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 THIRD BRIEF ON CROSS APPEAL

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SUMMARY OF ARGUMENT

In its opening brief, Dkt 28, DRA established the mandatory nature of the PRB Project's 2004-approved Water Quality Management and Monitoring Plan (WQMMP) and explained why its mandates are not nullified by language in the 2002-issued CWA §401 Certification.

The earlier-issued Certification required development of such a plan that would, at minimum, "reduce the Project's contribution" to breaches of water quality criteria for pH, dissolved oxygen and temperature. The WQMMP, in response and as incorporated into the Certification, complied with that instruction by establishing plans for temperature management (TMP), dissolved oxygen management (DOMP) and pH (Hydrogen Ion Concentration) management (pHMP) including express numeric constraints to which the Project must adhere. Dkt 29-2, ER at 162 (no warming beyond 0.25°F above "without project temperature"), ER at 167 (dissolved oxygen levels in Project discharge must be maintained above 9.0 mg/L during the year-round salmonid spawning and incubation period), ER at 170 (pH criterion for the lower river is 6.5 to 8.5 Standard Units).

Consistent with that reading, the Certification itself establishes that no modification of those water quality plans may be approved unless such modification "will not contribute" to the exceedance or violation of the criteria

they establish. Dkt 29-2, ER at 239 (C.7), ER at 242 (D.6), ER at 244 (E.6). Further, the WQMMP's "adaptive management considerations" that are based on the "staged implementation of selective withdrawal" commencing with operation of the Selective Water Withdrawal Tower's (SWW) fish screening devices, strongly supports DRA's view, since their very purpose is "to ensure compliance with water quality standards." Dkt 20-2, ER at 160 (WQMMP 1.1).

PGE, in the Second Brief in this cross-appeal, Dkt 41, offers three principal arguments, two of which were joined by the Tribe.

PGE first urges this Court to dismiss for lack of standing, alleging that DRA failed adequately to explain the relief it sought. Dkt 39 at 37-47. But PGE's argument is based in part on a patent distortion of DRA's position. DRA's request for an injunction to require Defendants to operate the PRB Project in actual compliance with the numerical limitations of the Project's water quality requirements, was adequate.

Second, PGE and the Tribe argue that the District Court was bereft of authority to decide DRA's claim that Defendants repeatedly violated the Certification and WQMMP. Dkt 39 at 47-57, Dkt 41 at 24-47. They averred that the sovereign interests of the Tribe are implicated by the action, and yet the Tribe cannot be joined as it enjoys immunity to CWA citizen suits. The Tribe also urges that its presence is indispensable. But these arguments all fail, in part because the

district court properly read together manifestly related provisions of the CWA.

Third, PGE urges this Court to uphold the summary judgment against DRA on the merits, Dkt 57-83. In support, PGE argues that express numeric water quality limitations do not amount to actual requirements.[1] But while the principles of adaptive management require *consideration* of the impact, say, on dissolved oxygen thresholds when controlling for the temperature of Project – akin to balancing twin state water quality requirements to minimize temperature and maximize dissolved oxygen in such discharge, the requirement to so consider *does not excuse* the Project's numerous and repeated violations. Accordingly, PGE's arguments do not support the District Court's reading of the WQMMP.

Moreover, even if the district court was correct that the WQMMP limitations for temperature and dissolved oxygen are overridden by "applicable ODEQ and Tribal water quality standards," to which the document merely refers, the Project's numerous breaches of the latter, less stringent standards were also established in

[1] PGE also seek refuge in year-by-year private "interim agreements" that it privately negotiated with the regulating agency. But those were in patent violation of state procedures, and the district court properly disagreed with PGE that they relaxed Project water quality obligations. Here PGE supports the district court's musing that the agreements amounted to "permissible adaptive management measures." Dkt 39 at 82. But that is inordinate, as we discussed *supra*. If adaptive management means anything, it is that the Project must be operated with several goals in mind – including to comply with water quality limitations. Adaptive management principles patently do not extend to private regulator-industry deals to loosen water quality limits. It the Project that must be managed, not the operative law.

DRA's filings with the District Court, Dkt 29-2, ER 174-230, as was also denoted in DRA's First Brief here. Dkt 28, at 23-29 (discussing pH limitation violations), 29-34 (Dissolved Oxygen threshold violations), and 34-51 (Temperature limit violations). These amply serve to ground a reversal. Indeed, the Project violates every water quality standard iteration even considered by the District Court. *See* Dkt 28 at 22-51.

ARGUMENT

A. INTRODUCTION

By its brief, Dkt 39, PGE continues to portray the Project's Certification to its advantage, presenting variously the SWW as lacking the ability to comply with Oregon's water quality standards for the Deschutes River, and justifying that by reference to principles of adaptive management that it presses to the breaking point. In so doing, PGE ignores the plain language of the Certification and its legal and historical context.

The legal context here is Section 401 of the Clean Water Act, which "requir[es] the State to find that 'there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.'" *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994) (quoting 40 CFR § 121.2(a)(3) (1993)); emphasis omitted). PGE

acknowledges that a CWA Certification "certifies that the discharge *will comply with applicable water-quality standards* . . . ." Dkt 39 at 6-7 (emphasis added). The historical context here matches this legal context, as it focuses on actual compliance with water quality standards.

Accordingly, in their June, 2001 Joint Certification Application, PGE and the Tribe acknowledged that "the state must certify that the proposed project *will comply with applicable water quality standards* . . . ." FER at 13 (emphasis added). DEQ for its part, in its June, 2002 Final Evaluation and Findings Report on the joint Certification application, issued findings that DEQ was "reasonably assured that the operation of the Project *will comply with the [temperature/dissolved oxygen/] standard[s]* . . ." FER at 48, 51-52, 55 (emphasis added). Despite DEQ's "reasonable assurance" findings, DEQ saw a need to "enter a § 401 Implementation Agreement concurrent with issuance of a § 401 Certification" for the purposes of

> (1) addressing ODEQ's role and the Joint Applicants' commitments regarding adaptive management measures required by the § 401 Certification conditions; and
>
> (2) *providing ODEQ and the public further reasonable assurance that the Project as proposed to be relicensed will comply with water quality standards*."
>
> FER at 59 (emphasis added).

In sum, the relevant statutory provisions, implementing regulations, and U.S.

Supreme Court consideration of Section 401 all point to the fact that the purpose of a Section 401 Certification is compliance with state water quality standards. PGE and the Tribe acknowledged this in their application to DEQ for Certification; DEQ made legal findings of reasonable assurance of Project compliance with water quality standards; and DEQ elected to provide for further such assurance of compliance via an agreement between it and PGE and the Tribe.

But here, the Defendants appear to take the position that the SWW has not only failed but that it is in fact *impossible* for the Project to comply with its water quality limitations.

DRA does not believe that the Project's asserted incapacity is established in the record. But PGE, resisting any liability for the ensuing water quality violations, here recasts the relevant legal and historical context so that its assertion of impossibility might appear always to have been understood.

Thus, PGE suggests that when crafting the Certification, DEQ fully anticipated that it would be impossible for the SWW to be operated as to achieve compliance with all water quality standards, claiming "[g]iven these inherent tensions, the Department carefully developed Certification conditions that will result in the *best overall compliance with these sometimes-conflicting water-quality criteria* . . . ." Dkt 39 at 43 (emphasis added). But the District Court directly refuted that "best overall compliance" interpretation. Dkt 29-1, ER at 21

("It is clear that the drafters . . . expected that, if operated in accordance with the WQMMP, the Project *would* comply with state water quality standards.").

There is thus no basis for the proposition that the Certification requires merely "best overall compliance" and, as recounted above, the joint application, DEQ's findings and evaluation, and the Implementation Agreement all indicate that DEQ crafted the Certification to achieve compliance with all water quality standards in accordance with the legal mandate of Section 401 and implementing regulations. And in fact a "best overall compliance" Certification is not what is at hand here, in light of its plain language.

B. Discussion

I. DRA Adequately Articulated an Adequate Remedy

PGE urges dismissal for lack of standing, alleging: (1) DRA failed to explain its requested relief, and (2) the relief PGE imagines DRA "apparently" sought was beyond the authority of a federal court to require.

(a) Adequacy of Remedy Explanation

DRA adequately explained its requested relief. In particular, DRA sought the District Court's determination that defendants were liable for violations of specific water quality limitations expressly to lay the groundwork for its injunction compelling PGE to comply with its Certification. DRA's declarants established their reasonable belief that PGE, as Project Operator, would comply with that

injunction, thus improving water quality in the lower Deschutes River (LDR), improving the LDR's ecological integrity, and their own experiences on the river.

See Dkt 40-2, SER 203 and 216 (Professional fish biologist with thirty years of State of Oregon service: Project compliance would enable the Deschutes River to "heal itself"); Dkt 40-2, SER 221-23 and 232 (Aquatic biologist with 22 years of service to the State of Oregon, stating, *inter alia*: "Operational changes at the SWW tower and at the Reregulating Dam can address the water quality problems and reverse the negative changes that have occurred to the ecosystem in the lower Deschutes River . . . without compromising the collection of downstream migrating smolts at the tower's fish trap."); *and* Dkt 40-2, SER 235-39 and 245-46 (Long-time river user and conservationist, citing 2017 evidence that operational changes under current Project configuration could improve lower Deschutes River water quality (and eliminate nearly all violations), also citing to a 1991 Sacramento River recovery). SER at 246. *See also* Dkt 40-2, SER 86-88 (First Amended Complaint (Unlawful discharges are "impairing water quality" and "harming Plaintiff's interests related to the river.").

DRA's view that such relief would remedy the Clean Water Act violations was reasonable. First, DRA's belief that PGE would comply with a District Court injunction was itself reasonable. The expectation of regularity is inherently reasonable, and PGE is contractually bound by its Ownership and Operating

Agreement with the Tribe to ensure the PRB Project complies with court orders. Dkt 29-2, ER at 235.

Second, as DRA established in Dkt 28 at 26 (for pH) 50-51 (for Temperature), and *infra*, the Project retains ample potential to release additional bottom water when discharge temperature or pH exceed their upper bounds, or Project discharge approaches the minimum required floor for DO. That compliant operation is feasible is consistent with the expectation of the WQMMP. *See* Dt. 29-2, ER at 163 (adjustments will be made "to ensure discharges meet the applicable temperature standard) and ER 167 ("Reregulation Dam . . . may also be used to comply with the applicable lower river DO . . . criteria, if needed . . ."). And third, record evidence establishes DRA's observation of the beneficial impact of certain operational changes undertaken in August 2017. Dkt 40-2, SER 245.

PGE cites this Court's decision in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) to support its argument that a remedial request, to be adequate, must be entire and specific at its outset. It claime that the *Juliana* Court determined that "an injunction 'requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions,' would be unlikely to redress the plaintiff's harms, under the first redressability element, because the plaintiffs did not adequately explain how the government would go about actually remedying the

plaintiffs' harms under such an injunction, as a practical matter." Dkt 39, 40-41 (internal citations omitted).

PGE flatly misreads *Juliana*. The Court's problem with the *Juliana* remedy arose not from plaintiffs' failure to explain how the government would implement the injunction, but instead, according to the *Juliana* Court, because plaintiffs experts established that the injunction sought by the plaintiffs would not, "reduce the global consequences of climate change." 947 F.3d at 1172.[2] And it was those consequences that generated the *Juliana* plaintiff's injuries.

But in these proceedings, DRA declarants expressly and uniformly stated that the injunction they sought *would* remedy the injuries of which they complain – by compelling a reduction in warm water release when temperature or pH approach relevant limits, or increasing spill when Project discharge DO approaches the minimum.

(b) Adequacy of Judicial Power

We note, as well, another major distinction. In *Juliana* the emissions generating the global warming danger derive principally from the activities of non-parties to the case – that is, production, transportation and burning of fossil fuels, by the fossil fuel industry or others. According to the Court, at argument the

[2] The Court determined also "that even the total elimination of the challenged programs would not halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth." *Juliana*, 947 F.3d at 1170.

Juliana plaintiffs targeted "affirmative activities by the government defendants," 947 F.3d at 1170, but again according to that Court, plaintiffs' own expert testimony established that "enjoining those activities will not . . . stop catastrophic climate change or even ameliorate their injuries."[3] But here, enjoinment of the targeted activity – Project discharges violating numeric parameter limitations – *will* ameliorate DRA's injuries.[4]

This distinction is critical, so that PGE's reliance on *Juliana* to support its little-developed "supervision or enforcement" argument, Dkt 39 at 41, is misplaced. The Court expressed concern that the *Juliana* remedy, a "phase out [of] fossil fuel emissions and draw down [of] excess atmospheric CO2," would require it "to pass judgment" on the government's response "which necessarily would entail a broad range of policymaking [a]nd inevitably. . . action not only by the Executive" but by Congress. 947 F.3d at 1172.

In sharp contrast, DRA does not seek a new plan, nor Congressional action. Rather, DRA seeks to compel the Defendants to operate the Project in compliance with its WQMMP limits, that is, within the strictures of its *existing* plan. Indeed, because the operative standards are discernible on the face of the Certification and

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[3] We cite the *Juliana* decision only to distinguish its reasoning without comment on the Court's interpretation of its evidence.

WQMMP, there may not even be a need for the type of "broad injunctive relief while leaving the details of implementation" to the defendants that the *Juliana* Court determined is sometimes appropriate. 947 F.3d 1172.

Here DRA had not determined that the SWW is an abject failure or even that it requires major modifications – either of which might ground a far-reaching remedy. The *Juliana* Court was patently correct that "broad injunctive relief" sometimes may be required (and is within the authority of a federal court). And with respect to the question of judicial power, PGE appears to concede the point. Dkt 39 at 50 (warning that "the district court could order a remedy in this case that fundamentally changes the operation of the Project . . . ."). *See also id.* at 32 (repeating the point).

Clearly the District Court retains authority to compel Defendants to figure out "the details of implementation." Such an injunctive component could induce the Defendants to undertake anything from simple fixes to far-reaching project changes. Indeed, citizen suit plaintiffs may seek relief that imposes on the violator the obligation to identify measures necessary for it to comply with the Clean Water Act. *See, e.g., Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1164 (D. Idaho 2012) (injunction placed burden on defendant to comply by date certain, with method of compliance up to defendant and permitting

[4] Another relevant distinction is that DRA's case is decidedly based on a claim that

authorities); *U.S. v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978) ("[T]he mere fact that [an] injunction is framed in language almost identical to the statutory mandate does not make the language vague.")[5] Placing the onus on the defendant for determining means of compliance especially makes sense when violations arise from the operation of complex facilities.

Importantly, the Certification's WQMMP requires *anticipatory* action to ensure against violations, mandating Project inflow temperature monitoring and, "if the temperature *approaches* the maximum limit, the percentage of deep-water discharges will be adjusted upward." Dkt 29-2, ER 166 (WQMMP 2.7) (Emphasis added). Similarly, as to dissolved oxygen in Project discharge, Defendants are to "institute controlled spills at the Reregulating Dam . . . *to maintain DO concentrations above 9.0 mg/L*." Dkt 29-2, ER 169 (WQMMP 3.6) (Emphasis added). The Reregulating Dam is denominated in the WQMMP among its "facilities for compliance." Dkt 29-2, ER 167 (WQMMP 3.3). And the evidence to date in the case establishes significant additional room to more fully utilize these compliance facilities to secure compliance.

PGE and the Tribe have violated a "statute or a regulation." *See* 947 F.3d at 1169.

[5] *See also*, FRCP 65; *Calif. Sportfishing Prot. All. v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059, 1078 (E.D. Cal. 2002); *Idaho Conservation League*, 879 F. Supp. 2d at 1164 (upholding injunction instructing defendant to comply with the terms of an NPDES permit))

Accordingly, DRA has not to date sought an injunction to modify or halt the SWW.

PGE's laments that DRA, rather than specifying remedial Project actions to resolve what it avers is the "unavoidable tension between the various water quality criteria and fish passage goals," has "thrown up its hands" and stated that the District Court should order PGE to "figure out a way to make the project comply." Dkt 39, SER 44-45.

But PGE omits the essential context at oral argument. DRA counsel had explained that Defendants must either "operate the project as it exists to come into compliance," or else modify it "to come into compliance." Dkt 39, SER 42. The District Court, pressing a hypothetical, then asked counsel to consider the circumstance that the Project Operator is "doing as good a job" as feasible, with the Project run as good as it gets, and yet, still, there are violations. Dkt 40-2, SER 42. In that circumstance, the Court demanded to know, "are you then going to [demand] the dams have to be stopped?" *Id*. In response, DRA counsel distinguished the present case, as it concerns literally hundreds of year-after-year violations, so that "here we're way over the line." When pressed further, he stated that, in the event of "a reasonable likelihood of continuing violations," "[i]f violations are [still] found there needs to be some remedy for that," and "so in this case," namely in the case of the District Court's counterfactual, the Court would

"order PGE to figure out a way to make the project comply. . . ." SER 48.

Accordingly, DRA Counsel hardly "threw up his hands." He instead provided a reasoned alternative to the District Court's all or nothing remedy, one consistent with the Certification's WQMMP scheme. *See* Dkt 29-2, ER 160-61 (requiring operation of the SWW to "satisfy[] water quality standards," providing for operational modifications on request of DEQ or WCB, and even providing for modifications requiring "significant capital expenditures.").

PGE, with considerable enthusiasm, also erects the straw man that DRA "appears to want a wholesale reworking of the Pelton Project, such as by returning it to its operations before the installation" of the SWW facility and that the Court "would have no authority to order any such relief." Dkt 39 at 45. Its reason: because "removing or ceasing to operate the [SWW] would necessarily entail forcing the Department to modify the Section 401 Certification, and then require FERC to amend the license to remove or revise the conditions that are inconsistent with such relief. But neither FERC nor the Department are parties in this case." *Id*. at 46.

In response we note, first, PGE's lightspeed move from "criticizing the SWW facility" to "removing or ceasing to operate" it. But DRA's remedy does not contemplate SWW removal, in part because the established facts to date do not yet

show that the SWW facility is an irretrievable failure.[6] By this action and its request for remedy to date, DRA seeks only to enforce the Certification and its express numeric water quality limitations.

Third, even if a court-ordered facility modification were required to ensure compliance with Project limits, there is no reason to think that FERC must also be subject to the Order. Indeed, PGE and the Tribe expressly agreed otherwise. Dkt. 29-2 at ER 239 (Certification C.8), ER 242 (D.7) and ER 244 (E.5: pH) (providing Defendants "shall implement modifications requested by ODEQ"); FER at 32-34. ("[N]either PGE nor CTWS may seek review before FERC of [those] ODEQ modifications.").

PGE's argument notwithstanding, nothing prevents the District Court from determining, upon further factual development, that modification of the SWW must be undertaken as necessary to secure Project compliance with its water quality limitations. We discussed, *supra*, that PGE and the Tribe expressly acceded

[6] The District Court noted that upon its construction "Operators discovered that the SWW could release only a finite amount of cold bottom warm, which complicated temperature outcomes in the late summer and early fall." Dkt 29-1 ER at 12. But that "discovery," even if correct, defies the Operator's own express commitment to construct and operate a SWW capable of 100% "deep withdrawal." Dkt 29-2, ER at 163 (WQMMP 2.4, Table 2.1). PGE cannot be excused for its failure to stay within mandatory temperature and pH limits by its own failure to construct the SWW according to the WQMMP on whose anticipated truthful basis DEQ granted the necessary Water Quality. And again, if true, nothing prevents PGE from undertaking modifications to the SWW, if necessary, to comply with the Project's water quality parameter requirements.

to DEQ's authority to compel such modifications We add here, as well, that DEQ has long anticipated the possibility that, short of the SWW being deemed a failure, it could require modification in order to ensure the facility's operation in compliance with water quality standards. FER at 47 ("It is highly likely that the operational plan and/or [SWW] facility will need to be modified over time to achieve desired objectives."). *See also* ER at 155 (Following 5 years of SWW operation, DEQ or WCB may request SWW blend discharge changes requiring structural modifications amounting even to significant capital expenditures).

Finally, in this section, if only for completeness, we recognize the possibility that, upon remand and further factual development, the District Court *might* conclude that the SWW has simply failed as an adequate water quality compliance facility, or else that even if it were reasonably modified (and even accounting for fuller use of the Reregulating Dam to ensure water quality compliance) – that still, some violations of water quality parameters would recur where the Project is also operated support a viable fish passage program. In that circumstance, the District Court might order not only major modifications but also supplementary environmental projects, and these appear within the District Court's authority to Order even if PGE's compliance required it to take steps to obtain any license amendments, recertification, or more, as needed for such Project modifications or

supplementary projects. Indeed, PGE and the Tribe's joint Certification application of September 14, 2000 spelled out such an option as an additional measure to eliminate Project violations. As was there discussed by PGE and the Tribe, they had earlier proposed the SWW to address fish passage and water quality concerns "and also proposed . . . a package of non-structural and habitat-related protection, mitigation, and enhancement measures (PMEs) upstream of the Project *if selective water withdrawal was not implemented*." FER at 14 (emphasis in original). Accordingly, again upon further factual development, the District Court might need to order PGE and the Tribe to identify supplementary measures that, in conjunction with their more rigorous utilization of existing Project compliance facilities (as currently constructed or as modified) may be needed for the Project to achieve compliance with the Clean Water Act.

II. The Court Rightly Rejected the Rule 12(B)(7) Motions

PGE and the Tribe cross-appealed the District Court's determination that DRA's citizen suit enforcement action need not be dismissed on the ground that DRA had not originally named the Tribe as a defendant. The District Court's determination rested on its finding that the Tribe is a necessary party that may be joined under Rule 19 on the ground that it does not enjoy immunity from a citizen suit under the Clean Water Act. The lower court's reasoning amounted to a straight-forward construal of specific relevant CWA provisions. Before turning to

that construal, however, we offer some relevant context as to the Tribe's formal role in the operation of the PRB Project.

(a) Project Authority Is Assigned by the Tribe to PGE

First, in the 2002 PRB Project Ownership and Operation Agreement -- as referenced by Tribal declarant Calica, at Dkt. 40-2, SER at 192, and the District Court, Dkt. 40-2, SER at 3[7] -- the Tribe expressly conveyed to PGE, as Project Operator, all "rights and duties" to take "any and all actions necessary or appropriate to comply" with applicable laws, permits, licenses, and orders. Dkt. 29-2, ER at 235. The Agreement also specifically "granted . . .the rights and powers to do everything necessary, proper and customary, in the ordinary course of business, to fulfill its obligations and effectuate its role as Operators, *including* . . . the power to initiate, compromise or settle claims with third parties." *Id*. (Emphasis added.) If "the power to initiate, compromise or settle claims with third parties" is central to the Operator's obligations to "do everything necessary, proper and customary," then so too is the power to defend claims that implicate its operation of the PRB Project. The Ownership and Operation Agreement's thus capaciously assigns authority and responsibility to PGE to act for itself and Tribe not only to ensure compliance with the terms and conditions of the §401 Cert/WQMMP but

[7] The District Court observed that the Ownership and Operation Agreement for the Pelton and Round Butte Dams and Generating Facilities "is still in effect." Dkt 40-2, SER 3.

also to litigate any dispute over such compliance.

Second, the Tribe has waived any right it might have to assert sovereign immunity in any action by DEQ to enforce the terms and conditions of the Project's Certification, including with respect to a CWA citizen suit. Specifically, in the 2004 PRB Implementation Agreement between DEQ, PGE and the Tribe, the Tribe agreed not to assert "sovereign immunity or raise any other federal or state law challenge to any other Party's authority or standing" to seek remedies – including specific performance, suspension or modification of the Certification, civil penalties, pollution abatement, or citizen suit enforcement action pursuant to 33 U.S.C. § 1365. FER at 33-34. The cited language is broad, arguably extending to anticipated future matters. And where, as here, relevant state agencies fail to take action to enforce Certification terms and conditions, the very same citizen suit provision enables organizations, such as DRA, to stand in their shoes to enforce the CWA. 33 U.S.C. § 1365(b)(1)(B).

(b) The Tribes' Participation As A Defendant Is Not Indispensable

Even if Tribes are able to *selectively* waive their sovereign immunity with respect to specific CWA enforcers but not others, the above two paragraphs serve to emphasize the Tribe's strictly cabined formal role in Project decision-making with respect to its operation, water quality compliance – including Certification

terms and conditions – and related administrative and legal enforcement actions. The implication of this is clear in the present context. Although the District Court did not reach the question, in the event, *arguendo*, that this Court finds that the Tribe retains sovereign immunity, the question would arise whether the Tribe's participation *as a named defendant* is "indispensable such that the action must be dismissed" in its absence Dkt. 40-1, SER 8 (citing to *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012)).

As to *that* question, PGE argues that the Tribe is indispensable because, in its absence "the Alliance [could] get[] what it apparently wants. . . returning the Project to the pre-selective water withdrawal facility state, which had a "profound[ly] negative "effect" on the Tribe and its members by blocking fish passage." Dkt 39 at 50. But, as was also discussed *supra*, PGE's speculation as to what DRA "apparently wants" is erroneous and manipulative. In the proceedings below, DRA made clear that it was seeking the Project's compliance with Certification requirements – clearly neither the return to pre-selective water withdrawal facility (SWW) conditions nor reinstitution of blocked fish passage that PGE and the Tribe claim. *See* DRA complaint (Dkt 29-2, ER at 278), DRA amended complaint (Dkt 29-2, SER at 93-94), DRA motion for summary judgment (Dkt 29-2, SER at 290), DRA reply/response to motion for summary judgment (FER at 15, 19-21), and various DRA declarations (Dkt 29-2, SER at 245-46, Dkt

29-2, SER at 232, Dkt 29-2, SER at 216). Additionally, DRA's opening brief to this Court maintains that call for compliance with the Certification's requirements. Dkt. 28 at 10-16.[8]

The Tribe argues that it a necessary party and then further that the case could not "proceed in equity and good conscience" without it. Dkt 41 at 43. But Tribes' argument does not seem tenable where, as discussed above, with respect to the PRB Project it already has assigned responsibility and authority to PGE, as Operator, to take all actions including, even, to settle claims. But in addition, we can observe that the District Court had already shown its willingness to consider the Tribe's interests as an amicus, even when the Tribe improperly filed a Rule

[8] The Court may take notice of relevant DRA publicly available documents advancing an alternative scenario that would simultaneously improve lower Deschutes River water quality while amplifying and improving the fish passage effort. FRE 201; *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (considering extra-record evidence not to supplement the record on the merits, but "to determine whether [the court has] jurisdiction"); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560-61 (9th Cir. 2000) (considering extra-record evidence in order to evaluate whether agency had rectified a prior NEPA violation after the onset of legal proceedings). *See* https://deschutesriveralliance.squarespace.com/where-are-the-fish; https://deschutesriveralliance.wordpress.com/2019/12/16/accomplishments-from-2019/, https://deschutesriveralliance.org/getthefacts, https://www.oregonlive.com/opinion/2019/09/readers-respond-plenty-of-blame-for-deschutes-problems.html; and https://www.bendsource.com/bend/letters-to-the-editor/Content?oid=10833417.

12(b)(7) motion as a non-party in the present case. Dkt 40-1, SER 6-7.[9] Any weighing of the equities is a fact-based undertaking and would need to account, in such an enforcement action, not only for DRA's interest but also the public interest in ensuring the Project is operated in compliance with its relevant legal requirements.[10] *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988) (denying joinder of parties on public rights grounds despite impacts to their lease rights). Accordingly, in order to resolve the question of indispensability, important factual

[9] PGE also advances the unhelpful suggestion that as an "alternative forum" DRA could bring its concerns to the Department and FERC. Dkt 39 at 50-51. *See also* Dkt 41 at 45. But lodging a complaint with FERC is no viable alternative forum at all, as DRA noted in the briefing over primary jurisdiction below. *See Friends of the Cowlitz v. Federal Energy Regulatory Commission*, 253 F.3d 1161 (9th Cir. 2001). And we are here, enforcing the CWA with respect to the Project only because DEQ, an agency in retention of report after report of Project violations, is not.

[10] Fed. R. Civ. Pro. 19(b) requires that courts consider four factors when addressing indispensability and dismissal, two of which focus, at least in part, on the plaintiff: "(1) prejudice to any party or to the absent party," and "(4) whether there exists an alternative forum." *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-11 (9th Cir. 1996). *Kescoli* further states that courts "should be 'extra cautious' before dismissing" where no alternative forum exists. 101 F.3d at 1311 (*quoting Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)).

Additionally, even if the factors weigh in favor of dismissal, the "public rights" exception describes situations where dismissal is not warranted. The two-prong test asks if the litigation (1) "transcend[s] the private interests of the litigants and seeks to vindicate a public right," and (2) "'destroy[s] the legal entitlements of the absent party.'" *Kescoli*, 101 F.3d at 1311 (*citing Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995), and *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) respectively).

questions going to the extent and implications of remedial relief would need to be addressed – that is, only if the Court determines that the District Court erroneously construed the key provisions of the statute with respect to tribal immunity to a CWA citizen's suit.

(c) The CWA's Unambiguous Abrogation of Tribal Immunity

Turning, then, to that construal, the question is whether the statute, read liberally in favor of the Tribe's position on sovereign immunity, nonetheless evinces a clear indication of Congressional intent to authorize citizen suits against Tribes. Dkt 40-1, SER 13.

The CWA provides that any citizen may bring an action "against any person…who is alleged to be in violation" of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1). The statute also broadly defines "person," with express application to the entire chapter that includes citizen suits, to include, *inter alia*, "municipalities." 33 U.S.C. § 1362(5). And the statute further defines "municipalities" to include, *inter alia*, "an Indian tribe or an authorized Indian tribal organization." 33 U.S.C. § 1362(4). The plain reading of the statute thus permits a citizens' group, like the DRA, to bring an action against an Indian tribe. The statutes' abrogation is simply unambiguous.

This plain language reading is broadly supported in previous cases, and for that reason here the district court noted that it agreed "with other courts that have

found that where a statute defines 'person' to include 'tribes,' and allows citizen suits against 'persons,' Congress has made a *clear and unequivocal waiver* of tribal sovereign immunity." Dkt. 40-1 at SER 22 (emphasis added).

The District Court relied on three main cases to support this finding of clear and unequivocal waiver of tribal sovereign immunity. First, in *Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.* (*Atl. States*), the District of Arizona found that the CWA's citizen suit provision abrogated tribal sovereign immunity. 827 F. Supp. 608, 611 (D. Ariz. 1993). Second, in *Blue Legs v. United States Bureau of Indian Affairs* (*Blue Legs*), the Eighth Circuit found that the Resource Conservation and Recovery Act of 1976's ("RCRA") citizen suit provision "clearly indicates Congressional intent to abrogate the Tribe's sovereign immunity." 867 F.2d 1094, 1097 (8th Cir. 1989). The RCRA citizen suit provision has the same definitional structure as the CWA, as the *Atl. States* court also noted. 827 F. Supp. at 609 n. 1.

Third, the *Blue Legs* reasoning was accepted by this Court in *Miller v. Wright*. 705 F.3d 919, 926 (9th Cir. 2013). This Court there adopted the *Blue Legs* reasoning where the laws at issue "'express[] in explicit legislation' that it abrogates tribal sovereign immunity." *Id.* (quoting *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004)). The *Miller* court was further persuaded by the Tenth Circuit's similar reasoning in *Osage Tribal Council v. U.S.*

Dep't of Labor, 187 F.3d 1174, 1182 (10th Cir. 1999)[11] which stated that while Congress "*could* have been more clear," "where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed . . . than that Congress unequivocally state its intent." *Id.* (emphasis in original).

These cases strongly support the District Court's determination that, by the CWA's citizen suit provision and associated definitions, Congress unequivocally abrogated tribal sovereign immunity.

But where the CWA is clear, the Tribe and PGE see ambiguity. Pointing to the CWA's definitional structure, the Tribe argues that the Supreme Court's long-applied presumption is that "person" does not include a "sovereign" without contrary legislative intent. Dkt 41 at 29. PGE makes the same argument. Dkt 39 at 53. The Tribe also observes that the term "Indian tribes" does not meet the "commonly understood" meaning of "municipality." Dkt 41 at 32. Even so, these assertions are irrelevant in the face of Congress' express definitions of "person" and "municipality" in the CWA. *See* 33 U.S.C. §§ 1362(4) & (5).

The Tribe also challenges the District Court's reading of the CWA's relevant provisions, questioning whether the "attenuated inclusion" of "Indian tribes" in

[11] "We hold that where Congress grants an agency jurisdiction over all 'persons,' defines 'persons' to include 'municipality,' and in turn defines 'municipality,' to include 'Indian Tribes,' in establishing a uniform national scheme of regulation of so universal a subject as drinking water, it has unequivocally waived tribal immunity." *Osage Tribal Council*, 187 F.3d at 1182.

"municipality," which term is then included in "person," qualifies as clear evidence of unequivocal Congressional intent to abrogate tribal sovereign immunity. Dkt. 41 at 31. But the inclusions are direct, not attenuated, so that they function to clearly abrogate immunity, as the Tenth Circuit found in *Osage Tribal Council*, 187 F.3d at 1182. *See also* n. 11 s*upra*. The Tenth Circuit's reasoning was accepted by the Ninth Circuit in *Miller*, 705 F.3d at 926, as well as by the Eighth Circuit in *Blue Legs*, 867 F.2d 1094. These three Courts of Appeal had no more trouble following the definitional chain that did the District Court below. And they seem to apply the phrase "when used in this chapter," which precedes the definitions in 33 U.S.C. § 1362, with both that section and the citizen suit provision being part of the same statutory chapter (Chapter 26, entitled "Water Pollution Prevention and Control"). The two-step inclusion of "Indian tribes" in the definition of "persons" subject to a citizen suit simply leaves no ambiguity regarding Congressional intent.

PGE attempts to rely on *Daniel v. National Parks Service*, 891 F.3d 762 (9th Cir. 2018) to make essentially the same definitional argument as the Tribe, and for the same reason its argument fails. Dkt. 39 at 52. In *Daniel*, this Court upheld the National Park Service's claim of immunity from a class-action suit brought under the Fair Credit Reporting Act (FCRA). That statute allowed suits against "any person," and "person" was there defined to include, *inter alia*, "government or

governmental subdivision or agency." *See* 15 U.S.C. § 1681a(b). The Ninth Circuit found that the FCRA, while generally subjecting governments and government agencies to suit, had not expressly intended abrogation of the **federal** government's immunity to suit. *Daniel*, 891 F.3d at 774. ("[W]e cannot say with "perfect confidence" that Congress meant to abrogate the federal government's sovereign immunity." *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018)

But FCRA's definitional structure materially differs from that of the CWA. In FCRA, the terms "government or governmental subdivision or agency" were not defined further, while in the CWA "municipality" *is* further defined to expressly include "Indian tribes." The District Court properly deemed that level of specificity in the CWA's definitional structure to be sufficient to abrogate the Tribe's sovereign immunity. *See supra*. Accordingly, the definitional and structural ambiguities that compelled the *Daniel* court are not present here, so that PGE's reliance on it is misplaced.

The Tribe and PGE also highlight the absence of "Indian tribe" in 33 U.S.C. § 1365(a)(1) as evidence of Congressional intent not to abrogate sovereign immunity, but that argument also falls short. *See* Dkt. 41 at 30-31, and Dkt. 39 at 55-56. The Tribe argues that the *clear* intent to abrogate sovereign immunity is seen only in the specific inclusion of "the United States" in the citizen suit section. Dkt. 41 at 31. *See also* 33 U.S.C. § 1365(a)(1). But "that degree of explicitness is

not required.'" *Osage Tribal Council*, 187 F.3d at 1182 (quoting *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990)). And there is a plainer reason for the express, albeit parenthetical, inclusion of the United States as a person in 33 U.S.C. § 1365(a)(1), and that is because, for purposes of the citizen suit provision, Congress saw fit to *expand* the definition of "persons" – since in 33 U.S.C. § 1362(5) the term was not defined to include the federal government. There was no reason to include a parallel statement about Indian tribes in 33 U.S.C. § 1365(a)(1) because the existing definition already expressly provided for suits against Tribes. The district court's argument thus was without error on this point. Dkt 40-1, SER 14-19.

PGE makes the additional argument that the definitions "do not cross-reference the citizen suit provision." Dkt 39 at 54. This argument is misleading. While the definitions do not cross-reference *any* specific section, the very first sentence of 33 U.S.C. § 1362 states that "when [the definitions are] used in this chapter" they have the meaning ascribed to them "[e]xcept as otherwise specifically provided." And, for its part, 33 U.S.C. § 1365(a)(1) does not otherwise specifically provide for a different definition of "person." It instead, by way of a parenthetical, expands that definition in specified ways. *See* 33 U.S.C. § 1365(a)(1) (employing the term "including" within the parenthetical). More broadly, 33 U.S.C. § 1365(a)(1) provides a cause of action by "any citizen" against "any

person" alleged to be violation an effluent standard, among other things.

Moreover, if the failure of the CWA's definitions section to "cross-reference" 33 U.S.C. § 1365(a)(1), and *vice versa,* renders that section too "opaque," Dkt 39 at 55, to bring "persons" as defined in § 1362 within its ambit, then a number of so-defined persons would escape coverage. These include private corporations. We presume that PGE is not here suggesting such a self-serving result, but the absence of a limiting principle renders PGE's argument from the absence of express cross-reference patently absurd.

PGE and the Tribe also argue that because the federal government and states are specifically mentioned in 33 U.S.C. § 1365(a)(1), that provision's failure to discuss Indian Tribes raises ambiguity about Congress's intent to abrogate Tribal immunity. *See* Dkt. 39 at 55-56, and Dkt. 41 at 30-31.

However, the individual states are *not* specifically mentioned by 33 U.S.C. § 1365(a)(1). Instead 33 U.S.C. § 1365(a)(1) refers to "all other governmental instrumentalities or agencies" and specifies that those are subject to citizen suit actions only "to the extent permitted by the eleventh amendment to the constitution." As DRA noted, and the District Court stressed below, this would "actually operate to *remove* states from the definition of 'persons.'" Dkt 40-1, SER 19 (emphasis in original). Thus, 33 U.S.C. § 1365(a)(1) *adds* both (1) the federal government and (2) government instrumentalities and agencies to the extent

permitted by the Eleventh Amendment to the list of persons against whom any citizen may enforce Clean Water Act requirements. Indian tribes were not mentioned at 33 U.S.C. § 1365(a)(1) for the simple reason that they were already expressly incorporated as persons by operation of the consecutive definitions in 33 U.S.C. § 1362(4) and (5). There was thus no reason to expressly add or discuss them at 33 U.S.C. § 1365(a)(1).[12] Similarly, states were not mentioned because there was no reason there to mention states, since states also were covered expressly by the definition provisions of 33 U.S.C. § 1362(4) and (5).[13] The provision therefore creates no ambiguity about Congressional intent to abrogate in the CWA.

The Tribe alleges that the statute is ambiguous due to the silence of legislative history on the issue of tribal immunity. Dkt. 41 at 32-37. However, extratextual sources, such as legislative history, can only be referenced when "an

[12] Doing so, therefore, would have been anomalous, and this explains why the Tribes' suggestion -- that Congress, had it meant to expressly abrogate Tribal immunity, would have expressly so provided in 33 U.S.C. § 1365(a)(1), makes no sense.

[13] Similarly, with respect to the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. They too are not expressly mentioned at 33 U.S.C. § 1365(a)(1), but there was no reason to do so because they too are defined as relevant persons by operation of two definitional provisions. *See* 33 U.S.C. § 1362 (3) & (5). Again, as indicated by 33 U.S.C. § 1365(a)(1), to the extent permitted by the Eleventh amendment.

ambiguous statutory term or phrase emerges." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2468 (2020). Where, as here, the relevant statutory text is unambiguous, it must be relied upon to the exclusion even of ambiguous legislative history. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("'We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (internal citations omitted)).

But even if, *arguendo*, legislative history permissibly may be considered to interpret the CWA's unambiguous statutory abrogation of Tribal immunity, the Tribe's arguments would remain unpersuasive. The Tribe argues that the legislative history does not establish that Congress sought to abrogate tribal sovereign immunity by its inclusion of Tribes within 33 U.S.C. § 1362(4). Dkt. 41 at 32. But that the point is inapposite because Congress *did* expressly amend the CWA to expand the definition of "municipalities" to include "Indian tribes." *See* Dkt. 41 at 33 *citing* Federal Water Pollution Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). Indeed, as the Tribe noted, although that history establishes that the CWA's citizen suit provision is "modeled on the provision enacted" in the 1970 Clean Air Act (CAA) Amendments, Dkt 41 at 35, it also denotes that Congress chose to include Indian tribes within the CWA definition of

"municipality" – and not in CAA's definition of the term. That tidbit of history serves only to strengthen the case for CWA abrogation, irrespective of whether Tribes enjoy immunity to suit under the CAA. In any event, we can presume that the Congress considering the CWA amendments would have understood their clear implication when read together.

The Tribe speculates that Congress meant to express only that Tribes are eligible for federal CWA-related grants. Dkt. 41 at 33. But, as noted, the definition is expressly denominated for broad, chapter-wide application, and so, if such a narrow purpose was intended as the Tribe proposes, Congress could have drafted it more narrowly. The Tribe also cites to EPA's analysis in a 1996 rulemaking for the proposition that Congress' incorporation of Tribes in a similar definition of "municipalities" under the federal Resource Conservation and Recovery Act did not abrogate "any tribal authority," but EPA was there not discussing tribal sovereign immunity at all. Dkt 41 at 40, citing to 61. Fed. Reg. 2584, 2588-89.[14] Congressional silence and inapposite agency analysis does not help the Tribe overcome the unambiguous statutory abrogation.

Finally, the Tribe and PGE argue that the precedents cited by DRA and accepted by the District Court must be ignored because the courts in these cases failed to consider whether there was clear evidence of Congressional intent to

[14] *See also* FER 41-43.

abrogate tribal sovereign immunity. Dkt. 41 at 37-39, Dkt. 39 at 51-52, 56-57. These arguments, however, seem to overlook those courts' specific statements finding unequivocal Congressional intent to abrogate sovereign immunity. *See Miller*, 705 F.3d at 926 ("Unlike these laws [referring to RCRA, *inter alia*] federal antitrust law does not 'unequivocally express[] in explicit legislation' that it abrogates tribal sovereign immunity (citation omitted)). *See also Blue Legs*, 867 F.2d at 1097 ("It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.") and *Osage Tribal Council*, 187 F.3d at 1182.[15] The Tribe and PGE may be suggesting a distinction between unequivocal expression and Congressional intent, but that would be unpersuasive since the former is the best evidence of the latter.

Amici National Congress of American Indians *et. al* largely rely on and echo the reasoning offered up by PGE and the Tribe and present few new arguments. We think it important to observe here, however, that Amici are flatly wrong to assert that "[t]he District Court acknowledged the ambiguity in the CWA citizen suit provision." The opposite is true, as the District Court took pains to explain both why § 1365 is not itself ambiguous and why that section cannot be read to add ambiguity to the CWA's express abrogation of tribal sovereign immunity to a

CWA citizen suit. Dkt 40-1, SER 13-19. Indeed, the District Court properly noted that "[i]t is perfectly logical, however, to apply § 1362's definition of "person" in § 1365 and to then add the United States and expressly limit the provision's applicability to states, which are included in the broad definition of person, by limiting suits against governmental entities to those allowed under the Eleventh Amendment. *Id*. at SER 16-17.

Amici stress as well that tribal immunity should not be readily deemed breached because, "[a]s compared with States protected by the Eleventh Amendment, tribes are far-more resources constrained," and "every dollar or moment spent dealing with motion practice, pretrial discovery etc., necessarily detracts from the tribe's ability to offer essential services to its citizens." That, however, is a pure policy argument, and a curious one at that in the context of the present case where the cause of the Tribe serving as a party derives from its own failed attempt to have the case dismissed on the ground that DRA had not initially named it as a Defendant.

Amici also advance the argument that "sovereign immunity is sacrosanct in our constitutional democracy and must not lightly be deconstructed by the court." However, the District Court did not "lightly deconstruct" tribal immunity to a CWA citizen suit; instead, it illustrated the care with which Congress did that.

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[15] *Supra* at n. 21.

Similarly, to the extent that 33 U.S.C. § 1365(a)(1) treats states asymmetrically from Tribes, that again is a function of express Congressional choices in the CWA, choices likely taken with the express terms of the Eleventh Amendment in mind.

In sum, the Court should uphold the District Court's decision that the Clean Water Act's abrogation of tribal sovereign immunity allowed the Tribe to be joined. Dkt 40-1, SER 22. The statutory language unambiguously establishes Congress' intent to abrogate tribal sovereign immunity by allowing citizen suits against "Indian tribes." The attempts by PGE and the Tribe to distinguish the relevant caselaw and read ambiguity when there is none are not persuasive.

III. DRA Amply Established PGE's Violations of the Project's Water Quality Limitations

(a) DRA's Adaptive Management Compliance Arguments Are Not Waived

PGE asserts that by failing to raise and develop specific arguments detailing PGE's failure to meet adaptive management requirements, DRA waived the issue. *See* Dkt. 39 at 74-76. However, DRA did argue that PGE's operation of the PRB Project was inadequate; likewise, DRA argued in its opening brief on this cross appeal that PGE failed fully to utilize to secure the best compliance with the critical water quality parameter limitations governing the Project. PGE's claims of waiver therefore should be rejected. And PGE adopts an overly burdensome

standard for DRA, seeming to argue from its hope that any effort in response to water quality violations satisfies its adaptive management requirements so that, therefore, DRA needed to have argued that PGE failed to do *anything* to limit Project breaches of relevant limitations.

However, DRA consistently argued below that PGE's responsive actions did not meet adaptive management requirements. In its response to PGE's cross-motion for summary judgment, DRA clearly states that adaptive management is meant to achieve compliance with the required water quality standards and that PGE's efforts consistently fell short of what was required. FER at 17-18, 25-26. Further, after oral argument, DRA submitted a motion for clarification specifically on the topic of adaptive management. FER at 3. Finally, the District Court itself observed that DRA had argued that PGE failed to undertake sufficient steps to meet its requirements under adaptive management. Dkt 29-2, ER at 19 ("Plaintiff also argues…that Defendants have violated specific requirements in the management plans and the overall adaptive management requirements in the WQMMP"). PGE's attempt to argue that DRA "explicitly refused" to raise the issue of adaptive management overlooks clear evidence to the contrary.

Second, even if DRA failed to "squarely address" the precise issue PGE demands, PGE misunderstands the requirement for preserving an issue for appeal.

While "no 'bright line rule' exists to determine whether a matter has been properly raised below," an issue will generally be deemed waived on appeal if the argument was not "'raised sufficiently for the trial court to rule on it.'" *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) *citing Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (*quoting O'Rourke v. Seaboard Sur. Co.*, 887 F.2d 955, 957 (9th Cir. 1989)). The Ninth Circuit has ruled that an issue is raised sufficiently if "the issue was raised, the party took a position, and the district court rules on it." *W. Watershed Project v. U.S. Dept. of Interior*, 667 F.3d 922, 925 (9th Cir. 2012). Further, there is no waiver of an issue, despite it not being explicitly raised "where the district court nevertheless addressed the merits of the issue." *Ahanchian v. Xenon Pictures, Inc.*, 667 F.3d 1253, 1260 n.8 (9th Cir. 2010) (*quoting Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009)).

Based on DRA's District Court filings and the caselaw noted above, DRA sufficiently raised the issue that PGE failed to properly employ adaptive management. DRA has clearly argued that PGE's adaptive management efforts fell far short of the requirements in the WQMMP. *See e.g.* ER 19. Additionally, the District Court addressed the issue and ruled on its merits – though DRA disagrees with the lower court's interpretation of adaptive management. Therefore, DRA did not waive its argument regarding adaptive management by failing to address it in

the lower court.

DRA also argued the question in its first brief with this court. While not using the exact wording that PGE seems to demand, DRA continues to argue that PGE's interpretation of operational requirements under the management plans is incorrect and results in violations of the Certification. Dkt. 28 at 14-15 ("The District Court here ignores the plain language of the [Certification and TMP], by effectively adding an asterisk…waiving the mandate to meet water quality standards so long as PGE and the Tribe demonstrate a mere attempt at compliance). DRA has consistently argued that the purpose of adaptive management is to achieve compliance with the water quality standards. Any adaptive management efforts that result in something less than compliance with those required standards is insufficient adaptive management, Dkt. 28 at 16, and therefore, an argument that PGE is failing "to comply with the Section 401 Certification's adaptive management requirements." Dkt 39 at 75.

In sum, DRA has not waived its argument that PGE's actions have failed to comply with the Certification's adaptive management requirements. Both here and below, DRA has argued that PGE's approach and interpretation of adaptive management requirements are wrong. Likewise, PGE's understanding of what is required for preserving an argument is incomplete. DRA adequately preserve the issue.

(b) PGE Misconstrues the Certification's Adaptive Management Requirements

PGE here also wields the WQMMP's discussion of adaptive management like a Swiss Army knife (or even, a Leatherman), so as to extricate itself from one or other water quality criteria limitation. Its brief is littered with references to the concept of "adaptive management," as if it that alone waives Project violations of water quality standards in the Deschutes River – so long it can point so some amorphous "best *overall* balance" of criteria is achieved. Dkt. 39 at 30 (emphasis in original).

Admittedly, installation of the SWW was not expected to result in immediate and complete compliance with every water quality parameter standard; instead, the parties and DEQ expected that operational adjustments would need to be made for some period of time before compliance was achieved. But read properly, the WQMMP reference to adaptive management principles does no more than counsel the Project operator and owners that, until sufficient experience in SWW operation is gained, special attention should be paid to that facility's "potential to affect numerous water quality parameters, as well as fish passage." Dkt 20-2, ER at 160. Thus, in considering, say, SWW operations to cool the lower river and keep pH under 8.5 S.U., the Operator also should consider the impact, if any, on the dissolved oxygen concentration of Project discharge. But PGE ignores

the plain language of the WQMMP provisions, because they make it clear that the purpose of adaptive management is "*to ensure compliance with water quality standards*." Dkt 29-2, ER at 160 ("Adaptive Management Considerations") (emphasis added).

Instead, PGE turns the WQMMP's reference to adaptive management on its head by repeatedly construing any effort undertaken in arguable response to WQMMP obligations as a means of compliance in-and-of itself *as evidence that it is achieving compliance*.

Thus, the WQMMP directs that the SWW be managed in consideration of its numerous potential impacts, so as to ensure that its operation does not lead to noncompliance/violations of any of several water quality parameter limits. Action under the WQMMP's temperature, dissolved oxygen and pH management plans is triggered when Project discharges approach water quality limits for pH, dissolved oxygen, and/or temperature.

But if the Operators efforts do not keep the Project in compliance with water quality standards, the mere act of undertaking action that PGE then denominates as 'adaptive management' does not itself substitute for actual compliance. Indeed, the tenets of adaptive management as provided in the Certification and its WQMMP dictate that the adaptive management process continues until monitoring indicates success in actually meeting water quality standards. *See* FER at 47 ("six main steps

in adaptive management as it will be applied to the Pelton Round Butte fish passage and water quality program") and 58 ("[adaptive management] approach consists of six main steps: problem assessment, plan design, implementation, monitoring, evaluation and adjustment").

Hence, the WQMMP's imposition of numeric criteria limits for pH, DO, and temperature, and its reference to adaptive management principles as a guide to effective SWW operation, are fully compatible with one another. The latter, in particular, do not replace the former. Neither can the adaptive management principles excuse the Project's repeated violations of the Project's water quality criteria limitations.[16]

(c) High pH Project Discharges Violate the Certification & Clean Water Act

PGE asserts, for this water quality parameter "in particular," that the

[16] In addition to attempting to portray the Certification as ambiguous, PGE also attempts to extend to the contract analogy such that DEQ's acquiescence in PGE's violations is mere "course of performance," *i.e.*, DEQ's lack of enforcement in the face of Certification violations somehow transforms those violations into indicators of compliance. *See, e.g.,* Dkt. 39 at 59. Similarly, PGE attempts to portray itself, the Tribe, DEQ, *etc.* as party insiders to the Certification/contract whose interpretation of the Certification should be given weight by the Court, to the apparent exclusion of "a nonparty like [DRA]." Dkt. 39 at 34. There is simply no support for PGE or the Tribe's interpretations of the Certification warranting special treatment; indeed, their interpretations should probably be viewed with skepticism given that they will financially benefit. In any case, the plain language of the Certification and its WQMMP are dispositive.

WQMMP "explicitly recognized that the Project may "exceed" the criteria. . ." Dkt 39 at 64 (citing ER 22 n.5).

But PGE's assertion is misleading or irrelevant. The WQMMP plainly does not state that the Project may exceed the pH criterion limit of 8.5 at its point of compliance in the lower Deschutes River that is at issue here, namely, the tailrace of the Reregulating Dam. Instead, the WQMMP provides a limited exception only for pH exceedances in "**the Project reservoirs**" – that is, in the impoundments created upstream of Project dams. Dkt 29-2, ER at 170 (WQMMP §4.2).[17] (Emphasis added.) That is an important distinction, but PGE's formulation appears to perpetuate a clear error made by the District Court.[18] In footnote 5 of its opinion (which is cited by PGE, *see* Dkt 39 at 64 (citing ER 22 n.5)), the District Court asserted that the PHMP "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." Dkt 29-1 at 22, n.5 (quoting Dkt 29-2 at 164 (§4.2 (second sentence)). The phrase quoted by the District Court, when read in context, very clearly applies only to "*Project reservoirs*." Dkt 29-2 at 164 (§4.2 (second sentence)). The DRA has alleged no violations of water quality standards in Project reservoirs; all of the violations alleged by DRA are instead

[17] Even for exceedances in the reservoirs, those may be excused "only "in instances where all practical measures are being employed to minimize exceedance." ER 170.

located are below the Reregulating Dam, in the lower Deschutes River. Therefore, any reliance by PGE on the District Court's error in this regard is similarly in error, and has no relevance to the present case.

In a similar vein, PGE cites inapplicable provisions for the following proposition: "The Section 401 Certification even addresses operation of the Project in a manner that may exceed the temperature, dissolved oxygen, or pH criteria, under certain circumstances." Dkt 39 at 62 (full paragraph starting about halfway down the page). The Certification provisions that PGE cites in support of this proposition are triggered by the existence of an EPA-approved total maximum daily load (TMDL) for the lower Deschutes River. *See* Dkt 29-2, ER at 238-39 (temperature), 240-41 (dissolved oxygen), and 243 (pH). While a TMDL had been anticipated in the near future at the time of the issuance of the Certification, no such TMDL was ever issued, and DRA is unaware of any progress on that front. Because no TMDL exists, the cited provisions simply do not apply to the case before the Court.

PGE also asserts that, upon exceeding the pH criteria limit, it is required merely to contact state and tribal agencies "to develop an approach to reduce pH that is consistent with maintaining" the other goals of the Project." Dkt. 39 at 64.

But none of that is correct. First, the WQMMP plainly does not permit PGE

[18] If running out of space, just cite to our 1st brief in its pH section for this.

to await an exceedance of the criteria limit to act, since the mandate to notify and "develop an approach to reduce" is triggered whenever "pH at the Reregulating Dam is found to exceed that of the weighted average of the inflows." Dkt 29-2, ER at 171 (WQMMP 4.6). Accordingly, the obligation may be triggered *well before* pH rises to the criteria limit of 8.5. Indeed, to ensure earlier detection, PGE is obligated under the WQMMP to increase monitoring in the tributaries, from monthly to weekly, whenever pH at the Reregulating Dam exceeds 8.3. Dkt 29-2, ER at 170 (WQMMP 4.5).

Second, as the District Court noted, the WQMMP requires PGE to do more than notify DEQ and WCB of pH limit breaches – it "requires Defendants to work toward compliance with pH criteria."

The District Court added the caveat "only to the extent doing so is consistent with other standards and goals – and . . . to use adaptive management." Before *this* Court, therefore, PGE appears to be doubling down on the basis of that caveat, implying that it need only notify DEQ and the WCB upon an actual pH criterion exceedance (not before) and then to develop an approach to reduce pH only if "consistent with the other goals."

But even if the assertion that the Project *sometimes* cannot simultaneously secure compliance with all water quality criteria limitations were correct, that would not excuse all breaches when more could be done. As DEQ's Eric Nigg put

it, although the WQMMP requires PGE to "maintain high water quality with respect to temperature and dissolved oxygen, and facilitate fish passage" it must "then mitigate pH *as much as possible*." (Emphasis added.) Dkt 29-2, ER at 53. Indeed, the WQMMP itself anticipates that something can be done, at it specifies that "the likely modification" is "a reduction in the amount of surface withdrawal relative to bottom withdrawal," though that must be determined "on a case-specific basis."

Contrary to PGE's assertions, the record establishes that there is usually, if not always, ample room to operate the Project so as to reduce pH without breaching other water quality limits. For example, DRA identified 104 days in 2017 where Project discharges exceeded the pH limit. ER 186-88. On none of those days did PGE release more than 65 percent bottom water and, moreover, it released that amount only on four of those days (Aug. 12-15, 2017). ER 139-141.[19] But, as we argued in our 1st brief here, Dkt 28 at 26-27, there is no record evidence of *any* such plan development following any of the 482 pH exceedances that DRA identified in the 2012-2017 period. ER 174-88.

If, following the District Court's analysis, PGE, as the operator of the PRB

[19] On all 104 days of pH violation, moreover, there was either no dissolved oxygen violation at the Reregulating Dam compliance point, or violations that might have been cured with additional spill (full spill not having been undertaken that year until Aug. 28, nearly two weeks after the last identified pH violation). The record thus plainly reflects that more to reduce pH was possible.

Project, is obliged to "work toward compliance with pH criteria," the burden to show impossibility of compliance on any particular day must be on PGE. Buy PGE, having not even attempted to meet that burden in the proceedings below or here,[20] and so it should not have its patent violations excused on that basis.

(d) Low Dissolved Oxygen Project Discharges Violate the Certification & Clean Water Act

Regarding Project compliance with the dissolved oxygen water quality standard, PGE's "adaptive-management-as-compliance" argument fails for the independent reason that "[t]he existing Reregulation Dam spillway facilities" are a means of dissolved oxygen standard compliance independent of the SWW facility, and outside the scope/umbrella of adaptive management. *See* Dkt 29-2, ER at 160-61 (WQMMP "Adaptive Management Considerations" section referencing only the SWW facility) and *id.* at 167 ("Facilities for Compliance" section of Dissolved Oxygen Management Plan stating that, for the Project, "The existing Reregulation

[20] Campbell stated that "[f]or *most* of the days listed in Exhibit K, the pH criterion was met, the Project did not contribute to the excursion from the criterion, or the low-level withdrawal from the SWW" was higher than called for by Blend 17 or at its maximum." Dkt 40.2 (SER 125). Thus, Campbell's statement functions as an admission that *some* of the violations are unaccompanied by any such excuse. Campbell also argued that "both the pH excursions and the Project's contribution to them was limited," maintaining that "[t]he average of all excursions did not exceed 8.7 in any year…." *Id.* But, as DRA noted in its 1st Brief, Dkt. 28 at 28, the Court may take notice that the pH scale is logarithmic. A reading of 8.7 therefore indicates that the impacted water retains 200% more hydroxyl ions than is permitted by the §401 Cert.

Dam spillway facilities *may also be used to comply* with the applicable lower river DO and IGDO criteria, if needed.").

Moreover, the "Approach to DO Management" section of the WQMMP/DOMP discusses operation of the SWW, followed by a discussion of spill at the Reregulation Dam indicating that PGE and the Tribe "*will institute controlled spills at the Reregulating Dam*" if adaptive management of the SWW appears to be unlikely to achieve dissolved oxygen standard compliance. Dkt 29-2, ER at 167-68 (emphasis added). But, in its brief, PGE continues to lump the Reregulation Dam spillway facilities in with the SWW under the adaptive management regime, avoiding the plain language of the DOMP discussed above.

It is important as well here to note that Oregon's current dissolved oxygen standard imposes a heightened oxygen level for spawning "where resident trout spawning occurs, during the time trout spawning through fry emergence occurs," Or. Admin. R. 340-041-0016(1), *i.e.*, the standard varies based on *actual resident trout activity* in the river. The resident trout spawning standard contrasts with the spawning standards for other species, for which spawning areas are defined via ". . . places and times indicated on . . . Tables and Figures . . . ." *i.e.*, for these other-than-resident-trout fish species, if spawning activity were to be observed outside of the times/places indicated on the applicable tables and figures, the more protective dissolved oxygen standards of the regulation would not apply -- unless and until

the relevant tables and figures were modified.

For resident trout, on the other hand, the application of the spawning standard varies based on actual factual conditions, not by reference to tables and figures. The full text of the relevant language of regulatory provision, with resident trout portions underlined, follows:

> 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 . . . .

Or. Admin. R. 340-041-0016(1) (emphasis added).

In the face of this regulation that potentially implicates weighing of evidence, the District Court made passing reference to DRA's evidence "based on a scientific study and from statements of individuals who frequently use the Deschutes River, that resident trout spawning occurs much later than June 15 in the lower Deschutes River." It then accepted as fact DEQ's now decade-and-a-half old pronouncement in a *letter* (*i.e.*, not the regulation quoted above) that resident trout spawning occurs "only between October 15 and June 15" *across the entire State of Oregon*. Dkt 29-1, ER at 31-32.

As outlined above, to the extent that evidence shows resident trout spawning

at a particular time in a particular waterway, the regulation indicates that the spawning standard applies. Neither the District Court, PGE, the Tribe, nor DEQ directly questioned DRA's evidence of post-June 15 resident trout spawning in the lower Deschutes River below the Project, instead merely pointing to the 2004 DEQ letter as somehow dispositive of the question of timing of resident trout spawning below the Project. While it appears that DRA's unchallenged evidence of resident trout spawning should be sufficient to support a summary judgment ruling in DRA's favor with regard to dissolved oxygen violations, it is at the very least indicative of a genuine issue of material fact. DRA's evidence of timing of resident trout spawning was patently material to the application of the regulatory standard.

Accordingly, the Project's repeated dissolved oxygen parameter violations cannot be excused. *See* Dkt 29-2, ER at 214-29, and Dkt 28 at 29-33.

(e) High Temperature Project Discharges Violate the Certification & Clean Water Act

PGE advances several arguments to bolster the District Court's determination that the WQMMP's delineation of "the temperature standard that must be satisfied," is not provided by WQMMP §2.2, but instead by WQMMP §2.2's reference to applicable state standards – the "*current*, less-stringent state-law temperature criteria," as PGE puts it. PGE 2d Br. on Cross at 77. [Emphasis in PGE's original.] And as to those incorporated less-stringent criteria, PGE alleges

that DRA "had not even shown that the Project caused any temperature exceedances." *Id*. at 74.

Quite apart from the erroneous basis for its first point, PGE's second point is simply plainly in error. First, it is not DRA's burden to show that the Project's warming of receiving waters "caused" any temperature exceedance. Rather, the Project is barred from *contributing* to any such exceedance beyond a certain threshold established in the §401 Cert (including its current WQMMP). Cite.

Second, the WQMMP forbids the Project from warming receiving waters beyond a prescribed deminimis amount (0.25 ºF) *when surface waters exceed a certain threshold*. Pursuant to WQMMP §2.2, that threshold is 50 ºF (the bull trout standard) "or when federally listed . . . species use the river." (Emphasis added.)

Thus, they argue, the WQMMP does not require PGE to avoid all exceedances. In particular, PGE argues, it is "the contracting parties' mutually agreed upon understanding" of the §401 Cert and its WQMMP that controls the question. PGE 2d Br on Cross at 60. But, in fact, the best evidence of that understanding is the text of WQMMP §2.2 itself – at least with respect to DEQ and the WCB:

> *The DEQ and the WCB interpret* the temperature standard to restrict the PRB Project from warming the water discharged into the lower Deschutes River below the Reregulating Dam more than 0.25 °F over what would occur at that location in the river if the PRB Project were not in place, when surface waters exceed 50°F (10°C) or when federally listed Threatened and Endangered species use the river.

Dkt 29-2, ER at 162 (WQMMP §2.2) (emphasis added).

Dispositive extrinsic evidence establishes that PGE also understood that the WQMMP *requires* compliance with the relevant temperature standard was not only held by the DEQ and WCB, but by PGE itself. First, PGE wrote the WQMMP. ER 158 (WQMMP "prepared by" the Tribe and PGE). Second, at least through the third year of its operation of the SWW the company quite frankly acknowledged its understanding, in its so-called interim agreements with DEQ.[21] While DRA strongly disputes that those documents serve to reduce PGE legal requirements under the WQMMP, they do serve to show the company's understanding that "[t]he § 401 Certification and the WQMMP *require* the Joint Licensees to discharge temperatures at the Reregulating Dam that are at or below Natural Thermal Potential ("NTP") + 0.25°F *when the combined inflows to Lake Billy Chinook are greater than" 8* °C [2012 interim agreement, ER 70] or 10 °C [2013 interim agreement, ER 73]. (Emphases added).

Accordingly, the "mutually agreed upon understanding" of the parties was that "the temperature standard that must be satisfied" was that provided expressly in WQMMP §2.2. Accordingly, the parties plainly did **not** consider the

[21] The 2012 interim agreement was signed by PGE's Julie Keil on May 12, 2012, while the 2013 interim agreement was signed by PGE's Julie Keil on May 23, 2013.

WQMMP's reference to state and tribal standards found in its §2.1 to override its express terms.[22] Instead, Project warming of more than 0.25°F was strictly forbidden, in light of the fact that listed species use the river. ER 162 (WQMMP §2.2). *See also* ER 239 (§401 Cert, Provision C.5.).

Still we can consider, for the sake of argument only, the implications if WQMMP §2.1 were to supersede §2.2. Then, the incorporated-by-reference state-law limit of 13 ºC (55.4 ºF) would apply for the lower river reach immediately impacted by the Project during the Oct. 15-June 15 period.

DRA's delineation of Project warming submitted to the District Court manifestly shows multiple and repeated contribution to warming beyond the less-stringent 13 ºC threshold applicable north of the Project during Oct. 15-June 15. *See* ER 190-192 also ER 90-92 (June 15-, 2011 violation), ER 194 (June 9-11, 2012 violations), ER 195 (Oct. 21 to Nov. 25, 2012 violations), ER 197 (May 25-June 15, 2013 violations), ER 198 (Oct. 15 through Nov 14, 2013 violations), ER 200 (May 20-June 15, 2014 violations), ER 201 (Oct. 15-18, 2014 violations), ER 204 (May 9-June 6, 2015 violations), ER 205 (Oct. 15-18, 2015 violations), ER 207 (June 13-15, 2016 violations) and ER 211 (June 4-14, 2017 violations).

[22] Presumably this was also the Tribe's understanding, since PGE signed for the Tribe as permitted by the PGE-Tribe "Ownership and Operation Agreement" of 2002. ER 235 (providing, in §3.1(b)(ii), that PGE "represents the Owners with Governmental Authorities on all Project matters within the scope of the Operator's responsibilities"). The Tribes' understanding may also be discerned by

Moreover, the state water quality standards themselves plainly do not permit warming beyond 0.3 ºC during summer months even when the water temperature is *less than* 13.0 ºC. OAR 340-041-0028(11)(a). Thus, e.g., for Sept. 21, 2017, PGE's delineation establishes that the 7-day average daily maximum temperature at the Reregulating Dam point of compliance was 0.5 ºC higher than the calculated without project temperature. ER 107. *See also* ER 103 (Sept. 6-10 and 12-21, 2016). That flatly violates OAR 340-041-0028(11)(a).

True, the private PGE-DEQ 2017 Interim Agreement sought to quadruple the WQMMP's temperature allowance (from 0.25 F to 0.5C) for limited periods. But again, as DRA discussed in its 1st Br. on Cross here, Dkt. 28 at 7 (and maybe 42-46?), in light of their procedural infirmities (promulgation with no public hearing), the agreements failed to modify the §401 Cert's WQMMP temperature limitations, including its temperature allowance. The District Court appeared to concur that the interim agreements did not effectively modify relevant terms of the Cert & WQMMP. But again, even if, *arguendo*, they **had** effectively modified the Cert and its WQMMP, as PGE continues to urge, those private agreements could **not** have thus modified the state rules, since those rules forbid a Department-authorized plan for a Project such as at PRB, even if duly promulgated with public input, that authorizes "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." OAR 340-041-0028(e)(A).

Thus, having relied here on the District Court's determination that less stringent state water quality rules override certain key water quality provisions of the WQMMP, PGE must not be heard to argue that its private interim agreements with DEQ also function to override specified limitations in those same **state rules**. More simply, regardless of whether relevant state rules override the strictures of the WQMMP, private PGE-DEQ agreement do not override state law. And state law provides no exceptions for warming violations on the basis that they derive from a defendant's addition to its licensed Project, which addition made defendants' compliance with its temperature limits less feasible. Again, more simply, PGE should not later gain the benefit of its earlier failure to construct a SWW that would render compliance more certain.

C. CONCLUSION

The Certification and WQMMP are "plain and capable of legal construction," and therefore their "language alone must determine the[ir] meaning." *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1205 (9th Cir. 2013) (quoting *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 270 (4th Cir.2001) (citation omitted)). In DRA's view, the Court's task here "at this point of the case is to determine what [DRA is] required to show

in order to establish *liability* under the terms of *this particular* [Certification]." *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d at 1205 (emphasis in original).

Had DRA initiated an enforcement action against PGE and the Tribe in 2011 concerning the earliest-in-time violations alleged in the present case (pH violations in April of that year), the court in that theoretical case should have found liability given the plain language of the Certification and WQMMP. However, when it came to relief, the court reasonably might have declined to issue an injunction requiring compliance given the fact that the SWW facility would have been operational for fewer than two years at that point, with the court deciding that PGE and the Tribe needed more time to effectively calibrate the SWW facility.

In reality, DRA filed its Clean Water Act enforcement action against PGE in August of 2016, in the latter half of the seventh year of Project operations since the SWW facility went online. Dkt 29-2, ER at 258 (DRA's complaint initiating this case). DRA's suit followed requisite notice to the parties and DEQ (among others) and alleged hundreds of instances in which Project discharges failed to comply with Oregon's water quality standards. Dkt 29-2, ER at 271-72. Over a year-and-a-half later, in March of 2018 (*i.e.*, in the ninth year of Project operations since SWW implementation), DRA moved for summary judgment, submitting evidence of the hundreds of instances in which Project discharges failed to comply with

Oregon's water quality standards that it had alleged in its complaint, augmented by the additional instances of noncompliance that had occurred in the year-and-a-half since the lawsuit was initiated. Dkt 29-2 at 166-221.

We are now nearing the end of the eleventh year of Project operations since the SWW was implemented, and over fifteen years into the fifty-year FERC license issued in June of 2005. That is to say, PGE has had over a decade to operate the SWW so as to fulfill the commitments it made to the people of Oregon—compliance with Oregon's water quality standards in the Deschutes River, along with significant progress in successfully reintroducing fish. The fish reintroduction efforts are an attempt to address the State of Oregon's objections to the original Project license "on the grounds that the dams would prevent the ascent of anadromous fish to their spawning grounds above the dam sites, and would result in the serious curtailment of the fish population and prevent its increase . . . .", *State of Oregon v. Federal Power Commission*, 211 F.2d 347, 349 (9th Cir. 1954), *rev'd*, 349 U.S. 435 (1955). PGE's representations regarding the SWW before it was constructed and operated appear to have unfortunate parallels with representations that were made with regard to the original incarnation of Project's effects on fish, when it was represented that facilities would be "designed to develop an equal or greater fish population." 349 U.S. at 439.

DRA is acutely concerned that in the absence of judicial intervention, the

State of Oregon will stand by while the present incarnation of the Project continues to violate water quality standards, and the lower Deschutes River will reach a point of no return if things play out along the lines of the decades-long timeline that continues to play out regarding the Project's effects on fish. DRA has properly construed the Certification and WQMMP at issue in this case, identified patent violation after violation of the Project's key water quality parameters criteria, and explained why those violations are not to be excused.

For the foregoing reasons, then, DRA urges the Court to reverse the judgment of the District Court, enter judgment as to liability against PGE and the Tribe, and remand the matter to the District Court for further proceedings as to remedy.

Respectfully submitted this November 6, 2020

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

/s/ Daniel M. Galpern (filing attorney)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 18-35867, 18-35932, 18-35933

I am the attorney or self-represented party.

This brief contains 13,984 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature s/Daniel M. Galpern **Date** November 6, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 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.

Dated: November 6, 2020

LAW OFFICE OF DANIEL M. GALPERN

/s/ Daniel M. Galpern
Daniel M. Galpern

Attorneys for Appellant Deschutes River Alliance

ADDENDUM

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33 U.S.C. § 1362

…

(3) The term "State" means a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

33 U.S.C. § 1365

…

(b) Notice No action may be commenced–

(1) Under subsection (a)(1) of this section–

…

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

Or. Admin. R. 340-041-0016

Dissolved oxygen (DO): No wastes may be discharged and no activities may be conducted that either alone or in combination with other wastes or activities will cause violation of the following standards…

…

(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.

APPEAL 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 OF OREGON,

Defendants-Appellees/ Cross-Appellants

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

Case No. 3:16-cv-01644-SI
Hon. Michael H. Simon

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DESCHUTES RIVER ALLIANCE, an Oregon nonprofit corporation,

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, *and*

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

Defendants.

Case No. 3:16-cv-01644-SI

PLAINTIFF'S PROPOSED CLARIFICATION OF ITS POSITION ON § 401 CERTIFICATION VIOLATIONS AND ADAPTIVE MANAGEMENT

Following review of the recently-issued transcript of the July 17, 2018 oral argument, Plaintiff Deschutes River Alliance (DRA) respectfully submits this clarification of its positions on topics raised at oral argument that had not been addressed in prior briefing, to assist the Court in its evaluation of pending cross motions for summary judgment.

At oral argument, the Court posited a question that had not been expressly addressed in any of the parties' briefing: namely, where is the "dividing line" at which point episodic or infrequent exceedances of specific criteria in the § 401 Certification would become sufficiently excessive to constitute a violation of that Certification? *See, e.g.,* Transcript at 6-7. The Court posed this question specifically in light of the certification language around adaptive management. *See id.*

In response to this question, Counsel for DRA indicated that the number of violations is relevant to the question of remedy, but that when violations are "rampant [and] continuing," as in the present case, the "dividing line" has clearly been crossed. *Id.* at 17-19. What was not made explicitly clear in this response, however, was DRA's position as to the relationship between violations of the § 401 Certification and Defendants' "adaptive management" of the Pelton Round Butte Project.

In short, while DRA believes that each instance where Project discharges exceed the Certification's relevant numeric criteria is a violation of the Certification, it is the sufficiency of Defendant's adaptive management of the Project that is relevant and determinative of the need for relief in this case, and to the breadth of that relief. As pointed out in Plaintiff's briefing and at oral argument, the explicit purpose of adaptive management in the Water Quality Management and Monitoring Plan is compliance with water quality standards. *See* Doc. 104 at 10-11. Thus, under appropriate adaptive management, the number of violations over time would be

eliminated, or at least significantly diminished. In such a situation, the need for relief from the Court would not be as acute. If, however, Defendants are failing to systematically reduce water quality violations, or if Defendants are failing to undertake prescribed adaptive management action to the maximum extent feasible, then injunctive relief from the Court would be warranted.

The water quality data Defendants have submitted over the years to the Oregon Department of Environmental Quality (ODEQ) clearly demonstrates that the number of violations at the Project has not significantly diminished. Indeed, there is not even a generally declining trend in numbers of violations over time. DRA submits the following tables showing year-to-year trends in violations to aid the Court in considering the sufficiency of Defendant's adaptive management:[1]

Dissolved oxygen violations alleged by Plaintiff:

2012	2013	2014	2015	2016	2017
108	91	65	101	78	97

Temperature violations alleged by Plaintiff:

2011	2012	2013	2014	2015	2016	2017
135	90	95	116	108	121	73

pH violations alleged by Plaintiff:

2012	2013	2014	2015	2016	2017
54	25	61	98	140	104

Further, the record clearly establishes that Defendants in some instances have failed even to undertake the specific adaptive management measures identified in the WQMMP. PGE counsel herself stated at oral argument that a "bright line" violation would occur where Defendants did not undertake spill at the Reregulating Dam when dissolved oxygen levels

[1] The yearly violation totals in these tables are based on violation data previously filed with the Court as Docs. 66-1, 66-2, 66-3.

dropped below 9.0 mg/L. Transcript at 39-40; Doc. 73-7 (WQMMP § 3.6). A review of the declaration of Lori Campbell indicates many dozens of instances where dissolved oxygen levels dropped below that level, but Defendants failed to perform full spill—or, on some occasions, any spill at all. *See generally* Doc. 90-10.[2] Counsel for DRA noted this fact in the course of asserting that the interim agreements struck privately between ODEQ and Defendants employed an erroneous dissolved oxygen standard. Transcript at 56. But DRA stresses here that his point was also germane to the question of Defendants' adaptive management performance under the Certification—in other words, to Defendants' failure to ensure compliance with water quality standards.

Similarly, for pH: Defendants are specifically required by the WQMMP to "modify the selective water withdrawal regime [with] the likely modification [being] the reduction in the amount of surface withdrawal relative to bottom withdrawal," when necessary in order "*to meet* the applicable ODEQ and CTWS pH standards. . . ."[3] Doc. 66-9 at 13-14 (emphasis added). Again, an examination of the declaration of Lori Campbell indicates numerous instances each

[2] As just one example: during the month of July 2017, dissolved oxygen levels fell below 9.0 mg/L on 27 of 31 days. However, on 23 of these days, Ms. Campbell's declaration indicates that no spill was performed. And on the other four days, spill was only "limited." Doc. 90-10 at 13.

[3] The WQMMP also states that "[t]he change in the proportion would be determined on a case-specific basis, if such modification can be undertaken consistent with temperature, DO, and fish passage considerations." Doc. 66-9 at 14. DRA does not read this statement to mean that any predicted minor adverse effect—for example, a small lowering of dissolved oxygen concentrations in Project discharge—thereby obviates the Defendants' obligation to act as specified to reduce pH via an increased share of bottom water discharge. Taking account of potential compliance impacts with respect to DO, temperature, and fish passage does not obviate the requirement to comply with pH criteria. The same is true with respect to the Certification requirements to meet or maintain specific criteria with respect to temperature and dissolved oxygen, as well as the requirement to pursue an effective fish passage program that does not impair lower river water quality.

year where the pH criterion was not met, and where the Project was clearly contributing to these violations. *See* Doc. 90-11. Rather than reduce the amount of surface water in sufficient amounts to eliminate or even reduce these violations, it appears Defendants seek to take refuge from this obligation by referring to the WQMMP's "adaptive management" language while merely noting that the amount of bottom water being discharged at that time was above that identified in "Blend 17." *See id*. On many occasions Ms. Campbell's declaration, in evaluating noncompliance with the pH standard, simply employs the phrase "adaptive management" to excuse that noncompliance with no further explanation. *See, e.g., id. at 18* (using solely the phrase "adaptive management" in excusing violations each day from August 1-10, 2017). Simply reciting the phrase cannot suffice to meet any reasonable interpretation of "adaptive management" as it applies in the WQMMP."[4]

All of the above demonstrate clearly that Defendants' "adaptive management" of the Project has failed under any reasonable definition of that phrase.[5] In such a situation, where

[4] An explanation offered multiple times by Defendants for their inability to release more bottom water is the need to comply with the Project's "Fish Passage Plan." *See, e.g.*, Doc. 117 at 6. But the only "requirements" in the Fish Passage Plan that Defendants have cited are (1) the need to construct and operate the SWW, and (2) to provide fish passage through the Project during all months of the year. *See, e.g.,* Doc. 86 at 20 n.16. Defendants have not explained how increasing the percentage of bottom water discharge would interfere with either of these requirements. Defendants have represented that, as currently constructed, at least 40% of the water passed through the SWW will always come from the reservoir surface, thus creating surface flows for the purpose of facilitating fish passage. Doc. 86 at 12 n.8. Defendants utilize this minimum amount of surface draw for a period of time each year in the late summer, and presumably this is a sufficient amount of surface water to provide fish passage during that time. Defendants have not explained in briefing or oral argument why these constant minimum levels of surface water are insufficient to provide effective fish passage at other times during the year.

[5] For an analysis of federal court opinions on federal agency implementation of adaptive management, *see* Robert L. Fischman and J.B. Ruhl, *Judging adaptive management practices of U.S. agencies*, 30 Conservation Biology 268 (2016) (analyzing U.S. federal court opinions to identify agency adaptive management practices that courts found the most deficient).

violations have not been diminished, Defendants have not taken measures specifically prescribed to come into compliance, and all available evidence indicates violations will continue, judicial intervention is clearly warranted.[6]

On a similar note, the Court advanced the idea, in course of its discussion with counsel for Portland General Electric, that [1] if the Court accepts DRA's reading of the certification, "then there probably is a violation" but [2] if it accepts "the defendant's reading . . . then it looks like there's no violation," and that, under either interpretation, [3] "there's no real disputed issue of material fact." Transcript at 40.

DRA disagrees with proposition [2] above. Under Defendants' reading of the Certification, the only requirements under the Certification appear to be for Defendants to "monitor the river's water quality and take specified adaptive management measures in response." *See, e.g.,* Doc. 86 at 5. DRA did not, in its summary judgment briefing, squarely address the question of Defendants' adaptive management performance because DRA believed that question was relevant to the need for and breadth of relief, and not to Defendants' liability for violations.[7] And at oral argument, Counsel for DRA did not later address the Court's formulation directly. But in light of the Court's potential entertainment of the notion that such performance may be instructive in determining Defendants' liability for violations, DRA wishes to stress its disagreement with point [2] above.

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[6] Defendants' failure to take even specifically prescribed adaptive management actions also provides an answer to the Court's question about where to "look in the record for evidence that [the Project] can be operated now in a way that more completely and perfectly complies with the certification requirements." Transcript at 12.

[7] Further, the question may implicate factual issues.

As explained above, the record clearly establishes that Defendants have in many instances failed even to undertake the specific adaptive management measures identified in the WQMMP. Thus, even under Defendants' reading of the Certification, DRA believes Defendants are routinely in violation. Accordingly, Defendants' manifold violations of their Certification requirements is evidenced not merely by their hundreds of violations of the numeric requirements for pH, temperature, and dissolved oxygen—and the lack of even a negative trend line in violations—but also by their failure to take actions enumerated in the Certification and WQMMP to address these problems.

Finally, during oral argument, the Court asked several questions related to what type of remedy could be granted in this case. *See, e.g.,* Transcript at 10-11.[8] While the oral argument did not focus on PGE's pending motion to dismiss on primary jurisdiction grounds, DRA respectfully refers the Court to its surreply to that motion, where DRA addressed this issue in some detail. Doc. 115 at 3-4. In this case, DRA seeks an order from the Court enjoining Defendants from operating the Project in violation of the specific § 401 Certification requirements. *See* Doc. 1 at 9. Contrary to assertions from PGE, *see* Doc. 109 at 12, this is sufficient under these circumstances. It is fully appropriate to impose upon the violator the obligation to identify measures necessary for it to achieve compliance with the Clean Water Act, and Fed. R. Civ. P. 65 does not require that more specific injunctive relief be spelled out by a plaintiff. *See* Doc. 115 at 3-4.

[8] PGE pointed to the discussion on remedy to claim that "there is just nowhere for the Court to go. . ." and then proceeded to challenge Plaintiffs' standing on that purported ground – even while admitting that it had not mentioned standing in its briefing. Transcript at 59.

In light of these clarifications, as well as argument set forth in its previous briefing and at oral argument, DRA believes the Court should grant DRA's motion for summary judgment and deny Defendants' cross-motion for summary judgment.

Respectfully submitted this 3d day of August, 2018.

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Application for Certification
Pursuant to Section 401 of the
Federal Clean Water Act

Submitted by:

Portland General Electric Company

and

The Confederated Tribes of the Warm Springs Reservation of Oregon

for the

RELICENSING OF THE PELTON ROUND BUTTE HYDROELECTRIC PROJECT ON THE DESCHUTES RIVER, JEFFERSON COUNTY, OREGON

(FERC No. 2030)

Pursuant to
Oregon Administrative Rules Chapter 340, Division 48
And Tribal Ordinances 45 and 80
And Tribal Code Chapters 433 and 479

Prepared by:

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June 2001

1. INTRODUCTION

Portland General Electric Company (PGE) and the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribes) are applying to the Federal Energy Regulatory Commission (FERC) for a new license to continue operation of the Pelton Round Butte Project, FERC No. 2030 (Project), on the Deschutes River near Madras, Oregon. The Project is also licensed by the State of Oregon under State License No. 222, for the Pelton and Reregulating Developments, and State License No. 217 for the Round Butte Development.

As part of the FERC relicensing process, PGE and the Tribes (Joint Applicants) must obtain a water quality standards compliance certification statement for the Project from the Oregon Department of Environmental Quality (ODEQ; Department), pursuant to requirements of Section 401 in the Federal Clean Water Act and Oregon Administrative Rules Chapter 340, Division 48 and from the Water Control Board of the Confederated Tribes of the Warm Springs Reservation of Oregon (WCB), pursuant to requirements of Section 401 in the Federal Clean Water Act and CTWS Ordinances 45, 80, and Tribal Code Chapters 433 and 479.

This application for certification has been prepared to meet the requirements of the Federal Clean Water Act, the State of Oregon, and the Tribes.

1.1. Procedural Background

On December 16 and 17, 1999, PGE and the Tribes, respectively, filed competing applications for new licenses for the Project. As required by the FERC's rules, both the Tribes and PGE also filed applications for water quality certifications of their applications with the ODEQ and the WCB. On February 1, 2000, PGE, the Tribes, and the Department of the Interior reached final agreement on a settlement of their pending relicensing competition. On April 20, 2000, the Tribes and PGE requested Commission approval of the settlement, and on November 21, 2000, the Commission approved that settlement.

While Commission approval of the settlement was pending, PGE and the Tribes continued agency consultation and work toward developing a proposal that would represent their position as joint applicants. A Draft Joint Application Amendment (DJAA) was distributed for comment on September 14, 2000. During the 90-day comment period that followed, by letters dated November 2 and 3, 2000, ODEQ and the WCB, respectively, denied *without prejudice* the applications for water quality certification. On January 26, 2001, FERC granted the Joint Applicants an extension until April 15, 2001, of the time to file a new application for water quality certification. On May 11, 2001, FERC extended this deadline until July 15, 2001.

On January 16 and 17, 2001, the Tribes and PGE held a two-day dispute resolution meeting with all agencies, non-governmental organizations (NGO's), and private individuals who had commented on, or expressed an interest in, the DJAA. A number of issues were discussed and resolved, including issues relating to the form and content of the applications for water quality certification. Written comments have been received from ODEQ and the WCB addressing water quality issues. In addition, several meetings of the Interagency Fisheries Technical Subcommittee (Technical Subcommittee), have addressed technical issues relating to water quality impacts of the Project and the conduct of recently-completed studies intended to quantify those impacts.

This joint application for water quality certification incorporates the results of studies completed since the original competing applications were filed in December 1999. It also responds to the comments from ODEQ and the WCB concerning the previously-filed applications for water quality certification and the studies completed since those applications were filed. It is intended to provide ODEQ and the WCB with reasonable assurance that the Project, as proposed, will not contribute "measurably" to the violation of applicable water quality standards and criteria; that the physical, chemical, and biological water quality of waters potentially affected by the Project will not be degraded from existing conditions; that future Project operations will offset any ongoing contributions to nonattainment of water quality standard numeric or narrative criteria; and that such operations will also mitigate for any ongoing adverse impact to designated beneficial uses.

1.2. Section 401 Regulatory Authority and Process

Section 401 of the Federal Clean Water Act (33 USC §1341; CWA) establishes requirements for state certification of proposed projects or activities that may result in any discharge of pollutants to navigable waters. Before a federal agency, such as FERC, may issue a license for any project that may result in any discharge of pollutants to navigable waters, the state must certify that the proposed project will comply with applicable water quality standards and implementation plans of Section 303 of the CWA and any state regulations adopted to implement this section. The state is authorized to condition any granted certificate to assure compliance with appropriate water quality related requirements of state law.

ODEQ is the agency of the State of Oregon designated to carry out the certification functions prescribed by Section 401 for waters of the State of Oregon. Such state certification responsibility applies not only to determination of compliance with the water quality standards, Section 303 implementation plans and state regulations of the state in which a project is located, but also to downstream states and tribes that may be affected by the project. Therefore, the State of Oregon evaluation and findings for 401 certification performed by ODEQ for the Pelton Round Butte Project must also consider compliance with the Tribes' water quality standards and beneficial uses.

The WCB is the Tribal entity charged with the responsibility of making 401 findings for waters of the Reservation. Thus, in order for a new FERC license to be issued for the Project, the Joint Applicants must obtain affirmative 401 certifications from *both* ODEQ and WCB, the conditions of which must be inserted into the new FERC license. To avoid the imposition of mutually exclusive 401 conditions and to foster consistent and supportive 401 conditions protective of State and Tribal water quality standards and designated beneficial uses, ODEQ and the WCB are closely coordinating the common 401 evaluation and findings processes.

1.3. Scope of Application

In the DJAA, the Joint Applicants proposed to implement a program of selective water withdrawal from Lake Billy Chinook to address fish passage and water quality concerns. The Joint Applicants also proposed in the DJAA to implement a package of non-structural and habitat-related protection, mitigation, and enhancement measures (PMEs) upstream of the Project *if selective water withdrawal was not implemented.* After further water quality modeling, and after reviewing agency comments on the DJAA, the Joint Applicants have concluded that the proposed implementation of selective water withdrawal, along with other PMEs described in the Final Joint Application Amendment (FJAA), will provide "reasonable assurance" that the Project will protect beneficial uses and meet applicable water quality standards.

Accordingly, at this time, the Joint Applicants are proposing *only* to implement selective water withdrawal, and other measures specifically included in the proposed PME package, as the long-term water quality PMEs. The Joint Applicants believe that selective water withdrawal is the most promising water quality mitigation alternative; they have no expectation that selective water withdrawal will not be implemented, regardless of its fish passage benefits. However, if for some unforeseen reason selective water withdrawal cannot be implemented, the Joint Applicants will seek to amend the FERC license for the Project to permit the implementation of alternative mitigation measures, which will be developed in consultation with the appropriate resource agencies and managers, and will apply for recertification of the Project at that time.

2. APPLICATION FOR WATER QUALITY CERTIFICATION

Many of the items required for Section 401 certification are closely related to items required for the FERC final license application, notably Exhibit A, Description of the Project; Exhibit B, Project Operations and Resource Utilization; Exhibit E, Environmental Statement and Response to Agency Comments; Exhibit F, General Design Drawings and Supporting Information; and Exhibit G, Project Boundary and Legal Description. These Exhibits, and other relevant sections

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DESCHUTES RIVER ALLIANCE, an Oregon nonprofit corporation,

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Defendant.

Case No. 3:16-cv-01644-SI

Plaintiff's Consolidated Response/Reply on Cross-Motions for Summary Judgment

I. INTRODUCTION

Section 401 of the Clean Water Act (CWA) mandates that applicants for a Federal license obtain a certification, from the appropriate state, that discharges from the licensed facility will comply with all relevant water quality standards. 33 U.S.C. § 1341. Oregon regulations reiterate that a § 401 Certification is a determination by the Oregon Department of Environmental Quality ("ODEQ") that the licensed activity "will comply with applicable provisions…of the [CWA]…including water quality standards." Or. Admin. R. 340-048-0010. The language above leaves little room for debate: in Oregon, a § 401 Certification, including any conditions therein mandated by ODEQ, must ensure that discharges from a federally-licensed facility will comply with all relevant state water quality standards.

In its application for § 401 Certification for the Pelton Round Butte Hydroelectric Project ("the Project"), Defendant Portland General Electric ("PGE") made broad assurances that Project discharges would comply with all relevant state standards, and in granting the water quality certification for the project ODEQ found that it was reasonably assured that the Project, when operated as conditioned, would in fact comply with those water quality standards. Specifically, it found reasonable assurance that dissolved oxygen concentrations would be at or above levels necessary to adequately protect both anadromous and resident Deschutes River fish; that the hydrogen ion concentration, or "pH," of Project discharges would fall within the range of 6.5 to 8.5 standard units, in compliance with the relevant state standard; and that the Project would not warm the river above temperatures that would occur in the absence of the Project. After the public had the opportunity to comment and otherwise participate in the certification process, a water

quality certification was issued, with conditions designed to ensure that PGE's assurances were correct.

Notably, in PGE's application for certification, and ODEQ's subsequent evaluation of that application and ultimate Project certification, there was no indication that compliance with these critical water quality standards would interfere with efforts from PGE and the Confederated Tribes of the Warm Springs Reservation of Oregon ("the Tribe") to reintroduce salmon and steelhead above the Project. On the contrary, operation of the new "Selective Water Withdrawal" ("SWW") tower was depicted as the mechanism needed to guide juvenile salmon and steelhead across Lake Billy Chinook reservoir in substantial numbers, while also ensuring compliance—as required under the CWA—with all state water quality standards. The goals were not identified as in competition; implementation of the Project's "Fish Passage Plan" would reintroduce salmon and steelhead above the Project, while also assuring compliance with water quality standards and protection of aquatic life in the lower Deschutes River.

Now, after eight years of SWW operations, PGE expressly takes the position that Project compliance with all water quality standards and requirements is *not* in fact possible, and that compliance with temperature and pH requirements is in direct *conflict* with the License's fish passage goals. PGE now purports to read the § 401 Certification to absolutely forbid any changes in operation that could hinder the fish passage program as it is currently pursued, but to allow noncompliance with the clear terms of the Certification's water quality requirements.

PGE's justifies its manifold and continuing deviations from the Certification's water quality requirements by recourse to the Certification's language regarding

"adaptive management." In PGE's telling, this language excuses any violations of the water quality conditions; so long as PGE states it is engaged in a vaguely defined "adaptive management" scheme, all is to be forgiven. This interpretation is contrary to the plain language of the Certification's adaptive management provisions, which make abundantly clear that "adaptive management" is to be employed *to ensure compliance with water quality standards*—not to excuse water quality violations. PGE's deference to stated needs of the fish passage program cannot excuse its water quality violations. Neither, for that matter, can ODEQ's sign-off on privately-negotiated "interim agreements" which PGE incorrectly describes as "modifications" of the Certification's water quality requirements.

The simple and lamentable fact is that PGE is regularly and repeatedly violating the Certification's requirements for dissolved oxygen, pH, and temperature. With regard to dissolved oxygen, PGE and ODEQ, in private "interim agreements," are applying a standard for Project discharge that is not strict enough to protect lower Deschutes River resident trout, as required under Oregon's dissolved oxygen standard. As a result, for several months each year Project discharges are violating Oregon's dissolved oxygen standard and the § 401 Certification. For pH, PGE is incorrectly reading out of the Cert a requirement to comply with the Deschutes basin pH standard, a specific limitation that it exceeds many dozens of times per year. And for temperature, PGE is regularly exceeding the § 401 Certification's temperature requirement, again under the attempted justification of interim agreements with DEQ that PGE purports modify that requirement. But these interim agreements have never been subject to the procedures for public participation that is necessary and required for any § 401 Certification modification, and relevant caselaw

makes clear that the original Certification requirements are valid and enforceable by citizen suit.

Because PGE is repeatedly violating the Project's § 401 Certification conditions for dissolved oxygen, pH, and temperature, the Court should grant DRA's motion for partial summary judgment and deny PGE's cross-motion for summary judgment.

II. ARGUMENT

A. PGE Mischaracterizes DRA's Positions in this Case and PGE's Obligations Under the Water Quality Certification.

Throughout its cross-motion and response, Defendant misrepresents DRA's positions relating to SWW operations and its claims in this case. Then, in arguing against its straw man, PGE attempts to excuse years of water quality violations by providing an unreasonable interpretation of its obligations under the water quality Certification—an interpretation contrary to the Certification's plain language as well as to representations made by PGE and ODEQ in the licensing process.

1. PGE Mischaracterizes DRA's Positions Regarding SWW Operations and the Water Quality Certification.

PGE states that "DRA argues that the Certification absolutely requires the Project to achieve…individual [water quality] objectives by discharging as much bottom water through the SWW as possible—regardless of the effects that that might have on fish passage or the achievement of other water quality objectives." Doc. 86 at 19 (citing Plaintiff's Memo. at 5, 8, 14-18). This assertion, repeated by Defendant in various iterations throughout its memorandum, is patently wrong in multiple respects.

First, it is unequivocally *not* Plaintiff's position that the Certification "absolutely requires" the Project to comply with water quality standards "by discharging as much bottom water through the SWW as possible." To the contrary, while it is of course Plaintiff's position that the Project must comply with water quality standards, and while Plaintiff would surely have comments and opinions on any operational changes proposed for bringing the Project into compliance with those standards, it is ultimately up to Defendant to devise the means of compliance. If Defendant is able to fashion solutions not involving the discharge of more bottom water than is currently discharged, and those solutions brought the project into compliance with the Clean Water Act and other applicable laws, then Plaintiff would have no legal grounds to oppose such solutions.

The second inaccuracy in PGE's statement is relevant to much of PGE's strained defenses to DRA's claims. Of course, it is unequivocally not Plaintiff's position that the Certification "absolutely requires" the Project to comply with water quality standards "regardless of the effects that that might have on fish passage or the achievement of other water quality objectives." Similarly, DRA does not seek compliance with individual water quality objectives "in isolation." *See, e.g.,* Doc. 86 at 19. These statements are entirely unsupported and without justification. To the contrary, DRA seeks compliance with *all* water quality requirements in the water quality Certification, *and* fully supports successful achievement of fish passage goals. DRA has never represented anything less. As discussed below, PGE's representations to the Court that it is incapable of complying with all water quality conditions and its fish passage goals is in striking contrast to the assurances the company made during the certification process. DRA believes that the water quality Certification and the CWA plainly require compliance with *all* water

quality conditions while the Project seeks to achieve successful fish passage at the Project.

2. PGE's Interpretation of the Water Quality Certification is Inconsistent with the Certification's Plain Language and the CWA.

PGE uses the inaccurate representations above as a jumping-off point for an interpretation of the § 401 Certification that is inconsistent with the CWA and contrary to evidence from the licensing and certification period. PGE appears now to take the position that compliance with water quality requirements and successful fish passage are mutually exclusive. Doc. 86 at 13. In PGE's view, operation of the SWW tower involves substantial tradeoffs, in which water quality requirements cannot be attained while at the same time providing effective fish passage through the Project. *Id*. Because (in PGE's telling) all water quality requirements cannot be met at the same time, violations are to be deemed inconvenient "excursions" so long as a vaguely defined "adaptive management" scheme is referenced in justification of management decisions. *Id*. at 13, 19, 22-23.

This position runs contrary to the mandates of CWA section 401, under which state certification is for the express purpose of ensuring compliance with state water quality standards. *See* 33 U.S.C. § 1341. It is also in marked contrast to commitments from PGE and the Confederated Tribes of the Warm Springs Reservation of Oregon ("the Tribe") in their joint application to ODEQ for the Project's water quality certification some seventeen years ago. At that time, PGE and the Tribe offered assurances that construction and operation of the SWW tower would not only provide successful fish passage, but would result in compliance with all state water quality standards, including numerical water quality criteria. Decl. of Jonah Sandford, Exh. A, at 140. The applicants characterized selective water withdrawal [SWW] as "the principal PME [protection,

mitigation, and enhancement measure] intended to mitigate for Project impacts on water quality." *Id*. at 126. SWW was listed first among ten such PMEs, with the "Fish Passage Plan" listed third. *Id*. at 126-133. The context for all ten of these PMEs is achievement of two goals---

1. "Ensur[ing] that discharges from the Reregulating Dam comply with applicable water quality standards"; and

2. "Develop[ing] management plans to reduce Project contributions to exceedances of water quality standards within Project reservoirs."

Id. at 125. The Defendant and the Tribe characterized the first of these two goals as the primary one: "The Joint Applicants' Primary goal is to provide reasonable assurance that all discharges from the Reregulating Dam to the lower Deschutes River comply with water quality standards, particularly those applicable to temperature and DO, without causing a noncompliance with any other standard." *Id*. at 125. In context, fish passage is one of ten means by which the Defendant and the Tribe proposed to achieve their primary goal of complying with water quality standards.

Seventeen years later, following years of water quality violations, the Defendant and the Tribe now attempt to turn this schema on its head by prioritizing one of the means of accomplishing the goals over achievement of the goals themselves (i.e., by prioritizing fish passage over water quality). The State, which has not only abdicated its enforcement responsibility with regard to the Project but seeks to prevent Plaintiff from fulfilling that responsibility in the State's stead, goes so far as to characterize achievement of both fish passage and compliance with water quality standards as some kind of "free lunch." State at 18. PGE and the Tribe certainly did not advertise what they were proposing in 2002 as a free lunch. To the extent that metaphor is apt, it appears that

the Defendant is the beneficiary to date of said free lunch here, with the People of Oregon picking up the tab in the form of reduced water quality in the lower Deschutes River.[1]

PGE's defense that violations of water quality standards and requirements are excused due to tradeoffs with fish passage goals is also belied by the requirements of CWA § 401 and relevant Oregon regulations. As defined by Oregon law, a water quality certification is "a written determination by the [ODEQ] Director that an activity subject to Section 401 of the Clean Water Act will comply with applicable provisions of . . . the Clean Water Act . . . including water quality standards . . . ." Or. Admin. R. 340-048-0010. If the DEQ Director approves a certification, the approval decision must include "conditions the Director determines are necessary to assure compliance with applicable standards and requirements . . . for the duration of the federal license or permit." Or. Admin. R. 340-048-0042(5)(g). The focus of a water quality certification, then, is the compliance of a federally-licensed project with Oregon water quality standards.

Toward that end, the water quality certification at issue here has a blanket condition that provides as follows: "Notwithstanding the conditions of this certification, no wastes shall be discharged and no activities shall be conducted which will violate state water quality standards." With regard to dissolved oxygen, pH, and temperature, the water quality certification has three analogous conditions providing that "The SWW

[1] If compliance with water quality standards and fish passage are not both achievable as was represented, this would be an unfortunate parallel with the project when it was originally proposed in the early 1950s, at which time it was represented there was no evidence that the project would fail to maintain fish runs existing at that time, and that the project might somehow even increase these fish runs. *Fed. Power Comm'n v. State of Or.*, 349 U.S. 435, 450 n. 23 (1955) (citing *In the Matter of Portland Gen. Elec. Co.*, 10 F.P.C. 445, 455 (Dec. 18, 1951)). Of course, had these representations borne out, there would have been no need for a Fish Passage Plan decades after the project came online.

facility shall be operated in accordance with the [Temperature Management Plan (TMP)/Dissolved Oxygen Management Plan (DOMP)/pH Management Plan (PHMP)] contained in the WQMMP." Doc. 66-8 at 1, 4, 6. The referenced plans, in turn, have three analogous provisions stating that the SWW facility "will be operated to blend water from the two intakes [when necessary] to meet the applicable ODEQ and CTWS [temperature/ DO/pH] standards in the lower Deschutes River . . . ." Doc. 66-9 at 4, 9, 13. Despite PGE's protestations to the contrary, this language makes clear that these requirements are not mere "objectives" to be complied with only when conducive to other Project goals. Instead, the Project must be operated to comply with the relevant requirements for all three criteria.[2]

To reiterate:

- Oregon law defines a water quality certification in pertinent part as a DEQ determination that an activity will comply with water quality standards;
- A water quality certification therefore must include conditions necessary to assure compliance with water quality standards;
- The water quality certification at issue here therefore prohibits violation of water quality standards; and
- The water quality certification at issue here addresses compliance with dissolved oxygen, pH, and temperature standards by requiring the SWW facility to be operated in accordance with specific plans for each of these parameters.

At the time it issued the water quality certification for the Project, ODEQ characterized the collective responsibility of the Defendant and the Tribe as follows:

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[2] DRA strongly disagrees that the Project cannot be operated to comply with all three criteria. *See* PGE Mot., Doc. 86, at 13. As explained in Rick Hafele's declaration at par. 16, PGE can utilize more bottom water to decrease pH levels and temperature in Project discharge. If doing so results in insufficient dissolved oxygen concentrations, PGE may spill water at the Reregulating Dam, as contemplated in the WQMMP, as necessary to ensure compliance with dissolved oxygen requirements. Further, we note that PGE has failed to establish with any data that withholding bottom water earlier in the year is necessary to avoid "exhaust[ion]" of the cold water supply later in the year. *See* Doc. 86 at 13.

"Joint Applicants are responsible to assure that the Project is operated in a manner that complies with all State and Tribal water quality standards." Doc 91-1 at 47 (Evaluation and Findings Report on Application for Certification Pursuant to Section 401 of the Federal Clean Water Act). That language could hardly be more clear—PGE's obligation as Project operator is to ensure compliance with all state water quality standards. The management plans in the WQMMP contain mandatory obligations designed to ensure these standards are met.[3]

3. PGE misrepresents the adaptive management provisions in the § 401 Certification.

PGE attempts to excuse its violations of the water quality certification by pointing to its "adaptive management" of the Project. This argument is a misrepresentation of language in the WQMMP, where the very context for adaptive management is in fact compliance with water quality standards:

> Because operation of the selective withdrawal facility [SWW] has the potential to affect numerous water quality parameters, as well as fish passage success, changes in the operation of the selective withdrawal facility must consider all possible impacts, not merely a single water quality parameter. In addition, actual impacts to water quality and

[3] For its part here, the State has submitted a brief on summary judgment, in part "to make the Court aware that there are material issues in dispute about existing water quality conditions on the Lower Deschutes River." Doc. 93 at 2. In it, the State denies various factual allegations made by Plaintiff, including those related to invasive species, fish diseases and parasites, algae, aquatic invertebrates, birds, and bats. Id. at 15-16. While Plaintiff's declarants do make various allegations on these subjects in their declarations, facts concerning these various subjects are simply not material to the present motion for summary judgment, which is focused on whether monitoring data submitted to the State by Defendant proves that Defendant has violated the Clean Water Act and is reasonably likely to continue to do so in the absence of judicial intervention. Nonetheless, Plaintiff has submitted additional declarations herewith to rebut the State's averments rejecting DRA's science-based conclusions. Nonetheless, Plaintiff has submitted additional declarations herewith to rebut the State's averments rejecting DRA's studied, direct observations.

> currents will not be known with certainty until the selective withdrawal facility is constructed, operated, and monitored, highlighting the need for *an adaptive management approach to ensure compliance with water quality standards*.
>
> *For the purpose of satisfying water quality standards for temperature, DO, pH*, and nuisance phytoplankton, as well as ensuring downstream fish passage, and implementing the adaptive management requirements of the §401 certification . . . , the Joint Applicants shall operate the selective withdrawal facility pursuant to general adaptive management considerations.

Doc. 66-9 at 3 (emphasis added). Accordingly, ODEQ's § 401 Evaluation and Findings Report for the Project states "The adaptive management and monitoring approach will allow tracking of water quality conditions and adjusting management as indicated *to ensure compliance with water quality standards and the antidegradation policy*." Doc. 91-1 at 170.

Contrary to PGE's various assertions, this language clearly is not intended to excuse repeated violations of the § 401 water quality requirements. Instead, a plain reading of the WQMMP establishes that adaptive management is to be performed at all times "to ensure compliance with water quality standards." Doc. 66-9 at 3. If any water quality requirement is not being met, the WQMMP mandates that PGE undertake adaptive management to bring the Project back into compliance, using measures that do not interfere with other water quality goals.

B. PGE is Violating § 401 Certification Requirements for Dissolved Oxygen, pH, and Temperature.

PGE's own data establishes that, since the SWW facility began operations, PGE has regularly violated the § 401 Certification's clear limitations on dissolved oxygen, pH, and temperature. The Court should grant DRA's motion for summary judgment on these claims, and the Court should deny PGE's motion for summary judgment.

CLEAN WATER ACT SECTION 401
IMPLEMENTATION AGREEMENT
PELTON ROUND BUTTE HYDROELECTRIC PROJECT

This Implementation Agreement ("Agreement") is entered between the Oregon Department of Environmental Quality ("ODEQ"), Portland General Electric ("PGE"), and the Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS"). As the Joint Applicants for § 401 certification related to issuance of a new license for the Pelton Round Butte Hydroelectric Project ("Project") by the Federal Energy Regulatory Commission ("FERC"), PGE and CTWS will be responsible jointly and severally for complying with this Agreement and, upon issuance of a new license by FERC, for complying with the conditions of the § 401 certification.

RECITALS

A. The Joint Applicants are the owner and operator of the Pelton-Round Butte Hydroelectric Project, located on the Deschutes River in Jefferson County, Oregon. The Project consists of three dams and impoundments, and three powerhouses with a total installed capacity of 427 megawatts. The upper two powerhouses, Round Butte and Pelton, operate in a peaking mode, with all flows reregulated at the Reregulating powerhouse. The project includes no diversions and operates in a modified run-of-river mode. The Project, the Pelton Development of which was constructed in 1957, with the Round Butte development being constructed in 1964, and the Reregulating powerhouse constructed in 1982, operates under license issued by FERC. Because the license expired in December 2001, the Joint Applicants applied to FERC in December 1999 for a new major license for the Project (FERC Project No. 2030).

B. ODEQ is the state agency charged with administering and enforcing state law regarding water quality. Pursuant to Oregon Revised Statute (ORS) 468B.040, the Director of ODEQ is authorized to approve or deny the water quality certification required for federally-licensed hydroelectric projects under Section 401 of the federal Clean Water Act, 33 U.S.C. §1341 ("§ 401"). In addition, the State of Oregon, by and through its Hydroelectric Application Review Team ("HART"), which includes representatives from ODEQ, is an intervenor in the FERC proceeding on the Joint Applicants' relicensing application.

C. Water temperatures in Project impoundments and in the Deschutes River downstream of the Project sometimes exceed the 50°F criterion established in the ODEQ water quality standards for designated bull trout habitat areas in the Deschutes River Basin. The 50°F criterion was established to protect the designated beneficial uses of bull trout fish rearing and spawning. Because significant questions have been raised by fisheries biologists, ODEQ and the Tribes' Water Control Board ("WCB"), in the upcoming Clean Water Act triennial review, intend to examine the appropriateness of the current bull trout standards and designated habitats. Although some exceedances may be caused by natural conditions,

operation of the Project contributes to these exceedances. ODEQ currently lists the portion of the Deschutes River from the Reregulating Dam to the mouth as water-quality limited for temperature in accordance with Section 303(d) of the Clean Water Act and state regulations. Consistent with this listing, ODEQ plans to develop a Total Maximum Daily Load ("TMDL") for temperature in the Deschutes River, which in turn will be the basis for waste load allocations ("WLAs") and Load Allocations ("LAs") for point and nonpoint sources, respectively, affecting temperatures in the river. The target year for establishment of temperature TMDLs, WLAs, and LAs for the Deschutes River is 2006.

D. Oregon's water quality standards for temperature include a provision that allows no measurable stream temperature increase due to anthropogenic activities that would impair the biological integrity of a threatened or endangered species. Bull trout and steelhead are listed as threatened under the federal Endangered Species Act. Bull trout are present within Project impoundments and in the Deschutes River below the Project. Steelhead are present in the Deschutes River below the Project and may be reintroduced into Project impoundments and the upper basin. Operation of the Project contributes to measurable increase in temperature which may impair the biological integrity of these threatened or endangered species.

E. Dissolved oxygen levels in portions of the Project impoundments and in the Deschutes River below the Project sometimes fall below the applicable salmonid rearing and spawning criteria, respectively, established in the water quality standards for the Deschutes River Basin. Operation of the Project contributes to these dissolved oxygen exceedances. ODEQ currently lists the portion of the Deschutes River from the Reregulating Dam to White River as water-quality limited for dissolved oxygen in accordance with Section 303(d) of the Clean Water Act and state regulations. Consistent with this listing, ODEQ plans to develop a TMDL for dissolved oxygen in the Deschutes River, which in turn will be the basis for WLAs and LAs for point and nonpoint sources, respectively, affecting dissolved oxygen levels in the river. The target year for establishment of dissolved oxygen TMDLs, WLAs, and LAs for the Deschutes River is 2006.

F. The hydrogen ion activity ("pH") in the Project impoundments and in the Deschutes River below the Project sometimes exceeds the upper limit of 8.5 standard units established in the water quality standards for the Deschutes River. While the pH exceedances in the impoundments appear to be caused by primary productivity supported by nutrients that arise from sources not associated with the impoundments, it is not clear to what extent the future operation of the Project might contribute to exceedances of the pH criterion in the lower river. ODEQ currently lists the portion of the Deschutes River from White River to the mouth, as well as Lakes Simtustus and Billy Chinook, as water-quality limited for pH in accordance with Section 303(d) of the Clean Water Act and state regulations. Consistent with this listing, ODEQ intends to develop a TMDL for pH in the Deschutes River, which in turn will be the basis for WLAs and LAs for point and nonpoint sources,

respectively, affecting pH in the river. The target year for establishment of pH TMDLs, WLAs, and LAs for the Deschutes River is 2006.

G. The levels of Chlorophyll *a* observed in the Project impoundments sometimes exceed the target criterion of 0.015 mg/l established in the nuisance phytoplankton water quality standard for reservoirs in the Deschutes River Basin. Operation of the Project contributes to these exceedances. However, the current levels of phytoplankton experienced within these reservoirs have not been determined to constitute a nuisance. ODEQ currently lists Lakes Simtustus and Billy Chinook as water-quality limited for chlorophyll *a* in accordance with Section 303(d) of the Clean Water Act and state regulations. Consistent with this listing, ODEQ plans to develop a TMDL for Chlorophyll *a* in the two Project impoundments, which in turn will be the basis for WLAs and LAs for point and nonpoint sources, respectively, affecting Chlorophyll *a* levels in these impoundments. The target years for establishment of Chlorophyll *a* TMDLs, WLAs, and LAs for Lake Billy Chinook and Lake Simtustus are 2003 and 2006, respectively.

H. In connection with the reintroduction of anadromous fish upstream of the Project, the Joint Applicants propose to enhance surface currents in Lake Billy Chinook by the construction and operation of a selective water withdrawal ("SWW") facility at the existing Round Butte Dam intake tower. This new facility also will help the Project meet temperature and water quality goals and standards in the lower Deschutes River and Project reservoirs, and allow the withdrawal of surface waters during salmonid smolt migration periods to facilitate the capture of downstream emigrating smolts from Lake Billy Chinook in support of the anadromous fish reintroduction goal. Considering the inherent uncertainties associated with modeling, actual impacts to water quality and currents will not be known until the SWW facility is constructed, operated, and monitored, highlighting the need for an adaptive management approach to ensure compliance with water quality standards.

I. On June 26, 2001, the Joint Applicants submitted an application to ODEQ for § 401 certification of the Project as proposed to be relicensed. The Joint Applicants have also submitted a proposed Water Quality Management and Monitoring Plan, based primarily on the construction and operation of the SWW facility at the Round Butte Dam, to provide reasonable assurance that the Project will comply with relevant water quality standards. On March 13, 2002, ODEQ published notice seeking public and other agency comment on a proposed § 401 certification. After consideration of public and agency comment and completion of its evaluation of the § 401 certification application, ODEQ has determined that the Project and its operation meet the requirements for certification. In particular, ODEQ is reasonably assured that the Project will comply with state water quality standards, including standards for temperature, dissolved oxygen, pH, nuisance phytoplankton, biological criteria, and deleterious conditions, as well as future TMDLs and other appropriate water quality-related requirements of state law, provided that the conditions of the § 401 certification are followed. A copy of the § 401 certification is attached to this Agreement.

J. Numerous federal, state, and tribal entities have jurisdiction or regulatory authority over one or more aspects of the continued operation of the Project. The water quality and resource mitigation measures proposed in the Joint Applicants' application for § 401 certification and in their application for a new license were developed in consultation with these and other entities. While ODEQ maintains authority concerning water quality for State waters, the long-term implementation of measures serving both purposes of water quality and resource mitigation will necessitate consultation with, and in some cases, concurrence by, some or all of these entities. Much of that consultation may occur through the Fisheries Technical Subcommittee ("FTS") established in connection with relicensing of the Project.

K. The purpose of this Agreement is to provide further assurances that the conditions of the § 401 certification will be appropriately implemented.

AGREEMENT

1. Issuance of § 401 Certification

a. Upon execution of this Agreement, ODEQ will issue the attached § 401 certification for the Project.

b. Provided that a third party does not seek administrative or judicial review of the § 401 certification, neither PGE nor CTWS will seek administrative or judicial review of the attached § 401 certification or contest the incorporation of the conditions of the attached § 401 certification into the new license issued by FERC for the Project.

c. Within 90 days of issuance of the attached § 401 certification, the Joint Applicants, in accordance with § 401 certification Condition A, shall revise the Water Quality Management and Monitoring Plan ("WQMMP") attached to the § 401 certification as Exhibit A and submit the revised plan for ODEQ approval. Upon ODEQ approval, the WQMMP becomes a condition of the § 401 certification for purposes of any federal license or permit thereafter issued.

2. Adaptive Management Provisions

a. Upon FERC's issuance of a new license for the Project, PGE and CTWS, in addition to complying with all § 401 certification and license conditions, will comply with the following adaptive management conditions as set forth in the § 401 certification:

Certification Condition C, regarding Temperature

Certification Condition D, regarding Dissolved Oxygen

Certification Condition E, regarding Hydrogen Ion Concentration (pH)

Certification Condition F, regarding Nuisance Phytoplankton Growth and Aesthetic Conditions

b. Subject to PGE's and CTWS's right to seek administrative and judicial review as specified in Subsection 3.d of this Agreement, PGE and CTWS will comply with adaptive management modifications requested by ODEQ in accordance with the above § 401 certification conditions.

c. In accordance with ORS 543.080, the Joint Applicants shall pay a project-specific fee for ODEQ's costs of overseeing implementation of the above § 401 certification conditions. The fee shall be $25,000 (2002 dollars) annually, made payable to "State of Oregon, Department of Environmental Quality", and due on July 1 of each year after issuance of the new FERC license. This fee will not pay ODEQ's costs of participation on the FTS, before or after issuance of the new FERC license; such costs shall be paid by Joint Applicants by arrangement separate from this Agreement. ODEQ shall credit against this amount any fee or other compensation paid or payable to ODEQ, directly or through other agencies of the State of Oregon, during the preceding year (July 1 to June 30) for ODEQ's cost of oversight of adaptive management. The fee shall expire 10 years after the first July 1 following issuance of the Agreement, unless terminated earlier by ODEQ because oversight of adaptive management is no longer necessary. One year before the tenth-anniversary expiration of the fee, or earlier if mutually agreed, ODEQ and the Joint Applicants shall review the need, if any, to modify, extend, or terminate the fee, in accordance with ORS 543.080. The Joint Applicants shall continue to pay any project-specific fee required after such review.

3. General Stipulations and Reservations

a. The terms of this Agreement are enforceable by ODEQ, PGE, and CTWS under applicable federal and state law. This Agreement does not create any right or benefit for third parties and is enforceable only by ODEQ, PGE, and CTWS.

b. ODEQ's § 401 certification for the Project and the adaptive management provisions of the certification were developed in consultation with the state HART. However, the terms of this Agreement are binding only on PGE, CTWS, and ODEQ and no other state or federal agency.

c. This Agreement is binding on ODEQ, PGE, and CTWS and successors and assigns, and on any other entity or person assuming ownership or operation of the Project.

d. Subject to the reservations set forth in Section 1.1 of Exhibit A to the § 401 certification regarding modifications to the blend of discharged waters outside the

range set forth in Table 3.1 of Exhibit A, neither PGE nor CTWS may seek review before FERC of ODEQ modifications requested under the § 401 certification conditions listed in Subsection 2.a. of this Agreement. This stipulation does not bar PGE or CTWS from seeking administrative or judicial review of ODEQ modifications in a state forum. This stipulation also does not bar PGE or CTWS from participating in or challenging the establishment of TMDLs and LAs upon which modifications are based, and nothing contained in this Agreement shall limit or affect the forum in which PGE or CTWS may seek to challenge the establishment of such TMDLs and LAs.

e. ODEQ, by use of the terms "Load Allocations" and "LAs" in this Agreement, does not waive ODEQ's right to assert in any other proceeding that the Pelton Round Butte Hydroelectric Project, or parts of the Project, or another hydroelectric project, is a point source under the Clean Water Act. Nothing contained in this Agreement shall limit PGE or CTWS from challenging, in any forum, an assertion by ODEQ that the Pelton Round Butte Hydroelectric Project, or parts of the Project, or another hydroelectric project, is a point source under the Clean Water Act.

f. ODEQ, by entering this Agreement to provide further assurances of compliance with § 401 certification conditions regarding water quality standards, does not waive any authority under federal or state law to require other measures necessary to assure compliance with all present and future water quality standards and to protect beneficial uses over the duration of the FERC new license for the Project. In addition to any other remedy under federal or state law, ODEQ may modify the § 401 certification in accordance with Condition N of the attached § 401 certification; provided, in determining whether a modification of the § 401 certification is feasible, ODEQ will consider a site-specific balance of criteria, including but not limited to the likely effectiveness of the modification in attaining any changed water quality standard or TMDL, the incremental protection the modification would provide to beneficial uses, the appropriateness to local conditions, the extent to which the modification reflects the use of best technologies or management practices or measures, the cost of compliance, and the likelihood of unintended environmental consequences. Neither PGE nor CTWS waive any right to oppose any such modifications by ODEQ or to seek administrative or judicial review of any such modifications.

g. In addition to modification of the § 401 certification as described in Subsection 3.f. above and any other remedy under federal or state law, ODEQ may request that FERC reopen or amend the new license for the Project to consider license modifications necessary to assure compliance with water quality standards or protection of beneficial uses. Neither PGE nor CTWS waive any right to oppose such actions by ODEQ or to seek administrative or judicial review of such actions.

4. Remedies

a. This Agreement is voidable at the election of ODEQ, or of PGE and CTWS jointly, upon seven days' written notice , if:

(1) An administrative or judicial appeal of ODEQ's § 401 certification for the Project by a third party results in revocation or denial of the § 401 certification or imposition of § 401 certification conditions that are inconsistent with the § 401 certification attached to this Agreement; or

(2) FERC does not issue a new license for the Project.

b. If FERC fails to incorporate into the new license for the Project a condition set forth in the attached § 401 certification, ODEQ may seek administrative and judicial review of the FERC action. Neither PGE nor CTWS may contest any such ODEQ action to the extent the action seeks review only of FERC's failure to incorporate the § 401 certification condition.

c. If FERC modifies Project operations in a manner inconsistent with the conditions of the attached § 401 certification or the provisions of this Agreement, ODEQ may seek any or a combination of the following remedies:

(1) Revocation, or suspension and modification, of the § 401 certification under OAR Chapter 340 Division 48;

(2) Administrative and judicial review of the FERC action; and

(3) Citizen suit against FERC under 33 USC 1365.

d. If PGE and CTWS fail to comply with this Agreement or conditions of the attached § 401 certification, ODEQ may seek any or a combination of the following remedies:

(1) Revocation, or suspension and modification, of the § 401 certification under OAR Chapter 340 Division 48;

(2) Specific performance of this Agreement;

(3) Citizen suit against PGE and CTWS under 33 USC 1365;

(4) Action to abate pollution under ORS Chapters 468 and 468B; and

(5) Assessment of civil penalties under ORS Chapters 468 and 468B.

e. None of the Parties to this Agreement may assert preemption or sovereign immunity or raise any other federal or state law challenge to any other Party's authority or standing to seek any of the remedies set forth in this Agreement; provided, this stipulation does not bar any of the Parties from litigating the merits

of any such action; and, provided further, this stipulation does not apply in any action by ODEQ seeking penalties.

f. The specification of remedies in this Section 4 of this Agreement is not intended to waive any other right or remedy ODEQ might have to enforce this Agreement or the § 401 certification. Neither PGE nor CTWS waive any right or argument it might have to oppose ODEQ's effort to assert or obtain such other right or remedy.

5. Regulatory Authority of the Tribes

a. The State and the Tribes have concurrent § 401 jurisdiction over the Project. ODEQ and CTWS are currently parties to a Letter of Agreement ("LOA") with the U.S. Environmental Protection Agency by which ODEQ and the WCB have coordinated to develop consistent ODEQ and WCB § 401 certification conditions. ODEQ will coordinate and consult with the WCB upon FERC issuance of a new license concerning implementation of § 401 certification conditions, for the purposes of fulfilling the agencies' respective water quality requirements and avoiding the imposition of conflicting or inconsistent § 401 certification implementation requirements on PGE and CTWS. Further, ODEQ will seek to amend the LOA or enter a new LOA with CTWS or the WCB to extend similar LOA terms to § 401 implementation.

b. CTWS is entering into this Agreement in its capacity as a license applicant. The Parties recognize that CTWS through the WCB and Natural Resources Department may exercise independent regulatory jurisdiction and in that capacity is not bound by the terms of this Agreement.

6. Entire Agreement

This Agreement, including Attachments and Exhibits specifically referenced herein, contains all the terms and conditions agreed upon by the Parties.

7. Effective Date

The effective date of this Agreement is the date of the latest signature below.

8. Signatures

PORTLAND GENERAL ELECTRIC COMPANY

Stephen Quennoz — 4/26/02

Stephen Quennoz
Vice President of Power Supply

Date

Should be 6/24/02

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

James Manion, General Manager of Warm Springs Power Enterprises — Date: 6/23/02

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY

Michael Llewelyn, Water Quality Administrator — Date: 6/24/02

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DESCHUTES RIVER ALLIANCE, an Oregon nonprofit corporation,

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Defendant.

Case No. 3:16-cv-01644-SI

PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

INTRODUCTION

Plaintiff Deschutes River Alliance (DRA) submits the following in response to the Court's request for supplemental briefing. Specifically, the Court requested additional analysis on whether the Clean Water Act's legislative history speaks to the question of Congressional intent regarding abrogation of tribal sovereign immunity from citizen suits. DRA was unable to find legislative history speaking directly to the issue of abrogation of tribal immunity. However, language from the House Committee on Public Works Report is relevant, and underscores the fact that arguments proffered by Defendant Portland General Electric (PGE) and amicus Confederated Tribes of the Warm Springs Reservation of Oregon (the Tribe) are based on a faulty premise.

In short, PGE and the Tribe argue that, in a parenthetical in the citizen suit provision, "Congress made a painfully explicit effort to include a waiver of sovereign immunity for both the United States…and individual states." Doc. 82 at 10. Because this parenthetical does not include mention of Indian tribes, PGE and the Tribe conclude that there is no similar abrogation of tribal immunity under the CWA. *See id.* at 11.[1]

This line of reasoning is severely flawed, however, primarily because the parenthetical referenced by PGE and the Tribe does not in fact abrogate state sovereign immunity. On the contrary, the parenthetical language in 33 U.S.C. § 1365(a), in its reference to the Eleventh Amendment, specifically *preserves* state sovereign immunity under the CWA—a conclusion

[1] In their supplemental briefing on this subject, PGE and the Tribe appear to now take the opposite position—that the parenthetical does *not* in fact abrogate sovereign immunity of individual states. *See* Doc. 97 at 7. Nonetheless, DRA will respond here to the original argument, which was forwarded in PGE's and the Tribe's Reply briefs and at oral argument, and appears to be based on reasoning in what they deem an "authoritative" law review article on the topic. *Id.* at 15.

supported by the statute's legislative history, the statutory text, and cases interpreting that text (or the same language in other environmental statutes). Thus, the argument put forward by PGE and the Tribe begins with a faulty premise, and simply finds no support in the law.

ARGUMENT

The CWA citizen suit provision provides that a citizen may commence a civil action "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 [the CWA]." 33 U.S.C. § 1365(a)(1). As DRA explained in its response to motions to dismiss from PGE and the Tribe, the term "person" is defined in the Act to include "municipality," and "municipality" is defined to include "an Indian tribe or an authorized Indian tribal organization." *Id.* §§ 1362(4), (5); *see* Doc. 76 at 13–15. Several courts have found that this language represents clear Congressional abrogation of tribal sovereign immunity with respect not only to the CWA but also, by virtue of identical language, with respect to the Safe Drinking Water Act and the Resource Conservation and Recovery Act. *See* Doc. 76 at 14.

In the face of this clear statutory language and persuasive caselaw, PGE and the Tribe nonetheless argue that there has been no abrogation of tribal immunity under the CWA. According to PGE and the Tribe, the parenthetical in 33 U.S.C. § 1365(a)(1) clearly abrogates immunity for two sets of sovereigns—the United States and individual states. And since the parenthetical does not reference Indian tribes, PGE and the Tribe argue that tribal immunity has not been similarly abrogated. *See* Doc. 82 at 10; Doc. 78 at 15–16.

There is a fundamental flaw in this reasoning, however, which is fatal to the argument. It is correct that the parenthetical quoted above supplements the CWA's general definition of "person" by including the United States among persons that may be sued for CWA violations, abrogating, as least in part, federal sovereign immunity to suit.[2] But PGE and the Tribe are simply incorrect in stating that the parenthetical abrogates immunity for state governments. On the contrary, the language "to the extent permitted by the Eleventh Amendment to the Constitution" plainly serves to *preserve* state sovereign immunity, not to abrogate it. And contrary to arguments in supplemental briefing by PGE and the Tribe, it is entirely sensible that Congress would include Indian tribes within the definition of "municipality," and that tribes and other entities identified in that definition would be subject to citizen suits under the CWA.

I. The House Committee Report affirms that Congress did not intend to abrogate state immunity from a citizen suit.

The CWA citizen suit provision does not abrogate state immunity, a fact underscored by a brief but germane statement in the Report of the House Committee on Public Works. That Report states that "Subsection (a) of section 505 authorizes a citizen to bring an action against any person, including the United States and other government agencies *to the extent permitted by*

[2] That abrogation, however, is not wholesale. *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992) (federal sovereign immunity not waived as to liability for civil fines imposed by a State for wholly past violations). Contrary to PGE's statement at oral argument, Transcript of Proceedings (May 9, 2018) at 81, the Supreme Court in *U.S. Dept. of Energy* was exceptionally clear that Congress' incorporation of the United States into the category of potential defendants of a Clean Water Act citizen suit should be read narrowly, namely to provide citizens with a cause of action against the federal government with appropriately limited remedies. The Court did not at all indicate that the parenthetical incorporation of "the United States" into the category of "any person" eligible to be a defendant in a citizen suit *displaces* the Act's general definition of "person." *Id*. at 617-619

the Constitution…." H.R. Rep. No. 92-911, March 11, 1972, at 133 (emphasis added).[3] This statement evidences congressional understanding that the citizen suit provision did not in fact abrogate the individual states' immunity from suit, which was granted to them under the Eleventh Amendment of the Constitution.[4]

This conclusion is supported by caselaw finding that the CWA citizen suit provision does not authorize citizen suits against state governments. *See, e.g., Natural Resources Def. Council*, 96 F.3d at 422–23 (holding that the district court properly dismissed all claims against a state agency "because it is . . . entitled to immunity from suit."); *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999) (finding that the citizen suit language in the CWA and other environmental statutes does not "unequivocally express Congress's intent to abrogate sovereign immunity and subject states to suit").[5]

The "to the extent" language was rendered necessary only because Congress elsewhere in the CWA used language that would otherwise authorize suits against states—by operation of

[3] Congressional Research Service, *A Legislative History of yhe Water Pollution Control Act Amendments of 1972 Together with A Section-By-Section Index*, Vol. 1 (published Jan. 1973) at 820.

[4] The Committee report noted as well that "Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act." *Id.* The legislative history of the similar (and earlier-enacted) Clean Air Act citizen suit provision also evinces congressional understanding that state immunity was not thereby abrogated. *See* Statement of the Managers on the Part of the House in H.R. 91-1783, Clean Air Amendments of 1970 Conference Report to accompany H.R. 17255 (Dec. 17, 1970) at 56 ("The conference substitute retains provisions for citizen suits with certain limitations. Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him. Suits against violators, including the United States and other government agencies *to the extent permitted by the Constitution*, would also be authorized."). Emphasis added.

[5] The Ninth Circuit has surmised, however, that by the "to the extent permitted" language Congress sought in the CWA "to authorize citizens to bring Ex parte Young suits against state officials. . . ." *Natural Resources Def. Council*, 96 F.3d at 424 (affirming that the lower court appropriately dismissed CWA claims against Caltrans, a state agency, but allowing a claim for prospective injunctive relief against the director of Caltrans).

"any person" earlier in 33 U.S.C. § 1365(a)(1), and by defining the term "person" to include states, among other entities. 33 U.S.C. § 1362(5). The Supreme Court, interpreting identical language in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), determined that "unless suits against the States were elsewhere permitted, Congress would have had no reason to specify that citizen suits . . . could be brought 'against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution).' [] The reservation of States' rights under the Eleventh Amendment would be unnecessary if Congress had not elsewhere in the statute overridden the States' immunity from suit." *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 10 (1989), *overruled on other grounds by Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996).

As noted, Congress decided in the CWA citizen suit section *to preserve* state sovereign immunity, to the extent required by the Eleventh Amendment, that by operation of other language in the Clean Water Act it otherwise would have abrogated. The statutory language is thus evidence that Congress knew how to preserve sovereign immunity where it deemed warranted. The fact that Indian tribes were not mentioned in the § 1365(a)(1) parenthetical evinces, if anything, that Congress elected not to preserve tribal sovereign immunity that it had abrogated elsewhere in the Act.

II. Contrary to arguments by PGE and the Tribe, Indian Tribes and authorized tribal organizations clearly fit within the CWA definition of "person."

In their consolidated supplemental briefing on this subject, PGE and the Tribe make several new arguments regarding Congress' intent with regard to tribal immunity. *See generally* Doc. 97. DRA believes one of these arguments warrants a brief response. Specifically, PGE and the Tribe argue that Congress could not have intended, by operation of § 1365(a)(1) and §

1362(5) and (4), to abrogate tribal sovereign immunity because tribes are not otherwise deemed municipalities under the CWA, and because a statement in a Senate report on the compromise CWA Amendments of 1972 indicated that the definition of "municipalities" was "clarified to make clear that public bodies eligible for grants under this Act includes associations formed under State law for the purpose of dealing with water problems . . . ." Doc. 97 at 11–14.

This argument is simply without merit. As an initial matter, nothing prevents Congress from providing a non-standard definition of "municipality," or any other term, to effectuate its legislative purpose. And because Tribes are not associations under state law, the selected snippet of legislative history is not relevant to comprehending Congress' purpose in including Tribes within the CWA 33 U.S.C. § 1362(4) definition of "municipalities."

A far more likely reason for the inclusion of tribes under the definition of "person" through the intermediate definition of "municipality," derives from Congress' fundamental purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to that end, to eliminate all discharges of pollutants into national waters. 33 U.S.C. § 1251(a)(1). "Municipalities," including each and every entity listed under the CWA's general definition – city, town, borough, county, parish, district, association, other public body, and Indian tribe or an authorized Indian tribal organization or other area-wide waste treatment management authority – are all public or quasi-public entities that may discharge pollutants in violation of the strictures of the Clean Water Act and in contravention of its objectives. If those entities are thus deemed outside the §1362(5) definition of "person" because, by its definition of municipalities in § 1362(4), Congress really sought only to identify entities "eligible for grants," Doc. 97 at 14, then citizens (including states) would be unable to enforce against violations of

effluent limitations and standards by cities, towns, counties, districts, and other public bodies, as well as against tribal violations. The no-discharge policy, as recognized in the Senate Report on the 1972 Amendments, Doc. 97-1 at 3, would not be secured with respect to those entities by federal citizen suit action (including that undertaken by states), and the promised citizen "right to seek vigorous enforcement" would be deprived of much content. *Id*.

Moreover, we note that if Tribes are not to be deemed "persons" under the CWA citizen suit provision, they would also not be deemed "citizens" under that section who are capable of *enforcing* the CWA. Specifically, CWA § 1365(g) defines the term "citizen," for purposes of identifying who may bring a citizen enforcement suit, as "a *person* or *persons* having an interest which is or may be adversely affected." 33 USC 1365(g) (emphasis added). A tribe certainly may have interests that are adversely affected by alleged violations of effluent standards and limitations. But because a tribe is not a natural person, it will be deemed a "citizen" only by recourse to a specified definition. Congress, as denoted *supra*, provided such a definition directly through §§1362(5) and (4), when read together. But if, as the Tribe and PGE maintain, the § 1362(4) definitional inclusion of "Indian tribe" under "municipality" is deemed ineffective for purposes of interpreting the meaning of "person" in 33 U.S.C. § 1365, then Indian tribes must also be deemed without authority to commence civil actions against violators of the Clean Water Act. The Court should not countenance the Tribe and PGE's reading of the Act that necessarily entails such a result.[9]

[9] In fact, Indian tribes have regularly brought suits under the CWA citizen suit provision. *See, e.g., South Florida Water Management Dist.v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

In sum, the varying arguments[10] advanced by PGE and the Tribe regarding tribal sovereign immunity are fatally flawed. The parenthetical in 33 U.S.C. § 1365(a) is not, as PGE claims, "a painfully explicit effort to include a waiver of sovereign immunity for both the United States…and individual states." Doc. 82 at 10. The parenthetical works to ensure a citizen cause of action against federal violations of the CWA, and it works to *restore* sovereign immunity, in conformity with the Eleventh Amendment, to states. Indian tribes are not mentioned in that parenthetical because a clear cause of action against, and abrogation of immunity for, tribes and authorized tribal organizations was provided by operation of 33 U.S.C. §§ 1365(a)(1), 1362(4), and 1362(5), and no statutory harmonization with respect to the Eleventh Amendment was needed. No sound reason is provided by PGE and the Tribe to read out of the Clean Water Act the specific terms of §§ 1365(a)(1), 1362(4), and 1362(5), or to refute the clear statutory abrogation of sovereign immunity. If warranted on other grounds, then, the Court should find it is feasible to join the Tribe in the present case.

CONCLUSION

For the foregoing reasons, and for the reasons identified in DRA's Consolidated Response, Doc. 76, DRA respectfully requests that this Court deny PGE's and the Tribe's motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(7).

[10] As explained above, in their initial briefing on this question PGE and the Tribe based their argument on the proposition that the parenthetical in Section 1365(a)(1) expressly abrogated sovereign immunity for states. *See* Doc. 82 at 10 ("Congress made a painfully explicit effort to include a waiver of sovereign immunity for both the United States…and individual states."). Now, the parties argue the opposite: "that CWA section 505(a)(1) does not abrogate sovereign immunity." Doc. 97 at 7 (*citing Natural Resources Def. Council v. Cal Dep't of Transportation*, 96 F.3d 420, 421 (9th Cir. 1996)).

Final

EVALUATION AND FINDINGS REPORT

on the

Application for Certification
Pursuant to Section 401 of the
Federal Clean Water Act

Submitted by:

Portland General Electric Company
and
The Confederated Tribes of the Warm Springs Reservation of Oregon

for the

RELICENSING OF THE PELTON ROUND BUTTE
HYDROELECTRIC PROJECT
ON THE DESCHUTES RIVER, JEFFERSON COUNTY, OREGON
(FERC No. 2030)

Pursuant to
Oregon Administrative Rules Chapter 340, Division 48

Prepared by:

Oregon Department of Environmental Quality
811 S. W. 6th Ave.
Portland, Oregon 97204

June 19, 2002

adaptive management program to monitor physical, chemical, and biological parameters; rigorously evaluate progress towards achieving defined measures of success; and utilize gained knowledge to make necessary modifications to the program through time. In this manner, knowledge gained from each phase of the program will receive broad review from resource managers and the public and will lead to informed decisions to proceed to subsequent phases in an appropriate and timely fashion.

5.2.2 Round Butte Hatchery

Because of the presence of Lake Billy Chinook and its proven capacity to produce kokanee, it is believed that development of an anadromous sockeye salmon population larger than was historically present in the system is possible. However, because successful reintroduction may take many years to achieve, the Joint Applicants propose to continue to fund steelhead and chinook production at the Round Butte Hatchery.

The Joint Applicants propose to work with the ODFW, the Tribes and other members of the Technical Subcommittee to develop a continuing hatchery production and review program linked to the anadromous fish reintroduction effort. The long-term goal of coordinating the hatchery and reintroduction efforts is to continue to fully mitigate Project impacts and eventually eliminate hatchery production of anadromous fish. The Joint Applicants' commitment to this revised hatchery management plan includes:

- Maintain and continue funding smolt production at the Round Butte Hatchery.
- Maintain mitigation goals of an average return of 1,800 adult steelhead and 1,200 (600 females) adult and jack spring-run chinook back to the Project.
- Review the hatchery production program every five years, starting 10 years after fish returns from production upstream of the Project, to adjust hatchery smolt production to a level consistent with the combined returns of hatchery and naturally-produced anadromous fish from upstream of the Project.
- Maintain the post-smolt steelhead liberation program (approximately 25,000 per year) and the fingerling kokanee liberation program (more than 100,000 per year) for Lake Simtustus. The post-steelhead program will be reviewed every five years. The fingerling kokanee program may be decreased or eliminated, in consultation with the Technical Subcommittee, if creel surveys show continued low survival.

The proposed hatchery program is described in greater detail in Exhibit E, Section III.C.2 of the FJAA.

5.2.3 Adaptive Management

Because there is uncertainty surrounding the ultimate effectiveness of proposed water quality PMEs, the Joint Applicants propose to adopt an adaptive management and decision approach. Adaptive management is a formal, systematic, and rigorous approach to learning from the outcomes of management actions, accommodating change, and improving management. It involves synthesizing existing knowledge, exploring alternative actions, and making explicit

forecasts about their outcomes. Management actions and monitoring programs must be carefully designed to generate reliable feedback and clarify the reasons underlying outcomes. Actions and objectives are then adjusted based on this feedback and improved understanding. In addition, decisions, actions, and outcomes are carefully documented and communicated to others, so that knowledge gained through experience is passed on, rather than being lost when individuals move or leave the effort (Taylor 1996).

With respect to the proposed selective water withdrawal structure, details regarding facility design and operational plan are yet to be worked out and ultimately tested. It is highly likely that the operational plan and/or facility will need to be modified over time to achieve desired objectives. Thus, as a component of the adaptive management approach, an adaptive monitoring program will also be needed to assess water quality, to determine the success of adaptive management, and to provide input to future adaptive management decisions and actions. There are six main steps in adaptive management as it will be applied to the Pelton Round Butte fish passage and water quality program:

1. *Problem assessment* — explicitly recognizing that there are uncertainties regarding the outcome of management activities and identifying those uncertainties that are critical to success.

2. *Plan design* — deliberately designing the plan to increase understanding about the system and reveal the best way to reduce the level of uncertainty and meet explicitly stated objectives.

3. *Implementation* — carefully implementing the plan.

4. *Monitoring* — developing and implementing a monitoring program of key indicators of success against which progress can be measured.

5. *Evaluation* — analyzing data from the monitoring program and assessing results, considering the objectives and predictions.

6. *Adjustment* — incorporating results into future decisions and actions.

These steps are consistent with the implementation steps recommended by the EDT[2] process. The discussion of the adaptive management process is contained in Exhibit E, Section III.C.1 of the FJAA and Appendix II of the Fish Passage Plan, which is included as Attachment III-2 to the FJAA. A copy of the adaptive management discussion was also provided to ODEQ and the WCB on April 14, 2000.

[2] The Ecosystem Diagnosis and Treatment (EDT) assessment evaluated the ability of existing conditions of the aquatic environment to support identified goals and values based on the effects of certain environmental attributes on chinook salmon, the EDT's diagnostic species. The EDT process was used by CTWS prior to jointly applying to FERC for a new license for the Project. Members of the EDT Fisheries Technical Committee included CTWS, USFS, USFWS, NMFS, BLM,Bureau of Indian Affairs (BIA), ODFW, NGOs, and private individuals with extensive local knowledge of the river basin.

purposes: (1) addressing ODEQ's role and the Joint Applicants' commitments regarding adaptive management measures required by § 401 certification conditions, and (2) providing ODEQ and the public further reasonable assurance that the Project as proposed to be relicensed will comply with water quality standards and future TMDLs.

With respect to public comment #CG-3, the WQMMP does, indeed, specify a restriction regarding ODEQ's ability to require modifications to the SWW structure. Based upon the information presented to ODEQ in support of § 401 certification, and considering the proposed blending regime, ODEQ is reasonably assured that upon construction of the SWW structure and implementation of the proposed flow regime, that additional structural modification will not be necessary. However, as provided for by 33 USC 1341 and OAR 340-48, ODEQ may reconsider the proposed § 401 certification and add, delete, or modify certification conditions as necessary to address changes in knowledge, Project conditions, or water quality standards or to address any failure of certification conditions to protect water quality and beneficial uses. ODEQ includes such a provision in the § 401 certification and the § 401 Implementation Agreement to be signed by the Joint Applicants and ODEQ.

9.2.8 ODEQ Finding

ODEQ is reasonably assured that operation of the Project will comply with the temperature standard provided that the Joint Applicants meet the following conditions:

Water Quality Management and Monitoring Plan

Within 90 days of issuance of the §401 certification, the Joint Applicants, in consultation with ODEQ, shall revise the Water Quality Management and Monitoring Plan attached to these certification conditions as Exhibit A and submit the revised plan to ODEQ for approval. The plan as approved by ODEQ is hereafter referred to in these certification conditions as the "WQMMP". Upon ODEQ approval, the WQMMP becomes a part of the §401 certification for the Project for purposes of any federal license or permit thereafter issued.

Selective Water Withdrawal Facility Construction and Operation

By no later than five years from the date of receiving a new FERC license for the Project, the Joint Applicants shall construct, test, and commence operation of the Selective Water Withdrawal (SWW) facility described in the Joint Applicants' §401 application.

Temperature

1. The SWW facility shall be operated in accordance with the Temperature Management Plan (TMP) contained in the WQMMP. The TMP shall identify those measures that the Joint Applicants will undertake to reduce the Project's contribution to exceedances of water quality standard criteria for temperature.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the temperature monitoring reasonably needed to determine (a) whether the temperature criteria continue to be exceeded in waters affected by the Project, (b) the

success of the TMP in reducing the Project's contribution to any continued exceedances of the criteria, and (c) any additional measures that may be needed to reduce the Project's contribution to exceedances of the criteria.

3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a TMDL for temperature in the portion of the Deschutes River affected by the Project, ODEQ may reevaluate the Joint Applicants' TMP in light of information acquired since the certification of the Project. If additional temperature reduction measures are feasible and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised TMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of the attached Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related thermal contributions to waters affected by the Project.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for temperature in waters affected by the Project, ODEQ may:

   (a) Determine whether the LA for the Project has been achieved.

   (b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the TMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the TMP.

   (c) If the LA for the Project has not been achieved, ODEQ may reevaluate the TMP to determine whether additional measures to reduce the Project's contribution to exceedances of the temperature criteria are necessary and feasible. If additional measures are necessary and feasible, ODEQ may require submittal of a revised TMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the TMP that would require the Project to reduce water temperatures beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

   (d) If (i) additional measures to reduce the Project's contribution to exceedances of the temperature criteria are necessary to achieve the LA but the measures are not feasible, and (ii) the water quality standard has not been achieved for waters affected by the Project, ODEQ shall verify whether all feasible measures have been undertaken within the Deschutes River Basin to achieve the LA for waters affected by the Project. If all feasible measures have not been undertaken, ODEQ, in conjunction with designated management agencies, shall take steps to ensure that all feasible measures are undertaken. If all feasible measures have been undertaken, ODEQ shall determine whether designated beneficial uses of waters affected by the Project are adversely affected by the failure to achieve the LA. If the designated beneficial uses are not adversely affected by the failure to achieve the LA, the Joint Applicants shall continue to implement the TMP unless, at the Joint Applicants' request, ODEQ approves modification or termination of

the TMP. If the designated beneficial uses are adversely affected by the failure to achieve the LA, ODEQ may modify the TMP to require additional temperature measures, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the TMP that would require the Project to reduce water temperatures beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

5. Any 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 or to a violation of the temperature water quality standard.

6. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

   (a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,

   (b) Modifications to the TMP require or indicate a need for modification to the WQMP.

7. With the approval of ODEQ, the Joint Applicants may cease implementing the TMP and WQMP or may implement a modified TMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement of any LA for the Project for temperature and will not contribute to the exceedance of the relevant temperature criterion in waters affected by the Project.

8. The Joint Applicants shall implement modifications requested by ODEQ under these certification conditions and the WQMMP.

9.3 Dissolved Oxygen (DO) – OAR 340-041-0565(2)(a) and CTWS Ordinance 80, 432.100(2)(a)

9.3.1 Applicable State Standard

The applicable State standard for dissolved oxygen is as follows:

340-041-0565(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 Basin:

(a) Dissolved oxygen (DO): 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:

   (A) For waterbodies identified by the Department as providing salmonid spawning, during the periods from spawning until fry emergence from the gravels, the following criteria apply:

dissolved oxygen between the water column and intergravel environments, resulting in greater differences with time following construction of the redds. Future methodologies may employ the collection of one or more additional measurements during the months following construction of the redd. Additionally, respiration and other metabolic processes occurring within an actual redd relative to embryo development would be expected to exert an oxygen demand on the IGDO that may not be experienced in an artificial redd. It is quite possible that preferred protocols for collecting IGDO data will evolve over time, and more representative sampling techniques will be developed. It is also possible that empirical relationships may be developed relating data collected from artificial redds to actual redds. Considering the current state-of-the-art IGDO methodology and potential for its evolution, it is appropriate that future IGDO sampling efforts receive contemporary approval from ODEQ. The WQMMP should be revised with respect to IGDO monitoring to reflect that the methodology to be employed will be based upon contemporary approval by ODEQ, reflective of the current methodologies. Additionally, as stated above, the WQMMP should be revised to require three years of additional DO/IGDO collection to potentially support a future proposal by the Joint Applicants to target the alternative 9.0 mg/L DO criterion.

In addition to the adaptive management and monitoring described in the WQMMP to address Project-related dissolved oxygen impacts, the Project operations must comply with future TMDLs. The target date for completing TMDLs for CWA 303(d) listings on the lower Deschutes, including dissolved oxygen listings, is 2006. The Joint Applicants will be expected to comply with the TMDL including any related necessary modification of the revised and ODEQ-approved WQMMP. To provide further assurance that adaptive management and TMDL requirements will be reliable and enforceable in the context of a new FERC license, ODEQ and the Joint Applicants propose to enter a § 401 Implementation Agreement, attached as Exhibit B to this report, concurrent with issuance of a § 401 certification. The agreement will serve two purposes: (1) addressing ODEQ's role and the Joint Applicants' commitments regarding adaptive management measures required by § 401 certification conditions, and (2) providing ODEQ and the public further reasonable assurance that the Project as proposed to be relicensed will comply with water quality standards and future TMDLs.

With respect to public comment #CG-3, the WQMMP does, indeed, specify a restriction regarding ODEQ's ability to require modifications to the SWW structure. Based upon the information presented to ODEQ in support of 401 certification, and considering the proposed blending regime, ODEQ is reasonably assured that upon construction of the SWW structure and implementation of the proposed flow regime, that additional structural modification will not be necessary. However, as provided for by 33 USC 1341 and OAR 340-48, ODEQ may reconsider the proposed 401 certification and add, delete, or modify certification conditions as necessary to address changes in knowledge, Project conditions, or water quality standards or to address any failure of certification conditions to protect water quality and beneficial uses. ODEQ includes such a provision in the § 401 certification and the § 401 Implementation Agreement to be signed by the Joint Applicants and ODEQ.

9.3.8 ODEQ Finding

ODEQ is reasonably assured that operation of the Project will comply with the dissolved oxygen standard provided that the Joint Applicants meet the following conditions:

Water Quality Management and Monitoring Plan

Within 90 days of issuance of the §401 certification, the Joint Applicants, in consultation with ODEQ, shall revise the Water Quality Management and Monitoring Plan attached to these certification conditions as Exhibit A and submit the revised plan to ODEQ for approval. The plan as approved by ODEQ is hereafter referred to in these certification conditions as the "WQMMP". Upon ODEQ approval, the WQMMP becomes a part of the §401 certification for the Project for purposes of any federal license or permit thereafter issued.

Selective Water Withdrawal Facility Construction and Operation

By no later than five years from the date of receiving a new FERC license for the Project, the Joint Applicants shall construct, test, and commence operation of the Selective Water Withdrawal (SWW) facility described in the Joint Applicants' §401 application.

Dissolved Oxygen

1. The SWW facility shall be operated in accordance with the Dissolved Oxygen Management Plan (DOMP) contained in the WQMMP. The DOMP shall identify those measures that the Joint Applicants will undertake to reduce the Project's contribution to violations of water quality standard criteria for dissolved oxygen.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the dissolved oxygen monitoring reasonably needed to determine (a) whether the dissolved oxygen criteria continue to be violated in waters affected by the Project, (b) the success of the DOMP in reducing the Project's contribution to any continued violations of the criteria, and (c) any additional measures that may be needed to reduce the Project's contribution to violations of the criteria.

3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a TMDL for dissolved oxygen in the portion of the Deschutes River affected by the Project, ODEQ may reevaluate the DOMP in light of information acquired since the certification of the Project. If additional dissolved oxygen improvement measures are feasible and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised DOMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related impacts on dissolved oxygen concentrations in waters affected by the Project.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for dissolved oxygen in waters affected by the Project, ODEQ may:

   (a) Determine whether the LA for the Project has been achieved.

(b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the DOMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the DOMP.

(c) If the LA for the Project has not been achieved, ODEQ may reevaluate the DOMP to determine whether additional measures to reduce the Project's contribution to exceedances of the dissolved oxygen criteria are necessary and feasible. If additional measures are necessary and feasible, ODEQ may require submittal of a revised DOMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the DOMP that would require the Project to increase dissolved oxygen concentrations beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

(d) If (i) additional measures to reduce the Project's contribution to violations of the dissolved oxygen criteria are necessary to achieve the LA but the measures are not feasible, and (ii) the water quality standard for dissolved oxygen has not been achieved for waters affected by the Project, ODEQ shall verify whether all feasible measures have been undertaken within the Deschutes River Basin to achieve the LA for waters affected by the Project. If all feasible measures have not been undertaken, ODEQ, in conjunction with designated management agencies, shall take steps to ensure that all feasible measures are undertaken. If all feasible measures have been undertaken, ODEQ shall determine whether designated beneficial uses of waters affected by the Project are adversely affected by the failure to achieve the LA. If the designated beneficial uses are not adversely affected by the failure to achieve the LA, the Joint Applicants shall continue to implement the DOMP unless, at the Joint Applicants' request, ODEQ approves modification or termination of the DOMP. If the designated beneficial uses are adversely affected by the failure to achieve the LA, ODEQ may modify the DOMP to require additional dissolved oxygen measures, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the DOMP that would require the Project to increase dissolved oxygen concentrations beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

5. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

(a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,

(b) Modifications to the DOMP require or indicate a need for modification to the WQMP.

6. With the approval of ODEQ, the Joint Applicants may cease implementing the DOMP and WQMP or may implement a modified DOMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement

of any LA for the Project for dissolved oxygen and will not contribute to violation of dissolved oxygen criteria in waters affected by the Project.

7. The Joint Applicants shall implement modifications requested by ODEQ under these certification conditions and the WQMMP.

9.4 pH (Hydrogen Ion Concentration) -- OAR 340-041-0565(2)(d)

9.4.1 Applicable State Standard

The applicable State standard for pH is as follows:

340-041-0565(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 Basin:

(d) pH (hydrogen ion concentration): pH values shall not fall outside the ranges identified in paragraphs (A), (B), and (C) of this subsection. The following exception applies: Waters impounded by dams existing on January 1, 1996, which have pHs that exceed the criteria shall not be considered 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:

(A) Mainstem Columbia River (river miles 147 to 203): pH values shall not fall outside the range of 7.0 to 8.5;

(B) Other Hood River Basin streams (except Cascade lakes): pH values shall not fall outside the range of 6.5 to 8.5;

(C) Cascade lakes above 3,000 feet altitude: pH values shall not fall outside the range of 6.0 to 8.5.

9.4.2 Applicable Tribal Standard

The applicable Tribal standard for pH is as follows:

CTWS Ordinance 80, 432.100(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:

(d) pH (Hydrogen Ion Concentration): pH values shall not fall outside the range of 6.5-8.5 with the following exception:

Waters impounded by dams existing prior to adoption of these water quality standards, which exceed the pH criterion shall not trigger a violation of the standard provided the following conditions are met:

certification and the § 401 Implementation Agreement to be signed by the Joint Applicants and ODEQ.

9.4.8 ODEQ Findings

ODEQ is reasonably assured that operation of the Project will comply with the hydrogen ion concentration (pH) standard provided that the Joint Applicants meet the following conditions:

Water Quality Management and Monitoring Plan

Within 90 days of issuance of the §401 certification, the Joint Applicants, in consultation with ODEQ, shall revise the Water Quality Management and Monitoring Plan attached to these certification conditions as Exhibit A and submit the revised plan to ODEQ for approval. The plan as approved by ODEQ is hereafter referred to in these certification conditions as the "WQMMP". Upon ODEQ approval, the WQMMP becomes a part of the §401 certification for the Project for purposes of any federal license or permit thereafter issued.

Selective Water Withdrawal Facility Construction and Operation

By no later than five years from the date of receiving a new FERC license for the Project, the Joint Applicants shall construct, test, and commence operation of the Selective Water Withdrawal (SWW) facility described in the Joint Applicants' §401 application.

Hydrogen Ion Concentration (pH)

1. The SWW facility shall be operated in accordance with the pH Management Plan (PHMP) contained in the WQMMP. In accordance with OAR 340-041-0565(2)(d), the PHMP shall identify those measures (including "all practicable measures" in impoundments) that the Joint Applicants will undertake to reduce the Project's contribution to exceedances of the water quality criterion for pH.

2. Upon issuance of a new FERC license for the Project, the Joint Applicants shall implement the Water Quality Monitoring Plan (WQMP) contained in the WQMMP. The WQMP shall specify the pH monitoring reasonably needed to determine (a) whether the pH criterion continue to be exceeded in waters affected by the Project, (b) the success of the PHMP in reducing the Project's contribution to any continued exceedances of the criterion, and (c) any additional measures that may be needed to reduce the Project's contribution to exceedances of the criterion.

3. Upon the U.S. Environmental Protection Agency's final approval or adoption of a TMDL for pH in waters affected by the Project, ODEQ may reevaluate the PHMP in light of information acquired since the certification of the Project. If additional pH measures are feasible and necessary to meet a Load Allocation (LA) for the Project under the TMDL (either as a component of the initial TMDL or any subsequent modification of the TMDL), ODEQ may require submittal of a revised PHMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. If the TMDL does not include a specific LA for the Project, references to the "LA for the Project" shall refer to the LA that encompasses Project-related pH

contributions to waters affected by the Project.

4. At the end of the period determined by ODEQ to be necessary to implement the TMDL for pH in waters affected by the Project, ODEQ may:

   (a) Determine whether the LA for the Project has been achieved.

   (b) If the LA for the Project has been achieved, the Joint Applicants shall continue to implement the PHMP unless, at the Joint Applicants' request, ODEQ approves a modification or termination of the PHMP.

   (c) If the LA for the Project has not been achieved, ODEQ may reevaluate the PHMP to determine whether additional measures to reduce the Project's contribution to exceedances of the pH criterion are necessary and feasible. If additional measures are necessary and feasible, ODEQ may require submittal of a revised PHMP that ensures attainment of the LA, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the PHMP that would require the Project to reduce pH beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

   (d) If (i) additional measures to reduce the Project's contribution to exceedances of the pH criterion are necessary to achieve the LA but the measures are not feasible, and (ii) the pH water quality standard has not been achieved for waters affected by the Project, ODEQ shall verify whether all feasible measures have been undertaken within the Deschutes River Basin to achieve the LA for waters affected by the Project. If all feasible measures have not been undertaken, ODEQ, in conjunction with designated management agencies, shall take steps to ensure that all feasible measures are undertaken. If all feasible measures have been undertaken, ODEQ shall determine whether designated beneficial uses of waters affected by the Project are adversely affected by the failure to achieve the LA. If the designated beneficial uses are not adversely affected by the failure to achieve the LA, the Joint Applicants shall continue to implement the PHMP unless, at the Joint Applicants' request, ODEQ approves modification or termination of the PHMP. If the designated beneficial uses are adversely affected by the failure to achieve the LA, ODEQ may modify the PHMP to require additional pH measures, subject to the limits set forth in Chapter 1.0 of Exhibit A and incorporated into the WQMMP. Any modification of the PHMP that would require the Project to reduce pH beyond what would be required by the LA for the Project shall be effective only upon modification of the LA to reflect the reduced load allocation.

5. ODEQ may make or require reasonable modifications to the WQMP that it considers to be reasonable and feasible if:

   (a) The WQMP proves inadequate to provide the data needed to make the determinations described in certification condition 2, above; or,

(b) Modifications to the PHMP require or indicate a need for modification to the WQMP.

6. With the approval of ODEQ, the Joint Applicants may cease implementing the PHMP and WQMP or may implement a modified PHMP and WQMP. ODEQ may approve termination or modification if ODEQ determines that it will not impair the achievement of any LA for the Project for pH and will not contribute to the exceedance of the relevant pH criterion in waters affected by the Project.

7. The Joint Applicants shall implement modifications requested by ODEQ under these certification conditions and the WQMMP.

9.5 Nuisance Phytoplankton Growth – OAR 340-041-0150 and CTWS Ordinance 80, 432.400

9.5.1 Applicable State Standard

The applicable State standard for nuisance phytoplankton growth is as follows:

340-041-0150 The following values and implementation program shall be applied to lakes, reservoirs, estuaries and streams, except for ponds and reservoir less than 10 acres in surface area, marshes and saline lakes:

(1) The following average Chlorophyll *a* values shall be used to identify waterbodies where phytoplankton may impair the recognized beneficial uses:

(a) Natural lakes which thermally stratify: 10 ug/L

(b) Natural lakes which do not thermally stratify, reservoirs, rivers and estuaries: 15 ug/L

(c) Average Chlorophyll *a* values shall be based on the following methodology (or other methods approved by the Department): a minimum of three (3) samples collected over any three consecutive months at a minimum of one representative location (e.g., above the deepest point of a lake or reservoir or at a point mid-flow of a river) from samples integrated from the surface to a depth equal to twice the Secchi depth or the bottom (the lesser of the two depths); analytical and quality assurance methods shall be in accordance with the most recent edition of *Standard Methods for the Examination of Water and Wastewater.*

(2) Upon determination by the Department that the values in OAR 340-041-0150(1) are exceeded, the Department shall:

(a) In accordance with a schedule approved by the Commission, conduct such studies as are necessary to describe present water quality; determine the impacts on beneficial uses; determine the probable causes of the exceedance and beneficial use impact; and develop a proposed control strategy for

- Fish Passage Plan: As discussed above, the Joint Applicants propose a four-phase, adaptive management approach to reestablish passage for anadromous and resident fish species through the Project, promoting species and life-history diversity and allowing for maximum utilization of existing and potential fish habitats within and upstream of the Project.

  With respect to fish passage, the Joint Applicants expressed (public comment JA-3) disfavor with ODEQ's proposed 401 requirements for construction, operation and maintenance of a fish screen and/or bypass device as part of the fish passage structure. The Joint Applicants indicate a preference that ODEQ's final condition instead reference FERC's future license condition regarding entrainment. ODEQ recognizes that the Joint Applicants, in consultation with the FTS, are still evaluating alternatives for a permanent downstream facility to collect downstream migrating fish. At this time, a decision has not yet been made whether to move smolts through Lake Simtustus or to trap and haul to the lower river. If Simtustus is used as a migrational corridor, a smolt pipeline may be used to transport fish around the Reregulating Reservoir. The Joint Applicants identify (FJAA E-III-57) that if the new passage facility at Lake Billy Chinook does not include exclusion of fish from water moving through the powerhouse, entrainment losses over different periods of the year will be determined. Considering that there is still much uncertainty regarding how fish will be passed downstream, and considering that there is very limited information available identifying entrainment mortality at the Project developments, ODEQ concurs that it is not prudent for ODEQ to include the earlier proposed entrainment language. However, ODEQ does not see utility in providing a 401 certificate requirement for entrainment that references a future FERC license requirement. In addition to both ODFW's authority to require screening under state law and their authority to recommend screening via their FPA 10(j) authority, ODEQ is reasonably assured that other agencies with mandatory conditioning authority will require screening/exclusion as is determined appropriate via ongoing evaluation. ODEQ will not include conditions related to screening in its final 401 conditions.

- Round Butte Hatchery: The Joint Applicants propose to continue to fund steelhead and chinook production at the Round Butte Hatchery. The expressed long-term goal is to coordinate the hatchery and reintroduction efforts and to continue to mitigate for Project impacts and eventually eliminate hatchery production of anadromous fish

- Adaptive Management Approach: To address uncertainty surrounding the ultimate effectiveness of proposed water quality and fish passage plan PMEs, the Joint Applicants have proposed to implement an adaptive management and decision approach. This approach consists of six main steps: problem assessment, plan design, implementation, monitoring, evaluation and adjustment.

- Flow and Operating Proposal (note, these proposed PMEs are detailed in Exhibit E, Section III-4 of FJAA and summarized here):

  - Ramping Rates in the lower Deschutes River: Proposed ramping rates are 0.1 foot/hour and 0.4 foot/day from October 16 to May 14, and 0.05 foot/hour and 0.2 foot/day from May 15 to October 15, except during certain extraordinary conditions. Minimizing Project-induced stage change in the river below the Project will help minimize the potential for stranding of aquatic and terrestrial life along the stream margins.

13. 401 IMPLEMENTATION AGREEMENT

Many of the ODEQ reasonable assurance findings in this *Evaluation and Findings Report* are premised on adaptive management and the ability of the Joint Applicants and ODEQ to modify Project operations in response to monitoring results and other new information during the term of the new FERC license. That license term is set by FERC and can range from 30 to 50 years. Further, TMDLs for various water quality parameters are scheduled to be adopted and will require implementation on waters affected by the Project. To provide further assurance that adaptive management and TMDL requirements will be reliable and enforceable in the context of a new FERC license, ODEQ and the Joint Applicants have developed and will enter a § 401 Implementation Agreement concurrent with issuance of a § 401 certification. This agreement will serve two purposes: (1) addressing ODEQ's role and the Joint Applicants' commitments regarding adaptive management measures required by the § 401 certification conditions; and (2) providing ODEQ and the public further reasonable assurance that the Project as proposed to be relicensed will comply with water quality standards.

14. CONCLUSIONS AND RECOMMENDATIONS FOR CERTIFICATION

The Department has evaluated the Joint Applicants' Project proposal for compliance with CWA Sections 301, 302, 303, 304, and 306, including the applicable provisions of Oregon Administrative Rules, Chapter 340, Division 41, and the specific provisions for the Deschutes Basin set forth in Sections 340-041-0562 and 340-041-0565 of Division 41. Section 340-041-0562 lists the beneficial water uses to be protected in the Deschutes Basin and Section 340-041-0565 describes the water quality standards to be met for the protection of those identified uses.

Based on the preceding analysis and findings, it is recommended that, pursuant to § 401 of the Federal Clean Water Act and ORS 468B.040, the Director conditionally approve the application for certification of the Pelton Round Butte Hydroelectric Project consistent with the findings of this document.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2020, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

LAW OFFICE OF DANIEL M. GALPERN

/s/ Daniel M. Galpern

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