IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

COLUMBIA RIVERKEEPER, a Washington non-profit corporation; NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation; WENDY SCHMIDT; and HALEY VOEKEL, Petitioners, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent,	Case No. **PETITION FOR REVIEW OF AGENCY ACTION** (ORS 183.484) **CLAIMS NOT SUBJECT TO MANDATORY ARBITRATION** **Filing Fee: $281** (ORS 21.135(1), (2)(e))

INTRODUCTION

1.

NXTClean Fuels ("NEXT") seeks to build a so-called "renewable diesel" fuel refinery near Clatskanie, Oregon. In order to build its refinery, NEXT needs a federal Clean Water Act permit from the U.S. Army Corps of Engineers ("Corps"). The Corps cannot issue that permit unless and until Respondent, the Oregon Department of Environmental Quality ("DEQ"), certifies that the construction and operation of the NEXT Refinery will comply with state water quality standards and other water-quality-related requirements of state law.

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2.

This certification requirement—called "section 401 certification"—is key to the design of the federal Clean Water Act. It ensures that states and Native American tribes can protect their surface water and groundwater from the harmful effects of federally-permitted projects. In short, section 401 "gives the states a veto over federal actions." *Arnold Irr. Dist. v. DEQ*, 79 Or App 136, 140 n.4, 717 P2d 1274 (1986), *rev den*, 301 Or 765 (1986).

3.

On January 7, 2025, DEQ issued a section 401 certification for the NEXT Refinery ("NEXT 401 Certification" or "Certification"). *See* Ex. 1 (Certification). Unfortunately, the NEXT 401 Certification is legally deficient. Despite the fact that the NEXT Refinery will be built in a liquefaction zone—an area where the soil acts like a liquid during a strong earthquake—DEQ failed to assess the seismic vulnerability of the project or impose any seismic resiliency conditions on the project to protect water quality. Nor did DEQ assure that the NEXT Refinery will comply with several drainage-related requirements of state law; on the contrary, DEQ issued the NEXT 401 Certification even though the NEXT Refinery will plainly violate those drainage laws. For these (and many other) reasons, the Certification is legally deficient.

4.

Petitioners are adversely affected and aggrieved by DEQ's erroneous grant of 401 certification to NEXT and/or DEQ's failure to include sufficient conditions in the Certification to protect water quality. The Certification is necessary for the NEXT Refinery to be built, and the construction and operation of the NEXT Refinery will thus be a direct result of the Certification. The individual Petitioners have substantial recreational, aesthetic, spiritual, and economic interests in the water, air, land, wildlife, and other aspects of the environment near the NEXT Refinery site, and those interests will be impaired by the construction and operation of the NEXT Refinery as authorized by the Certification. Because

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the individual Petitioners' use and enjoyment of the area will be injured as a direct result of DEQ's decision, they have standing to challenge that decision under the Oregon Administrative Procedures Act ("OAPA"). *See* ORS 183.480(1) ("any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order"). The organizational Petitioners (Columbia Riverkeeper and the Northwest Environmental Defense Center) also have standing, because DEQ's erroneous decision is forcing them to use time, money, and other organizational resources to continue combatting the NEXT Refinery.

5.

Petitioners ask this Court to reverse and/or set aside DEQ's grant of section 401 certification to NEXT under the OAPA, order whatever other relief is appropriate to remedy DEQ's violations of law, and award Petitioners their reasonable attorney fees and costs under ORS 183.497.

PARTIES

6.

Petitioner Columbia Riverkeeper is a 501(c)(3) non-profit corporation with offices in Portland and Hood River, Oregon. The mission of Columbia Riverkeeper is to restore and protect the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. To achieve these objectives, Columbia Riverkeeper conducts scientific, educational, and legal programs aimed at protecting water quality, air quality, and habitat in the Columbia River Basin. For more than a decade, Columbia Riverkeeper has worked with its members and with the general public to protect the farmland and natural resources in the area where the NEXT Refinery is proposed to be built. Columbia Riverkeeper has expended a significant amount of time and resources trying to stop the NEXT Refinery from being built.

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7.

Columbia Riverkeeper has over 16,000 members, many of whom use the waters and lands near the proposed NEXT Refinery for fishing, farming, hiking, walking, photography, boating, spiritual and religious purposes, and observing wildlife. These members' aesthetic, economic, recreational, scientific, and spiritual interests in these areas will be adversely impacted if the NEXT Refinery is built as proposed, because the project will increase air and water pollution, lead to more barge and rail traffic and associated noise and other disturbances, destroy over 100 acres of wetlands, raise the risk of a catastrophic spill of diesel fuel and toxic substances, lead to a higher risk of flooding, and cause other environmental harms, as discussed in more detail below.

8.

Petitioner Northwest Environmental Defense Center ("NEDC") is a nonprofit environmental organization based in Portland, Oregon. Its members include attorneys, law students, and members of the public. NEDC's mission is to preserve and protect the natural environment in the Pacific Northwest by identifying legal and policy solutions to address threats to natural resources. Like Columbia Riverkeeper, NEDC has expended a significant amount of time and resources trying to stop the NEXT Refinery from being built.

9.

NEDC has over 1,000 members, several of whom live, work, recreate, observe, or otherwise enjoy surface waters, fish, or wildlife within the areas that would be impacted by the construction and operation of the proposed NEXT Refinery. These members' recreational, aesthetic, and spiritual interests will be adversely affected if the NEXT Refinery is built as proposed, because of the extensive environmental harms described herein.

10.

Petitioner Wendy Schmidt is a farmer who owns and farms land near the proposed NEXT Refinery. Ms. Schmidt grows hay, oats, blueberries, apples, and cherries, and keeps

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cows, sheep, goats, and chickens. Ms. Schmidt's farm is directly adjacent to the site of the wetland that NEXT intends to construct as mitigation for its destruction of wetlands at the facility site. McLean Slough—into which the NEXT Refinery will discharge polluted stormwater—runs along and through Ms. Schmidt's farm, providing drinking water for her livestock and recharging groundwater that irrigates Ms. Schmidt's crops. Ms. Schmidt depends on clean water for her livelihood.

11.

Petitioner Haley Voekel lives and works at the Great Vow Zen Monastery, which is located less than a mile from the NEXT Refinery site. Both when leading retreats as part of her duties at the monastery and when engaged in her own spiritual and recreational pursuits, Ms. Voekel enjoys the relative tranquility and natural beauty of the area. Ms. Voekel frequently takes recreational walks near the future site of the NEXT Refinery, during which she enjoys watching for birds, river otters, and other wildlife.

JURISDICTION

12.

This petition challenges an order in other than a contested case. Rehearing of the order was timely sought, and DEQ denied rehearing on May 7, 2025. *See* Ex. 2 (denial of rehearing). This petition is being filed within 60 days of May 7, 2025, and is thus timely. ORS 183.484(2). Petitioners Columbia Riverkeeper and NEDC each has a "principal business office" in Multnomah County. Accordingly, jurisdiction is proper in this Court.

LEGAL BACKGROUND

13.

Congress enacted the Clean Water Act in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251(a). "To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 US 700, 704,

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114 S Ct 1900, 1905, 127 L Ed 2d 716 (1994). This "scheme of cooperative federalism ... gives states an important role in regulating water quality. 'The states remain, under the Clean Water Act, the prime bulwark in the effort to abate water pollution.'" *Cal. State Water Res. Control Bd. v. Fed. Energy Regul. Comm'n*, 43 F4th 920, 923–24 (9th Cir 2022) (quoting *Keating v. Fed. Energy Regul. Comm'n*, 927 F2d 616, 622 (DC Cir 1991)).

14.

One key way that states regulate water quality under the Clean Water Act is through the promulgation of state water quality standards. "Section 303 of the Act[, 33 USC § 1313,] ... requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters." *PUD No. 1*, 511 US at 704. "States establish standards under [section 303] by first designating the uses of the waters which they wish to assure; they then adopt water quality standards which will allow the designated uses to be actual uses." *Arnold Irr. Dist.*, 79 Or App at 139. Oregon has adopted, and the U.S. Environmental Protection Agency ("EPA") has approved, water quality standards under section 303. *See* OAR ch 340, div 41 (state water quality standards).

15.

Another important way that states control pollution of their waters is through section 401 certification. Section 401 of the Clean Water Act, 33 USC § 1341, "requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." *PUD No. 1*, 511 US at 707. A section 401 certification "represents the state['s] ... conclusion that the proposed activity will comply with the applicable state water quality standards." *S.F. Bay Conservation & Devel. Comm'n v. U.S. Army Corps of Eng'rs*, 8 F4th 839, 846 (9th Cir 2021). DEQ has been vested with the power to act on behalf of the State of Oregon in issuing section 401 certifications.

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16.

When considering a request for a section 401 certification, DEQ "must evaluate whether the activity for which certification is sought will comply with applicable provisions of … the Clean Water Act, water quality standards [adopted pursuant to section 303], and other appropriate requirements of state law." OAR 340-048-0042(2). This requires an assessment of the proposed activity *as a whole*—construction and operation—and not just the specific discharge that triggers the need for 401 certification. *PUD No. 1*, 511 US at 712.

17.

Section 401 "authorizes [DEQ] to place restrictions on the activity as a whole" in order to assure compliance with water quality standards. *Id.* In other words, DEQ can—and indeed *must*—include in a certification "any effluent limitations and other limitations, and monitoring requirements necessary to assure ... compl[iance] with [state water quality standards and certain Clean Water Act provisions] and with any other appropriate requirement of State law." 33 USC 1341(d). These limitations then become conditions incorporated into the federal permit. *Id.*

18.

When making a certification decision, DEQ must assess the proposed activity's compliance with water quality standards adopted under section 303 of the Clean Water Act *and* with "any other appropriate requirement of State law." *Id.* "'[A]ny other appropriate requirement of State law' is ... a Congressional recognition of all state action related to water quality and Congressional authorization to the states to consider those actions in imposing limitations on [section 401] certificates." *Arnold Irr. Dist.*, 79 Or App at 142. Thus, DEQ can and must "enforce *all* water quality-related statutes and rules through" certification. *Id.* (emphasis in original). Only if a state law "has absolutely no relationship to water quality would it not be an 'other appropriate requirement of State law.'" *Id.* at 143.

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FACTUAL ALLEGATIONS

The NEXT Project

19.

The NEXT Refinery is a proposed "renewable diesel" facility to be built in a low-lying area of Columbia County near Clatskanie, Oregon. According to the project's proponent, the NEXT Refinery will be able to produce up to 50,000 barrels per day of "renewable diesel" and "sustainable aviation fuel."[1] The refinery would be the largest of its kind in the Pacific Northwest and one of the largest in the United States.

20.

The plan for the NEXT Refinery is to make renewable diesel fuel by refining various "feedstocks" such as soybean oil, used cooking oil, and animal tallow. The facility would bring in these feedstocks both by rail and by barge, with up to 318 rail cars per week, one to two ships per month, and 10–11 barges per month. Most of the refined fuel would then be sent out from the facility via pipeline to be transported by ship down the Columbia River, with the remainder transported to market by truck or rail.

21.

The NEXT Refinery would be built entirely within the boundaries of the Beaver Drainage District, a federally authorized flood damage reduction system that includes levees and a pumping station. The system is operated and maintained by the Beaver Drainage Improvement Company ("BDIC"), a nonprofit municipal corporation organized under ORS chapter 554.

[1] The company behind the NEXT Refinery is currently known as NXTClean Fuels, but it was previously named NEXT Renewable Fuels. In this petition, the company is simply referred to as "NEXT."

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22.

The area in which the NEXT Refinery would be built is characterized by loose, soft soils; shallow groundwater (between two and four feet below the surface, according to NEXT's application materials); and wetlands. Borings conducted during various tests over the past 50 years have never encountered drilling refusal—*i.e.*, they have never hit any layer of earth solid enough to stop the bore from advancing. Without the Beaver Drainage District system, the area would be flooded for large portions of the year. Even with the system, portions of the area are seasonally ponded or inundated with water.

23.

The Oregon Department of Geology and Mineral Industries ("DOGAMI") has rated the site of the proposed NEXT Refinery as having a "very high" susceptibility to liquefaction in the event of a strong earthquake. Liquefaction occurs when soil—often wet soil—loses strength in response to shaking and begins to act like a liquid. Liquefaction can cause major damage to buildings and other structures.

24.

DOGAMI has rated the NEXT site as having a "very high" potential for permanent ground deformation due to liquefaction and/or landslides caused by an earthquake. DOGAMI has also rated the site as having a "high" probability of earthquake-induced landslides and/or lateral spreading caused by liquefaction. These are the highest ratings—that is, the ratings reflecting the greatest risk—given by DOGAMI in each category.

25.

A 2021 study of the seismic vulnerability of the Portland General Electric Beaver Facility, which is adjacent to the NEXT site, found that the Beaver Facility site is "highly susceptible to liquefaction." The study found that "the potential for seismic damage or failure of berms, concrete containment, and/or tanks … is very likely" due to earthquake-induced ground deformation.

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26.

The odds of a strong earthquake affecting the area where the NEXT Refinery will be built is quite high. The Cascadia Subduction Zone—a "megathrust" fault zone—stretches from British Columbia down to Northern California, lying about 70–100 miles off the coast. According to the Oregon Department of Emergency Management, there is around a 37% chance that a megathrust earthquake of 7.1+ magnitude will hit the Cascadia Subduction Zone in the next 50 years.

27.

Building the NEXT Refinery would require constructing the following: a pre-treatment plant, office and administration buildings, a laboratory, 10 large and 11 small tanks to hold product and feedstock, a wastewater treatment facility, a steam methane reforming hydrogen plant, several incinerators, a 350-foot-tall flare, an access road, a rail branchline and associated access road, a rail yard, four new pipelines, and many other pieces of industrial infrastructure. Constructing the refinery would require the permanent destruction of over 117 acres of wetlands, which is nearly 80 times the impact of the median development project in Oregon in recent years and three times greater than the largest wetland loss authorized in Oregon since 2011.

28.

As part of facility construction, NEXT plans to permanently fill in part of a waterway called "Waterway E" and install culverts in several drainage ditches near the facility site. BDIC—which, under Oregon law, has supervision and control of these waterways and ditches—has consistently raised concerns about the effects that these alterations will have on the efficacy of the drainage and irrigation system. BDIC has never consented to these alterations of its drainage and irrigation system.

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29.

To make up for the destruction of over 100 acres of wetlands, NEXT plans to construct a compensatory mitigation wetland southwest of the facility site. Constructing this wetland would entail filling approximately 26,800 linear feet of existing drainage ditches, relocating another drainage ditch, and lowering the elevation of the 466-acre mitigation site by six to twelve inches. It would also involve constructing a network of shallow "dendritic channels" in and around the site.

30.

As with the plan to fill in Waterway E and install culverts at the facility site, NEXT's mitigation plan has drawn criticism from BDIC, which has supervision and control over all drainage ditches and similar drainage infrastructure at the mitigation site. BDIC told DEQ in its comments on the section 401 certification that the "mitigation site is unlikely to work as proposed." BDIC has stated that the mitigation wetland will "re-configure internal drainage to impede water movement, … creat[ing] a series of shallow waterways and shallow ponds" that "will promote disease and bacterial growth." This would negatively impact water quality in area waterways and ditches used for irrigation and drainage. BDIC has never approved of NEXT's mitigation wetland plan, nor has it consented to the alterations of drainage infrastructure that constructing the mitigation wetland will require.

31.

The NEXT Refinery will generate a large amount of industrial wastewater, which will be processed on-site using a wastewater treatment facility. Stormwater runoff from most of the Main Plant area will also be routed to this wastewater treatment facility, as will "greywater" from the refinery.[2] (Stormwater runoff from pervious areas will follow existing

[2] "Greywater" refers to "shower and bath waste water, bathroom sink waste water, kitchen sink waste water and laundry waste water," but not "toilet or garbage wastes or waste water contaminated by soiled diapers." ORS 454.605(8).

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drainage patterns.) The comingled treated industrial wastewater, stormwater, and greywater will then be sent to the Port of Columbia County's wastewater collection system and ultimately discharged into the Columbia River from the Port's permitted outfall. Thus, NEXT expects that its discharge of pollutants into the Columbia River will be "covered" by the Port's existing Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit.

32.

The portion of the Columbia River where NEXT's wastewater and much of its stormwater runoff will be discharged is listed as a "water quality limited" or impaired water body under section 303(d) of the Clean Water Act, 33 USC § 1313(d). Specifically, this portion of the Columbia is listed as impaired for temperature, dioxin, total dissolved gas, polychlorinated biphenyls ("PCBs"), and DDE.

33.

Stormwater runoff from the 14 acres of the facility outside the Main Plant area will be handled differently. Runoff from this area will contain pollutants including motor oil, gasoline, diesel, antifreeze, and hydraulic fluids from equipment, vehicles, and roads; copper from brake pads and debris on roads; 6PPD-quinone from tires and tire debris on roads; zinc from galvanized surfaces; suspended solids from gravel, decaying vegetation, and eroding soil; and nutrients from decaying organic matter and soil. Polluted stormwater runoff will be directed to four new treatment ponds, where it will be treated via sedimentation and biofiltration before being discharged into McLean Slough.

34.

NEXT's proposal, as reflected in its application to DEQ for 401 certification, is to leave the stormwater treatment ponds unlined because "[l]iners can negatively impact … pond vegetation, make maintenance more difficult and expensive and are subject to buoyancy." However, given the shallow groundwater in the area, leaving the ponds unlined

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would lead to contamination of groundwater and a reduction in the effectiveness of filtering within the pond. This would be especially damaging given that many of the chemicals that will be found in the stormwater ponds are toxic and/or extremely harmful to marine life.

35.

Even if the ponds work as planned, they will not remove all pollutants from stormwater before it is discharged into McLean Slough. Indeed, NEXT's application materials state that "stormwater will receive further treatment … in McLean Slough" and that "[s]tormwater effects are estimated to extend in McLean Slough to its confluence with Beaver Slough, which is the next significant hydrologic break." These pollutants will degrade water quality in McLean Slough and surface waters hydrologically connected to McLean Slough, and will ultimately end up in groundwater used to irrigate crops.

36.

Both feedstock and finished fuel products at the NEXT Refinery will be stored in tanks, which will range in capacity from 10,000 barrels (420,000 gallons) to 225,000 barrels (9,450,000 gallons). The NEXT Refinery's total storage capacity for finished fuel products—renewable diesel fuel, renewable jet fuel, and naphtha—will be at least 950,000 barrels, or nearly 40 million gallons. By way of comparison, the 1989 Exxon Valdez accident involved just over 10 million gallons of crude oil being spilled in Alaska's Prince William Sound.

37.

The storage of fuel products in a seismically sensitive area like the NEXT site presents special dangers. As DEQ itself has recognized, "[a] Cascadia Subduction Zone earthquake impacting the large capacity fuel handling facilities in Oregon could create widespread environmental damage." OAR 340-300-0000(1). An earthquake-induced spill at the NEXT Refinery would be environmentally devastating: it would pollute surface and groundwater throughout the Beaver Drainage District area, harm and kill wildlife, and ruin prime farmland. Such a spill would violate the Clean Water Act and many state water-quality

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standards. *See, e.g.*, OAR 340-041-0033(1) ("Toxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife or other designated beneficial uses."); OAR 340-041-0007(12) ("Objectionable discoloration, scum, oily sheens, or floating solids, or coating of aquatic life with oil films may not be allowed.").

38.

The effects of a large spill would be especially harmful due to the nature of the land within the Beaver Drainage District. NEXT has described its refinery as being "strategically located" within the Beaver Drainage District due to the lack of any "direct or open connections from the [Beaver Drainage District] to" surrounding water bodies, such as the Columbia River. NEXT has insisted that this would "prevent[] any potential contamination from reaching" those water bodies. But, assuming NEXT is correct, that means that any contamination from a spill would remain entirely within the Beaver Drainage District—an area with shallow groundwater and a high degree of hydrologic connectivity.

39.

Even putting aside the risk of a catastrophic spill, the operation of the NEXT Refinery will have a deleterious effect on water quality in the area. As discussed above, stormwater and wastewater from the facility will be discharged into the Columbia River, McLean Slough, and drainage and irrigation ditches, causing increased pollution in those water bodies. The mitigation wetland will also interfere with existing drainage patterns within the Beaver Drainage District, negatively impacting drainage efficiency and water quality. And stormwater runoff in pervious areas of the facility will add pollutants to groundwater.

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40.

The Columbia River Estuary, which is hydrologically connected to the wetlands and surface waters in and around the NEXT site, is designated critical habitat for 13 different populations of salmon and steelhead listed as threatened or endangered under the federal Endangered Species Act. The operation of the NEXT Refinery—and especially a large-scale spill—would further imperil these species by degrading water quality.

41.

The operation of the NEXT Refinery, including the attendant rail and truck traffic, will also contribute significantly to air pollution in the area. The refinery itself will emit nearly 27 tons per year of fine particulate matter and 34 tons per year of nitrogen oxides. Freight trains and trucks delivering feedstock to the refinery and transporting finished product from the refinery will add to these totals. In addition to negatively impacting air quality, these pollutants (and many other pollutants from the facility) will end up in surface water in the area through atmospheric deposition.

42.

Relatedly, the operation of the NEXT Refinery will cause offensive odors. Smells from nearby industrial sources, including the Columbia Pacific Bio-Refinery, can already be a nuisance, especially during certain times of the year. The NEXT Refinery will exacerbate this problem and lead to more frequent and more severe incidences of foul odors in the area.

43.

The NEXT Refinery and its attendant rail traffic will also be very noisy. Existing industrial activity and rail traffic in the area already creates noise issues from time to time; the NEXT Refinery will make those issues much worse.

44.

Finally, the NEXT Refinery—which will include a 350-foot-tall flare stack, one of the tallest structures in the area—will be an eyesore.

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The NEXT 401 Certification

45.

NEXT applied for a section 401 certification in October 2021. In September 2022, DEQ informed NEXT that it "did not have the information … need[ed] to determine compliance with water quality requirements." Accordingly, DEQ denied NEXT's application "without prejudice."

46.

NEXT re-applied for section 401 certification on January 13, 2024. Soon after that, DEQ sent NEXT a series of questions and comments regarding the application. DEQ asked NEXT about the seismic resiliency of the facility's stormwater infrastructure, but did not inquire about the facility's overall seismic vulnerability.

47.

On September 5, 2024, DEQ issued a draft 401 certification for the NEXT Refinery and invited public comment. DEQ also held a hearing on October 8, 2024, at which members of the public commented on the draft certification.

48.

Comments from Petitioners—and many others—raised several troubling issues about the draft 401 certification. For instance, Petitioner Wendy Schmidt pointed out that the NEXT site is in a liquefaction zone and that any spill at the NEXT Refinery would affect the entire Beaver Drainage District area, which includes her farm. Similarly, Petitioners Columbia Riverkeeper and NEDC noted that DEQ should "consider impacts to water quality in the event of a major earthquake, given NEXT's choice to site the refinery in a liquefaction zone." They also pointed out several other issues with the draft certification, including the general lack of information in NEXT's application regarding the refinery's impacts to surface and groundwater within the Beaver Drainage District.

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49.

Following the October 8, 2024 public hearing, DEQ issued a document containing "a comprehensive list of questions that were asked during the public hearing" along with DEQ's answers to those questions. *See* Ex. 3. In its answers, DEQ asserted that a "401 water quality certification does not regulate groundwater" and that "certification relative to … earthquake-specific conditions is outside of DEQ's authority."

50.

On January 7, 2025, DEQ issued a section 401 water quality certification for the NEXT Project and a separate "Hearing Officer's Report and Response to Comments" ("Response to Comments") addressing the comments DEQ had received on the draft 401 certification. *See* Ex. 1 (Certification); Ex. 4 (Response to Comments). The Response to Comments is not incorporated by reference into the NEXT 401 Certification. Thus, the Response to Comments will not be part of any future Clean Water Act permit issued by the Corps; only the conditions listed in the NEXT 401 Certification itself will "become … condition[s]" of the federal permit. 33 USC § 1341(d).

51.

The Response to Comments states that "[s]eismic stability of the project is not an element of DEQ's 401 … analysis." The NEXT 401 Certification contains no limitations or conditions regarding the seismic resiliency of the NEXT Refinery. Thus, the Certification does not reflect consideration of whether the NEXT Refinery is likely to violate water quality standards due to its location in an area that is highly vulnerable to seismic activity, nor does the Certification properly assure compliance with water quality standards in light of the seismic vulnerability of the area. In addition, the Certification completely ignores (and thus does not assure compliance with) ORS 468B.510 *et seq.* and its implementing regulations at OAR chapter 340, division 300, which deal specifically with the seismic vulnerability of facilities like NEXT. *See* OAR 340-300-0001(2) (setting out requirements for "bulk fuel

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terminals or industrial facilities with at least 2-million-gallon oil or liquid fuel products storage capacity located in Columbia, Multnomah and Lane counties").

52.

The NEXT 401 Certification contains certain limitations and conditions related to managing spills during construction of the NEXT Refinery. However, the Certification contains no conditions related to preventing or managing spills during facility operation. The Response to Comments states that "Oregon's spill rules will apply during the … operational stage[] of this facility." But the Certification itself does not contain a condition requiring compliance with "Oregon's spill rules" (*e.g.*, ORS 468B.300 *et seq.*), nor does it place any other spill-related limitations on NEXT's operation of its refinery to assure compliance with water quality standards

53.

Even though the NEXT Refinery will discharge polluted stormwater to McLean Slough, the Certification does not assure compliance with Oregon's antidegradation rules as applied to McLean Slough. *See* OAR 340-041-0004.

54.

The Certification requires NEXT to line its stormwater treatment ponds only "[i]f groundwater is encountered during construction." DEQ's post-construction stormwater guidance states that a liner should be required "if the groundwater table is less than 5 feet from the surface," and NEXT's own application materials estimate groundwater levels at the NEXT site as "between 2 and 4 feet below existing ground surface."

55.

Even though the NEXT Refinery's operation will result in polluted stormwater infiltrating into groundwater, the Certification does not mention, much less assure compliance with, Oregon's groundwater laws and regulations. *See* ORS 468B.150 *et seq.*

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(statutory provisions related to groundwater); OAR ch 340, div 40 (implementing regulations).

56.

The Certification itself and the Response to Comments make clear that DEQ is relying on compliance with the Port's NPDES permit to conclude that NEXT will not violate water quality standards through its discharges to the Columbia River. However, there is no analysis or discussion in the Certification of whether compliance with that permit is even feasible, nor any acknowledgment that the permit—which was issued in 2003—did not contemplate discharge of pollutants of the type that the NEXT Refinery will produce. DEQ has not attempted to characterize in detail the effluent that will come out of the refinery and be sent to the Port for discharge. Without understanding the quality and quantity of effluent leaving the refinery, DEQ could not be reasonably assured that the NEXT Refinery will comply with applicable water quality requirements.

57.

Despite the fact that NEXT plans to build what it calls a "wastewater treatment facility" as part of its refinery, the Certification does not mention, much less assure compliance with, DEQ's regulations regarding wastewater treatment facilities. *See* OAR ch 340, div 45. Nor does the Certification mention, much less assure NEXT's compliance with, new source performance standards under section 306 of the Clean Water Act, 33 USC § 1316. And there is no condition that NEXT comply with applicable state and federal pretreatment requirements for the wastewater it sends to the Port. Because the Port's treatment facility is a "treatment works" and the Port is a "municipality" within the meaning of the Clean Water Act, NEXT's discharges to the Port's treatment facility are subject to pretreatment laws and regulations. *See* 40 CFR pt 403 (general pretreatment requirements); OAR 340-045-0063 (DEQ pretreatment regulations). NEXT did not provide adequate

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information to DEQ to allow the agency to determine whether pretreatment regulations are likely to be violated.

58.

The Certification does not even purport to assure compliance with relevant Oregon drainage laws, nor does it contain any limitations to assure compliance with those laws. ORS 547.425(2) makes it unlawful to "[b]efoul or pollute or allow to be befouled or polluted any … ditch, lateral, canal, slough, waterway or conduit" under the control of BDIC, and ORS 547.425(3) makes it unlawful to "[i]n any manner obstruct or permit to be obstructed by stock any such waterway, canal, ditch, lateral, slough or conduit." Similarly, BDIC's Bylaws prohibit the obstruction of drainage works as well as the "[p]lace[ment] or construct[ion] [of] any article or thing or any culvert, structure, improvement or bridge in any ditch, lateral, canal, slough, waterway or conduit without consent of" BDIC.

59.

One condition of the Certification is that "DEQ may modify or revoke this certification … if the project changes, project activities are having an adverse impact on state water quality or beneficial uses, or if [NEXT] violates any of the conditions of this certification." Under EPA's section 401 regulations, however, DEQ cannot unilaterally revoke or modify the NEXT 401 Certification. *See* 40 CFR § 121.10 (prohibiting revocation of 401 certifications and requiring federal permission for modifications of 401 certifications).

60.

The Certification does not explain why each of its conditions is necessary to assure compliance with water quality standards. Indeed, most of the conditions are boilerplate conditions that are not tailored to the specifics of the NEXT Refinery. EPA's regulations require that a certification with conditions contain "[a] statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements." 40 CFR § 121.7(d)(3)

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The Petition for Reconsideration

61.

On March 7, 2025, Petitioners Columbia Riverkeeper and NEDC submitted a petition for reconsideration to DEQ, asking the agency to revisit the NEXT 401 Certification. DEQ denied the petition for reconsideration on May 7, 2025. *See* Ex. 2.

62.

In its denial of the petition for reconsideration, DEQ explained in more detail some of its legal reasoning with respect to the issues raised by Petitioners and others during the public comment period. For instance, on the issue of seismic resiliency, DEQ stated that "seismic stability requirements related to earthquake risk are addressed by building codes," and building codes are not "water-quality requirement[s]." On the issue of the NEXT Refinery's violation of drainage-related laws, DEQ stated that "[d]rainage district law does not present a state law water quality requirement that must be addressed in a" 401 certification.

The Impacts of DEQ's 401 Certification Decision on Petitioners

63.

Section 401 certification is a prerequisite for the Corps' issuance of a Clean Water Act § 404 permit and for construction and operation of the NEXT Refinery. Thus, the construction and operation of the NEXT Refinery and the attendant harms to Petitioners flow directly from DEQ's grant of section 401 certification and/or DEQ's failure to include in the Certification sufficient conditions to assure compliance with water quality standards and other water-quality-related requirements of state law.

64.

The refinery—both its construction and operation—will negatively affect Petitioner Wendy Schmidt's substantial interests in several ways. Ms. Schmidt lives and farms near the site of the NEXT Refinery, within the Beaver Drainage District, and she relies on clean water to irrigate her crops and provide drinking water for her animals. In fact, Ms. Schmidt lives

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directly adjacent to the proposed mitigation wetland site. As discussed above, construction of the proposed mitigation site will likely interfere with drainage in the Beaver Drainage District, including on Ms. Schmidt's farm, and lead to reduced water quality. Moreover, Ms. Schmidt will also be negatively affected by the NEXT Refinery's discharge of polluted stormwater into McLean Slough, which runs along and through her property. Finally, a large-scale spill at the NEXT Refinery could very well decimate Ms. Schmidt's farm.

65.

The NEXT Refinery will also negatively affect Petitioner Haley Voekel's substantial interests. The operation of the refinery will cause increased noise pollution and offensive odors at the Great Vow Zen Monastery, interfering with both Ms. Voekel's spiritual practice and her recreational enjoyment of the monastery's grounds. The refinery will also diminish Ms. Voekel's enjoyment of her walks in the area—especially her walks near the site where the NEXT Refinery will be built—due to the refinery's noise, smell, and unattractive industrial appearance.

66.

Columbia Riverkeeper and NEDC will also be adversely affected by DEQ's erroneous certification decision. Both Columbia Riverkeeper and NEDC have expended time and resources over the past few years trying to stop the NEXT Refinery from being built. Had DEQ followed the law and denied NEXT's section 401 application, Columbia Riverkeeper and NEDC would be able to use their resources on other pressing environmental and land-use issues. Instead, they must now pour resources into the upcoming Clean Water Act § 404 permitting process and the associated National Environmental Policy Act ("NEPA") process—processes which are only still occurring because of DEQ's erroneous decision. DEQ's decision thus adversely affects Columbia Riverkeeper and NEDC. *Cf. Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F4th 664, 683 (9th Cir 2023) (en banc) (explaining that, under federal law, "[l]ost money and staff time

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spent responding to a challenged government action are directly redressable and … vest direct organizational standing") (cleaned up).

PETITION FOR JUDICIAL REVIEW

67.

Petitioners hereby incorporate by reference and restate the preceding paragraphs of this Petition.

68.

As discussed below, DEQ's section 401 certification decision for the NEXT Project is legally defective and must be set aside under the OAPA.

69.

On the issue of the NEXT Refinery's seismic resiliency, the Certification is defective in several respects:

(a) The Certification's conclusion that "implementation of the [NEXT] project will be consistent with" state water quality standards and other water-quality-related laws is based on DEQ's erroneous legal conclusion that NEXT's seismic resiliency is outside the scope of section 401 review and/or is not supported by substantial evidence.

(b) The Certification does not include adequate seismic-related conditions to assure compliance with water quality standards and other water-quality-related laws. The lack of such conditions is based on DEQ's erroneous legal conclusion that the NEXT Refinery's seismic resiliency is outside the scope of section 401 review, represents an abuse of discretion, and/or is not supported by substantial evidence.

(c) The Certification does not assure compliance with ORS 468B.510 *et seq.* and its implementing regulations at OAR chapter 340, division 300. This failure is based on DEQ's erroneous interpretation of law and/or represents an abuse of discretion.

Any one of these errors, standing alone, warrants reversing DEQ's order and setting aside the Certification. ORS 183.484(5), ORS 183.486(1).

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70.

The Certification does not purport to provide assurance of the NEXT Refinery's compliance with relevant state drainage laws, nor does it contain conditions to assure such compliance. This reflects DEQ's legally erroneous view that ORS 547.425 and the BDIC Bylaws do not qualify as "other appropriate requirements of state law" with which DEQ must assure compliance. Under a correct view of the law, DEQ could not have issued the Certification, so the Certification should be set aside. *See* ORS 183.484(5) (discussing the situation where an "agency has erroneously interpreted a provision of law and … a correct interpretation compels a particular action").

71.

The Certification is conditioned, in part, on DEQ's ability to revoke or modify the Certification in the event of changed circumstances or noncompliance. But, under EPA's regulations, DEQ lacks authority to unilaterally revoke or modify a section 401 certification in the event of changed circumstances or noncompliance. Because this condition—which DEQ found *necessary* to assure compliance with water quality standards and other water-quality-related requirements—is invalid, the Certification is based on an erroneous interpretation of the law and/or is not supported by substantial evidence, and it should be set aside. ORS 183.484(5)(a), (c).

72.

The Certification does not purport to provide assurance of the NEXT Refinery's compliance with Oregon's groundwater laws. This reflects DEQ's legally erroneous view that a "401 water quality certification does not regulate groundwater." Under a correct view of the law, Oregon's groundwater laws are among the laws that DEQ must assure compliance with under section 401. Had DEQ interpreted the law correctly, it would not have been able to issue the Certification, so the Certification should be set aside. *See* ORS 183.484(5)

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(discussing the situation where an "agency has erroneously interpreted a provision of law and … a correct interpretation compels a particular action").

73.

The NEXT 401 Certification relies on NEXT's compliance with various regulatory requirements and future plans. But DEQ failed to actually condition certification on compliance with said requirements and plans, and/or DEQ lacks sufficient information about those requirements and plans to assure that the NEXT Refinery will not violate water quality standards even if it complies with those requirements and plans. These errors include, but are not limited to, the following:

(a) The Certification appears to rely on NEXT's compliance with "Oregon's spill rules" to assure that water quality standards are not violated during operation of the NEXT Refinery. However, the Certification does not actually require compliance with said spill rules, or even identify which rules applicable.

(b) The Certification relies on an as-yet-undeveloped "spill prevention and control plan" to assure compliance with water quality standards during construction.

(c) The Certification relies on NEXT's compliance with a 1200-Z permit for its stormwater discharges to McLean Slough, but DEQ has not determined that NEXT will even be covered by such a permit, nor has DEQ assessed whether the permit will be sufficient to assure compliance with water quality standards in receiving waters.

Each of these errors reflects an erroneous interpretation of law, an abuse of discretion, and/or a lack of substantial evidence underlying DEQ's finding of reasonable assurance that water quality standards will not be violated. *See* ORS 183.484(5). Any one of these errors, standing alone, warrants reversing DEQ's order and setting aside the NEXT 401 Certification.

74.

The Certification relies on the Port of Columbia County's existing NPDES permit to assure NEXT's compliance with water quality standards in the Columbia River. However,

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the Port's permit was not developed with a waste stream like NEXT's in mind, and DEQ lacks sufficient information about the wastewater from the NEXT Refinery to assess whether the Port's facilities can effectively process that wastewater. Moreover, the Certification does not include a specific condition that requires NEXT to comply with the Port's permit, or to seek coverage under an individual NPDES permit as an alternative. Accordingly, the Certification's conclusion that the NEXT Refinery will not violate water quality standards in the Columbia River is not supported by substantial evidence and must be set aside. ORS 183.454(c).

75.

It does not appear that the Certification purports to assure the NEXT Refinery's compliance with applicable state and federal pretreatment requirements. *See* OAR 340-045-0063. This reflects an erroneous interpretation of law (*i.e.*, that such requirements do not apply to the NEXT Refinery) and/or an abuse of discretion. Under a correct view of the law, DEQ would not have been able to assure compliance with pretreatment requirements. In the alternative, to the extent that the Certification does purport to assure compliance with pretreatment requirements, the Certification is not supported by substantial evidence. Either way, the Certification should be set aside. ORS 183.484(5)(a), (c).

76.

It does not appear that the Certification purports to assure the NEXT Refinery's compliance with new source performance standards under section 306 of the Clean Water Act, 33 U.S.C. § 1316, and its implementing regulations. This reflects an erroneous interpretation of law (*i.e.*, that such standards do not apply to the NEXT Refinery) and/or an abuse of discretion. In the alternative, to the extent that the Certification does purport to assure compliance with new source performance standards, the Certification is not supported by substantial evidence. Either way, the Certification should be set aside. ORS 183.484(5)(a), (c).

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77.

The Certification does not assure compliance with Oregon's antidegradation policy, because DEQ did not conduct any antidegradation review for McLean Slough. This omission is based on an erroneous interpretation of law, is outside the range of discretion delegated to DEQ, is inconsistent with an agency rule (OAR 340-041-0004), and/or is not supported by substantial evidence. Accordingly, the NEXT 401 Certification should be set aside on this basis.

78.

The Certification requires NEXT to install liners in its stormwater ponds only "[i]f groundwater is encountered during construction." DEQ's decision to include this condition rather than requiring liners to be installed is outside the range of discretion delegated to DEQ, is inconsistent with an officially stated agency position (DEQ's Post-Construction Stormwater Management Plan Submission Guidelines), and/or is not supported by substantial evidence. Accordingly, the NEXT 401 Certification should be set aside and remanded to DEQ to change this condition.

79.

The Certification lacks adequate explanations as to "why each of the included conditions is necessary to assure that the [NEXT Refinery] will comply with water quality requirements," as mandated by EPA's section 401 regulations. 40 CFR § 121.7(d)(3). This represents an abuse of discretion and/or is based on a misinterpretation of law, so the Certification should be set aside and remanded to DEQ.

80.

DEQ acted without a reasonable basis in fact or in law in issuing its order granting the NEXT 401 Certification, and Petitioners are thus entitled to their reasonable attorney fees and costs. ORS 183.497(1)(b). In the alternative, the factors in ORS 20.075(1) counsel in favor of a discretionary award of attorney fees and costs under ORS 183.497(1)(a).

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REQUEST FOR RELIEF

81.

WHEREFORE, Petitioners request the following relief:

(a) The NEXT 401 Certification should be set aside, reversed, modified, and/or remanded pursuant to ORS 183.484(5) and ORS 183.486. If the Certification is remanded to DEQ, the Court should instruct DEQ to comply with the law in issuing a new or revised section 401 certification.

(b) If the Court sets aside or reverses the Certification and/or remands the Certification to DEQ, it should order whatever interim relief is necessary to preserve Plaintiffs' interests and the interests of the public pending further proceedings before DEQ. ORS 183.486(2).

(c) The Court should award Petitioners their reasonable attorney fees and costs under ORS 183.497.

(d) The Court should award whatever other relief is just and equitable.

Dated: May 22, 2025

Respectfully submitted,

/s/ Andrew R. Missel
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January 7, 2025

Christopher Efird
NEXT Renewable Fuels Oregon
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RE: 2020-383; NEXT Renewable Fuels Oregon 401 Water Quality Certification

The Department of Environmental Quality (DEQ) has reviewed the U.S. Army Corps of Engineers (USACE) Permit application # 2020-383 (Department of State Lands [DSL] # 63077-RF), pursuant to a request for a Clean Water Act Section 401 Water Quality Certification (WQC) received on January 13, 2024. The following required processing dates are listed below:

- On October 24, 2022, a pre-filing meeting request was submitted to DEQ.
- On January 13, 2024 DEQ received a request for a Clean Water Act Section 401 WQC.
- On January 23, 2024 the USACE notified DEQ that they are processing the project under a Standard Permit.
- DEQ's reasonable period of time for review of this project has been established as January 12, 2025.
- On September 5, 2024 DEQ issued a public notice of the draft 401 WQC for comment. DEQ received water quality comments that were taken into consideration in this final WQC.

According to the application, NEXT Renewable Fuels Oregon ("the Applicant") proposes to impact wetlands and waters in order to construct a renewable fuels facility at the Port Westward Industrial Park. The project is located in wetlands and waters that discharge to McLean Slough, a tributary to the Clatskanie River, near Clatskanie, Columbia County, Oregon (Sections 16, 21, 22, 23, 27, 28, 33 & 34, Township 8N, Range 4W).

Project Description: The Applicant proposes to permanently impact approximately 104.3 acres of wetlands, temporarily impact 32.03 acres of wetlands, and permanently impact 0.87 acres of waters by excavating approximately 164,615 cubic yards and discharging approximately 664,812 cubic yards of fill material to wetlands and waters in order to build the facility. The fuels facility will include the Main Plant facility, a new main access road, a rail spur and access road, four pipelines, twenty-one feedstock tanks, and post-construction stormwater facilities outside of the Main Plant facility. The proposed facility is capable of producing 50,000 barrels per day of renewable diesel and aviation fuel product by using the Ecofining Green Diesel technology process by the Honeywell UOP company. Feedstocks will primarily be received via barge and vessels to Port of Columbia's Port Westward dock and delivered to the facility through a pipeline. Feedstocks will range from vegetable oils, used cooking oil, animal tallow and inedible corn oil. Finished fuel products will be shipped from the Port Westward dock. Facility components will be seismically supported with pile foundations by installing approximately

15,200 16-inch steel piles that are 90 feet long and will be driven by a vibratory hammer. The project will create approximately 72.6 acres of new impervious surface area on a 122.5 acre site in the Lower Columbia River basin.

Mitigation for project impacts will be conducted per the Mitigation Plan dated May 2, 2023 through off-site mitigation at Township 8N, Range 4W, Section 27, Tax Lots 100, 200, 400 and 1600, Section 28, Tax Lots 300 and 1400, Section 33, Tax Lot 100 and Section 34, Tax Lot 300. The mitigation site is located approximately 0.25 miles southwest of the proposed facility. The mitigation plan is to enhance a total of 476.60 acres of wetlands by re-establishing a native shrub and bottomland emergent wetland community. The mitigation plan will involve removing noxious and non-native plants, removing the existing poplar tree plantation and creating shallow water areas and channels to enhance habitat diversity and distribute nutrients and sediments throughout the area.

Status of Affected Waters of the State: McLean Slough is a tributary to the Clatskanie River. The Clatskanie River to its confluence with the Columbia River is classified as water quality limited under the Federal Clean Water Act and is listed on the Section 303(d) list of impaired water bodies for dissolved oxygen.

The Columbia River between Mill Creek and Wallace Slough is classified as water quality limited under the Federal Clean Water Act with an Environmental Protection Agency approved Total Maximum Daily Load (TMDL) developed for temperature, dioxin (2,3,7,8-TCDD) and total dissolved gas, and is listed on the Section 303(d) list of impaired waters for the parameters of polychlorinated biphenyls (PCBs) and DDE 4,4'.

The above listed parameters impair the beneficial use of fish and aquatic life in the Clatskanie River. The above listed parameters impair the following beneficial uses in the Columbia River: fish and aquatic life, fishing, public domestic water supply, and private domestic water supply. Additional beneficial uses include: industrial water supply, irrigation, livestock watering, wildlife and hunting, boating, water contact recreation, aesthetic quality, and commercial navigation and transportation.

Certification Decision: Based on the information provided by the Applicant, DEQ is reasonably assured that implementation of the project will be consistent with applicable provisions of Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act, state water quality standards set forth in Oregon Administrative Rules Chapter 340 Division 41 and other appropriate requirements of state law, provided the following conditions are incorporated into the USACE permit and strictly adhered to by the Applicant.

GENERAL CONDITIONS

1) **Responsible parties:** This 401 WQC applies to the Applicant. The Applicant is responsible for the work of its contractors and subcontractors, as well as any other entity that performs work related to this 401 WQC.

   Authority: *OAR 340-048-0015*
   Justification: *DEQ must be aware of responsible parties to ensure compliance.*

2) **Work Authorized:** Work authorized by this Order is limited to the work described in the valid request received on January 13, 2024, and additional supporting document materials referenced in Table 1 below (hereafter "the permit application materials"), unless otherwise authorized by DEQ. If the project is operated in a manner that is not consistent with the project description contained in the permit application materials, the Applicant is not in compliance with this Order and may be subject to enforcement.

Table 1 Supporting Documents

Date Received	Document Type	Title and Date	Author
1/13/2024	Joint Permit Application (JPA)	JPA, 1/10/2021	Chris Efird
1/13/2024	Request for Certification Form	Request for Certification, 1/13/2024	Chris Efird
1/13/2024	Figures	JPA Figures 1-19, Revised 2/2023	Stewardship Solutions
1/13/2024	Drawings	Attachment C: NEXT Exhibit Plan Sheets	Maul, Foster & Alongi, Inc.
1/13/2024	SWMP	Post-Construction Stormwater Management Plan, 1/30/23 and updated 8/3/2023	Maul, Foster & Alongi, Inc.
1/13/2024	Mitigation Plan	Compensatory Mitigation Plan for NEXT Renewable Fuels Oregon, Revised 5/2/2023	Anderson Perry & Associates

Authority: *OAR 340-048-0015*
Justification: *To ensure the project will comply with water quality standards, DEQ must evaluate all work involved in the construction and operation of the project.*

3) **Duration of Certificate:** This 401 WQC for impacts to waters, including dredge and fill activities, is valid for five years from the date of issuance of the USACE 404 permit. A new or modified 401 WQC must be requested before any modification of the USACE 404 permit. Post-construction stormwater facilities must be maintained for the life of the facility.

Authority: *OAR 340-048-0015*
Justification: *Certification is required for any license or permit that authorizes an activity that may result in a discharge.*

4) **Modification**: Any approved modifications to this certification, including a change of ownership, will incur a Tier 1 fee of $1,041 at a minimum. A higher fee may be assessed for complex modifications.

Authority: *OAR 340-048-0050*
Justification: *To ensure the project will comply with water quality standards, DEQ must understand all work involved in the construction and operation of the project.*

5) **Change of Ownership:** The Applicant must notify DEQ of any change in ownership or control of this project within 30 days and obtain DEQ review and approval before undertaking any change to the project that might affect water quality.

Authority: *OAR 340-048-0050*
Justification: *To ensure the project will comply with water quality standards, DEQ must understand all work involved in the construction and operation of the project.*

6) **Construction Notification to DEQ:** The Applicant must provide pre-construction notification to DEQ 14 days before construction starts. Contact information can be found at the end of the certification.

Authority: *OAR 340-012*
Justification: *DEQ must inspect facilities for compliance with all state rules and laws.*

7) **401 WQC on Site:** A copy of this 401 WQC letter must be kept on the job site and readily available for reference by the Applicant and its contractors and subcontractors, as well as by DEQ, US Army Corps of Engineers, National Marine Fisheries Service, Oregon Department of Fish and Wildlife and other state and local government inspectors.

Authority: *OAR 340-012*
Justification: *All parties must be aware of and comply with the 401 WQC, including on-site contractors.*

8) **Project Changes:** DEQ may modify or revoke this certification, in accordance with Oregon Administrative Rules 340-048-0050, if the project changes, project activities are having an adverse impact on state water quality or beneficial uses, or if the Applicant violates any of the conditions of this certification. This condition also fully applies to the off-site mitigation plan.

Authority: *OAR 340-048-0050*
Justification: *To ensure the project will comply with water quality standards, DEQ must understand all work involved in the construction and operation of the project.*

9) **Access:** The Applicant and its contractors must allow DEQ access to the project site with or without prior notice, including staging areas, and mitigation sites to monitor compliance with these certification conditions, including:
   a. Access to any records, logs, and reports that must be kept under the conditions of this certification;
   b. To inspect best management practices, monitoring or equipment or methods; and
   c. To collect samples or monitor any discharge of pollutants

Authority: *OAR 340-048*
Justification: *DEQ must inspect facilities for compliance with all state rules and laws.*

10) **Enforcement:** Failure of any person or entity to comply with this order may result in enforcement, including the issuance of civil penalties or other actions, whether administrative or judicial, to enforce its terms.

Authority: *OAR 340-048, OAR 340-012*
Justification: *If the project is not being constructed or operated as proposed, it may not be consistent with water quality requirements.*

CONSTRUCTION SPECIFIC CONDITIONS

11) **Erosion Control:** During construction, erosion control measures must be implemented to prevent soil from reaching waters of the state. The Applicant is required to obtain coverage under the National Pollutant Discharge Elimination System 1200-C construction stormwater general permit. Contact the DEQ Stormwater Program for more information at: https://www.oregon.gov/deq/wq/wqpermits/Pages/Stormwater-Construction.aspx

In addition, the Applicant, unless otherwise authorized by DEQ in writing must:

a. Maintain an adequate supply of materials necessary to control erosion at the construction site.

b. Prohibit erosion of stockpiles. Deploy compost berms, impervious materials, or other effective methods during rain or when stockpiles are not moved or reshaped for more than 48 hours.

c. Inspect erosion control measures daily and maintain erosion control measures as often as necessary to ensure the continued effectiveness of measures. Erosion control measures must remain in place until all exposed soil is stabilized;

   i. If monitoring or inspection shows that the erosion and sediment controls are ineffective, the Applicant must act immediately to make repairs, install replacements, or install additional controls as necessary.

   ii. If sediment has reached a third of the exposed height of a sediment or erosion control, the Applicant must remove the sediment to its original contour.

d. Use removable pads or mats to prevent soil compaction at all construction access points through, and staging areas in, riparian or wetland areas to prevent soil compaction, unless otherwise authorized by DEQ.

e. Flag or fence off wetlands not specifically authorized to be impacted to protect from disturbance and/or erosion.

f. Place excavated material on upland areas with stable slopes to prevent materials from eroding back into waterways or wetlands.

g. Place clean aggregate at all construction entrances, and utilize other best management practices, including, but not limited to truck or wheel washes, when earth-moving equipment is leaving the site and traveling on paved surfaces. Vehicles are prohibited from tracking sediment off site.

h. This certification does not authorize the placement of best management practices into waters of the state unless specifically outlined in the application and authorized by DEQ.

i. Upon completion of construction activities, stormwater facilities must be inspected and adequately prepared for post-construction stormwater treatment.

j. Upon completion of construction activities, stormwater facilities must be tested to ensure they are working and adequately prepared for post-construction stormwater treatment.

Authority: *OAR 340-041-0007(8), ORS 468B.025, ORS 468B.050, OAR 340-045*

Justification: *DEQ must ensure that pollution does not enter waterways.*

12) **Deleterious waste materials:** The Applicant is prohibited from placing biologically harmful materials and construction debris where they could enter waters of the state, including wetlands (wetlands are waters of the state). This includes but is not limited to: petroleum products; chemicals; cement cured less than 24 hours; welding slag and grindings; concrete saw cutting by-products; sandblasted materials; chipped paint; tires; wire; steel posts; asphalt; and waste concrete.

The Applicant must:

a. Cure concrete, cement, or grout for at least 24 hours before any contact with flowing waters;

b. Use only clean fill, free of waste and polluted substances;

c. Employ all practicable controls to prevent discharges of spills of harmful materials to surface or groundwater;

d. Maintain at the project construction site, and deploy as necessary, an adequate supply of materials needed to contain deleterious materials during a weather event;

e. Remove all foreign materials, refuse, and waste from the project area; and

f. Employ general good housekeeping practices at all times.

Authority: *OAR 340-041-0007(8), ORS 468B.025, ORS 468B.050*
Justification: *DEQ must ensure that pollution does not enter waterways.*

13) **Spill Prevention:** The Applicant must have a spill prevention and control plan. The Applicant must fuel, operate, maintain, store vehicles, and equipment, and construction materials, in areas that will not disturb native habitat directly or result in potential discharges. In general, reasonable precautions and controls must be used to prevent any discharges of petroleum products or other harmful or toxic materials from entering the water as a result of any in-water activities. In addition, the following specific requirements apply:

a. Vehicle and motorized equipment staging, cleaning, maintenance, refueling, and fuel storage must take place in a vehicle staging area 150 feet or more from any waters of the state. DEQ may approve in writing exceptions to this distance if all practical prevention measures are employed and this distance is not possible because of any of the following site conditions:

i. Physical constraints that make this distance not feasible (e.g., steep slopes, rock outcroppings)

ii. Natural resource features would be degraded as a result of this setback

iii. Equal or greater spill containment and effect avoidance is provided even if staging area is less than 150 feet away from waters of the state.

b. If staging areas are within 150 feet of any waters of the state, as allowed under subsection (a)(iii) of this condition, full containment of potential contaminants must be provided to prevent soil and water contamination, as appropriate.

c. All vehicles operated within 150 feet of any waters of the state must be inspected daily for fluid leaks before leaving the vehicle staging area. Any leaks detected in the vehicle-staging area must be repaired before the vehicle resumes operation.

d. Before operations begin and as often as necessary during operation, equipment must be steam cleaned (or undergo an approved equivalent cleaning) until all visible oil, grease, mud, and other visible contaminants are removed if the equipment will be used below the bank of a waterbody.

e. All stationary power equipment (e.g., generators, cranes, stationary drilling equipment) operated within 150 feet of any waters of the state must be covered by an absorbent mat to prevent leaks, unless other suitable containment is provided to prevent potential spills from entering any waters of the state.

f. An adequate supply of materials (such as straw matting/bales, geotextiles, booms, diapers, and other absorbent materials) needed to contain spills must be maintained at the project construction site and deployed as necessary.

g. All equipment operated in state waters must use bio-degradable hydraulic fluid.

h. A maintenance log documenting equipment maintenance inspections and actions must be kept on-site and available upon request.

Authority: *ORS 466.645(1); ORS 468B.025, OAR 340-142-0030(1)(b)(B), OAR 340-041*
Justification: *DEQ must ensure that pollution does not enter waterways and must be protective of beneficial uses, including fish.*

14) **Spill & Incident Reporting:**

a. In the event that petroleum products, chemicals, or any other harmful materials are discharged into state waters, or onto land with a potential to enter state waters, the Applicant must report the discharge to the Oregon Emergency Response System (800-452-0311) and Beaver Drainage Improvement Company, Inc. within 24 hours. The Applicant must immediately begin containment and complete cleanup as soon as possible.

b. If the project operations cause a water quality problem which results in distressed or dying fish, the operator must immediately: cease operations; take appropriate corrective measures to prevent further environmental damage; collect fish specimens and water samples; and notify DEQ, Oregon Department of Fish and Wildlife and other appropriate regulatory agencies.

Authority: *ORS 466.645(1), ORS 468B.025, OAR 340-142-0030(1)(b)(B), OAR 340-041*
Justification: *DEQ must ensure that pollution does not enter waterways and must be protective of beneficial uses, including fish.*

15) **Vegetation Protection and Restoration:**

a. The Applicant must protect riparian, wetland, and shoreline vegetation not proposed for impact in the authorized project area (as defined in the permit application materials) from disturbance through one or more of the following:

i. Minimization of project and impact footprint

ii. Designation of staging areas and access points in open, upland areas

iii. Fencing and other barriers demarcating construction areas

iv. Use of alternative equipment (e.g., spider hoe or crane)

b. If authorized work results in vegetative disturbance and the disturbance has not been accounted for in planned mitigation actions, the Applicant must successfully reestablish vegetation to a degree of function equivalent or better than before the disturbance. The standard for success is 80 percent cover for native plant species. The vegetation must be reestablished by the completion of authorized work and include:

i. Restoring damaged streambanks to a natural slope, pattern, and profile suitable for establishment of permanent woody vegetation, unless precluded by pre-project conditions (e.g., a natural rock wall)

ii. Replanting or reseeding each area requiring revegetation before the end of the first planting season following construction

iii. Planting disturbed areas with native plants and trees in all cases except where the use of non-native plant materials may be essential for erosion control

iv. The use of invasive species to re-establish vegetation is prohibited

c. Pesticides (including herbicides) and fertilizers must be applied per manufacturer's instructions, and only if necessary for vegetation establishment. If chemical treatment is necessary, the Applicant is responsible for ensuring that pesticide application laws, including with the National Pollutant Discharge Eliminations System 2300-A general permit are met. Please review the information on the following website for more information: https://www.oregon.gov/deq/wq/wqpermits/Pages/Pesticide.aspx

i. For pesticide application within stormwater treatment facilities or within 150 feet of waters of the state, the Applicant must adopt an Integrated Pest Management (IPM) plan that describes pest prevention, monitoring and control techniques with a focus on prevention of inputs to waters of the state, or coverage under an NPDES permit, if required.

ii. Pesticide application should be applied during the dry season and avoid direct water application;

iii. Unless otherwise approved in writing by DEQ, applying surface fertilizer within stormwater treatment facilities or within 50 feet of any stream channel is prohibited.

iv. Install wildlife-friendly fencing as necessary to prevent access to revegetated sites by livestock or unauthorized persons.

d. Minimize soil compaction, especially in areas that are designated for replanting. If soils are compacted, decompact staging areas and work construction areas prior to replanting. Leave topsoil when possible. Chip materials from clear and grub operation and spread on soil surface, unless cleared areas contained invasive species.

Authority: *ORS 468B.025, OAR 340-048, OAR 340-041*
Justification: *Riparian, wetland, and shoreline vegetation help ensure excess sediment does not enter a waterway, and helps offset potential temperature impacts. DEQ must ensure that pollution does not enter waterways.*

16) **Post-Construction Buffers:** The Applicant shall avoid and protect from harm, all remaining and unimpacted wetlands and provide a 50 foot buffer to waters of the state, unless proposed, necessary, and approved as part of the project. If a local jurisdiction has a more stringent buffer requirement, that requirement will override this certification requirement.

Authority: *ORS 468B.025, OAR 340-041*
Justification: *Riparian, wetland, and shoreline buffers help ensure excess sediment does not enter a waterway, and helps offset potential temperature impacts. DEQ must ensure that pollution does not enter waterways.*

17) **Previously Contaminated Soil and Groundwater:** If any contaminated soil or groundwater is encountered, it must be handled and disposed of in accordance with the soil and groundwater management plan for the site, as well as local, state and federal regulations. The Applicant must notify the Environmental Cleanup Section of DEQ at 800-452-4011 Ex.6258.

Authority: *ORS 468B.025, OAR 340-041, OAR 340-122, OAR 340-040*
Justification: *DEQ must ensure that pollution does not enter waterways. As sediments are disturbed, pollutants could become redistributed.*

18) **Water Pollution Control Facilities Permit Compliance:** The Applicant must comply with the active Water Pollution Control Facilities Permit No. 111746 and any subsequent renewals or modifications to the WPCF permit.

Authority: *ORS 468B.025 OAR 340-041, OAR 340-045*
Justification: *DEQ must ensure that pollution does not enter waterways.*

SPECIFIC CONDITIONS FOR IN-WATER WORK

19) **Fish Protection/ Oregon Department of Fish and Wildlife Timing:** The Applicant must perform in-water work only within the Oregon Department of Fish and Wildlife preferred time window as specified in the *Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources* (https://www.dfw.state.or.us/lands/inwater/2023%20Oregon%20In-Water%20Work%20Guidelines.pdf) or as authorized otherwise under a Department of State Lands removal/fill permit. Exceptions to the timing window must be recommended by Oregon Department of Fish and Wildlife and/or the National Marine Fisheries Services as appropriate.

Authority: *OAR 340-041-0011*
Justification: *DEQ must be protective of all water quality standards, including beneficial uses such as fish and aquatic life.*

20) **Aquatic Life Movements:** The Applicant must provide unobstructed fish passage and movement of aquatic life at all times during any authorized activity. Exceptions must be reviewed and recommended by Oregon Department of Fish Wildlife and/or the National Marine Fisheries Service as appropriate.

Authority: *OAR 340-041-0016; OAR 340-041-0028*
Justification*: DEQ must be protective of all water quality standards, including beneficial uses such as fish.*

21) **Isolation of Work Areas:** The applicant must isolate in-water work areas from the active flowing stream, unless otherwise authorized as part of the approved application, or authorized by DEQ.

Authority: *OAR 340-041, OAR 340-045*
Justification: *DEQ must ensure that pollution does not enter waterways.*

22) **Cessation of Work**: The Applicant must cease project operations under high-flow conditions that will result in inundation of the project area. Only efforts to avoid or minimize turbidity or other resource damage as a result of inundation of the exposed project area are allowed during high-flow conditions.

Authority: *OAR 340-041*
Justification: *DEQ must ensure that pollution does not enter waterways*.

23) **Turbidity:** The Applicant must implement best management practices (BMPs) to minimize turbidity during in-water work. Any activity that causes turbidity to exceed 10 percent above natural stream turbidity is prohibited except as specifically noted below:

a. Monitoring: Turbidity monitoring must be conducted and recorded as described below. Monitoring must occur at two hour intervals each day during daylight hours when in-water work is being conducted, including while dewatering or work area isolation measures are in place. A properly calibrated turbidimeter is required.

i. **Representative Background Point**: The Applicant must take and record a turbidity measurement every two hours during in-water work at an undisturbed area 100 feet up-current from the in-water disturbance, in order to establish background turbidity levels. The background turbidity, location, date, tidal stage (if applicable) and time must be recorded immediately prior to monitoring down-current at the compliance point described below.

ii. **Compliance Point**: The Applicant must monitor every two hours, 100 feet downcurrent from the disturbance, at approximately mid-depth of the waterbody and within any visible plume. The turbidity, location, date, tidal stage (if applicable) and time must be recorded for each measurement.

b. Compliance: The Applicant must compare turbidity monitoring results from the compliance points to the representative background levels taken during each two hour monitoring interval. Pursuant to Oregon Administrative Rules 340-041-0036, short-term exceedances are allowed as followed:

MONITORING WITH A TURBIDIMETER *EVERY 2 HOURS*	
TURBIDITY LEVEL	***Restrictions to Duration of Activity***
0 to 4 NTU above background	No Restrictions
5 to 29 NTU above background	Work may continue maximum of 4 Hours. If turbidity remains 5-29 NTU above background, stop work and modify BMPs. Work may resume when NTU is 0-4 above background.
30 to 49 NTU above background	Work may continue maximum of 2 Hours. If turbidity remains 30-49 NTU above background, stop work and modify BMPs. Work may resume when NTU is 0-4 above background.
50 NTU or more above background	Stop work immediately and inform DEQ

If an exceedance over the background level occurs, the Applicant must modify the activity and continue to monitor every two hours. If an exceedance over the background level continues after the second monitoring interval, the activity must stop. If, however, turbidity levels return to background at or after second monitoring level due to implementation of best management practices or natural attenuation, work may continue with appropriate monitoring as above.

The activity must stop immediately and remained stopped for the remainder of that 24-hour work period if an exceedance reaches: 50 NTU or more over background; 30 NTU over background for two hours; or 5-29 NTU over background for eight hours.

c. Reporting:

i. Record all turbidity monitoring required by subsections (a) and (b) above in daily logs which must include: calibration documentation; background NTUs; compliance point NTUs; comparison of the points in NTUs; and location; date; time; and tidal stage (if applicable) for each reading.

ii. Keep records on file for the duration of the permit cycle.

iii. **Submit turbidity monitoring records to DEQ annually at the end of the in-water work window**. Prepare a narrative discussing any exceedances with subsequent monitoring, actions taken, and the effectiveness of the actions. The Applicant must make available copies of daily logs for turbidity monitoring to regulatory agencies including DEQ, USACE, NMFS, USFWS, and ODFW upon request. An example turbidity log is attached to this certification.

If turbidity monitoring cannot be conducted due to dry conditions, the Applicant must provide photo documentation with a date and time stamp.

d. Best Management Practices to Minimize In-stream Turbidity: The Applicant must implement the following best management practices, unless accepted in writing by DEQ:

i. Sequence/Phasing of work – The Applicant must schedule work activities to minimize in-water disturbance and duration of in-water disturbances.

ii. Bucket control - All in-stream digging passes by excavation machinery and placement of fill in-stream using a bucket must be completed to minimize turbidity. All practical techniques such as employing an experienced equipment operator, not dumping partial or full buckets of material back into the wetted stream, adjusting the volume, speed, or both of the load, or using a closed-lipped environmental bucket must be implemented.

iii. The Applicant must limit the number and location of stream-crossing events. Establish temporary crossing sites as necessary at the least sensitive areas and amend these crossing sites with clean gravel or other temporary methods as appropriate, to discharge sediments to the waterbody.

iv. Machinery may not be driven into the flowing channel, unless authorized in writing by DEQ.

v. Excavated material must be placed so that it is isolated from the water's edge or wetlands, and not placed where it could re-enter waters of the state uncontrolled.

vi. Containment measures such as silt curtains, geotextile fabric, and silt fences must be in place and properly maintained in order to minimize in-stream sediment suspension and resulting turbidity.

Authority: *OAR 340-041-0036, OAR 340-041*
Justification: *DEQ must ensure that pollution does not enter waterways.*

SPECIFIC CONDITIONS FOR POST-CONSTRUCTION STORMWATER MANAGEMENT

24) **Post Construction Stormwater Management:** The Applicant must implement and comply with the terms of the approved post-construction stormwater management plan, which describes best management practices to prevent or treat pollution in stormwater anticipated to be generated by the project, in order to comply with state water quality standards. The Applicant must implement best management practices as proposed in the stormwater management plan, including construction, operation, and maintenance, dated January 30, 2023 (updated August 3, 2023). If proposed stormwater facilities change due to site conditions, the Applicant must receive approval in writing from DEQ to make changes.

Stormwater from the Main Plant will be collected and treated at the Port of Columbia County wastewater treatment facility and discharged to the Port's outfall to the Columbia River. Treated discharges are covered under the Port's National Pollutant Discharge Elimination System Wastewater Discharge Permit (NDPES) DEQ File No. 102650.

The remaining areas of the facility will be covered under the National Pollutant Discharge Elimination System 1200-Z Industrial Stormwater general permit. The 1200-Z

permit will govern industrial stormwater discharges from the site, including the paved access road, gravel laydown area, the rail yard west of the Main plant, the rail spur southeast of the Main plant, and the aboveground pipeline and its access road. Stormwater runoff will be collected into a series of catch basins and conveyed into four linear vegetated stormwater ponds for detention and treatment. The details below are subject to change based on the 1200-Z application review.

Pond 1 and Pond 2 (both 23 feet wide) will collect stormwater runoff from the West Rail Spur area west of the Main Plant using a series of catch basins. Treated runoff will discharge to McLean Slough via Discharge Point 002. Pond 3 (8.5 feet wide) will collect stormwater runoff via sheet flow from the pipeline and maintenance road located in the northwest portion of the site. Treated runoff will discharge from Point 002 to McLean Slough. Stormwater from the East Rail Spur area located southeast of the Main Plant will discharge to Pond 4 (34 feet wide). Treated runoff from Pond 4 will discharge from Point 003 to Waterway F and then McLean Slough. Treated runoff discharged to McLean Slough will flow to the Beaver Drainage Improvement Company's pumping station. During the winter months, water is pumped over the levee into the Clatskanie River. In the spring and summer water will be used for irrigation.

If groundwater is encountered during construction, then a liner must be incorporated to prevent the facilities from intercepting sub-surface flow.

a. **Reporting:** Within 30 days of project completion, the Applicant must submit a copy of the "as-builts" or red-lined construction drawings showing all stormwater management facilities**.**

Authority: *ORS 468B.025, ORS 468B.050, OAR 340-045, OAR 340-041*
Justification: *DEQ must ensure that pollution does not enter waterways.*

25) **Stormwater Management & System Maintenance:** The Applicant is required to implement effective operation and maintenance practices for the lifetime of the proposed facility. These include but are not limited to:

a. Protecting stormwater treatment facilities from degradation during construction.
b. Monitoring facilities for signs of groundwater interception, and reconstructing the facilities as needed to prevent interception of sub-surface flow.
c. Maintenance techniques and frequency for each system component must follow appropriate recommendations in accepted manuals.
d. Long-term operation and maintenance of stormwater treatment facilities will be the responsibility of the Applicant unless and until an agreement transferring that responsibility to another entity is submitted to DEQ.

Authority: *ORS 468B.025, OAR 340-041, OAR 340-012, OAR 340-045*
Justification: *DEQ must ensure that pollution does not enter waterways.*

26) **Corrective Action May Be Required:** DEQ retains the authority to require corrective action in the event the stormwater management facilities are not built or performing as described in the plan.

Authority: *ORS 468B.025OAR 340-041, OAR 340-048*
Justification: *DEQ must ensure that pollution does not enter waterways.*

If the Applicant is not satisfied with the conditions contained in this certification, a contested case hearing may be requested in accordance with Oregon Administrative Rule 340-048-0045. Such requests must be made in writing to the DEQ Office of Compliance and Enforcement at 700 NE Multnomah St, Suite 600, Portland Oregon 97232 within 20 days of the mailing of this certification-.

The DEQ hereby certifies this project in accordance with the Clean Water Act and state rules, with the above conditions. If you have any questions, please contact Haley Teach at haley.teach@deq.oregon.gov, by phone at (503) 229-5051, or at the address on this letterhead.

Sincerely,

Theresa Burcsu
Water Quality Manager
Northwest Region

ec: James “Bo” Davidson, USACE
Chris Castelli, DSL
Kathleen Wells, NOAA
Laurie Parry, Stewardship Solutions

State of Oregon
DEQ Department of Environmental Quality

401 Water Quality Certification Turbidity Monitoring Report

Project Name:	USACE Project #	DSL Project #

Name of Inspector(s):	Turbidimeter Model:	Calibration Standard Type (Circle One) Formazin Solution or Gelex	Calibration Standard Expiration Date:

Sampling Date:	Calibration Values:	*Upstream (Background) Point Location:	*Downstream (Compliance) Point Location:
	_____NTU (Standard) = _____NTU (Reading) _____NTU (Standard) = _____NTU (Reading) _____NTU (Standard) = _____NTU (Reading)	Latitude: Longitude:	Latitude: Longitude:

In-Water Work Start Time:	In-Water Work End Time:	Description of In-Water Work:

Upstream Sample		Downstream Sample		Change in Turbidity (NTU)	Observation of waterbody		NOTES (Describe any modifications made to BMPs)
Time	Turbidity (NTU)	Time	Turbidity (NTU)		Tidal Stage	Note any plume, sheen, floatables, color	

** Include a figure with the turbidity sampling forms showing the sampling locations.*

Turbidity: The Applicant must implement appropriate Best Management Practices (BMPs) to minimize turbidity during in-water work. Any activity that causes turbidity to exceed 10% above natural stream turbidity is prohibited except as specifically provided below:

MONITORING WITH A TURBIDIMETER *EVERY 2 HOURS*	
TURBIDITY LEVEL	***Restrictions to Duration of Activity***
0 to 4 NTU above background	No Restrictions
5 to 29 NTU above background	Work may continue maximum of 4 hours. If turbidity remains 5-29 NTU above background, stop work and modify BMPs. Work may resume when NTU is 0-4 above background.
30 to 49 NTU above background	Work may continue maximum of 2 hours. If turbidity remains 30-49 NTU above background, stop work and modify BMPs. Work may resume when NTU is 0-4 above background.
50 NTU or more above background	Stop work immediately and inform DEQ

Monitoring: Turbidity monitoring must be conducted and recorded as described below. Monitoring must occur at two hour intervals each day during daylight hours when in-water work is being conducted, including while dewatering or work area isolation measures are in place. A properly calibrated turbidimeter is required unless another monitoring method is proposed and authorized by DEQ.

Representative Background Point: The Applicant must take and record a turbidity measurement every two hours during in-water work at an undisturbed area. A background location shall be established at a representative location approximately 100 feet upcurrent of the in water activity unless otherwise authorized by DEQ. The background turbidity, location, date, tidal stage (if applicable) and time must be recorded immediately prior to monitoring downcurrent at the compliance point described below.

Compliance Point: The must monitor every two hours. A compliance location shall be established at a representative location approximately 100 feet downcurrent from the disturbance at approximately mid-depth of the waterbody and within any visible plume. The turbidity, location, date, tidal stage (if applicable) and time must be recorded for each measurement.

Compliance: The Applicant must compare turbidity monitoring results from the compliance points to the representative background levels taken during each two – hour monitoring interval. Pursuant to OAR 340-041-0036, short term exceedances of the turbidity water quality standard are allowed as shown in the monitoring table shown here.

Reporting: The Applicant must record all turbidity monitoring required by subsections (a) and (b) above in daily logs, kept on file for the duration of the permit cycle. The daily logs must include calibration documentation; background NTUs; compliance point NTUs; comparison of the points in NTUs; location; date; time; and tidal stage (if applicable) for each reading. Additionally, a narrative must be prepared discussing all exceedances with subsequent monitoring, actions taken, and the effectiveness of the actions. Applicant must make available copies of daily logs for turbidity monitoring to DEQ, USACE, NMFS, USFWS, and ODFW upon request.

BMPs to Minimize In-stream Turbidity: The Applicant must implement the following BMPs, unless otherwise accepted by DEQ:

i. Sequence/Phasing of Work – The Applicant must schedule work activities so as to minimize in-water disturbance and duration of in-water disturbances;
ii. Bucket control - All in-stream digging passes by excavation machinery and placement of fill in-stream using a bucket must be completed so as to minimize turbidity. All practicable techniques such as employing an experienced equipment operator, not dumping partial or full buckets of material back into the wetted stream, adjusting the volume, speed, or both of the load, or using a closed-lipped environmental bucket must be implemented;
iii. The Applicant must limit the number and location of stream-crossing events. Establish temporary crossing sites as necessary in the least sensitive areas and amend these crossing sites with clean gravel or other temporary methods as appropriate;
iv. Machinery may not be driven into the flowing channel, unless authorized by DEQ; and
v. Excavated material must be placed so that it is isolated from the water edge or wetlands, and not placed where it could re-enter waters of the state uncontrolled.

VIA ELECTRONIC MAIL ONLY

STATE OF OREGON

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

NEDC, COLUMBIA RIVERKEEPER Petitioner, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY Respondent.	**NEXT Renewable Fuels Oregon Section 401 Water Quality Certification** **ORDER ON PETITION FOR RECONSIDERATION**

The Department of Environmental Quality (DEQ) received a petition for reconsideration of the January 7, 2025, order of the Oregon Department of Environmental Quality (Department or DEQ) issuing a Clean Water Act Section 401 Water Quality Certification (WQC) to NEXT Renewable Fuels Oregon (NEXT) ("the Order") from the Northwest Environmental Defense Center and Columbia Riverkeeper (Petitioners) on March 7, 2025. As discussed in the Order, DEQ has considered the grounds for reconsideration asserted by the Petitioners and denies the request for reconsideration.

A. Background

1. Statutory Background

ORS 468B.035 grants DEQ authority to perform acts to implement the Clean Water Act in Oregon. Through OAR chapter 340, division 48 the Environmental Quality Commission (EQC) has provided processes and procedures for issuing Clean Water Act Section 401 WQCs in Oregon. On January 7, 2025, DEQ issued a Clean Water Act Section 401 WQC to NEXT authorizing the project described in its January 13, 2024, application.

2. Agency Order at Issue

On January 7, 2025, DEQ provided notice to NEXT and Petitioners of DEQ's WQC. Regulations implementing the Oregon Administrative Procedures Act authorize petitions to reconsider only final agency orders. OAR 137-004-0080. An "order" is "any agency action expressed orally or in writing directed to a named person or persons, other than employees, officers or members of an agency." ORS 183.310(6). Given that DEQ's January 7, 2025, WQC was directed to NEXT, and expressed in writing the agency's WQC decision, the January 7, 2025, WQC is a final order subject to a petition for reconsideration.

DEQ conducted a review of the NEXT application following EPA's final 2023 Clean Water Act (CWA) Section 401 Water Quality Certification Improvement Rule (2023 Rule), which went into effect on Nov. 27, 2023. The 2023 Rule requires NEXT, as the applicant for a federal permit from the U.S. Army Corps of Engineers (USACE), to submit a "request for a 401 water quality certification" from DEQ. The federal permit from USACE is required under Section 404 of the CWA for activities that may result in any discharge into waters of the United States.

The activity subject to the USACE permit for this proposed project is the construction of the Main Plant facility, roads, pipelines, rail spurs, and stormwater facilities. A 401 WQC identifies the conditions required for the activity to meet Oregon's applicable water quality requirements, including water quality standards. Upon careful review the information provided by NEXT, DEQ determined that it is reasonably assured that implementation of the project activities will be consistent with applicable water quality requirements under sections 301, 302, 303, 306 and 307 of the CWA and state water quality standards in Oregon Administrative Rules 340-041, provided the conditions of the 401 WQC are incorporated into the USACE Section 404 authorization and strictly adhered to by NEXT. The review included interdependent and interrelated activities associated with the construction and operation of the proposed facility. The interdependent and interrelated project components reviewed were stormwater treatment and discharge, water intake and outfalls, wetland and waters functional value assessment, the Biological Assessment, land use decisions, the mitigation proposal, alternatives analysis, and vessel use. Registration to the 1200-C Construction Stormwater General Permit and the associated Erosion and Sediment Control Plan submittal will be required for construction activities before any ground disturbing activities can take place at the site. Coverage under DEQ's 1200-Z Industrial Stormwater General Permit is required before construction activities can begin.

B. Request for Reconsideration

Pursuant to ORS 183.484(2) and the Attorney General's Uniform and Model Rules at OAR 137-004-0080, a petition for reconsideration of a final order in other than a contested case may be filed with the agency within 60 calendar days after the date of the order. The EQC has adopted and incorporated the Attorney General's Uniform and Model Rules at OAR 340-011-0009. Petitioner's request for reconsideration was filed on March 7, 2025, within 60 days of the date of the letter notice and therefore was timely filed.

Petitioners raised four concerns related to compliance with water quality standards for which they believe that the agency should reconsider its decision. The issues raised by Petitioner are listed and addressed below.

1. Petitioners assert that the WQC must include additional conditions to prevent water quality standards violations in the event of an earthquake or flood.

When undertaking the WQC process, states evaluate the proposed project for compliance with applicable state effluent limitations and water quality standards. In completing WQC review,

states can deny, condition, or approve the application for water quality certification depending on its evaluation and determination of the water quality impacts of the proposed activity and its compliance with applicable requirements. 33 U.S.C. § 1341(a). As to the scope of WQC review, the current EPA WQC rules at 40 CFR § 121.3 provides:

> (a) When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether the activity will comply with applicable water quality requirements. The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation.
>
> (b) Consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.

Additionally, "water quality requirements" is defined to mean:

> "[A]ny limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality related requirement of state or Tribal law."

Given this scope and definition, the question is whether there are earthquake or flood-related state law water quality requirements that were not addressed in the WQC. Geologic data substantiates that earthquake risk is a valid concern in the Pacific Northwest. However, seismic stability requirements related to earthquake risk are addressed by building codes. While building codes may at times include water quality-focused elements, "[t]he main purpose of building codes is to protect public health, safety and general welfare in the construction and occupancy of buildings."[1] The proposed project will be designed to seismic requirements specified in the Oregon Structural Specialty Contractors Code, which Columbia County adheres to. The Oregon Structural Specialty Code includes seismic design requirements based off the International Building Code and ASCE 7 Minimum Design Loads and Associated Criteria for Buildings and Other Structures standards. As the requirement to construct structures to comply with building codes is generally not a water quality requirement and is required by the local planning department, DEQ reasonably does not include conditions requiring compliance with building code in WQCs. However, prior to issuances of a WQC, DEQ does require submittal of a land use compatibility statement or goal findings establishing compliance with the local acknowledge comprehensive plan as required by ORS 197.180. Given this, DEQ has information regarding the local planning authority's engagement on the project and the application did contain information regarding the local government requirements being implemented to reduce the potential for structure failure during a seismic event.

[1] Building Codes, Standards, and Regulations: Frequently Asked Question, R47665, available at: www.epa.gov/system/files/documents/2024-08/crs-building-codes-standards-and-regulations-frequently-asked-questions.pdf

Petitioners additionally assert that there will be accidental releases of pollutants at the facility due to the potential failure of levee infrastructure. Specifically, petitioners assert: "By issuing a Certification that neglects to condition any meaningful levee infrastructure improvement—by way of the Corps' levee accreditation mechanism—DEQ fails to ensure that the refinery will comply with water quality standards." Petition, p. 8. However, regulation of and safety of levee infrastructure is the purview of the USACE. DEQ generally does not analyze the structural integrity of related infrastructure in the context of WQC of a project. In this case the USACE is engaged as it is processing the 404 permit application associated with the WQC for which reconsideration is requested. Additionally, the USACE determined that the actions proposed on the levee did not require Section 408 review. A Section 408 review by USACE is the process that allows alteration to a federally authorized project, like a federally authorized levee. Petitioners have not raised a state law water quality requirement related to the levee infrastructure that is required to be addressed in the WQC.

As the Petitioners' arguments related to earthquake and flood risk raise only general concerns regarding potential impacts if natural disasters were to occur in the vicinity of the project as opposed to identifying any specific state law based water quality requirement not addressed in DEQ's WQC, DEQ does not grant reconsideration based on this issue.

2. ***Petitioners assert that the WQC does not ensure compliance with statewide narrative criteria, or rules for biocriteria and toxic substances due to the potential for oil spills, infrastructure leaks, and exposure to stormwater runoff.***

Petitioners assert DEQ's WQC is insufficient because there is no reasonable assurance for compliance with the water quality standards listed in the event of potential oil spills, infrastructure leaks, or exposure to stormwater runoff. Specifically, Petitioners contend the WQC "fails to confront the site-specific challenges that exacerbate the inherent risk of oil spills, infrastructure leaks, and exposure to stormwater runoff." Petition, p. 9. As to spills or leaks, condition 13 of the WQC addresses spill prevention and requires a spill prevention and control plan along with specific requirements to prevent spill. WQC, p. 6-7. The Spill Prevention Control Plan (SPCP), and the Erosion and Sediment Control Plan (ESCP) will be submitted prior to beginning construction. These plans will be provided to DEQ for review and approval. The SPCP will identify the appropriate spill containment materials and the means and methods of implementation, response, and reporting. DEQ requires all elements of the SPCP to be available at the project site at all times. Approval of these plans is dependent upon their sufficiency to protect water quality in the event of potential spills or leaks. As to Petitioners' concerns regarding stormwater impacts associated with the proposed activities, the project's stormwater management plan meets DEQ 401 WQC requirements and National Marine Fisheries Service (NMFS) Standard Local Operating Procedures for Endangered Species (SLOPES) V regulations for post-construction stormwater management. Such requirements and regulations ensure project stormwater runoff meets water quality requirements. Also, regarding stormwater, NEXT is required to obtain 1200-Z and 1200-C permit coverage from DEQ before construction can begin. These separate permits also impose conditions necessary to ensure water quality protection from project stormwater runoff. Because the risks related to oil spills, infrastructure leaks and exposure to stormwater runoff are adequately addressed in the WQC, DEQ does not grant reconsideration based on this issue.

3. Petitioners assert that the WQC failed to ensure compliance with Oregon's antidegradation requirements.

The Antidegradation Policy guides decisions that affect water quality to prevent unnecessary further degradation from new or increased point and nonpoint sources of pollution. The goal of the policy is to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses, as stated in OAR 340-041-0004. Degradation of water quality is allowed only after a systematic decision-making process considering many factors.

The proposed facility will discharge comingled wastewater/stormwater to the Columbia River via the Port of Columbia County wastewater treatment facility, which has an existing NPDES permit that complies with the current TMDL. The outfall at Port Westward to the Columbia River does not require an antidegradation review as part of the 401 WQC review process because it is an existing NPDES permitted outfall. OAR 340-041-0004(3)(a) does not require an antidegradation review for discharges into an existing mixing zone for a permitted source, as long as the Port continues to comply with the effluent limits set out in its NPDES permit.

The remaining stormwater runoff from contributing impervious areas not connected to the NPDES permitted outfall will be collected and treated prior to discharging to McLean Slough under a NPDES 1200-Z Industrial Stormwater general permit that regulates how the facility manages its stormwater while operating.

Petitioners assert that McLean Slough, Waterway F, and Waterway D are "High Quality Waters" under the antidegradation rules; therefore, additional evidence that these waters will be maintained and protected is required. This argument fails for the following reasons. First, Petitioners misunderstand the designation of these waters. "High Quality Waters" are defined by OAR 340-041-0(23) as "those waters that meet or exceed levels necessary to support the propagation of fish, shellfish and wildlife; recreation in and on the water; and other designated beneficial uses." McLean Slough is not defined as a high-quality water, which is information DEQ evaluates during the antidegradation review. The closest downstream waterbody listed as water quality limited is the Clatskanie River, which is listed on the Section 303(d) list of impaired water bodies for dissolved oxygen; however, the project design has provided reasonable assurance that it will not further degrade dissolved oxygen levels in Clatskanie River. Second, condition 25 of the WQC requires the applicant to comply with effective operation and maintenance practices for the lifetime of the proposed facility, including protecting stormwater treatment facilities from degradation during construction. Accordingly, because DEQ's antidegradation review was consistent with the EQC rule, DEQ does not grant reconsideration based on this issue.

4. Petitioners assert that the WQC failed to ensure that NEXT will not violate "other appropriate requirement[s] of State law" that protect BDIC's drainage and irrigation water.

The final issue on which Petitioners request reconsideration is their assertion that the WQC violates Oregon's laws protecting waterways managed by local drainage districts. DEQ

acknowledges that the Beaver Drainage Improvement Company (BDIC) provides important services to its members. ORS chapter 547 contains authorities related to the organization of drainage districts. ORS chapter 547 grants certain authorities to drainage districts but does not provide any authorities for or directives to DEQ. DEQ's WQC would not prevent BDIC from exercising any authorities that it has under ORS chapter 547. Petitioners cite the Oregon Court of Appeals case *Arnold Irrigation District* in support of the argument that ORS chapter 547 creates a state law-based water quality requirement that must be addressed in the WQC.[2] However, this cited case does not support Petitioners' argument. The court in *Arnold Irrigation District* analyzed the state law requirement in ORS 197.180 that state agencies only take actions consistent with the statewide planning goals and comprehensive plans. ORS 197.180 places a clear directive on DEQ, and Petitioners have not identified any similar directive on DEQ in ORS chapter 547. Petitioners vaguely reference ORS 547.425, but DEQ is not undertaking any of the prohibited practices cited in that statute. Moreover, the court in *Arnold Irrigation District* held that federal law authorized DEQ to place conditions in its WQC if it determined such was necessary for compliance with State water-quality related laws. Drainage district law does not present a state law water quality requirement that must be addressed in a WQC, and the WQC issued does not infringe on the authority of the BDIC. DEQ understands that NEXT has engaged with the BDIC, including all board members, regarding the mitigation plan and that design adjustments to the mitigation plan were made as a result of discussions with the BDIC. As far as DEQ understands, the mitigation site does not require approval by BDIC. But again, if BDIC has such authority based on ORS 547, DEQ's WQC would not prevent BDIC from exercising that authority.

The impact to on-site wetland and waters requires mitigation, and this mitigation was approved by both USACE and Oregon Department of State Lands (DSL). DEQ is not the lead regulatory agency to determine appropriate mitigation compliance for wetland impacts. The purpose of the mitigation site is to offset the permanent impacts to wetlands and waters occurring at the proposed facility site. Concerns regarding the mitigation plan were addressed in the Stewardship Solutions letter "RE: DSL 63077 – RF Permit Application, Response to Public Review Comments" dated December 3, 2021, as part of the DSL removal-fill permit process. Densely planted native vegetation provides shade to on-site waters and mitigates bacterial growth because pollutants and nutrients are absorbed by the plants and microorganisms in the soil. The proposed branching channels and planting plan will also slow surface water runoff rates and provide improved water storage on-site, which allow for better infiltration versus the existing straight waterways on-site. DSL approved the state removal-fill permit for this project in 2022. The DSL removal-fill permit includes conditions regarding the compensatory mitigation plan and mitigation monitoring reporting requirements, including conditions to directly address concerns raised by BDIC. DSL is responsible for overseeing the mitigation plan reporting and implementation requirements as described in the DSL removal-fill permit.

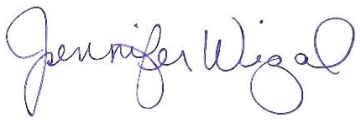
Given that drainage district law does not present a state law water quality requirement that must be addressed in a WQC, DEQ does not grant reconsideration based on this issue.

[2] *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274, 1278–79 (Or. Ct. App. 1986).

Order

For the reasons discussed above Petitioner's request for reconsideration is denied.

DATED this 6th day of May 2025.



Jennifer Wigal, Water Quality Administrator
Oregon Department of Environmental Quality.

Notice: Pursuant to ORS 183.484 you may petition for judicial review of this order. Any petition for judicial review of this order must be filed within the 60-day time period specified by ORS 183.484.

Oregon Department of Environmental Quality

Questions and Answers

NEXT Renewable Fuels Draft 401 Water Quality Certification

This document is a comprehensive list of questions that were asked during the public hearing that DEQ held on Oct. 8, 2024 about NEXT Renewable Fuels Oregon's draft 401 Water Quality Certification.

Can the January 2025 deadline be extended to allow for the U.S. Army Corps of Engineers (USACE) to complete the Environmental Impact Statement (EIS)?

The U.S. Environmental Protection Agency's 401 rule gives DEQ a maximum of one year to issue a decision. Under that rule, DEQ would waive authority if it does not issue a decision by that deadline. DEQ does not waive authority. DEQ intends to issue a certification or denial by Jan. 12, 2025.

If DEQ denies the application, can NEXT reapply?

NEXT cannot reapply for a 401 water quality certification without having the reasons for the denial addressed. Per EPA's final 401 rule from 2023, DEQ must explain in a denial of certification why DEQ is unable to certify that the activity will comply with water quality requirements. This could include, but is not limited to, a description of any missing water quality-related information if the denial is based on insufficient information.

Why does the public notice refer to the 2021 application?

The federal application with the USACE for the Section 404 authorization has been active since 2021.

How much have you have engaged Beaver Drainage Improvement Company (BDIC), who has, by statute, overall approval of any projects in the Beaver Drainage District? This was reinforced with Multnomah County Drainage District vs an entity in Oregon court, which stated you have to get approval from the drainage district.

DEQ has been in communication with the Beaver Drainage Improvement Company over the years of DEQ's involvement with the project. DEQ has not found evidence of the statute referenced in the question. The project site is located on land zoned Resource Industrial Planned Development (RIPD).

The waterways within the Beaver Drainage District are intimately connected. The surface water and groundwater are often the same. How is it possible to look at stormwater runoff as a separate entity when the entire area of this facility is located on unstable ground, with a failing dike system and completely surrounded by water? The emergency game plan in the event of catastrophe for the NEXT facility is to flood the Beaver Drainage District for containment.

Surface water is defined as any body of water that is above ground including rivers, streams, lakes, reservoirs, and wetlands. The 401 water quality certification does not regulate groundwater. DEQ uses Water Pollution Control Facility (WPCF) permits to implement groundwater protection rules, which are required for facilities that discharge to the ground. No WPCF permits will be issued to this proposed facility because it will not discharge wastewater or stormwater to the ground.

DEQ does not approve of untreated stormwater runoff to comingle with groundwater or surface water.

Columbia Pacific Bio-Refinery (CPBR) is the terminalling provider for the NEXT project. CPBR has oil spill contingency plans with EPA, U.S. Coast Guard and DEQ in the event of a spill at Port Westward. CPBR also practices spill scenarios as spill drills regularly, which the latest worst case scenario spill drill was in August 2024.

How can DEQ be "reasonably assured" the project complies with the Clean Water Act if the local drainage district has identified glaring flaws in the proposal already?

DEQ's review of the project has concluded it will be consistent with applicable provisions of Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act, state water quality standards set forth in Oregon Administrative Rules Chapter 340 Division 41 and other requirements of state law, provided the conditions incorporated into the 401 WQC are strictly adhered to by NEXT.

In 2021, EPA expressed concerns that NEXT "has not provided sufficient information for the to make a reasonable and defensible judgment that the proposed activities comply with the Clean Water Act…" Why is DEQ concluding that this proposal is reasonable, when EPA said it was not?

That comment from EPA was from NEXT's 2021 request. DEQ has received revised materials and information since then. The draft 401 WQC is based on the 2024 request for a 401 WQC received by DEQ in January 2024.

Why is DEQ apparently relying solely on information from the applicant, which has a track record of misleading the community and providing contradictory information, and not even waiting for the draft EIS?

Like other permits, DEQ evaluates the information submitted in the application and determines if the requested permit or certification will comply with Oregon's regulations. DEQ then drafts the permit or certification in accordance with Oregon rules and provides a public review and comment process, which could impact the final permit or certification based on comments received. Issued permits and certifications are enforceable and violations may result in orders to pay a civil penalty or perform corrective actions.

DEQ's 401 Water Quality Certification Program reviews and evaluates the water quality impacts of projects that require a federal permit or license to conduct any activity that may result in a discharge to waters of the United States under Section 401 of the federal Clean Water Act. DEQ reviews the environmental information submitted to the federal permitting agency, which is USACE in this case, and other environmental information and evaluations as necessary to demonstrate that the activity will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act. This includes water quality standards described in OAR 340-041, and other requirements of state law. DEQ may request any additional information necessary to complete an application or to assist the department in evaluating a proposed activity's impacts on water quality.

The 401 WQC is part of the federal 404 authorization process led by USACE. As the lead agency for evaluating the 404 application and preparing the draft EIS, USACE will publish the draft EIS for public review and comment prior to preparing the final EIS.

Why is DEQ describing the number and contents of tanks as it did in the public notice and stating that feedstocks will primarily arrive by barge, despite ample evidence that rail-fed feedstocks like soybean oil will be used?

Feedstocks will primarily be received via barge and oceangoing vessels. The finished products will then be transported through a pipeline to the terminal provider where it will be shipped via vessels. Product will also be

transported via rail to connect with the existing port's rail spur. A rail spur is a short, dead-end track that branches off from a main track to provide access to commercial or industrial areas.

Why is DEQ failing to consider the seismic readiness of dikes in the area?

The facility will be seismically supported with pile foundations by installing approximately 15,200 16-inch steel piles that are 90-feet long and will be driven by a vibratory hammer. USACE is the regulatory agency in charge of Section 408 authorizations, which allows another party, such as a local government, company or individual, to alter a Civil Works project, such as a levee.

Why is DEQ saying that they will use waste materials? NEXT investors stated as recently as October 2023 that it would rely on soybean oil, not a waste product, for the majority of its feedstock.

The application states "vegetable oils, used cooking oil, animal tallow and inedible corn oil." Soybean is a vegetable oil.

Did I hear that the Oregon Department of State Lands is the agency that will approve or deny this certification? What is DEQ's role?

DEQ is the agency to issue or deny the 401 water quality certification. This is part of the federal 404 authorization process administered by USACE. The Oregon Department of State Lands and USACE are responsible for overseeing the details and implementation of the mitigation plan. DSL issued a state removal-fill permit to NEXT in 2022 which includes the off-site mitigation plan.

Why is DEQ not addressing pollution into Bradbury Slough in the public notice, despite the fact it will receive toxic pollution from this facility? Is DEQ claiming that it will sample water into Bradbury Slough?

NEXT is not proposing in-water work within Bradbury Slough. NEXT will need a 1200-Z Industrial Stormwater general permit from DEQ for the project. Wastewater discharge is permitted under the Port's NPDES permit.

Will there be water sampling in the Bradbury Slough?

The 401 WQC is not conditioning water quality sampling within Bradbury Slough because the application for a 401 WQC does not propose discharging to Bradbury Slough. The facility will discharge comingled wastewater/stormwater to the Columbia River via the Port of Columbia County wastewater treatment facility which has an existing NPDES permit 102650 (WQ File number 111746) that complies with the current TMDL. The NPDES permit requires sampling of the effluent before it goes out into the Columbia River and at some internal monitoring points on the property. The outfall is along the riverbed is in the main channel, not Bradbury Slough.

How many fuel tanks? How many gallons of flammable, toxic fuel?

The proposed plan at full capacity is 50,000 barrels per day, or 1.58 million gallons.

What are the bidding requirements for the U.S. Army Corp of Engineers?

The USACE's' bidding requirements are not part of DEQ's 401 WQC review process. This is a question for the USACE.

Does DEQ not consider water quality impacts from discharge that is in its jurisdiction points during flood conditions/seismic events?

DEQ considers water quality impacts by projects within a mapped floodplain; however, certification relative to flooding or earthquake-specific conditions is outside of DEQ's authority.

Didn't NEXT stop paying full rent to the Port in 2024? Isn't this a warning signal that NEXT will fail to support the community and its mitigation project?

The tenant-landlord relationship isn't part of the 401 WQC review process. This is a question for the Port of Columbia County.

Contact

Please reach out to the following individuals for questions about DEQ's regulatory oversight of NEXT:

- 401 Water Quality Certification: Haley Teach, 401 Program Coordinator
- Air quality permit: David Graiver, Air Quality Permit Writer
- Emergency Response Program, spill drills: Scott Smith, Emergency Response Planner
- Community Liaison: Melyssa Graeper, North Coast Regional Solutions Team Coordinator
- Media: Michael Loch, Public Affairs Specialist

If you have questions about the land use compatibility statement or anything related to NEXT being allowed to operate in its current location, please contact the Columbia County at building@columbiacountyor.gov, or Port of Columbia County at inquiries@portofcolumbiacounty.org.

If you have questions about the mitigation plan, please contact Heather Dimke at Oregon Department of State Lands at heather.dimke@dsl.oregon.gov.

If you have questions about the draft Environmental Impact Statement or alternative analysis, please contact Bo Davidson at U.S. Army Corps of Engineers at james.e.davidson2@usace.army.mil.

Non-discrimination statement

DEQ does not discriminate on the basis of race, color, national origin, disability, age, sex, religion, sexual orientation, gender identity, or marital status in the administration of its programs and activities. Visit DEQ's Civil Rights and Environmental Justice page.

State of Oregon Department of Environmental Quality

Hearing Officer's Report and Response to Comments

Date: Jan. 7, 2025
Hearing Officer: Tiffany Yelton-Bram
Date of Hearing: Oct. 8, 2024
Company: NEXT Renewable Fuels Oregon
USACE/ DEQ Permit No. 2020-383

Background

NEXT Renewable Fuels Oregon (NEXT), applied to Oregon Department of Department of Environmental Quality (DEQ) for a Clean Water Act Section 401 water quality certification (WQC) to construct a renewable diesel and aviation fuel manufacturing facility, located at the Port Westward Industrial Park in Clatskanie, Oregon.

DEQ prepared a draft 401 water quality certification (WQC) and proposed it for public review and comment in a public comment period from Sept. 5, 2024, through Oct. 25, 2024. In addition, DEQ held a virtual public hearing for the proposed certification on Oct. 8, 2024. This report and Response to Comments describes DEQ's review and consideration of the public comments submitted during the comment period and public hearing.

Public comment

DEQ received 887 written comments and 40 oral comments. Comments received during the public comment period as well as comments received at the public hearing are summarized or stated below. Similar comments are grouped in sections with headings that begin with "Comments related to..." followed by the common topic. Individual comments and summarized comments are numbered following each section heading. For example, the first comment appears under the heading "1. Comments related to 401 review scope" and is enumerated with *1.1*. The second comment is enumerated with *1.2.* and so on.

Comments grouped in sections are provided as examples and are not an exhaustive list of such comments. DEQ responses follow each comment or group of comments.

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1. COMMENTS RELATED TO 401 REVIEW SCOPE

1.1. The [401] rule requires ODEQ to review requests for certification by not only looking at the project's potential discharges, but its activity as a whole, "including the activity's construction and operation."

DEQ Response: DEQ conducted a review of the NEXT application following EPA's final 2023 Clean Water Act (CWA) Section 401 Water Quality Certification Improvement Rule (2023 Rule), which went into effect on Nov. 27, 2023. The rule requires NEXT, as the applicant for a federal permit from the U.S. Army Corps of Engineers (USACE), to submit a "request for a 401 water quality certification" from DEQ. The federal permit from USACE is required under Section 404 of the CWA for activities that may result in any discharge into waters of the United States. The 401 WQC from DEQ documents that the applicant's activity will comply with all applicable water quality standards, limitations and restrictions (Section 121.2), based on thorough evaluation of the project using required documents submitted to DEQ as part of the request process for a 401 WQC. The 2023 Rule also explains that evaluation scope includes the water quality-related impacts from the activity subject to the USACE permit, including the activity's construction and operation.

The activity subject to the USACE permit for this proposed project is the construction of the Main Plant facility, roads, pipelines, rail spurs and stormwater facilities. The 401 WQC states that the discharge will comply with applicable provisions of the CWA, including state water quality standards.

The review included interdependent and interrelated activities associated with the construction and operation of the proposed facility. The interdependent and interrelated project components reviewed were stormwater treatment and discharge, water intake and outfalls, wetland and waters functional value assessment, the Biological Assessment, land use decisions, the mitigation proposal, alternatives analysis and vessel use. DEQ's 1200-C Construction Stormwater General Permit and the associated Erosion and Sediment Control Plan will be required for construction activities before any ground disturbing activities can take place at the site. DEQ's 1200-Z Industrial Stormwater General Permit is also required before construction activities can begin.

1.2. DEQ's process in this case has been flawed, providing incomplete information and rushing to a decision without adequate public engagement, ignoring the voices of the people most impacted, including residents of Port Westward and the Estuary who rely on fishing and clean water for crops and their livelihoods. Public notice and basic project information have been wholly inadequate.

DEQ Response: DEQ acknowledges and appreciates this feedback. Public engagement is a vital component of the regulatory process. The 401 WQC program follows the administrative process and rules for 401 WQC applications, found in Oregon Administrative Rule (OAR) 340-048-0027. Per EPA's 2023 401 Rule, DEQ has up to one year to issue a 401 water quality decision once a valid request for a 401 WQC is received. A valid request for certification to DEQ must include a copy of the federal permit application and a completed Request for Certification form (Section 121.5). DEQ received a valid request for a 401 WQC by NEXT on Jan. 13, 2024, and has until Jan. 12, 2025, to issue a decision with conditions or

a denial. Per Oregon Administrative Rules, the 401 program has, at minimum, a 35-day public notice period to receive public comments for this type of proposed action. DEQ extended the public notice period of the draft WQC for this project to 50 days, and pre-emptively scheduled a public hearing, to provide more time for public engagement.

Below is a summarized timeline of DEQ's public engagement during this process. Documents and recordings from these meetings, additional questions and answers and 401 WQC application documents are available at https://ordeq.org/next-renewables.

- Public Engagement History:
  - Sept. 7, 2021: Public information meeting
  - Nov. 5 – Dec. 5, 2021: Joint public notice of application with USACE
  - Feb. 8 - 23, 2022: DEQ re-opened the public notice of the application
  - Sept. 5 – Oct. 25, 2024: DEQ public notice of draft WQC announced and 50-day comment period
  - Oct. 8, 2024: Public hearing to share information, accept comments, and answer questions

1.3. *The relevant segment of the Columbia River is impaired for a number of parameters, including pH, temperature, DDE 4,4, Polychlorinated Biphenyls ("PCBs"), dioxin and dissolved gases.*

DEQ Response: The Columbia River between Mill Creek and Wallace Slough is classified as water quality limited under the CWA with an EPA approved Total Maximum Daily Load (TMDL) developed for temperature, dioxin (2,3,7,8-TCDD) and total dissolved gas. It is also listed on the Section 303(d) list of impaired waters for the parameters of polychlorinated biphenyls (PCBs) and DDE (4,4). Dissolved oxygen and pH are listed as attaining parameters, which means the water quality measurements for dissolved oxygen and pH fall within the established standards.

1.4. *Is DEQ and the public evaluating this application without the benefit of consultation with DOGAMI or evaluation of the design by the Army Corps of Engineers? That is to say, I'm concerned that the NEXT refinery will be a water quality catastrophe in the event of an earthquake or flood.*

DEQ Response: Oregon Department of Geology and Mineral Industries (DOGAMI) review is not a required element of DEQ's 401 WQC analysis. The 401 WQC administered by DEQ is a requirement of the USACE Section 404 dredge/fill authorization for the proposed discharge to wetland and waters on-site. USACE cannot issue their Section 404 authorization without a 401 WQC decision from DEQ. USACE is the lead regulatory agency for this federal permitting action and is evaluating the design of the project through their CWA Section 404 review process.

1.5. Please ask staff to withdraw the draft certification which has major flaws, causes massive harm to the area, violates the Clean Water Act and Oregon goals, and has high potential of major impact on the Columbia River.

1.6. I strongly urge DEQ to withdraw the proposed Clean Water Act Section 401 water quality certification for NEXT Renewable Fuels Oregon because of several concerns, the primary of which is that DEQ has not addressed serious questions concerning pollution of the State's waterways and with NEXT's statements that it's project would, in fact, cause water pollution.

DEQ Response: DEQ must issue a decision in response to a 401 WQC application and the required application materials. For this application, DEQ must issue a decision by Jan. 12, 2025. DEQ's decision options are to: *grant*; *grant with conditions*; *deny* or *waive* the 401 WQC. DEQ does not waive authority on issuing a 401 WQC decision in response to an application.

1.7. DEQ cannot blindly accept NEXT's unsupported conclusion that there will be no impacts to water quality.

1.8. NEXT's proposed permit violates the Clean Water Act, specifically the narrative water quality standards and anti-degradation rules.

1.9. The proposed refinery project would violate the Clean Water Act's water quality standards and anti-degradation rules, but DEQ proposes to authorize it anyway, without due consideration of concerns voiced by the community that relies on clean water for their crops and livelihoods.

DEQ Response: DEQ acknowledges the concerns raised in these comments. A 401 WQC identifies the conditions required to meet Oregon's water quality standards for waters impacted by a proposed project and is not a statement that a proposed project will have no impact on water quality. Upon careful review the information provided by NEXT, DEQ is reasonably assured that implementation of the project will be consistent with applicable water quality requirements under sections 301, 302, 303, 306 and 307 of the CWA and state water quality standards in Oregon Administrative Rules 340-041, provided the conditions of the 401 WQC are incorporated into the USACE Section 404 authorization and strictly adhered to by NEXT. The proposed project is covered by the 401 WQC, 1200-Z permit (industrial stormwater management during operations) and 1200-C (stormwater management during construction) permit. NEXT is required to obtain 1200-Z and 1200-C permit coverage by DEQ before construction can begin, and DEQ has yet to receive those applications. If DEQ proposes to issue stormwater permit coverage, the application must be posted for public review. DEQ is committed to engaging with the community during that process.

The Antidegradation Policy is to guide decisions that affect water quality to prevent unnecessary further degradation from new or increased point and nonpoint sources of pollution, and to protect, maintain and enhance existing surface water quality to ensure the full protection of all existing beneficial uses, as stated in OAR 340-041-0004. Degradation of

water quality is allowed only after a systematic decision-making process considering many factors.

The outfall at Port Westward to the Columbia River does not require an antidegradation review as part of the 401 WQC review process because it is an existing NPDES permitted outfall. OAR 340-041-0004(3)(a) does not require an antidegradation review for discharges into an existing mixing zone for a permitted source, as long as the Port continues to comply with the effluent limits set out in its NPDES permit.

The remaining stormwater runoff from contributing impervious areas not connected to the NPDES permitted outfall will be collected and treated prior to discharging to McLean Slough. McLean Slough is not a listed water quality limited water. The closest downstream waterbody listed as water quality limited is the Clatskanie River, which is listed on the Section 303(d) list of impaired water bodies for dissolved oxygen; however, the project design has provided reasonable assurance that it will not further degrade dissolved oxygen levels in Clatskanie River.

1.10. The Beaver Drainage Irrigation Company (BDIC) maintains broad authority granted by Oregon Statutes Chapters 547 and 554 to works related to water flow and drainage within the bounds of the district. The BDIC will exercise this authority for maintaining operations of drainage and irrigation within the district for Sanitary and Agricultural purposes as stated in the above-mentioned statutes and the BDIC bylaws, and fully expects any agencies attempting to regulate matters related to works within the district to perform due diligence regarding these statutes.

DEQ Response: DEQ acknowledges that BDIC provides important services to its members. Oregon Revised Statute (ORS) chapter 547 contains authorities related to the organization of drainage districts. ORS 554 covers corporations for irrigation, drainage, water supply or flood control. The proposed project will not inhibit BDIC from maintaining operations of drainage and irrigation within the drainage district. DEQ will maintain communication with the BDIC to share updates and answer questions.

1.11. The section 401 regulations specifically state that 401 certification should address "the activity's construction," but DEQ has explicitly disregarded water quality impacts related to the construction of the refinery and associated infrastructure. Similarly, DEQ's past statements on the scope of 401 review support analyzing an activity's indirect effects on water quality, but DEQ has disclaimed responsibility for considering a wide range of indirect impacts on water quality, from proposed mitigation to spill risk to shipping impacts. In short, DEQ's proposed approval does not appear to follow the law or past practice of the agency.

DEQ Response: DEQ conducts 401 reviews following the following EPA's final 2023 Clean Water Act (CWA) Section 401 Water Quality Certification Improvement Rule (2023 Rule), which went into effect on Nov. 27, 2023. A 401 review includes consideration of indirect impacts related to the construction of the project and compliance with project activities with a water quality nexus. DEQ has written NEXT's 401 WQC in accordance with the requirements of DEQ rules and EPA's 2023 Rule.

There is an existing NPDES permit #111746 for treated wastewater/stormwater discharges from Port Westward. The Port's water-intake structure and outfall structure have undergone Endangered Species Act (ESA) and Magnuson-Stevens Act (MSA) consultations (Corps 200200448 and NWP-2020-119-1). Water quality will be addressed by the proposed project's stormwater management plan, which meets DEQ 401 WQC requirements and Standard Local Operating Procedures for Endangered Species (SLOPES) V regulations for post-construction stormwater management. Treated stormwater runoff will be discharged at or below the pre-construction levels and therefore will not increase the volume of water in drainage ditches. USACE issued a permit for the existing dock, NWP-2007-998-1, which did not require a 401 WQC from DEQ.

The Columbia Pacific Bio-Refinery (CPBR) is the operator of the bulk liquid fuels terminal at Port Westward and the terminalling provider for the NEXT project. CPBR has spill response plans with EPA, DEQ and the U.S. Coast Guard in the event of a spill at Port Westward. CPBR practices spill scenario drills regularly, with the most recent drill being a worst-case scenario drill in August 2024. NEXT will be required to report spills to DEQ and the Oregon Emergency Response System (OERS). DEQ has emergency response equipment near the proposed NEXT site at CPBR to help mobilize a swift response if a spill occurs.

Water in existing ditches on the site proposed for impact is currently removed from within the diked areas by pumping it over the levee. Per the Oregon Department of Fish and Wildlife's (ODFW) comments in 2021, the existing levee system does not allow fish from the Columbia River to enter waterways inside the dikes.

2. COMMENTS RELATED TO CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS

2.1. It will continue the use of fossil fuels at a time when we all know we need to get OFF climate harming fuels as soon as possible.

2.2. The Port Westward NEXT Refinery and Rail Yard proposal would be one of the largest greenhouse gas polluters in Oregon while using unsustainable feedstocks from the Midwest.

The hydrogen plant at the refinery used to make the fuel will rely on fracked gas. The proposal would be one of the largest greenhouse gas polluters in Oregon.

2.3. The project would emit over 1 million tons of greenhouse gas pollution each year, and it would rely on feedstocks from unknown sources as well as millions of cubic feet of fracked gas daily. NEXT told investors it would get most of its feedstocks by rail from the Midwest at the outset of production. Although NEXT calls its production "renewable," it has major negative climate consequences. The hydrogen plant at the refinery used to make the fuel will rely on fracked gas.

2.4. Biofuels produce substantial carbon in the atmosphere when burned, they produce carbon in the atmosphere when produced. Fracked gas is used to make the hydrogen necessary for the refining process.

2.5. NEXT would also consume over 14 million cubic feet of fracked gas per day, roughly on par with the entire City of Eugene. In short, the refinery would make it significantly harder to achieve the stated goal of your administration and agency: reducing Oregon's greenhouse gas emissions to 90% below 1990 levels by 2050.

DEQ Response*:* DEQ's 401 WQC review analyzes consistency with applicable water quality standards, limitations and restrictions. The proposed facility would be regulated under the newly approved Climate Protection Plan rules for its natural gas emissions. Under these rules, NEXT is considered an "Emissions Intensive, Trade Exposed" (EITE) entity and would be regulated directly for the emissions associated with the natural gas delivered to the facility. Emissions from EITE facilities are exempt from these emissions regulations at their facilities for the first three years. The emissions from the proposed NEXT facility, if constructed, would become regulated under the cap beginning in 2028.

NEXT is subject to greenhouse gas monitoring and reporting requirements under the Greenhouse Gas Program (OAR 340-215). Any future new, applicable greenhouse gas regulations adopted by the Environmental Quality Commission, DEQ's governing body, will be applied to this proposed facility in the appropriate manner and as defined by the commission in rule.

2.6. The lifecycle emissions of NEXT's product's feedstocks are key to understanding the project's overall impacts. While renewable diesel can be produced from truly waste feedstocks like "fish grease" and used cooking oil, the vast majority of these low-carbon feedstocks are spoken for on the market—a direct result of California's Low Carbon Fuel Standard that prioritizes these feedstocks. In actuality, NEXT's product will be made primarily from carbon-intensive, purpose-grown feedstocks like corn and soybean oil, shipped from the Midwest on long trains. Regulators must take into account the lifecycle emissions of a product labeled as "renewable" before buying into greenwashed selling points and authorizing a massive refinery in a sensitive area.

DEQ Response: DEQ's 401 WQC review analyzes consistency with applicable water quality standards, limitations and restrictions. NEXT has a DEQ Standard Air Contaminant Discharge Permit from the agency's stationary source air quality permitting program. This program regulates emissions generated from a stationary source. This includes emissions from on-site operations and equipment but does not include production of feedstocks, transport of feedstocks to/from the NEXT facility or the end use of fuel products developed using feedstocks.

3. COMMENTS RELATED TO AN ENVIRONMENTAL IMPACT STATEMENT

3.1. The EIS from the Army Corps of Engineers should be reviewed before a decision is made by DEQ.

3.2. DEQ is rushing its decision without having seen even a draft of the environmental impact statement from the Army Corps of Engineers.

3.3. NEXT and DEQ acknowledge that groundwater problems, safety and geotechnical issues are not fully addressed or even understood — issues that should be fully evaluated in an Environmental Impact Statement (EIS). DEQ is rushing to a decision prior to seeing an EIS, which is not consistent with DEQ's approach on other mega-projects, and frankly unfathomable.

3.4. Before DEQ approves NEXT's permit, it needs more information, including the Corps' EIS.

3.5. DEQ can and should require additional information about water quality impacts, including the draft Environmental Impact Statement for the facility to inform its analysis.

DEQ Response: An Environmental Impact Statement (EIS) is a document issued by the USACE that discusses the potential environmental impacts of a proposed action and how to mitigate those impacts. The purpose of an EIS is to inform the public and decision-makers about the potential environmental consequences of a proposed action. The EIS is part of the USACE CWA Section 404 dredge/fill review. The 401 WQC is part of the federal 404 authorization process led by USACE. The USACE, as the lead agency under the National Environmental Policy Act (NEPA), has determined the proposed project by NEXT may significantly affect the quality of the environment and will prepare a draft EIS for public review and comment prior to preparing the final EIS.

The EIS is not a required document for the DEQ Section 401 WQC review. NEXT has provided DEQ all the required documents related to water quality for the 401 review. DEQ reviewed the proposed NEXT facility's operations and design in a manner consistent with this authority. DEQ will review the draft EIS when it becomes available. Per Condition #8 of the 401 WQC, "DEQ may modify or revoke this certification, in accordance with Oregon Administrative Rules 340-048-0050, if the project changes, project activities are having an adverse impact on state water quality or beneficial uses or if the Applicant violates any of the conditions of this certification."

4. COMMENTS RELATED TO LAND USE AND LOCATION

4.1. NEXT's proposal conflicts with the interests of local farmers who have decades of first-hand knowledge regarding the hydrology and surface water movement in the area. NEXT continues to ignore and downplay community concerns.

4.2. A main concern of ours is the increase in industrial and delivery activity that would result [from] the construction of NEXT's refinery.

DEQ Response: DEQ appreciates the concerns that local farmers and community members have about the location of this proposed project. Land use zoning decisions are made at the local government level. Columbia County is the land use authority for the location of this proposed project. It is not within DEQ's jurisdiction to determine the location of any proposed

project. DEQ received a Land Use Compatibility Statement from Columbia County that states NEXT's proposed uses are consistent with the Columbia County Comprehensive Plan and the activity or use is allowed. Changes to this land use decision would need to come from either Columbia County or the Land Use Board of Appeals.

5. COMMENTS RELATED TO THE MITIGATION PLAN

5.1. *The BDIC has not yet signed on to the mitigation plan from NXT. This must happen before this project moves forward*.

5.2. Facility will impose impacts to the rest of the BDIC through the proposed mitigation project, shallow channels warm water and foster bacteria etc. which would contaminate irrigation water on food crops grown adjacent, could result in human health and safety problems. Mitigation is against the BDIC bylaws and articles of incorporation and the BDIC cannot legally approve such a project. DSL has also stated on public record that the mitigation site is unlikely to work as proposed. NEXT, DSL, USACE have acknowledged that there will be many impacts to BDIC.

DEQ Response: NEXT has engaged with the BDIC regarding the mitigation plan, including all board members, and design adjustments to the mitigation plan were made as a result of discussions with the BDIC. As far as DEQ understands, the mitigation site does not require approval by BDIC. Other mitigation sites are existing within the drainage district boundaries.

The impact to on-site wetland and waters requires mitigation approved by both USACE and Oregon Department of State Lands (DSL). DEQ is not the lead regulatory agency to determine appropriate mitigation compliance for wetland and waters impacts. The purpose of the mitigation site is to offset the permanent impacts to wetlands and waters occurring at the proposed facility site. Concerns regarding the mitigation plan were addressed in the Stewardship Solutions letter "*RE: DSL 63077 – RF Permit Application, Response to Public Review Comments*" dated December 3, 2021, as part of the DSL removal-fill permit process. Densely planted native vegetation provides shade to on-site waters and mitigates bacterial growth because pollutants and nutrients are absorbed by the plants and microorganisms in the soil. The proposed branching channels and planting plan will also slow surface water runoff rates and provide improved water storage on-site, which allow for better infiltration versus the existing straight waterways on-site. The mitigation site is owned by Oregon Port AG Investors, LLC and leased to NEXT. DSL approved their state removal-fill permit for this project in 2022. The DSL removal-fill permit includes conditions regarding the compensatory mitigation plan and mitigation monitoring reporting requirements, including conditions to directly address concerns raised by BDIC. DSL is responsible for overseeing the mitigation plan reporting and implementation requirements as described in the DSL removal-fill permit.

5.3. The mitigation associated with the project will also include heavy loads of glyphosate, as the herbicide will be used to control invasive plants at the mitigation site.

DEQ Response: Condition 15 of the 401 WQC discusses herbicide and pesticide use within 150 feet of a waterway. The Applicant is responsible for following the NPDES 2300-A general water quality permit, applicable regulations and adopting an Integrated Pest Management

plan that describes pest prevention, monitoring and control techniques with a focus on prevention of inputs to waters of the state. Glyphosate application typically binds tightly to soil and is broken down by bacteria in the soil after application. This reduces the load of glyphosate within surface waters because of the binding. The Biological Assessment (March 2023) provided references showing that glyphosate poses low acute toxicity to amphibians. In most conditions, over 90% of applied glyphosate dissipates within 180 days.

6. COMMENTS RELATED TO THE PORT OF COLUMBIA COUNTY'S NPDES PERMITTED OUTFALL

6.1. [NEXT] proposes to use millions of gallons of water in its industrial processes and then dump millions of gallons of "treated" wastewater into manmade ponds in the estuary on Beaver Island.

DEQ Response: Water rights are managed by the Oregon Water Resources Department (OWRD). Raw water intake for the project will be drawn from the existing Port Westward water intake with the Port's existing water right. There will be no increase of water allocation intake by the Port for the NEXT project. The March 2023 Biological Assessment states, "The permitted volume is well within the proposed water usage proposed by NEXT, and additional water usage will have no effect on Columbia River aquatic habitat." Treated wastewater discharged by Port Westward is covered under the existing NPDES permit #111746. Port Westward's water-intake structure and outfall structure have undergone ESA and MSA consultation (Corps 200200448 and NWP-2020-119-1). Wastewater systems will meet 40 CFR 60 Subpart QQQ, *Standards of Performance for VOC Emissions from Petroleum Refinery Wastewater Systems* requirements. The Port is not requesting a change to the existing NPDES permit at this time.

7. COMMENTS RELATED TO LEVEES AND FLOODING

7.1. The refinery is to be located behind levees built in the 60's. They were not deeply engineered, have already settled to some extent (some are dangerously 3-5 feet lower that adequate) and can be overtopped in a 100-year flood. They are at such risk of overtopping that the Army Corps of Engineers will not certify them. NXT has not demonstrated that they have addressed this problem and could mitigate any problems that arose from flooding.

7.2. BDIC levee system is not certified by FEMA and will not protect against a 100-year flood per FEMA's report in 2012. Lands proposed for the project are within the floodway and thus DEQ has not performed necessary work. BDIC levee system also has not been seismically analyzed but due to its construction materials likely would not survive seismic activity.

7.3. The project would disrupt a system of dikes and levees that control water drainage for much of the farmland in the Columbia River Estuary.

DEQ Response: DEQ does not issue decisions related to seismic stability of the levee or levee engineering. Floodplain development permits are approved at the local level through

the county planning department. In accordance with OAR 340-048-0020(2) (i), NEXT must submit findings prepared by the local land use jurisdiction that demonstrates the activity's compliance with the local comprehensive plan prior to the issuance of a 401 WQC. Other industrial development has been approved and constructed within the Port Westward Industrial Park.

DEQ's Post-Construction Stormwater Management Guidance requires applicants to address how sediment will be stabilized or removed prior to flood events if siting structural stormwater controls in floodplains are unavoidable.

USACE is the regulatory authority for levee management. The levee currently used as the access road for the Port Westward Industrial site will remain a road and will be consistent with current and past activities. USACE determined the proposed new use as a haul road will not alter the levee system; therefore, the proposed project will not alter, occupy or use a USACE federally authorized project and thus does not require permission from USACE under Section 408. The comments raise points and concerns outside of DEQ's authority and so, DEQ cannot act to deny or modify the proposed permit as requested.

Waterway G within the project site will remain in place to maintain existing drainage conditions for the areas outside of the project boundary. Treated post-construction stormwater runoff is required to discharge at a rate no more than the pre-construction runoff rate.

8. COMMENTS RELATED TO SEISMIC STABILITY

8.1. The proposal is located on unstable soil in diked land, leaving levees prone to failure near homes, farms, and a Zen monastery.

DEQ Response: Seismic stability of the project is not an element of DEQ's 401 WQC analysis. The proposed project will be designed to seismic requirements specified in the Oregon Specialty Contractors Code. In the final design phase, the following additional seismic considerations will be included for seismic resilience: ASCE 7 Minimum Design Loads and Associated Criteria for Buildings and Other Structures, International Building Code (IBC), National Earthquakes Hazards Reduction Program (NEHRP) Recommended Seismic Provisions and Local Seismic Hazard Maps and Data.

Regarding foundation construction, the final grade of the project site will be approximately 3 feet above the existing grade and fill material will consist of clean soil and aggregate. Concrete piles are proposed for the foundations under the tanks. The concrete piles will be constructed using deep soil mixing, which uses wet soil mixing with a binder slurry to provide a proper foundation for the concrete piles. This process constructs individual soilcrete columns that are 16 inches in diameter by 60 feet in depth, in rows with the columns overlapping for 100% mass stabilization. The deep soil mixing process that forms soilcrete columns is a common ground improvement technique in the Pacific Northwest to strengthen weak soils. Facility components will also be seismically supported with pile foundations by installing approximately 15,200 16-inch steel piles.

In accordance with OAR 340-048-0020(2) (i), NEXT submitted findings prepared by the local land use jurisdiction that demonstrates the activity's compliance with the local comprehensive

plan prior to the issuance of a 401 WQC.

8.2. If the weight limit requirements for the road for trucks is not known, how can a flare stack be planned for? A 300-foot-tall flare stack built for Deep South weighs 368,000 pounds. How much more will a 400-foot flare stack weigh? How can a secure foundation for a flare stack be built on land that is rated by the Oregon Department of Geology and Mineral Resources as having "violent" shaking in the event of the expected 9.0 or above magnitude earthquake we are overdue for?

DEQ Response: Seismic stability of the project is not an element of DEQ's 401 WQC analysis. The flare stack design, operations, maintenance and monitoring will be done in accordance with the air quality permit ACDP 32808. The flare height at the NEXT project is based on safety considerations following guidance from American Petroleum Institute Standard 521. DEQ does not have rules that would allow us to limit the height of a flare stack.

9. COMMENTS RELATED TO SPILLS

9.1. If an accident occurs causing a release of diesel, fracked gas, toxic chemicals or aviation fuel, the consequences would be bad for salmon and nearby communities.

DEQ Response: If a spill occurs within the facility's Main Plant, it will be contained and collected in the Main Plant's stormwater/wastewater system. The system will treat any spill material before being discharged to the Port's existing system approved by NPDES Permit #111746. The aboveground pipelines will be in operation only while a vessel or barge at the loading docks is being filled or unloaded. When the pipeline is not in operation, it will be filled with stagnant product or will be cleared. The pipelines will be inspected twice per day.

Conditions #13 and #14 of the 401 WQC address spill prevention and response during construction of the proposed project.

9.2. The company also makes little effort to provide realistic information about routine impacts, major spill impacts or worst-case scenarios in a seismic event... In the event of an accident, nearby and downstream communities and wildlife who will be exposed to the release of diesel, fracked gas, toxic chemicals or aviation fuel, in the event of an accident will bear the disastrous consequences.

9.3. *What aspects of the project prevent incidental spills from reaching neighboring properties and the Columbia River?*

DEQ Response: Oregon's spill rules will apply during the construction and operational stages of this facility. The Columbia Pacific Bio-Refinery (CPBR) is the operator of the bulk liquid fuels terminal at Port Westward and is the terminalling provider for the NEXT project. CPBR will be responsible for receiving the feedstock and loading finished product onto vessels at the dock at Port Westward. CPBR stages over 6,500 feet of containment boom, skimmers and two deployment vessels at the Port facility. A containment boom is placed around each ocean-going vessel until the transfer of fuel product is complete. Once an

ocean-going vessel enters the Columbia River, a second marine organization, Maritime Fire and Safety Association becomes an additional Oil Spill Response Organization (OSRO). CPBR has a spill contingency plan and contracts with Clean Rivers Cooperative as their OSRO. CPBR, DEQ, the U.S. Coast Guard and other responder agencies practice spill scenarios and spill drills regularly. CPBR has spill contingency plans with EPA, the U.S. Coast Guard and DEQ. NEXT is required to report spills.

Conditions #13 and #14 of the 401 WQC address spill prevention and response during construction of the proposed project.

9.4. Draft permit requires notification of state agencies but must also require notification of BDIC for spills.

DEQ Response: Condition #14 of the draft 401 WQC requires NEXT to report to OERS within 24 hours. DEQ added additional requirements to notify the BDIC if a spill occurs in the final 401 WQC.

10. COMMENTS RELATED TO BRADBURY SLOUGH

10.1. The public notice does not provide any discussion of Bradbury Slough, which provides high-value salmon habitate. [sic] It would receive pollution from the project.

10.2. DEQ's draft permit correctly identifies the Columbia River, McLean Slough and the Clatskanie River as affected waters of the state, but fails to identify and account for potential water quality violations in Bradbury Slough, Beaver Slough and smaller waterways within and near the project site.

DEQ Response: The proposed project is not discharging to Bradbury or Beaver Sloughs. Port Westward has an outfall at the Columbia River at river mile 53, east of the Port's dock. Treated stormwater discharge outside of the Main Plant will discharge to McLean Slough. The stretch of the Columbia River that encompasses Bradbury Slough has the same TMDLs and impaired beneficial uses listed in the 401 WQC, with an addition of arsenic as a parameter on the Section 303(d) list. Wastewater discharge effluent will be monitored and tested in accordance with the Port's NPDES Permit. Sampling and measurement procedures are required to comply with 40 CFR 136, or as specified in the NPDES permit.

11. COMMENTS RELATED TO STORMWATER

11.1. The project poses acute risks of water quality degradation through its construction and operation. Heavy metal and 6PPD-quinone contamination—a common byproduct of tire erosion from construction and continuous road use—are lethal to salmon in small concentrations. By constructing roads and filling drainages in a low-lying floodplain, NEXT's proposed activities will likely result in contaminants accumulating throughout the site over the life of project and especially in adjacent sloughs critical for juvenile salmon rearing.

11.2. For example, this level of impervious surface is harmful to water quality and will cause environmental degradation due to the loss of habitat.

11.3. NEXT would violate Oregon's water quality standards for temperature, turbidity and toxins by contributing contaminated stormwater and draining polluted water into the Columbia River and surrounding wetlands.

11.4. NEXT's refinery will add pollutants to the smaller waterways and drainage ditches on the property. By definition, these drainage ditches transport water—and pollutants—to waterways within the levee system that DEQ has not considered.

DEQ Response: The proposed project design is in accordance with water quality standards listed in OAR 340-041, which include temperature, turbidity and toxins. Stormwater runoff from impervious areas will be treated to meet DEQ and SLOPES V (Standard Local Operating Procedures for Endangered Species) programmatic requirements for post-construction stormwater management before discharge to on-site waters. The SLOPES V and DEQ Post-Construction Stormwater Management Plan design storms are equivalent and exceed the Columbia County stormwater requirements. SLOPES V is a set of guidelines used by USACE to comply with the Endangered Species Act (ESA) when authorizing projects related to stormwater, transportation and utilities, acting as a streamlined process for consultations with the National Marine Fisheries Service (NMFS) regarding potential impacts on endangered species. The concept of SLOPES exists nationwide, and "SLOPES V" specifically refers to the version used in Oregon. Stormwater management is achieved using best management practices to control sources of contaminants, control flows and volumes of stormwater, and treat stormwater prior to discharge.

The discovery of 6PPD and 6PPD-quinone is relatively new (discovered in 2020) and there is ongoing research related to best avoidance and treatment practices. 6PPD-quinone is not currently regulated in stormwater discharge permits; however, it is a pollutant under evaluation and is addressed in the post-construction stormwater management plan for this site. A study by Washington State Department of Ecology showed that stormwater and treatment flow best management practices had a high likelihood of treating 6PPD and 6PPD-q. As of November 2024, EPA announced an advance notice of proposed rulemaking under Section 6 of the Toxic Substances Control Act to gather information on the potential risks associated with 6PPD and 6PPD-q in tire material.

According to the Biological Assessment (March 2023) written for the project, any stormwater effects for the project outside of the Main Plant area are estimated to end at the confluence of McLean Slough and Beaver Slough, which is outside of the boundary presence of salmon and steelhead in the Clatskanie River and 4-7 miles from the project site. The treated stormwater/ wastewater discharged to the Columbia River is covered under the Port's NPDES permit.

11.5. *DEQ proposes that NEXT control groundwater with a liner, but NEXT's January 2023 Stormwater plan states that this liner would not work, and "*a *liner is not recommended at this time."*

DEQ Response: DEQ has included conditions in the 401 WQC that NEXT controls the access area's (project area outside of the Main Plant) stormwater treatment facilities with a liner due to the low level of infiltration and high levels of groundwater on-site. Lined

stormwater treatment facilities include an impervious bottom designed to prevent infiltration to groundwater. DEQ's post-construction stormwater management guidance requires a minimum separation distance of five feet between the bottom of the stormwater treatment facility and the seasonal high groundwater level unless otherwise approved by DEQ. A liner is required if the five-foot distance cannot be achieved. This is a standard practice to prevent pre-treated stormwater comingling with groundwater, and it is a common requirement for many stormwater facilities located in areas with high groundwater.

12. COMMENTS RELATED TO FISH AND AQUATIC SPECIES

12.1. NEXT's own Biological Assessment states, *"Because of potentially lethal effects from stormwater contaminants, the project will adversely affect Pacific Salmon EFH and the Pacific Coast groundfish EFH."*

12.2. NEXT's proposed project directly impacts the critical habitat of thirteen endangered salmon and steelhead stocks, including critically endangered spring/summer Snake River chinook.

DEQ Response: This statement in the Biological Assessment is related to heavy metal and 6PPD-quinone presence in stormwater. 6PPD-quinone is not currently regulated in stormwater discharge permits; however, it is a pollutant under evaluation and is addressed in the post-construction stormwater management plan for this site. Stormwater generated in the Main Plant area of the project will be regulated by the existing Port NPDES permit, which has an outfall to the Columbia River. This stretch of the Columbia River contains Evolutionarily Significant Units and Distinct Population Segments of salmon and steelhead. The remaining stormwater runoff in the access area of the project site will be treated prior to discharge to waterways which drain to McLean Slough. McLean Slough does not have an open water, salmon and steelhead passable, connection to the Clatskanie River due to the drainage district pump system. Stormwater treatment for the project has been designed to meet, or exceed, post-construction stormwater treatment standards by DEQ and SLOPES V (Standard Local Operating Procedures for Endangered Species) programmatic requirements.

U.S. Fish and Wildlife Service (USFWS) has not listed new threatened or endangered species or designated critical habitats that occur in the aquatic portion of the action area for the NEXT project since 2015. NMFS has listed additional species and designated critical habitats since 2015, so project impacts for these species and designated critical habitats from previously permitted Berth 1 improvements are addressed in the March 2023 Biological Assessment. The area of the Columbia River near the Berth 1 dock has not been identified by fisheries agencies for spawning or rearing. The closest presence of salmon and steelhead to the project in the floodplain is 4-7 miles south of the project in the Clatskanie River.

13. COMMENTS RELATED TO RAIL CONSTRUCTION AND USE

13.1. If the rail yard goes in, there are water issues that must be resolved. Yards inevitably contain runoff from trains like oil and grease and this polluted water would be headed straight into the Columbia River Estuary.

DEQ Response: All stormwater runoff from the rails on the project site will be detained and treated to DEQ's post-construction stormwater management standards prior to discharge. Treated runoff will discharge to on-site waters and McLean Slough.

13.2. The proposal includes miles of new rail tracks. This rail track includes a system that includes millions of gallons of tank storage to accommodate long trains of unsustainable feedstocks and toxic fuel.

13.3. What are the requirements for the natural gas trains that come into the rail yard, passing through agricultural land, including blueberry farms? The pollution, including operating oils and lubricants, will pollute the areas along the tracks to the rail yard. Storm water treatment will deal with the material in the water in the yard, but not the pollution along the tracks. Also, exhaust from the locomotives will settle out on the surrounding farms and go into the ground water there. These pollutants include PCBs and toxic materials from the diesel fuel burned by the trains.

DEQ Response: DEQ's 401 WQC review analyzes consistency with applicable water quality standards, limitations and restrictions. Direct regulation of trains or railroad activities is handled by the United States Department of Transportation Federal Railroad Administration and the Oregon Department of Transportation Rail Safety Division.

The proposed rail spurs (west rail spur, east rail spur and main plant rail spur) and tracks on the project site will run east and west from the existing Portland & Western's rail line through the proposed facility along the new access road to Hermo Road. The overall rail spur will be approximately 8,900 feet long, or 1.68 miles. On Nov. 6, 2022, the Land Use Board of Appeals overturned Columbia County's decision to expand the rail yard next to the fuel facility. On Dec. 16, 2022, NEXT submitted an updated, approved LUCS that no longer included the rail facility. Stormwater runoff generated by the on-site rail spurs will be detained and treated to DEQ's post-construction stormwater management standards.

14. COMMENTS RELATED TO MARINE VESSEL USE

14.1. [Commentor] understands that the NEXT facility's operation will significantly increase vessel traffic to and from the adjoining Columbia Pacific Bio-Refinery (CPBR).

14.2. NEXT proposes a refinery operation that would produce 50,000 barrels per day of fuel – a production scale that would require an annual average of 115 medium-sized tankers for imported feedstock and 56 medium-sized or Panamax vessels for export. The lower Columbia River and its estuary system cannot support salmon survival while sustaining vessel traffic of this magnitude.

14.3. The increased vessel pollution from NEXT's operation, in the sensitive Columbia River Estuary, and associated water quality violations, are too great—DEQ can determine that no conditions can assure that NEXT can comply with water quality requirements and deny the 401.

DEQ Response: The Port of Columbia County owns and operates the dock that will be used to transport fuel materials and products. Berth improvements related to the construction of an additional berth and vessel capacity were approved by USACE under permit #2007-98-1 and the permittee was Cascade Kelly, LLC dba Columbia Pacific Bio-Refinery. During the CPBR permitting process to upgrade Berth 1, the project noted that Berth 1 had an annual operational capacity of 264 barges or 108 ocean going vessels, which exceeds NEXT's annual vessel needs. Aquatic impacts from the upgrade to Berth 1 were evaluated during that permitting process.

The vessel use analysis for this project has concluded that the increase in vessels will not further degrade designated beneficial uses. The area of the Columbia River near the Berth 1 dock has not been identified by fisheries agencies for spawning or rearing. It is a narrow stretch used for quick migration rather than lingering activity. The vessel use is not anticipated to create erosion of the banks or stranding from wake. This is not an area of highly active commercial or recreational fishing. As conditioned in the 401 WQC, the project activity must provide unobstructed fish passage and movement of aquatic life at all times.

Each vessel is required to have a containment boom in place until the transfer of fuel product is complete. Once an ocean-going vessel enters the Columbia River the Maritime Fire and Safety Association becomes an additional Oil Spill Response Organization (OSRO). CPBR has a spill contingency plan and contracts with Clean Rivers Cooperative as their OSRO.

15. COMMENTS RELATED TO FEEDSTOCK

15.1. NEXT has refused to make any commitments about the feedstocks for, or the carbon intensity of, the fuel that NEXT claims would be "clean," "renewable" and "sustainable." NEXT's lack of transparency is important because different feedstocks—such as seed oil, palm oil, or animal fats—result in end products with significantly different carbon, social and environmental footprints.

15.2. The DEQ has stated that the feedstock will be brought in by barge but that is not accurate according to NEXT's documents, it will come in by rail.

15.3. In actuality, NEXT's product will be made primarily from carbon-intensive, purpose-grown feedstocks like corn and soybean oil, shipped from the Midwest on long trains.

DEQ Response: DEQ's 401 WQC review analyzes consistency with applicable water quality standards, limitations and restrictions. Both the Joint Permit Application to USACE, DEQ and DSL and Biological Assessment for the project state that feedstocks will primarily be received via barge and ocean-going vessels to Port Westward and the preference for feedstock transport is from marine transportation. The proposed facility will use the Ecofining Green Diesel technology process by the Honeywell UOP company to create the final products. Feedstocks will range from vegetable oils, used cooking oil, animal tallow and inedible corn oil. According to the applicant, palm oil will not be used for feedstock by this project.

15.4. *The feedstocks to make this inaccurately-named renewable fuel, according to NEXT's own reports, would be purposefully grown crops (such as soy) brought in by rail from the*

Midwest, increasing the release of diesel and other fossil fuel and toxic emissions, increasing unsustainable energy use to produce and transport these crops, exacerbating climate disruption, increasing competition for fertile land for food crops also threatened by climate disruption and increasing air, soil and water pollution, with the resulting adverse effects on human and ecosystem health.

15.5. However, feedstocks such as U.S. Midwestern corn and soybeans are allowed under Oregon's Clean Fuels Program, even though the dual use of these commodities for food and fuel has potential to drive up food prices. As the NEXT facility will likely expand RD usage in Washington and Oregon, we ask that DEQ monitor this potential impact and consider reducing or excluding impacted crop RD feedstocks as may be appropriate in the future.

DEQ Response: DEQ's 401 WQC review analyzes consistency with applicable water quality standards, limitations, and restrictions. DEQ's stationary source air quality permitting program that issued NEXT's Air Contaminant Discharge Permit looks at emissions generated from a stationary source. This includes emissions from on-site operations and equipment but does not include offsite production of feedstocks, travel to/from the facility or the end use of fuel products developed using feedstocks.

16. COMMENTS IN SUPPORT OF THE PROJECT

16.1. We support NEXT permitting because of the very substantial healthy climate benefits of renewable diesel (RD). Carbon intensities for many of the approved RD pathways in Oregon's Clean Fuels Program (CFP) are in the range of 20-40 g CO_2e/MJ, far lower than the equivalent value of about 100 g CO_2e/MJ for petroleum diesel. According to ODOE's most recent Clean Fuels Forecast, RD is projected to account for 10% of the total diesel volume used in Oregon for 2024, compared to just over 1% in 2021.

16.2. Nearby, NEXT is proposing the enhanced restoration of more than 470 acres of wetlands within the Beaver Drainage District. This wetland restoration will allow for better groundwater filtration and act as flood mitigation during storm events. There are wetland benefits to native plant species, pollinators and wildlife.

DEQ Response: DEQ acknowledges these comments.

17. COMMENTS RELATED TO PAST PRACTICES OF APPLICANT

17.1. ... NEXT's fraught history in the region. Bolstering DEQ's outright authority to deny the Certification is the authority set forth in ORS 468.070, which gives DEQ clear authority to deny a request for Certification based on prior behavior.

17.2. While Commenters acknowledge that this would be NEXT's first operation in Oregon, it is not without concern that NEXT's backers have a troubled history of environmental compliance in the region. Given this fraught history, DEQ can and should use its authority

under ORS 468.070 to deny this request for Certification, based on NEXT's historic disregard for environmental regulations.

DEQ Response: This application was reviewed based on the authority in ORS 468.070 and no applicable provisions were found. Any violations of the 401 WQC or other DEQ regulations would be addressed through DEQ's enforcement process and could result in orders to pay civil penalties or perform corrective actions. DEQ's Office of Compliance and Enforcement has an established process used to determine the appropriate response for non-compliance with applicable permit conditions and environmental laws and permits. DEQ may modify or revoke a 401 WQC in accordance with OARs 340-048-0050 if the project changes, project activities are having an adverse impact on state water quality or beneficial uses or if the Applicant violates any of the conditions of the certification.

18. CONCLUSION

Based on review of the information and documents submitted by the Applicant and the comments received during the public review process, DEQ intends to issue the proposed 401 WQC with the following noted revisions:

1. Included the 401 WQC review processing dates and timeline
2. Condition 2 includes Table 1 of Supporting Documents
3. Condition 8 clarifies it includes the off-site mitigation plan
4. Condition 14 includes the requirement to contact BDIC
5. Condition 24 includes the SWMP revision date

DEQ would like to thank all individuals who took the time to review the proposed 401 WQC as well as those who attended the virtual public hearing and/or submitted comments.

Non-discrimination statement

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