewed *de novo*. *See, e.g.,* Branch Banking & Tr. Co. v. D.M.S.I., LLC, 871 F.3d 751, 759 (9th Cir. 2017); Mull for Mull v. Motion Picture Indus. Health Plan, 865 F.3d 1207, 1209 (9th Cir. 2017); Szajer v. City of Los Angeles, 632 F.3d 607, 610 (9th Cir. 2011); Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004); *but see*

Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 877 n.1 (9th Cir. 2002) (declining to review denial of summary judgment). A district court's decision on cross motions for summary judgment is also reviewed *de novo*. See Guatay Christian Fellowship v. County of San Diego, 670 F.3d 957, 970 (9th Cir. 2011); Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co., 546 F.3d 1142, 1145 (9th Cir. 2008); Arakaki v. Hawaii, 314 F.3d 1091, 1094 (9th Cir. 2002).

The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). See Suzuki Motor Corp. v. Consumers Union, Inc., 330 F.3d 1110, 1131 (9th Cir. 2003).

On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Frudden v. Pilling, 877 F.3d 821, 828 (9th Cir. 2017); Olsen v. Idaho State Bd. of Medicine, 363 F.3d 916, 922 (9th Cir. 2004). The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. See Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

Summary judgment may be appropriate when a mixed question of fact and law involves undisputed underlying facts. See EEOC v. United Parcel Serv., 424 F.3d 1060, 1068 (9th Cir. 2005); Colacurcio v. City of Kent, 163 F.3d 545, 549

(9th Cir. 1998). However, summary judgment is not proper if material factual issues exist for trial. *See* Simo v. Union of Needletrades, 322 F.3d 602, 610 (9th Cir. 2003).

Summary judgment may be affirmed on any ground supported by the record. *See* Campidoglio LLC v. Wells Fargo & Co., 870 F.3d 963, 973 (9th Cir. 2017); Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 956 (9th Cir. 2009).

B. Discussion

1. The WQMMP Numeric Criteria Limitations Were (And Are) Applicable, and Enforceable

The District Court sets out the following formulation for legally construing the Project’s Water Quality Certification: “‘If the language of the [Certification], considered in light of the structure of the [Certification] as a whole, is plain and capable of legal construction, the language alone must determine the [Certification’s] meaning.’” ER 19. (quoting Nat. Res. Def. Council, Inc. [“NRDC”] v. Cnty. of Los Angeles, 725 F.3d 1194, 1204-05 (quotation marks omitted by lower court)). The Project’s Water Quality Certification “incorporates a Water Quality Management and Monitoring Plan (‘WQMMP’) . . . [which] contains several specific management plans, including, as relevant here: a Water Temperature Management Plan (‘TMP’), a Dissolved Oxygen Management Plan

(‘DOMP’), and a pH (Hydrogen Ion Concentration) Management Plan (‘PHMP’). *The Certification mandates that the SWW be operated in accordance with [these plans].*” ER 11. (emphasis added). Each of these plans has a provision under the heading “Facilities for compliance” stating that the SWW “will be operated . . . to meet the applicable . . . [temperature/DO/pH] standards in the lower Deschutes River” WQMMP at 4 (Section 2.3); 9 (Section 3.3); and 12 (Section 4.3); *see* ER 162, 167, and 170.

In spite of the District Court’s acknowledgement of the mandatory nature of the WQMMP and its PHMP, DOMP, and TMP, the District Court then proceeded to ignore this plain reading of the Water Quality Certification and WQMMP. This appears to be at least in part based on the District Court’s misconstruction of the Water Quality Certification’s guiding language regarding preparation of the PHMP, DOMP, and TMP. The Water Quality Certification contains parallel provisions in the following form: “The [TMP/DOMP/PHMP] shall identify those measures . . . that [PGE and the Tribe] will undertake to reduce the Project’s contribution to violations of water quality standard criteria for [temperature/dissolved oxygen/pH].” ER 237 (Section C.1.), 240 (Section D.1.), and 242 (Section E.1.). The District Court appears to focus on the “reduce the Project’s contribution” language of these provisions in arriving at its conclusion that the Water Quality Certification’s mandates that the SWW “shall be operated in

accordance with” the TMP/DOMP/PHMP “means using the techniques identified to *work toward compliance*, and following the overall mandate to use adaptive management.” ER 24 (emphasis added). That is, the District Court took the guiding language for *development* of the plans as a basis for concluding that the mandatory language contained in the actual plans that were created need not be followed/does not mean what it says. This, in spite of the fact that the guiding language in and of itself reinforces the mandatory nature of the plans, i.e., it characterizes the plans as identifying measures that PGE and the Tribe “will undertake.” ER 237 (Section C.1.), 240 (Section D.1.), and 242 (Section E.1.).

The Project’s Water Quality Certification was issued in June of 2002, *see* ER 9, and the WQMMP containing the TMP, DOMP, and PHMP was approved by DEQ and issued a little over two years later in July of 2004. WQMMP at 1. ER 159. The July 2004 WQMMP and the TMP, DOMP, and PHMP contained within it are the currently-effective plans that PGE and the Tribe formulated in response to the Water Quality Certification’s parallel charges to “identify measures” that they “will undertake.” Three such identified measures are central to this case—measures that mandate in plain language that the SWW “will be operated . . . to meet the applicable . . . [temperature/DO/pH] standards in the lower Deschutes River” WQMMP at 4 (Section 2.3); 9 (Section 3.3); and 12 (Section 4.3). ER 162, 167, and 170. The fact that these measures identified by PGE and the Tribe

require water quality standards compliance (versus merely “reduc[ing] the Project’s contribution to violations of water quality standard[s]”) does not and should not somehow negate the fact that the plans do in fact include these mandatory compliance measures, nor does it or should it convert them from mandates to aspirations.

If PGE and the Tribe (and DEQ) are of the opinion that the TMP, DOMP, or PHMP’s mandatory language regarding SWW operation is overly-restrictive, the Project’s Water Quality Certification provides multiple avenues for addressing this. DEQ is empowered to approve either termination or modification of the TMP, DOMP, and/or PHMP however, DEQ’s approval is exclusively conditioned on its determination that such termination or modification “*will not contribute to violation of* [temperature/dissolved oxygen/pH] criteria in waters affected by the Project.” ER 239 (Section C.7.), 242 (Section D.6.), and 244 (Section E.6) (emphasis added). This language pertaining to plan termination or modification helps explain why measures identified by PGE and the Tribe go beyond merely “identify[ing] those measures that [PGE and the Tribe] will undertake to reduce the Project’s contribution to violations of water quality standard criteria” That is, the *raison d’être* for Section 401 of the Clean Water Act, the Project’s Water Quality Certification, and WQMMP and its sub-plans is compliance with water

quality standards, i.e., not mere reducing of contribution to violations, but *elimination* of contribution to violations.

The District Court's failure to credit the plain language of the Project's Water Quality Certification and associated water quality plans also appears to have some basis in the Court's linking of the plans' "approach to management" and "management operations" sections with the plans' "Facilities for compliance" sections. In addition to the three "Facilities for compliance" sections containing the mandates that the SWW "will be operated . . . to meet the applicable . . . [water quality] standards in the lower Deschutes River," the plans also include "Approach to [temperature/DO/pH] management" and "[Temperature/DO/pH] management operations" sections that discuss approaches to Project operations that PGE and the Tribe anticipated would achieve the compliance mandates. *See generally*, WQMMP at ER 162-172. Structurally, the WQMMP's "Facilities for compliance" sections identify the "what" that is to be achieved, whereas the "approach" and "operations" sections identify "how" PGE and the Tribe *anticipated* the Project would secure its compliance with water quality standards.

In its discussion of the Water Quality Certification's temperature provisions and associated TMP, the District Court states as follows: ". . . to establish a violation of Condition C.1 [of the WQMMP/TMP], *Plaintiff would have to show more than the exceedance of criteria*; Plaintiff would have to show that Defendants

failed to comply with specific measures called for in the TMP, or failed to use adaptive management.” ER 28 (emphasis added). The District Court here ignores the plain language of the Water Quality Certification and temperature management plan, by effectively adding an asterisk to the plan provision requiring operation of the SWW to meet water quality standards, with that asterisk waiving the mandate to meet water quality standards as long as PGE and the Tribe demonstrate a mere attempt at compliance.

The District Court extends this analysis to dissolved oxygen, with its discussion of dissolved oxygen beginning as follows:

Condition D.1., which relates to dissolved oxygen, requires that Defendants operate the SWW in accordance with the DOMP. The DOMP, in turn, describes the measures that Defendants will undertake in an effort to reduce the Project’s contribution to dissolved oxygen exceedances. The DOMP calls for adaptive management of the SWW, taking into consideration all water quality criteria and fish passage goals.

ER 29.

While the District Court acknowledges the Water Quality Certification’s mandate that PGE and the Tribe comply with the DOMP, it then fully skips over any mention of the DOMP’s mandate for operation of the SWW so as to meet water quality standards, focusing instead on the vague requirement that PGE and the Tribe instead merely “undertake” “measures . . . in an effort to reduce the Project’s contribution to dissolved oxygen exceedances.” *Id.*

The District Court’s judicial modification of the plain language of the TMP and DOMP’s compliance mandates is legally unsupported, effectively transforming the Project’s Water Quality Certification into a toothless, unenforceable participation trophy that makes a mockery of Section 401 of the Clean Water Act; in Yoda-speak, the District Court’s interpretation of the Project’s Water Quality Certification translates to “There is only try.”⁵

It also bears pointing out that the District Court’s assertion that “Operating the Project ‘in accordance’ with [the TMP/DOMP/PHMP], then, means using the techniques identified to work toward compliance, and following the overall mandate to use adaptive management, ” ER 21 by its own terms evinces noncompliance or violations. Working “toward compliance” connotes a prerequisite state of noncompliance. Referencing adaptive management similarly connotes a prerequisite state of noncompliance, inasmuch as the WQMMP points out “the need for an adaptive management approach *to ensure compliance with water quality standards.*” WQMMP at ER 160 (emphasis added). Adaptive management, then, is implicated when there is a condition of noncompliance or

⁵ *I.e.*, the polar opposite of Yoda’s actual admonition “Do or do not. There is no try.”

violations, and a different operational approach is employed in an attempt to achieve compliance/remedy violations.

(a) Condition S Supports DRA’s Reading, Cannot Be Read Out of the Cert and Affirms the Project’s Regulatory Floor

In addition to the mandates already discussed, the Cert provides as follows:

“Notwithstanding any of those conditions, no activities shall be conducted which will violate state water quality standards.” Cert, Condition S. The district court dismissed the applicability of this condition, notwithstanding its facially mandatory character, contending (a) that it required adherence, if at all, only to state water quality standards that are less stringent than the criteria limits DRA attempted to enforce and (b) that in any event, the terms of the Condition S are too sweeping to be reconciled with other “more carefully planned provisions” of the §401 Cert. ER 23.

The court’s reasoning, however, was flawed. First, the Cert can be read harmoniously to give effect both to its Condition S and to those provisions on which the court relied. Accordingly, that harmonious reading is required.

Second, the applicable and mandatory state (and tribal) water quality standards strongly support a full effect reading of Condition S. The WQMMP tiers to “ODEQ and Tribal water quality standards [] found in OAR 340-41 and Tribal Ordinance 80, respectively.” WQMMP 2.1. ER 162. State rules seek “to prevent unnecessary further degradation . . . and to protect, maintain, and enhance existing

surface water,” and provide that “[w]ater quality limited waters may not be further degraded.” OAR 340-041-0004(1)⁶ and (7). Source discharges therefore are subject to the “protect, maintain and enhance” mandate even when their impacts are insignificant. OAR 340-041-0004(3)(c) and (d). Further, the rules expressly provide: “Notwithstanding the water quality standards contained in this Division, the highest and best” practicable control of activities and flows “*must in every case* be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures . . . and other deleterious factors at the lowest possible levels.” OAR 340-041-0007(1) [Emphasis added.] Tribal Ordinance 80 provides precisely the same exceptionally protective mandate. Ordinance at §432.100(1).⁷

As well, and contrary to the court’s presumption, Condition S does not substantially override other Cert provisions, including those requiring the WQMMP managements plans – here, the PHMP, DOMP and the TMP – to

⁶ “The standards and policies set forth in OAR 340-041-0007 through 340-041-0350 supplement” that policy. OAR 340-041-0004(1).

⁷ The relevant State and Tribe regulatory provisions recognize that natural conditions or discharges by other sources may contribute or cause a waterway to be in breach of its water quality standard range, violate minimum concentration requirements, or exceed applicable limits. But if without the regulated specific source the water quality parameter would still abrogate relevant criteria standards, the rules still establish minimum requirements restricting its discharge, namely that it not further degrade the waterway. And if the source through its activities or flows is able to ensure a waterway’s adherence to the standards, it must do so. OAR 340-041-0007(1).

identify measures to “reduce the Project’s contribution” to breaches of applicable criteria. If sufficiently strong, such measures should ensure that breaches are eliminated. But Condition S applies to guard against any interpretation that would allow for merely modest contribution reductions that *still* would cause Project discharge to violate its applicable numeric limits.

The provisions on their face all seek to secure improved water quality outcomes. They must if feasible be read in harmony, with Condition S establishing the performance floor. This entails that the plain meaning of Condition S not be ignored. As this Court has observed:

“[A] court must give effect to every word or term” in an NPDES permit “and reject none as meaningless or surplusage. . . .” *In re Crystal Props., Ltd., L.P.*, 268 F.3d 743, 748 (9th Cir. 2001) (quotations omitted); *see also* Restatement (Second) of Contracts § 203(a) (1981) (“[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.”). “Therefore, we must interpret the [Permit] in a manner that gives full meaning and effect to all of the [Permit's] provisions and avoid a construction of the [Permit] that focuses only on” a few isolated provisions. *In re Crystal Props.*, 268 F.3d at 748.

NRDC v. Cnty. of L.A., 725 F.3d 1194, 1206 (9th Cir. 2013)

To the extent, however, that Condition S effects a tightening of options that otherwise might be taken, its wording makes clear that it controls.

“Notwithstanding” means “despite” or “in spite of.” *Black’s Law Dictionary*, 7th Edition 1091 (1999). Thus, “despite” or “in spite of” any other of its conditions,

the Cert makes clear that no Project activities will be countenanced “which will violate state water quality standards.” *See also* Webster's Third New International Dictionary 1545 (1981) (“without prevention or obstruction from or by”); *B. Cisneros v Alpine Ridge Group*, 508 US 10 (1993) (“notwithstanding” functions as an overall limitation).⁸

The district court’s treatment of Condition S and its reading of the Cert was not permissible. It was not entitled to ignore the Project’s critical water quality limitation provided by Condition S. It thus erred in treating the numeric and narrative criteria limits of the Cert and in the WQMMP as optional, that is, as requiring a mere improvement over some other prior or feasible contribution. Read in the light of Condition S, the Project may not cause water quality standard criteria violations. Neither may it, if the Cert and its WQMMP are read, as required, in the light of pertinent state rules, induce further degradation. As discussed *supra*, Defendants’ mere *attempts to comply with measures that aim to comply* will not suffice.

⁸ The term and its similar use are found, as well, at OAR 340-041-0565(1)(2003). https://web.archive.org/web/20030816233614/http://arcweb.sos.state.or.us/rules/OARS_300/OAR_340/340_041.html

(b) The District Court’s Reliance on the Interim Agreements Was Ineffective

The district court offered a curious argument concerning the annual interim agreements (IAs), mentioned *supra*, struck between PGE and DEQ. While questioning their effectiveness, the district court nonetheless found DRA’s failure to expressly aver that Defendants violated the criteria limitations found in those IAs was telling. It reasoned that the IAs provided criteria limitations that were more stringent than the standards in state rules, which standards, as discussed *supra*, the court deemed the applicable ones. Accordingly, the district court concluded, the Project was in compliance with the minimum state standards.

We take it a step at a time. The district court questioned whether the IAs even effectively modified the WQMMP and, indeed, whether they even *purport* to modify the WQMMP. ER 27. We can promptly deal with the latter construal; it is plainly wrong. The 2012 IA provides, for instance, that “[t]his Agreement does not *otherwise* affect, modify, or supersede the Joint Licensees’ obligations under the WQMMP.” (Emphasis added.) *See also* ER 73 to 89 (same). The logical import can only be that the IAs *do* purport to “affect, modify, or supersede.” ER 70.

As to whether the IAs were effective in amending the WQMMP, the district court was right to point to DEQ’s apparent failure to render appropriate determinations, ER 27, and the point is supported, in DRA’s view, by the failure of the record to establish that the Agency undertook any relevant public proceedings.

OAR 340-048-0050(2) (“Modification or Revocation of a Certificate”). But if the IAs did not effectively modify the WQMMP standards, even for a temporary period, then DRA’s enforcement of its criteria limitations as written was effective. If their promulgation was permissible, on the other hand, they were nonetheless void for attempting to establish criteria limitations falling sharply below the minimum state standards, as discussed *infra* with respect to dissolved oxygen and temperature criteria.

Moreover, DRA’s allegations and submitted evidence sufficed to establish that even if the IAs were effective, Project discharge nonetheless regularly violated even their less stringent criteria limitations, as we also discuss *infra*. Accordingly, the district court’s attempted reliance on the IAs to demonstrate that DRA failed to establish Project violations simply holds no water.

In sum then, in this part, the WQMMP numeric criteria limitations were applicable and enforceable, Condition S must be credited to provide the Project’s regulatory floor, and the district court’s reliance on its IA argument was ineffective.

2. Record Evidence Established Project Discharge Violations Under the Proper Standard and Under Every Other Standard Averred Below

Turning then to the actual criteria limits that DRA properly sought to enforce, we consider those for pH, dissolved oxygen, and temperature.

(a) **pH (Hydrogen Ion Concentration)**

As noted *supra*, the Project’s Water Quality Certification “mandates that the SWW be operated in accordance with” various plans, one of which is the PH Management Plan (“PHMP”). As is the case for the Dissolved Oxygen Management Plan (DOMP) and the Temperature Management Plan (TMP), the PHMP is part of the overall Water Quality Management and Monitoring Plan (“WQMMP”) for the Project. ER 11. The PHMP in turn mandates that the SWW “will be operated . . . to meet the applicable . . . pH standards in the lower Deschutes River”, WQMMP at 12 (Section 4.3). ER 170.

As noted by the District Court, “[t]he parties agree that the applicable water quality standard for pH in the lower Deschutes River is that ‘pH values may not fall outside’ the range of 6.5-8.5 in river below the Project.” *Id.* (citing OAR 340-041-0021; OAR 340-041-0135(1)(a)). The District Court goes on to state that “the Certification does not *imply* that every given exceedance of a water quality standard constitutes a violation of the Certification.” *Id.* (Emphasis added).

The DRA agrees that the Project’s Water Quality Certification does not “imply” violation of the Certification when Project discharges exceed pH of 8.5 in the river below the Project; the Certification instead plainly provides that such discharges *are* in fact violations. Indeed, given the Certification’s mandate the the SWW “shall be operated in accordance with the pH Management Plan,” ER 240

(Section E.1.), and the PHMP’s separate mandate that the SWW “will be operated . . . to meet the applicable . . . pH standards in the lower Deschutes River,” WQMMP, ER 170 (Section 4.3), the plain language of the Cert and PHMP *mandate* strict Project compliance with the pH standard in the river below the Project. That is, the undisputed evidence submitted by DRA of “482 days since January 1, 2012, in which Project discharges exceeded 8.5” in the river below the Project, *id.* at 189 indicates 482 violations of the PHMP, which in turn also violates the Cert and the Clean Water Act.

The District Court’s opinion includes the following misleading statement regarding pH: “The PHMP, however, in contrast to the TMP and DOMP, demonstrates an expectation that pH target levels may not be met, providing that pH may exceed target levels when ‘all practical measures are being employed to minimize exceedances.’” ER 22, n. 5 (quoting PHMP at 12 (Section 4.2); emphasis in original). Looking to the quoted language from the PHMP, it is clear that this language refers specifically to “Project reservoirs” (i.e., it does not refer to the lower Deschutes River below the Project). This case, of course, is focused on the lower Deschutes River and includes no allegations of violations in Project reservoirs, therefore the District Court’s statement has no relevance to this case or to the summary judgment motion that is the subject of this appeal.

DRA's evidence alleged 482 violations of applicable pH criteria limits over 2012-2017. ER 174. OAR 340-041-0135(1)(a) establishes for the Deschutes Basin that "pH values may not fall outside the range of 6.5 to 8.5." *See also* WQMMP 4.2. As noted, *supra*, that criterion applies to all Project-impacted waters – not only the lower Deschutes River but the series of three reservoirs created above it by Project impoundments. Consistent with state rules, the WQMMP carves out an allowance for those reservoirs to exceed the 8.5 limit where "all practical measures are being employed." *Id.* *See also* ER 242 Condition E.2. Also consistent with state rules, however, the WQMMP provides no similar exception for Project discharges to the lower Deschutes River.

Still, the district court read the Cert and WQMMP to allow Project discharges to violate its pH criterion without end, so long as there are measures for the Project to reduce its contribution to pH exceedances. That is *not* the necessary implication of either the ER 242 Condition E.1. or the PHMP, as discussed *supra*. In particular, the Project's adaptive management requirements do not obviate Defendants' liability for failing to keep Project discharge within its numeric pH criteria range. Specifically, the numeric criteria compliance duty applies even though the PHMP *also* requires Defendants, when the risk of Project pH violations climb high, to "immediately contact ODEQ and the CTWS WCB to develop an approach to reduce pH that is consistent with maintaining compliant temperature

and DO values and surface withdrawal volumes necessary to facilitate smolt movement in Lake Billy Chinook.”

The district court points to the record for the proposition that managing Project discharge for pH could affect other management goals, but none of its citations supports the court’s conclusion that there are “*no* measures that can lower pH without adversely affecting temperature, dissolved oxygen, and fish passage,” emphasis added. ER 36, citing to ER 52-3 ¶ 32; ER 142 ¶ 12; ER 62-3, 66-7 ¶¶ 9, 40. First, the assertion is erroneous on its face in that the same use of the same “compliance facility,” that is, increased bottom water release from the SWW, can function to lower *both* temperature and pH. Moreover, an assertion as expansive as the court’s is not advanced in any of the declarations it cites. Further, bottom water releases do not ineluctably induce dissolved oxygen *violations*, as is plain on the face of evidence placed in the record by PGE. *Cf.* ER 109 with ER 124 for July 13-27 (65% bottom water released at SWW to control pH and no spill at Rereg Dam).⁹ Simultaneous compliance with pH and temperature limits on the one hand, and dissolved oxygen criteria on the other, accordingly, is not impossible. Further still, there is not even record evidence that Defendants ever “immediately contacted the

⁹Simultaneous management is uncontestably feasible, since additional bottom water can be released at the SWW, located at the Pelton Round Butte Dam, while water may be spilled 7 miles downstream at the Reregulating Dam point of compliance. Operations at one are not limited by operations at the other.

Agencies” and then actually developed a plan that even *tries* to constrain pH when Project discharge exceeds inflows, as required in the WQMMP.

The fully dispositive consideration here is that the relevant state rules and the WQMMP carve out no circumstantial compliance exception for the Project’s impact on lower river pH (unlike, as noted *supra*, for the Project’s reservoirs). The assertion of multiple parameter compliance “impossibility,” then, would be relevant, if at all, only to the *remedy* stage of the case – and best resolved after discovery and testimony. But as to *liability*, the district court’s reliance on any impossibility assumption or assertion (whether or not substantiated) was plain error.

There is, moreover, nothing surprising about the WQMMP’s firm criteria limitation on pH governing Project discharge. The District Court apparently had in mind that Cert “explicitly recognizes that water quality standards were already being exceeded at the time it was issued” and so deemed it “unreasonable to conclude that any given exceedance necessarily constitutes a violation of the Certificate.” ER 24. But as to pH, the statement mischaracterizes the record before the district court. The “Evaluation and Findings Report” for the Project’s Water Quality Certification reveals a single, aberrational instance of the pH standard having been exceeded pre-SWW. ER 55-6 (noting single exceedance on September 19, 1999 due to a “powerline failure caused by a range fire”). Similarly,

the Tribe's separate Water Quality Certification for the Project states that "Modeling results have indicated that discharges from the Reregulating Dam *will continue to meet* the pH criterion . . ." ER 173 (emphasis added; indicating that Project discharges complied with the pH standard pre-SWW).

For its part, DEQ was "reasonably assured Project operations with the SWW will comply with the hydrogen ion concentration (pH) standard," ER 59, while PGE and the Tribe anticipated, based on their pre-SWW modeling, "that discharges from the Reregulating Dam will continue to meet the pH criterion, with the possible exception of minor, brief, and isolated instances during the summer months." *Id.* at 58. DRA's submission of evidence before the district court, in fact, evinced substantial,¹⁰ repeated, and numerous Project pH violations, lasting to the middle or end of November, depending on the year. ER 172.

The district court indicated that Defendants should not be held responsible for violating their Cert simply because, in their representations to the state, they got their pH modeling all wrong. But that is not the basis for DRA's motion as to liability. The Project's numeric criteria pH limitations and adaptive management duties are compatible with one another; the later does not displace the former. But if there were any doubt, as discussed *supra*, Condition S functions entirely to

¹⁰ The Court is entitled to take notice that the pH scale is logarithmic.

remove it. DRA enforced the applicable criterion, and its submitted evidence stands. The Court should reverse the dismissal and direct a judgment for DRA on the ground of the Project's manifold violations of its pH criterion limits.

(b) **Dissolved Oxygen Limitation**

As discussed above, the Water Quality Certification's dissolved oxygen provisions are analogous to its pH and temperature provisions—they are quite plain in having required PGE and the Tribe to formulate a Dissolved Oxygen Management Plan (“DOMP”), and in mandating that “[t]he SWW facility shall be operated in accordance with” said plan. Cert at 3. Analogous to the PHMP, the DOMP in turn includes a section entitled “Facilities for compliance,” which provides that the SWW “will be operated . . . to meet the applicable . . . DO standards in the lower Deschutes River” WQMMP at 9. The District Court acknowledges this relationship between the Project's Water Quality Certification and the DOMP, e.g., “The Certification mandates that the SWW be operated in accordance with . . . the DOMP (ECT 66-8 at 4)” ER 11.

Despite its acknowledgement of the mandatory nature of the DOMP, the District Court then proceeds to ignore this plain reading of the Water Quality Certification and the DOMP. As previously discussed, the District Court erroneously ignores the DOMP's mandate that PGE and the Tribe operate the SWW so as to meet DO standards in the lower Deschutes River, interpreting the

Water Quality Certification and DOMP to merely “undertake” “measures . . . in an effort to reduce the Project’s contribution to dissolved oxygen exceedances.” ER 29. This interpretation is at odds with the plain language of the Project’s Water Quality Certification and DOMP.

The parties dispute the applicable numeric dissolved oxygen criterion in the lower Deschutes. The DOMP applies Oregon’s “salmonid spawning DO criterion” year-round based on the fact the salmonid spawning and incubation occur in the lower river over “the entire year.” WQMMP at 9. The relevant Oregon Administrative Rule references various spawning maps regarding fish species other than resident trout. *See* ER 30 (indented paragraph, citing OAR 340-041-0016(1) (emphasis added)). When it comes to resident trout, the rule is based on fact-based/in-the-river activity (as opposed to relying on maps): “[the spawning criterion applies] . . . where resident trout spawning occurs, during the time trout spawning through fry emergence occurs.” *Id.* Tribal Ordinance 80 explicitly designates the reach of river including the Project’s compliance point for spawning through fry emergence, and year-round. Tribal Ordinance 80, §432.100(2)(A)(a) and incorporated Table 1, Table 4, Figure 1 and Map C. In light of the WQMMP’s express citation to Tribal law, the District Court was not entitled to ignore Ordinance 80.

PGE and the Tribe argue that the salmonid spawning standard applies only from October 15 to June 15, citing changed standards since the July, 2004 WQMMP. As discussed above, DEQ has entered into a series of “interim agreements” with PGE and the Tribe pursuant to which DEQ has agreed to apply the spawning criterion only from October 15 to June 15. ER 31. The Deschutes River Alliance, however, presented undisputed evidence of post-June 15 resident trout spawning in the lower Deschutes below the Project. *Id.* PGE and the Tribe point to a February 4, 2004 letter from DEQ to EPA in which DEQ, citing a “lack of site specific data” purported to “deem” “residential trout spawning . . . to occur from January 1-June 15 each year” across the entire State of Oregon in waters designated as “core cold water habitat” (which is the designation of the lower Deschutes below the project). ER 32. This letter, which purported to apply a broad-brush designation statewide based on a lack of site-specific information, preceded the WQMMP by many months (February of 2004 for the letter versus July of 2004 for the WQMMP). WQMMP at 1. The WQMMP was the end result of an exhaustive, years-long agency evaluation process that concluded that the DO standard should apply year-round below the project; additionally, as noted above, the Deschutes River Alliance presented evidence of post-June 15 resident trout spawning to the District Court on summary judgment, and neither PGE nor the Tribe presented evidence to the contrary (nor did DEQ). Given the undisputed

nature of the spawning evidence presented to the District Court by the DRA, along with the evidence of year-round spawning indicated by the Tribal Ordinance cited above, it appears that there is no genuine dispute regarding these material facts.

The plain language of the DOMP imposes the “salmonid spawning DO criterion” year-round. As discussed above, DEQ has the authority to terminate or modify the DOMP if it specifically makes a determination that such termination or modification “will not contribute to violation of dissolved oxygen criteria in waters affected by the Project.” ER 242 (section D.6). No evidence has been presented of such a determination here, therefore the DOMP’s year-round application of the spawning criterion to the lower Deschutes still holds.

A final consideration with regard to the DOMP is that it significantly differs from both the PHMP and TMP inasmuch as there are multiple “Facilities for compliance” for dissolved oxygen, i.e., the operation of the SWW is not the sole means of compliance with the water quality standards for dissolved oxygen. *See* WQMMP at 9, ER 167 (Section 3.3). The DOMP provides that “[t]he existing Reregulation Dam spillway facilities may also be used” for purposes of compliance, *id.*, with the DOMP including mandatory provisions requiring that PGE and the Tribe “will institute controlled spills at the Reregulating Dam” as necessary for dissolved oxygen compliance. *Id.* at 169 (Section 3.6) (emphasis added). Significantly, the WQMMP’s adaptive management requirements do not

apply to the use of controlled spill, and instead apply only to the operation of the SWW: “[PGE and the Tribe] shall operate *the selective withdrawal facility* pursuant to general adaptive management considerations.” WQMMP at 2, ER 160. The District Court appears to note this subtle (but significant) distinction toward the beginning of its discussion of dissolved oxygen: “The DOMP calls for adaptive management of the SWW” ER 29. However, the District Court then appears to lose sight of this distinction by the end of its consideration of dissolved oxygen, where it erroneously imposes the Water Quality Certification’s adaptive management framework on the DOMP’s mandatory controlled spill requirements: “. . . even if the year-round spawning criterion applied, and even if the Project did not initiate spill on days where the year-round spawning criterion was not met, Plaintiff has not established that Defendants failed to meet their adaptive management obligations.” ER 34. It makes sense that adaptive management requirements do not apply to controlled spill given the fact that the Reregulating Dam is located at the downstream-most reach of the Project, over ten miles downstream from the uppermost dam (Round Butte) and its associated SWW.

DRA’s submitted evidence demonstrated 540 Project violations of its dissolved oxygen criterion limit in the 2012-17 period.

DRA's submitted evidence demonstrated 540 Project violations of its dissolved oxygen criterion limit in the 2012-17 period. The Court should reverse the dismissal and direct a judgment for DRA on the ground of the Project's violations of its dissolved oxygen criterion limits.

(c) **Temperature**

As noted *supra*, WQMMP 2.2 provides, that Project discharge into the lower Deschutes River must not be $WPT + 0.25\text{ }^{\circ}\text{F}$. "when surface waters exceed $50\text{ }^{\circ}\text{F}$ ($10\text{ }^{\circ}\text{C}$) or when federally listed threatened and endangered species use the river." ER 162. The IAs were read by DEQ and PGE to relax that standard but, as discussed *supra*, they were not properly executed and so did not modify the Project's criteria limitations, even on interim bases. We consider them nonetheless, here.

The 2012 IA directed that during cooling events "the 7-day average daily maximum discharge temperature below the Reregulating Dam can be" up to $WPT + 0.3\text{ }^{\circ}\text{C}$ for up to 3 days "before the Joint Licensees bring discharge temperatures *back to the standard*" of $WPT + 0.25\text{ }^{\circ}\text{F}$. ER 71, Term 1. Applicable Temperature Standard. [Emphases added.] Succeeding IAs went further in attempting to modify the applicable temperature standard. Thus, the 2013 IA provided that 7DADM temperature can be up to $WPT + 0.5\text{ }^{\circ}\text{C}$ for up to 3 days before Defendants "bring discharge temperatures back to the standard of $[WPT] + 0.3\text{ }^{\circ}\text{C}$." It also provided

that PGE need not begin blending operations at the SWW until “the increasing discharge temperature below the Reregulating Dam approaches 12 °C.”

The district court’s question whether the IAs were effective in amending the temperature limits relevant to the Project is important here, in part because PGE, in its ER 90 filing with the district court, interpreting its own error-ridden 2013 IA language,¹¹ presumed the IAs to have modified not only the WPT criterion limit, but also the circumstances governing when that limit must be applied.¹² If they are not effective, then the terms of the WQMMP as written must apply, and it was the temperature criterion limitation in those terms, specifically WQMMP 2.2, that DRA sought to enforce.

However, the district court determined that “the undisputed evidence fails to establish that the Project is operating in violation of the temperature requirements

¹¹ The WQMMP-provided criterion is “NTP+0.25°F” and *not* “NTP+0.3°C.”

¹² As noted *supra*, the WQMMP criterion limit was applied “when surface waters exceed 50°F (10°C) or when federally listed Threatened and Endangered species use the river.” However, under PGE’s apparent reading of the 2013 IA, a modified criterion limit was to be applied only “when the increasing discharge temperature below the Reregulating Dam approaches 12.0 °C.” Ensuing IAs reprised, year by year, the 2013 IA’s alteration of the criterion and its change in the circumstances triggering its application, though commencing with the 2015 IA PGE was to begin blending operations “when the increasing discharge temperature below the Reregulating Dam approaches 13.0 °C.” ER 80, Agreement Provision 1.

in the Certification.” ER 29.¹³ In support of that determination, the district court advanced three principal arguments: (1) that DRA’s evidence established violations, if any, only of an invalid standard, (2) that PGE’s undisputed assertions established Defendants’ compliance with IA limits that are stricter than those established in state water quality standards, and (3) that Defendants’ actual efforts under their TMP work to waive any failure to comply with relevant numerical criteria limitations. DRA here assigns error to the district court determination and turns here to examine its three arguments.

¹³ The district court also concluded that DRA had “not shown a genuine material fact sufficient to support its contention that Defendants are operating the PRB Hydroelectric Project in violation of Condition C.1” or Condition S. ER 37. But because it is Defendants’ burden to show a genuine dispute of material fact that precludes Plaintiff’s evidence from telling in favor of summary judgment against it, it is difficult to comprehend the district court’s reasoning.

(i) Plaintiff's Evidence Established Violations of Temperature Criterion Limits

As discussed *supra*, the WQMMP expressly prohibited Project discharge more than $WPT + 0.25$ °F when: [a] “surface waters exceed 50 °F (10 °C)” (hereafter, “50 °F condition”) or [b] “when federally listed Threatened and Endangered species use the river.” (hereafter, “ESA-use condition) *Id.*

It is true that, at the time of the WQMMP's writing (Sept. 2002), ER 159, the strictest applicable water quality limitation for temperature was provided by the state bull trout standard of 50 °F (10 °C). OAR 340-041-0565(2)(b)(A)(iv) (July 15, 2002). The district court then correctly observed that, pursuant to 2004 state rules revisions, state water quality standards no longer that standard to the lower Deschutes. ER 25-6. But the district court then leapt to the following conclusion: “Thus, the water quality standard now ‘found in OAR 340-41’ is a different, less stringent standard. *See* OAR 340-041-0028(4)(a)-(b), -0130(2), Figure 130A, and Figure 130B.”

The district court's conclusion, however, was a *non sequitur*. For at least three reasons, the “different, less stringent standard” of OAR 340-041-0028(4)(a)-(b) that it identifies simply does not supersede the more protective WQMMP standard.

First, no provision of law or rule prevents the joint licensees and DEQ from maintaining a TMP with more stringent restrictions than the minimum state

standards. Indeed, while a key limitation in the Project's § 401 Cert, that is, Condition S, disallows activities that violate state standards, neither it nor any other such provision bars TMP restrictions that build-in a margin of safety through a stricter standard.

Second, the § 401 Cert provides the state with the opportunity to modify its terms, including its incorporated WQMMP, "to address changes in water quality standards." ER 252, Condition N. Defendants, as Joint Licensees, also are able to seek a modified TMP. *Id.* at 239, Condition C.6. If the 2004 state regulatory changes effectively vacated the key water quality temperature criterion limit of the WQMMP, then DEQ or the Defendants could have moved to modify the plan to clarify expectations and obligations. They did not do so and in light of the state's strong commitment to water quality reflected in its rules, including not only statements of policy but in critical narrative criteria, it cannot be presumed they would have succeeded had they tried (considering as well the opportunity for public participation). Most importantly they must not, in the course of defending a citizen suit enforcement action, gain the benefit of their indolence.

Turning, third, to the State and Tribal commitment in law to water quality, relevant provisions establish the clear expectation that TMP plans governing such projects must, in every case, limit their thermal impact to the greatest possible extent. OAR 340-041-0007(1). Tribal Ordinance at §432.100(1). Accordingly, if the TMP

retained no limitation such as is provided in present WQMMP 2.2, it likely would need to be modified to add a no-less stringent criterion limit.

By its terms, the WQMMP applies under two sets of circumstances, the aforementioned 50 °F condition and ESA-use condition. The conditions are independent and because the WQMMP provides them in the disjunctive it means the WPT + 0.25 °F water quality criterion applies when either condition is satisfied. [Each event, then, is sufficient but not necessary.] Thus, if bull trout are resident, under the WQMMP, then the WTP + 0.25°F criterion limit applies, even if surface waters are warmer than 50 °F.

The district court did not expressly aver that the change erected in the 2004 state regulations also requires vacatur of the WQMMP's ESA-use condition, but it may be implied. Nonetheless, it is also invalid. As per the discussion *supra*, even if that ESA-use condition were mentioned in the 2003 rules and not in 2004, nothing prevents its retention in the WQMMP – particularly as the state rules provide only minimum standards. This interpretation is supported by the WQMMP's formulation itself, as the WQMMP's ESA-use condition is far more protective than that “found in OAR 340-41” of 2003.¹⁴ In addition, the state standard is not the

¹⁴ OAR 340-041-0565(2)(b)(A) (2003), applied its thermal warming limit to “(vi) in stream segments *containing* federally listed Threatened and Endangered species *if the increase would impair the biological integrity of the Threatened and*

only “applicable water quality standard,” as WQMMP 2.1 also cites to Tribal Ordinance 80. ER 162, provision 2.1. A proper interpretation of the WQMMP, therefore, may not ignore tribal water quality standards. Turning, then, to Tribal Ordinance 80, it provides, in relevant part:

No measurable surface water temperature increase resulting from anthropogenic activities is allowed unless a management plan has been reviewed and approved by the Tribe.” 432.100(b)(A). . . This plan must show how the thermal load is (or will be) minimized and how the activity does not (or will not) interfere with attainment of numeric criteria within the watershed in question. . . This standard applies . . . (v) In stream segments containing federally listed Threatened and Endangered species.

Ordinance 80, § 432.100(2)(b)(A) (Emphasis added.) A threatened or endangered species that uses a river, will perforce be found in some of its segments.

The Court is entitled to take judicial notice of the fact that the bull trout, a federally listed threatened species, 64 Fed. Reg. 58910 (Nov. 1, 1999), uses the

Endangered population.” (Emphasis added.) Thus, the WQMMP formulation is more protective as the circumstance “when federally listed Threatened and Endangered species use the river” is far broader. A species can “use the river” even when a river segment does not “contain” one of its members. It can *use* the river as well (indeed, better) even when a measurable temperature increase will not impair its biological integrity.

river,¹⁵ as does the federally listed threatened Middle Columbia River steelhead.¹⁶ ER 190, n. 1 and ER 256 66-11 at 5-6. Therefore, the WQMMP's application of its WPT + 0.25 °F (0.1 °C) standard, ER 162 66-9 at 5, Provision 2.2 is consistent with Tribal Ordinance 80.

State policy is also relevant to the question whether the temperature criterion limit of WQMMP 2.2 remains effective. It expressly “recognizes that some of the State's waters will, in their natural condition, not provide optimal thermal conditions at all places and at all times that salmonid use occurs. Therefore, it is especially important to minimize additional warming due to anthropogenic sources.” OAR 340-041-0028(2).¹⁷

¹⁵ See also 75 Fed. Reg. 63898 (Oct. 10, 2010) designating the lower Deschutes River as critical habitat and, at 63909-10, describing its lower bull trout populations as “some of the healthiest and most stable populations” in the state.

¹⁶ See Oregon Dept. Fish and Wildlife, Madras West quadrant map, designating the Project's point of compliance and downstream as Bull Trout Habitat used “primarily for spawning with some rearing.” [https://nrimp.dfw.state.or.us/web%20stores/nrimp/pub/gis/pdf/distrib/bull/Madras West.pdf](https://nrimp.dfw.state.or.us/web%20stores/nrimp/pub/gis/pdf/distrib/bull/MadrasWest.pdf)

¹⁷ Similarly OAR 340-041-0007(1) provides a narrative minimum floor for every specific source: “Notwithstanding the water quality standards contained in this Division, the highest and best practicable [] control of [] activities [] and flows must in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures [] and other deleterious factors at the lowest possible levels.”

The district court's displacement of WQMMP 2.2 with OAR 340-041-0028(4)(a)-(b) would cut sharply, markedly, away from the regulatory mandate. The clear direction in state rules and tribal law – that “in every case” the relevant authority must provide for “the highest and best practicable control of activities and flows” so as to “maintain water temperatures” “at the lowest possible levels” – is not compatible with the backsliding entailed by the district court's reading of the WQMMP. OAR 340-041-0007(1); Tribal Ordinance at §432.100(1).

Among DRA's alleged Project temperature criterion violations, some 135 violated the limitation during 2011. All of those hold in the face of the various Interim Agreements (IAs) between PGE and DEQ, in part because the WQMMP's ESA-use condition was unqualified by any provision in the 2011 PGE to DEQ communication. ER 70. Moreover, subsequent IAs cannot condone earlier violations. In its line-by-line analysis of the DRA allegations of year-2011 violations filed with the district court, PGE effectively conceded the point, determining that no temperature criterion applied to the WPT + 0.25 °F compliance assessment. ER 90-92 (middle column following dates, assessing Temperature Criterion to be “not applicable”).

(ii) Purported Compliance With IA Criterion Limits Can Not Waive Liability For WQMMP Or State Water Quality Violations

As to the question of whether the IA's validly modified the WQMMP we turn first to the procedural requirements. The district court properly observed that

the Joint Licensees had failed to point to any evidence that DEQ had rendered a determination, pursuant to § 401 Cert, Condition C.6. ER 239, that the proposed modifications will not “impair the achievement” of any load allocation (LA) for any TMDL for the Project. “Thus,” the court stated, “it is not clear that the IAs *did* modify the TMP.” ER 27. The plain problem with that observation is that there is no present TMDL for the Project – even though for 18 years the § 401 Cert and WQMMP have called for DEQ to put one in place. But if no TMDL, then no LA. We therefore question whether DEQ’s failure to evaluate an LA that does not exist afforded the district court a basis to reject the legal sufficiency of the IAs.

Notwithstanding that point, the district court’s broader observation is sound: Where an IA provision fails to satisfy or otherwise contravenes the § 401 Cert, it is legally ineffective. As to that, we note the § 401 Cert, Condition C.6, ER 239, condition precedent to a DEQ modification approval. That is, to approve a modification DEQ must determine that it “will not contribute to the exceedance of the relevant temperature criterion in waters affected by the Project.” Defendants in the record before the district court pointed to no evidence demonstrating such a DEQ determination. Accordingly, the Court should conclude that the IAs did not effectively authorize PGE to “implement a modified TMP.” ER 239, Condition C.6.

Beyond the procedural deformities attending their adoption, there remains the question whether the IAs were ineffective as a matter of law. They appear especially questionable as to their changes to the WQMMP's temperature allowance. As noted *supra*, the WQMMP permits thermal heating up to and including WPT + 0.25 °F. Each of the 2013-2017 IA's attempted to expand that temperature allowance by *nearly a factor of four*, that, is from a limit of 0.25°F to "up to 0.5 °C" above WPT, albeit with certain conditions. The district court's depiction of the IA's as "more stringent than current state water quality standards," ER 29, did not account for this key attempt to amplify the Project's temperature allowance. That attempt is, moreover, *ultra vires* for sharply conflicting OAR 340-041-0028(12)(a) - (b) ("In no case may a source cause more warming" than 0.3 °C.). It is inconsistent, as well, with the standard of OAR 340-041-0028(12)(e) (contemplating, for private hydropower, that where DEQ mandates a TMP it "must ensure that the nonpoint source controls its heat load contribution to water temperatures such that the water body experiences no more than a 0.3 degrees Celsius (0.5 degree Fahrenheit) increase above the applicable criteria from all sources taken together at the maximum point of impact").

Importantly, the § 401 Cert recognizes that not every exceedance of the relevant temperature criteria can be attributed to the Project, since at its peak the

WPT for the river at the point of compliance may exceed even 14 °C (57 °F).¹⁸ Consistent with state and tribal rules requiring the Project’s contribution to any exceedance to be as minimal as possible, the § 401 Cert, Condition C.5, ER 239, expressly provides that “[a]ny Project-related instream temperature increase of 0.25°F or less above the relevant criterion shall not be deemed to contribute to an exceedance of the temperature criterion. . .” [Emphasis added.] The clear implication is that Project-related instream temperature increases “greater than 0.25°F above the relevant criterion *shall* be deemed to contribute to an exceedance of the temperature criterion.” The implication simply cannot be avoided if one also considers that state and tribal law direct that in every case activities and flows will ensure the lowest possible temperatures. In that context, then, for the source and DEQ to contract privately to allow a four-fold expansion of the temperature allowance – and without modifying the § 401 Cert accordingly – is to undermine the § 401 Cert itself, if not respect for state and tribal law.

The Court therefore should find DRA’s ability to enforce the WQMMP’s WPT + 0.25 °F temperature standard to be unconstrained by the district court’s IA argument. Because the IA modifications of the WQMMP were ineffective, the

¹⁸ See, e.g., ER 100 for July 19, 2015, wherein the calculated WPT was 15.0 °C.

district court erred in holding that Defendants' asserted compliance with them tells against DRA's motion for summary judgment and in favor of Defendants' motion.

Moreover, even if (a) the IA's were effective in establishing criterion limits, and (b) Defendants' discharges complied with their terms, it does not follow that (c) Defendants thereby complied with state water quality standards. Putting aside the relevance of (c),¹⁹ the conclusion could follow only if the premises were satisfied and the IA retained more stringent limitations than are found in the state rules as to numerical criterion limits. But as noted supra the minimum state water quality standards are more protective in respect of the temperature allowance and, in any event, Defendants repeatedly failed to comply with their own IA limits.

Turning now to that last point: it is clear upon a reading of the IAs and inspection of PGE's line by line review of DRA temperature violation allegations, ER 85 (Difference per 7DADM-WPT) that Defendants repeatedly exceeded the IA temperature limits. Therefore, even if the IAs lawfully modified the temperature criterion limits, albeit on an interim basis, Project operations violated IA

¹⁹ As discussed above, by their own terms state water quality standards provide only the regulatory floor, and so cannot work to supersede more protective WQMMP limits.

requirements 53 times in 2012, 31 times in 2013, 71 times in 2014, 49 times in 2015, and 44 times in 2016. Inspection of ER 190, *passim*.

(iii) PGE Use Of Blend 17 Cannot Waive Defendants' Failure To Comply With The Project's Numerical Temperature Criterion Limits

The district court also averred that Defendants satisfied the § 401 Cert and WQMMP effort requirements by releasing more bottom water than was compelled by Blend 17. That, according to the district court, effectively waived their liability for temperature criterion exceedances. The district court also argued that DRA never disputed such of Defendants' assertions.

At the outset, we observe that the Blend 17 argument is vacuous. Not only is compliance with that blend irrelevant to satisfaction of more central requirements to adhere to temperature criterion limits, but there is no requirement that PGE even comply with Blend 17. In particular, Blend 17 is not mentioned in the § 401 Cert, it is not mentioned in the WQMMP, and it is not even mentioned in the IAs from 2012-17. It is discussed in the aforementioned 2011 PGE letter to DEQ, specifically in its attachment, but that states merely that the company "will implement an interim operating procedure for the SWW in accordance with" Blend 17 "[f]or the period January 1, 2011 through December 31, 2011." There is, thus, not even an implication in the 2011 IA that PGE will continue to utilize that blend

schedule, and certainly none that it must do so.²⁰ There is, moreover, no indication in that letter that even PGE conceived that by operating its SWW “in accordance with Blend 17,” whatever that could mean, it thereby would be relieved of actually needing to comply with relevant water quality criterion limits, and there is certainly no DEQ approval of PGE’s use of PGE’s letter for that purpose.

More fundamentally, even if, contrary to their own terms and the required Cert modification procedures, PGE’s obligations under the WQMMP could be read as modified so as to allow PGE to operate the Project “in accordance” with a Blend 17 schedule,²¹ it is a huge leap for the district court to deem such an allowance to waive the Project’s temperature compliance obligations. Further, again to the extent that anything in any IA or the 2011 communication conceivably could be read to relieve the Defendants of their Project discharge temperature limits, there is no hint in any IA that the required DEQ condition precedent determination was done. ER 239, C.6.

²⁰ Further, the communication anticipated that it would be making improvements to the SWW “programmable logic controls” in order “make the system more nimble and to allow deviations from the Blend 17 flow percentages to be made more easily.” According, the 2011 communication itself bound PGE to nothing in particular with respect to the blend.

²¹ The failure of any IA even to include such a Blend 17 schedule similar to that in the WQMMP Fig. 2.1, ER 164, is yet another reason to reject the district court’s presumption that PGE was authorized by the IAs to utilize such a schedule use as a shield against enforcement of numeric limitations.

More generally, the district court argues that the temperature criterion limitations of the § 401 Cert and WQMMP are not effective, and that it is the Defendants' mere efforts that count. In discussing its view, the district court concedes that there is *some* mandatory language in the WQMMP, ER 24, but in actuality the plan is replete with mandates to comply with the relevant temperature limits. Indeed, the entire purpose of the § 401 Cert and its WQMMP is to ensure compliance with relevant water quality limitations and standards. Further, if the § 401 Cert required no compliance with relevant temperature criteria, then the required determination by DEQ to ensure that any modification will not even “contribute to the exceedance of the relevant temperature criterion in waters affected by the Project” would make no sense. ER 239, Condition C.6.

This straightforward reading of the § 401 Cert is consistent with the minimum temperature compliance duties provided in state rules, as previously discussed. Thus, the rules require that “activities, and flows must *in every case* be provided so as to maintain . . . water temperatures. . .and other deleterious factors at the lowest possible levels.” OAR 340-041-007(1). [Emphases added.] They further admonish that “[*i*]n *no case* may a source cause more warming than that allowed by the human use allowance.” OAR 340-041-0028(12). [Emphasis added.] *See also* OAR 340-041-0028(12)(e) and Tribal Ordinance 80 at 432.100 (b)(A) discussed *supra*.

Those rules, then, simply do not admit of exceptions efforts to comply with one or another blend, as postulated by the district court. And, as discussed above, mere effort to reduce the Project's contributions to exceedance do not suffice where they nonetheless are sufficient to violate the applicable criteria.

Moreover, even if the § 401 Cert and WQMMP allowed such a waiver for full use of its "compliance facility" to control discharge temperature control, on not even one occasion does the record show PGE releasing more than 65% bottom water, ER 90, *passim*, even though the WQMMP, Table 2.1, indicated that the SWW would be capable of releasing 100% bottom water. The district court credits Defendants' averment that its SWW is in fact limited to only 65% bottom draw, but PGE cannot shield itself from *liability* with respect to DRA's summary judgment motion by alleging limitations in its facility for compliance, where such limitations can only be of its own making. In any event, the question of Operator difficulty in securing compliance with Project water quality limitations, including perhaps, the need for it to modify its SWW compliance facility, is a question, if at all, for the *remedy* stage.

Nonetheless, we stress that DRA's submitted evidence showed scores of instances, in the 2011-17 period, in which the Project is releasing less than maximum capacity bottom water and yet still contributing to exceedances beyond

the WPT + 0.25 °F criterion, or even the more relaxed limits that PGE in its 2012-2017 IAs attempted to establish.

The district court, in closing as to temperature, avers that on all occasions that the Project was not satisfying even its more lax IA temperature limits, PGE nonetheless, in operating “the SWW was withdrawing either a percentage of deep water that exceeded what is called for by Blend 17, identified in the Interim Agreements, or the maximum percentage of deep water that was possible.” ER 29. Aside from the considerations discussed *supra* concerning the irrelevance of such efforts to the Defendants’ central obligation to adhere to numerical limits, the district court’s averment is simply false. That is clear, once again, not only from an inspection of PGE’s own line-by-line analysis filed with the district court, ER 90, *passim* (two second-to-the-last columns) but also from PGE’s own description at ER 65, § 24 (“10 days in 2011, 36 days in 2012, and 1 day in 2014”).

The Court should reverse the dismissal and direct a judgment for DRA on the ground of the Project’s violations of its temperature criterion limits.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, summary judgment as to liability against Defendants should be entered on behalf of DRA, and the case should be remanded to the district court to consider remedy.

Date: June 19, 2020

Daniel M. Galpern
J. Douglas Quirke
Attorneys for Appellant, Deschutes River Alliance

/s/ Daniel M. Galpern (filing attorney)

STATEMENT OF RELATED CASES

Deschutes River Alliance know of only one related case, namely that of the same name heard with the 9th Circuit, upon a petition for interlocutory appeal, case no. 17-80092.

Date: June 19, 2020

Daniel M. Galpern

J. Douglas Quirke

Attorneys for Appellant, Deschutes River Alliance

/s/ Daniel M. Galpern (filing attorney)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,645 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Date: June 19, 2020

Daniel M. Galpern
J. Douglas Quirke

Attorneys for Appellant, Deschutes River Alliance

/s/ Daniel M. Galpern (filing attorney)

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 19, 2020

Daniel M. Galpern

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ADDENDUM

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Federal Statutes

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28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

...

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

...

28 U.S. C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

...

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

...

33 U.S. Code § 1341; CWA § 401 Certification

...

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

...

33 U.S. Code § 1365. Citizen suits

...

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order

issued by the Administrator or a State with respect to such a standard or limitation, or

...

(d) **Litigation costs** The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

...

Federal Regulations

...

“We, the U.S. Fish and Wildlife Service, determined threatened status for all populations of bull trout (*Salvelinus confluentus*) within the coterminous United States, with a special rule, pursuant to the Endangered Species Act of 1973, as amended (Act).

....

64 Fed. Reg. 58910, 58910 (Nov. 1, 1999)

Full rule available at:

<https://www.govinfo.gov/content/pkg/FR-1999-11-01/pdf/99-28295.pdf>

....

“: We, the U.S. Fish and Wildlife Service, are revising critical habitat for the bull trout (*Salvelinus confluentus*) under the Endangered Species Act of 1973, as amended (Act).”

...

“The lower Deschutes River bull trout populations are some of the healthiest and most stable populations in Oregon, n, and the designation of unoccupied habitat in this area is not essential to the conservation of the species.” . . .

. . . .

75 Fed. Reg. 63898, 63909-63910 (Oct. 10, 2010)

Full rule available at: <https://www.govinfo.gov/content/pkg/FR-2010-10-18/pdf/2010-25028.pdf>

Oregon Administrative Rules (no longer in effect)

...

OAR 340-041-0565(2) (July 15, 2002)

...

Water Quality Standards Not to be Exceeded (To be Adopted Pursuant to ORS 468.735 and Enforceable Pursuant to ORS 468.720, 468.990, and 468.992)

...

(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Deschutes River Basin:

...

(b) Temperature: The changes adopted by the Commission on January 11, 1996, become effective July 1, 1996. Until that time, the requirements of this rule that were in effect on January 10, 1996, apply. The method for measuring the numeric temperature criteria specified in this rule is defined in OAR 340-041-0006(54):

(A) To accomplish the goals identified in OAR 340-041-0120(11), unless specifically allowed under a Department-approved surface water temperature management plan as required under OAR 340-041-0026(3)(a)(D), no measurable surface water temperature increase resulting from anthropogenic activities is allowed:

...

(iv) In waters determined by the Department to support or to be necessary to maintain the viability of native Oregon bull trout, when surface water temperatures exceed 50.0°F (10.0°C). . .

...

Link to 2003 Archive Rule at:

https://web.archive.org/web/20030816233614/http://arcweb.sos.state.or.us/rules/OARS_300/OAR_340/340_041.html

OAR 340-041-0565(1) (2003)

...

Water Quality Standards Not to be Exceeded (To be Adopted Pursuant to ORS 468.735 and Enforceable Pursuant to ORS 468.720, 468.990, and 468.992)

(1) Notwithstanding the water quality standards contained below, the highest and best practicable treatment and/or control of wastes, activities, and flows shall in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels.

...

Link to 2003 Archive Rule at:

https://web.archive.org/web/20030816233614/http://arcweb.sos.state.or.us/rules/OARS_300/OAR_340/340_041.html

Oregon Administrative Rules

OAR 340-041-0002

Definitions

Definitions in this rule apply to all basins unless context requires otherwise.

...

(70) "Water Quality Limited" means one of the following:

(a) A receiving stream that does not meet narrative or numeric water quality criteria during the entire year or defined season even after the implementation of standard technology;

(b) A receiving stream that achieves and is expected to continue to achieve narrative or numeric water quality criteria but uses higher than standard technology to protect beneficial uses;

(c) A receiving stream for which there is insufficient information to determine whether water quality criteria are being met with higher-than-standard treatment technology or a receiving stream that would not be expected to meet water quality criteria during the entire year or defined season without higher than standard technology.

...

OAR 340-041-0004

Antidegradation

(1) Purpose. The purpose of the Antidegradation Policy is to guide decisions that affect water quality to prevent unnecessary further degradation from new or increased point and nonpoint sources of pollution, and to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses. The standards and policies set forth in OAR 340-041-0007 through 340-041-0350 supplement the Antidegradation Policy.

...

(3) Nondegradation Discharges. The following new or increased discharges are subject to this division. However, because they are not considered degradation of water quality, they are not required to undergo an antidegradation review under this rule:

...

(c) Temperature. Insignificant temperature increases authorized under OAR 340-041-0028(11) and (12) are not considered a reduction in water quality.

(d) Dissolved Oxygen. Up to a 0.1 mg/l decrease in dissolved oxygen from the upstream end of a stream reach to the downstream end of the reach is not considered a reduction in water quality so long as it has no adverse effects on threatened and endangered species.

...

(7) Water Quality Limited Waters Policy: Water quality limited waters may not be further degraded except in accordance with paragraphs (9)(a)(B), (C) and (D) of this rule.

OAR 340-041-0007

...

Statewide Narrative Criteria

....

(1) Notwithstanding the water quality standards contained in this Division, the highest and best practicable treatment and/or control of wastes, activities, and flows must in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels.

...

OAR 340-041-0016

Dissolved Oxygen

...

(1) For water bodies identified as active spawning areas in the places and times indicated on the following Tables and Figures set out in OAR 340-041-0101 to 340-041-0340: Tables 101B, 121B, and 190B, and Figures 130B, 151B, 160B, 170B, 180A, 201A, 220B, 230B, 260A, 271B, 286B, 300B, 310B, 320B, and 340B, (as well as any active spawning area used by resident trout species), the following criteria apply during the applicable spawning through fry emergence periods set forth in the tables and figures and, where resident trout spawning occurs, during the time trout spawning through fry emergence occurs:

- (a) The dissolved oxygen may not be less than 11.0 mg/l. However, if the minimum intergravel dissolved oxygen, measured as a spatial median, is 8.0 mg/l or greater, then the DO criterion is 9.0 mg/l;
- (b) Where conditions of barometric pressure, altitude, and temperature preclude attainment of the 11.0 mg/l or 9.0 mg/l criteria, dissolved oxygen levels must not be less than 95 percent of saturation;
- (c) The spatial median intergravel dissolved oxygen concentration must not fall below 8.0 mg/l.

...

OAR 340-041-0021

(1) Unless otherwise specified in OAR 340-041-0101 through 340-041-0350, pH values (Hydrogen ion concentrations) may not fall outside the following ranges:

- (a) Marine waters: 7.0-8.5;
- (b) Estuarine and fresh waters: See basin specific criteria (OAR 340-041-0101 through 340-041-0350).

(2) Waters impounded by dams existing on January 1, 1996, which have pHs that exceed the criteria are not in violation of the standard, if the Department determines that the exceedance would not occur without the impoundment and that all practicable measures have been taken to bring the pH in the impounded waters into compliance with the criteria.

....

OAR 340-041-0028

Temperature

...

(2) Policy. It is the policy of the Commission to protect aquatic ecosystems from adverse warming and cooling caused by anthropogenic activities. The Commission intends to minimize the risk to cold-water aquatic ecosystems from anthropogenic warming, to encourage the restoration and protection of critical aquatic habitat, and to control extremes in temperature fluctuations due to anthropogenic activities. The Commission recognizes that some of the State's waters will, in their natural condition, not provide optimal thermal conditions at all places and at all times that salmonid use occurs. Therefore, it is especially important to minimize additional warming due to anthropogenic sources. In addition, the Commission acknowledges that control technologies, best management practices and other measures to reduce anthropogenic warming are evolving and that the implementation to meet these criteria will be an iterative process. Finally, the Commission notes that it will reconsider beneficial use designations in the event that man-made obstructions or barriers to anadromous fish passage are removed and may justify a change to the beneficial use for that water body.

...

(4) Biologically Based Numeric Criteria. Unless superseded by the natural conditions criteria described in section (8) of this rule, or by subsequently adopted site-specific criteria approved by EPA, the temperature criteria for State waters supporting salmonid fishes are as follows:

- (a) The seven-day-average maximum temperature of a stream identified as having salmon and steelhead spawning use on subbasin maps and tables set

out in OAR 340-041-0101 to 340-041-0340: Tables 101B, and 121B, and Figures 130B, 151B, 160B, 170B, 220B, 230B, 271B, 286B, 300B, 310B, 320B, and 340B, may not exceed 13.0 degrees Celsius (55.4 degrees Fahrenheit) at the times indicated on these maps and tables;

(b) The seven-day-average maximum temperature of a stream identified as having core cold water habitat use on subbasin maps set out in OAR 340-041-101 to 340-041-340: Figures 130A, 151A, 160A, 170A, 180A, 201A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A, may not exceed 16.0 degrees Celsius (60.8 degrees Fahrenheit);

...

(12) Implementation of the Temperature Criteria.

(a) Minimum Duties. There is no duty for anthropogenic sources to reduce heating of the waters of the State below their natural condition. Similarly, each anthropogenic point and nonpoint source is responsible only for controlling the thermal effects of its own discharge or activity in accordance with its overall heat contribution. In no case may a source cause more warming than that allowed by the human use allowance provided in subsection (b) of this rule.

(b) Human Use Allowance. Insignificant additions of heat are authorized in waters that exceed the applicable temperature criteria as follows:

(A) Prior to the completion of a temperature TMDL or other cumulative effects analysis, no single NPDES point source that discharges into a temperature water quality limited water may cause the temperature of the water body to increase more than 0.3 degrees Celsius (0.5 Fahrenheit) above the applicable criteria after mixing with either twenty five (25) percent of the stream flow, or the temperature mixing zone, whichever is more restrictive; or

(B) Following a temperature TMDL or other cumulative effects analysis, waste load and load allocations will restrict all NPDES point sources and nonpoint sources to a cumulative increase of no greater than 0.3 degrees Celsius (0.5 Fahrenheit) above the applicable criteria after complete mixing in the water body, and at the point of maximum impact.

(C) Point sources must be in compliance with the additional mixing zone requirements set out in OAR 340-041-0053(2)(d).

(D) A point source in compliance with the temperature conditions of its NPDES permit is deemed in compliance with the applicable criteria.

...

(e) Other Nonpoint Sources. The department may, on a case-by-case basis, require nonpoint sources (other than forestry and agriculture), including private hydropower facilities regulated by a 401 water quality certification, that may contribute to warming of State waters beyond 0.3 degrees Celsius (0.5 degrees Fahrenheit), and are therefore designated as water-quality limited, to develop and implement a temperature management plan to achieve compliance with applicable temperature criteria or an applicable load allocation in a TMDL pursuant to OAR 340-042-0080.

(A) Each plan must ensure that the nonpoint source controls its heat load contribution to water temperatures such that the water body experiences no more than a 0.3 degrees Celsius (0.5 degree Fahrenheit) increase above the applicable criteria from all sources taken together at the maximum point of impact.

(B) Each plan must include a description of best management practices, measures, effluent trading, and control technologies (including eliminating the heat impact on the stream) that the nonpoint source intends to use to reduce its temperature effect, a monitoring plan, and a compliance schedule for undertaking each measure.

(C) The Department may periodically require a nonpoint source to revise its temperature management plan to ensure that all practical steps have been taken to mitigate or eliminate the temperature effect of the source on the water body.

...

...

OAR 340-041-0130

Basin-Specific Criteria (Deschutes): Beneficial Uses to Be Protected in the Deschutes Basin

(1) Water quality in the Deschutes Basin (see Figure 1) must be managed to protect the designated beneficial uses shown in Table 130A (November 2003).

(2) Designated fish uses to be protected in the Deschutes Basin are shown in Figures 130A and 130B (November 2003).

...

OAR 340-041-0130(2), Figure 130A [Map, Fish Use Designations, Deschutes Basin]

Available at: <https://www.oregon.gov/deq/Rulemaking%20Docs/figure130a.pdf>

...

OAR 340-041-0130(2), Figure 130B [Map, Spawning and Steelhead Use Designations, Deschutes Basin]

Available at: <https://www.oregon.gov/deq/Rulemaking%20Docs/figure130b.pdf>

...

OAR 340-041-0135

Basin-Specific Criteria (Deschutes): Water Quality Standards and Policies for this Basin

(1) pH (hydrogen ion concentration). pH values may not fall outside the following ranges:

(a) All other Basin streams (except Cascade lakes): 6.5–8.5;

...

...

OAR 340-048-0050

Modification or Revocation of a Certificate

...

(2) Before modification or revocation of a certification, the department must provide the certification holder and the public with written notice of the department's intent to modify or revoke the certification and at least 30 days to submit written comment. If the certification is for a hydroelectric project, the department must also consult with the HART for the project, if any. Upon request by the certification holder, 10 or more persons, or an organization representing 10 or more members, the department must provide a public hearing on the proposed modification or revocation. After consideration of public comment and, if applicable, consultation with a HART, the Director must determine whether to modify or revoke the certification.

...

Tribal Ordinance 80

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Tribal Ordinance §432.100 (1) Water Quality Standards not to be Exceeded in Deschutes, Clackamas, and Santiam River Basins on the Reservation

(1) Notwithstanding the water quality standards contained below, the highest and best practicable treatment and/or control of wastes, activities, and flows shall in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels.

(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Deschutes, Clackamas, and Santiam River Basins on the Reservation. The Tribe has designated specific water bodies and stream reaches within these basins in Table 4, indicating the designated beneficial use, fish species, life history and temperature regime. In Figure 1, the Tribe has established the period of time for native salmonid spawning, egg incubation and fry emergence. As additional information is developed, changes may be made to Table 4, and Figure 1, based on site specific data for stream reaches, water bodies, fish species and their associated life histories. Changes may be made by the Tribe, only after full satisfaction of the public participation of the Tribe's continued integrated planning process. Changes to Table 4 and Figure 1 constitute changes to the water quality standards regulations and will be submitted to EPA for review and approval following adoption by the Tribe.

(a) Dissolved oxygen (DO):

(A) For water bodies identified by the Tribe in Table 4, as providing salmonid spawning (see Tables 5 & 6 for indigenous and introduced species list), during the periods from spawning until fry emergence from the gravels, listed in Figure 1, the following criteria apply:

(i) The seven day mean minimum dissolved oxygen shall not be less than 11.0 mg/l. However, if the minimum intergravel dissolved oxygen, measured as a spatial median, is 8.0 mg/l or greater, then the DO Criteria is 9.0 mg/l, (Table 2);

(ii) Where conditions of barometric pressure, altitude, and temperature preclude attainment of the 11.0 mg/l or 9.0 mg/l criteria, dissolved oxygen levels shall not be less than 95 percent of saturation.

(iii) Periods of native salmonid spawning, egg incubation, and fry emergence from the gravel are flow and temperature dependent and tend to vary with elevation. If necessary, site specific dates for these periods may be established by the Tribe after full satisfaction of the public participation of the Tribe's continued and integrated planning process. Changes to Table 4, and Figure 1, constitute changes to the water quality standards regulations and will be submitted to EPA for review and approval following adoption by the Tribe.

(B) For waterbodies identified by the Tribe in Table 4, as providing salmonid spawning, during the period from spawning until fry emergence from the gravels (Figure 1), the spatial median intergravel dissolved oxygen concentration shall not be less than 6.0 mg/l.

(C) A spatial median of 8.0 mg/l intergravel dissolved oxygen shall be used to

(b) Temperature:

(A) No measurable surface water temperature increase resulting from anthropogenic activities is allowed unless a management plan has been reviewed and approved by the Tribe. The Tribes may allow a variance to the standards on a site specific basis in accordance with section 432.120, and after full satisfaction of the public participation of the Tribe's continued integrated planning process. Variance standards will be set using the best data available and reviewed every three years as part of the triennial review process. This plan must show how the thermal load is (or will be) minimized and how the activity does not (or will not) interfere with attainment of numeric criteria within the watershed in question (See attached Table 4, and appropriate watershed maps for locations). This standard applies to the following:

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(v) In stream segments containing federally listed Threatened and Endangered species. . .

The full Tribal Ordinance 80, including referenced tables, figures and maps, is available at: <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-confederated-tribes-warm-springs-indian-reservation>.