

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DESCHUTES RIVER ALLIANCE,
an Oregon nonprofit corporation,

Plaintiff-Appellant/Cross-Appellee,

v.

PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon corporation, and THE CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF OREGON, a federally-recognized Indian
tribe,

Defendants-Appellees/Cross-Appellants,

On Appeals from the United States District Court
for the District of Oregon
Case No. 3:16-cv-1644-SI
Hon. Michael H. Simon

CONSENT MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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CONSENT MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), Idaho Power Company (“IPC”) hereby submits the attached *amicus curiae* brief in support of Defendant-Appellee/Cross-Appellant Portland General Electric Company (“PGE”) and affirming the district court.

All parties consent to the filing of this brief. No party’s counsel prepared any part of this brief; no party or party’s counsel contributed money to prepare or submit this brief; and no one other than IPC contributed money to prepare or submit this brief.

IPC is a 100-year-old energy company serving over 500,000 customers in Idaho and Oregon. IPC operates hydroelectric projects, including the Hells Canyon Complex on the Snake River, a border river between the States of Oregon and Idaho. The Hells Canyon Project discharges from both Oregon and Idaho into the Snake River. Like defendant-appellee PGE, IPC’s hydroelectric projects are licensed by the Federal Energy Regulatory Commission (“FERC”). As part of the licensing process, the Clean Water Act offers Oregon and Idaho the opportunity to certify that continued operation of the dams will meet water quality requirements under various sections of the Clean Water Act and any other appropriate requirements of State law. 33 U.S.C. § 1341(d). Both states have issued such

certifications, with conditions. The Hells Canyon Complex relicensing process before FERC is ongoing.

IPC's certifications include a requirement that IPC implement a temperature management plan. The centerpiece for that plan is a multi-million-dollar watershed restoration project designed to reduce temperatures of water flowing into the Hells Canyon Complex. The Snake River restoration plan and other requirements of the certifications include such activities as ongoing monitoring of temperature and other water quality criteria and adaptive management practices, just as in the certification issued to PGE and The Confederated Tribes of the Warm Springs Reservation of Oregon to operate the Pelton Round Butte Hydroelectric Project at issue in this appeal. IPC accordingly has a direct interest in this Court's consideration of the issues presented in this appeal.

RESPECTFULLY SUBMITTED this 5th day of October, 2020.

DAVIS WRIGHT TREMAINE LLP

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,277 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated October 5, 2020.

s/ P. Andrew McStay, Jr.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 5, 2020, I 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.

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By: *s/ P. Andrew McStay, Jr.*

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**BRIEF OF *AMICUS CURIAE* IDAHO POWER COMPANY IN SUPPORT
OF DEFENDANT-APPELLEE/CROSS-APPELLANT PORTLAND
GENERAL ELECTRIC COMPANY AND AFFIRMING THE DISTRICT
COURT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26, Idaho Power Company discloses the following corporate information:

Idaho Power Company is an Idaho corporation. The publicly-traded corporation Idacorp, Inc., an Idaho corporation, owns 100% of the stock of Idaho Power Company.

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INTRODUCTION AND STATEMENT OF INTEREST

Amicus curiae Idaho Power Company (“IPC”) is a 100-year-old energy company serving over 500,000 customers in Idaho and Oregon. IPC operates hydroelectric projects, including the Hells Canyon Complex on the Snake River, a border river between the States of Oregon and Idaho. The Hells Canyon Project discharges from both Oregon and Idaho into the Snake River. Like defendant-appellee Portland General Electric Company (“PGE”), IPC’s hydroelectric projects are licensed by the Federal Energy Regulatory Commission (“FERC”). As part of the licensing process, the Clean Water Act offers Oregon and Idaho the opportunity to certify that continued operation of the dams will meet water quality requirements under sections 1311, 1312, 1316 and 1317 of the Clean Water Act and any other appropriate requirements of State law. 33 U.S.C. § 1341(d). Both states have issued such certifications, with conditions. The Hells Canyon Complex relicensing process before FERC is ongoing.

IPC’s certifications include a requirement that IPC implement a temperature management plan. The centerpiece for that plan is a multi-million-dollar watershed restoration project designed to reduce temperatures of water flowing into the Hells Canyon Complex. The Snake River restoration plan and other requirements of the certifications include such activities as ongoing monitoring of temperature and other water quality criteria and adaptive management practices,

just as in the certification issued to PGE and The Confederated Tribes of the Warm Springs Reservation of Oregon to operate the Pelton Round Butte Hydroelectric Project at issue in this appeal.

IPC submits this brief under Fed. R. App. P. 29(a)(2) in support of PGE to urge this Court to affirm the district court's dismissal of plaintiff-appellant Deschutes River Alliance's citizen suit.¹ The district court correctly recognized that state agencies may impose conditions in a Clean Water Act Section 401 certification to require ongoing monitoring and adaptive management practices in an effort to reduce existing exceedances of water quality standards. The district court further properly ruled that a mere exceedance of numeric water quality criteria, standing alone, does not constitute a Clean Water Act violation in this context, and that a citizen-suit plaintiff must instead show that a project operator failed to comply with project-specific measures or adaptive management requirements in a certification.

I. ARGUMENT

A. Section 401 Certifications May Employ Ongoing Monitoring and Adaptive Management Conditions to Ensure Compliance with

¹ All parties consent to the filing of this brief. No party's counsel prepared any part of this brief; no party or party's counsel contributed money to prepare or submit this brief; and no one other than IPC contributed money to prepare or submit this brief.

Water Quality Standards.

The district court correctly understood that state agencies like the Oregon Department of Environmental Quality are authorized under Section 401 of the Federal Water Pollution Control Act (commonly called the “Clean Water Act” or “CWA”), 33 U.S.C. § 1341,² to require ongoing monitoring of water quality standards and adaptive management of hydroelectric projects to reduce exceedances that may violate water quality standards. *See, e.g., Deschutes River Alliance v. Portland Gen. Elec. Co.*, 331 F. Supp. 3d 1187, 1202 (D. Or. 2018) (noting Project certification’s “overall mandate to use adaptive management”).

Under Section 401, an applicant seeking a federal license or permit that may result in a discharge into navigable waters must seek a state certification that any such discharge will comply with the CWA. 33 U.S.C. § 1341(a). Section 401(a) further requires the certifying authority to certify that the discharge from a proposed federally licensed or permitted project will comply with enumerated CWA provisions, and Section 401(d) allows the certifying authority to include

² Section 401 of the Clean Water Act provides in part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate[.]

33 U.S.C. § 1341(a)(1).

conditions to assure that the applicant will comply with enumerated CWA provisions and “any other appropriate’ state law requirements.” *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 708 (1994) (quoting 33 U.S.C. §1341(d)) (emphasis added); *see also S.D. Warren Co v. Me. Bd. of Env’tl. Protection*, 547 U.S. 370, 386 (2006) (explaining that the fundamental purpose of Section 401 is to protect state-level decision-making). But a state agency’s determination of non-violation does not require absolute certainty that a project will strictly meet all water quality standards at all times, as the district court recognized and other courts have affirmed.

Section 401 certifications often represent a state agency’s attempt to model complex and dynamic ecological effects over extended time periods. A project’s FERC license period can extend up to 50 years, during which time water quality conditions and considerations will evolve and change and be subject to unanticipated impacts. The Section 401 certification process is therefore, as the Fourth Circuit has noted, “inherently predictive in nature.” *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 404 (4th Cir. 2018); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 90 P.3d 659, 679 (2004) (“[The agency] could not be absolutely certain when it issued the § 401 certification that the project as currently planned would comply with water quality standards.”). Moreover, for historical or other reasons, projects may not be able to

achieve strict compliance with *all* water quality standards at *all* times. That was precisely the situation in the case below. As the district court noted, “It is sometimes impossible for the Project simultaneously to achieve all water quality and fish passage objectives.” *Deschutes River Alliance*, 331 F. Supp. 3d at 1204 and n.8 (citing record evidence and noting that plaintiff did not appear to dispute this finding). A Section 401 certification can thus allow for forward-looking monitoring and adaptive management that balance sometimes competing water quality objectives, rather than mandate immediate, strict compliance with all existing water quality standards. *See* 33 U.S.C. § 1341(d) (“Any certification provided under this section shall set forth ... monitoring requirements necessary to assure that any applicant ... will comply with any applicable effluent limitations and other limitations[.]”); *see also Port of Seattle*, 90 P.3d at 679 (“Monitoring and adaptive management provide a mechanism through which [the agency] can mitigate that inherent uncertainty.”).

In the case below, the Section 401 certification required PGE to monitor temperature and other water quality criteria and take certain adaptive management steps to promote all relevant water quality objectives under the certification. *See, e.g., Deschutes River Alliance*, 331 F. Supp. 3d at 1202 (describing adaptive management requirements for compliance with state temperature criteria). Where similar approaches have been employed elsewhere, reviewing courts have

concluded that the approaches do ensure compliance with the CWA. For example, the Fourth Circuit recently reviewed a Section 401 certification that required the operator “to promptly report any sampling results ‘that exceed the applicable water quality criteria,’ so that DEQ and [the operator] can quickly engage in consultation and make appropriate adjustments,” and determined that it “was reasonable for the State Agencies to conclude that DEQ, like the EPA, would be able to use the tools at its disposal to adjust to any unexpected contingencies that may lead to a short-term exceedance.” *See Sierra Club*, 898 F.3d at 404. Similarly, the Washington Court of Appeals concluded that the state Department of Ecology had the authority to approve a water right for a hydroelectric project where the Section 401 certification was conditioned in part on requiring “monitoring program for the period of the license, with a five year adaptive management approach that required increasing and resetting the minimum flows for a season in which water quality standards were violated.” *Ctr. for Env’tl. Law v. Wash. Dep’t of Ecology*, 196 Wash. App. 360, 383 P.3d 608, 611 (2016); *see also Port of Seattle*, 90 P.3d at 678–79 (approving the use of monitoring and adaptive management).

As the district court rightly explained, “Operating the Project ‘in accordance’ with those plans [for water quality management incorporated in the Section 401 certification], then, means using the techniques identified to work toward compliance, and following the overall mandate to use adaptive

management.” *Deschutes River Alliance*, 331 F. Supp. 3d at 1202.³ The district court further correctly noted that a contention that monitoring and adaptive management requirements in a Section 401 certification will not result in compliance is appropriately addressed in a challenge to an agency’s issuance of certification, not in a citizen suit challenging the operation of a project. *Id.* at 1201. Judicial review of challenges to a state’s certification process typically occurs in state court. *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) (“A State’s decision on a request for Section 401 certification is generally reviewable only in State court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law.”).

B. Exceedances of Water Quality Criteria, Standing Alone, Do Not Violate a Section 401 Certification.

This Court should affirm the district court’s conclusion that “the exceedance alone of water quality criteria ... does not necessarily constitute a violation” of conditions in the Project’s Section 401 certification. *Deschutes River Alliance*, 331 F. Supp. 3d at 1202. In this context, state agencies can reasonably determine in a Section 401 certification that projects will comply with water quality standards

³ The district court essentially adopted Oregon DEQ’s own position as expressed in filings in the district court proceeding. *See Deschutes River Alliance*, 331 F. Supp. 3d at 1202 (quoting DEQ filing).

over the lifetime of a license or permit despite occasional exceedances of water quality criteria.

As an initial matter, the district court’s approach to interpreting the certification—as a contract—was the proper one. *See Nw. Env’tl. Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995) (court should review permit as it “would the interpretation of a contract or other legal document”); *see also Nat. Res. Def. Council v. Cty. of Los Angeles*, 725 F.3d 1194, 1206 (9th Cir. 2013) (court must give effect to every word or term in permit). As noted above, Section 401 certifications may concern project sites where strict compliance with all water quality standards is not always possible. *Cf. Miners Advocacy Council, Inc. v. State Dep’t of Env’tl. Conservation*, 778 P.2d 1126, 1138 (Alaska 1989) (Section 401 certification “do[es] not necessarily require [agency] to provide absolute certainty that permittees will never violate state standards, assuming this sort of guarantee is even possible.”). Steps taken by a project to meet one water quality standard may inadvertently but unavoidably cause a violation of another standard. In the case below, for example, the district court noted undisputed evidence that “there are no measures that can lower pH without adversely affecting temperature, dissolved oxygen, and fish passage. *Deschutes River Alliance*, 331 F. Supp. 3d at 1209 (citing record evidence). Under such circumstances, a Section 401 certification may balance such factors and should be interpreted as a whole to give

effect to the goal to *reduce* occasional exceedances.

The district court's reasoning is supported by other cases. As noted above, the Fourth Circuit upheld a Section 401 certification that explicitly contemplated exceedances and required sampling, consultation, and remedial steps. *Sierra Club*, 898 F.3d at 404. The North Carolina Court of Appeals affirmed a state certification determination based on the agency's computer model that showed compliance on average despite some daily exceedances of a daily maximum water quality standard. *See Deep River Citizens Coalition v. N.C. Dep't for Env'tl. & Nat. Res.*, 598 S.E.2d 565, 569 (N.C. Ct. App. 2004); *see also Sound Rivers, Inc. v. N.C. Dep't of Env'tl. Quality, Div. of Water Res.*, 845 S.E.2d 802, 842–43 (N.C. Ct. App. 2020) (upholding wastewater discharge permit that included specific monitoring and reporting requirements where “no one will know precisely whether or to what extent’ violations of various water quality standards, including standards not addressed in this opinion, may occur until after discharge of wastewater begins”) (quoting *Deep River*, 598 S.E.2d at 569). Similarly, the Washington Supreme Court approved a Section 401 certification that required that “contingency plans shall be implemented to bring the project back into compliance” when monitoring revealed water quality standards were being violated. *Port of Seattle*, 90 P.3d at 678. In the case below, the district court properly focused the inquiry not on individual exceedances of water quality standards, but on whether the Project was

being operated in accordance with the specific measures and adaptive management requirements contained in the certification. This Court should affirm the district court's commonsense approach.

II. CONCLUSION

For the foregoing reasons, IPC urges the Court to affirm the district court.

Dated this 5th day of October, 2020.

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