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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**DESCHUTES RIVER ALLIANCE, an
Oregon nonprofit corporation,**

Plaintiff,

v.

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

Defendant.

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

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM IN
SUPPORT**

(Oral Argument Requested)

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1, the undersigned attorneys certify that the parties made a good faith effort through personal or telephone conferences to resolve the dispute, including the issues raised by this motion, and have been unable to do so.

MOTION

Plaintiff Deschutes River Alliance hereby moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for partial summary judgment as to Defendant's liability for violations of its Clean Water Act § 401 Certification requirements related to pH, temperature, and dissolved oxygen.

Plaintiff believes that this motion raises what are fundamentally legal issues, and that there is no genuine dispute as to any material fact with respect to either the water quality requirements governing PGE's operation of the Pelton Round Butte Hydroelectric Project (including its associated Selective Water Withdrawal tower) or to Defendant's violations of those requirements. The former are provided in the §401 Certification and its incorporated Water Quality Management and Monitoring Plan. The latter are provided in reports submitted by the Defendant to the State of Oregon Department of Environmental Quality.

This motion is supported by the following legal memorandum and by the declaration of Jonah Sandford and its accompanying exhibits, as well as the declarations of Greg McMillian, Rick Hafele, Steven Pribyl, John Hazel and Amy Hazel.

I. INTRODUCTION

Plaintiff Deschutes River Alliance (“DRA”) filed this Clean Water Act citizen suit against Portland General Electric (“PGE”) over ongoing violations of the water quality certification for the Pelton Round Butte Hydroelectric Project (“The Project”). Discharges from the Project are regulated by a water quality certification issued by the Oregon Department of Environmental Quality (“ODEQ”) pursuant to Section 401 of the Clean Water Act (the “§ 401 Certification”). *See* 33 U.S.C. § 1341. PGE has been in violation of the § 401 Certification since at least August 12, 2011.

DRA hereby seeks summary judgment as to its claim that PGE is liable under the Clean Water Act. PGE’s own monitoring reports, filed monthly with ODEQ, establish that PGE has routinely violated, and is reasonably likely to continue to violate, the § 401 Certification’s requirements related to pH, temperature, and dissolved oxygen.

PGE’s violations of its water quality requirements have caused or contributed to degradation of the lower Deschutes River, a treasured recreational destination for many in the Pacific Northwest and across the United States. *See* Declaration of John Hazel at ¶ 34. Plaintiff respectfully moves the Court for an order declaring that PGE is in violation of the Clean Water Act and granting DRA summary judgment on these claims.

II. LEGAL BACKGROUND

The Clean Water Act (“the Act”) was enacted in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Pursuant to this ambitious goal, Section 303 of the Act requires each state to institute, subject to Environmental Protection Agency (“EPA”) approval, comprehensive water quality standards for all waters within that state. 33 U.S.C. § 1313(a). These standards must consist of “the designated

uses of the navigable waters involved and the water quality criteria for such waters based upon such uses,” as well as an antidegradation policy designed to ensure the protection of existing uses and the level of water quality necessary to protect those uses. *Id.* § 1313(c)(2); 40 C.F.R. §§ 131.6, 131.12.

Section 401(a) of the Act provides that any applicant for a Federal license or permit to conduct any activity that may result in discharge into navigable waters must provide the licensing or permitting agency a water quality certification (“§ 401 Certification”) from the state in which the discharge originates. 33 U.S.C. § 1341(a). The § 401 Certification must provide that the license or permit holder’s discharges will comply with the Act, including any applicable state water quality standards and requirements. *Id.*

Further, each § 401 Certification “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure” that the applicant’s discharges and other activities will comply with applicable state water quality standards and requirements. *Id.* § 1341(d). Each of these requirements “shall become a condition on any Federal license or permit subject to [§ 401 Certification].” *Id.* Put another way, the certification required under § 1341(a) “includes the conditions the state deems necessary to achieve compliance with the applicable provisions of the CWA in order to give the certification in the first place.” Opinion and Order, Doc 22 at 18, published as *Deschutes River All. v. Portland Gen. Elec. Co.*, 249 F.Supp.3d 1182, 1194 (D. Or. 2017). Thus, once a § 401 Certification is issued, its terms must be strictly complied with. In Oregon, ODEQ is responsible for establishing state water quality standards. ODEQ is further responsible for issuing § 401 Certifications with appropriate water quality limitations for select activities in the state, including hydroelectric projects. *See Or. Admin. R.*

340-048. Citizens may enforce § 401 Certification water quality requirements, as this Court has recognized. *DRA v. PGE*, 249 F.Supp.3d at 1194.

III. FACTUAL BACKGROUND

A. *The Pelton Round Butte Project and the Lower Deschutes River*

The Pelton Round Butte Hydroelectric Project (“The Project”) is a complex of three dams and associated developments on the Deschutes River, located between river miles 100 and 120 in Jefferson County, Oregon. *See* Declaration of Jonah Sandford, Ex. D at 4–5. Round Butte Dam, the most upstream development at river mile 110.4, forms Lake Billy Chinook, impounding several miles of the Metolius, Crooked, and Deschutes rivers. *Id.* at 4. Further downstream, at river mile 103.4, Pelton Dam forms Lake Simtustus, a seven mile-long reservoir. *Id.* Furthest downstream, at river mile 100.1, the Reregulating Dam forms a 2.5 mile-long impoundment called the Reregulating Reservoir, and is designed to attenuate high and low peak flows from the Round Butte and Pelton Dams. *Id.* at 4-5.

There are no further dams or impoundments on the Deschutes River downstream of the Reregulating Dam. As a result, Project operations and discharges play a central role in the water quality and ecological characteristics of the Deschutes River below the Project. Before 2010, Project discharges consisted exclusively of water drawn from near the bottom of Lake Billy Chinook. Declaration of Steven Pribyl at ¶ 12. This water drawn from depth was relatively cold and clean, and these characteristics attracted fishermen and other recreationists from all over the world—providing substantial economic benefits to the region. Pribyl Decl. ¶ 12; J. Hazel Decl. ¶ 31.

B. *Licensing and Certification History*

PGE first obtained federal licensing for the Project in 1951, with the initial license term expiring on December 31, 2001.¹ Sandford Decl., Ex. D at 2. In 2000, PGE entered into a Long-Term Global Settlement and Compensation Agreement (“Global Agreement”) with the Confederated Tribes of the Warm Springs Reservation of Oregon (“CTWS”). *See* Sandford Decl., Ex. E.² Under that agreement, CTWS became a 1/3 owner of the Project, with the option to purchase a greater stake in coming years. *See Id.* at 11–14. Exhibit D to the Global Agreement is an “Ownership and Operation Agreement” between PGE and CTWS. *See* Sandford Decl., Ex. F. That document identifies PGE as the “Operator” of the Project. *Id.* at 5–6. In that role, PGE is obligated, among other duties, to “operate and maintain the Project” and to “take any and all actions necessary or appropriate to comply with such Applicable Laws, orders, permits and licenses, now or hereafter in effect.” *Id.* at 6.

On June 29, 2001, PGE and CTWS filed a joint application for a renewed Project license. On June 21, 2005, the Federal Energy Regulatory Commission (“FERC”) issued a new license for the Project. *See* Sandford Decl., Ex. D at 1.

C. *The § 401 Certification and Selective Water Withdrawal*

Because the Project discharges into Oregon’s navigable waters at the Reregulating Dam, PGE was required to provide FERC with a § 401 Certification issued by ODEQ. *See* 33 U.S.C. § 1341(a). On June 24, 2002, ODEQ issued a § 401 Certification for the Project. *See* Sandford Decl., Ex. H. Each of the requirements in the § 401 Certification became legally binding conditions of the Project’s FERC license. *See* 33 U.S.C. § 1341(d).

¹ This initial license was issued by the Federal Power Commission, predecessor agency to the Federal Energy Regulatory Commission.

² Much of the Project lies on land owned by the CTWS, and CTWS had filed a competing application for the new license in December 1999. Sandford Decl., Ex. E at 8.

The new FERC License and § 401 Certification for the Project incorporated a proposal from PGE and CTWS to construct a Selective Water Withdrawal (“SWW”) tower above Round Butte Dam. Sandford Decl., Ex. G at 10. The SWW tower was designed to significantly modify the way water was drawn from Lake Billy Chinook reservoir before being discharged downstream into the lower Deschutes River. Instead of drawing water exclusively from the bottom of Lake Billy Chinook, the SWW tower was designed to draw surface water from that reservoir, and mix it with various amounts of water from depth before discharging downstream. *Id.* at 13. The tower was subsequently constructed, and commenced operations in December 2009.

A principal purpose of the tower was to help the Project “meet temperature and water quality goals and standards in the lower Deschutes River and Project reservoirs.” Sandford Decl., Ex. I at 2.³ To that end, and as required under the Act, the Project’s § 401 Certification contains clear requirements designed to ensure that PGE would operate the new SWW tower, and the entire Project, so that Project discharges and operations would comply with all applicable Oregon water quality standards. *See* 33 U.S.C. § 1341(d). A critical part of the Project’s § 401 Certification is a Water Quality Management and Monitoring Plan (“WQMMP”). The WQMMP contains mandatory “management plans” for various water quality criteria related to Project discharges, including pH, temperature, and dissolved oxygen. *See generally* Sandford Decl., Ex. I.

Along with the § 401 Certification, the State of Oregon submitted a “Final Unified State Position” on the Project to FERC. Sandford Decl., Ex. J. In that document, the State reiterated

³ The SWW tower was also intended to aid in the reintroduction of salmon and steelhead above the Project, by generating surface currents in Lake Billy Chinook to guide out-migrating juvenile fish to a collection facility at Round Butte Dam. From there, the fish would be trucked around the Project. Sandford Decl., Ex. M at 4.

that PGE “must implement all conditions in the [§ 401 Certification] and comply with *all state water quality standards*.” *Id.* at 6 (emphasis added). Accordingly, the § 401 Certification mandates that “Notwithstanding the conditions of this certification, no wastes shall be discharged and no activities conducted which will violate state water quality standards.” Sandford Decl., Ex. H at 17.

D. Post-SWW Changes in the Lower Deschutes River

Almost immediately upon implementation of the SWW tower, longtime Deschutes River users began to notice significant changes in the aquatic ecosystem below the Project. *See* Pribyl Decl. ¶¶ 14, 15. These changes have included impacts to water color and odor, rampant proliferations of nuisance algae on the river’s rocks, significant changes in aquatic insect populations, increased occurrences of fish diseases, and declines in bird populations. *Id.* at ¶ 15, 18, 19, 21; Declaration of Richard Hafele at ¶ 4-5; Declaration of Greg McMillan at ¶ 10.⁴

These ecological changes have dramatically altered the fishing and recreation experience on the lower Deschutes River. The river’s rocks are now extremely slick due to the new communities of nuisance algae, making wading dangerous. Pribyl Decl. ¶ 21; Hafele Decl. ¶ 5. Further, anglers regularly report observing far fewer aquatic insects in the air, and fewer fish caught. *See* Hafele Decl. ¶ 4. Birdwatchers have reported the “virtual disappear[ance] of several species that were once observed regularly on the Deschutes River, in large numbers.” Declaration of Amy Hazel at ¶ 39. In turn, these changes have negatively impacted businesses in central Oregon towns like Maupin, which have long relied on strong populations of aquatic insects, fish, and birds for their livelihood. *See id.* ¶¶ 30, 35; J. Hazel Decl. ¶ 31.

⁴ In addition, in 2016 and 2017, anglers reported the presence of significant numbers of two nonnative warmwater species—smallmouth bass and walleye—which were previously extremely uncommon or nonexistent in the lower Deschutes River. Pribyl Decl. ¶¶ 28-32; J. Hazel Decl. ¶ 23.

E. PGE's Monitoring Demonstrates Violations of the § 401 Certification Conditions

Defendant's § 401 Certification and incorporated WQMMP mandate that Project discharges comply with various requirements related to pH, temperature, and dissolved oxygen, among other criteria. *See* Sanford Decl., Exs. H and I. PGE's own monitoring data demonstrate that since August 12, 2011, its discharges from the Project have routinely violated the § 401 Certification's requirements. *See* Sanford Decl., Exs. A, B, C. Despite this fact, PGE has failed to implement operational changes to bring the Project into compliance with the fundamental requirements of its § 401 Certification. *See id.* PGE's violations of its § 401 Certification, accordingly, are ongoing. Absent effective state or federal action to compel compliance, DRA brings this case to enforce the § 401 Certification's water quality requirements.

On May 13, 2016, more than sixty days before filing this action, DRA gave notice of the violations alleged in the Complaint and of its intent to file suit to address the violations to PGE. *See* Doc. 1-1.

IV. STANDARD OF REVIEW

Summary judgment is proper when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A plaintiff may move for summary judgment on part of a claim. *Id.*

V. ARGUMENT

A. DRA Has Standing to Bring this Citizen Suit

DRA has standing to bring this case on behalf of several members of its Board of Directors for Defendant's violations of the Clean Water Act. Standing is established here by the fact that DRA Board members (1) have suffered an “injury in fact” that is concrete,

particularized, and actual or imminent; (2) their injuries are fairly traceable to PGE's challenged actions; and (3) it is likely that these Board members' injuries will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 181 (2000). "The relevant showing for purposes of Article III standing...is not injury to the environment but injury to the plaintiff." *Id.* at 181. Harm to aesthetic and recreational interests is sufficient to confer standing. *See Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

A plaintiff organization has representational standing on behalf of its members when "the interests at stake are germane to the organization's purpose," the claim itself and relief requested do not require "the participation of individual members in the lawsuit," and one of the organizations' members could otherwise establish standing to sue on their own behalf. *Friends of the Earth*, 528 U.S. at 181. It is well established that representational standing is not limited to traditional membership organizations. *See Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 344–45 (1977).

DRA is a nonprofit corporation based in Portland, Oregon. DRA's mission includes "advocat[ing] for water quality, a healthy ecosystem, and for the establishment and protection of robust populations of resident and anadromous fish throughout the [Deschutes] river's entire watershed." None of the claims in this case and relief requested—injunctive and declaratory relief—require the participation of individual members. As explained below, at least five members of DRA's Board of Directors retain standing to bring this action independently. Accordingly, DRA meets the requirements for representational standing.

1. DRA's Members Have Suffered Injuries in Fact

Members of the DRA Board of Directors have been and will continue to be injured by PGE's unlawful discharges. To demonstrate an injury-in-fact for standing purposes, DRA must

demonstrate its Board members have suffered an injury that is “(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Friends of the Earth*, 528 U.S. at 180; *Natural Res. Def. Council v. Southwest Marine*, 236 F.3d 985, 994 (9th Cir. 2000). A plaintiff’s “actual or threatened injury may be aesthetic or recreational as well as economic.” *National Wildlife Federation v. Burford*, 871 F.2d 849, 852 (9th Cir. 1989) (citations omitted). “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Friends of the Earth*, 528 U.S. at 183. “These injuries need not be large to confer standing; an ‘identifiable trifle’ will suffice.” *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3rd Cir. 1990) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).

As documented by the five standing declarations, DRA’s Board members have each suffered an injury in fact. First, several standing witnesses have in the past used, and are planning in the future to use, the waters of the lower Deschutes River for aesthetic, recreational, and spiritual pursuits. Pribyl Decl. ¶¶ 5, 6, 7; Hafele Decl. ¶¶ 3, 15; McMillan Decl. ¶¶ 8, 39. Second, these witnesses’ uses of the lower Deschutes River are being impaired by Defendant’s failure to comply with the § 401 Certification and Oregon water quality standards. Pribyl Decl. ¶¶ 13, 26; Hafele Decl. ¶¶ 4-6, McMillan Decl. ¶ 10. These witnesses’ enjoyment of viewing wildlife in the Deschutes River, fishing in the Deschutes River, and viewing the Deschutes River itself is diminished by their knowledge that Project discharges are not in compliance with water quality standards, are thus not sufficiently protective of aquatic life, and are degrading the aquatic environment. Pribyl Decl. ¶ 13. Hafele Decl. ¶¶ 27, 30, 32; McMillan Decl. ¶¶ 10, 38.

These witnesses have curtailed their fishing and water contact recreation in the lower Deschutes River due to these unlawful discharges. Pribyl Decl. ¶ 37; Hafele Decl. ¶ 32; McMillan Decl. ¶ 39.

“The threshold question of citizen standing under the CWA is whether an individual can show that she has been injured in her use of a particular area because of concerns about violations of environmental laws, not whether the plaintiff can show there has been actual environmental harm.” *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000). Reduced enjoyment or curtailment of recreational or spiritual use of a water body, due to reasonable fears of environmental degradation of the water, is sufficient to establish an injury in fact. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996); *See also Friends of the Earth*, 528 U.S. at 184-85. Here, the witnesses’ fear of degradation is more than reasonable: Project discharges in fact are failing to comply with water quality standards specifically designed to protect the river’s aquatic life.

In addition, two of DRA’s standing witnesses have experienced an adverse impact to their businesses as a result of Defendant’s unlawful discharges. Declaration of A. Hazel ¶¶ 27, 28, 30; J. Hazel Decl. ¶¶31-33.

In sum, DRA has demonstrated that its members have suffered a concrete, actual, injury in fact due to unlawful discharges at the Project. *See Southwest Marine*, 236 F.3d at 994 (finding testimony that witnesses have derived recreational and aesthetic benefit from their use of a water body and “that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like” sufficient to satisfy the “injury in fact” component of Article III standing); *Pacific Lumber Co.*, 230 F.3d at 1150 (finding same); *see also Powell Duffryn*, 913 F.2d at 71 (same).

2. DRA's Injuries are Traceable to Defendant's Actions

DRA's members' injuries are "fairly traceable" to Defendant's unlawful discharges. To satisfy the traceability requirement for standing, DRA is not required to "show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiff[]." *Powell Duffryn*, 913 F.2d at 72. Instead, "plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm." *Id.* (quoting *Duke Power Co. v. Carolina Env'tl Study Group, Inc.*, 438 U.S. 59, 78 (1978)). For standing purposes, "the causal connection...need not be so airtight...as to demonstrate that the plaintiffs would succeed on the merits." *Pacific Lumber Co.*, 230 F.3d at 1152. To prove an injury is fairly traceable to defendant's activities, "[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Southwest Marine*, 236 F.3d at 995 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000)).

DRA meets this burden by demonstrating that Defendant's unlawful discharges, resulting in violations of water quality requirements and standards formulated to adequately protect aquatic life, cause or contribute to the kinds of injuries that DRA's members have suffered. *See* Hafele Decl. ¶ 27 (explaining that failure to meet the dissolved oxygen standard can increase mortality rates of fish eggs and fry); *id.* ¶ 30 (explaining that high pH levels are indicative of increased algal activity resulting from Project discharge of nutrient-laden water to the lower Deschutes River). DRA's standing witnesses have explained that these violations impair aquatic insect habitat and fish populations, and they are concerned that they are degrading conditions in the lower Deschutes to the detriment of themselves and other river users. Pribyl Decl. ¶¶ 17-26;

Hafele Decl. ¶¶ 27, 30. Further, standing witnesses John Hazel and Amy Hazel explained that they believe these water quality violations and degradation are resulting in decreased interest in fishing the Deschutes River, which has led to significant revenue losses due to fewer customers for their businesses. A. Hazel Decl. ¶¶ 26–28; J. Hazel Decl. ¶¶ 31–33.

3. DRA's Requested Relief Will Redress its Members' Injuries.

DRA's injuries will be redressed by granting DRA's requested relief—including declaratory relief and injunctive relief requiring compliance with each of the § 401 Certification's relevant water quality requirements. *See* Doc. 1 at 1. “A plaintiff who seeks injunctive relief satisfies the requirement of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard.” *Southwest Marine*, 236 F.3d at 995. Further, DRA need not show that the cessation of Defendant's unlawful conduct would return the lower Deschutes River to a pristine condition. Instead, the necessary showing is only that the injunctive relief requested would “decrease” pollution. *See, e.g., Powell Duffryn*, 913 F.2d at 73. Here, DRA satisfies the redressability requirement by demonstrating that PGE is routinely violating the conditions of its § 401 Certification, and continues to do so. Compliance with all conditions of the § 401 Certification would improve water quality by lowering water temperatures, lowering pH values, and increasing dissolved oxygen concentrations in Project discharges.

B. Defendant is Repeatedly Violating the § 401 Certification's Requirements for pH, Temperature, and Dissolved Oxygen.

Since SWW operations began, Defendant has repeatedly violated the § 401 Certification's clear requirements designed to ensure the Project complies with pH, temperature, and dissolved oxygen water quality standards.

1. pH

PGE has violated, and continues to violate, the § 401 Certification's requirement related to pH. Condition E.1 of the § 401 Certification requires that the "SWW facility shall be operated in accordance with the pH Management Plan contained in the WQMMP." Sandford Decl., Ex. H at 6. Section 4.3 of the pH Management Plan, in turn, requires the SWW facility to be operated "to meet the applicable...pH standards in the lower Deschutes River." Sandford Decl., Ex. I at 13. The applicable pH standards, per the pH Management Plan, are found at OAR 340-041-0135(1), which specifies that pH values must fall within the range of 6.5 to 8.5 Standard Units. *See also* Sandford Decl., Ex. I at 13. Per the pH Management Plan, the Project's SWW facility "will be operated to blend water from the two intakes to meet the applicable ODEQ and CTWS pH standards in the lower Deschutes River...." *Id.*

Project discharges have regularly exceeded the applicable pH standard since SWW operations began in late 2009. Data from Defendant's own monthly water quality reports, submitted to ODEQ, demonstrate 482 days since January 1, 2012 where Project discharges exceeded 8.5 Standard Units, including 140 days in 2016, and 104 days in 2017. *See* Sandford Decl, Ex. A.⁵ Each of these instances is a violation of Defendant's § 401 Certification, of the State of Oregon's water quality standards, and of the Act.

2. Temperature

Defendant has violated, and continues to violate, the § 401 Certification's clear requirement related to the temperature of Project discharge. Condition C.1 of the § 401 Certification requires that the "SWW facility shall be operated in accordance with the

⁵ Ex. A. to the Sandford Declaration provides a summary of pH data contained in monthly reports that PGE has submitted to ODEQ. Pursuant to FRE 1006, DRA has provided those underlying reports to Defendant PGE and Amici CTWS.

Temperature Management Plan contained in the WQMMP.” Sandford Decl., Ex. H at 1. Section 2.2 of the Temperature Management Plan, in turn, restricts the Project “from warming the water discharged into the lower Deschutes River below the Reregulating Dam more than 0.25° F over what would occur at that location in the river if the PRB Project were not in place,⁶ when surface waters exceed 50° F (10° C) or when federally listed Threatened and Endangered species use the river.” Sandford Decl., Ex. I at 5. Middle Columbia River steelhead, an Evolutionarily Significant Unit listed as “Threatened” under the federal Endangered Species Act, use the river year-round, meaning under the WQMMP the Project must comply with the temperature requirement at all times. Sandford Decl., Ex. K at 5–6. Per the Temperature Management Plan, the SWW facility “will be operated to blend water from the two intakes when necessary to meet the applicable...temperature standards in the lower Deschutes River.” Sandford Decl., Ex. I at 5. Further, “[i]f needed, the percentage of water discharged from the lower or hypolimnic outlet in Lake Billy Chinook will be increased to maintain outflow temperatures no greater than 0.25° F of temperatures that would occur if the Project were not present.” *Id.* at 6.

Project discharges have regularly violated the § 401 Certification’s temperature requirement since SWW operations began. Data from Defendant’s monthly reports to ODEQ demonstrate at least 688 days since August 12, 2011 that Project discharges exceeded the temperature requirement, including 121 days in 2016 and 73 days in 2017. *See* Sandford Decl.,

⁶ The temperature that “would occur at that location in the river if the PRB Project were not in place” is calculated on an ongoing basis, using a regression equation. *See* Sandford Decl., Ex. I at 6. Actual discharge temperatures are then to be compared with this calculated temperature to determine compliance. *See id.* at 9.

Ex. B.⁷ Each of these instances is a violation of Defendant's § 401 Certification, of the State of Oregon's water quality standards, and of the Act.

3. Dissolved Oxygen

Defendant has violated, and continues to violate, the § 401 Certification's clear requirement related to dissolved oxygen concentrations in Project discharge. Condition D.1 of the § 401 Certification requires that the "SWW facility shall be operated in accordance with the Dissolved Oxygen Management Plan contained in the WQMMP." Sandford Decl., Ex. H at 4. Section 3.2 of the Dissolved Oxygen Management Plan, in turn, states that the dissolved oxygen concentration in Project discharges must exceed 9.0 mg/L throughout the year.⁸ Sandford Decl., Ex. I at 9.

Project discharges have regularly violated the § 401 Certification's dissolved oxygen requirement since SWW operations began. Data from Defendant's monthly reports to ODEQ demonstrate over 501 days since January 1, 2012 that Project discharges fell below the 9.0 mg/L criteria, including 78 days in 2016 and 58 days in 2017. *See* Sandford Decl., Ex. C.⁹ Each of

⁷ Ex. B to the Sandford Declaration provides a summary of temperature data contained in monthly reports that PGE has submitted to ODEQ. Pursuant to FRE 1006, DRA has provided those underlying reports to Defendant PGE and Amici CTWS.

⁸ The Dissolved Oxygen Management Plan identifies an initial, higher dissolved oxygen standard of 11.0 mg/L. Sandford Decl., Ex. I at 10. However, the Plan provides that if subsequent monitoring of intergravel dissolved oxygen concentrations below the Project exceed 8.0 mg/L at relevant times, then the lower discharge requirement of 9.0 mg/L would be applicable. *Id.* at 10, 12. In 2013, ODEQ appears to have concluded, based on a series of PGE studies, that intergravel dissolved oxygen levels below the Project do in fact exceed 8.0 mg/L. *See* Sandford Decl., Ex. L at 23. DRA's position is that the higher 11.0 mg/L standard may still apply; however, proving that this standard applies likely involves genuine issues of material fact. Thus, DRA is applying the 9.0 mg/L standard for purposes of the present motion. DRA is not conceding that the 9.0 mg/L standard is in fact appropriate.

⁹ Ex. C to the Sandford Declaration provides a summary of dissolved oxygen data contained in monthly reports that PGE has submitted to ODEQ. Pursuant to FRE 1006, DRA has provided those underlying reports to Defendant PGE and Amici CTWS.

these instances is a violation of Defendant's § 401 Certification, of the State of Oregon's water quality standards, and of the Act.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court find it has standing to bring this suit and grant its Motion for Partial Summary Judgment on Count One of the Complaint, declaring Defendant liable for the aforementioned violations of the § 401 Certification's pH, temperature, and dissolved oxygen requirements and of the Clean Water Act.

Respectfully submitted this 5th day of March, 2018.

s/ Daniel M. Galpern
Daniel M. Galpern, OSB # 061950

s/ J. Douglas Quirke
J. Douglas Quirke, OSB # 955346

Attorneys for Plaintiff Deschutes River Alliance

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2018, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Oregon via the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

LAW OFFICE OF DANIEL M. GALPERN

/s/ Daniel M. Galpern
Daniel M. Galpern, OSB# 061950

Attorney for Plaintiff Deschutes River Alliance