

Beth S. Ginsberg, OSB No. 070890
beth.ginsberg@stoel.com
Michael R. Campbell, OSB No. 870016
michael.campbell@stoel.com
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: 206.624.0900
Facsimile: 206.386.7500

Attorneys for Defendant

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

PGE'S CROSS-MOTION FOR
SUMMARY JUDGMENT AND
RESPONSE TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

(Oral Argument Requested)

PGE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

	Page
CERTIFICATION	1
MOTION.....	1
MEMORANDUM OF LAW	2
I. INTRODUCTION AND SUMMARY	2
II. FACTUAL BACKGROUND.....	5
A. Project Facilities and Operations	5
B. Project Relicensing and Certification History	7
C. The Fish Passage Plan and the SWW	9
D. Downstream River Water Quality and the SWW	12
III. LEGAL BACKGROUND	14
A. Water Quality Standards.....	14
B. CWA Section 401 Certifications	15
C. CWA Citizen Suit Enforcement of Section 401 Certifications	16
D. Interpretation of Certification Conditions.....	17
E. Summary Judgment	18
IV. ARGUMENT.....	18
A. The Certification Does Not Require the Project to Achieve Individual Water Quality Objectives in Isolation.....	19
B. The Project Complies with the Certification’s Adaptive Management Requirements for Temperature.	24
1. DRA’s argument misstates the applicable temperature objectives of the TMP.	25
2. The Project operates in accordance with the Certification’s adaptive management requirements for temperature.	27
C. The Project Complies with the Certification’s Adaptive Management Requirements for Dissolved Oxygen.	29
1. DRA’s argument misstates the applicable dissolved oxygen objectives of the DOMP.....	29
2. The Project operates in accordance with the Certification’s adaptive management requirements for dissolved oxygen.	31
D. The Project Complies with the Certification’s Adaptive Management Requirements for pH.....	32
Page - i PGE’S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT	

1.	DRA’s argument misstates the applicable pH objectives of the PHMP.....	32
2.	The Project operates in accordance with the Certification’s adaptive management requirements for pH.	33
V.	CONCLUSION.....	35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	18
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	18
<i>Friends of Merrymeeting Bay v. Hydro Kennebec, LLC</i> , 759 F.3d 30 (1st Cir. 2014).....	17
<i>Nat. Res. Def. Council, Inc. v. County of Los Angeles</i> , 725 F.3d 1194 (9th Cir. 2013)	17
<i>Nw. Envtl. Advocates v. City of Portland</i> , 56 F.3d 979 (9th Cir. 1995)	16, 17
<i>Or. Nat. Res. Council v. U.S. Forest Serv.</i> , 834 F.2d 842 (9th Cir. 1987)	16
<i>Piney Run Pres. Ass’n v. Cty. Comm’rs of Carroll Cty., Md.</i> , 268 F.3d 255 (4th Cir. 2001)	17
Statutes	
16 U.S.C. § 811.....	9
16 U.S.C. § 1536(b)(4)	9
16 U.S.C. § 1536(o)(2)	9
33 U.S.C. § 1313(c)(2).....	14
33 U.S.C. § 1313(c)(2)(A)	14
33 U.S.C. § 1313(c)(3)-(4).....	14
33 U.S.C. § 1319(d)	16
33 U.S.C. § 1341.....	passim
33 U.S.C. § 1341(a)(1).....	15
33 U.S.C. § 1341(d)	9, 15, 16

33 U.S.C. § 1362(7)15
 33 U.S.C. § 1365(a)16
 33 U.S.C. § 1365(a)(1).....16
 33 U.S.C. § 1365(f)(5)16
 33 U.S.C. § 1377(e)14, 15
 ORS 468B.04015

Rules

FRCP 56.....1
 FRCP 56(a)18
 Local Rule 7-1(a)1

Regulations

40 C.F.R. § 122.215
 40 C.F.R. §§ 131.10, .1114
 40 C.F.R. § 131.2114
 50 C.F.R. § 17.11(h)10
 50 C.F.R. § 223.102(e).....10
 50 C.F.R. § 223.301(a)(1), (4), (6).....10
 78 Fed. Reg. 2893-2907 (Jan. 15, 2013).....10
 OAR 340-041-0002(13), -013014
 OAR 340-041-0002(39).....30
 OAR 340-041-0002(74).....30
 OAR 340-041-0007(10), -013014
 OAR 340-041-0016(1)-(2), -0130(2).....30
 OAR 340-041-0016(1)(a)30

OAR 340-041-0016(1)(b)30

OAR 340-041-0016, -0021, -0028.....14

OAR 340-041-0021(1)(b), -0135(1)(a).....33

OAR 340-041-0028(4)(a)-(b)25

OAR 340-041-0028(4)(a)-(b), -0130(2)25

OAR 340-041-0028(12)(b)(B).....25

OAR ch. 340, div. 04114

Other Authorities

<http://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards-and-contacts> (last visited Apr. 26, 2018)14

<https://www.epa.gov/wqs-tech/water-quality-standards-regulations-confederated-tribes-warm-springs-indian-reservation> (last visited Apr. 26, 2018).....15

WSTC § 433.008(1).....15

WSTC ch. 432.....14

WSTC ch. 475.....15

CERTIFICATION

Pursuant to Local Rule 7-1(a), the undersigned attorney certifies that the Parties have made a good-faith effort through personal and telephone conferences to resolve the dispute raised by this cross-motion for summary judgment, including each claim, issue, or defense at issue, and have been unable to do so.

MOTION

Pursuant to Federal Rule of Civil Procedure 56, Defendant Portland General Electric Company (“PGE”) cross-moves for summary judgment on the single claim for relief set forth in the Complaint filed by Plaintiff Deschutes River Alliance (“DRA”), namely, the claim that PGE is violating the Clean Water Act (“CWA”) section 401 certification (“Certification”) for the Pelton Round Butte Hydroelectric Project (“Project”) issued by the Oregon Department of Environmental Quality (“DEQ”). This cross-motion is supported by the following legal memorandum; the Declarations of Lori Campbell (“Campbell Decl.”), Lee Cramer (“Cramer Decl.”), Megan Hill (“Hill Decl.”), Don Ratliff (“Ratliff Decl.”), and Beth Ginsberg (“Ginsberg Decl.”); the exhibits accompanying these declarations; and the Court file.

MEMORANDUM OF LAW

I. INTRODUCTION AND SUMMARY

DRA's Motion for Partial Summary Judgment (Dkt. No. 65) should be denied, and PGE's Cross-Motion for Summary Judgment should be granted instead. As DEQ has concluded, the Project is operating consistently with the Certification. Oregon Department of Environmental Quality's Amicus Curiae Brief on Summary Judgment ("DEQ's Brief") at 18 (Dkt. No. 85-1). Because there is no genuine dispute of material fact concerning PGE's compliance with the Certification, PGE is entitled to summary judgment.

In support of its motion, DRA simply cites monitoring data that shows that individual water quality objectives set forth in the Certification are sometimes not met in the Deschutes River downstream of the Project. DRA fundamentally misinterprets the Certification by ignoring its fish passage requirements, ignoring its goal of restoring the river's water quality to that which would exist without the Project, and ignoring its provisions for adaptively managing the Project to achieve a careful balance of these fish passage and water quality objectives. Indeed, DRA seeks through its motion to force the Project to operate in precisely the manner that the Certification prohibits and that would re-create the fish passage and water quality problems that the Certification is specifically intended to eliminate.

Before the Certification was issued, the Project was a complete barrier to the passage of resident and anadromous fish, which led to the extirpation of all anadromous fish runs upstream of the Project. In addition, the Project's discharge of water solely from the lower levels of Lake Billy Chinook, the large reservoir impounded by Round Butte Dam, contributed to downstream river conditions that were detrimental to fish, including temperatures that were too cold in the spring and early summer and too warm in the late summer and fall. To address these problems,

the Certification requires the construction and operation of a selective water withdrawal facility (“SWW”) in Lake Billy Chinook. The SWW allows the discharge of a variable blend of deep and surface water from the reservoir, rather than solely water from the reservoir’s lower levels, as before. This serves two principal purposes. First, the surface withdrawals create surface currents in the reservoir’s forebay that are essential for downstream fish passage through the Project, as well as the reintroduction of anadromous fish runs upstream of the Project. Second, the ability to discharge a variable blend of surface and deep water enables the Project to achieve a seasonal pattern of water temperatures in the river downstream that more closely resembles the pattern that the river would have without the Project.

DRA, however, blames the SWW for what it alleges are detrimental changes in the river’s water quality. It seeks to force the Project to operate much as it did before the SWW was constructed, by again discharging water largely, and perhaps solely, from the lower levels of Lake Billy Chinook. PGE and the Confederated Tribes of the Warm Springs Reservation of Oregon (the “Tribe”), the co-owners of the Project, strongly oppose this objective. DRA’s portrait of an idyllic, pristine river before the SWW began operation not only ignores the river’s pre-SWW water quality problems, it more importantly ignores the pre-SWW harm to anadromous fish, including the elimination of anadromous fish runs upstream of the Project. The Tribe especially does not share DRA’s nostalgia for the river during the decades when these runs, which are profoundly important to the Tribe’s culture and economy, were diminished or extirpated altogether.¹

¹ The proportion of deep and surface water discharged through the SWW has no effect on power generation. From the standpoint of Project revenues, it does not matter whether the source of the water for the power generation turbines at Round Butte Dam is deep water, surface water, or a mixture of both. Cramer Decl. ¶ 7.

A CWA citizen suit can only enforce, not rewrite, the conditions of a section 401 certification. Notwithstanding DRA's objections to the SWW, the Certification expressly requires PGE and the Tribe to construct and operate it. In an effort to overcome this difficulty, DRA alleges that the Project's operation of the SWW violates the Certification whenever the temperature, dissolved oxygen concentration, or pH measured in the river downstream of the Project does not conform to the Certification's individual objectives for these parameters. DEQ has rejected this reading of its Certification. *See* DEQ's Brief at 18. DRA's selective reading of the Certification disregards both its fish passage requirements and its admonition that the Project must not be managed to achieve any single water quality objective, but must instead be adaptively managed to consider simultaneously its effects on all water quality parameters *and* fish passage. If, for example, the Project were to discharge more cold, deep reservoir water through the SWW in the late spring and early summer to lower river temperatures downstream—as DRA demands—that would have a documented adverse effect on fish passage by reducing the reservoir forebay surface flows that are essential for downstream fish migration through the Project and, in turn, the reintroduction of anadromous fish runs upstream of the Project. The increased discharge of deep reservoir water would also make it more difficult to achieve dissolved oxygen objectives in the river because the deep water is lower in dissolved oxygen than the surface water, as well as more difficult to achieve the temperature objectives for the river later in the year because the limited supply of cold deep reservoir water would have been exhausted earlier in the year. Rather than making PGE and the Tribe responsible for ensuring that the river meets individual water quality objectives, which would risk compelling Project operations to achieve one water quality objective that might impair fish passage or the achievement of another water quality objective, the Certification requires PGE and the Tribe to

monitor the river's water quality and take specified adaptive management measures in response. These measures, which must be undertaken in close cooperation with DEQ and other management agencies, are carefully designed to balance fish passage and water quality objectives.

Because the Certification does not require the Project to ensure that individual water quality objectives for temperature, dissolved oxygen, and pH are met in the river downstream of the Project, the water quality data presented by DRA in its Motion for Partial Summary Judgment is insufficient to establish violations of the Certification. Moreover, DRA has presented no evidence that the Project has failed to comply with any of the Certification's required adaptive management measures. To the contrary, and as DEQ's brief states, the Project is in compliance with these requirements. DEQ's Brief at 18 ("[T]he Project is operating consistent with its certification."). Accordingly, PGE is entitled to summary judgment as a matter of law, and the Court should deny DRA's Motion for Partial Summary Judgment and grant PGE's Cross-Motion for Summary Judgment.

II. FACTUAL BACKGROUND

A. Project Facilities and Operations

The Project consists of three dams and associated hydroelectric facilities on the Deschutes River approximately 100 river miles upstream from its confluence with the Columbia River. Federal Energy Regulatory Commission ("FERC"), Order Approving Settlement and Issuing New License ¶¶ 1, 11, Project No. 2030-036, 111 FERC ¶ 61,450 (June 21, 2005) ("License").² From upstream to downstream the dams are: Round Butte Dam, Pelton Dam, and the Reregulating Dam. *Id.* Because the middle of the river channel is the eastern boundary of

² The License is attached to the Declaration of Charles R. Calica (Dkt. No. 73) as Ex. 9 (Dkt. No. 73-9).

the Tribe's Warm Springs Reservation, much of the Project lies within the reservation, and the remainder borders it. Declaration of Charles R. Calica ("Calica Decl.") ¶ 6 (Dkt. No. 73); License ¶ 107.

Round Butte Dam is the uppermost and largest Project dam at approximately river mile ("RM") 110. License ¶¶ 11-12. In addition to the Deschutes River, two large tributaries, the Metolius River and the Crooked River, flow into Lake Billy Chinook, the reservoir impounded by the dam. *Id.* Water from the reservoir flows through a powerhouse at the base of the dam and is discharged downstream. *Id.* ¶ 16. Pelton Dam is about seven miles downstream from Round Butte Dam, at approximately RM 103. *Id.* ¶¶ 11, 13. It impounds a narrow reservoir, Lake Simtustus, which discharges through a powerhouse at the base of the dam. *Id.* ¶ 16. The lowermost dam, the Reregulating Dam, is about 2.5 miles downstream from Pelton Dam, at approximately RM 100, and includes a powerhouse that discharges to the Deschutes River. *Id.* ¶¶ 11, 16. The Reregulating Dam is operated to attenuate the fluctuations in flows from Round Butte and Pelton Dams, so that the daily average flows released to the river downstream generally approximate the daily average flows into the Project. *Id.* ¶ 17, App. A (§ G.7); Calica Decl. ¶ 14.

Although the Project when first constructed in the 1950s included a fish ladder around the Reregulating and Pelton Dams, the high elevation of Round Butte Dam, which was constructed in 1964, precluded the use of a fish ladder. *See* Offer of Settlement and Joint Explanatory Statement in Support of Settlement Agreement at 26 (July 30, 2004) ("JES").³ Instead, adult fish were collected below the dam and transported over it through a bucket tramway, and downstream juvenile migrants were captured in a surface collector at the dam and transported by

³ The JES is Ex. 8 to the Calica Decl. (Dkt. No. 73-8).

truck or pipe below the dam. *Id.* at 26-27. These facilities soon proved to be ineffective, however, largely because the absence of a strong downstream surface current in Lake Billy Chinook prevented the juvenile migrants from being attracted into the downstream collection facility. *Id.* at 27; Ratliff Decl. ¶ 5. As a result, the Project's fish passage facilities were abandoned by 1973 and replaced with a hatchery. *See* JES at 27; Ratliff Decl. ¶ 5. This resulted in the extirpation of all anadromous fish runs upstream of the Project. Calica Decl. ¶¶ 26, 35; Hill Decl. ¶ 4; Ratliff Decl. ¶ 5.

With the addition of the SWW in late 2009, fish passage through the Project has been restored. Calica Decl. ¶ 35; Hill Decl. ¶ 9; Ratliff ¶ 17. The reservoir surface flows created by the SWW enable downstream migrants to be effectively collected at the SWW and trucked to a release point in the river below the Project. Hill Decl. ¶¶ 8-9. Upstream migrants are collected in a fish trap at the Reregulating Dam and trucked above Round Butte Dam for release. *Id.* ¶ 8.

B. Project Relicensing and Certification History

The Project was originally licensed to PGE in 1951 by the Federal Power Commission, FERC's predecessor, pursuant to the Federal Power Act ("FPA"). JES at 12. In 1980, FERC authorized the Tribe to construct a powerhouse at the Reregulating Dam, which began generating electricity in 1982. *Id.* The Tribe also became a joint licensee to the extent of its interest in the Reregulating Dam powerhouse. License ¶ 3.

Anticipating the expiration of the original FERC license on December 31, 2001, PGE and the Tribe initially filed competing applications for a new Project license. *Id.* ¶ 1. They later entered into an agreement under which the Tribe acquired an ownership interest in the Project as a whole, and they became joint applicants for the new license in 2001. Calica Decl. ¶¶ 20-23.

In conjunction with their license application, PGE and the Tribe requested CWA section 401 certifications for the Project from DEQ and the Tribe’s Water Control Board (“WCB”). License ¶ 103; Calica Decl. ¶ 23. DEQ and the WCB issued separate certifications for the Project in June 2002 with somewhat different conditions. License ¶ 104, App. A, B. Both certifications, however, referenced the same draft Water Quality Management and Monitoring Plan (“WQMMP”).⁴ *Id.*, App. A (§ A), App. B (§ 1.B). Moreover, both certifications require PGE and the Tribe to comply with the final, approved WQMMP, and the DEQ Certification expressly provides that the final WQMMP is “a part of the §401 certification.” *Id.*

As the FERC licensing proceedings progressed, PGE and the Tribe entered into settlement discussions with the other parties to the proceedings. These discussions resulted in a comprehensive settlement agreement among PGE, the Tribe, DEQ, the Oregon Department of Fish and Wildlife (“ODFW”), the U.S. Fish and Wildlife Service (“USFWS”), the National Marine Fisheries Service (“NMFS”), and 16 other public and private entities, including five environmental advocacy organizations (“Settlement Agreement”⁵). License ¶ 2. In 2005, FERC approved the Settlement Agreement and issued the new 50-year License for the Project to PGE and the Tribe as joint licensees. The License includes, with minor revisions, the Settlement

⁴ The WQMMP is Ex. 4 to the Ginsberg Decl. filed in support of PGE’s Mot. to Dismiss at Dkt. No. 75.

⁵ Settlement Agreement Concerning the Relicensing of the Pelton Round Butte Hydroelectric Project, FERC Project No. 2030 (July 13, 2004). The Settlement Agreement is Ex. 7 to the Calica Decl. (Dkt. No. 73-7). The full list of parties to the Settlement Agreement is: PGE, the Tribe, DEQ, ODFW, USFWS, NMFS, U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, U.S. Forest Service, Oregon Water Resources Department, Oregon Parks and Recreation Department, Deschutes County, Jefferson County, the Cities of Bend, Madras, and Redmond, the Avion Water Company, American Rivers, the Native Fish Society, Oregon Trout, Trout Unlimited, and WaterWatch of Oregon. License ¶ 9; Calica Decl. ¶ 25, Ex. 7.

Agreement’s proposed license terms. *See id.* As required by CWA section 401(d), 33 U.S.C. § 1341(d), the License terms also include all the conditions of the DEQ and WCB section 401 certifications. These conditions are Appendices A and B of the License, respectively. Other License terms include the USFWS’s and NMFS’s mandatory FPA section 18 “fishway prescriptions” (License Appendices C and D, respectively), *see* 16 U.S.C. § 811, and their Endangered Species Act (“ESA”) “reasonable and prudent measures” (License Appendices F and E, respectively), *see* 16 U.S.C. § 1536(b)(4), (o)(2).⁶ The DEQ and WCB certifications, fishway prescriptions, and ESA reasonable and prudent measures incorporated into the License all require the Project to implement the Settlement Agreement’s “Fish Passage Plan,” which includes the construction and operation of the SWW. License, App. A (§ B, G.9), App. B (§ 1.F), App. C (§ 1), App. D (§ 1), App. E (§ 1), App. F (§ 1.1).

C. The Fish Passage Plan and the SWW

As stated above, the Project was a complete barrier to upstream and downstream fish migration under the previous FERC license, and this resulted in the extirpation of anadromous fish runs upstream of the Project and the loss of substantial anadromous fish habitat—30 miles on the Deschutes River upstream of the Project, 155 miles on the Crooked River, and 41 miles on the Metolius River. Calica Decl. ¶¶ 26-27; Hill Decl. ¶ 4; JES at 3, 22-23, 25-30. The affected anadromous fish populations included fall and spring Chinook salmon, sockeye salmon, Pacific lamprey, and the Middle Columbia River steelhead distinct population segment (“DPS”)

⁶ The ESA reasonable and prudent measures stem from the incidental take statements in USFWS’s November 2, 2004, biological opinion concerning the Columbia River bull trout distinct population segment (“DPS”), and NMFS’s February 28, 2005, biological opinion concerning the Middle Columbia River steelhead evolutionarily significant unit (“ESU”). License ¶ 127.

(*Oncorhynchus mykiss*), the latter of which is listed as threatened under the ESA.⁷ Hill Decl. ¶ 4; JES at 30; 50 C.F.R. § 223.102(e). The passage barrier also resulted in the isolation of native resident fish populations upstream and downstream of the Project, including rainbow trout, mountain whitefish, and bull trout (*Salvelinus confluentus*), the latter of which is listed as threatened under the ESA. Hill Decl. ¶ 4; JES at 30, 33-36; 50 C.F.R. § 17.11(h).

The foremost objective of the Settlement Agreement is to reestablish year-round fish passage through the Project to support the restoration of anadromous fish runs upstream of the Project and the reconnection of isolated native resident fish populations. JES at 24-49. This objective is implemented through the Settlement Agreement’s Fish Passage Plan and related fish passage provisions. The stated goals of the plan are to “establish self-sustaining harvestable anadromous fish runs of Chinook, steelhead and sockeye above the Project” and, “during all months of the year,” to “provide for safe, timely and effective upstream and downstream fish passage of adult and juvenile life stages of spring and fall Chinook, summer steelhead, sockeye salmon, bull trout, rainbow trout, and mountain whitefish.” *E.g.*, License ¶ (J), App. D (§§ 1(a), 1(b), 2(a)).

Under the License, the implementation of the Fish Passage Plan is overseen by the “Fish Committee.” License art. 402(a). The Fish Committee consists of PGE, the Tribe, DEQ, the WCB, NMFS, USFWS, ODFW, the Tribe’s Branch of Natural Resources (“BNR”), three other federal agencies, and four environmental advocacy organizations. *Id.* The Fish Committee is a consultative body that attempts to achieve consensus regarding PGE and the Tribe’s implementation of the Fish Passage Plan. *Id.* If consensus cannot be achieved, a member of the

⁷ The Middle Columbia River steelhead DPS upstream of Round Butte Dam is currently designated as a nonessential experimental population until January 15, 2025 while reintroduction efforts continue. 50 C.F.R. § 223.301(a)(1), (4), (6); 78 Fed. Reg. 2893-2907 (Jan. 15, 2013).

Fish Committee may invoke dispute resolution procedures and ultimately refer the matter to FERC. *Id.* Four agencies, however, have statutory authorities, as well as authority under the License, to approve the implementation of certain aspects of the Fish Passage Plan. *See* License art. 402(a)(2); JES at 68-69. These four—NMFS, USFWS, ODFW, and BNR—are known as the “Fish Agencies.” License art. 402(a)(2).

The Project’s previous fish passage efforts failed because of the inability to effectively capture downstream migrants at Round Butte Dam for transport downstream. Hill Decl. ¶ 5; Ratliff ¶ 5; JES at 27. The dam’s withdrawal of water only from the lower levels of the reservoir did not create sufficient reservoir surface flows to attract downstream juvenile migrants into the fish collection facilities at the dam. Hill Decl. ¶ 5; Ratliff ¶ 5; JES at 27. To create the necessary surface flows, the Fish Passage Plan requires PGE and the Tribe to construct and operate the SWW. *See, e.g.*, JES at 21, 24-25; License ¶¶ 38, (F), App. A (§ B). The Settlement Agreement parties described the SWW as the “centerpiece” of the Fish Passage Plan, JES at 21, and it is the essential element for its success, Calica Decl. ¶ 34; Hill Decl. ¶ 7; Ratliff Decl. ¶ 17.

In accordance with the License, PGE and the Tribe designed the SWW in consultation with the Fish Committee, and the final design was approved by the Fish Agencies and FERC. License, App. C (§§ 4-5); Hill Decl. ¶ 7; Ratliff Decl. ¶¶ 4, 7-9. The top of the SWW draws water from the surface of the reservoir. Cramer Decl. ¶ 4. Fish drawn in with the water are collected for transport to the Deschutes River downstream of the Project or returned to the reservoir. *Id.* The water—now free of fish—flows down the SWW’s “vertical flow conduit” to the preexisting low-level intake to the powerhouse, where it can combine with water withdrawn from the deep levels of the reservoir through the SWW’s bottom control gates. *Id.*; Ratliff Decl.

¶ 17. The position of the bottom gates can be adjusted to change the blend of deep and surface water discharged downstream through the powerhouse.⁸ Cramer Decl. ¶ 5.

D. Downstream River Water Quality and the SWW

Under the previous License, water quality standards for temperature, dissolved oxygen, and pH were not met in the Deschutes River downstream of the Project. *See* Calica Decl. ¶¶ 35-39; DEQ Eval. Rep. at 38, 58-59, 77, 91-92; JES at 3, 23. Before the SWW was constructed, the exclusive discharge of water from the lower levels of Lake Billy Chinook contributed to these problems. For example, water from the bottom of the reservoir is low in dissolved oxygen, which, when discharged, contributes to low dissolved oxygen in the river downstream. Campbell Decl. ¶ 9; DEQ Eval. Rep. at 77. In addition, although the deep reservoir water is colder than the surface water for much of the year, large reservoirs such as Lake Billy Chinook warm and cool much more slowly than rivers, so that they tend to shift the seasonal temperature regime of the river downstream. Ratliff Decl. ¶¶ 5, 12-13. By discharging exclusively deep water from Lake Billy Chinook, the Project contributed to downstream river temperatures that were unnaturally cold in the spring and early summer and unnaturally warm in the late summer and early autumn. *Id.*; DEQ Eval. Rep. at 38, 58-59, 136. These deviations from natural

⁸ There are no gates at the top of the SWW to shut off surface flow through the SWW. Cramer Decl. ¶ 5. When the SWW's bottom gates are fully open (sometimes informally and incorrectly referred to as "100 percent bottom flow"), water continues to flow through the top of the SWW, such that the maximum proportion of flow from the lower levels of the reservoir that can be discharged through the SWW is approximately 60 percent. *Id.* When DEQ issued the Certification in 2002, it understood that flow through the SWW would be controlled only through bottom gates, and thus that the SWW would not be able to discharge 100 percent deep water. *See* Ginsberg Decl., Ex. A (DEQ, "Evaluation and Findings Report" 20, 59 (2002) ("DEQ Eval. Rep.")). Because the Fish Passage Plan requires year-round downstream fish passage through the Project, which requires reservoir surface flows provided by the SWW, and because no water quality need for exclusively deep withdrawal was identified during the design of the SWW, there was no need to design the SWW to exclude surface flows. Ratliff Decl. ¶ 11.

temperatures can harm fish by delaying or accelerating their life stages, including spawning, egg incubation, and migration. Ratliff Decl. ¶¶ 14-15. The shift in river temperatures was particularly detrimental to the Tribe's treaty reserved fall Chinook fishery. Calica Decl. ¶ 37; Ratliff Decl. ¶ 15.

By allowing the discharge of a variable blend of reservoir surface and deep water, the SWW allows the Project to achieve downstream river conditions that more closely resemble those that the river would have without the Project and thereby reduces the Project's contributions to deviations from water quality standards. WQMMP §§ 1.0-1.1; DEQ Eval. Rep. at 58-59; Campbell Decl. ¶ 7; Ratliff Decl. ¶¶ 12-14. These adjustments, however, involve several tradeoffs. The most substantial of these relates to increasing the proportion of cold deep water discharged through the SWW to lower the temperature of the river downstream. This will have at least three adverse effects. First, it will reduce surface flows in the reservoir, which will impair fish passage. There is a strong, inverse relationship between SWW bottom withdrawals and the number of downstream migrating fish that can be captured and transported downstream below the Project. Hill Decl. ¶ 12. Second, it will reduce dissolved oxygen concentrations in the river downstream because bottom water tends to be low in dissolved oxygen. Campbell Decl. ¶ 9. And, third, it will more quickly exhaust the supply of cold water in the reservoir, which will lead to higher river temperatures later in the year. *Id.* Because of these tradeoffs, it is sometimes impossible for the Project to achieve all water quality and fish passage objectives simultaneously. *Id.* ¶ 11. But this was also impossible before the construction of the SWW, when the Project blocked all fish passage. *Id.*; Ratliff Decl. ¶ 5.

III. LEGAL BACKGROUND

A. Water Quality Standards

The CWA requires states and authorized tribes to establish instream water quality standards for their waters and submit them to EPA for approval. *See* 33 U.S.C. §§ 1313(c)(2), 1377(e). Once approved by EPA, the standards are the applicable water quality standards under the CWA. *See id.* § 1313(c)(3)-(4); 40 C.F.R. § 131.21. The Tribe is authorized under the CWA to adopt standards for its waters,⁹ *see* Calica Decl. ¶ 19; Warm Springs Tribal Code (“WSTC”) ch. 432, and both the Tribe and Oregon have adopted and obtained EPA approval for water quality standards in the Deschutes River downstream of the Project, *see* WSTC ch. 432; OAR ch. 340, div. 041.

Water quality standards include the designated uses of a waterbody and water quality criteria to protect those uses. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, .11. Oregon designates the Deschutes River immediately downstream of the Project for “Fish and Aquatic Life,” including “salmon and steelhead rearing,” “bull trout migration,” and “foraging and sub-adult rearing,” as well as, from October 15 through June 15, “salmon and trout steelhead spawning use.” *See* OAR 340-041-0002(13), -0130, Table 130A, Figures 130A, 130B. Oregon has adopted numeric water quality criteria to protect these uses, including numeric criteria for temperature, dissolved oxygen, and pH. *See, e.g.*, OAR 340-041-0016, -0021, -0028. But the designated fish and other uses must independently be protected, regardless whether the numeric criteria are met. *See* OAR 340-041-0007(10), -0130.

⁹ *See* 33 U.S.C. § 1377(e); EPA, EPA Approvals of Tribal Water Quality Standards and Contacts, <http://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards-and-contacts> (last visited Apr. 26, 2018).

B. CWA Section 401 Certifications

CWA section 401 requires applicants for federal licenses involving discharges to “waters of the United States” to obtain a certification from the state in which the discharge originates that the discharge will comply with specified sections of the CWA, including water quality standards.

Any applicant for a Federal license . . . [,] which may result in any discharge into the navigable waters,^{10]} shall provide the licensing . . . agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title [CWA sections 301, 302, 303, 306, and 307]. . . . No license . . . shall be granted until the certification . . . has been obtained or has been waived

33 U.S.C. § 1341(a)(1).

Pursuant to CWA section 518(e), 33 U.S.C. § 1377(e), EPA has approved the Tribe’s treatment as a state for purposes of the CWA, including section 401 certifications.¹¹ Because the boundary of the Warm Springs Reservation is the middle channel of the Deschutes River, Calica Decl. ¶ 6, discharges from the Project to the river originate both within and outside the reservation. Therefore, PGE and the Tribe’s joint application to FERC for a new FPA license required section 401 certifications from both DEQ and the WCB.¹² License ¶ 103. DEQ and the WCB issued separate certifications for the Project in June 2002. *Id.* ¶ 104.

CWA section 401(d) provides that certifications may include conditions to ensure compliance with the applicable provisions of the CWA “and with any other appropriate

¹⁰ The CWA defines “navigable waters” as “waters of the United States.” 33 U.S.C. § 1362(7). The Deschutes River is a “water of the United States.” *See* 40 C.F.R. § 122.2.

¹¹ *See* WSTC § 433.008(1); EPA, Water Quality Standards Regulations: Confederated Tribes of the Warm Springs Indian Reservation of Oregon, <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-confederated-tribes-warm-springs-indian-reservation> (last visited Apr. 26, 2018).

¹² DEQ and the WCB are the agencies authorized by the State of Oregon and the Tribe, respectively, to issue CWA section 401 certifications. *See* ORS 468B.040; WSTC ch. 475; Calica Decl. ¶ 19.

requirement of State law.” 33 U.S.C. § 1341(d). Any such conditions “shall become a condition on any Federal license . . . subject to the provisions of this section [CWA section 401].” *Id.* The terms of the FERC License for the Project include the conditions of the DEQ and WCB certifications as Appendices A and B of the License, respectively. License ¶¶ (F), (G).

C. CWA Citizen Suit Enforcement of Section 401 Certifications

The CWA authorizes “any citizen” to bring a civil action against any person “who is alleged to be in violation of” “an effluent standard or limitation” under the CWA. 33 U.S.C. § 1365(a)(1). For purposes of this provision, the CWA defines “an effluent standard or limitation” to include “certification under section 1341 of this title [CWA section 401].” *Id.* § 1365(f)(5). This Court has held that “certification under section 1341” includes both the certification requirement and the conditions of any certification.¹³ Dkt. No. 22.

In a CWA citizen suit, the Court may “enforce such an effluent standard or limitation”—in this instance the Certification conditions that DRA alleges PGE is violating.¹⁴ 33 U.S.C. § 1365(a). The Court, however, has no authority to revise the Certification conditions or to enforce the CWA or other statutory or regulatory provisions except insofar as they are reflected in the conditions of the Certification. *See Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 848-50 (9th Cir. 1987) (citizen suit may not directly enforce water quality standards); *cf. Nw. Env'tl. Advocates v. City of Portland*, 56 F.3d 979, 986-90 (9th Cir. 1995) (CWA citizen suit

¹³ PGE respectfully disagrees with and hereby reserves its right to appeal that jurisdictional ruling.

¹⁴ DRA has not sought, nor could it seek, civil penalties for the alleged violations. In a citizen suit, the court may “apply any appropriate civil penalties under section 1319(d) of this title [CWA section 309(d), 33 U.S.C. § 1319(d)].” 33 U.S.C. § 1365(a). That section authorizes civil penalties for violations of several specific CWA sections, but not section 401. *See id.* § 1319(d).

may enforce water quality standards and other CWA requirements only to the extent that they are incorporated into permit conditions).

D. Interpretation of Certification Conditions

By analogy to the interpretation of National Pollutant Discharge Elimination System (“NPDES”) permit conditions in CWA citizen suits, the conditions of a CWA section 401 certification should be interpreted in the same manner as a contract or other legal document. *See Nat. Res. Def. Council, Inc. v. County of Los Angeles (“NRDC”),* 725 F.3d 1194, 1204-05 (9th Cir. 2013) (using contract interpretation principles to interpret the meaning of NPDES permit conditions); *Nw. Env’tl. Advocates,* 56 F.3d at 982 (same); *see also Friends of Merrymeeting Bay v. Hydro Kennebec, LLC,* 759 F.3d 30, 33-34 (1st Cir. 2014) (applying contract interpretation principles to interpret the meaning of certification conditions that were based on the terms of a settlement agreement). When interpreting a permit, “[i]f the language of the permit, *considered in light of the structure of the permit as a whole*, ‘is plain and capable of legal construction, the language alone must determine the permit’s meaning.’” *NRDC,* 725 F.3d at 1204-05 (emphasis added) (quoting *Piney Run Pres. Ass’n v. Cty. Comm’rs of Carroll Cty., Md.,* 268 F.3d 255, 270 (4th Cir. 2001)). Terms should not be read in isolation, however, to reach an interpretation that is at odds with other permit terms or that does not give full meaning and effect to all the permit’s provisions. *See id.* at 1206; *Nw. Env’tl. Advocates,* 56 F.3d at 983. If “the permit’s language is ambiguous,” the court “may turn to extrinsic evidence to interpret its terms.” *NRDC,* 725 F.3d at 1205. The terms of a permit are “ambiguous if reasonable people could find its terms susceptible to more than one interpretation.” *Id.*

E. Summary Judgment

Summary judgment is required when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FRCP 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party may meet its burden by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. Once this initial burden is met, the nonmoving party must go beyond the pleadings and identify facts that show a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although all reasonable inferences must be drawn in favor of the nonmoving party, if the nonmoving party's evidence is "merely colorable" or "not significantly probative," summary judgment is appropriate. *Id.* at 249-50.

IV. ARGUMENT

DRA's motion for summary judgment is based solely on its argument that water quality measurements in the river downstream of the Project do not meet the individual objectives for temperature, dissolved oxygen, and pH set forth in the Certification. Plaintiff's Motion for Partial Summary Judgment and Memorandum in Support ("Plaintiff's Memo.") at 14-18 (Dkt. No. 65). This argument misinterprets the Certification by ignoring not only the Certification's fish passage requirements, but also its extensive adaptive management requirements for balancing fish passage and water quality objectives, which the Certification acknowledges cannot always be achieved simultaneously. Indeed, the Certification expressly directs that the "operation of the selective withdrawal facility must consider all possible impacts, *not merely a single water quality parameter.*" WQMMP § 1.1 (emphasis added). Because the water quality data that DRA has presented is insufficient to demonstrate a violation of the Certification, and

because DRA has presented no evidence that the Project has been operated inconsistently with the Certification's adaptive management requirements, DRA's Motion for Partial Summary Judgment should be denied, and PGE's Cross-Motion for Summary Judgment should be granted.

A. The Certification Does Not Require the Project to Achieve Individual Water Quality Objectives in Isolation.

The fundamental error in DRA's argument is that it focuses on the Certification's individual water quality objectives for temperature, dissolved oxygen, and pH in isolation from the other provisions of the Certification. DRA argues that the Certification absolutely requires the Project to achieve each of these individual objectives by discharging as much bottom water through the SWW as possible—regardless of the effects that that might have on fish passage or the achievement of other water quality objectives. *See* Plaintiff's Memo. at 5, 8, 14-18. In fact, under DRA's interpretation, each excursion from a water quality objective violates the Certification even if the SWW is discharging exclusively bottom water. This ignores both the stated purposes of the Certification and its specific requirements. It also flatly contradicts the understanding of all parties to the Certification—DEQ, PGE, and the Tribe. Given that DRA did not participate in the development or issuance of the Certification, the Court should accept the interpretation advanced by PGE, the Tribe, and DEQ, and should accordingly reject DRA's.

The very first substantive condition of the Certification requires PGE and the Tribe to “construct, test, and commence operation of the Selective Water Withdrawal (SWW) facility.” Certification § B.¹⁵ The SWW's purposes are stated succinctly in section 1.0 of the WQMMP, which is made a part of the Certification by condition A:

¹⁵ The Certification is Appendix A to the FERC License. It is Ex. H to the Declaration of Jonah Sandford (Dkt. No. 66-8), and it is included in Calica Decl., Ex. 9 (Dkt. No. 73-9), which is the FERC License.

As a major mitigation measure for the new license period, the Joint Applicants [PGE and the Tribe] propose to reintroduce anadromous fish upstream of the Project. To enhance surface currents in Lake Billy Chinook . . . , the Joint Applicants propose to construct a selective water withdrawal facility (SWW) at the existing Round Butte Dam intake tower. This new facility will allow water withdrawal from both the surface (warmer epilimnion) and the bottom (cooler hypolimnion) of the reservoir. This new facility will meet two significant purposes:

- Help the Project meet temperature and water quality goals and standards in the lower Deschutes River and Project reservoirs, and,
- Allow the withdrawal of surface waters during salmonid smolt migration periods to facilitate the capture of downstream emigrating smolts from Lake Billy Chinook in support of the anadromous fish reintroduction goal.

These dual water quality and fish passage goals are also set forth in the Certification itself.

Certification condition G.1 requires the SWW to be operated “in accordance with conditions C, D, and E of this certification,” which are the Certification conditions related to temperature, dissolved oxygen, and pH, respectively. Certification condition G.9 directs PGE and the Tribe to “construct, maintain and operate . . . such facilities and equipment for fish migration, propagation or conservation consistent with the proposed Fish Passage Plan.” The Fish Passage Plan requires that the Project operate the SWW not only for the reintroduction of anadromous fish upstream of the Project, but also for year-round fish passage through the Project for both anadromous and native resident fish.¹⁶ *See, e.g.*, License, App. C (§§ 1(a), 1(b), 2(a)).

Given the Certification’s multiple fish passage and water quality goals, it would be inconsistent for it to require the SWW to be operated to achieve only one goal—meeting an

¹⁶ More specifically, the Fish Passage Plan goals are to “establish self-sustaining harvestable anadromous fish runs of Chinook, steelhead and sockeye above the Project” and, “*during all months of the year,*” to “provide for safe, timely and effective upstream and downstream fish passage of adult and juvenile life stages of spring and fall Chinook, summer steelhead, sockeye salmon, bull trout, rainbow trout, and mountain whitefish.” *E.g.*, License, App. C (§§ 1(a), 1(b), 2(a)) (emphasis added).

individual water quality objective in the river downstream of the Project—to the exclusion of all other goals. According to DRA, however, the SWW must at all times be operated to achieve the temperature objective, regardless of the effect on the dissolved oxygen and pH objectives, and regardless of the effect on the temperature objective itself at other times of the year. At all times, the SWW must be operated to achieve the dissolved oxygen objective, regardless of the effect on the temperature and pH objectives. At all times, the SWW must be operated to achieve the pH objective, regardless of the effect on the temperature and dissolved oxygen objectives. And the effects of attempting to achieve all these individual water quality objectives on the Certification’s fish passage goals do not enter into DRA’s argument at all.

Moreover, the operation of the SWW that DRA appears to seek, the discharge of exclusively deep water from the reservoir, *see* Plaintiff’s Memo. at 8, was how the Project operated before the SWW was constructed, which would make the Certification’s requirement to construct and operate the SWW superfluous. The Certification cannot be read to require, and does not require, results that are contrary to its own stated purposes.

As discussed above in Section II.D, increasing the flow of cold deep water through the SWW reduces the temperature of the river downstream so long as the deep water remains colder than the reservoir’s surface water, but it has at least three negative consequences for the Certification’s other objectives: (1) it impairs fish passage by reducing the reservoir surface flows that are needed to attract downstream migrants into the fish collection facilities at the SWW, Hill Decl. ¶ 12; (2) it makes it more difficult to achieve dissolved oxygen criteria in the river downstream because the deep water is low in dissolved oxygen, Campbell Decl. ¶ 9; and (3) it reduces the Project’s ability to achieve temperature criteria in the river downstream later in

the year by depleting the reservoir's limited supply of cold water, *id.* The WQMMP acknowledges and emphasizes these tradeoffs:

Because operation of the selective withdrawal facility [SWW] has the potential to affect numerous water quality parameters, as well as fish passage success, changes in the operation of the selective withdrawal facility must consider all possible impacts, *not merely a single water quality parameter*. In addition, actual impacts to water quality and currents will not be known with certainty until the selective withdrawal facility is constructed, operated, and monitored, highlighting the need for an adaptive management approach to ensure compliance with water quality standards.

For the purpose of satisfying water quality standards for temperature, DO, pH, and nuisance phytoplankton, as well as ensuring downstream fish passage, and implementing the adaptive management requirements of the §401 certification . . . , *the Joint Applicants shall operate the selective withdrawal facility pursuant to general adaptive management considerations*.

WQMMP § 1.1 (emphases added). In light of this statement of SWW management principles, the Certification cannot be read to require PGE and the Tribe to operate the SWW to achieve individual water quality objectives at the expense of all other water quality and fish passage objectives.

The need to adaptively manage the SWW to achieve a balance of fish passage and water quality objectives is also reflected in the Certification's specific temperature, dissolved oxygen, and pH requirements. Certification condition C.1 provides:

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

(Emphases added.) The Certification includes nearly identical provisions for dissolved oxygen and pH. Condition D.1 provides:

The SWW facility shall be operated in accordance with the Dissolved Oxygen Management Plan (DOMP) contained in the WQMMP. The DOMP shall

identify those *measures* that the Joint Applicants will undertake *to reduce the Project's contribution* to violations of water quality standard criteria for dissolved oxygen.

(Emphases added.) And condition E.1 provides:

The SWW facility shall be operated in accordance with the pH Management Plan (PHMP) contained in the WQMMP. . . . [T]he PHMP shall identify those *measures* . . . that the Joint Applicants will undertake *to reduce the Project's contribution* to exceedances of water quality the water quality criterion for pH.

(Emphases added.) These conditions do not require the Project to achieve the applicable temperature, dissolved oxygen, and pH criteria in isolation, but only to implement the measures identified in the specific water quality management plans for these parameters “to reduce” the Project’s contribution to criteria exceedances. To require otherwise would risk forcing the Project to operate the SWW in a manner that would impair fish passage or the achievement of other water quality criteria.

Similarly, Certification conditions C.2, D.2, and E.2 require the Project to undertake water quality monitoring programs to determine “the success of the TMP [or DOMP or PHMP] in *reducing* the Project’s contribution to any continued exceedances of the criteria [or criterion]” and “any additional *measures* that may be needed to *reduce* the Project’s contribution to exceedances [or violations] of the criteria [or criterion].” (Emphases added.) Again, the Certification does not require the Project to achieve the individual temperature, dissolved oxygen, or pH objectives of the TMP, DOMP, or PHMP, respectively, at the potential expense of fish passage and the achievement of other water quality criteria. It requires instead that the Project take the measures identified in these adaptive management plans to reduce the Project’s contributions to any excursions from the individual water quality objectives, while minimizing potential adverse effects on fish passage and other water quality objectives.

DRA's motion does not include any evidence or argument that the Project is operating inconsistently with the TMP, DOMP, or PHMP. DEQ, moreover, concurs that PGE *is* operating the Project consistently with the Certification. DEQ's Brief at 18. Instead, DRA presents monitoring data purporting to show that the temperature, dissolved oxygen concentration, or pH of the river downstream of the Project did not conform to the individual objectives for these water quality parameters. This data is insufficient to demonstrate a violation of the Certification because it says nothing at all about how the Project was operating at the time of the alleged violations and whether those operations were inconsistent with the TMP, DOMP, or PHMP.¹⁷ Indeed, in response to similar claims by DRA based on much of the same water quality data, DEQ has previously stated unequivocally that the Project is in compliance with the Certification. Letter from DEQ to Low Impact Hydropower Institute (Sept. 18, 2014) ("The Project is in compliance with the conditions included in these certifications [the DEQ and WCB certifications]."), attached to Ginsberg Decl., Ex. B. Absent any evidence showing that the Project is being operated inconsistently with the TMP, DOMP, or PHMP, much less undisputed evidence, and in light of DEQ's determination to the contrary, the Court should decline to award DRA summary judgment, and should award PGE summary judgment instead.

B. The Project Complies with the Certification's Adaptive Management Requirements for Temperature.

Although DRA has not presented any evidence or argument that the Project is operated inconsistently with the Certification's adaptive management requirements for temperature, PGE

¹⁷ As only one example, the Project may have been discharging the maximum percentage of deep water possible from the SWW when the temperature objectives were exceeded. Under any reading of the TMP, this would be all the "measures" that the Project could "undertake to reduce the Project's contribution to exceedances of water quality standard criteria for temperature," as required by Certification condition C.1.

has in fact complied with these requirements and continues to comply with them, as described in the following sections.

1. *DRA's argument misstates the applicable temperature objectives of the TMP.*

As an initial matter, DRA misstates the currently applicable temperature objective for the river downstream of the Project. Citing sections 2.2 and 2.4 of the TMP, DRA argues that the objective is no more than a 0.25 °F increase in temperature attributable to the Project year-round. DRA alleges that the temperature monitoring data submitted to DEQ by PGE shows that the Project increased the river temperature just downstream of the Reregulating Dam by more than 0.25 °F on 738 days in 2011-17, including 73 days in 2017. *See* Plaintiff's Memo. at 15-17.

The temperature objective contained in the TMP, however, was derived from the temperature criteria for the river that were in effect when the Certification was issued in 2002. The currently applicable temperature criteria are 13.0 °C (55.4 °F) from October 15 through June 15, and 16.0 °C (60.8 °C) during the remainder of the year, from June 16 through October 14.¹⁸ *See* OAR 340-041-0028(4)(a)-(b), -0130(2), Figures 130A, 130B. Moreover, when these criteria are exceeded, human sources are allowed to further warm the river by a *de minimis* amount, 0.3 °C (0.54 °F, or 0.5 °F, if rounded). *See* OAR 340-041-0028(12)(b)(B).

Based on the revised temperature criteria, DEQ and PGE (on behalf of itself and the Tribe) have since 2011 entered into approximately annual "Interim Agreements" that modify the temperature objectives of the TMP cited by DRA. Campbell Decl. ¶¶ 16-22, Exs. A-G. The revised objectives are stated in the currently effective Interim Agreement as follows:

PGE will attempt to anticipate cooling events based on weather forecasts, and to increase the percentage of cooler water in the water released by the

¹⁸ These criteria are applied as moving seven-day averages of daily maximum temperatures. *See* OAR 340-041-0028(4)(a)-(b).

SWW to match the anticipated decline in the WPT [the calculated “Without Project Temperature”]. [T]he blending operations at the SWW may target a 7-day average daily maximum discharge temperature below the Reregulating Dam of up to 0.5°C above WPT for up to three (3) calendar days.¹⁹ Thereafter, the targeted 7-day average daily maximum discharge temperature will be no more than WPT+0.3°C. PGE will begin blending operations at the SWW [to increase the proportion of bottom water] when the increasing discharge temperature below the Reregulating Dam approaches 13.0°C.

2017-18 Interim Agreement, Campbell Decl., Ex. G, ¶ 1. The Interim Agreement is nonetheless still more stringent than the current criteria by making the temperature objective for the TMP 13.0 °C year-round, rather than 16.0 °C from June 16 through October 14.

Certification condition C.7 expressly provides that PGE and the Tribe may implement a modified TMP (or may cease implementing the TMP altogether) with the approval of DEQ:

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

The modified TMP approved by DEQ in the Interim Agreements is consistent with this Certification condition because it is consistent with (and, indeed, more stringent than) the currently applicable temperature criteria.

The currently applicable TMP objective in the river downstream of the Project, then, is not a Project-related increase of no more than 0.25 °F year-round, but a Project-related increase

¹⁹ The 2017-18 Interim Agreement recites that the WPT at the Reregulating Dam is calculated using a mathematical model that includes the temperatures of the three tributaries to the Project and the air temperature at Redmond Airport. “If the weather cools suddenly, and the maximum daily temperatures of the three upstream tributaries suddenly decline, the calculated WPT can decrease before the cooler water reaches the Reregulating Dam,” which takes approximately three days from the SWW at Round Butte Dam. 2017-18 Interim Agreement, Campbell Decl., Ex. G, ¶ D. The 0.5 °C allowance for three days compensates for this delay in the Project’s ability to respond to cooling temperatures. *Id.*

of no more than 0.3 °C (0.54 °F) whenever the river temperature exceeds 13.0 °C (55.4 °F).²⁰

Most of the temperature violations alleged by DRA met this objective, including in 2017 when the modified objective was met on all but one day. *See* Campbell Decl. ¶¶ 23-24, Ex. H.

2. *The Project operates in accordance with the Certification’s adaptive management requirements for temperature.*

As described in the TMP, the Project operates the SWW in accordance with a schedule of “blends” of reservoir surface and bottom that is intended to balance fish passage and river temperature objectives. *See* WQMMP § 2.4; Campbell Decl. ¶¶ 12-25. Table 2.1 of the TMP describes two such blends, “Blend 13” and “Blend 16.” From January through June, when the river is cold and the need to provide surface flows in the reservoir to attract downstream migrating anadromous fish is particularly acute, Table 2.1 calls for exclusively surface withdrawals from the SWW. WQMMP § 2.4. As the river warms during the summer and early autumn, Table 2.1 calls for gradually increasing the percentage of bottom withdrawal from the SWW to meet the increasing need for temperature reductions in the river, before the SWW returns to largely surface withdrawals in November and December as the river cools and fish passage concerns again become paramount. *Id.*; Campbell Decl. ¶ 12. Based on temperature monitoring, however, the Project may deviate from the scheduled blend to discharge a greater proportion of deep water as needed to achieve the river temperature objective, but subject to overarching adaptive management concerns, including the need to provide sufficient reservoir surface flows for fish passage. *See* WQMMP §§ 2.4, 2.7; Campbell Decl. ¶ 14.

²⁰ The 2017-18 Interim Agreement, however, allows an increase of up to 0.5 °C (0.9 °F) for up to three days to account for the time that it takes water from the SWW to reach the Reregulating Dam. 2017-18 Interim Agreement, Campbell Decl., Ex. G, ¶ 1.

Following the issuance of the Certification, and after further evaluations of water quality and fish passage needs, DEQ, the WCB, and the Fish Committee identified a slight revision to Blend 16, designated “Blend 17,” that would better balance fish passage and water quality needs.²¹ Ratliff Decl. ¶ 16; Campbell Decl. ¶¶ 12, 14. The Project implements Blend 17 at the SWW unless additional bottom water withdrawal is needed to reduce temperatures downstream in accordance with the TMP and the revised temperature objectives included in the Interim Agreements.²² See WQMMP §§ 2.4, 2.7; Campbell Decl. ¶¶ 14-25. Specifically, the Project monitors the temperature of the river at the Reregulating Dam. When the temperature approaches 13.0 °C, the Project will notify DEQ and the WCB within 24 hours and begin increasing the percentage of bottom water called for by Blend 17 in order to limit the Project’s calculated temperature contribution to 0.3 °C. See Campbell Decl. ¶¶ 14-15, 22-25. The decision to deviate from Blend 17 takes into consideration fish passage and other water quality needs, including the need to preserve the pool of cold deep water for use later in the year. *Id.* ¶ 14. At all times since and including 2011, however, when the currently applicable temperature objectives have not been met, the SWW was withdrawing either a percentage of deep water that exceeded that called for by Blend 17 or the maximum percentage of deep water possible. *See id.* ¶¶ 23-24, Ex. H. In addition, neither DEQ nor the WCB has objected to the Project’s adaptive management decisions regarding the percentage of deep water to withdraw through the SWW to respond to river temperatures downstream. *See id.* ¶ 25.

²¹ Blend 17 differs from Blend 16 only during late October (when Blend 17 calls for 50 percent bottom withdrawal) and in November (when Blend 17 calls for 0 percent bottom withdrawal). Compare WQMMP § 2.4, Table 2.1, with Campbell Decl. ¶ 12.

²² Again, Certification condition C.7. authorizes DEQ to approve implementation of a modified TMP.

As demonstrated by the Campbell Declaration and supporting information, the Project has responded to river temperatures as required by the TMP and the Interim Agreements. DRA has presented no evidence to the contrary. Accordingly, there is no genuine issue of material fact regarding DRA's claim, and PGE is entitled to summary judgment as a matter of law.

C. The Project Complies with the Certification's Adaptive Management Requirements for Dissolved Oxygen.

Although DRA has not presented any evidence or argument that the Project is operated inconsistently with the Certification's adaptive management requirements for dissolved oxygen, PGE in fact complies with these requirements, as described in the following sections. Summary judgment should be awarded to PGE on these issues.

1. *DRA's argument misstates the applicable dissolved oxygen objectives of the DOMP.*

DRA alleges that the DOMP requires the dissolved oxygen concentration in the river downstream of the Project to "exceed 9.0 mg/L [milligrams per liter] throughout the year."²³ Plaintiff's Memo. at 17. Based on PGE's water quality reports showing dissolved oxygen concentrations less than 9.0 mg/L at the Reregulating Dam on 501 days between 2012 and 2017, DRA argues that PGE has violated the Certification on each of these days. *Id.* at 17-18.

The dissolved oxygen objective contained in the DOMP, however, was derived from the dissolved oxygen criteria for the river that were in effect when the Certification was issued in 2002. The currently applicable dissolved oxygen criterion from October 15 through June 15 is 9.0 mg/L;²⁴ from October 15 through June 15, the criteria are 8.0 mg/L as a 30-day mean

²³ DRA contends that the applicable criterion may be 11.0 mg/L, rather than 9.0 mg/L, but its Motion for Partial Summary Judgment is based on only the 9.0 mg/L criterion. Plaintiff's Memo. at 17 n.8.

²⁴ The "spawning" dissolved oxygen criterion, which applies from October 15 through June 15, is either 11.0 mg/L or 9.0 mg/L, depending on whether DEQ has determined that the spatial

minimum, 6.5 mg/L as a seven-day minimum mean, and 6.0 mg/L as an absolute minimum.²⁵

See OAR 340-041-0016(1)-(2), -0130(2), Figure 130B.

Based on the revised criteria, DEQ and PGE (on behalf of itself and the Tribe) have since 2012 entered into approximately annual “Interim Agreements” that modify the dissolved oxygen objectives of the DOMP cited by DRA. See Campbell Decl. ¶¶ 29-35; Exs. B-G, I. The revised objectives are stated in the currently effective 2017-18 Interim Agreement as follows:

[T]he Joint Licensees will operate the Project pursuant to the terms of the [DOMP] to achieve: (i) dissolved oxygen concentrations of at least 8.0 mg/L (30-D [30-day mean minimum] value), 6.5 mg/L (7-Mi [7-day minimum mean] value) and 6.0 mg/L (absolute minimum value) in the Deschutes River downstream of the Reregulating Dam during the period from June 16 through October 14; and (ii) an absolute minimum dissolved oxygen concentration of 9.0 mg/L (or 95% saturation) in the Deschutes River downstream of the Reregulating Dam from October 15 through June 15.^[26]

2017-18 Interim Agreement, Campbell Decl. ¶ 35, Ex. G. ¶ 2.

Certification condition D.6 expressly provides that PGE and the Tribe may implement a modified DOMP (or may cease implementing the DOMP altogether) with the approval of DEQ.

median intergravel dissolved oxygen (“IGDO”) concentration in the waterbody is 8.0 mg/L or more. OAR 340-041-0016(1)(a). If DEQ has made that determination, the spawning criterion is 9.0 mg/L. *Id.* DEQ has determined that the spatial median IGDO concentration in the river is more than 8.0 mg/L. See, e.g., Campbell Decl. ¶ 35, Ex. G, ¶ E. Accordingly, the 9.0 mg/L criterion applies.

²⁵ The 30-day “mean minimum” is the moving 30-day average of the daily mean dissolved oxygen concentration. See OAR 340-041-0002(39). The seven-day “minimum mean” is the moving seven-day average of daily minimum dissolved oxygen concentrations. See OAR 340-041-0002(74).

²⁶ As provided in the 2017-18 Interim Agreement, Oregon’s dissolved oxygen standards provide for an alternative 95 percent saturation spawning criterion “[w]here conditions of barometric pressure, altitude, and temperature preclude attainment” of the 9.0 mg/L criterion. See OAR 340-041-0016(1)(b).

With the approval of ODEQ, the Joint Applicants may cease implementing the DOMP . . . or may implement a modified DOMP ODEQ may approve termination or modification if ODEQ determines that it will not . . . contribute to violation of dissolved oxygen criteria in waters affected by the Project.

The modified DOMP approved by DEQ in the Interim Agreements is consistent with this Certification condition because it is consistent with the currently applicable criteria.

The applicable DOMP objective in the river downstream of the Project, then, is not a year-round absolute minimum of 9.0 mg/L, as alleged by DRA. That objective applies only from October 15 through June 15. During the remainder of the year, the objective is 8.0 mg/L as a 30-day mean minimum concentration, 6.5 mg/L as a seven-day minimum mean concentration, and 6.0 mg/L as an absolute mean. Most of the dissolved oxygen violations alleged by DRA met these modified objectives. *See* Campbell Decl. ¶¶ 36-37, Ex. J.

2. *The Project operates in accordance with the Certification's adaptive management requirements for dissolved oxygen.*

For much of the year, and particularly during the warmer seasons when high temperatures and low dissolved oxygen are a concern in the river downstream of the Project, the water in the lower levels of Lake Billy Chinook is cold but low in dissolved oxygen, whereas the surface of the reservoir is warmer but higher in dissolved oxygen. *Id.* ¶ 27. Discharges of cold deep water through the SWW to reduce river temperatures—the very operation of the SWW that DRA seeks—will reduce dissolved oxygen concentrations in the river, making it more difficult for the Project to achieve the applicable dissolved oxygen criteria. *Id.*

Although the DOMP states that the SWW will be used to blend surface and bottom water to meet the applicable water quality criteria for dissolved oxygen, WQMMP § 3.3, the DOMP anticipates that the blends used to meet the temperature objectives in the river will also achieve the dissolved oxygen objectives, *id.* § 3.4. If, however, adaptive management of the SWW for

temperature does not achieve the dissolved oxygen objectives, the DOMP does not provide for further adjustments of the SWW blend. *See id.* Any adjustment of the SWW blend to increase dissolved oxygen downstream would require reducing deep withdrawals, which would conflict with achieving the temperature objective. Campbell Decl. ¶ 27. Instead, the DOMP, as modified by the Interim Agreements, requires the Project to monitor dissolved oxygen at the Reregulating Dam and initiate controlled spills to increase dissolved oxygen if it appears that the concentration will fall below the applicable dissolved oxygen objective. *See* WQMMP §§ 3.4, 3.6.

As demonstrated by the attached Campbell Declaration and supporting information, the Project initiates spills at the Reregulating Dam when dissolved oxygen concentrations fall below the applicable dissolved oxygen objectives in the DOMP, as those objectives have been modified by the Interim Agreements. *See* Campbell Decl. ¶¶ 36-37, Ex. J. Because DRA has presented no evidence that the Project does not initiate spill at the Reregulating Dam as required by the DOMP, there is no genuine issue of material fact regarding DRA's dissolved oxygen claim, and PGE is entitled to summary judgment on this claim as a matter of law.

D. The Project Complies with the Certification's Adaptive Management Requirements for pH.

Although DRA has not presented any evidence or argument that the Project is operated inconsistently with the Certification's adaptive management requirements for pH, PGE in fact complies with these requirements, as described in the following sections. PGE's motion for summary judgment should be granted as to this issue as well.

1. *DRA's argument misstates the applicable pH objectives of the PHMP.*

DRA contends that the PHMP requires the pH value in the river downstream of the Project to "fall within the range of 6.5 to 8.5 Standard Units." Plaintiff's Memo. at 15. Based on PGE's water quality reports showing pH values in excess of 8.50 at the Reregulating Dam on

482 days between 2012 and 2017, DRA argues that PGE has violated the Certification on each of these days. *Id.* Although DRA is correct that the applicable water quality criterion for pH in the Deschutes River is 6.5 to 8.5 standard units, *see* OAR 340-041-0021(1)(b), -0135(1)(a), the pH objective in the PHMP is *no Project increase in pH* when the pH in the river exceeds 8.5. *See* WQMMP §§ 4.4-4.6. The PHMP requires the Project to measure pH weekly in the three tributaries to the Project (the Crooked, Deschutes, and Metolius Rivers) and compare “the weighted average [pH] of the three inflows” to the pH at the Reregulating Dam. *See id.* § 4.6. The pH values that DRA has attached to its Motion for Partial Summary Judgment represent only the pH measured at the Reregulating Dam and do not include any information regarding whether these pH values are higher than the contemporaneous weighted average pH of the inflows. *See* Declaration of Jonah Sandford, Ex. A (Dkt. No. 66-1). In the absence of evidence of the inflow pH, there is no basis for concluding that the pH at the Reregulating Dam exceeds the pH objective in the PHMP.

Many of the measured pH values are in fact lower than the inflow pH and are thus consistent with the pH objective in the PHMP. *See* Campbell Decl. ¶¶ 42-43, Ex. K.

2. *The Project operates in accordance with the Certification’s adaptive management requirements for pH.*

The PHMP acknowledges that photosynthetic activity in the surface water of Lake Billy Chinook may increase pH. *See* WQMMP § 4.6. Surface withdrawals from the SWW, then, may increase pH in the river downstream. Campbell Decl. ¶ 40. Increasing deep water withdrawals through the SWW, however, could have a negative effect on both fish passage and dissolved oxygen in the river downstream. *Id.* For this reason, the WQMMP recognizes that any Project measures to reduce pH should not be undertaken without considering the potential effects on fish passage and other water quality criteria. *See* WQMMP §§ 1.1, 4.6.

Although the PHMP states that the SWW will be used to blend water to meet the pH standard, *id.* § 4.3, the PHMP anticipates that the blends used to meet the temperature objectives in the river will also achieve the pH objective, *id.* §§ 4.4, 4.6. The PHMP goes on to state:

However, if pH at the Reregulating Dam is found to exceed that of the weighted average of the inflows, the Joint Applicants will immediately contact ODEQ and the CTWS WCB to develop an approach to reduce pH *that is consistent with maintaining compliant temperature and DO values and surface withdrawal volumes necessary to facilitate smolt movement in Lake Billy Chinook.*

Under the guidance of the two regulatory agencies, the Joint Applicants will modify the selective withdrawal regime within the range of surface and bottom withdrawals shown in Table 2.1. Because pH of the Project discharge could exceed inflow pH as a result of withdrawal of surface water from Lake Billy Chinook (due to photosynthetic activity in the reservoir's epilimnion), the likely modification would be the reduction in the amount of surface withdrawal relative to bottom withdrawal. The change in the proportion would be determined on a case-specific basis, if such modification can be undertaken consistent with temperature, DO, and fish passage considerations.

Id. § 4.6 (emphases added). PGE and the Tribe's obligation under the PHMP is to notify DEQ and the WCB if pH at the Reregulating Dam is higher than 8.5 and higher than the weighted average of the pH of the inflows to the Project. PGE and the Tribe are then to work with DEQ and the WCB to develop an approach to reducing pH *if that can be done without negatively affecting fish passage and other water quality objectives.*

PGE has complied with this requirement. It has reported the pH exceedances to DEQ and the WCB, and those agencies have not chosen to require additional measures to address pH. Campbell Decl. ¶ 43. The deviations from the pH criterion have been limited, and the Project's calculated contributions to those deviations have also been limited.²⁷ *Id.* The measures that

²⁷ With the exception of extreme conditions during September 2015, when the maximum pH measured at the Reregulating Dam was 9.23, no pH value measured at the dam has exceeded 9.0.

would be required to reduce the Project's limited contributions to these limited deviations—such as reducing reservoir surface flows through the SWW—would likely have a disproportionately negative effect on the Certification's fish passage and dissolved oxygen objectives. *See id.* ¶ 40.

Because the Project has complied with the PHMP, and because DRA has presented no evidence to the contrary, there is no genuine issue of material fact regarding DRA's pH claim, and PGE is entitled to summary judgment on this claim as a matter of law.

V. CONCLUSION

Because the Certification does not require PGE to comply with each individual numeric water quality objective in isolation; because the Certification requires PGE to adaptively manage the Project to balance the water quality objectives with the no less important fish passage objectives; because DEQ concurs that PGE is operating the Project in compliance with the adaptive management requirements of the Certification; and because there is no evidence to the contrary, DRA's Motion for Partial Summary Judgment should be denied, and PGE's Cross-Motion for Summary Judgment should be granted instead.

DATED: May 27, 2018

STOEL RIVES LLP

/s/ Beth S. Ginsberg

BETH S. GINSBERG, OSB No. 070890

beth.ginsberg@stoel.com

MICHAEL R. CAMPBELL, OSB No. 870016

michael.campbell@stoel.com

Telephone: 206.624.0900

Attorneys for Defendant

Campbell Decl., Ex. K. In addition, the Project's calculated contribution to these exceedances has generally averaged less than 0.5 in each year. *Id.*