

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' RESPONSE TO
RESPONDENT'S CROSS-MOTION
FOR SUMMARY JUDGMENT AND
REPLY IN SUPPORT OF THEIR
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
PURELY LEGAL ISSUES**

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(ORS 21.200(1)(a))

PETITIONERS' SUMMARY
JUDGMENT RESPONSE/REPLY

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1 **I. Introduction.**

2 The Oregon Department of Environmental Quality's ("DEQ") Clean Water Act
3 Section 401 Certification for the NEXT Refinery is, for the most part, a boilerplate 401
4 certification. *Compare* Ex. 1 (401 certification for the NEXT Refinery, which will destroy
5 more than 100 acres of wetlands), *with* Ex. 37 (DEQ's 401 certification for a small project
6 affecting 0.03 acres of wetlands).¹ The NEXT 401 Certification does not take account of the
7 scale of the NEXT Refinery, does not assure compliance with all relevant water quality-
8 related legal requirements, and does not contain sufficient conditions to protect water quality.

9 In its summary-judgment motion, DEQ argues otherwise, insisting that the
10 Certification does far more than it actually does. DEQ argues, for instance, that the
11 Certification *does* assure NEXT's compliance with pretreatment standards and that it *does*
12 require NEXT to comply with seismic-related building codes. These arguments, in addition
13 to being contrary to DEQ's past statements and/or binding admissions, are simply wrong.
14 Also wrong is DEQ's argument that it has (apparently limitless) discretion to ignore water
15 quality-related laws that will clearly be violated by the NEXT Refinery.

16 No doubt DEQ's task in writing a section 401 certification for a massive project like
17 the NEXT Refinery is a daunting one. But that does not excuse DEQ's failure to comply with
18 its own rules and section 401 in issuing the NEXT 401 Certification. Nor does it justify
19 DEQ's inclusion of an invalid "reopener condition" in the Certification. DEQ's job is not to
20 kick the can down the road and hope that it can figure out how to regulate the NEXT
21 Refinery in the future; its job is to determine whether the NEXT Refinery will comply with
22 specific water quality-related legal requirements and include legally valid conditions to
23 assure such compliance. DEQ failed to do its job, and the Certification should be set aside.

24
25 _____
26 ¹ All references to "Ex. _" are to exhibits to the Missel Declaration and Second Missel
Declaration. Exhibits 1 through 36 are attached to the Missel Declaration; Exhibits 37
through 41 are attached to the Second Missel Declaration.

1 **II. Argument.**

2 **A. DEQ’s Rules and Section 401 Itself Require DEQ to Assure Compliance**
3 **with *All* Water Quality-Related Requirements of State Law, Which**
4 **Includes Certain Drainage Laws.**

5 Petitioners contend that the NEXT 401 Certification is deficient because it does not
6 assure compliance with or contain conditions to assure compliance with certain drainage-
7 related legal requirements—specifically, ORS 547.425 and portions of the Beaver Drainage
8 Improvement Company (“BDIC”) Bylaws. Pet’rs SJ Mot. at 19–23. These legal requirements
9 are intended to protect BDIC’s infrastructure from pollution and ensure that the 5,000+ acres
10 serviced by BDIC are properly drained and irrigated. *See id.* at 7–8, 20–21 (discussing BDIC
11 and its drainage and irrigation system). Because these legal requirements are related to water
12 quality, DEQ was supposed to at the very least include conditions in the Certification to
13 assure compliance with them. In its summary-judgment motion, DEQ insists that it did not
14 have to do so, but its arguments repeat the agency’s legal errors from the NEXT 401 process.

15 DEQ first argues that “[d]rainage district laws” under ORS chapter 547 “are not
16 focused on water quality” and thus do not qualify as “other appropriate requirements of state
17 law.” DEQ SJ Mot. at 4. But DEQ discusses chapter 547 at a high level of generality, and
18 does not even specifically mention ORS 547.425 or the relevant BDIC Bylaws, the
19 requirements of state law at issue here. DEQ cannot ignore these specific water quality-
20 related legal requirements just because they appear in a chapter of the Oregon Revised
21 Statutes that contains some non-water quality-related provisions. *See Arnold Irr. Dist. v.*
22 *DEQ*, 79 Or App 136, 143, 717 P2d 1274 (1986), *rev den*, 301 Or 765 (requiring DEQ to
23 determine which specific portions of a county’s land-use regulations related to water quality
24 and thus needed to be considered in a 401 certification). The question is not whether ORS
25 chapter 547 is “focused on water quality” as a whole, but whether ORS 547.425 (and
26 portions of the BDIC Bylaws) count as “other appropriate requirements of state law” because
they are related to water quality. *See id.* at 142. ORS 547.425 and the relevant portions of the

1 BDIC Bylaws are obviously related to water quality, *see* Pet’rs SJ Mot. at 20–21—a point
2 that DEQ does not even attempt to rebut.

3 Next, DEQ argues that the drainage district laws “place no responsibility on DEQ.”
4 DEQ SJ Mot. at 4. This fundamentally misunderstands how section 401 certification is
5 supposed to work. When considering a request for 401 certification, DEQ, acting on behalf
6 of the State of Oregon, “must evaluate whether the activity for which [401] certification is
7 sought will comply with ... other appropriate requirements of state law.” OAR 340-048-
8 0042(2). The phrase “other appropriate requirements of state law” means “*all* water quality-
9 related [state] statutes and rules.” *Arnold Irr. Dist.*, 79 Or App at 142 (emphasis in original);
10 *see also id.* (“[A]ny other appropriate requirement of State law’ is ... a Congressional
11 recognition of all state action related to water quality ...”). Nothing in DEQ’s rules—and
12 certainly nothing in section 401 itself—suggests that DEQ can ignore water quality-related
13 legal requirements because they are administered or enforced by other state or local entities
14 outside the context of 401 certification.

15 On the contrary, other parts of DEQ’s 401 rules confirm that section 401 certification
16 involves DEQ assuring compliance with requirements of state law that are not otherwise
17 administered or enforced by DEQ. For instance, applicants for certification must “identif[y]
18 and describe[] other requirements of state law applicable to the activity that have any
19 relationship to water quality”—*i.e.*, “other appropriate requirements of state law”—
20 “including but not limited to requirements under ... ORS chapter 496 regarding fish and
21 wildlife[] and ORS chapter 390 regarding recreation and scenic waterways.” OAR 340-048-
22 0020(2)(j). The relevant portions of ORS chapter 496 and ORS chapter 390 place no
23 responsibility on DEQ; they are administered and enforced by other agencies. Yet DEQ’s
24 401 rules ask applicants to identify water quality-related legal requirements under these
25 chapters, because it is *DEQ* that must determine whether a proposed activity requiring 401
26 certification will comply with those water quality-related requirements.

1 DEQ's past practice also confirms that it must assure compliance with (including by
2 conditioning certification on compliance with) provisions of state and local law not otherwise
3 administered by DEQ. When issuing a 401 certification for a complicated and/or large
4 project, DEQ sometimes prepares a report explaining its reasoning and conclusions. These
5 reports typically contain a section discussing "other appropriate requirements of state law"
6 considered by DEQ, including many such requirements that are not otherwise enforced or
7 administered by DEQ. For instance, in a report issued in connection with a 401 certification
8 for the removal of a dam project, DEQ identified as "other appropriate requirements of state
9 law" certain laws administered by the Division of State Lands and the Department of Fish
10 and Wildlife. Ex. 38 at 2–5; *see also* Ex. 39 at 2–7 (report discussing "other appropriate
11 requirements of state law" that DEQ "would consider" in a potential future certification
12 request, including many administered by other agencies), Ex. 40 at 2–5 (similar). Indeed, a
13 draft report for the NEXT 401 Certification itself lists several laws administered by other
14 agencies as "potential water quality-related requirements of state law"—*i.e.*, "other
15 appropriate requirements of state law." Ex. 41 at 2–4.²

16 DEQ's point that "nothing prevents BDIC from enforcing its own rules that may
17 apply to the [NEXT] project" is irrelevant. *See* DEQ SJ Mot. at 4. Most, if not all, of the legal
18 requirements with which DEQ must assure compliance in a 401 certification are enforceable
19 outside the 401 certification itself. In fact, section 401 provides that "[n]othing in this section
20 shall be construed to limit the authority of any department or agency pursuant to any other
21 provision of law to require compliance with any applicable water quality requirements." 33
22 USC § 1341(b). The fact that a legal requirement is enforceable outside a 401 certification
23 has *no bearing* on whether DEQ must assure compliance with that requirement—including
24 by conditioning certification on such compliance—as part of 401 certification.

25
26 ² It is not clear why a final version of this report was never issued. Petitioners obtained the
draft report through discovery.

1 DEQ next argues that it “appropriately accounted for any ... drainage-related issues”
2 by “evaluating water quality as a whole.” DEQ SJ Mot. at 5. As discussed above, this
3 10,000-foot-view approach is not what the law requires. In considering a request for 401
4 certification, DEQ must evaluate whether the proposed activity will comply with specific
5 water quality-related legal requirements: “Sections 301, 302, 303, 306, and 307 of the Clean
6 Water Act, water quality standards set forth in OAR chapter 340, division 041, and other
7 appropriate requirements of state law.” OAR 340-048-0042(2). The last phrase includes “*all*
8 water quality-related [state] statutes and rules.” *Arnold Irr. Dist.*, 79 Or App at 142 (emphasis
9 in original). This evaluation will sometimes require a provision-by-provision analysis of state
10 and local laws. *See id.* at 143 (requiring DEQ to evaluate which provisions of a county’s
11 land-use regulations related to water quality). DEQ cannot make an end run around these
12 duties by “evaluating water quality as a whole.”

13 Here, construction of the NEXT Refinery will violate several drainage-related
14 requirements of state law. For instance, NEXT will completely fill in one drainage/irrigation
15 ditch under BDIC’s jurisdiction without BDIC’s consent, which plainly violates ORS
16 547.425(1) and (3) and BDIC Bylaws 13.2.2 and 13.2.3. *See* Pet’rs SJ Mot. at 20–22. These
17 requirements of state law are related to water quality, and therefore qualify as “other
18 appropriate requirements of state law.” *Arnold Irr. Dist.*, 79 Or App at 142. Thus, DEQ has
19 not assured compliance with, or imposed conditions to assure compliance with, all applicable
20 water quality-related legal requirements. It does not matter if DEQ has assured compliance
21 with *some*, or even *most*, applicable legal requirements; again, its job under section 401 is not
22 to look at water quality “as a whole,” but rather to assure compliance with (or include
23 conditions to assure compliance with) specific legal requirements.

24 Finally, DEQ argues that its rules allow it to pick and choose which water quality-
25 related state laws to certify compliance with when issuing a section 401 certification. *See*
26 DEQ SJ Mot. at 5. But DEQ’s rules say that it “*must* evaluate whether the activity for which

1 certification is sought will comply with ... *other appropriate requirements of state law.*”
2 OAR 340-048-0042(2) (emphasis added). The phrase “other appropriate requirements of
3 state law” means “*all* water quality-related [state] statutes and rules.” *Arnold Irr. Dist.*, 79 Or
4 App at 142 (emphasis in original). “Must” means “must.” *See ONRC Action v. Columbia*
5 *Plywood, Inc.*, 332 Or 216, 222, 26 P3d 142 (2001) (“The word ‘must’ indicates that the ...
6 requirement is mandatory.”). By the plain terms of OAR 340-048-0042, if a requirement of
7 state law is related to water quality, DEQ must assure compliance with it, which DEQ may
8 accomplish by putting conditions on certification to assure compliance.

9 DEQ insists that *Arnold Irrigation District* does not require it “to consider every
10 potentially relevant law related to water” when reviewing a request for section 401
11 certification. DEQ SJ Mot. at 5. This misunderstands Petitioners’ argument. The importance
12 of *Arnold Irrigation District* is its interpretation of the phrase “any other appropriate
13 requirement of State law” in section 401 to mean “*all* water quality-related [state] statutes
14 and rules.” 79 Or App at 142 (emphasis in original). DEQ’s rules, which have been amended
15 many times since *Arnold Irrigation District*, use that phrase in describing the set of legal
16 requirements with which DEQ must assure compliance.³ *See* OAR 340-048-0042(2) (stating
17 that DEQ “must evaluate whether the activity for which certification is sought will comply
18 with ... other appropriate requirements of state law”). When writing DEQ’s rules, the
19 Environmental Quality Commission (“EQC”) and DEQ were aware of *Arnold Irrigation*
20 *District*’s interpretation of the phrase “other appropriate requirements of state law,” so the
21 rules should be read to reflect that interpretation.⁴ *Cf. Moro v. State*, 354 Or 657, 665–66, 320

22 ³ Technically, the phrase used in section 401(d) is “any other appropriate requirement of
23 State law,” while the phrase used in DEQ’s rules is “other appropriate requirements of state
24 law.” *Compare* 33 USC § 1341(d), *with* OAR 340-048-0042(2). DEQ does not argue, nor
could it plausibly argue, that the minor difference in language has any significance.

25 ⁴ EQC is tasked with “perform[ing] or caus[ing] to be performed any acts necessary to be
26 performed by the state to implement” the Clean Water Act. ORS 468B.035(1). DEQ exists
under EQC and carries out EQC’s Clean-Water-Act related duties, subject to oversight by

1 P3d 539 (2014) (“In interpreting statutes, this court presumes that the legislature is aware of
2 existing law and this court’s interpretation of that law.”). The result is that DEQ’s 401 rules
3 require DEQ to consider *all* water quality-related state legal requirements in a section 401
4 certification.⁵ To the extent that DEQ reads its rules differently, its reading is implausible.
5 *See PacifiCorp v. DEQ*, 344 Or App 11, 16, – P3d – (2025) (discussing how courts do not
6 defer to an agency’s implausible interpretation of its own rules).

7 At any rate, even if DEQ’s rules *did* allow it to pick and choose which water quality-
8 related legal requirements it considers during 401 certification, those rules would violate
9 section 401 and the U.S. Environmental Protection Agency’s (“EPA”) 401 regulations.
10 EPA’s regulations provide that a “certifying authority *shall* evaluate whether the activity will
11 comply with applicable water quality requirements.” 40 CFR § 121.3(a) (emphasis added).
12 The phrase “water quality requirements,” in turn, is defined as “any limitation, standard, or
13 other requirement under [certain sections of the] Clean Water Act, any Federal and state or
14 Tribal laws or regulations implementing those sections, and *any other water quality-related*
15 *requirement of state or Tribal law.*” *Id.* § 121.1(j) (emphasis added). Under this definition, a
16 law is either water quality-related, in which case DEQ *must* assure compliance with it; or it is
17 not water quality-related, in which case DEQ *cannot* consider it. DEQ cannot decline to
18 consider a state law that is related to water quality. *See also* Ex. 31 at 4 (EPA’s explanation
19 that, “consistent with the statutory text, this final rule *requires* certifying authorities to
20 consider whether the activity will comply with water quality requirements, which includes
21 but is not limited to water quality standards”) (emphasis added).

22 _____
23 EQC. *See PNW Metal Recycling, Inc. v. DEQ*, 371 Or 673, 679, 540 P3d 523 (2023)
24 (describing the relationship between EQC and DEQ).

25 ⁵ Inserting the definition of “other appropriate requirements of state law” from *Arnold*
26 *Irrigation District* into DEQ’s rules results in the following: “[DEQ] must evaluate whether
the activity for which certification is sought will comply with ... all water quality-related
statutes and rules.”

1 DEQ made a legal error when it determined that ORS 547.425 and portions of the
2 BDIC Bylaws are not “other appropriate requirements of state law.” Under a correct
3 interpretation of the law, the Certification could not have been issued in its current form—at
4 the very least, DEQ would have had to include conditions to assure compliance with ORS
5 547.425 and relevant portions of the BDIC Bylaws. Thus, the Court should set aside and/or
6 reverse the Certification and order DEQ to deny NEXT’s request for certification without
7 prejudice. *See* ORS 183.484(5).

8
9 **B. The Certification Must at the Very Least Include Conditions Requiring
Compliance with Building Standards.**

10 The NEXT Refinery will store more than 40 million gallons of finished fuel products
11 in a low-lying, marshy area near the Columbia River.⁶ If the NEXT Refinery is not
12 seismically resilient, a strong earthquake will almost certainly lead to the release of fuel and
13 other chemicals into surface water and groundwater. Yet, due to its incorrect interpretation of
14 the law, DEQ largely ignored the refinery’s seismic resiliency in issuing the NEXT 401
15 Certification. DEQ’s summary-judgment motion repeats the agency’s legal errors from the
16 certification process and adds some new errors, as well.

17 DEQ’s first argument is that any legal requirements related to seismic stability are not
18 water quality-related laws and are thus beyond the scope of 401 certification. DEQ SJ Mot. at
19 6. This conflates two distinct aspects of 401 certification: (1) the legal requirements with
20 which DEQ must assure compliance and (2) the “limitations” (*i.e.*, conditions) that DEQ is

21 _____
22 ⁶ The Teach Declaration takes issue with the description of the project area as “marshy.” *See*
23 Teach Decl. ¶¶ 8–10. Petitioners maintain that “marshy” is an accurate description of the
24 area, but the important point is that the project area is comprised largely of “wetlands” under
25 federal jurisdiction. *See, e.g.*, Ex. 5 at 4 (“The project site is generally flat consisting of
26 farmed wetlands and ditches ...”). “Wetlands” are legally defined as “those areas that are
inundated or saturated by surface or ground water at a frequency and duration sufficient to
support, and that under normal circumstances do support, a prevalence of vegetation typically
adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes,
bogs, and similar areas.” 33 CFR § 328.3(c)(1).

1 empowered to place in a certification to assure compliance with those legal requirements. To
2 be clear, Petitioners’ argument in this motion is *not* that there are seismic-related legal
3 requirements with which DEQ has failed to assure compliance. Rather, Petitioners’ argument
4 is that DEQ must include in the Certification sufficient *conditions* related to seismic
5 resiliency to assure compliance with water quality standards, such as the water quality
6 standard prohibiting “scum, oily sheens, or floating solids, or coating of aquatic life with oil
7 films.” OAR 340-041-0007(12). These water quality standards are the relevant legal
8 requirements with which DEQ must assure compliance. *See* OAR 340-048-0042(2) (DEQ
9 must assure compliance with “water quality standards set forth in OAR chapter 340, division
10 041”).

11 DEQ next suggests that the risk of water quality violations from an earthquake is
12 “speculative.” DEQ SJ Mot. at 6. The risk of a massive earthquake in the region is not
13 “speculative”—it is a very real threat, as recognized by the Oregon legislature. *See* ORS
14 468B.510 *et seq.* (SB 1567, which concerns the seismic stability of bulk fuel facilities).
15 Indeed, DEQ’s own rules recognize that “[a] Cascadia Subduction Zone earthquake
16 impacting the large capacity fuel handling facilities in Oregon could create widespread
17 environmental damage, fires, [and] endanger [the] health and safety of surrounding
18 communities” OAR 340-300-0000(1). For DEQ to suggest that this is a “speculative” risk
19 flies in the face of its own rules and the judgment of the Oregon legislature. As one DEQ
20 official said concerning the need to ensure the seismic resiliency of facilities that store large
21 amounts of fuel, “[w]e know [a large earthquake’s] going to come. ... We don’t know when,
22 but we need to prepare to avoid the problems that will occur if these [fuel] tanks are not
23 managed appropriately.”⁷

24
25 ⁷ Monica Samoya, *Oregon looks to head off an earthquake-triggered fuel-spill disaster*,
26 OPB.org (Oct. 19, 2022), *available at* <https://www.opb.org/article/2022/10/19/oregon-plan-to-prevent-earthquake-triggered-fuel-spill-disasters/> (quoting Mike Korten Hof, who was at that time DEQ’s Fuel Tank Compliance Manager).

1 Immediately after its halfhearted argument about the “speculative” risk of earthquake-
2 related environmental damage from the NEXT Refinery, DEQ appears to concede that
3 seismic resiliency is, in fact, a serious issue. *See* DEQ SJ Mot. at 6 (“This is not at all to say
4 that earthquake mitigation is not an important thing to consider.”). It is hard to see how DEQ
5 could not concede this point given the size of the proposed NEXT Refinery and the Oregon
6 legislature’s judgment that facilities like NEXT pose a grave risk to the environment and
7 human health in the event of a massive earthquake. The NEXT Refinery will store more than
8 40 million gallons of fuel in an area prone to liquefaction next to the Columbia River
9 Estuary, which is critical habitat for 13 different populations of endangered or threatened
10 salmon and steelhead species. *See* Pet’rs SJ Mot. at 8–9 (discussing the seismic vulnerability
11 of the NEXT site); Ex. 21 at 7 (listing endangered and threatened species likely to be affected
12 by the NEXT Refinery). If the NEXT Refinery is not seismically resilient, the environmental
13 damage to the area in the event of a large earthquake would likely be catastrophic.

14 Perhaps recognizing the futility of arguing that seismic concerns are irrelevant or
15 somehow outside the scope of section 401 review, DEQ pivots to arguing that the
16 Certification actually “does address the seismic stability of the project by requiring
17 compliance with the building codes.” DEQ SJ Mot. at 6–7. This directly contradicts DEQ’s
18 past statements that the Certification “does not include conditions requiring compliance with
19 building code[s],” Ex. 2 at 3, and that the “[s]eismic stability of the project is not an element
20 of DEQ’s 401 WQC analysis,” Ex. 4 at 12. DEQ’s past statements—not its convenient
21 litigation position—reflect the agency’s actual treatment of seismic issues in the 401 process:
22 in short, the Certification does not require compliance with building codes.

23 DEQ points to the land use compatibility statement issued by Columbia County in
24 connection with the Certification, and states that NEXT will comply “with the local
25 requirements being implemented to reduce the potential for structure failure during a seismic
26 event.” DEQ SJ Mot. at 7. Tellingly, though, neither DEQ’s motion nor the Teach

1 Declaration specifies which parts of Columbia County’s land-use regulations require seismic
2 resiliency. The Columbia County Zoning Ordinance does not use the words “seismic” or
3 “earthquake” at all.⁸ The Columbia County Comprehensive Plan does use these words, but
4 only in the context of the dubious statement that “[e]arthquake hazards in the County appear
5 nominal, and special precautions appear unnecessary.”⁹ DEQ also fails to point to any part of
6 the NEXT 401 Certification that actually requires compliance with the Oregon Structural
7 Specialty Contractors Code. Bluntly, there is no support for DEQ’s statement that it has
8 “address[ed] the seismic stability of the [NEXT] project by requiring compliance with the
9 building codes,” either directly or by ensuring compliance with local land-use requirements.

10 DEQ also appears to argue that it didn’t need to consider seismic resiliency or include
11 seismic-related conditions in the Certification because state laws (including building codes)
12 exist that will ensure that the NEXT Refinery is seismically resilient. *See* DEQ SJ Mot. at 6–
13 7. But if DEQ’s reasonable assurance that water quality standards will not be violated relies
14 on NEXT’s compliance with some state or local laws, the Certification must include
15 conditions requiring compliance with those laws. In other words, even assuming that
16 compliance with building codes would be sufficient to prevent violations of water quality
17 standards in the event of an earthquake, the Certification must actually include conditions
18 requiring such compliance.

19 The U.S. Court of Appeals for the Fourth Circuit considered a similar situation in
20 *Sierra Club v. West Virginia Department of Environmental Protection*, 64 F.4th 487 (4th Cir.
21 2023). In that case, the state’s determination that its water quality standards would not be

22 ⁸ *See* Columbia Cnty. Zoning Ordinance (updated through Aug. 2023), *available at*
23 https://www.columbiacountyor.gov/media/Land_Development/planning%20division%20files/2023-4%20Zoning%20Ordinance.pdf
24

25 ⁹ *See* Columbia Cnty. Comprehensive Plan at 317–18 (updated through Oct. 12, 2023),
26 *available at*
https://www.columbiacountyor.gov/media/Land_Development/planning%20division%20files/COMP%20PLAN%202023.pdf

1 violated “relied on [the project proponent’s] observance of” a certain general permit and a
2 stormwater pollution prevention plan. *Id.* at 505. But the state “failed to include compliance
3 with [those requirements] among the certification conditions, leaving out of the federal
4 permit a central justification for its reasonable assurance determination.” *Id.* at 505–06. The
5 Fourth Circuit held that this was error: “[g]iven the [state’s] clear reliance on the [general
6 permit and stormwater plan] to make its reasonable assurance determination, compliance
7 with those permits should have been a condition of the certification.” *Id.* at 506. Here, to the
8 extent that DEQ’s determination that NEXT will not violate water quality standards is
9 premised on NEXT’s compliance with certain building codes, DEQ should have made
10 compliance with those codes a condition of certification. As discussed above, it did not do
11 so.¹⁰

12 Importantly, it would not be redundant or pointless to include a condition in the
13 Certification requiring compliance with those building codes. A condition in a section 401
14 certification “become[s] a condition on” the associated federal permit. 33 USC § 1341(d). If
15 NEXT were to violate a building-code-related condition of the Certification—say, by cutting
16 corners in facility construction—the U.S. Army Corps of Engineers (“Corps”), or even an
17 affected member of the public, could remedy that violation. *See* 33 USC § 1344(s) (Corps’
18 enforcement authority), *id.* § 1365(a), (f) (allowing citizens to sue for violations of 401
19 certifications). Thus, including a condition in the Certification requiring compliance with
20 building codes would have significant legal effects, even if NEXT must comply with those
21 building codes irrespective of the 401 Certification.

22 ¹⁰ DEQ’s discussion of SB 1567 misses the mark. For purposes of this motion, Petitioners do
23 not contend that SB 1567 applies of its own force to the NEXT Refinery. The relevance of
24 SB 1567 is twofold: first, it demonstrates that seismic resiliency is an important issue for
25 facilities like the NEXT Refinery; second, it includes substantive and procedural
26 requirements that DEQ could impose on NEXT as “limitations” (*i.e.*, conditions) on NEXT’s
operations to assure compliance with water quality standards. DEQ’s confusion on this point
reflects its conflation of legal requirements and “limitations” that can be imposed to assure
compliance with legal requirements. *See supra* pp. 8–9 (discussing this issue).

1 The Certification does not, in fact, require NEXT to comply with any seismic-related
2 building codes. DEQ’s failure to include any such conditions in the Certification stems from
3 its erroneous legal position that seismic considerations are somehow outside the scope of 401
4 certification. The Certification should be set aside, and DEQ must prepare a new 401
5 certification containing whatever seismic-related conditions are necessary to prevent
6 violations of water quality standards. At a bare minimum, this would include requiring
7 NEXT to comply with applicable seismic-related building codes, such as the Oregon
8 Structural Specialty Contractors Code.

9
10 **C. DEQ’s Summary-Judgment Motion Confirms that the Certification Does
Not Assure Compliance with Pretreatment Standards.**

11 DEQ’s summary-judgment motion confirms that the NEXT 401 Certification does
12 not assure compliance with pretreatment standards, as required by section 401 and DEQ’s
13 own rules. *See* 33 USC § 1341(a), (d); OAR 340-048-0042(2). Assuring that NEXT complies
14 with pretreatment standards is vitally important given that the Port of Columbia County’s
15 wastewater treatment facility—where NEXT will send industrial wastewater—was not
16 designed with a facility like NEXT in mind. *See* Pet’rs SJ Mot. at 12, 29.

17 Surprisingly, DEQ refuses to make an argument in its motion as to whether the Port’s
18 wastewater treatment facility is a publicly owned treatment works (“POTW”), calling this
19 issue “irrelevant.” DEQ SJ Mot. at 8. Pretreatment standards under section 307 of the Clean
20 Water Act, 33 USC § 1317, apply to NEXT’s industrial wastewater discharges *only if* (1)
21 NEXT will introduce pollutants into the Port’s facility and (2) the Port’s facility qualifies as a
22 POTW. Pet’rs SJ Mot. at 27–28. It is undisputed that NEXT will introduce pollutants into the
23 Port’s facility. Ex. 14 at 3. Thus, whether the Port’s facility is a POTW is the *only* relevant

1 issue. DEQ’s failure to recognize this confirms that the agency ignored pretreatment
2 standards when issuing the NEXT 401 Certification.¹¹

3 DEQ insists that “the [C]ertification does, in fact, require compliance with applicable
4 pretreatment standards.” DEQ SJ Mot. at 8. This is nonsensical. DEQ has taken the position
5 that the Port’s facility is *not* a POTW. Ex. 14 at 3; *see also* Ex. 22 (Port’s permit, which does
6 not treat the Port as a POTW). Under that longstanding (mis)interpretation of the law, there
7 were no “applicable pretreatment standards” for DEQ to assure compliance with as part of
8 401 certification. That is why, in response to a request for admission, DEQ denied that
9 pretreatment standards apply to NEXT’s discharges to the Port. Ex. 14 at 3. DEQ is stuck
10 with that admission; it cannot now argue that the Certification did, in fact, consider and
11 assure compliance with pretreatment standards. *See* ORCP 45 D (discussing the effect of an
12 admission).

13 Given this, it is not surprising that the two conditions in the Certification that DEQ
14 points to as supposed proof that it has assured compliance with pretreatment standards have
15 *nothing to do* with pretreatment. *See* DEQ SJ Mot. at 8 (citing conditions 18 and 24 of the
16 Certification). The condition related to industrial stormwater discharges to McLean Slough
17 does not even concern NEXT’s discharges to the Port’s treatment facility, which are the
18 discharges subject to pretreatment standards. As for the condition of the Certification
19 requiring NEXT to comply with the Port’s Clean Water Act permit, that permit doesn’t
20 actually contain any standards for NEXT. *See* Ex. 22 (Port’s permit). As DEQ puts it, “[t]he
21 Port is responsible for compliance with its permit, including any relating to any discharge
22
23
24

25 ¹¹ Whatever the reason for DEQ’s decision not to argue that the Port’s treatment facility is
26 not a POTW, it cannot make that argument for the first time in its forthcoming reply. *Cf. City of Troutdale v. Palace Construction Corp.*, 293 Or App 785, 790, 429 P3d 1042 (2018) (“We normally will not consider issues raised for the first time on appeal in a reply brief ...”).

1 from its tenants.” DEQ SJ Mot. at 8. The Port’s permit certainly does not require NEXT to
2 comply with any pretreatment standards.¹²

3 Finally, DEQ’s point that the Port’s permit “is due for renewal” and that “any
4 concerns regarding the sufficiency of that permit would be addressed in that permitting
5 process” is irrelevant. DEQ SJ Mot. at 8. The question here is not the sufficiency of the
6 Port’s permit; rather, it is whether DEQ has assured that *NEXT* will comply with
7 *pretreatment* standards, as required by section 401. Because the Port’s facility is a POTW,
8 pretreatment standards apply to NEXT regardless of the terms of the Port’s permit.

9 In short, because of its erroneous interpretation of the law, DEQ did not think it had a
10 reason to—and thus did not—assure NEXT’s compliance with pretreatment standards as part
11 of section 401 certification. DEQ “has erroneously interpreted a provision of law,” ORS
12 183.484(5)(a), and a correct interpretation requires DEQ to assure NEXT’s compliance with
13 pretreatment standards. The Certification should be set aside and/or reversed on this basis.

14 **D. The Certification Includes an Unlawful Reopener Condition.**

15 The NEXT 401 Certification includes a condition that allows DEQ to “modify or
16 revoke this certification ... if the project changes, project activities are having an adverse
17 impact on state water quality or beneficial uses, or if [NEXT] violates any of the conditions
18 of this certification.” Ex. 1 at 4. As a matter of policy, this type of condition—known as a
19 “reopener condition”—may be wise. But it is simply not allowed under federal law and is
20 thus invalid. If DEQ attempted to enforce this condition by revoking or unilaterally
21 modifying the Certification, it would be unable to do so. DEQ must replace the invalid

22 ¹² In response to a request for admission, DEQ asserted that the Port’s permit “requires all
23 industries discharging to the [Port’s] facility to meet new source performance standards
24 related to their respective industries.” Ex. 14 at 3. That is not true, as a review of the permit
25 shows. *See* Ex. 22. (At most, the Port’s permit contains requirements for steam electric power
26 generators discharging to the Port, which does not cover NEXT. *See id.* at 3–4.) Even if it
were true, though, it would not matter: new source performance standards are not the same as
pretreatment standards. *See Waterkeeper All. v. EPA*, 140 F4th 1193, 1201 (9th Cir 2025)
(discussing types of standards applicable to different sources under the Clean Water Act).

1 Reopener Condition with valid “adaptive management” conditions that will actually protect
2 water quality if the NEXT Refinery causes water quality problems in the future.

3 In its summary-judgment motion, DEQ tries to escape this straightforward result. To
4 the extent its arguments are even responsive to Petitioners’ motion, they are unpersuasive.

5
6 *1. DEQ’s First Three Arguments Concerning the Reopener Condition
Are Beside the Point.*

7 DEQ’s first three arguments concerning the Reopener Condition (Sections VII.A, B,
8 and C of DEQ’s motion) are beside the point. Petitioners’ argument is that the Reopener
9 Condition conflicts with 40 CFR § 121.10, a federal regulation, and is thus invalid. Pet’rs SJ
10 Mot. at 30–32. To rebut that argument, DEQ must either show that (1) the Reopener
11 Condition does *not* conflict with 40 CFR § 121.10 or that (2) 40 CFR § 121.10 itself is
12 somehow not valid. DEQ does attempt to make both of those showings, *see* DEQ SJ Mot. at
13 11–12 (Sections VII.D and VII.E), but not in its first three arguments. Those three arguments
14 simply don’t address the relevant points of Petitioners’ argument.

15
16 *2. The Challenged Condition Is an Unlawful Reopener Condition, Not
a Lawful Adaptive Management Condition.*

17 DEQ’s primary argument in defense of the Reopener Condition is that it is not, in
18 fact, a reopener condition, but is instead an “adaptive management” condition allowed under
19 EPA’s section 401 regulations. DEQ SJ Mot. at 11–12. This is incorrect. An adaptive
20 management condition “provide[s] a concrete action that must occur in the event certain
21 criteria are met.” 88 Fed Reg 66,558, 66,615 (Sept. 27, 2023). For instance, an adaptive
22 management condition “may require a project proponent to increase monitoring efforts or
23 conduct remediation if the baseline, routine monitoring established in the certification reveals
24 an increase in a specific pollutant due to the activity.” *Id.* Crucially, “[t]he text of an adaptive
25 management condition does not change after certification is granted.” *Id.* Both the trigger for
26 action and the action that must be taken are spelled out in the certification condition.

1 Here, the challenged condition states that DEQ may “modify ... th[e] certification” if
2 certain circumstances occur. Ex. 1 at 4. It does not spell out what additional requirements
3 would apply to NEXT if such circumstances were to occur; rather, it allows some unspecified
4 modification of the Certification, with the substance to be determined at a later date. This is
5 precisely the type of “reopener condition” forbidden by EPA’s regulations: rather than
6 specifying what NEXT must do in the event that certain circumstances occur, which is what
7 an adaptive management condition does, the condition “purport[s] to authorize [DEQ] to ...
8 modify [the] certification at a later date.” 88 Fed Reg at 66,631. That later modification
9 would necessarily include changes to the text of the Certification. The Reopener Condition
10 is, in fact, a reopener condition.¹³

11 DEQ also argues that, regardless of whether the Reopener Condition is in fact a
12 reopener condition, it does not violate 40 CFR § 121.10. DEQ SJ Mot. at 11–12. According
13 to DEQ, EPA’s guidance on 40 CFR § 121.10 in its preamble to the section 401 regulations
14 is “broader than the actual rule,” and the actual rule does not preclude the challenged
15 condition.¹⁴ *Id.* at 12. But the preamble is entirely consistent with the text of the “actual
16 rule”: 40 CFR § 121.10, by its terms, allows DEQ to modify a 401 certification *only if* the
17 relevant federal agency consents—*i.e.*, it does not allow unilateral modifications. *See* 40 CFR
18 § 121.10(a) (“*Provided that the Federal agency and the certifying authority agree in writing*
19 *that the certifying authority may modify a grant of certification ...*, the certifying authority
20 may modify *only the agreed-upon portions* of the certification.”) (emphasis added). The
21 problem with the Reopener Condition is that it purports to allow DEQ to modify the NEXT

22 ¹³ The NEXT 401 Certification does include some true adaptive management conditions. For
23 instance, the Certification provides that, “[i]f sediment has reached a third of the exposed
24 height of a sediment or erosion control, [NEXT] must remove the sediment to its original
25 contour.” Ex. 1 at 5. This is an adaptive management condition because it “provide[s] a
concrete action that must occur in the event certain criteria are met.” 88 Fed Reg at 66,615.

26 ¹⁴ The preamble, which starts at page 66,558 of volume 88 of the Federal Register, can be
found here: <https://www.govinfo.gov/content/pkg/FR-2023-09-27/pdf/2023-20219.pdf>

1 401 Certification *unilaterally*, and also allows DEQ to revoke the Certification, both in
2 violation of 40 CFR § 121.10.¹⁵

3 DEQ also suggests that it may still revoke or unilaterally modify the NEXT 401
4 Certification without violating EPA’s regulations because 40 CFR § 121.10 doesn’t cover the
5 full range of modifications and revocations of 401 certifications. *See* DEQ SJ Mot. at 12.
6 Putting aside for a moment that this would render 40 CFR § 121.10 entirely ineffectual,
7 DEQ’s argument ignores the text of the regulation, which plainly conditions a certifying
8 authority’s ability to modify a 401 certification on the consent of the relevant federal agency
9 (here, the Corps). *See* 40 CFR § 121.10(a) (“*Provided that ...*”) (emphasis added). Simply
10 put, a law that says “provided you get X’s consent, you may do Y” necessarily prohibits
11 doing Y without first getting X’s consent.¹⁶

12 *3. 40 CFR § 121.10 Is Consistent with the Clean Water Act.*

13 DEQ next argues that, to the extent 40 CFR § 121.10 does bar the Reopener
14 Condition, the regulation “is contrary to the expressed intent of the CWA.” DEQ SJ Mot. at
15 12. In support of this argument, DEQ cites (1) the Clean Water Act’s broad statement of
16

17 ¹⁵ To the extent that 40 CFR § 121.10 is ambiguous, EPA’s interpretation is entitled to
18 deference by this Court. *See E. Or. Mining Ass’n v. DEQ*, 365 Or 313, 352–53, 445 P3d 251
19 (2019) (explaining how federal agencies’ interpretations of their own regulations deserve
20 deference); *United States v. Trumbull*, 114 F4th 1114, 1118 n.2 (9th Cir 2024) (reaffirming
21 principles of agency deference). The preamble to the current regulations is the best place to
22 find EPA’s interpretation of 40 CFR § 121.10. *See, e.g., E. Or. Mining Ass’n*, 365 Or at 334–
23 38 (interpreting federal regulations by looking at rulemaking preambles). And it is crystal
24 clear from the preamble that the challenged Reopener Condition is not allowed under 40 CFR
25 § 121.10. *See* 88 Fed Reg at 66,630 (“while the statutory language and legislative history
26 appear to countenance a role for certifying authorities after a certification is issued, EPA
concludes that this role does not include unilateral action to revoke or reverse the decision”),
id. at 66,632 (“EPA’s final rule does not authorize certifying authorities to unilaterally ...
modify a certification decision. This holds true regardless of whether a certifying authority
has inserted language into its grant of certification asserting this extra power.”).

¹⁶ DEQ does not have an agreement with the Corps that would allow DEQ to modify the
Certification. Ex. 36 at 4.

1 policy and (2) section 401(d)'s allowance of limitations and monitoring requirements in
2 certifications. DEQ SJ Mot. at 12. But 40 CFR § 121.10 is not contrary to either of those
3 provisions. The Clean Water Act's broad statement of policy is just that—a statement of
4 policy; it does not require interpreting every sentence in the statute in such a way as to
5 advance that policy. *See Hensen v. Santander Consumer USA Inc.*, 582 US 79, 89, 137 S Ct
6 1718, 198 L Ed 2d 177 (2017) (“[I]t is quite mistaken to assume ... that whatever might
7 appear to further the statute's primary objective must be the law.”) (cleaned up). And section
8 401(d)'s allowance of conditions in 401 certifications does not mean, of course, that any and
9 all 401 certification conditions are valid.

10 DEQ ignores that Congress has given EPA explicit authority “to prescribe such
11 regulations as are necessary to carry out [its] functions under” the Clean Water Act. 33 USC
12 § 1361(a); *see also N.Y. State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n*,
13 884 F3d 450, 455 (2d Cir 2018) (discussing how EPA administers the Clean Water Act,
14 including section 401). EPA's 401 regulations were promulgated pursuant to that authority,
15 and they serve to “fill up the details” of the Clean Water Act. *See Loper Bright Enters. v.*
16 *Raimondo*, 603 US 369, 395, 144 S Ct 2244, 219 L Ed 2d 832 (2024) (discussing how some
17 statutes “empower an agency to prescribe rules to fill up the details of a statutory scheme”)
18 (citation and internal quotation marks omitted). Whatever its merits, 40 CFR § 122.10 is not
19 contrary to the Clean Water Act in general or section 401 in particular; rather, it is “a
20 permissible exercise[] of th[e] delegated authority” Congress gave to EPA. *Nat'l Ass'n of*
21 *Broads. v. FCC*, 147 F4th 978, 1007 (D.C. Cir 2025).

22 *4. The Court Cannot Simply “Excise” the Reopener Condition.*

23 Finally, DEQ argues that the Court should simply “excise” the Reopener Condition if
24 it is found to be invalid, and that there is “no basis for [the] argument that the whole
25 certification is invalid if one condition is.” DEQ SJ Mot. at 13. This ignores that DEQ has
26 determined that the Reopener Condition—like all conditions in the Certification—is

1 “necessary” to assure that the NEXT Refinery does not violate water quality-related legal
2 requirements. *See* OAR 340-0448-0042(5)(g) (requiring DEQ to include “conditions the
3 [agency] determines are necessary to assure compliance ...”); *see also* 33 USC § 1341(d)
4 (requiring a certifying authority to include conditions in a certification that are “necessary to
5 assure” compliance with water quality-related laws). “[T]he word ‘necessary,’ without more,
6 is stringent.” *Vorchheimer v. Philadelphian Owners Ass’n*, 903 F3d 100, 106 (3d Cir 2018).
7 “[W]hen Congress wants to loosen necessity to mean just ‘sufficiently important,’ it uses the
8 phrase ‘reasonably necessary.’ Or it pairs ‘necessary’ with a looser term to include what is
9 merely fitting or preferable.” *Id.* at 107 (citation omitted). But “necessary,” standing alone,
10 suggests that whatever is “necessary” is truly *required*. And “[e]ven the most inclusive
11 dictionary definition of ‘necessary’ requires that the subject be ‘essential,’ or ‘not to be
12 dispensed with without loss, damage, inefficiency, or the like,’ which is more demanding
13 than ‘useful.’” *State v. Jackson*, 369 Or 510, 523, 508 P3d 457 (2022) (quoting *Webster’s*
14 *Second New Int’l Dictionary* 1635 (unabridged ed. 1935)).

15 Because the Reopener Condition is essential to DEQ’s bottom-line certification
16 decision, the invalidity of that condition invalidates the Certification as a whole. By way of
17 analogy, imagine that a parent decides that they are reasonably assured that it is safe for their
18 16-year-old child to drive herself to the movies, provided that three conditions are met: (1)
19 she wears a seatbelt, (2) she brings a cell phone, and (3) she comes home by 11 pm. Now
20 imagine that it turns out that the movie the child wants to see ends at 11:30 pm. The 11 pm
21 condition cannot simply be “excised,” because the ultimate decision made by the parent
22 relies on that condition being satisfied. Rather, the impossibility of that condition being
23 satisfied undermines the entire decision; the only thing for the parent to do is to reevaluate
24 whether some *other* conditions—like requiring the child to call home as soon as the movie is
25 over—might be sufficient to assure safety. So too here: the NEXT 401 Certification must be
26

1 set aside and reversed, and DEQ must determine what other (lawful) conditions are
2 “necessary to assure” compliance with water quality-related legal requirements.

3 With the Reopener Condition, DEQ has tried to “‘bootstrap’ [itself] greater authority
4 to modify a certification beyond what is authorized in” EPA’s regulations. 88 Fed Reg at
5 66,615. While DEQ’s desire for more control in the event of changed circumstances is
6 understandable, the Reopener Condition is not the way to go about retaining such control—in
7 fact, it is unenforceable and would leave DEQ unable to respond to unexpected water quality
8 problems. Because all conditions in a 401 certification are “necessary to assure” that water
9 quality standards are not violated, the invalidity of the Reopener Condition renders the entire
10 Certification defective. DEQ must go back and add enforceable adaptive management
11 conditions sufficient to ensure that future water quality problems and other contingencies can
12 be addressed.

13 **E. Proper Remedy.**

14 The Court should grant Petitioners’ motion for partial summary judgment and deny
15 DEQ’s cross-motion for summary judgment. If the Court does so, the next question will be
16 what relief to grant to Petitioners. Under the Oregon Administrative Procedures Act, this
17 Court “shall provide whatever relief is appropriate,” and may “[o]rder agency action required
18 by law, order agency exercise of discretion when required by law, set aside agency action,
19 [or] remand the case for further agency proceedings.” ORS 183.486(1), (1)(a).

20 The vital thing in this case is that the Certification be deprived of legal effect pending
21 new action by DEQ. The cleanest way for the Court to do this is to set aside/reverse the
22 Certification and order DEQ to deny (without prejudice) NEXT’s request for certification.
23 Such relief is appropriate in light of the legal errors made by DEQ.¹⁷ See ORS 183.484(5)(a);
24

25 ¹⁷ If the Court sets aside the Certification, it must first “make special findings of fact based
26 upon the evidence in the record and conclusions of law indicating clearly all aspects in which
the agency’s order is erroneous.” ORS 183.484(6). If the Court decides to set aside the

1 *see also Kasliner v. Dep't of Human Servs., Child Welfare Servs.*, 330 Or App 85, 100 n.15,
2 543 P3d 131 (2024) (“[W]e conclude that ‘revers[ing]’ an agency’s order includes ‘set[ting]
3 aside’ that order.”).

4 If, however, the Court is inclined to remand to DEQ rather than set aside/reverse the
5 Certification, it should make clear that the Certification has no legal effect until DEQ
6 completes its proceedings on remand. *See Gunderson, LLC v. City of Portland*, 243 Or App
7 612, 635, 259 P3d 1007 (2011) (discussing the legal effect of a remand). In fact, to avoid any
8 uncertainty, the Court should explicitly order that the Certification has no legal effect until
9 such time as it is modified or reissued by DEQ on remand. *See* ORS 183.486(2) (allowing the
10 Court to “make such interlocutory order as the court finds necessary to preserve the interests
11 of any party and the public pending further proceedings or agency action”).

12 If the Court decides to award relief that renders the Certification legally void, it is
13 very likely that the remaining grounds of error asserted in the Amended Petition will be
14 rendered moot. In other words, there would probably be no occasion to litigate those other
15 grounds of error, because Petitioners would have already received complete relief. *See*
16 *Gunderson, LLC*, 243 Or App at 635 (concluding that it was not error for the Land Use
17 Board of Appeals to decline to reach certain grounds of error when it was already remanding
18 for other reasons).

19 **III. Conclusion.**

20 As explained in Petitioners’ summary-judgment motion and in this response to
21 DEQ’s summary-judgment motion, DEQ’s Clean Water Act Section 401 Certification for the
22 NEXT Refinery rests on at least four legal errors. Accordingly, the Court should grant
23 Petitioners’ motion, deny DEQ’s motion, set aside/reverse the Certification, and order DEQ
24 to deny NEXT’s request for 401 certification.

25 _____
26 Certification, Petitioners ask that they be given a chance to submit to the Court proposed
findings of fact (which will be undisputed facts) and conclusions of law.

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Dated: November 7, 2025

Respectfully submitted,

/s/ Andrew R. Missel

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1 **CERTIFICATE OF SERVICE**

2 I certify that on November 7, 2025, I served the foregoing Petitioners' Response to
3 Respondent's Cross-Motion for Summary Judgment and Reply in Support of Their Motion
4 for Partial Summary Judgment on Purely Legal Issues upon the parties to this case by email.
5 Service was accomplished at the following email addresses:

6
7 **Respondent:**

8 Tracy White

9 Jane Kim

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19 Dated: November 7, 2025

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