Nos. 18-35867, -35932, -35933

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

DESCHUTES RIVER ALLIANCE,
PLAINTIFF-APPELLANT/CROSS-APPELLEE,
v.
PORTLAND GENERAL ELECTRIC COMPANY AND THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
DEFENDANTS-APPELLEES/CROSS-APPELLANTS.

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

SECOND BRIEF ON CROSS-APPEAL OF PORTLAND GENERAL ELECTRIC COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Portland General Electric Company states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: September 28, 2020

/s/ Misha Tseytlin
MISHA TSEYTLIN

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INTRODUCTION

More than fifteen years ago, the Oregon Department of Environmental Quality ("the Department") and other state agencies, the National Marine Fisheries Service and other federal natural resource agencies, several environmental nongovernmental organizations, the Portland General Electric Company ("Portland General"), and the Confederated Tribes of the Warm Springs Reservation of Oregon[1] ("the Tribe") completed a careful, painstaking process to improve the operation of the Pelton Round Butte Hydroelectric Project ("Pelton Project"). This involved years of close collaboration between these entities, who all share the common goal of protecting the water quality of the Deschutes River, while safeguarding and restoring the treaty-protected populations of anadromous fish that are of paramount, cultural concern to the Tribe. The outcome of this lengthy negotiation was a well-considered plan that the Department embodied in a certification under Section 401 of the

[1] The Tribe comprises a confederations of the Warm Springs, the Wasco, and the Paiute tribes. ER 5. Citations of "ER" refer to the "Excerpts of Record." Dkt. 29-1. Citations of "SER" refer to Portland General's "Supplemental Excerpts of Record," filed contemporaneously with this Brief. Citations of "Dkt." refer to this Court's docket.

Clean Water Act, and which the Federal Energy Regulatory Commission ("FERC") approved as part of its 2005 license for the Pelton Project.

The Deschutes River Alliance ("the Alliance") now seeks, years later, to upend this carefully balanced compromise. The parties to the Section 401 Certification—the Department, Portland General, and the Tribe—understood the certification to include a flexible, adaptive management approach to administering the Project. This was necessary, these parties well understood, because the Section 401 Certification's water-quality and fish-passage goals are often in tension with one another; measures needed to achieve individual water-quality criteria may be inconsistent with providing fish passage or meeting other water-quality criteria. The Pelton Project must be adaptively managed to achieve an appropriate balance of these goals.

The Alliance takes a different view, arguing that the certification embodies an inflexible requirement that makes the Project responsible for ensuring that the river downstream never exceeds any individual water-quality criterion, regardless of adverse effects on fish passage or other water-quality criteria. As the district court correctly concluded, the undisputed evidence establishes that under the Alliance's reading, it

would be *impossible* for the Project to comply with the certification's terms, given the unavoidable tension between the certification's various criteria, including maintaining fish passage. That means that the Alliance's lawsuit seeks some manner of wholesale reconfiguration of the Pelton Project, although the Alliance refuses to explain what form that redesign would take or how the Project could achieve the criteria.

This Court should remand this lawsuit for dismissal for two independently sufficient reasons. First, the Alliance has failed to show the redressability element of Article III standing. The Alliance brought this lawsuit to vindicate its claimed interest in the fish and water quality of the Deschutes River. But it has repeatedly refused to explain what judicial remedy would vindicate that interest. The reason for the Alliance's failure on this point is, of course, that the certification has *already* determined how the Project should be designed and operated to achieve the best balance of fish and water-quality goals, given the unavoidable tension among them, and Portland General and the Tribe operate the Project in accordance with the certification. The Alliance's repeated failure to explain what remedy would cause it to suffer less of the injuries it claims to be seeking to vindicate is fatal to its Article III

standing. Second, as described in detail by the Tribe and more briefly below, this lawsuit should be dismissed because the Tribe is a necessary and indispensable party, and it has sovereign immunity for this lawsuit that Congress has not unequivocally abrogated.

If this Court reaches the merits, it should affirm the district court's grant of summary judgment in favor of Portland General and the Tribe. In doing so, this Court should uphold the district court's conclusion that the Department, Portland General, and the Tribe correctly understood the meaning of the certification. The certification repeats over and again that Portland General and the Tribe must "undertake to *reduce* the Project's" exceedances through adaptive management techniques, and nowhere embodies the inflexible, unfeasible requirement that they are responsible for ensuring that each individual water-quality criterion is always met, regardless of adverse effects on fish passage and other water-quality parameters. The Alliance's contrary argument is based upon a myopic focus on certain snippets of the certification's text, without considering other text, context, the parties' mutual understanding, or their course of performance.

JURISDICTIONAL STATEMENT

The district court lacked jurisdiction over the Alliance's lawsuit because the Alliance has no Article III standing, *see infra* Part I.A, and because the Tribe is an indispensable party, which has not waived its sovereign immunity, *see infra* Part I.B. This Court has jurisdiction to adjudicate the Alliance's appeal because the Alliance filed a notice of appeal on October 17, 2018, ER 43–44, and has jurisdiction to adjudicate Portland General's cross-appeal and the Tribe's cross-appeal because they each filed timely notices of appeal on October 31, 2018, SER 23–28.

STATUTORY AND REGULATORY AUTHORITIES

All applicable statutes and regulations are contained in the Opening Brief or addendum to the Opening Brief of Plaintiff-Appellant/Cross-Appellee Deschutes River Alliance or in the Addendum to this Second Brief On Cross-Appeal.

STATEMENT OF THE ISSUES

1. Whether the Alliance lacks Article III standing given that it has not explained what judicially administrable remedy would redress its claimed harms.

2. Whether this case must be dismissed because the Tribe is an indispensable party, and Congress did not unambiguously abrogate the Tribe's sovereign immunity.

3. Whether the district court properly granted summary judgment to Portland General and the Tribe by holding that all of the parties to the Section 401 certification at issue correctly understood the certification's meaning.

STATEMENT OF THE CASE

A. Legal Background

Section 401 of the Clean Water Act requires a federal hydropower license applicant that discharges to waters of the United States to obtain a "certification" from the State where the discharge occurs, which certifies that the discharge will comply with applicable water-quality standards and other specified requirements of the Clean Water Act. 33 U.S.C. § 1341(a)(1); *see PUD No. 1 of Jefferson Cty. v. Wash. Dep't of*

Ecology, 511 U.S. 700 (1994). In such a Section 401 certification, the State can "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" the applicant's compliance with applicable water quality standards and "any other appropriate requirements of State law set forth in such certification." *Id.* at 708 (quoting 33 U.S.C. § 1341(d)).

The Federal Power Act embodies "a broad federal role in the development and licensing of hydroelectric power," *California v. FERC*, 495 U.S. 490, 496 (1990), by, as relevant here, granting to FERC the exclusive authority to "issue licenses . . . for the purpose of constructing, operating, and maintaining" hydropower projects on navigable waters, 16 U.S.C. § 797(e). An applicant for a hydropower license, like an applicant for any other federal license that involves a discharge to waters of the United States, must obtain a Section 401 certification from the State, which certification "shall become a condition" of the FERC-issued license. 33 U.S.C. § 1341(d); *see PUD No. 1*, 511 U.S. at 709. Once FERC issues a hydropower license, it retains the exclusive authority to "monitor and investigate compliance with [the] license," 16 U.S.C. § 823b(a), to "issue an order revoking any license," *id.* § 823b(b), "to require the

modification" of the license, *id.* § 803(a)(1), or to impose "other conditions" on the license at its "discretion," *id.* § 803(g). The Federal Power Act provides a procedure for modifying a FERC-issued license, 16 U.S.C. § 803(a)(1), including requiring that the party seeking such relief first seek relief from FERC before coming to federal court, *see* 16 U.S.C. § 825*l*.

The Clean Water Act's citizen-suit provision allows "any citizen" to "commence a civil action on his own behalf" against "*any person*" alleged to be in violation of "an effluent standard or limitation." 33 U.S.C. § 1365(a)(1) (emphasis added). This "any person" language defines the permissible defendants in such a citizen-suit and includes "(i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution." 33 U.S.C. § 1365(a)(1). As described in detail by the Tribe and more briefly below, this provision does not abrogate the sovereign immunity enjoyed by Indian tribes. *See infra* pp. 54–58.

B. Factual Background

1. Historical Background Of The Pelton Project

Portland General and the Tribe jointly own and operate the Pelton Project, which is situated within and adjacent to the Tribe's Reservation,

the Warm Springs Indian Reservation, on the Deschutes River in Jefferson County, Oregon. ER 8. The Project comprises a series of three dams—the Round Butte Dam, the Pelton Dam, and the Reregulating Dam—and related generating and transmission facilities. ER 141. The Round Butte Dam, the uppermost of the three dams, forms Lake Billy Chinook, which is the largest reservoir of the Project. ER 142; SER 111. The Pelton Dam is located seven miles downstream from the Round Butte Dam. ER 142. The Reregulating Damn, in turn, is located below the Pelton Dam and is primarily used to distribute uneven discharges from the two upper dams to approximate the natural flow of the Deschutes River. ER 142.

Portland General first obtained a 50-year license to build and operate the Pelton Project in 1951 from the Federal Power Commission, the predecessor to FERC. ER 8; *Portland Gen. Elec. Co.*, 10 F.P.C. 445, 450 (1951). Four years later, in 1955, the Tribe and Portland General entered into an agreement that granted Portland General easements to construct and operate the Project and that affirmed the Tribe's right to construct and operate power-generation facilities in the Reregulating Dam. ER 142. Portland General completed construction of the Pelton

and Reregulating Dams in 1958, and the Round Butte Dam in 1964. ER 142. FERC amended the Project's license in 1980 to designate Portland General and the Tribe as joint licensees. ER 143; *Portland Gen. Elec. Co.*, 10 F.E.R.C. ¶ 62,142 (1980).

Under the original 50-year license, the Pelton Project provided clean, emission-free energy to tens of thousands of Oregon families. *See* 10 F.P.C. at 447–48, 454. The Project, however, created a total barrier to fish migration, including salmon and steelhead, which were prevented from reaching historical spawning and rearing areas. SER 162. This impact on fish movement and spawning had a "profound[ly]" negative "effect" on the Tribe and its members. ER 146. Further, the Project at this time also did not meet all of the water-quality criteria for the portion of the Deschutes River immediately below the Project's final dam. ER 9, 145; SER 162–63.

2. Settlement Agreement And The 2005 FERC License

In June 2001, near the end of the Project's 50-year license term, Portland General and the Tribe filed their application to relicense the Project with FERC and applied for Section 401 water-quality certifications from both the Tribe's Water Control Board and the Oregon

Department of Environmental Quality (hereinafter, collectively, "Section 401 Certification"). ER 145. Oregon's water quality standards designate the portion of the Deschutes River downstream of the Project for "Fish and Aquatic Life" year-round and for salmon and steelhead spawning use between October 15 and June 15. The standards also contain numeric and narrative water-quality criteria to protect those uses. OAR 340-041-0130(1), Table 130A; *id.*, Figure 130B; ER 6. These include numeric water-quality criteria for temperature, dissolved oxygen, and pH (hydrogen ion concentration), *see* OAR 340-041-0028 (temperature); -0016 (dissolved oxygen); -0021 (pH); ER 6–7, which criteria the Project had failed to meet before the 2005 relicensing, ER 9, 145; SER 162–63. The Department and the Tribe issued separate Section 401 certifications for the Project in June 2002. ER 145; SER 99. These Certifications reference and incorporate a Water Quality Management and Monitoring Plan and a then-proposed Fish Passage Plan, the terms of which are discussed below. *Infra* pp. 13–23.

Several stakeholders objected to the license application before FERC, which led to the formation of a Settlement Working Group. ER 145–46. The parties to the Settlement Working Group included

Portland General, the Tribe, regulators, other interested government parties, and environmental groups. *See* ER 145–46.[2] This led to a "Settlement Agreement Concerning the Relicensing of the Pelton Round Butte Hydroelectric Project, FERC Project 2030" ("Agreement"). ER 9, ER 149–51 (excerpts of Agreement). The "centerpiece" of this Agreement was the adoption of the proposed Fish Passage Plan, including the core requirement to construct and operate a selective water withdrawal facility, which is overseen by a "Fish Committee" composed of Portland General, several non-governmental organizations, and various federal, state, and tribal agencies. ER 10, 146.

On June 21, 2005, FERC approved the Agreement and issued a new 50-year license to Portland General and the Tribe as joint licensees. *Portland Gen. Elec. Co.*, 111 F.E.R.C. ¶ 61,450 (2005); ER 147 (Decl. of

[2] The Settlement Working Group parties were: Portland General; the Tribe; U.S. Department of the Interior's Bureaus of Indian Affairs, Land Management, and Fish and Wildlife Service; National Marine Fisheries Service; the U.S. Department of Agriculture's Forest Service; the Oregon Department of Environmental Quality; the Oregon Department of Fish and Wildlife; the Oregon Water Resources Department; the Oregon Parks and Recreation Department; Deschutes County, Oregon; Jefferson County, Oregon; City of Bend, Oregon; City of Madras, Oregon; City of Redmond, Oregon; Avion Water Company; American Rivers; Oregon Trout; The Native Fish Society; Trout Unlimited; and WaterWatch of Oregon. ER 145–46. The Settlement Working Group did not include the Alliance.

Charles Calica). The 2005 FERC license incorporates the Section 401 Certification, the Water Quality Management and Monitoring Plan adopted as part of the Section 401 Certification, and the Fish Passage Plan. The Section 401 Certification also requires compliance with the Fish Passage Plan. ER 10, 146–47; 111 F.E.R.C. ¶ 61,450, at 62,929, 62,941. The 2005 FERC license also requires Portland General to conduct water-quality monitoring pursuant to the Water Quality Management and Monitoring Plan and to file annual reports with the Department and the Tribe's Water Control Board, copying FERC and the Fish Committee. ER 147.

3. Current Pelton Project Overview

Portland General and the Tribe have successfully operated the Pelton Project consistent with the 2005 FERC license and the Section 401 Certification, while working closely with the Oregon Department of Environmental Quality.

a. The Selective Water Withdrawal Facility. The facility, constructed in 2009, is expressly required by the Section 401 Certification and the 2005 FERC license and, indeed, is at the core of both. Portland General and the Tribe designed the selective water withdrawal facility in

consultation with the Fish Committee, state, federal, and tribal agencies; FERC approved the design. ER 10.

This facility allows the Project to draw water from both the surface of Lake Billy Chinook (which is warmer) and from the lake's bottom (which is colder) to pass downstream to the other dams. SER 197; *see* ER 15–16. These calibrated proportions of warm and cold water are called "blends." *See* ER 11–12. The facility also contains a "Fish Handling Facility" that helps the passage of fish downstream. SER 101–02; *see* SER 112, 130. The surface flows in the reservoir created by the selective water withdrawal facility are essential to the successful passage of fish downstream by attracting fish to the fish handling facility. *See* SER 129–30. Fish can now pass both upstream and downstream through the Project, ER 15, which is a "remarkable achievement" for the Tribe and its members, SER 198. The facility also helps achieve compliance with water-quality criteria in the river downstream of the Project. Prior to the facility, the Round Butte Dam only drew cold water from the bottom of Lake Billy Chinook, which resulted in the Project exceeding water-quality criteria for temperature, dissolved oxygen, and pH. SER 100–01, 162–63; *see* ER 10. Now, by selectively blending warm and cold

water, the Project can better manage water conditions. SER 101, 113, 197; ER 10.

b. Temperature, Dissolved Oxygen And pH Criteria. The Section 401 Certification requires Portland General and the Tribe to adaptively manage the Project, including the selective water withdrawal facility, in accordance with the Water Quality Management and Monitoring Plan and the Fish Passage Plan. ER 229, 240–41. The Water Quality Management and Monitoring Plan contains a Water Temperature Management Plan, a Dissolved Oxygen Management Plan, and a pH Management Plan—which means that the Project has four criteria relevant here: temperature, dissolved-oxygen, pH, and fish passage. ER 154, 156, 164, 229, 232, 234. And the Section 401 Certification requires Portland General to implement a Water Quality Monitoring Plan. ER 229, 232, 234. The Section 401 Certification also provides, in "Condition S," that "[n]otwithstanding the conditions of this certification, no wastes shall be discharged and no activities shall be conducted which violate state water quality" criteria. ER 245. Below is an explanation of the Water Quality Management and Monitoring Plan's temperature,

dissolved-oxygen, and pH criteria—as incorporated in the Section 401 Certification.

Temperature. The Section 401 Certification provides that the "[selective water withdrawal] facility shall be operated in accordance with the Temperature Management Plan (TMP) contained in the [Water Quality Management and Monitoring Plan]," and that the "TMP shall identify those measures that [Portland General and the Tribe] will undertake to reduce the Project's contribution to exceedances of water quality [ ] criteria for temperature." ER 229. The Water Quality Monitoring Plan "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." ER 229.

The district court held that the Water Quality Management and Monitoring Plan's Temperature Management Plan adopts "[t]he applicable [Oregon] . . . water quality" criteria that are "found in OAR 340-41." ER 156. Thus, the State's "current temperature" criteria in that

rule govern, despite the Water Quality Management and Monitoring Plan's discussion of "outdated" temperature criteria. ER 26–27. Under the current state-law criteria, the "seven-day-average maximum temperature" of the river "may not exceed 13.0 degrees Celsius (55.4 degrees Fahrenheit)" from October 15 to June 15 and 16.0 degrees Celsius from June 16 to October 14. OAR 340-041-0028(4)(a); ER 22–23. By agreement with the Oregon Department of Environmental Quality, however, Portland General manages the Project more stringently to achieve a target of 13.0 degrees Celsius year-round. *See* ER 81 (also discussing a 0.3-degree warming allowance for the Project in accordance with the state criteria when the river does not meet the target). To meet this temperature target, Portland General operates the selective water withdrawal facility to withdraw colder, bottom water from the reservoir, as needed. ER 15–16.

Dissolved Oxygen. The Section 401 Certification states that the "[selective water withdrawal facility] shall be operated in accordance with the Dissolved Oxygen Management Plan (DOMP) contained in the [Water Quality Management and Monitoring Plan]," and that this Plan "shall identify those measures that [Portland General and the Tribe] will

undertake to reduce the Project's contribution to violations of water quality [ ] criteria for dissolved oxygen." ER 232. The Water Quality Monitoring Plan "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 [Dissolved Oxygen Management Plan] 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." ER 232.

As the district court held, the Water Quality Management and Monitoring Plan adopts a dissolved oxygen concentration of at least 9.0 mg/L between October 15 and June 15, which is the spawning period for certain fish in the Deschutes River, as defined by the Oregon Department of Environmental Quality. ER 161 (incorporating criteria in OAR 340-41); ER 29–31. For the remainder of the year, the Water Quality Management and Monitoring Plan adopts a dissolved oxygen concentration of over 8.0 mg/L as a 30-day mean minimum, 6.5 mg/L as a seven-day minimum mean, and 6.0 mg/L as an absolute minimum. ER 30, 161; OAR 340-041-0016(2), Table 21.

pH. The Section 401 Certification provides that the "[selective water withdrawal facility] facility shall be operated in accordance with the pH Management Plan (PHMP) contained in the [Water Quality Management and Monitoring Plan]," and that the "PHMP shall identify those measures (including 'all practicable measures' in impoundments) that [Portland General and the Tribe] will undertake to reduce the Project's contribution to exceedances of the water quality criteria for pH." ER 234. Additionally, the Section 401 Certification provides that the Water Quality Monitoring Plan "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." ER 234.

The Water Quality Management and Monitoring Plan adopts pH values within the range of 6.5–8.5 in the portion of the Deschutes River below the Project. ER 164 (citing criteria in OAR 340-41); ER 34; OAR 340-041-0021; OAR 340-041-0135(1)(a) (Basin-Specific Criteria). Project reservoirs must meet the same range, with an exception "for exceedances

of 8.5 in instances where all practical measures are being employed to minimize exceedance." ER 34, 164.

c. Adaptative Management Requirement. Because the Settlement Working Group relied on "mathematical models," with "no way to know how accurately these models would match the response of the reservoirs and river once the [selective water withdrawal facility] became operational," ER 13 (quoting SER 102–03)—and because the Project was not meeting all water-quality criteria at the time of the Section 401 Certification's issuance, *see, e.g.*, ER 9–10—the Water Quality Management and Monitoring Plan requires Portland General and the Tribe to use "an adaptive management approach" to limit exceedances in the Project's temperature, dissolved-oxygen, pH criteria, and fish-passage goals, ER 154. "Adaptive management" means that once Portland General and the Tribe implement a specific measure to mitigate the Project's impact on a water-quality criterion or on fish passage, they must monitor and evaluate that measure and then implement adjustment measures in accordance with the Water Quality Management and Monitoring Plan if water-quality or fish-passage goals are not met. SER 165–66; ER 14. This allows "changes in future management actions

that reflect the knowledge gained through these [adjustment] measures" to better meet the water-quality and fish-passage goals. SER 165–66.

This adaptive management approach is also essential "[b]ecause operation of the selective withdrawal facility has the potential to affect numerous water quality [criteria]," including "fish passage success," meaning that "changes in the operation of the selective withdrawal facility must consider all possible impacts, not merely a single water quality [criterion]." ER 154. Particularly challenging is the fact that the criteria for temperature, dissolved-oxygen concentration, and pH are at times in tension with one another and with fish passage, *see* SER 107, 113–14, meaning that "it is sometimes impossible" "to achieve all water quality and fish passage objectives simultaneously," *see* SER 114–16 (Decl. of Lori Campbell); *see also* ER 12–13 & n.2. For example, increasing the proportion of cold deep water discharged by the selective water withdrawal facility to lower water temperature pursuant to the Temperature Management Plan can impair fish passage. ER 137 (Decl. of Charles Calica); SER 113–14 (Decl. of Lori Campbell); SER 131 (Decl. of Megan Hill, Project Fisheries and Water Quality Manager); ER 12–13. Withdrawing deep water also reduces the dissolved-oxygen concentration

downstream of the Project because bottom water is relatively low in dissolved oxygen compared to surface water. ER 58–59 (Decl. of Lori Campbell). Further, "[t]here is no operational procedure that can lower pH without adversely affecting temperature or dissolved oxygen," as lower-pH water is found at the bottom of the reservoir, which water is lower in temperature and dissolved oxygen. ER 50 (Decl. of Eric Nigg); ER 13 (district-court opinion). Releasing this cold water to lower pH when the water temperature does not need to be lowered decreases the amount of cold water that is later available to reduce temperatures when needed. ER 13, 50.

In light of these unavoidable tensions, the Section 401 Certification outlines measures that Portland General and the Tribe must take based on current observed conditions. With respect to temperature, the Water Quality Management and Monitoring Plan states that "[i]f the temperature approaches the maximum limit, the percentage of deep water discharged" by the selective water withdrawal facility "will be adjusted upward." ER 160. As for dissolved oxygen, the Water Quality Management and Monitoring Plan states that "if under the temperature management selective withdrawal regime it appears that the [dissolved

oxygen] concentration in the Reregulating Dam discharge is going to drop below" an applicable saturation percentage, Portland General and the Tribe "will institute controlled spills at the Reregulating Dam" to raise dissolved oxygen concentration. ER 162. And for pH, the Water Quality Management and Monitoring Plan provides that "if pH at the Reregulating Dam is found to exceed that of the weighted average of the inflows," Portland General and the Tribe must immediately contact the Department and the Tribe's Water Control Board "to develop an approach to reduce pH that is consistent with maintaining compliant temperature and DO values and surface withdrawal volumes necessary to facilitate smolt movement in Lake Billy Chinook." ER 165.

d. The Parties' Course Of Performance. Both before and after the beginning of the operation of the selective water withdrawal facility in 2009, the Project exceeded the specific temperature, dissolved-oxygen, and pH criteria set out in the Water Quality Management and Monitoring Plan. *See* ER 15. This was due, in part, to the "competing nature of blending" warm and cold water to achieve water-quality and fish-passage objectives and to the need of the facility's operators to learn how to optimize mitigation efforts. *See* ER 15. So, consistent with "the

context of adaptive management as required by the [Water Quality Management and Monitoring Plan]," Portland General and the Department entered into a series of interim agreements that established the proper operation of the selective water withdrawal facility for a given year, *e.g.*, ER 63 (2011 Interim Operating Procedure), and "provid[ed] a framework . . . to evaluate management and monitoring measures that may be needed to ensure continued compliance with [water quality criteria]," *e.g.*, ER 81. This "facilitated the experimentation necessary to better understand the [selective water withdrawal] system," SER 105, which is core to adaptive management, and "established achievable goals for the Project and new methods of compliance," ER 28; *see also* SER 105.

The Department has concluded that Portland General and the Tribe have complied with the Section 401 Certification, given that they have "worked diligently to manage these facilities in the most effective way to achieve outcomes expressed in the [Water Quality Management and Monitoring Plan]." SER 107; *see also* ER 45 (Department's 2004 Section 401 Certification compliance letter). Moreover, the Department needed the several-years-long operational effort under the interim agreements "for the operations to be smooth and predictable enough for

[it] to reasonably expect to see routine compliance with the applicable criteria." SER 105–06. As a result, the Project has now "largely met the currently applicable water quality [criteria] for temperature and dissolved oxygen" set out in the interim agreements "for approximately the last 5 years." SER 107. And when Portland General observed "a departure from expected temperatures or dissolved oxygen," it "made timely changes to balance competing processes . . . as well as possible," as required by its adaptive management obligations. SER 107.

C. Procedural Background

The Alliance is a group of individuals who enjoy the Deschutes River and its tributaries near the Pelton Project. ER 5. The Alliance filed its one-count Complaint on August 12, 2016, naming only Portland General as a defendant and alleging violations of the Section 401 Certification as to temperature, dissolved-oxygen, and pH water-quality criteria. ER 270, 273, 278–79. The Alliance alleged that it had standing to bring this lawsuit because Portland General's "operation of the Project . . . degrades the Deschutes River's fish and other wildlife habitat, diminishes recreational opportunity, and harms the economic and

personal (including aesthetic) interests of [the Alliance's] members and supporters." ER 273.

Portland General—then supported by the Tribe as amicus curiae—moved to dismiss the Complaint on the grounds that the Tribe was an indispensable party that could not be joined, given the Tribe's sovereign immunity. SER 2. The district court denied this motion. SER 22. While the district court concluded that the Tribe was a necessary party, it then held that the Tribe could be joined because the district court believed that Congress had expressly "abrogated tribal sovereign immunity for citizen suits" under the Clean Water Act's citizen-suit provision. SER 13, 22. The court then ordered the Alliance to amend its Complaint to name the Tribe as a defendant. SER 22. The Alliance filed an Amended Complaint against Portland General and the Tribe, reasserting the exact same claim as in its original Complaint, while relying upon the same claimed harms for standing. SER 87–88.

The parties then each moved for summary judgment.

The Alliance moved for partial summary judgment solely on the question of Portland General's liability for violations of the Section 401 Certification. SER 285. The Alliance first argued that it had standing

for much the same reasons asserted in its Amended Complaint. SER 286–90. The Alliance then asserted that monitoring data from the Pelton Project showed that the Project "routinely violated the § 401 Certification's requirement[s]" with respect to temperature, dissolved oxygen, and pH, since that data showed exceedances of each of those criteria on multiple days since August 2011 or January 2012. SER 290–93. The Alliance did not explain how the court could remedy any injuries that it allegedly suffered; rather, it simply *asserted* that "[c]ompliance with all conditions of the § 401 Certification would improve water quality." SER 290; *see* SER 31. The Alliance thus asked the court to find Portland General and the Tribe liable for violations, while leaving "the question of relief" and "determining remedies" for a later date. SER 96.

When the district court pressed the Alliance's counsel at the summary-judgment hearing as to how the Alliance could establish Article III standing without explaining what judicial remedy would redress its harms, SER 40, counsel variously stated that "the potential remedy is so complex" that "it makes sense to separate remedy from liability here," SER 41–42, and that the court could "order [Portland General] to figure

out a way to make the project comply" with the Section 401 Certification, SER 48; *see also* SER 42–44.

Portland General opposed the Alliance's partial-summary-judgment motion and moved for summary judgment, arguing, as relevant here, that the Section 401 Certification requires Portland to "adaptively manag[e] the Project to achieve a careful balance of the[ ] fish passage and water quality objectives." SER 134. Thus, monitoring data showing the exceedance of individual water-quality objectives cannot, as a matter of law, demonstrate a violation of the Section 401 Certification. SER 134. Further, the Alliance "presented no evidence that the Project has failed to comply with any of the Certification's required adaptive management measures." SER 137. The Alliance conceded that it did not "squarely address the question of Defendants' adaptive management performance because [it] believed that question was relevant to the need for and breadth of relief, and not to Defendants' liability for violations." SER 30.

The district court granted summary judgment to Portland General and the Tribe. ER 4–38. The court held that the Section 401 Certification "prescribe[s] the measures and processes Defendants are to use in operating the Project, with the goal being to *reduce* exceedances of water

quality" criteria. ER 21 (emphasis added). The Project exceeding a given metric on a given day does not "constitute[ ] a violation of the Certification." ER 20. The court further explained that "Condition S" in the Section 401 Certification does not change the result. The district court explained that this Condition is "general text" only serving as a "savings clause," which general text does not override the more specific language in the Section 401 Certification. ER 22–23. With this interpretation of the Section 401 Certification settled, the court held that there was no dispute that Portland General and the Tribe were not operating the Project in accord with the Section 401 Certification across the temperature, dissolved-oxygen, and pH water-quality criteria, following all mandatory adaptive manage requirements. ER 25–37.

The Alliance timely appealed the grant of summary judgment, ER 43–44, and Portland General and the Tribe timely cross-appealed, SER 23–28.

SUMMARY OF ARGUMENT

I. The Court should remand for dismissal for two reasons.

A. The Alliance lacks Article III standing because it has failed to establish redressability. *See Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

To begin, the Alliance has repeatedly failed to explain what judicially administrable remedy would redress the harms that the Alliance complains of. The criteria at issue here—temperature, dissolved oxygen, pH, and fish passage—are sometimes in tension with one another, such that it is at times impossible to avoid all exceedances of these criteria. This is why the Section 401 Certification requires adaptive management of the Project to achieve the best *overall* balance of these criteria. Given this delicate balance, the Alliance has never explained what injunction could lead to a better overall outcome, from the point of view of the harms it is purporting to allege here. That is fatal to the Alliance's redressability showing, mandating dismissal of this case.

The Alliance has also failed to show redressability for the independent reason that the district court lacks the power to issue the remedy that the Alliance appears to seek. The Alliance appears to desire

a wholesale reworking of the Project, but any such remedy would require a federal court to order that the Department modify the Section 401 Certification in some manner, and that FERC agree to amend the 2005 license. But neither the Department nor FERC are parties here (and FERC need not amend the Project's license at all, even if the Department were inclined to modify the Section 401 Certification at this time as the Alliance wishes), thus the district court could not bind them in this case. Moreover, the Alliance has not followed the statutory procedures for challenging a FERC decision for a FERC-issued license.

B. Second, tribal immunity bars the Alliance's lawsuit, as the Tribe is a necessary and indispensable party that cannot be joined, since Congress has not unambiguously abrogated the Tribe's sovereign immunity.

The Tribe is a necessary and indispensable party. The Tribe is necessary because it has an ownership interest in the Project; that interest could be impaired by a finding that the Project is not operating in accordance with its Section 401 Certification; and Portland General cannot adequately protect the Tribe's interests, since the Tribe has unique interests in both the operation of the Project and in its effect on

the surrounding natural resources. The Tribe is also indispensable, since the district court could order a remedy in this case that fundamentally changes the operation of the Project, having a profoundly negative impact on the Tribe.

The Tribe enjoys sovereign immunity and the Clean Water Act's citizen-suit provision, the basis of this suit, does not unequivocally abrogate that immunity. Although that provision permits suits against "any person," the word "person" alone does not include the Tribe. Further, while another Clean Water Act provision—which neither cross-references the citizenship-suit provision, nor is cross referenced by it—defines "person" to include a "municipality" and then a "municipality" to include "an Indian tribe," that opaque definitional chain falls far short of an unequivocal congressional abrogation. Further, the citizen-suit provision expressly abrogates sovereign immunity for two *specifically referenced* types of sovereigns—"including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution," 33 U.S.C. § 1365(a)—which does not include sovereign tribes.

II. If the Court reaches the merits, it should affirm the district court's grant of summary judgment to Portland General and the Tribe.

A. Using ordinary principles of contract interpretation relevant here, the district court was correct to conclude that the Section 401 Certification requires Portland General and the Tribe to undertake to *reduce* the Project's exceedances of water-quality criteria using adaptive management techniques, not to actually prevent all exceedances of every individual water-quality criterion, regardless of any adverse effects on the other criteria.

The relevant text in the Section 401 Certification itself provides, over and again, that Portland General and the Tribe "will undertake to reduce the Project's contribution" to exceedances through adaptive management techniques. And the Section 401 Certification even contemplates operation of the Project in a manner that exceeds water-quality criteria.

The broader context provided by the Water Quality Management and Monitoring Plan and the Fish Passage Plan, both incorporated by the Section 401 Certification, further support the district court's interpretation. The Water Quality Management and Monitoring Plan's

first substantive section explicitly states that Portland General and the Tribe "shall operate the selective withdrawal facility pursuant to general adaptive management considerations," and the provisions for temperature, dissolved-oxygen, and pH monitoring state that Portland General and the Tribe will "eventually improve" their operation of the selective withdrawal facility "[o]ver time." The Department, the Tribe, and Portland General have attached the same meaning to the Section 401 Certification, which strongly indicates that this is the correct interpretation, particularly against the claims of a nonparty like the Alliance.

The parties' course of performance also provides powerful support for the district court's holding. Portland General and the Tribe have consistently used adaptive management techniques to reduce exceedances of water-quality criteria, beginning shortly after the construction of the selective water withdrawal facility, with the Department's full knowledge and support. This is why the Department explicitly informed the district court that Portland General and the Tribe are in compliance with the Section 401 Certification.

B. The Alliance's extreme position that the Section 401 Certification requires each individual water quality criteria to be met on every single day, regardless of adverse effects on fish and other water quality criteria, is incorrect. While the Alliance cites isolated language in the Water Quality Management and Monitoring Plan, the Section 401 Certification as a whole establishes the overarching requirement to use adaptive management to reduce exceedances. The Alliance argues that even if the Section 401 Certification required adaptive management, exceedances would still violate the Section 401 Certification, but this is self-contradictory. The Alliance also points to Condition S of the Section 401 Certification for support, but that general provision, which states only that the Project shall not violate state water quality criteria, does not displace the far more specific adaptive management terms throughout the Section 401 Certification.

C. The district court correctly concluded that the undisputed evidence showed that Portland General and the Tribe have complied with the Section 401 Certification's adaptive management requirements for temperature, dissolved oxygen, and pH, and the Alliance has doubly waived any argument to the contrary by explicitly refusing to present

such arguments below and by failing to develop them in its first brief on appeal here. To the extent that this argument is somehow not waived, the Alliance's often disjointed assertions relating to the Project's exceedances are legally irrelevant and entirely meritless.

STANDARD OF REVIEW

This Court reviews de novo the district court's denial of a motion to dismiss for lack of jurisdiction, "accept[ing] as true the factual allegations in the complaint." *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). This Court reviews the district court's determination of whether a party is necessary under Federal Rule of Civil Procedure 19(a) "for an abuse of discretion." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002). However, "if the district court's determination . . . decided a question of law," *id.*, such as with regard to abrogation of sovereign immunity, *Cook v. AVI Casino Enters.*, 548 F.3d 718, 722 (9th Cir. 2008), that review is *de novo*, *id.*; *Am. Greyhound Racing*, 305 F.3d at 1022.

This Court reviews "a district court's decision on cross-motions for summary judgment de novo." *Avery v. First Resol. Mgmt. Corp.*, 568 F.3d 1018, 1021 (9th Cir. 2009). A court should grant summary judgment

"when, viewing the evidence in the light most favorable to the nonmoving party," there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* On cross motions, a court must "evaluate[s] each motion separately, giving the non-moving party in each instance the benefit of all reasonable inferences." *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 790–91 (9th Cir. 2006) (citations omitted). However, "the court must consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011).

ARGUMENT

I. This Court Should Remand This Case For Dismissal

A. The Alliance Lacks Article III Standing Because It Cannot Articulate What Judicial Remedy Would Redress Its Claimed Harms

The Alliance brought this lawsuit to vindicate its claimed interest in the "fish and other wildlife habitat," "recreational opportunity," and "economic and personal (including aesthetic) interests" of the Deschutes River. ER 273. But, in crafting the requirements for the Project and its operation included in the Section 401 Certification, the Department—working closely with federal, state, tribal and environmental groups—

has *already* determined the appropriate balance of measures to protect the water quality of the Deschutes River and to safeguard and enhance the fish population. *See supra* pp. 11–15. Thus, for the Alliance to show Article III redressability, it would need to identify a judicially administrable remedy that would *better* achieve its claimed interests than the status quo. The Alliance has failed to make this mandatory showing, arguing that the courts should find Portland General liable for violating the Alliance's understanding of the Section 401 Certification, App.Br. 27; *but see infra* Part II.A, while deferring any issues relating to "remedy" until later, App.Br. 27. The Alliance's approach here is legally inadequate, requiring dismissal of this lawsuit for lack of Article III standing.[3]

A. "[A] plaintiff may not invoke federal-court jurisdiction unless" the plaintiff can "satisfy the familiar three-part test for Article III

[3] In its briefing below, Portland General framed the problems stemming from the Alliance's refusal to articulate what judicially administrable remedy it seeks as requiring dismissal under the primary jurisdiction doctrine. *E.g.*, ER 293. At the summary-judgment hearing, the district court raised these defects as a matter of Article III standing, focusing on the redressability prong. SER 48–51. "Lack of Article III standing is," of course, "a non-waivable jurisdictional defect that may be raised at any time, even on appeal after failing to raise it in the district court." *Renee v. Duncan*, 686 F.3d 1002, 1012 (9th Cir. 2012).

standing: that [the plaintiff] (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (citations omitted). The third of these elements is known as "redressability," and looks at "relief *requested* by the plaintiffs," while asking whether such relief "would . . . remed[y] the[ ] injury in fact." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96, 108 (1998) (citation omitted). To meet its burden on this Article III redressability prong, the plaintiff must "show a substantial likelihood that the relief sought would redress the injury." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (citation omitted).

This Court has held that a plaintiff can fail to show Article III redressability in at least two independently fatal respects. First, the plaintiff fails to show Article III redressability if "a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, . . . unless [plaintiff] adduces facts to show that the defendant or a third party are nonetheless likely to provide redress as a result of the decision." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). Second, "even where a plaintiff requests relief that would redress her claimed

injury, there is no redressability if a federal court lacks the power to issue such relief." *Id.*; *accord Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017).

This Court's recent decision in *Juliana* illustrates the proper application of the two-element Article III redressability inquiry. There, 21 minors brought a lawsuit against the federal government, arguing that its "promot[ion of] fossil fuel use despite knowing that it can cause catastrophic climate change," will cause them grave "psychological harm" "impairment to recreational interests," and "exacerbated medical conditions." *Juliana*, 947 F.3d at 1164–65. This Court noted that the plaintiffs had compiled an "extensive record" to support their argument that the government's actions are causing them harm, *id.* at 1166–69, but nevertheless ruled that the lawsuit must be dismissed for lack of Article III redressability, *id.* at 1169–73. A mere declaration that the government was violating the plaintiffs' rights "is not substantially likely to mitigate the plaintiffs' asserted concrete injuries." *Id.* at 1170. Meanwhile, 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. *Id.* at 1170–71. In any event, the plaintiffs' lawsuit independently failed on the second redressability element because they did not explain how a court would go about "supervis[ing] or enforc[ing]" the type of injunction that the plaintiffs contemplated. *Id.* at 1171–73.

B. In the present case, the Alliance has failed to establish redressability, and thus lacks Article III standing to invoke the federal courts' jurisdiction. The Alliance has argued that the Pelton Project harms the enjoyment and aesthetic interests of its members, in terms of allegedly inadequate fish and water quality. SER 240–44. Yet, the Alliance failed to explain what judicially administrable remedy would redress these claimed harms. Instead, as this Court can see from the Alliance's brief here, the Alliance has steadfastly sought to evade the issue of what remedy it seeks by claiming that the federal courts should determine "liability," without even considering the issue of "remedy." App.Br. 27. Bedrock Article III principles foreclose that head-in-the-sand

approach. In *Juliana*, for example, this Court required dismissal of the lawsuit for lack of redressability without deciding the merits, even though the plaintiffs had submitted copious amounts of powerful, competent evidence of the harms they will suffer from climate change. 947 F.3d at 1166–69.

The Alliance failed to show redressability on both of the redressability elements; indeed, it has not even tried to make these mandatory showings.

1. The Alliance failed to show Article III redressability on the first redressability element because it has not explained how a "favorable judicial decision would . . . require the defendant to redress the plaintiff's claimed injury," nor would any third party "likely" redress that injury. *Brown*, 902 F.3d at 1083.

The Alliance has not articulated what remedy would improve the water quality and fish passage in the Deschutes River above the status quo. As the district court explained, "[t]he three water quality standards and goals at issue in this case—temperature, dissolved oxygen concentration, and pH, are sometimes in tension with one another, and with the Fish Passage Plan." ER 12. If the Project seeks to lower water

temperature to avoid a temperature exceedance by increasing cold deep-water discharges, this will impair fish passage and reduce dissolved-oxygen concentrations, leading to additional exceedances, while also making less cold water available for temperature control later in the year, leading to more exceedances later. ER 12–13. That is why the district court noted that it is "sometimes impossible for the Project" to avoid all exceedances. ER 12–13 n.2; ER 28 & n.8. Portland General submitted *undisputed* evidence supporting these conclusions. *See supra* pp. 21–22. Given these inherent tensions, the Department carefully developed certification conditions that will result in the best *overall* compliance with these sometimes-conflicting water-quality criteria, through the use of adaptative management techniques aimed at *reducing* exceedances. *See supra* pp. 20–23. The Alliance has never explained what injunction would lead to better overall outcomes on these metrics.

To the extent that the Alliance addresses this core defect in its lawsuit in its brief before this Court, its discussion is plainly inadequate to meet its jurisdictional burden. The Alliance claims that "[s]imultaneous compliance with pH and temperature limits on the one hand, and dissolved oxygen criteria on the other . . . is not *impossible*,"

but its *only* support for this claim is a tellingly denominated "*cf.*" citation that only shows that not *every single* cold deep-water discharge always results in a dissolved-oxygen exceedance. App.Br.26 (emphasis added). The Alliance's brief thus does nothing to displace the district court's well-considered conclusion, based upon undisputed record evidence, that the adaptive management techniques that Portland General and the Tribe are employing *already* strike a careful balance and thus reduce overall exceedances by preserving a complex equilibrium.

All of this is fatal to the Alliance's Article III redressability. While the Alliance wants the federal courts to find Portland General and the Tribe "liab[le]" for certain exceedances, App.Br. 27 (emphasis removed); *but see infra* Part II, the Alliance cannot evade its obligation to show that a "favorable judicial decision" would "require the defendant to redress the plaintiff's claimed injury," *Brown*, 902 F.3d at 1083. The Alliance has failed to explain what remedy would make the operation of the Project better from the point of view of protecting water quality and fish passage, given the unavoidable "tension" between the various water quality criteria and fish passage goals. ER 12. Instead, the Alliance has thrown up its hands and stated that the district could "order [Portland General]

to figure out a way to make the project comply" with the Section 401 Certification. SER 48. But as this Court made clear in *Juliana*, such a vague, the-defendants-can-figure-it-out mandate fails to satisfy the first redressability element. 947 F.3d at 1170–71.

2. The Alliance also failed to show Article III redressability under the second redressability element because, to the extent that Portland General can surmise what sort of remedy the Alliance is actually seeking, the Alliance appears to promote one that the district court "lacks the power to issue." *Brown*, 902 F.3d at 1083.

So far as Portland General can glean from the Alliance's submissions to the district court, the Alliance appears to want a wholesale reworking of the Pelton Project, such as by returning it to its operations before the installation of the selective water withdrawal facility. *See* SER 202–83 (Alliance's declarants criticizing the selective water withdrawal facility and the changes that they believe have occurred since the facility began to operate). Notably, the Alliance has not submitted any record evidence to support the conclusion that any such changes would *actually* reduce any of its claimed harms. After all, the reason that state, federal, tribal, and environmental entities entered

into the settlement that led to the requirements in both the certification and the 2005 FERC license to install and operate the selective water withdrawal facility was that the pre-selective water withdrawal facility conditions were devastating fish passage *and* undermining water quality. *Supra* pp. 8–13.

What is relevant for purposes of the second redressability element is that the district court here would have no authority to order any such relief in this case. *See Brown*, 902 F.3d at 1083. Any such relief requiring a wholesale reworking of the Pelton Project, including removing or ceasing to operate the selective water withdrawal facility, 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, meaning that any injunction "cannot bind [these] nonparties." *Smith v. Bayer Corp.,* 564 U.S. 299, 305 (2011); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Further, the Alliance does not explain how the district court would go about "supervis[ing] or enforc[ing]" a modification of the Section 401 Certification and the amendment of the FERC license (even

if FERC could be forced to make such an amendment, *but see Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1215 (W.D. Wash. 2003)), which are further Article III requirements, *Juliana*, 947 F.3d at 1171–73.

Further, and also independently fatal to the Alliance's redressability on this score, FERC has exclusive authority to issue or revise a hydropower dam license, including to remove the selective water withdrawal facility or otherwise approve a fundamental reworking of the operations of the Pelton Project. The Alliance has not followed the statutory-provided procedure for challenging a FERC decision regarding a FERC-issued license. 16 U.S.C. §§ 803(a)(1), 825*l*. Accordingly, the federal courts in this case "lack[ ] the power to issue" the relief that the Alliance appears to want for that additional reason. *See Brown*, 902 F.3d at 1083.

B. Tribal Immunity Bars This Lawsuit Because The Tribe Is A Necessary And Indispensable Party And Congress Has Not Unambiguously Abrogated The Tribe's Sovereign Immunity

As the Tribe powerfully explains in detail in its brief, Tribal immunity bars this lawsuit because the Tribe is an indispensable party,

and Congress has not unambiguously abrogated the Tribe's sovereign immunity.

1. As a threshold matter, the district court did not "abuse [its] discretion" when it held that the Tribe is a necessary party in this lawsuit, *Am. Greyhound Racing*, 305 F.3d at 1022, and the Tribe is also an indispensable party.

a. Federal Rule of Civil Procedure 19(a) provides the "framework for determining whether a party"—including an Indian tribe—"is necessary and indispensable." *Am. Greyhound Racing*, 305 F.3d at 1022. A party is "necessary" "if *any* of the following requisites [are] met: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." *Id.*; *see also* Fed. R. Civ. P. 19(a). If a party is "necessary," the district court must then determine whether that party is also "indispensable,"

Am. Greyhound Racing, 305 F.3d at 1024, by deciding "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," Fed. R. Civ. P.19(b). "To make this determination, [the court] must balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161–62 (9th Cir. 2002). If a party is indispensable and cannot be joined in the case, the lawsuit must be dismissed. *Id.* at 1155; *see also Jamul Action Comm. v. Simermeyer*, No. 17-16655, __ F.3d __, 2020 WL 5361652, at *10 (9th Cir. Sept. 8, 2020).

b. In the present case, the district court correctly held that the Tribe was a necessary party. First, the Tribe has a protectable interest in this lawsuit because it is a "co-licensee[ ] of the Pelton Project," "holds an ownership interest in the entirety of the Pelton Project, and serves as operator of the generation facilities at the Reregulating Dam," while holding treaty-based rights impacted by this litigation. SER 10. Second,

the Tribe's rights could be impaired by this lawsuit because "the question of whether the Pelton Project is being operated in violation" of the Section 401 Certification "could impair the Tribe's interest as co-operator and co-licensee of the Pelton Project," and any relief "would inevitably impact, or at least carry a risk of impacting, the Tribe's interests in the resources of the Deschutes River Basin." SER 11. Portland General does not adequately protect the Tribe's rights, as "[t]he Tribe has unique interests in not only the operation of the Pelton Project, but also in its effect on the surrounding natural resources." SER 11–12.

The Tribe is plainly an indispensable party as well. Absent the Tribe's status as a party in this case, the district court could order a remedy that would fundamentally change the operation of the Pelton Project. This could include—if the Alliance gets what it apparently wants, *see supra* Part I.A—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. ER 152. There would be no practical way to shape relief to "lessen prejudice" to the Tribe, as the Pelton Project is the product of a carefully balanced agreement, and the Tribe's core interests are inextricably intertwined

with that balance. *Dawavendewa*, 276 F.3d at 1161–62. And there is an "alternative forum," *id.*, for the Alliance: bringing its concerns to the Department and FERC. *See supra* pp. 8, 31, 47.

2. The Tribe "enjoy[s] sovereign immunity from suit, and it may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress." *Dawavendewa*, 276 F.3d at 1159 (citation omitted). Here, Congress has not unequivocally abrogated the Tribe's sovereign immunity, meaning that dismissal of this lawsuit is mandatory.

a. The standard for abrogation of sovereign immunity is an exceedingly demanding one, requiring an "unequivocal[ ]" congressional abrogation. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation omitted). Sovereign immunity abrogations must be "strictly construed, in terms of [their] scope, in favor of the sovereign." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Furthermore, ambiguity *within* a waiver must be narrowly construed against the finding of waiver. *FAA v. Cooper*, 566 U.S. 284, 290 (2012). Strict adherence to these demanding, clear-statement standards ensures "that Congress has *specifically* considered" and "*intentionally legislated* on the

matter" of sovereign immunity, rather than "legislat[ing] on a sensitive topic inadvertently or without due deliberation." *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011) (citation omitted) (emphases added).

This Court has held that inclusion of the sovereign in the definitional section of a statute, denoting the proper defendants under a statute, can be insufficient to find an abrogation of sovereign immunity, in appropriate circumstances. In *Daniel v. National Park Service*, 891 F.3d 762 (9th Cir. 2018), this Court confronted the Fair Credit Reporting Act, which defined the defendants as "any person," and then defined "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision* or agency, or other entity." 15 U.S.C. § 1681a(b) (emphasis added). Even though the defendant was a government subdivision—the National Park Service—this Court held that the definitional section was not sufficiently specific to abrogate the United States' immunity. *Daniel*, 891 F.3d at 772–74. This Court adopted this pro-sovereignty approach in the face of a contrary conclusion by the Seventh Circuit in *Bormes v. United States*, 759 F.3d 795 (2014). *See Daniel*, 891 F.3d at 773. And while this Court in *Daniel* discussed the Clean Water Act's citizen-suit provision as an

example of clear abrogation of the *United States'* immunity, it did so only because the Act specifically references "including (i) the United States" within its abrogation. *Id.* at 772 (quoting 33 U.S.C. § 1365).

The Supreme Court, in turn, has long applied an "interpretative presumption that 'person' [in a statute] does not include the sovereign," unless there is "some affirmative showing of statutory intent to the contrary." *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 708 (2003) (quoting *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780–81 (2000)).

b. Here, the Tribe has not waived its sovereign immunity, so the only question is whether Congress has "unequivocal[ly]" done so. *Dawavendewa*, 276 F.3d at 1159. If Congress has not unequivocally abrogated this immunity, this lawsuit must be dismissed. *Id.* at 1155. The district court ruled that Congress had, in fact, abrogated the Tribe's immunity, SER 22, but—with all respect—that was legal error, based upon an insufficiently rigorous application of the unequivocal abrogation standard.

The district court made its legal conclusion of congressional abrogation by looking at the Clean Water Act citizen-suit provision,

which permits 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 (A) an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). Another provision of the Clean Water Act thereafter defines "person" as "an individual, corporation, partnership, association, State, *municipality*, commission, or political subdivision of a State, or any interstate body," 33 U.S.C. § 1362(5) (emphasis added), with "municipality" then defined as "a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, *or an Indian tribe or an authorized Indian tribal organization*, or a designated and approved management agency under section 1288 of this title." 33 U.S.C. § 1362(4) (emphasis added). These definitions do not cross-reference the citizen-suit provision, and the citizen-suit provision does not cross-reference these definitions. Further, the Clean Water Act contains several other definitions of "person" that do not include tribes, for certain other purposes. *See, e.g.*, 33 U.S.C. §§ 1319(c)(6), 1321(a)(7),

The opaque definitional chain between the citizen-suit provision and one definition of "person" in the Clean Water Act falls far short of an "unequivocal[ ]" congressional abrogation of tribal immunity. *See Santa Clara Pueblo*, 436 U.S. at 58. As this Court correctly concluded in *Daniel*, merely subjecting a "person" to liability under a statute, and thereafter defining "person" as including a sovereign, in a different statutory section, does not generally meet the high standard for an unequivocal abrogation of sovereign immunity. 891 F.3d at 772. Any contrary conclusion fails to honor the principle that to find a sovereign-immunity abrogation, Congress must have "*specifically* considered" and "*intentionally legislated* on the matter" of sovereign immunity. *Sossamon*, 563 U.S. at 290–91 (emphases added). And the definitional chain here is, if anything, *more* opaque than the statute at issue in *Daniel*. There, the disputed definition of "person" itself included "government or governmental subdivision." 15 U.S.C. § 1681a(b); *see Daniel*, 891 F.3d at 769. Here, in contrast, the district court had to dig through *two* levels of definitional cross-reference to get to Indian tribes.

Further, while the Clean Water Act's citizen-suit provision *specifically references* two types of sovereigns within its sovereign-

immunity waiver/abrogation scope—"including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution," 33 U.S.C. § 1365(a)—it emphatically does not mention sovereign Indian tribes. It is thus entirely implausible to conclude that Congress "specifically considered" abrogating tribal immunity. *Sossamon*, 563 U.S. at 290–91. At the very most, Congress was not considering the issue of tribal immunity, focusing instead on the treatment it would afford the United States and the States, and such "inadvertent[ance]" is categorically insufficient to find an unequivocal sovereign immunity abrogation. *Id.* (citation omitted).

While the statutory text is sufficiently ambiguous for this Court to conclude that Congress did not "unequivocally" abrogate tribal immunity, *Santa Clara Pueblo*, 436 U.S. at 58, the additional contextual and statutory history arguments that the Tribe discusses provide further, powerful support.

For its part, the district court relied primarily, SER 15, upon a district court decision, *see Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608 (D. Ariz. 1993), and the Eighth

Circuit's finding of abrogation under an arguably analogous provision of the Resource Conservation and Recovery Act, *see Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094 (8th Cir. 1989), which this Court then cross-referenced in passing dicta in *Blue Legs* in *Miller v. Wright*, 705 F.3d 919, 926 (9th Cir. 2013). With all due respect, these cases failed to conduct the mandatory analysis of *unequivocal* immunity abrogation, such as this Court most recently conducted in *Daniel*. Portland General thus respectfully submits that this Court should follow the approach in *Daniel*, which correctly enforced the unambiguous abrogation requirement to find no abrogation, notwithstanding the Seventh Circuit's erroneous, contrary holding. *See* 891 F.3d at 773.

II. The District Court Correctly Concluded That The Undisputed Evidence Entitles Portland General And The Tribe To Summary Judgment

As the district court held, the Section 401 Certification requires that Portland General and the Tribe "undertake to *reduce* the Project's" exceedances through the adaptive management measures specified in the Section 401 Certification, not to strictly prevent such exceedances at all times. The Section 401 Certification's text, context, and the parties' course of performance all support that interpretation. The arguments of

the Alliance—a nonparty to the Certification—do not change the result. Finally, the district court properly held that Portland General and the Tribe complied with the Section 401 Certification's adaptive management requirement, and the Alliance has doubly waived any argument to the contrary.

A. The Certification Requires "Undertak[ing] To *Reduce* The Project's" Exceedances Through Adaptative Management Techniques

1. A court interprets a Section 401 certification "like any other contract," just as it interprets Clean Water Act permits. *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("*NRDC*") (interpreting National Pollution Discharge Elimination System permit); *Nw. Envtl. Advocs. v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995) (same). The court interprets a certification and the documents that it incorporates according to their "ordinary meaning" and "in light of the structure of the [documents] as a whole." *NRDC*, 725 F.3d at 1204–05; Restatement (Second) of Contracts § 202 (1981) ("all writings that are part of the same transaction are interpreted together."); *see generally NRDC*, 725 F.3d at 1207 (relying on the Restatement (Second) of Contracts); *Klamath Water Users Protective Ass'n v. Patterson*, 204

F.3d 1206, 1210–11 (9th Cir. 1999) (same). This is a "search for the common meaning of the parties, not a meaning imposed on them by the law." *City of Springfield v. Wash. Pub. Power Supply Sys.*, 752 F.2d 1423, 1427 (9th Cir. 1985) (quoting Restatement (Second) of Contracts § 201 cmt. c). So, "'[w]here the parties have attached the same meaning'" to a contract, then "'it is interpreted in accordance with that meaning,'" unless "[un]reasonable." *Am. Cas. Co. of Reading, Penn. v. Baker*, 22 F.3d 880, 887 (9th Cir. 1994) (quoting Restatement (Second) of Contracts § 201(1)). "[C]ourts eschew interpretations of contract provisions that make them unreasonable[.]" *United States v. Hallahan*, 756 F.3d 962, 974 (7th Cir. 2014).

After considering a Section 401 certification's language, the court may, if needed, "turn to extrinsic evidence to interpret its terms," *NRDC*, 725 F.3d at 1205, including "any course of performance" by the parties, *N. Cty. Commc'ns Corp. of Ariz. v. Qwest Corp.*, 824 F.3d 830, 840 (9th Cir. 2016) (quoting Restatement (Second) of Contracts § 202(4)). The parties' course of performance "is given great weight in the interpretation of the agreement" and may be "highly probative" to the contract's meaning. *Id.* (citations omitted).

As a general matter, a nonparty to a contract must carry an exceedingly heavy burden to persuade the court to adopt a contractual interpretation that differs from the contracting parties' mutually agreed upon understanding. *See generally Flexi-Van Leasing, Inc. v. Aetna Cas. & Sur. Co.*, 822 F.2d 854, 856 (9th Cir. 1987); *Pennzoil Co. v. FERC*, 645 F.2d 394, 397 (5th Cir. 1981); *James v. Zurich-Am. Ins. Co. of Ill.*, 203 F.3d 250, 258 (3d Cir. 2000); *Honeywell, Inc. v. J.P. Maguire Co., Inc.*, No. 93-cv-5253, 2000 WL 307398, at *9 (S.D.N.Y. Mar. 23, 2000) (courts do not "override the parties' stipulated understanding at the behest of a nonparty to the contract claiming that the contract should be interpreted differently"). Any contrary approach would impermissibly "subvert" contract principles for the "benefit" of a third party, *James*, 203 F.3d at 258, since it is the mutual interpretation of "*the parties*" that controls, Restatement (Second) Contracts § 201 (emphasis added).

2. Here, the text and context of the Section 401 Certification, as confirmed by the parties' course of performance, make clear that the district court was correct when it concluded that Portland General and the Tribe must "undertake to *reduce* the Project's" exceedances by using adaptive management techniques, not that Portland General must

actually prevent every exceedance of each individual water quality criterion, regardless of adverse effects on other water quality parameters or fish passage. ER 229, 232, 234 (emphasis added); *see* ER 27–28 (district-court opinion). Those adaptive management techniques, as relevant here, are increasing the selective water withdrawal facility's withdrawal of cold bottom water from Lake Billy Chinook—which lowers temperature and pH, but affects fish passage and dissolved-oxygen concentration—and instituting controlled spills from the Reregulating Dam, which increases dissolved oxygen. *See* ER 11–14.

a. Beginning with the Section 401 Certification's plain text, *NRDC*, 725 F.3d at 1204–05, the relevant text provides, over and again, that Portland General and the Tribe "will undertake to reduce the Project's contribution" to exceedances through the adaptive management "measures" identified in the Water Quality Management and Monitoring Plan. ER 229 (temperature), 232 (dissolved oxygen), 234 (pH); *see* ER 20–21 (district-court opinion).

The Certification's provisions for the creation of the Water Quality Monitoring Plan emphasize that exceedances of the temperature, dissolved-oxygen, and pH *criteria* are not violations of the Section 401

Certification itself. The Water Quality Monitoring Plan "shall specify" the monitoring needed to determine: (a) *whether* the temperature, dissolved oxygen, or pH "criteria continue to be exceeded" or "violated" by the Project; (b) the success of existing measures "in *reducing* the Project's contribution to any continued exceedances" or "violation of the criteria"; and (c) *whether* additional measures are needed "to *reduce* the Project's contribution to exceedances" or "violations of the criteria." ER 229 (temperature), 232 (dissolved oxygen), 234 (pH) (emphases added); *see* ER 21 (district-court opinion).

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. If an exceedance of a criterion remains even after "all feasible measures have been undertaken" to reduce it, and "the designated beneficial uses [of the Deschutes River] are not adversely affected by the failure to achieve" the criterion, then Portland General "shall continue" to operate the Project under the existing Water Quality Management and Monitoring Plan. ER 230–31 (temperature), 232–33 (dissolved oxygen), 235 (pH).

Moving to the broader context, *NRDC*, 725 F.3d at 1204–05, provisions in the Water Quality Management and Monitoring Plan and the Fish Passage Plan—both incorporated by the Section 401 Certification, *supra* p. 13—support the conclusion that the Certification requires Portland General to undertake adaptive management measures to reduce exceedances, *see* ER 27–28 (district-court opinion).

The Water Quality Management and Monitoring Plan explicitly states in its first substantive section that Portland General and the Tribe "shall operate the selective withdrawal facility pursuant to general adaptive management considerations" because the operation of that facility "has the potential to affect numerous water quality parameters, as well as fish passage success." ER 154. That is, "changes in the operation of the selective withdrawal facility must consider all possible impacts, not merely a single water quality parameter." ER 154. Only after establishing this overarching adaptive management requirement does the Water Quality Management and Monitoring Plan establish the specific temperature, dissolved-oxygen, and pH criteria for the Project's operations. ER 156–60 (temperature), 161–63 (dissolved oxygen), 164–65 (pH). Even then, the sections governing each water-quality criterion

recognize that Portland General and the Tribe will "eventually improve" their operation of the selective withdrawal facility "[o]ver time," as more experience is gained and more data is gathered. ER 159–60 (temperature); ER 163 (dissolved oxygen), 165 (pH); *see also* ER 14–15 (district-court opinion). And for pH, in particular, the Water Quality Management Plan explicitly recognizes that the Project may "exceed" the criteria and requires Portland General and the Tribe to "immediately contact" state and tribal agencies "to develop an approach to reduce pH that is consistent with maintaining" the other goals of the Project. ER 165; *see* ER 22 & n.5, 34 (district-court opinion).

The Fish Passage Plan provides further useful context. This Plan mandates that it "will be implemented according to the principles of adaptive management." SER 178; *see also* SER 176. This requires Portland General and the Tribe to, for example, "explicitly recognize that there are uncertainties regarding the outcome of fish protection/management measures" and incorporate the results from previous fish-protection measures into "future decisions . . . as needed to modify the [future] fish protection/management measures." SER 179. Moreover, the Fish Passage Plan explains that Portland General and the

Tribe must use water-quality-monitoring data "for evaluation and decision making in conjunction with the fish passage Testing/Verification and long-term monitoring programs," even as the plan recognizes that Portland General and the Tribe may need to "modify" water-quality measures to obtain "compliance" with the water-quality criteria, in consultation with the Fish Committee. SER 183–85.

The Department, the Tribe, and Portland General "have attached the same meaning" to the Section 401 Certification: namely, that it requires undertaking active-management measures to reduce exceedances, not as strictly prohibiting all exceedances at all times, regardless of adverse effects on other water quality parameters or fish passage. *Baker*, 22 F.3d at 887; *see also Wash. Pub. Power Supply*, 752 F.2d at 1427. As the Department explained below, it "did not expect that compliance with [temperature, dissolved-oxygen, and pH criteria] would be immediate and be achieved at all times." SER 144. Instead, the Section 401 Certification requires a "thoughtful, science-based adaptive management approach." SER 144; *see also* SER 102 (Decl. of Eric Nigg, Oregon Department of Environmental Quality water-quality manager) ("The [Water Quality Management and Monitoring Plan] also provides

substantial latitude for adaptive management."). So, under the proper understanding of the Certification, the Department "has concluded that the Project is operating consistent with its certification." SER 145; *see also* ER 46 (Department's 2004 Section 401 compliance letter).

Finally, interpreting the Section 401 Certification to require Portland General and the Tribe to avoid every such exceedance, on each day, would impose an "absurd or impossible condition," *Hallahan*, 756 F.3d 962, 974; *Southland Corp. v. Emerald Oil Co.*, 789 F.2d 1441, 1443 (9th Cir. 1986), because "it is sometimes *impossible* for the Project to achieve all water quality and fish passage objectives simultaneously," SER 114–16 (Decl. of Lori Campbell) (emphasis added); *see supra* pp. 21–22.

b. The parties' course of performance provides powerful support for the conclusion that the Section 401 Certification requires only that Portland General and the Tribe undertake adaptive management techniques to reduce water-quality-criteria exceedances, not to avoid every such exceedance, on each day. This extrinsic evidence carries "great weight" and is "highly probative" of the Section 401 Certification's

meaning. *Qwest Corp.*, 824 F.3d at 840; *see also NRDC*, 725 F.3d at 1208 (views of "permitting authority[ ]" carry "significant weight").

The parties' course of performance consists of Portland General and the Tribe using adaptive management techniques to reduce exceedances of water-quality criteria, with the *full support* of the Department. This began very soon after the construction of the selective water withdrawal facility in 2009, when the Project saw water-quality-criteria exceedances owing to the "competing nature" of the facility's blending of warm and cold water from Lake Billy Chinook. SER 104–05; *see* ER 15 (referencing water-quality monitoring data). Consistent with the adaptive management requirements of the Certification, "[w]hen there was a departure from expected temperatures or dissolved oxygen," Portland General and the Tribe "made timely changes in order to balance competing processes . . . as well as possible." SER 107.

Notably, over this years' long course of performance, the Department *never* alleged that the Project's exceedances of the water-quality criteria in the Water Quality Management and Monitoring Plan violated the Section 401 Certification, even though the state agency was fully aware of the exceedances that are the gravamen of the Alliance's

lawsuit. *See* SER 107–09 ("[The Department] believes [Portland General] is operating the project and facilities consistent with the 401 certification and that water quality has improved in demonstrable ways."); SER 144 (Department's amicus brief).

B. The Alliance's Extreme Position That The Certification Is Violated If The Project Results In Any Exceedance, On Any Day, Is Wrong

The Alliance argues that the Certification requires the elimination of all exceedances, on any day. *See, e.g.*, App.Br. 10–12. As explained below, the Alliance is plainly wrong in its understanding of the Certification, but, at the minimum, the Alliance cannot carry the heavy burden of showing that the parties' understanding of the Certification is so demonstrably wrong that a nonparty's understanding should prevail. *See Flexi-Van Leasing*, 822 F.2d at 856; *James*, 203 F.3d at 258.

The Alliance primarily focuses its argument on isolated language within the Water Quality Management and Monitoring Plan that provides that the selective water withdrawal facility "will be operated . . . to meet the applicable" water quality criteria in that Plan. App.Br. 11 (citing ER 156 (temperature), 161 (dissolved oxygen), 164 (pH)). However, this language does not make the water-quality criteria

"mandatory compliance measures," App.Br. 13, when the Section 401 certification is interpreted "as a whole," *NRDC*, 725 F.3d at 1204–05. Again, the Section 401 Certification's overarching requirement is for Portland General to *adaptively manage* the project to *reduce* exceedances. This is why the Section 401 Certification repeatedly recognizes that the operation of the Project may cause exceedances, which Portland must take measures to "*reduce*." ER 229, 232, 234 (emphasis added).

While the Alliance claims that the language requiring Portland General and the Tribe to "reduce" exceedances is only "guiding language for *development*" of the temperature, dissolved-oxygen, and pH monitoring plans, App.Br. 11–12, the context defeats this argument. The Certification states that monitoring is necessary to determine whether temperature, dissolved-oxygen, or pH "criteria *continue to be exceeded*" or "*violated*" "in waters affected by the Project." ER 229, 232, 234 (emphasis added). This language, which the Alliance does not discuss, shows that all parties expected the operation of the Project to *continue* to result in exceedances that would need to be managed. Moreover, other provisions recognize that, under some circumstances, the Project may

operate in excess of the criteria, ER 230–31, 232–33, 235, and the Alliance fails to discuss those provisions as well.[4]

The Alliance claims that even if the adaptive management requirement were part of the Section 401 Certification, this requirement itself indicates that exceedances of a criterion alone are violations of the Section 401 Certification. App.Br. 16. That is, since adaptive management means that Portland General is "[w]orking toward compliance," this presupposes "a condition of noncompliance or violations." App.Br. 16. The Alliance's interpretation is self-contradictory. If the requirement that Portland General adaptively manage the Project to minimize exceedances is *part of* the Section 401 Certification, which it plainly is, this means that the Section 401 Certification itself recognizes that exceedances may well occur and provides a mechanism for the parties to respond.

[4] The Alliance claims that the district court incorrectly interpreted language in the Water Quality Management and Monitoring Plan sections entitled "Facilities for compliance," "Approach to [temperature, dissolved-oxygen, and pH] management," and "[Temperature, Dissolved Oxygen, and pH] management operations." App.Br. 14. Yet none of the district court's analysis relied on language from these sections. *See* ER 20–21. Further, none of the language that Portland General cites above comes from these sections, either.

The Alliance also claims that Condition S of the Section 401 Certification requires the Project to avoid every exceedance, on each day, App.Br. 16–20, but that is wrong. Condition S provides: "Notwithstanding the conditions of this certification, no wastes shall be discharged and no activities shall be conducted which will violate state water quality" criteria. ER 245. The far more "specific terms" discussed above make clear that Portland General and the Tribe need only undertake adaptive management measures to reduce exceedances, and these more specific terms "control over" the more "general" terms of Condition S. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 891 (9th Cir. 2003); Restatement (Second) of Contracts § 203(c); ER 22–23. As the district court correctly concluded, Condition S operates as a "savings clause," clarifying that the Section 401 Certification is not a license for the Project to violate any other state water-quality criteria, so long as the Section 401 Certification is not violated. ER 22–23. This provision "provide[s] for unexpected eventualities, such [as] new activities conducted at the Project or the emission of a new pollutant" not contemplated at the time of the Section 401 Certification's drafting. ER 23.

The Alliance has no meaningful response to the parties' robust course-of-performance evidence or the parties' mutual understanding. While it claims that the parties never expected the Project to exceed the pH criterion, App.Br. 27–28, the Alliance tellingly fails to make a similar argument with respect to the parties' manifest expectations for the temperature and dissolved-oxygen criteria. This pH criterion argument fails, in any event, as evident from the same page of the report that the Alliance cites for support. *See* App.Br. 28 (citing ER 59). While the report does state that the Department "is reasonably assured that operation of the Project will comply" with the pH criteria, the report then explains—just down the same page—that Portland General and the Tribe "will undertake" certain measures "to reduce the Project's contribution to exceedances of the water quality criterion for pH." ER 59.

The Alliance next argues that Section 401 *itself* compels the Alliance's interpretation of the Section 401 Certification because the "*raison d'etre* for Section 401 . . . is compliance with water quality standards, *i.e.*, not mere reducing of contribution to violations, but *elimination* of contribution to violations." App.Br. 13. The Alliance cites no authority for the meritless proposition that a Section 401 certification

and FERC license cannot tie compliance to carefully designed adaptive management techniques that reduce, but do not wholly eliminate, all exceedances. And to the extent that the Alliance wishes to dispute the *validity* of the Section 401 Certification and the 2005 FERC license, that challenge could only have been made administratively with the Department and *before* FERC incorporated the Section 401 Certification into the license, not through a subsequent Clean Water Act citizen-suit filed in the district court. *See* ER 23–24.

Finally, while the Alliance criticizes this Section 401 Certification as a "toothless, unenforceable participation trophy that makes a mockery of Section 401," App.Br. 16, this is demonstrably incorrect. The certification here requires Portland General and the Tribe to take a variety of specific adaptive management measures, such as adjusting the percentage of cold-water discharge upward if the water temperature approaches maximum levels, instituting controlled spills if dissolved oxygen levels drop too low, and immediately contacting the Department to develop a mitigation measure if pH levels exceed certain thresholds. ER 160, 162, 165. These measures allow for corrective management actions to be taken despite the unavoidable tension between the

certification's various criteria, and that is why the Section 401 Certification has already improved water quality in the Deschutes River "in demonstrable ways." SER 109.

C. The Alliance Has Waived Any Argument That Portland General And The Tribe Failed To Adaptively Manage The Project

The district court correctly held that Portland General and the Tribe complied with the Section 401 Certification's adaptive management requirements for the temperature, dissolved oxygen, and pH criteria. With respect to temperature, these parties had not "failed to use adaptive management" or "failed to comply with [other] specific measures" to reduce any temperature exceedances, given that they have consistently "worked closely" with the Department "when issues arose," as the district court explained, ER 28, and made the "timely changes" to bottom-water withdrawals to reduce potential temperature exceedances whenever required, SER 107. Indeed, the Alliance had not even shown that the Project caused any temperature exceedances, under the current state-law temperature criteria that the Water Quality Management and Monitoring Plan incorporated. ER 25–27. For dissolved oxygen, Portland General and the Tribe met their "adaptive management

obligations," since, again, "Defendants have worked closely with [the Department]," ER 33–34 (a single "oversight" in operations that caused an exceedance did not trigger liability or permit forward-looking remedy), and made timely controlled spills at the Reregulating Dam as necessary to reduce exceedances, SER 107; ER 161–62. As to pH, any Project exceedance did not violate the Section 401 Certification "in light of the . . . adaptive management considerations," especially since the Section 401 Certification's "approach to pH management" overall "is highly deferential to temperature, dissolved oxygen, and fish passage goals," ER 35–36, which means that the Section 401 Certification requires "action" to correct exceedances only when it is "consistent with" those other higher-priority goals, ER 36. Further, Portland General dutifully complied with the adaptive management requirement to notify the Department promptly when pH exceedances occurred. SER 107–09.

The Alliance has doubly waived any argument that Portland General and the Tribe failed to comply with the Section 401 Certification's adaptive management requirements, both by explicitly refusing to present such arguments below in its summary-judgment briefing, *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992

(9th Cir. 2010); SER 30 (Alliance conceding that it did not "squarely address the question of Defendants' adaptive management performance"), and by failing to develop these arguments in its first brief to this Court, *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1211 (9th Cir. 2012).

While the Alliance makes a series of often logically disconnected assertions relating to aspects of the district court's opinion in Pages 22 through 51 of its brief here, the fully dispositive point is that these arguments are *legally irrelevant* if this Court agrees with the district court and all of the parties to the Certification that the Certification does not require Portland General and the Tribes to avoid all exceedances, on every day. Nevertheless, to the extent that the Alliance's discussion here includes any specific arguments, those arguments are wrong.

First, the Alliance makes a series of arguments on temperature. App.Br. 37–51. But the *only* upshot of each of these arguments is that, in the Alliance's view, the Project exceeded a stricter temperature criterion than the Alliance would apply on a certain day. App.Br. 41–42. The Alliance does not cite any evidence to support a claim that Portland General "failed to use adaptive management" to minimize any

exceedances with regard to temperature. ER 28. That means that if this Court agrees with the district court, the Department, Portland General and the Tribe on the Certification's core meaning, *see supra* Part II.A, all of the Tribe's lengthy temperature-based arguments are legally irrelevant.

Having said that, the Alliance's various arguments on this score are wrong. The Alliance disputes the district court's conclusion that the Water Quality Management and Monitoring Plan incorporates the *current*, less-stringent state-law temperature criteria as the controlling criterion. App.Br. 37–51. But the Water Quality Management and Monitoring Plan explicitly states that "[t]he *applicable* [Oregon] . . . water quality [criteria] can be found in OAR 340-41." ER 156 (emphasis added). This, as the district court held, "reflects a clear intention to tie the applicable water quality [criteria] to *current* water quality [criteria]" found in those rules. ER 27 (emphasis added); *see Nehmer v. U.S. Dep't of Veterans Affs.*, 494 F.3d 846, 863 n.7 (9th Cir. 2007) ("a contract's reference to the terms of a particular statutory provision incorporates subsequent statutory changes to that law") (citing *Torrance v. Workers' Comp. Appeals Bd.*, 650 P.2d 1162, 1166 (Cal. 1982)). So,

contrary to the Alliance's argument, App.Br. 37–38, the Water Quality Management and Monitoring Plan's reference to a different, more stringent temperature criteria in Section 2.2. does not control, *see supra* pp. 60–61 (mutual interpretation of the parties' controls); ER 156.

The Alliance's remaining points here are also wrong. The Section 401 Certification's incorporation of the state-law temperature criteria does not conflict with OAR 340-041-0007(1), or Warm Springs Tribal Code § 432.100(1), App.Br. 38–39, 41–42, 49, which requires "the highest and best practicable" water-quality control measures, because a court must interpret those rules as consistent with the more-specific temperature criteria that state-law itself imposes, *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). More fundamentally, this argument again seeks to challenge the *validity* of the Section 401 Certification, rather than Portland General's compliance with the Section 401 Certification, which the Alliance cannot do under the citizen-suit provision. *See* ER 23–24; *supra* p. 74. The Alliance's quibbles on the temperature criteria dealing with the Project's use of the "Blend 17" mixture of warm and cold water from Lake Billy Chinook presume that the Section 401 Certification requires the more-strict criteria that were

properly rejected by the district court. *See* App.Br. 46–48. Likewise irrelevant is the Alliance's claim that the two conditions mentioned in Section 2.2 of the Water Quality Management and Monitoring Plan have been met. App.Br. 39–41 (referencing a "50 °F condition" and an "[Endangered Species Act]-use condition"); *see* ER 156. Because the more-strict temperature standard in Section 2.2 does not govern, *supra* pp. 78–79, the status of these two conditions does not change the outcome here.

Second, on dissolved oxygen, the Alliance disputes the district court's conclusion that the more-stringent criteria reserved for spawning season applied only between October 15 and June 15, rather than year-round. ER 31–32; App.Br. 29–34. As a threshold matter, the Alliance does not argue that Portland General failed to undertake adaptive management measures to reduce any alleged dissolved-oxygen exceedances, which makes this argument legally irrelevant. Portland General "work[ed] closely," ER 28, with the Department whenever "there was a departure from expected temperatures or dissolved oxygen" criteria to make "timely changes in order to balance competing processes

. . . as well as possible," namely, controlled spills at the Reregulating Dam to reduce exceedances, SER 107, 122–23; ER 167–68.

In any event, the Alliance is mistaken as to its spawning season argument. Under the year-round, stringent criteria, the Alliance claims that the Project caused repeated exceedances. App.Br. 33. The Alliance is wrong here because the Water Quality Management and Monitoring Plan states that "[t]he *applicable* [Oregon] . . . water quality standards can be found in OAR 340-41." ER 161 (emphasis added). This means that, as the district court held, the Water Quality Management and Monitoring Plan incorporates the *current* dissolved-oxygen criteria in state law (which, as noted, impose strict criteria for spawning season only between October 15 and June 15), rather than the criteria mentioned in Section 3.2 of the plan (which, again, would impose the strict criteria for spawning year-round). ER 29–31; *see Nehmer*, 494 F.3d at 863 n.7.

The Alliance's attempts to resist this conclusion fail. The Alliance claims that it submitted evidence establishing that, in fact, the spawning season for "resident trout" in the portion of the Deschutes River below the Project extends beyond June 15. App.Br. 31. However, the length of the spawning season is a *legal* conclusion, not a factual one. *See* ER 31–

32. Here, Oregon designated the spawning season for all relevant fish, including trout, as October 15 through June 15. App.Br. 31. The Alliance argues that the Court should disregard that spawning-season designation for trout in particular because it was made without the benefit of the information gathered for the adoption of the Water Quality Management and Monitoring Plan. App.Br. 31–32. Yet, the Clean Water Act provides that only the EPA may approve a State's changes to its water-quality criteria, 33 U.S.C. § 1313(c), and the Alliance cites no authority for the proposition that a federal court may displace such criteria simply because new information might have counseled the State to adopt different criteria, *see* App.Br. 31–32. Finally, the Alliance states that Tribal Ordinance 80 "explicitly designates" the applicable spawning period as year-round, App.Br. 30, yet the tribal standards do not apply to Oregon's certification, and the Alliance did not even cite that ordinance in its briefing below, so it has waived any such argument here, *In re Mercury*, 618 F.3d at 992.

Third, on pH, the Alliance claims that the undisputed evidence shows that the Project exceeded the applicable criteria, on certain days, App.Br. 24, but that does not violate the Section 401 Certification, *see*

supra Part II.A. Although the Alliance argues that there is "not even record evidence" that Portland General satisfied the pH-related adaptive management obligations by "immediately contact[ing]" the Department, as required, App.Br. 26–27, the declaration of the Department's water-quality manager specifically refutes that claim, SER 107–09.

Finally, the Alliance claims that the district court should not have considered the interim agreements because they "were not properly executed" to qualify as modifications to the Water Quality Management and Monitoring Plan. App.Br. 34; *see also* App.Br. 21–22, 42–46. The district court referred to the interim agreements as mere *evidence* of Portland General and the Tribe "work[ing] closely" with Oregon "to determine the best way to operate the [selective water withdrawal facility," consistent with the adaptive management obligations in the Section 401 Certification itself. ER 34. Thus, the district court held that these agreements were permissible expressions of the adaptive management requirement in the Section 401 Certification. ER 27–29 & n.7, 34; *accord* SER 105–06. So, while the court did conclude that these agreements did not modify the plan—contrary to an argument that Portland General had put forward below, and that it continues to believe

is correct, SER 139–41—the court concluded that Portland General, the Tribe, and Oregon could operate under these agreements to reduce water-quality exceedances, under the adaptive management obligations. ER 27–29, 34. While the Alliance claims that the court should have disregarded these agreements once it held that they did not modify the Water Quality Management and Monitoring Plan, App.Br. 21–22, it never contests the district court's conclusion that they represent a permissible adaptive management measure, *see* App.Br. 21–22, 42–46.[5]

CONCLUSION

This Court should either remand for dismissal or affirm the district court's grant of summary judgment in favor of Portland General and the Tribe.

[5] The Alliance also argues that the interim agreements are invalid because they violate state-law standards found in OAR 340-041-0028(12) and tribal-law standards in Tribal Ordinance 80. App.Br. 49; *see* App.Br. 22 (mentioning this argument without elaboration). The Alliance never presented this argument in its three summary-judgment briefs below and so has waived it here. *In re Mercury*, 618 F.3d at 992.

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STATEMENT OF RELATED CASES

I am unaware of any related cases currently pending in this court other than the cases identified in the initial briefs filed by the other parties. Circuit Rule 28-2.6.

Dated: September 28, 2020

/s/ Misha Tseytlin
MISHA TSEYTLIN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Opening Brief or addendum to the Opening Brief of Plaintiff-Appellant/Cross-Appellee Deschutes River Alliance.

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15 U.S.C. § 1681a, Definitions; rules of construction

. . .

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

16 U.S.C. § 797, General powers of Commission

The Commission is authorized and empowered—

. . .

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:1 The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on

any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission. *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 803, Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title1 if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

. . .

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

16 U.S.C. § 823b, Enforcement

(a) Monitoring and investigation

The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter. The Commission shall conduct such investigations as may be necessary and proper in accordance with this chapter. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to

require compliance with the terms and conditions of licenses and permits issued under this subchapter and with the terms and conditions of exemptions granted from any requirement of this subchapter.

(b) Revocation orders

After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this subchapter or any exemption granted from any requirement of this subchapter where any licensee or exemptee is found by the Commission:

(1) to have knowingly violated a final order issued under subsection (a) after completion of judicial review (or the opportunity for judicial review); and

(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.

In any such proceeding, the order issued under subsection (a) shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

16 U.S.C. § 825*l*, Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such

application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem

proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

33 U.S.C. § 1313, Water quality standards and implementation plans

. . .

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the

purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

33 U.S.C. § 1319, Enforcement

. . .

(c) Criminal penalties

. . .

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

33 U.S.C. § 1321, Oil and hazardous substance liability

(a) Definitions

For the purpose of this section, the term—

. . .

(7) "person" includes an individual, firm, corporation, association, and a partnership;

33 U.S.C. § 1362, Definitions

Except as otherwise specifically provided, when used in this chapter:

. . .

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.