

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. 25CV32544

**PETITIONERS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON PURELY LEGAL ISSUES**

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(ORS 21.200(1)(a))

Oral Argument Requested

PETITIONERS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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1 **UTCR MATTERS**

2 Pursuant to UTCR 5.050, Petitioners request oral argument on their Motion for Partial
3 Summary Judgment. Petitioners estimate that an hour and a half is sufficient for argument.
4 Official court reporting services are requested.

5 **MOTION**

6 Pursuant to ORCP 47, Petitioners Columbia Riverkeeper, Northwest Environmental
7 Defense Center (“NEDC”), Wendy Schmidt, and Haley Voekel move the Court for summary
8 judgment on Counts One, Six, and Nine of their First Amended Petition for Review, and for
9 summary judgment on Count Two insofar as it presents purely legal issues. This motion is
10 supported by the Points and Authorities below, the Declaration of Andrew R. Missel and
11 exhibits thereto, the Declaration of Audrey Leonard, the Declaration of Jonah Sandford, the
12 Declaration of Wendy Schmidt, and the Declaration of Haley Voekel.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. Introduction.**

15 This case concerns a massive fuel refinery proposed to be built in a wetland near the
16 Columbia River. If built, the refinery would destroy over 100 acres of wetlands; spew tons of
17 fine particulate matter, nitrogen oxides, and hazardous pollutants into the air every year;
18 pollute nearby water bodies; and set the stage for a catastrophic spill in the event of an
19 earthquake. The U.S. Army Corps of Engineers (“Corps”) has determined that the refinery
20 “is likely to have significant effects” on the human environment. Ex. 5 at 11.¹ The refinery
21 would negatively impact the lives and livelihoods of area residents, including Petitioners
22 Wendy Schmidt and Haley Voekel. *See* Schmidt Decl.; Voekel Decl. And due to the serious
23 threats the refinery poses to the community, the local environment, and the broader Columbia
24 River ecosystem, Petitioners Columbia Riverkeeper and NEDC have invested considerable
25

26

¹ All references to “Ex. _” are to exhibits to the Missel Declaration.

1 resources opposing the siting of this refinery in such a highly sensitive area. *See* Leonard
2 Decl.; Sandford Decl.

3 However, the refinery cannot be built until the Corps issues a federal permit to
4 NEXTClean Fuels (“NEXT”), the project proponent. And, under section 401 of the Clean
5 Water Act, 33 USC § 1341, the Corps cannot issue that permit unless the State of Oregon
6 certifies that the construction and operation of the refinery will comply with various water
7 quality-related requirements of state and federal law. This certification requirement—called
8 “section 401 certification”—gives Oregon a powerful tool to ensure that federally-permitted
9 projects like the NEXT Refinery do not pollute state waters.

10 On January 7, 2025, Respondent Oregon Department of Environmental Quality
11 (“DEQ”) issued a section 401 certification (the “Certification” or the “NEXT 401
12 Certification”) on behalf of the State of Oregon for the NEXT Refinery. Ex. 1. The
13 Certification is riddled with errors. *See* First Amended Petition for Review ¶¶ 68–88
14 (grounds of error asserted by Petitioners). This motion for partial summary judgment
15 concerns just four of the Certification’s deficiencies. These deficiencies are purely legal in
16 nature, and there are no relevant disputed facts precluding summary judgment on these
17 issues.

18 **Count 1:** The Certification does not assure compliance with several drainage-related
19 requirements of state law. This error stems from DEQ’s legal position that these drainage
20 laws are not among the water quality-related laws with which DEQ must assure compliance
21 in a section 401 certification. DEQ’s interpretation of section 401 is wrong: DEQ must assure
22 compliance with these drainage laws, and must include whatever conditions are necessary to
23 assure such compliance.

24 **Count 2:** The Certification does not include adequate conditions to ensure that the
25 NEXT Refinery will comply with state water quality standards in light of the seismic
26 vulnerability of the NEXT site. The omission of such conditions is a result of DEQ’s

1 erroneous legal position that the seismic vulnerability of the NEXT Refinery is outside the
2 scope of section 401 certification. Under a correct interpretation of the law, the Certification
3 must include whatever seismic-related conditions are necessary to ensure that water quality
4 standards are not violated in the event of a major earthquake.

5 **Count 6:** The Certification does not assure compliance with applicable pretreatment
6 standards promulgated by the U.S. Environmental Protection Agency (“EPA”). This
7 omission stems from DEQ’s erroneous position that such pretreatment standards do not apply
8 to the NEXT Refinery at all. Under a correct interpretation of the law, the Certification must
9 assure compliance with these pretreatment standards.

10 **Count 9:** The Certification includes a legally invalid condition—namely, a condition
11 allowing DEQ to revoke or unilaterally modify the Certification in the event of changed
12 circumstances, noncompliance, or unforeseen water quality issues. This condition is invalid
13 because it conflicts with federal law. The Certification necessarily relies on this condition;
14 because the condition is invalid, so too is the Certification.

15 If the Court agrees with Petitioners on one or more of these issues and sets aside the
16 Certification, it could obviate the need for the parties to litigate the remaining issues in the
17 case. Thus, although this is a motion for partial summary judgment, it is potentially
18 dispositive of the entire case.

19 **II. Legal Background.**

20 **A. The Purpose of Section 401 Certification.**

21 Congress enacted the Clean Water Act in order “to restore and maintain the chemical,
22 physical, and biological integrity of the Nation’s waters.” 33 USC § 1251(a). “To achieve
23 these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State
24 Governments.” *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 US 700, 704,
25 114 S Ct 1900, 127 L Ed 2d 716 (1994). This “scheme of cooperative federalism ... gives
26

1 states an important role in regulating water quality.” *Cal. State Water Res. Control Bd. v.*
2 *Fed. Energy Regul. Comm’n*, 43 F4th 920, 923–24 (9th Cir 2022).

3 One important role that the Clean Water Act reserves for the states is found in section
4 401 of the Act, 33 USC § 1341. Section 401 “requires States to provide a water quality
5 certification before a federal license or permit can be issued for activities that may result in
6 any discharge into intrastate navigable waters.” *PUD No. 1*, 511 US at 707. A section 401
7 certification reflects a state’s conclusion that the proposed activity “will comply with” certain
8 parts of the Clean Water Act as well as water quality-related provisions of state law. 40 CFR
9 § 121.3(a); *see also id.* § 121.1(j) (EPA definition of “water quality requirements” with
10 which state must assure compliance). If a state is not assured of such compliance, it must
11 deny certification. *See* 40 CFR § 121.7(e) (describing denials of certification).

12 In essence, section 401 “gives the states a veto over” certain activities requiring a
13 federal permit. *Arnold Irr. Dist. v. DEQ*, 79 Or App 136, 140 n.4, 717 P2d 1274 (1986), *rev*
14 *den*, 301 Or 765 (1986). “State certifications under § 401 are essential in the scheme to
15 preserve state authority to address the broad range of pollution.” *S.D. Warren Co. v. Me. Bd.*
16 *of Env’t Prot.*, 547 U.S. 370, 386, 126 S Ct 1843, 164 L Ed 2d 625 (2006). In Oregon, DEQ
17 has been delegated the power to issue section 401 certifications on behalf of the State.

18 **B. The Scope of 401 Certification.**

19 When DEQ considers an application for section 401 certification, it must “evaluate
20 whether the activity will comply with applicable water quality requirements.” 40 CFR
21 § 121.3(a).² These water quality requirements include “applicable provisions of ... the Clean
22 Water Act, water quality standards set forth in OAR chapter 340, division 041, and other

23 ² Both EPA and DEQ have issued regulations implementing section 401. *See* 40 CFR part
24 121 (EPA regulations); OAR chapter 340, div 048 (DEQ regulations). For the most part, the
25 regulations are in harmony. As EPA has noted, however, EPA “is the Federal agency tasked
26 with administering and interpreting the [Clean Water Act], including section 401, and [its]
interpretation supersedes any contrary interpretation taken by a certifying authority” like
DEQ. 88 Fed Reg 66,558, 66,632 (Sep. 27, 2023) (citations omitted).

1 appropriate requirements of state law.” OAR 340-048-0042(2); *see also* 40 CFR § 121.1(j)
2 (EPA definition of “water quality requirements”). A certification may be issued only if DEQ
3 is assured of such compliance. 40 CFR § 121.7(c), (d). In three distinct ways, DEQ’s review
4 under section 401 is broad in scope.

5 First, DEQ must look at the proposed activity *as a whole*—not just the specific part of
6 the activity that requires a federal permit. *See* 40 CFR § 121.3(a) (discussing the scope of
7 certification); OAR 340-048-0042(2)(a)–(i) (listing factors that DEQ considers when
8 reviewing an application for 401 certification). As EPA has explained, a certifying authority
9 like DEQ must “evaluate the water quality-related impacts of the *entire activity* subject to the
10 Federal license or permit, including the construction and operation, and not solely the aspect
11 of the activity directly authorized by a given Federal license or permit.” 88 Fed Reg 66,558,
12 66,599 (Sep. 27, 2023) (emphasis added).

13 Second, DEQ must be assured that the proposed activity as a whole will comply with
14 a broad swath of water quality-related legal requirements: “applicable provisions of Sections
15 301, 302, 303, 306, and 307 of the Clean Water Act, water quality standards set forth in OAR
16 chapter 340, division 041, and other appropriate requirements of state law.” OAR 340-048-
17 0042(2); *see also* 40 CFR § 121.1(j) (relevant EPA definition). This last phrase—“other
18 appropriate requirements of state law”—is taken from section 401(d). *See* 33 USC § 1341(d).
19 The Oregon Court of Appeals has interpreted this phrase to mean “*all* water quality-related
20 [state] statutes and rules.” *Arnold Irr. Dist.*, 79 Or App at 142 (emphasis in original). If a
21 particular state statute or rule “has absolutely no relationship to water quality,” then it does
22 not qualify as an “other appropriate requirement of state law.” *Id.* at 143. But if a legal
23 requirement has “*any* relationship to water quality,” then it does qualify. *Id.* (emphasis
24 added). EPA’s section 401 regulations are in accord with this reading of the statute. *See* 40
25 CFR § 121.1(j) (relevant definition); 88 Fed Reg at 66,602–04 (discussing the scope of
26 section 401 review and the meaning of “other appropriate requirement[s] of State law”).

1 Third, DEQ is empowered to impose a wide range of conditions on certification if
2 necessary to ensure an activity's compliance with water quality-related requirements. A
3 section 401 certification must include "any effluent limitations *and other limitations*, and
4 monitoring requirements necessary to assure" compliance with water quality requirements.³
5 33 USC § 1341(d) (emphasis added); *see also PUD No. 1*, 511 US at 713. The use of the
6 phrase "other limitations" refers to limitations *other than* "effluent limitations." *Cf. City &*
7 *Cnty. of San Francisco v. EPA*, 604 US – , 145 S Ct 704, 714, 221 L Ed 2d 166 (2025)
8 (construing similar language in a different part of the Clean Water Act). For instance, the
9 NEXT 401 Certification contains a condition requiring NEXT to "[f]lag or fence off
10 wetlands not specifically authorized to be impacted to protect [them] from disturbance and/or
11 erosion" and another condition requiring NEXT to "[m]aintain an adequate supply of
12 materials necessary to control erosion at the construction site." Ex. 1 at 5. Limitations placed
13 on a certification "become ... condition[s] on any Federal license or permit" issued in
14 connection with the certification. 33 USC § 1341(d).

15 **C. The Section 401 Certification Process.**

16 DEQ requires an applicant for section 401 certification to submit certain information
17 to the agency concerning the proposed activity. *See* OAR 340-048-0020 (general application
18 requirements). In order to evaluate the proposed activity's compliance with the wide range of
19 water quality-related requirements within the scope of 401 certification, DEQ can ask the
20 applicant for more information if needed, and DEQ may deny certification due to inadequate
21 information. OAR 340-048-0020(3).

22 Following an opportunity for public comment, DEQ decides whether to grant or deny
23 certification. OAR 340-048-0042(5). If DEQ grants certification, it must include in the
24

25 ³ The term "effluent limitations" refers to "restrictions imposed ... on quantities, discharge
26 rates, and concentrations of pollutants which are discharged ... into" water bodies subject to
the Clean Water Act. 40 CFR § 122.2.

1 certification those conditions that are necessary to assure that the proposed activity complies
2 with water quality-related legal requirements. OAR 340-048-0042(5)(g); *see also* 33 USC
3 § 1341(d) (“Any certification provided under this section shall set forth any effluent
4 limitations and other limitations, and monitoring requirements necessary to assure that any
5 applicant for a Federal license or permit will comply with” water quality-related legal
6 requirements.).

7 If DEQ denies certification, it may do so with or without prejudice. A denial “without
8 prejudice” means that the applicant for certification may submit a new application.⁴ A denial
9 without prejudice is appropriate when DEQ lacks sufficient information about the proposed
10 activity to be reasonably assured that the activity will comply with applicable water quality-
11 related legal requirements. *See, e.g.*, Ex. 28 (denial of NEXT’s second request for 401
12 certification).

13 **III. Relevant Facts.**

14 **A. The Proposed NEXT Refinery.**

15 *1. The Refinery and Its Proposed Site.*

16 The NEXT Refinery is a so-called “renewable diesel” refinery proposed to be built at
17 Port Westward, which is in Columbia County, near Clatskanie. Ex. 5 at 1–2. The refinery
18 would be able to produce up to 50,000 barrels per day of “renewable diesel” and “sustainable
19 aviation fuel” using various “feedstocks” such as soybean oil, used cooking oil, and animal
20 tallow. Ex. 6 at 3; Ex. 7 at 3–4.

21 The proposed site for the refinery is in a low-lying, marshy area. *See* Ex. 5 at 4 (“The
22 project site is generally flat consisting of farmed wetlands and ditches”); *see generally*
23 Ex. 8 (Corps’ jurisdictional determination detailing wetlands in and near the NEXT site). The

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25 ⁴ *See* <https://www.oregon.gov/deq/Programs/Pages/NEXT-Renewable-Fuels.aspx> (“A denial
26 without prejudice is an administrative denial that allows an applicant to resubmit an
application for a 401 certification.”).

1 site is located entirely within the Beaver Drainage District, a roughly 5,700-acre area that
2 receives drainage, irrigation, and flood control services from the Beaver Drainage
3 Improvement Company (“BDIC”), a nonprofit municipal corporation organized under ORS
4 Chapter 554. Ex. 8 at 27. BDIC has “supervision and control of all drainage ditches, laterals,
5 drains, canals, sloughs, waterways or conduits within the boundaries” of the Beaver Drainage
6 District, ORS 547.405, and is empowered to operate and maintain drainage and irrigation
7 works under its jurisdiction, ORS 554.110, 554.380(2)(f).

8 BDIC manages a network of drainage and irrigation waterways throughout the
9 Beaver Drainage District. Ex. 8 at 27–28. Many of these waterways—even ones referred to
10 as “ditches”—are permanent or relatively permanent water bodies. For instance, many of the
11 drainage and irrigation ditches located at the NEXT site “exhibit[] bed[s], banks, indicators
12 of an [ordinary high water mark], and discharge[] relatively permanent flow into” a slough.
13 *Id.* at 12–13. Even with the drainage, irrigation, and flood control services provided by
14 BDIC, many areas within the Beaver Drainage District experience seasonal ponding and
15 inundation, and other areas are proper wetlands. *See* Ex. 6 at 4 (“Despite agriculture
16 disruptions[,] wetlands and waterways still persist within the project area.”); *see generally*
17 Ex. 8. And groundwater in the area is very shallow—between two and four feet deep at the
18 proposed facility site, according to NEXT. Ex. 9 at 6.

19 In addition to being very wet and marshy, the area in which the NEXT Refinery is
20 proposed to be built is characterized by loose, soft soils. Ex. 10 at 13. These characteristics
21 make the soil in the area prone to liquefaction. *Id.*; *see also* Ex. 11 (study of the PGE Beaver
22 site, which is adjacent to the NEXT site). Liquefaction occurs when wet soil loses strength in
23 response to shaking and begins to act like a liquid.

24 Liquefaction can cause major damage to buildings and other structures. The Oregon
25 Department of Geology and Mineral Industries (“DOGAMI”) has rated the NEXT site as
26 having a “very high” potential for permanent ground deformation due to liquefaction and/or

1 landslides caused by an earthquake. Ex. 12 at 2. DOGAMI has also rated the site as having a
2 “high” probability of earthquake-induced landslides and/or lateral spreading caused by
3 liquefaction. *Id.* at 3. Similarly, a 2021 study of the seismic vulnerability of the Portland
4 General Electric Beaver Facility, which is located adjacent to the NEXT site, found that “the
5 potential for seismic damage or failure of berms, concrete containment, and/or tanks ... is
6 very likely” at that facility due to earthquake-induced ground deformation. Ex. 11 at 6.

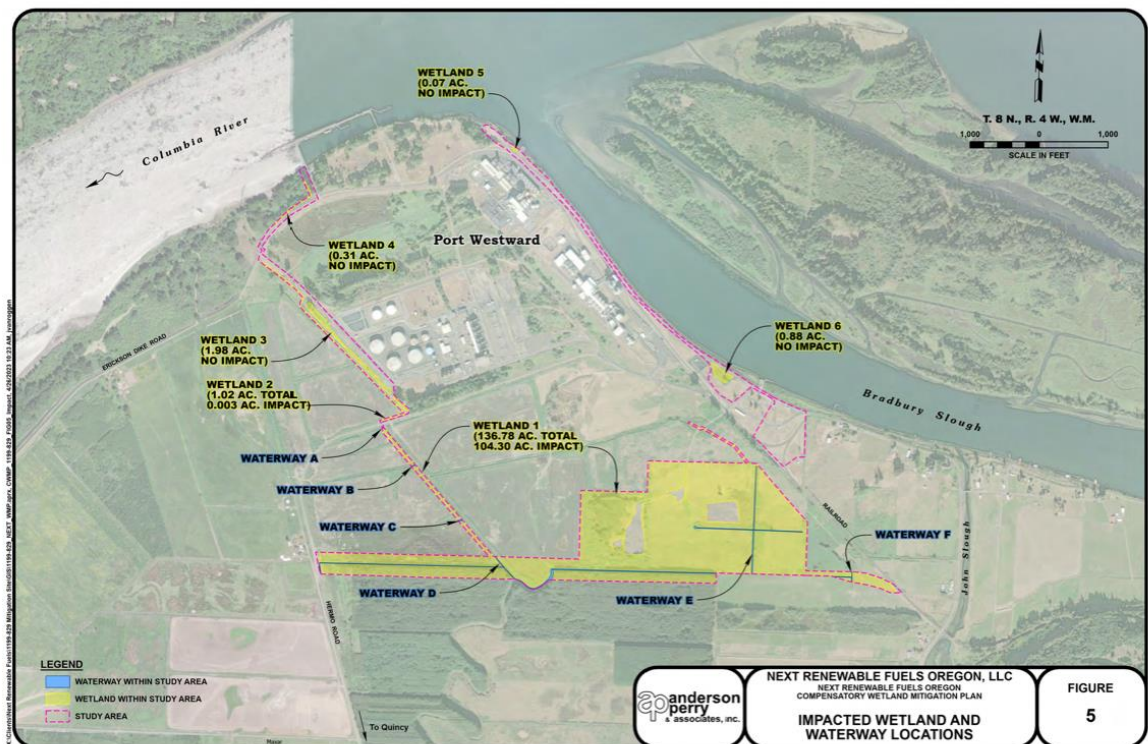
7 The risk of a major earthquake in the area is not speculative. The Cascadia
8 Subduction Zone—a “megathrust” fault zone—stretches from British Columbia down to
9 Northern California, lying about 70–100 miles off the Pacific coast. According to the Oregon
10 Department of Emergency Management, there is around a 37% chance that a megathrust
11 earthquake of 7.1+ magnitude will hit the Cascadia Subduction Zone in the next 50 years.⁵

12 2. *Constructing the Refinery.*

13 Building the NEXT Refinery would require constructing the following: a pre-
14 treatment plant, office and administration buildings, a laboratory, 10 large and 11 small tanks
15 to hold product and feedstock, a wastewater treatment facility, several incinerators, a 350-
16 foot-tall flare, an access road, a rail branchline and associated access road, a rail yard, four
17 new pipelines, and many other pieces of industrial infrastructure. Ex. 6 at 4; Ex. 13 at 3–8.
18 Constructing the refinery would require the permanent destruction of over 100 acres of
19 wetlands Ex. 6 at 6. This is around 70 times the impact of the median development project in
20 Oregon in recent years and nearly three times greater than the largest wetland loss authorized
21 in Oregon since 2011. Ex. 5 at 10. A map showing the proposed facility is reproduced on the
22 next page.

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26 ⁵ <https://www.oregon.gov/OEM/hazardsprep/Pages/Cascadia-Subduction-Zone.aspx>

As part of facility construction, NEXT plans to permanently fill in a waterway called “Waterway E.” Ex. 14 at 1. Waterway E is currently used for drainage and/or irrigation purposes. Ex. 6 at 18–19. NEXT also plans to install culverts in several other waterways at the facility site that are used for irrigation and/or drainage purposes. Ex. 13 at 9–11; Ex. 14 at 1–2. BDIC has never approved these plans. Ex. 15; Ex. 16 at 2. In fact, BDIC has consistently raised concerns about these plans and insisted that it needs more information before being able to agree to any alteration of drainage and irrigation works under its jurisdiction. *See* Exs. 15–18 (BDIC comments to DEQ, the Columbia County Commission, and the Department of State Lands).



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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. *See* Ex. 19 (portions of NEXT’s compensatory wetland mitigation plan). Constructing this wetland would entail filling approximately 26,800 linear feet of existing drainage/irrigation ditches,

1 relocating another ditch, and lowering the elevation of the 466-acre mitigation site by six to
2 twelve inches. *Id.* at 10–11. It would also involve constructing a network of shallow
3 “dendritic channels” in and around the site. *Id.* at 10. Like the facility site, the mitigation site
4 is located within the Beaver Drainage District. *Id.* at 8.

5 For years, BDIC has raised concerns about NEXT’s mitigation wetland plan. In 2021,
6 BDIC told the Department of State Lands that the mitigation plan would lead to stagnant
7 water at the mitigation site, which would “promote disease and bacterial growth [and] have
8 significant adverse operational and financial impacts to ... agricultural operations” in the
9 area. Ex. 18 at 3. In its comments on the draft 401 certification, written nearly three years
10 later, BDIC repeated this criticism, stating that the shallow channels in the proposed
11 mitigation wetland will “foster bacteria etc. which would contaminate irrigation water on
12 food crops grown adjacent.” Ex. 15. BDIC has never approved of the filling in and rerouting
13 of drainage and irrigation waterways required to construct the mitigation wetland.⁶ *Id.*; Ex.
14 17 at 1.

15 3. *Operating the Refinery.*

16 At full capacity, the NEXT Refinery would be able to produce 50,000 barrels per day
17 of “renewable diesel” fuel, “sustainable aviation fuel,” and naphtha. Ex. 6 at 3; Ex. 7 at 3–4.
18 This amounts to more than 1.5 million gallons per day.

19 The refinery would bring in feedstocks (*i.e.*, raw materials to refine into fuel) both by
20 rail and by barge, with hundreds of rail cars per week and around 10 barges per month. Ex.
21 13 at 14; Ex. 21 at 6. Most of the refined fuel would then be sent out from the facility via
22 pipeline to be transported by ship down the Columbia River, with the remainder transported
23 to market by truck or rail. Ex. 6 at 3; Ex. 13 at 14.

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26 ⁶ Notably, EPA has also raised concerns about the mitigation wetland, along with many other
aspects of the NEXT Refinery. Ex. 20 at 10–11.

1 Not surprisingly for a facility of its size, the refinery will generate a large amount of
2 industrial wastewater, which will be processed on-site using a wastewater treatment facility.
3 Ex. 13 at 7–13. Stormwater runoff from much of the facility area will also be routed to this
4 wastewater treatment facility, as will “greywater” from the refinery.⁷ *Id.* at 8. The industrial
5 wastewater, stormwater, and greywater will then be sent to the Port of Columbia County’s
6 wastewater collection system and ultimately discharged into the Columbia River from the
7 Port’s outfall. *Id.* at 7–13. Thus, NEXT expects that its discharge of pollutants into the
8 Columbia River will be “covered” by the Port’s existing Clean Water Act National Pollutant
9 Discharge Elimination System (“NPDES”) permit, *id.* at 7, which was first issued in 2003
10 and last renewed in 2007, *see* Exs. 22–25 (Port permit documents). When issuing and
11 renewing the Port’s permit, DEQ did not contemplate that a renewable diesel refinery would
12 be discharging to the Port’s treatment facility, nor did DEQ contemplate the discharge of
13 large amounts of stormwater to the facility. *See* Ex. 23 at 7 (assumptions about future
14 industries in the Port’s permit application); Ex. 24 at 2 (permit evaluation from 2003 stating
15 that stormwater is “not an issue”); Ex. 25 at 4 (permit evaluation from 2008 stating that
16 stormwater is “not an issue”).

17 Stormwater runoff from 14 acres of the facility outside the main area will be handled
18 differently. Ex. 9 at 7–9. Runoff from this area will likely contain pollutants including motor
19 oil, gasoline, diesel, antifreeze, and hydraulic fluids from equipment, vehicles, and roads;
20 copper from brake pads and debris on roads; 6PPD-quinone from tires and tire debris on
21 roads; zinc from galvanized surfaces; suspended solids from gravel, decaying vegetation, and
22 eroding soil; and nutrients from decaying organic matter and soil. *Id.* at 13. This polluted
23 stormwater runoff will be directed to four new treatment ponds, where it will be treated via
24

25 ⁷ “Greywater” refers to “shower and bath waste water, bathroom sink waste water, kitchen
26 sink waste water and laundry waste water,” but not “toilet or garbage wastes or waste water
contaminated by soiled diapers.” ORS 454.605(8).

1 sedimentation and biofiltration before being discharged into McLean Slough. *See generally*
2 Ex. 9 (post-construction stormwater management plan).

3 According to BDIC, these ponds could interfere with drainage and irrigation and lead
4 to contamination of groundwater. Ex. 15; Ex. 16 at 3; Ex. 17 at 2. Moreover, the ponds will
5 not remove all pollutants from stormwater before it is discharged into McLean Slough, which
6 is a secondary tributary of the Columbia River. Indeed, even NEXT’s application materials
7 admit that “stormwater will receive further treatment ... in McLean Slough” and that
8 “[s]tormwater effects are estimated to extend in McLean Slough to its confluence with
9 Beaver Slough, which is the next significant hydrologic break.” Ex. 13 at 28. These
10 pollutants will affect water quality in McLean Slough and surface waters hydrologically
11 connected to McLean Slough, and will ultimately end up in groundwater used to irrigate
12 crops.

13 Both feedstock and finished fuel products at the NEXT Refinery will be stored in
14 tanks, which will range in capacity from 10,000 barrels (420,000 gallons) to 225,000 barrels
15 (9,450,000 gallons). Ex. 6 at 4. The NEXT Refinery’s total storage capacity for finished fuel
16 products—renewable diesel fuel, renewable jet fuel, and naphtha—will be at least 1,050,000
17 barrels, or over 40 million gallons. Ex. 7 at 6. By way of comparison, the 1989 Exxon Valdez
18 accident involved 11 million gallons of crude oil being spilled in Alaska’s Prince William
19 Sound.⁸

20 As discussed above, the site of the NEXT Refinery is vulnerable to liquefaction,
21 landslides, and other serious problems in the event of an earthquake. An earthquake-induced
22 spill of finished fuel products, process chemicals, and/or feedstock at the refinery would be
23 especially damaging to the local environment due to the wet, marshy nature of the land
24 within the Beaver Drainage District. A spill could also impact the Columbia River Estuary,
25 which is hydrologically connected to the wetlands and surface waters in and around the

26 ⁸ <https://darrp.noaa.gov/oil-spills/exxon-valdez>

1 NEXT site. *See* Ex. 8 at 28–29 (discussing how ditches, sloughs, and wetlands in the project
2 area are connected to downstream navigable waters). The Columbia River Estuary is
3 designated critical habitat for 13 different populations of salmon and steelhead listed as
4 threatened or endangered under the federal Endangered Species Act.

5 The operation of the NEXT Refinery, including the attendant rail and truck traffic,
6 will also contribute significantly to air pollution in the area. The refinery itself will emit
7 nearly 27 tons per year of fine particulate matter and 34 tons per year of nitrogen oxides. Ex.
8 26 at 2. Freight trains and trucks delivering feedstock to the refinery and transporting
9 finished product from the refinery will add to these totals. In addition to negatively impacting
10 air quality, these pollutants (and many other pollutants from the facility) will end up in
11 surface waters in the area through atmospheric deposition. According to EPA, “[t]he
12 atmospheric deposition of nitrogen, sulfur and other chemical species to underlying surfaces
13 is an important exposure pathway that can contribute or lead to the degradation of air, land
14 and water quality as well as reductions in the benefits humans may derive from
15 ecosystems.”⁹

16 Relatedly, the operation of the NEXT Refinery will cause offensive odors. Smells
17 from nearby industrial sources, including the Columbia Pacific Bio-Refinery, can already be
18 a nuisance, especially during certain times of the year. Schmidt Decl. ¶ 12; Voekel Decl.
19 ¶ 11. The NEXT Refinery will exacerbate this problem and lead to more frequent and more
20 severe incidences of foul odors in the area.

21 The NEXT Refinery and its attendant rail traffic will also be very noisy. Existing
22 industrial activity and rail traffic in the area already creates noise, Voekel Decl. ¶ 9–10; the
23 NEXT Refinery will make those issues worse. *See* Ex. 13 at 29 (map showing “in-air noise
24 impacts” extending to Petitioner Wendy Schmidt’s property).

25
26 ⁹ <https://www.epa.gov/cmaq/estimating-atmospheric-deposition-cmaq>

1 **B. NEXT’s Application for 401 Certification.**

2 NEXT first applied for section 401 certification in January 2021. Ex. 27 at 1. DEQ
3 denied NEXT’s request without prejudice in September 2021, citing insufficient information.
4 *Id.* NEXT submitted a second application for 401 certification in October 2021. *Id.* That
5 request was denied in September 2022, again due to insufficient information. Ex. 28.

6 On January 13, 2024, DEQ submitted a third application for 401 certification. Ex. 1 at
7 1. Soon after that, DEQ sent NEXT a series of questions and comments regarding the
8 application. Ex. 21 at 1. DEQ asked NEXT about the seismic resiliency of the facility’s
9 stormwater infrastructure, but did not inquire about the facility’s overall seismic
10 vulnerability. *Id.* at 4–5.

11 On September 5, 2024, DEQ issued a draft 401 certification for the NEXT Refinery
12 and invited public comment. Ex. 1 at 1. DEQ also held a hearing on October 8, 2024, at
13 which members of the public commented on the draft certification. Ex. 3 at 1.

14 Comments from Petitioners—and many others—raised several troubling issues about
15 the draft 401 certification. For instance, Petitioner Wendy Schmidt pointed out that the
16 NEXT site is in a liquefaction zone and that any spill at the NEXT Refinery would affect the
17 entire Beaver Drainage District area, which includes her farm. Ex. 29. Similarly, Petitioners
18 Columbia Riverkeeper and NEDC noted that DEQ should “consider impacts to water quality
19 in the event of a major earthquake, given NEXT’s choice to site the refinery in a liquefaction
20 zone.” Ex. 30 at 2. BDIC also submitted comments, again raising concerns about the
21 mitigation wetland and stating that it had “not approved any modification to its
22 infrastructure.” Ex. 15.

23 Following the October 8, 2024 public hearing, DEQ issued a document containing “a
24 comprehensive list of questions that were asked during the public hearing” along with DEQ’s
25 answers to those questions. Ex. 3. In its answers, DEQ asserted that “certification relative to
26 ... earthquake-specific conditions is outside of DEQ’s authority.” *Id.* at 4.

1 **C. DEQ’s Section 401 Certification Decision.**

2 On January 7, 2025, DEQ issued a section 401 water quality certification for the
3 NEXT Project, Ex.1, and a separate “Hearing Officer’s Report and Response to Comments”
4 (“Response to Comments”) addressing the comments DEQ had received on the draft 401
5 certification, Ex. 4. The Response to Comments is not incorporated by reference into the
6 NEXT 401 Certification.

7 Several features of the Certification and the Response to Comments are particularly
8 relevant to this motion:

- 9 • While the Response to Comments acknowledges that BDIC “provides important
10 services to its members,” Ex. 4 at 6, the Certification does not mention various
11 drainage-related provisions of state law that are intended to protect drainage and
12 irrigation works under BDIC’s control and supervision.¹⁰
- 13 • The Response to Comments states that the “[s]eismic stability of the project is not an
14 element of DEQ’s 401 ... analysis.” Ex. 4 at 12. The Response to Comments
15 mentions various building codes that NEXT may have to comply with, *id.*, but the
16 Certification does not actually include a condition requiring such compliance.
- 17 • The Certification relies on the Port’s existing Clean Water Act permit to legally
18 “cover” most of NEXT’s discharges of polluted water. Ex. 1 at 12.
- 19 • The Certification contains the following condition: “**Project Changes:** DEQ may
20 modify or revoke this certification, in accordance with Oregon Administrative Rules
21 340-048-0050, if the project changes, project activities are having an adverse impact
22 on state water quality or beneficial uses, or if the Applicant violates any of the
23 conditions of this certification. This condition also fully applies to the off-site
24 mitigation plan.” *Id.* at 4.

25
26

¹⁰ These laws will be discussed at length below in the Argument section.

1 On March 7, 2025, Petitioners Columbia Riverkeeper and NEDC submitted a petition
2 for reconsideration to DEQ, asking the agency to revisit the NEXT 401 Certification. Ex. 2 at
3 1. DEQ denied the petition for reconsideration on May 7, 2025. *Id.* In its denial, DEQ
4 explained in more detail some of its legal reasoning with respect to the issues raised by
5 Petitioners and others during the public comment period. For instance, on the issue of seismic
6 resiliency, DEQ stated that “seismic stability requirements related to earthquake risk are
7 addressed by building codes,” and building codes are not “water-quality requirement[s].” *Id.*
8 at 3. On the issue of the NEXT Refinery’s compliance with drainage-related laws, DEQ
9 stated that “[d]rainage district law does not present a state law water quality requirement that
10 must be addressed in a” 401 certification. *Id.* at 5–6.

11 Petitioners filed this action on May 22, 2025. Petitioners then filed a First Amended
12 Petition for Review on June 26, 2025.

13 **IV. Standard of Review.**

14 This Court’s review of the NEXT 401 Certification is governed by the Oregon
15 Administrative Procedures Act (“OAPA”). *See* ORS 183.484(5). The grounds of error
16 addressed in this motion all concern DEQ’s legal errors and/or misinterpretations of law, so
17 the only issues for the Court to resolve are legal ones. Thus, this Court’s task is to “determine
18 whether, in issuing the [Certification], [DEQ] ‘erroneously interpreted a provision of law’
19 and whether [DEQ] exercised its discretion ‘outside the range of discretion delegated’ by
20 law, or acted ‘inconsistently with an agency rule’ or ‘otherwise in violation of a statutory
21 provision.’ ORS 183.484(5). Specifically, [this Court] examines the requirements of the
22 statutory and regulatory provisions that [P]etitioners contend [DEQ] violated in issuing the
23 [Certification].” *Tualatin Riverkeepers v. DEQ*, 235 Or App 132, 138, 230 P3d 559 (2010)
24 (alterations in original omitted).

25 The usual summary-judgment standard also applies to this motion. Under that
26 standard, this Court “must view the evidence and all reasonable inferences it may support in

1 the light most favorable to the nonmoving party and determine whether the moving party,
2 despite that view of the evidence, is entitled to judgment as a matter of law.” *Powell v. Bunn*,
3 185 Or App 334, 338, 59 P3d 559, 565 (2022) (citing ORCP 47 C). However, the summary-
4 judgment standard and the OAPA standard of review “converge” for purposes of this motion,
5 “because the inquiry for both is legal only.” *Id.* at 340. In other words, because the issues
6 involved in this motion are legal issues, the summary-judgment inquiry and the OAPA
7 inquiry are identical.

8 **V. Argument.**¹¹

9 This motion for partial summary judgment concerns four distinct legal defects with
10 the NEXT 401 Certification. First, the Certification does not assure compliance with certain
11 drainage-related requirements of state law. Second, the Certification lacks adequate seismic-
12 related conditions to protect water quality. Third, the Certification does not assure
13 compliance with applicable pretreatment standards. Fourth, the Certification relies on a
14 condition that is invalid under federal law.

15 These deficiencies are the result of legal errors on the part of DEQ. Had DEQ
16 interpreted the law correctly, it could not have issued the Certification in its current form; at
17 the very least, it would have had to include additional conditions in the Certification to assure
18 compliance with water quality-related requirements. Thus, these deficiencies, alone or in
19 combination, warrant setting aside the Certification.¹² *See* ORS 183.484(5)(a).

20 ¹¹ The declarations of Wendy Schmidt, Haley Voekel, Audrey Leonard, and Jonah Sandford,
21 all filed contemporaneously with this motion, establish that Petitioners will be “adversely
22 affected or aggrieved by” DEQ’s grant of certification, and thus have “standing” to maintain
23 this case. *See* ORS 183.480(1) (“any person adversely affected or aggrieved by an order or
24 any party to an agency proceeding is entitled to judicial review of a final order ...”); *see also*
Cascadia Wildlands v. Or. Dep’t of State Lands, 293 Or App 127, 131–39, 427 P3d 1091
(2018) (analyzing standing).

25 ¹² Although any one of the identified errors, standing alone, would warrant setting aside the
26 Certification, Petitioners believe that both judicial and administrative efficiency counsel in
favor of the Court addressing all the grounds of error raised in this motion.

1 **A. The NEXT 401 Certification Does Not Assure Compliance with Water**
2 **Quality-Related Drainage Laws.**

3 The Certification is defective because it does not assure compliance with several
4 drainage-related requirements of state law that are intended to prevent obstruction and
5 pollution of drainage works. These requirements—ORS 547.425 and portions of the BDIC
6 Bylaws—are related to water quality and are therefore “other appropriate requirements of
7 state law” under section 401 and DEQ’s regulations. As proposed, the NEXT Refinery will
8 plainly violate these requirements. Thus, DEQ should have denied certification, or at least
9 included conditions to assure compliance. DEQ’s failure to do so stems from its incorrect
10 legal position that ORS 547.425 and the BDIC Bylaws do not qualify as “other appropriate
11 requirements of state law.” *See* Ex. 2 at 5–6.

12 Federal law requires DEQ to assure compliance with all water quality-related
13 requirements of state law in a 401 certification. EPA’s 401 regulations provide that a
14 “certifying authority *shall* evaluate whether the activity will comply with applicable water
15 quality requirements.” 40 CFR § 121.3(a) (emphasis added). The phrase “water quality
16 requirements,” in turn, is defined as “any limitation, standard, or other requirement under
17 [certain sections of the] Clean Water Act, any Federal and state or Tribal laws or regulations
18 implementing those sections, and *any other water quality-related requirement of state or*
19 *Tribal law.*” *Id.* § 121.1(j) (emphasis added). Under this definition, a state law is either water
20 quality-related, in which case DEQ *must* assure compliance with it; or it is not water quality-
21 related, in which case DEQ *cannot* consider it. *See* Ex. 31 at 4 (“consistent with the statutory
22 text, this final rule *requires* certifying authorities to consider whether the activity will comply
23 with water quality requirements, which includes but is not limited to water quality
24 standards”) (emphasis added).¹³

25 _____
26 ¹³ EPA promulgated revised section 401 regulations in 2023. *See* 88 Fed Reg 66,558 (Sep.
27, 2023). The final regulations, along with a “preamble” explaining EPA’s reasoning and

1 DEQ's own rules are in accord with EPA's regulations. DEQ's rules provide that, in
2 considering an application for 401 certification, DEQ "*must* evaluate whether the activity for
3 which certification is sought will comply with ... other appropriate requirements of state
4 law." OAR 340-048-0042(2) (emphasis added). The phrase "other appropriate requirements
5 of state law," which is taken from section 401, means "*all* water quality-related [state]
6 statutes and rules." *Arnold Irr. Dist.*, 79 Or App at 142 (emphasis in original). Thus, if a
7 given requirement of state law is related to water quality, DEQ must assure that a proposed
8 activity complies with that requirement as part of 401 certification, and DEQ must include in
9 any grant of certification those conditions necessary to ensure such compliance. "State law"
10 includes not only relevant provisions of the Oregon Revised Statutes and Oregon
11 Administrative Rules, but also local laws. *See id.* at 143 (discussing how county land-use
12 regulations qualify as appropriate requirements of state law if they "relate to water quality").

13 ORS 547.425 and the relevant portions of the BDIC Bylaws are clearly related to
14 water quality. These requirements of state law make it illegal to pollute, place items in, or
15 block drainage and irrigation works under BDIC's jurisdiction.¹⁴ The evident purpose of

16 _____
17 responding to public comments, were published in the Federal Register. *Id.* In addition, EPA
18 released a "Response to Comments" document, portions of which are included as Exhibit 31.
19 "A preamble's interpretation of regulations may help clarify any ambiguity in them," though
20 only the regulations themselves are binding. *Wilgar Land Co. v. Director, Office of Workers'*
Compensation Programs, U.S. Dep't of Labor, 85 F.4th 828, 837 (6th Cir. 2023). The
21 Federal Register notice containing the preamble is available here:
22 <https://www.govinfo.gov/content/pkg/FR-2023-09-27/pdf/2023-20219.pdf>

23 ¹⁴ ORS 547.425 reads in full as follows: "No person shall:

- 24 (1) Throw, dump or place or allow to be thrown, dumped or placed, any rubbish, refuse
25 or any article or thing in any ditch, lateral, canal, slough, waterway or conduit used as
26 a part of or in connection with any drainage works or drainage plant or drainage
system or any waterway under the control of any drainage district lying west of the
Cascade Mountains; or
- (2) Befoul or pollute or allow to be befouled or polluted any such ditch, lateral, canal,
slough, waterway or conduit; or

1 these laws is to protect the functioning of BDIC's drainage and irrigation works, and to
2 prevent the pollution of water carried in those works. The proper functioning of drainage and
3 irrigation systems in agricultural areas is deeply connected to water quality. In fact, the Clean
4 Water Act identifies "changes in the movement, flow, or circulation of any navigable waters
5 or ground waters, including changes caused by the construction of ... channels, causeways,
6 or flow diversion facilities" as a source of water pollution. 33 USC § 1314(f)(2)(F). For
7 BDIC-managed drainage and irrigation works specifically, BDIC has articulated how filling
8 in or otherwise reconfiguring those works can lead to water quality problems. *See, e.g.*, Ex.
9 15; Ex. 16 at 3; Ex. 17 at 2 (relevant comments from BDIC to various state and local
10 governmental bodies concerning the NEXT project).

11 Because ORS 547.425 and the relevant portions of the BDIC Bylaws relate to water
12 quality, they count as "other appropriate requirements of state law." This means that DEQ
13 was required to "evaluate whether the [NEXT Project] will comply with" them, OAR 340-
14 048-0042(2), and was required to include in the NEXT Certification whatever conditions are
15 necessary to assure such compliance, OAR 340-048-0042(5)(g). But the NEXT Certification
16 does *not* assure compliance with ORS 547.425 and the relevant portions of the BDIC
17 Bylaws. On the contrary, DEQ issued the Certification despite the fact that the NEXT
18 Refinery will plainly violate these laws in several ways, as summarized in the table below:

19
20
21
22 (3) In any manner obstruct or permit to be obstructed by stock any such waterway, canal,
23 ditch, lateral, slough or conduit."

24 The relevant portions of the BDIC Bylaws are included as Exhibit 32. These bylaws were
25 adopted pursuant to ORS 554.080(6), which empowers BDIC to "make, establish or amend
26 bylaws, rules and regulations[] ... prescribing the manner and mode of ... distributing and
using water in domestic use, irrigating land, [or] using any drainage or flood control works"
under its jurisdiction.

Activity	Citation	Provision Violated
Filling in Waterway E during construction	Ex. 14 at 1	ORS 547.425(1) (placing “any article or any thing in any ditch ... [or] waterway”); BDIC Bylaws 13.2.2 (same); ORS 547.425(3) (obstructing a ditch or waterway); BDIC Bylaws 13.2.3 (same)
Installing culverts in Waterways A–D during construction	Ex. 14 at 2	ORS 547.425(1) (placing “any article or any thing in any ditch ... [or] waterway”); BDIC Bylaws 13.2.2 (installing a culvert without BDIC’s consent)
Filling in and rerouting ditches at the mitigation site during construction	Ex. 19	ORS 547.425(1) (placing “any article or any thing in any ditch ... [or] waterway”); BDIC Bylaws 13.2.2 (same); ORS 547.425(3) (obstructing a ditch or waterway); BDIC Bylaws 13.2.3 (same)
Discharging polluted stormwater to ditches and McLean Slough during facility operation	Ex. 14 at 2	ORS 547.425(2) (befouling or polluting a ditch or waterway)

DEQ’s failure to assure compliance with these drainage laws is particularly troubling given the importance of the services provided by BDIC. BDIC operates and maintains the waterways under its jurisdiction “for sanitary or agricultural purposes, or both,” Ex. 33 at 2, and even DEQ acknowledges that BDIC “provides important services to its members,” Ex. 4 at 6. BDIC has never approved the alterations to its drainage and irrigation works that the NEXT project would entail, because BDIC is concerned that those alterations will interfere

1 with its operations and lead to water quality problems. For DEQ to ignore those concerns in
2 the context of a 401 certification—a legal requirement specifically designed to allow states to
3 protect water quality—undermines a municipal entity charged with important functions.

4 Under a correct interpretation of the law, DEQ would have had to either deny
5 NEXT’s application or include conditions to assure compliance with ORS 547.425 and the
6 relevant portions of the BDIC Bylaws; DEQ could not have issued the Certification in its
7 current form. Thus, the Court should set aside and reverse the Certification and/or order DEQ
8 to deny the application for certification. ORS 183.484(5)(a).

9
10 **B. The Certification Does Not Contain Adequate Conditions to Assure**
11 **Compliance with Water Quality Standards Given the Seismic**
Vulnerability of the NEXT Refinery.

12 Given that the NEXT Refinery is going to be built in an area that is highly seismically
13 vulnerable, being assured that NEXT will not violate water quality standards in the event of
14 an earthquake means ensuring that the NEXT Refinery will be seismically resilient. Despite
15 this, the Certification contains no conditions to ensure the NEXT Refinery’s seismic
16 resiliency. This omission is a result of DEQ’s erroneous legal position that “[s]eismic
17 stability of the [NEXT Refinery] project is not an element of DEQ’s 401 ... analysis.” Ex. 4
18 at 12. Under a correct interpretation of the law, the Certification must include sufficient
19 conditions to ensure that the NEXT Refinery does not pollute surface and groundwater in the
20 event of a massive earthquake. As it stands, the Certification lacks such conditions, and thus
21 must be set aside.

22 In considering an application for 401 certification, DEQ must determine whether the
23 proposed activity will comply with various water quality-related requirements of law. *See*
24 OAR 340-048-0042(2). This necessarily requires an understanding of both the activity and
25 the environment in which it will take place. *See, e.g.,* OAR 340-048-0020(2) (listing required
26 information in a 401 application). For instance, to determine whether an activity might

1 violate temperature limits, DEQ would need to know the temperature of any effluent
2 discharged from the activity, as well as the background temperature levels and other
3 characteristics of water bodies into which the activity would discharge that effluent.

4 A project's seismic stability is one project characteristic that DEQ must understand in
5 order to determine whether the project will comply with water quality standards. That is
6 especially true for a project like the NEXT Refinery, which will be built in an area that is
7 highly seismically vulnerable and which involves storing large amounts of fuel products and
8 hazardous materials on-site. If the NEXT Refinery is not seismically resilient, then an
9 earthquake can cause leaks of oil and hazardous substances from storage tanks and other
10 areas of the facility, and these pollutants can enter surface waters or groundwater. This, in
11 turn, would violate state water quality standards. *See, e.g.,* OAR 340-041-0007(12)
12 (“Objectionable discoloration, scum, oily sheens, or floating solids, or coating of aquatic life
13 with oil films may not be allowed.”).

14 The Oregon Legislature, recognizing the special risks posed by facilities like NEXT,
15 enacted a law in 2022 (commonly referred to as SB 1567) that requires the “owner or
16 operator of [each] bulk oils or liquid fuels terminal” located in Columbia County to “conduct
17 and submit to [DEQ] a comprehensive seismic vulnerability assessment for the entire bulk
18 oils or liquid fuels terminal.” Or Laws 2022, ch 99, § 2(2), *codified at* ORS 468B.510(2).¹⁵
19 As DEQ’s rules implementing that law state, “[a] Cascadia Subduction Zone earthquake
20 impacting the large capacity fuel handling facilities in Oregon could create widespread
21 environmental damage.” OAR 340-300-0000(1). This “widespread environmental damage”
22

23 ¹⁵ SB 1567 defines “bulk oils or liquid fuels terminal” as “an industrial facility located in
24 Columbia, Multnomah or Lane County that is primarily engaged in the transport or bulk
25 storage of oils or liquid fuel products and is characterized by having: (a) [m]arine, pipeline,
26 railroad or vehicular transport access; (b) [t]ransloading facilities for transferring shipments
of oils or liquid fuel products between transportation modes; and (c) [o]ne or more bulk
storage tanks with a combined capacity of two million gallons or more.” ORS 468B.510(1).
The NEXT Refinery will have a bulk storage capacity of over 40 million gallons.

1 would almost certainly include the discharge of fuel products and hazardous materials to
2 surface waters. *See, e.g.*, Ex. 34 (portion of study discussing the effects of a Cascadia
3 Subduction Zone earthquake on the Critical Energy Infrastructure Hub in Multnomah
4 County).

5 Without being assured of the NEXT Refinery’s seismic stability, DEQ cannot
6 possibly determine whether the operation of the refinery will violate water quality standards.
7 DEQ’s opposite conclusion—that “[s]eismic stability of the [NEXT Refinery] project is not
8 an element of DEQ’s 401 ... analysis,” Ex. 4 at 12—does not stand up to scrutiny. Taken to
9 its logical conclusion, this legal position would allow DEQ to issue a 401 certification for an
10 oil refinery proposed to be made of Tinker Toys with oil stored in old wine barrels stacked
11 precariously atop one another. Such a project would pose an obvious risk of violating several
12 water quality standards due to its lack of seismic resiliency. *See, e.g.*, OAR 340-041-
13 0007(12) (“Objectionable discoloration, scum, oily sheens, or floating solids, or coating of
14 aquatic life with oil films may not be allowed.”). And yet, by DEQ’s reasoning, it would be
15 required to ignore that risk, because the “seismic stability” of a project is categorically
16 outside the scope of 401 review.

17 Just as DEQ must ensure that the NEXT Refinery is seismically resilient in order to
18 be assured that the refinery will not lead to water quality violations, DEQ is empowered to
19 place seismic-related conditions on certification to ensure that water quality standards are not
20 violated. Section 401 requires DEQ to place “any effluent limitations *and other limitations*,
21 and monitoring requirements necessary to assure” compliance with water quality
22 requirements. 33 USC § 1341(d) (emphasis added). For instance, DEQ could require NEXT
23 to conform to certain construction or building standards that are designed to ensure seismic
24 resiliency, or DEQ could require NEXT to develop and implement a special risk mitigation
25 plan tailored to the specifics of the proposed facility and facility site. *Cf.* OAR 340-300-0004
26 (requirements for risk mitigation plans for existing bulk fuel facilities to address, *inter alia*,

1 effects on surface water and ground water). The problem here is that the NEXT 401
2 Certification contains no such conditions, because DEQ erroneously interpreted the scope of
3 its review and authority under section 401.

4 In short, the seismic stability of the NEXT Refinery is not categorically outside the
5 scope of DEQ's section 401 review. On the contrary, given the location of the NEXT
6 Refinery and the nature of the project, DEQ cannot possibly assure compliance with water
7 quality standards without knowing whether the refinery will be seismically resilient. And
8 DEQ must, if necessary, include conditions in the certification to ensure seismic resiliency so
9 as to prevent violations of water quality standards.

10
11 **C. The Certification Fails to Assure Compliance with Applicable
Pretreatment Requirements.**

12 The Certification is invalid for yet another reason: it does not assure compliance with
13 applicable pretreatment requirements adopted pursuant to section 307 of the Clean Water
14 Act, 33 USC § 1317. This failure is based on DEQ's legal position that pretreatment
15 requirements don't apply to the NEXT Refinery. Ex. 14 at 3. That legal position is incorrect.
16 Under a correct view of the law, the Certification must be set aside. *See* ORS 183.484(5)(a).

17
18 *I. Pretreatment Requirements Apply to "Indirect" Industrial
Dischargers.*

19 The Clean Water Act regulates both "direct dischargers" and "indirect dischargers."
20 *Waterkeeper Alliance v. EPA*, 140 F4th 1193, 1201 (9th Cir. 2025). "Direct dischargers"
21 discharge pollutants directly into waters regulated under the Clean Water Act. *Id.* For
22 instance, a paper mill that sends polluted process water out through a pipe into a river is a
23 "direct discharger." An "indirect discharger," on the other hand, sends polluted water to a
24 publicly owned treatment works ("POTW"), which then discharges pollutants into a water
25 body. *Id.*; *see also* 40 CFR § 403.3(i) ("The term Indirect Discharge or Discharge means the
26

1 introduction of pollutants into a POTW from any non-domestic source regulated under
2 section 307(b), (c) or (d) of the Act.”).

3 Under section 307 of the Clean Water Act, 33 USC § 1317, indirect dischargers are
4 subject to “pretreatment standards.” “Pretreatment standards are meant to ensure that indirect
5 dischargers ... achieve the same levels of pollution control as direct dischargers, taking into
6 account the fact that publicly owned treatment works are able to achieve at least some level
7 of pollution control.” *Waterkeeper Alliance*, 140 F4th at 1219. Relevant to this case, when
8 DEQ issues a section 401 certification for an activity that involves an indirect discharge, it
9 must assure that the indirect discharge will comply with those pretreatment standards. *See* 33
10 USC § 1341(a); *see also id.* § 1341(d) (requiring a certifying authority to include conditions
11 in a certification to assure compliance “with pretreatment standard[s] under [33 USC] section
12 1317”).

13 EPA has promulgated both generally applicable pretreatment standards and
14 pretreatment standards applicable to specific categories of indirect dischargers. *See* 40 CFR
15 § 403.5 (generally applicable standards); 40 CFR pts 405–471 (standards applicable to
16 specific categories of industrial dischargers). The general pretreatment standards prohibit an
17 indirect discharger from “introduc[ing] into a POTW any pollutant(s) which cause” a
18 violation of the POTW’s Clean Water Act permit or disrupt or inhibit the operation of the
19 POTW. 40 CFR § 403.5(a)(1); *see also id.* § 403.3(k), (p) (defining terms used in
20 § 403.5(a)(1)). The general pretreatment standards also contain several more targeted
21 prohibitions. *Id.* § 403.5(b). For instance, there is a general prohibition on the introduction of
22 “[p]ollutants which result in the presence of toxic gases, vapors, or fumes within the POTW
23 in a quantity that may cause acute worker health and safety problems.” *Id.* § 403.5(b)(7).

24 *2. NEXT Is an Indirect Discharger Subject to Pretreatment Standards.*

25 Pretreatment standards apply to industrial sources that “introduce[e] ... pollutants”
26 into POTWs. 33 USC § 1317(b); *see also* 40 CFR § 403.3(i) (defining “Indirect Discharge”).

1 NEXT will send wastewater to the Port of Columbia County's treatment facility, which DEQ
2 admits will introduce pollutants into the treatment facility. Ex. 14 at 3. Thus, if the Port's
3 treatment facility qualifies as a POTW, NEXT is subject to pretreatment standards.

4 Under the applicable regulations, a POTW is "a treatment works as defined by section
5 212 of the [Clean Water] Act, which is owned by a State or municipality (as defined by
6 section 502(4) of the Act)." 40 CFR § 403.3(q). Section 212 of the Clean Water Act, in turn,
7 defines "treatment works" as "any devices and systems used in the storage, treatment,
8 recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature ..., or
9 necessary to recycle or reuse water at the most economical cost over the estimated life of the
10 works, including intercepting sewers, outfall sewers, sewage collection systems, pumping,
11 power, and other equipment, and their appurtenances" 33 USC § 1292(2)(A). And section
12 502(4) of the Clean Water Act defines "municipality" as "a city, town, borough, county,
13 parish, district, association, or other public body created by or pursuant to State law and
14 having jurisdiction over disposal of sewage, industrial wastes, or other wastes" *Id.*
15 § 1362(4).

16 DEQ admits that the Port's wastewater treatment facility is a "treatment works"
17 within the meaning of section 212 of the Clean Water Act. Ex. 14 at 2. And the facility is
18 owned by the Port of Columbia County, which is clearly a "municipality": the Port, which is
19 organized under ORS chapter 777, is a "district ... or other public body created by or
20 pursuant to State law," and it has "jurisdiction over disposal of sewage, industrial wastes, or
21 other wastes," 33 USC § 1362(4), because it owns and controls the treatment facility into
22 which users discharge industrial and other wastes. Thus, the Port's wastewater treatment
23 facility is a POTW.

24 In short, the NEXT Refinery will introduce pollutants into the Port of Columbia
25 County's treatment works, and that treatment works is a POTW. Accordingly, NEXT's
26 discharge of industrial wastewater to the Port's facility is subject to pretreatment standards.

1 NEXT is not subject to pretreatment requirements. Thus, the Certification should be reversed
2 and set aside.

3
4 **D. The NEXT 401 Certification Relies on DEQ’s Ability to Revoke or**
5 **Unilaterally Modify Certification, but Such Revocation or Modification Is**
6 **Unlawful Under Federal Law.**

7 The NEXT 401 Certification contains a condition that allows DEQ to “modify or
8 revoke th[e] certification ... if the project changes, project activities are having an adverse
9 impact on state water quality or beneficial uses, or if [NEXT] violates any of the conditions
10 of th[e] certification.” Ex. 1 at 4. As with the other conditions in the Certification, DEQ has
11 determined that this condition is *necessary* to assure that the NEXT Refinery complies with
12 water quality standards and other water quality-related laws. 33 USC § 1341(d); *see also*
13 OAR 340-048-0042(5)(g) (stating that a certification must include “conditions [DEQ]
14 determines are necessary to assure compliance with applicable standards and requirements”).

15 However, this condition—the “Reopener Condition”—is legally invalid under federal
16 law. Under EPA’s section 401 regulations, DEQ cannot revoke the NEXT 401 Certification
17 at all, and it can modify the Certification only with the written agreement of the U.S. Army
18 Corps of Engineers. 40 CFR § 121.10. DEQ does not have such an agreement with the Corps.
19 Ex. 36 at 4–5. Thus, the Reopener Condition conflicts with federal law and is invalid.
20 Because the Certification rests in part on this invalid condition, the Certification is defective
21 and must be set aside.

22 *1. The Reopener Condition Is Inconsistent with EPA’s Section 401*
23 *Regulations.*

24 EPA’s section 401 regulations are clear: a “certifying authority” like DEQ “may
25 modify a grant of certification” only with the written agreement of the federal agency issuing
26 the federal permit for which certification is needed. 40 CFR § 121.10(a). And, even then, a
certifying authority “shall not ... [r]evoke a grant of certification ... or ... [c]hange a grant of

1 certification ... into a denial or waiver of certification.” *Id.* § 121.10(b). As EPA explained in
2 promulgating its regulations, the Clean Water Act “appear[s] to countenance a role for
3 certifying authorities after a certification is issued, [but] ... this role does not include
4 unilateral action to revoke or reverse the decision.” 88 Fed Reg at 66,630.

5 In its rulemaking, EPA explicitly rejected conditions like the Reopener Condition,
6 stating that its “final rule does not authorize certifying authorities to unilaterally (*i.e.*, without
7 Federal agency agreement) ‘reopen’ or modify a certification decision. *This holds true*
8 *regardless of whether a certifying authority has inserted language into its grant of*
9 *certification asserting this extra power.*” *Id.* at 66,632 (emphasis added). Notably, EPA
10 reached its decision despite opposition from many commenters who urged EPA to allow
11 reopener clauses and pointed out that they are frequently included in certifications.¹⁷ *Id.* at
12 66,631.

13 Because the Reopener Condition allows DEQ to unilaterally modify or revoke the
14 Certification, it is inconsistent with EPA’s regulations.

15
16 2. *EPA’s Section 401 Regulations Control Over DEQ’s Contrary*
Regulations and Practices.

17 To be sure, the Reopener Condition is consistent with DEQ’s *own* section 401
18 regulations. *See* OAR-340-048-0050. But DEQ’s regulations must yield to EPA’s regulations
19 in the event of a conflict. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*,
20 348 Or 159, 177–78, 182, 230 P3d 518 (2010) (discussing conflict preemption). “EPA is the
21 Federal agency tasked with administering and interpreting the CWA, including section 401,
22 and [its] interpretation supersedes any contrary interpretation taken by a certifying authority.”
23 88 Fed Reg at 66,632 (citations omitted). EPA has rejected, in no uncertain terms, an
24

25 ¹⁷ Petitioners note that, as a matter of *policy*, they agree that certifying authorities like DEQ
26 should be able to revoke or unilaterally modify the conditions in a section 401 certification.
But, as a matter of *law*, DEQ simply cannot do so, and so the Reopener Condition is invalid.

1 interpretation of the Clean Water Act that would allow a certifying authority like DEQ to
2 revoke or unilaterally modify a section 401 certification. *Id.* at 66,630–32. Thus, the
3 Reopener Condition is invalid despite being consistent with DEQ’s own regulations.

4 *3. The Certification Relies on the Validity of the Reopener Condition.*

5 By definition, all conditions in the NEXT 401 Certification are “*necessary* to assure”
6 compliance of the NEXT Refinery project with applicable water quality requirements. 33
7 USC § 1341(d) (emphasis added); *see also* OAR 340-048-0042(5)(g). In other words, the
8 Certification reflects a determination by DEQ that the NEXT Refinery will not violate water
9 quality standards, *if and only if* the included conditions are satisfied. *See* Ex. 1 at 2 (“DEQ is
10 reasonably assured that implementation of the project will be consistent with applicable
11 [water quality-related laws,] *provided* the following conditions are incorporated into the
12 [Clean Water Act] permit”) (emphasis added). Thus, the Certification rests on DEQ’s
13 ability to revoke or unilaterally modify the Certification in the event of changed
14 circumstances, water quality violations, or the like, as set out in the Reopener Condition. But,
15 as discussed above, DEQ lacks the ability under federal law to revoke or unilaterally modify
16 the Certification. The Reopener Condition is therefore unenforceable and invalid.

17 The inclusion of an invalid, unenforceable condition in the Certification is not a
18 minor technical error—it could have potentially devastating real-world consequences. If, two
19 or three years from now, it turns out that the NEXT Refinery is causing far more water
20 pollution than DEQ anticipated, the invalid Reopener Condition will not provide DEQ with a
21 legally viable means of acting to protect Oregon’s waters. The Reopener Condition is an
22 entirely illusory backstop.

23 This is not to say that DEQ is powerless to guard against unexpected events or
24 unforeseen water quality issues. DEQ is allowed to include in section 401 certifications
25 “adaptive management conditions”—conditions that specify what particular changes a
26 project proponent must make in the event of unexpected water quality issues or other future

1 events. *See* 88 Fed Reg at 66,615 (“adaptive management conditions are set at the time the
2 certification is granted and provide a concrete action that must occur in the event certain
3 criteria are met”). Unlike reopener conditions, adaptive management conditions are
4 consistent with section 401 and are valid. *Id.* In fact, EPA “encourages” adaptive
5 management conditions. *Id.*

6 Whatever mechanisms DEQ uses—whether it be adaptive management or other types
7 of conditions—DEQ must include in each 401 certification conditions to assure a project’s
8 compliance with water quality-related requirements of law. 33 USC § 1341(d). DEQ cannot
9 continue to do what it has done in the NEXT Certification: include invalid reopener
10 conditions that give the illusion of assurance without the possibility of enforcement.

11 The Certification rests on a legally invalid condition and is thus itself invalid. This
12 invalidity stems from DEQ’s erroneous interpretation of law—namely, its incorrect position
13 that it has legal authority to revoke or unilaterally modify the Certification. The Certification
14 should be reversed and set aside; DEQ must determine, on remand, what legally valid
15 conditions are necessary to ensure that the NEXT Refinery complies with water quality-
16 related legal requirements, and must include such conditions in a new certification.

17
18 **E. The Court Should Set Aside the NEXT 401 Certification and/or Order
DEQ to Deny NEXT’s Application for Certification.**

19 Under the OAPA, this Court “shall provide whatever relief is appropriate,” and may
20 “[o]rder agency action required by law, order agency exercise of discretion when required by
21 law, set aside agency action, remand the case for further agency proceedings or decide the
22 rights, privileges, obligations, requirements or procedures at issue between the parties.” ORS
23 183.486(1). In this case, it is essential that the Court set aside the Certification and/or order
24 DEQ to deny NEXT’s application for certification.

25 As discussed above in the context of the Reopener Condition, section 401 does not
26 allow DEQ to unilaterally modify or revoke the Certification. However, section 401 does not

1 prohibit *this Court* from setting aside the Certification, nor does it bar DEQ from revoking
2 the Certification if ordered to do so by this Court. 88 Fed Reg at 66,630 n.91. For this reason,
3 this Court should set aside/reverse the Certification and/or order DEQ to revoke the
4 Certification and deny NEXT's application for certification on remand. Merely remanding
5 this matter to DEQ without either reversing/setting aside the Certification or ordering DEQ to
6 revoke/deny certification would create uncertainty as to the scope of DEQ's ability to act on
7 remand.

8 **VI. Conclusion**

9 As detailed above, DEQ's Clean Water Act Section 401 Certification for the NEXT
10 Refinery rests on at least four fundamental legal errors. Accordingly, the Certification should
11 be set aside/reversed, and/or DEQ should be ordered to deny NEXT's request for
12 certification.

13
14
15 Dated: August 22, 2025

Respectfully submitted,

16 /s/ Andrew R. Missel

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1 **CERTIFICATE OF SERVICE**

2 I certify that on August 22, 2025, I served the foregoing Motion for Partial Summary
3 Judgment upon the parties to this case by email. Service was accomplished at the following
4 email addresses:

5
6 **Respondent:**

7 Tracy White

8 Jane Kim

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