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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES, Plaintiff, v. CITY OF MEDFORD, Defendant.	Case No.: 1:18-cv-00856-CL **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **Oral Argument Requested**

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MOTION

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Northwest Environmental Advocates ("NWEA") hereby moves the Court for an order granting it summary judgment on the issue of Defendant City of Medford's liability for all three claims alleged in NWEA's complaint. Pursuant to the Court's bifurcation order (Dkt. #9), all remedy issues are reserved for subsequent discovery and briefing.

In compliance with Local Rule 7–1(a), the parties made a good faith effort through both personal and telephone conferences to resolve this dispute, but have been unable to do so.

MEMORANDUM OF LAW

INTRODUCTION AND BACKGROUND

Nutrient pollution is "one of America's most widespread, costly and challenging environmental problems," according to the U.S. Environmental Protection Agency ("EPA").[1] Nutrient pollution occurs when excess nitrogen and phosphorus enters a waterway, causing the rapid growth of algae and aquatic vegetation that can degrade

[1] EPA, Nutrient Pollution, at https://www.epa.gov/nutrientpollution/issue (last checked January 21, 2021); *see also* State-EPA Nutrient Innovations Task Group, An Urgent Call to Action (August 2009) at 1, *available at* https://www.epa.gov/nutrient-policy-data/reports-nutrient-pollution (last checked January 21, 2021) (describing the "growing environmental crisis" of nutrient pollution).

water quality and aquatic habitat, reduced dissolved oxygen, and threaten drinking water supplies. There is nothing new about this threat; the causes and ecological effects of nutrient pollution have been studied for decades, and advanced wastewater treatment systems to reduce or eliminate both nitrogen and phosphorus were long ago proven to be both effective and affordable for municipalities around the nation.

On the southern bank of the Rogue River, about four miles north of the City of Medford, Oregon, lies the City's Regional Water Reclamation Facility ("RWRF"), a large wastewater treatment plant that receives and partially treats an average of 20 million gallons per day of municipal sewerage prior to discharging it into the river. That pollutant discharge is authorized and regulated by a permit issued by the Oregon Department of Environmental Quality ("Oregon DEQ") pursuant to the national pollutant discharge elimination system ("NPDES") established by Section 402 of the Clean Water Act, 33 U.S.C. § 1342. But the minimal amount of treatment provided by the plant—which uses century-old technology that predates the passage of the Clean Water Act—fails to remove or even meaningfully reduce the amount of nutrients that are ultimately discharged to the Rogue River. Those excess nutrients, in turn, are the primary driver of myriad adverse ecological impacts to the downstream river system, which include the proliferation of nuisance algae and submersed aquatic vegetation and detrimental changes to the native macroinvertebrate community, among others.

Both Medford and Oregon DEQ have long known about this rampant pollution problem, but have failed to act—claiming a lack of information about the scope of the pollution or its potential causes. Yet between the years 2013 and 2019, at least six field studies were performed on the Rogue River just downstream from Medford's RWRF in an attempt to understand the extent to which the facility's discharges were harming the river's ecosystem. These studies were performed by or at the request of local fly-fishing groups, Oregon DEQ, NWEA and its members, and even the City of Medford itself, and they studied a host of common indicators of water quality impairment including water chemistry, macroinvertebrate diversity and abundance, nuisance algae growth, and submersed aquatic vegetation. All of the studies identified significant degradation to the river's native biota downstream of the RWRF's outfall, and all of them identify (to varying degrees) the facility's discharges of nitrogen and phosphorus as the primary cause of that degradation.

NWEA's expert Rick Hafele—who in his 40+ year career as an aquatic biologist (including 22 years at Oregon DEQ) has performed dozens of stream surveys—testifies that he "cannot think of a river or stream with more compelling and well-documented evidence of biological impairment than exists in the Rogue River below the Medford RWRF." Hafele Decl. ¶ 77. DEQ's current lead staff for stream assessment believes that "there is ample evidence that the Medford WWTP is impacting biological

conditions outside of the mixing zone, in violation of the biocriteria standard." Saul Decl. Ex. 8 at NWEA_DEQ_000283.[2] Even Medford's own expert witness agrees, stating in his report that nutrient discharges from the Medford RWRF "contribute to local effects on the resident biological community that represent a shift away from the biological community that would be otherwise attainable." Saul Decl. Ex. 10 at 49.

And so, given the overwhelming weight of this evidence, the City of Medford finally stipulated in response to this litigation that "effluent discharges from the Facility are contributing to exceedances of Oregon's biocriteria standard (OAR 340-041-0011) in the Rogue River downstream of the regulatory mixing zone identified in the Permit." Saul Decl. Ex. 3, ¶ 2. And although the City preserves its right to quibble about "the magnitude or geographic or seasonal extent of its contribution to such exceedances[,]" *id.*, ultimately it cannot hide from the fact that its uncontrolled and

[2] Shannon Hubler—the author of DEQ's "Rogue River Algae Reconnaissance" conducted in 2013-14 in the vicinity of the Medford RWRF— is DEQ's current "biocriteria staff lead person" responsible for biological stream assessments in Oregon. Saul Decl. Ex. 4, Wigal Dep. 6:19–20, 9:9–21. Mr. Hubler was so frustrated by the agency's inaction with respect to Medford's pollution of the Rogue River that he wrote his supervisors a formal "Professional Difference of Opinion" memorandum that called out DEQ's failure to address the "unmistakable biological impairments" below the Medford RWRF, and rightly criticized the agency for "being less than straightforward, especially given the clarity of the data." Saul Decl. Ex. 8 at NWEA_DEQ_000279, NWEA_DEQ_000281.

excessive nutrient discharges are in violation of Oregon water quality standards, its NPDES Permit, and the Clean Water Act.

LEGAL BACKGROUND

I. The Summary Judgment Standard Under Rule 56

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In resolving a motion for summary judgment, the Court "evaluates all of the evidence presented, and any reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party." *Or. State Pub. Interest Research Group, Inc. v. Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1238 (D. Or. 2005) (citing *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1140 (9th Cir. 2003)).

II. Water Quality Standards and NPDES Permits Under the Clean Water Act

The overarching purpose of the federal Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to achieve that purpose the Act broadly prohibits the discharge of pollutants from any point source (e.g., a pipe or other conduit) to navigable waters. 33 U.S.C. §§ 1251(a), 1311(a). However, point sources may become authorized to discharge pollutants by a

permit issued pursuant to the National Pollutant Discharge Elimination System ("NPDES"), *id*. § 1342, but such permits may only be issued where they include conditions that, among other things, "ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d).

The Clean Water Act also requires the states to adopt and implement water quality standards for all surface waters within their borders, consisting primarily of specific "designated uses" for each water and narrative or numeric water quality criteria intended to protect those uses. 33 U.S.C. § 1313(a), (c)(2); *see also Nw. Envtl. Advocates v. U.S. Envtl. Protection Agency*, 855 F. Supp. 2d 1199, 1205 (D. Or. 2012) (describing the purpose and function of water quality standards under the Clean Water Act). Oregon's water quality standards are codified at OAR 340-041-0001 *et seq*., and they include two standards that are relevant to this case: A narrative biological conditions criterion that Oregon DEQ calls the "biocriteria" (OAR 340-041-0011), and a suite of statewide narrative criteria focused on aesthetic and other conditions important for human health and aquatic life (OAR 340-041-0007).

State water quality standards are implemented through NPDES permits, thereby becoming a "part of the federal law of water pollution control." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). NPDES permits may include numeric effluent limitations, narrative conditions or limitations, or both, as necessary to ensure compliance with

water quality standards. *See* 40 C.F.R. § 122.44(d)(1) (requiring NPDES permits to include effluent limitations as necessary to achieve state water quality standards, "including State narrative criteria for water quality").

III. Citizen Suits Under the Clean Water Act

A violation of any term or condition of an NPDES permit is a violation of the Clean Water Act that is subject to enforcement under the Act's citizen suit provision. 33 U.S.C. § 1365. That provision authorizes "any citizen" to commence a civil action "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under" the Act. 33 U.S.C. § 1365(a)(1)(A). The phrase "effluent standard or limitation" is further defined to include "a permit or condition of a permit issued under" Section 402 of the Act—that is, an NPDES permit. *Id.* § 1365(f)(7); *see also* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for [an] enforcement action"); *Citizens for a Better Env't v. Union Oil Co. of California*, 83 F.3d 1111, 1119 (9th Cir. 1996), *as amended* (July 16, 1996) ("Thus, violation of the limits specified in an NPDES permit is a violation of 'an effluent standard or limitation' within the meaning of § 1365.").

States can become authorized by EPA to issue NPDES permits within their borders, *see* 33 U.S.C. § 1342(b), and the terms, conditions, and limitations in such state-issued NPDES permits are also federally enforceable via the Act's citizen suit

provision. *Nw. Envtl. Advocates v. City of Portland,* 56 F.3d 979, 988 (9th Cir. 1995) ("The Supreme Court has acknowledged citizen standing under CWA § 505(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated effluent limitations and state-established standards."). *See also Waterkeepers of N. California v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 916 (9th Cir. 2004); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1145 (9th Cir. 2000) (both involving federal citizen suit enforcement of state-issued NPDES permits).

Upon finding a party liable for Clean Water Act violations, district courts are authorized to impose "any appropriate civil penalties" under the Act, 33 U.S.C. § 1319(d), and to "enforce such effluent standard or limitation" through appropriate injunctive relief. *Id.* § 1365(a).[3] Further, courts may award "costs of litigation (including reasonable attorney and expert witness fees)" to a prevailing or substantially prevailing party. *Id.* § 1365(d); *Saint John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1064 (9th Cir. 2009).

[3] NWEA and the City of Medford entered a partial settlement agreement on May 28, 2019, as amended on April 27, 2020, that, among other things, resolved NWEA's claim for civil penalties for all claims alleged in the complaint as well as NWEA's claim for costs of litigation incurred through May 15, 2020. That settlement agreement does not resolve NWEA's claims for injunctive relief or any remedy other than penalties, nor does it resolve NWEA's claim for costs and fees incurred after May 15, 2020.

ARGUMENT

I. NWEA Satisfies All Jurisdictional Prerequisites to Suit

A. NWEA has Standing to Sue Under Article III

To satisfy the Article III standing requirements, a party must demonstrate that it "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). An organization has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Com'n*, 432 U.S. 333, 343 (1977); *see also Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000).

An individual has standing to sue in his own right under Article III if he (1) has suffered an "injury in fact," that is (2) fairly traceable to the challenged conduct; and that is (3) likely to be redressed by a favorable decision from the court. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014); *see also Laidlaw*, 528 U.S. at 180–81. Injury in fact is established by "showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has suffered or will suffer in his or her degree of aesthetic or

recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859–60 (9th Cir. 2005). Even the threat of environmental harm to specific areas a plaintiff uses is sufficient to establish injury in fact. *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992).

Here, the protection of the Rogue River under the Clean Water Act is germane to NWEA's mission to protect and restore water and air quality, wetlands, and wildlife habitat in the Northwest through advocacy, education, and litigation. Bell Decl. ¶¶ 3–11. And individual member involvement is not required, nor would it aid, in the resolution of this case. Furthermore, as demonstrated below, several NWEA members have standing to sue in their own right. *See* Bell Dec. ¶¶ 12–14.

As long-time users of the Rogue River, Robert Hunter and John MacDiarmid face ongoing injuries to their recreational and aesthetic values. Mr. Hunter is a long-time resident of Eagle Point, Oregon just eight miles north of Medford, Oregon and three miles east of the Rogue River. Hunter Decl. ¶ 2. Mr. MacDiarmid has lived in Jackson County, just north of Medford, Oregon, for approximately 23 years. MacDiarmid Decl. ¶ 2. Both members are avid fishermen and often fish the Middle Rogue River near, and downstream from, Medford's RWRF. MacDiarmid Decl. ¶¶ 4–5; Hunter Decl. ¶¶ 4, 10. Both members are avid river conservationists who have

committed much personal time and effort to protecting the Rogue River. MacDiarmid Decl. ¶ 9; Hunter Decl. ¶ 5. Both Mr. MacDiarmid and Mr. Hunter have strong interests in a clean and healthy Rogue River capable of providing excellent fishing opportunities. MacDiarmid Decl. ¶¶ 4–8; Hunter Decl. ¶¶ 4–10.

The legally protected interests of these two NWEA members are harmed by the pollutant discharges from the Medford RWRF. Both Mr. Hunter and Mr. MacDiarmid frequently observe the RWRF's visibly discolored, foamy effluent, smell a foul odor near the outfall, and see a sustained, unsightly effluent plume that extends nearly a quarter-mile downstream. MacDiarmid Decl. ¶ 13; Hunter Decl. ¶ 13. Both frequently observe the unnatural nuisance algae on the surface of the river, on river rocks, and on river gravel. MacDiarmid Decl. ¶ 14; Hunter Decl. ¶ 14. The algae and weed growth and other results from Medford's nutrient discharges degrade salmon and steelhead habitat downstream, and significantly diminishes both members' recreational and aesthetic enjoyment when fishing or floating this section of the river. MacDiarmid Decl. ¶¶13–21; Hunter Decl. ¶¶11–15.

Further, the aesthetic, recreational, and other injuries sustained by Mr. MacDiarmid and Mr. Hunter are fairly traceable to Medford's pollutant discharges. Both members aver how the aesthetic and ecological conditions of the Rogue River noticeably change for the worse downstream from the RWRF, and that the facility's

nutrient discharges in particular are driving those changes. MacDiarmid Decl. ¶¶ 11–21; Hunter Decl. ¶¶ 8–17. Finally, their injuries would be redressed by a favorable decision by the Court requiring Medford to improve the quality of its discharge by reducing or eliminating its excessive nutrient discharges. MacDiarmid Decl. ¶¶ 21–22; Hunter Decl. ¶¶ 16–18. Accordingly, NWA has Article III standing to sue in this case.

B. NWEA has Satisfied the Clean Water Act's Pre-Suit Notice Requirements

The Clean Water Act's citizen suit provision requires plaintiffs to give at least 60 days advance notice to defendants of their intent to file suit. 33 U.S.C. § 1365(b); *see Hallstrom v. Tillamook County*, 493 U.S. 20, 26 (1989) (construing the Act's notice requirement). Such notice "must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit." *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 996 (9th Cir. 2000) (quoting *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997)).

NWEA satisfied its pre-suit notice obligations here by letter dated October 26, 2017, which informed Medford of the legal and factual basis for each of the three claims ultimately alleged in NWEA's complaint. Saul Decl. Ex. 1. That letter identified with specificity the history and mechanism of Medford's ongoing contributions to the downstream biocriteria violations; the specific dates and observations of its

contributions to the statewide narrative water quality criteria; and the basis for alleging Medford's failure to minimize or prevent the long-documented adverse effects to the Rogue River, all of which are violations of Medford's NPDES Permit. *Id.* The Court, therefore, has subject matter jurisdiction over each of NWEA's claims.

C. NWEA Alleges Ongoing Violations of the Clean Water Act

As a final prerequisite to suit, NWEA has alleged—and, as shown below, has proven—ongoing violations of the Clean Water Act. The Act does not authorize suit for "wholly past" violations; instead, it "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation." *Southwest Marine*, 236 F.3d at 998 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987)). But only where the defendant has achieved a permanent "state of compliance" can it defeat jurisdiction; citizen suits may still be prosecuted where the defendant's "past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated." *Id*. at 69 (Scalia, J., concurring).

Here, the City of Medford remains in a state of non-compliance because it has not abated its nutrient discharges that are contributing to the in-stream biocriteria and narrative criteria violations in the Rogue River. *See* Hafele Decl. at ¶¶ 61–79. Moreover, Medford stipulated on May 8, 2019—a year after the complaint was filed in this case—

that its discharges "are contributing to" (i.e., in the present tense) "exceedances of Oregon's biocriteria standard" in the Rogue River downstream of the discharge. Saul Decl. Ex. 3 at ¶ 2. This is sufficient to show that NWEA has alleged ongoing violations of the Clean Water Act.

II. The City of Medford has Violated, and Continues to Violate, its NPDES Permit and the Clean Water Act

As shown below, Medford has violated and continues to violate several provisions of its NPDES Permit—and will continue to do so unless and until it is enjoined from further violations by the Court.

A. Medford's NPDES Permit Unambiguously Prohibits it from Discharging Wastes that Cause or Contribute to a Violation of Applicable State Water Quality Standards

In 2011, DEQ issued to Medford an NPDES Permit that authorizes the discharge of treated wastewater from the RWRF to the Middle Rogue River near Central Point, Oregon. Saul Decl. Ex. 2.[4] Medford's Permit includes several numeric effluent limitations that were intended to achieve compliance with applicable technology-based

[4] DEQ has issued several modifications to Medford's Permit since 2011, but they did not alter the substantive permit provisions at issue here. Although Medford's Permit expired in 2016, it remains "administratively extended" (and therefore in full force and effect) because Medford timely submitted to DEQ an application for a new permit prior to the expiration date.

standards as well as certain Oregon water quality standards, in addition to various monitoring and reporting requirements.[5]

Medford's Permit does not include any numeric limitations specifically intended to ensure compliance with Oregon's biocriteria (OAR 340-041-0011) or state-wide narrative criteria (OAR 340-041-0007), which are applicable to all waters of the State including the Rogue River. Instead, the Permit includes a narrative condition that expressly prohibits any discharges from the RWRF that "cause or contribute to a violation of water quality standards" outside of an allowed mixing zone, which is defined in the permit as a 31,000 square foot rectangle in the vicinity of the RWRF's outfall, extending 300 feet downstream from it:

> No wastes may be discharged or activities conducted that **cause or contribute to a violation of water quality standards** in OAR 340-041 applicable to the Rogue Basin except as provided for in OAR 340-045-0080 and the following regulatory mixing zone:
>
> The allowable mixing zone is that portion of the Rogue River contained within a band extending out 100 feet from the south bank of the river and extending from a point 10 feet upstream of the outfall to a point 300 feet downstream from the outfall. The Zone of Immediate Dilution (ZID) is defined as that portion of the

[5] In general, all NPDES permits will include one or more "technology-based effluent limitations" that are typically derived from EPA-promulgated and nationally applicable performance standards. Where such uniform, technology-based standards are insufficient to ensure compliance with the receiving water's applicable water quality standards, the permit must also contain additional and more stringent "water quality-based effluent limitations." *See, e.g., Waterkeeper Alliance, Inc. v. U.S. Envtl. Protection Agency*, 399 F.3d 486, 491 (2d Cir. 2005). Those effluent limitations may come in numeric or narrative form.

> allowable mixing zone that is within 2 feet upstream to 30 feet downstream of the point of discharge.

Saul Decl. Ex. 2, NPDES Permit, at 5, Schedule A, Condition 1.e. (emphasis added). This unambiguous narrative prohibition is enforceable by NWEA in this citizen suit.

The Ninth Circuit held long ago, in another case litigated by NWEA, that citizens may bring a Clean Water Act citizen suit to enforce narrative provisions in NPDES permits that require compliance with state water quality standards—even if those standards have not been converted into site-specific, numeric effluent limitations. *City of Portland*, 56 F.3d at 990.[6] The Ninth Circuit held that the "plain language of CWA § 505 authorizes citizens to enforce all permit conditions" including "the broad narrative criteria contained in water quality standards." *Id*. at 987 (citing *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 715 (1994)) (emphasis in original). Drawing upon the Act's legislative history and U.S. Supreme Court precedent, the *City of Portland* court noted certain water quality standards simply "cannot be expressed quantitatively, such as those that apply . . . to bacterial pollution, aesthetic conditions, and objectionable matter" and that without an enforcement

[6] The permit language enforced by NWEA in the *City of Portland* case was nearly identical to Condition 1.e. in Medford's Permit, stating in pertinent part that "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in OAR 340–41–445 except in the following defined mixing zone[.]" 56 F.3d 979 at 985.

mechanism, such narrative standards would be rendered meaningless—contrary to the Act's purpose and policy objectives. 56 F.3d at 989. *See also Jefferson County*, 511 at 700 (holding that the Clean Water Act "permits enforcement of broad, narrative criteria based on, for example, 'aesthetics.'"); *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 673 F.3d 880, 896 (9th Cir. 2011), *rev'd on other grounds sub nom. Los Angeles Cty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78 (2013) (reiterating the key holding of *City of Portland*, and noting that "each permit term is simply enforced as written").

Consistent with that Supreme Court and Ninth Circuit precedent, a number of district courts have found NPDES-permitted facilities liable for Clean Water Act violations where evidence showed that their discharges caused or contributed to in-stream violations or exceedances of state water quality standards. *See, e.g., Santa Monica Baykeeper v. Int'l Metals Ekco, Ltd.*, 619 F. Supp. 2d 936, 948 (C.D. Cal. 2009); *Cal. Sportfishing Prot. All. v. River City Waste Recyclers, LLC*, 205 F. Supp. 3d 1128, 1151 (E.D. Cal. 2016). Indeed, several analogous citizen suits have been prosecuted where the defendant was held liable for "causing or contributing to" in-stream violations of a state's narrative biological conditions criterion. *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chicago*, 175 F. Supp. 3d 1041, 1051 (N.D. Ill. 2016); *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673, 699 (S.D.W. Va. 2015), *aff'd* 845 F.3d 133 (4th Cir. 2017).

Here, although it concedes the ultimate fact that its discharges contribute to downstream violations of Oregon's biocriteria water quality standard, Medford has preserved its right to

> assert as a defense (whether affirmative or otherwise) that (a) the Permit does not prohibit the City from causing or contributing to biocriteria exceedances in the Rogue River and (b) any contribution to biocriteria exceedances is allowed pursuant to OAR 340-045-0080 and the Clean Water Act's permit shield, 33 U.S.C. § 1342(k).

Saul Decl. Ex. 3 at ¶ 4. Presumably, Medford will assert such defenses in its own summary judgment briefing, and if it does NWEA will respond accordingly; but suffice it to say that nothing in OAR 340-045-0080 "allows" Medford to violate Oregon's water quality standards. In fact, that same regulation goes on to state that:

> Nothing in this rule prevents DEQ from instituting any proceeding against a permittee **for violating ambient water quality standards, outside of any applicable mixing zone**, in effect at the time the permit issued, that are not implemented through an effluent limitation.

Id. at 340-045-0080(4) (emphasis added). Although that subsection expressly references DEQ enforcement, there is no reason why citizen suit enforcement would be treated any differently; indeed, as the Ninth Circuit has noted, "nothing in the language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens from enforcing the same conditions of a certificate or permit that a State may enforce." *City of Portland*, 56 F.3d at 988.

Any permit shield or similar defense asserted by Medford must fail. As the Northern District of Illinois recently held "the entire point of the permit shield is to insulate polluters who are in compliance with their permit; it is not a license to violate the express terms of the permit." *Metro. Water Reclamation Dist. of Greater Chicago*, 175 F. Supp. 3d at 1051. *See also Fola Coal*, 82 F. Supp. 3d at 679 (rejecting a similar permit shield defense and noting that, "quite simply, permit holders are obliged under the law to comply with numeric and narrative water quality standards."). Here, Schedule A, Condition 1.e. of Medford's Permit unambiguously requires compliance with all applicable water quality standards; that provision is enforceable as written, and Medford is not entitled to a permit shield defense.

B. Medford's Pollutant Discharges have Caused or Contributed to Violations of Oregon's "Biocriteria" Water Quality Standard.

Oregon DEQ has promulgated a narrative biological conditions criterion, called the "biocriteria," which states as follows: "Waters of the State must be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities." OAR 340-041-0011. The phrase "without detrimental changes" means "no loss of ecological integrity when compared to natural conditions at an appropriate reference site or region." OAR 340-041-0002. DEQ acknowledges that such detrimental changes "are a form of pollution," and consistent with EPA recommendations, uses "biological community assessments as an indicator for aquatic

life beneficial use support." Saul Decl. Ex. 11, 2018 Oregon 303(d) Listing Methodology, at NWEA000400.[7] DEQ has explicitly endorsed the use of study designs that examine "upstream-downstream changes in macroinvertebrate community composition and function" as a means of assessing compliance with the biocriteria. *Id.* at NWEA000403.

Medford has stipulated "for purposes of this litigation that effluent discharges from the Facility are contributing to exceedances of Oregon's biocriteria standard (OAR 340-041-0011) in the Rogue River downstream of the regulatory mixing zone identified in the Permit." Saul Decl. Ex. 3, ¶ 2. There is no temporal limitation to that stipulation, but Medford retained the right to dispute "the magnitude [and] geographic or seasonal extent of its contribution to such exceedances." *Id.*[8] This admission is all that is required to find Medford liable for NWEA's first claim for relief.

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[7] DEQ considered the November 2018 version of its 303(d) Listing Methodology to be a draft pending approval by EPA. *See* Saul Decl. Ex. 4, Wigal Dep. 104:17–105:21. A newer, "final" version of the 2018 Oregon 303(d) Listing Methodology (dated October 2020) is available on DEQ's website at https://www.oregon.gov/deq/wq/Pages/epaApprovedIR.aspx (select "Submittal documents" and then "Final Assessment Methodology") (last checked January 21, 2021). With respect to Oregon's biocriteria and statewide narrative criteria, the two versions are substantially identical.

[8] The question of the "magnitude" and "geographic or seasonal extent" of Medford's contributions to the Rogue River's biocriteria exceedance is relevant, if at all, only to the question of remedy. Medford's Permit prohibits any such "contribution", regardless of size or extent, and the Clean Water Act is a strict liability statute that does not excuse rare or de minimis violations. *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491 (9th Cir. 1987), *judgment vacated on other grounds*, 485 U.S. 931 (1988). Still,

Nonetheless, the undisputed evidence of Medford's past and ongoing contributions to the existing in-stream violations of Oregon's biocriteria standard is remarkably comprehensive, and tells a discouraging story of Medford's and DEQ's years of inaction in the face of such evidence. First, NWEA's expert witness Richard Hafele—an aquatic biologist who worked for over 20 years for DEQ, drafting the State's biocriteria standard and performing dozens of stream assessments on the agency's behalf—found clear and convincing evidence of biocriteria violations downstream of the Medford RWRF when he surveyed the Rogue River in 2013, 2017, and 2018. Hafele Decl. ¶¶ 46–60. His testimony explains how Medford's discharges of nitrogen and phosphorus have caused widespread degradation in the Rogue River, including the proliferation of nuisance algae and aquatic vegetation and resulting adverse shifts in the native macroinvertebrate community. *Id.* ¶¶ 61–76. Mr. Hafele concludes his testimony by stating that he "cannot think of a river or stream with more compelling and well-documented evidence of biological impairment than exists in the Rogue River below the Medford RWRF." *Id.* ¶ 77.

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as NWEA's expert Richard Hafele has testified, Medford's contributions to the biocriteria violations are significant and occur on each day that the RWRF discharges nutrients to the Rogue River. *See* Hafele Dec. at ¶¶ 72–76.

Second, **every other person, agency, or entity** that has looked for detrimental changes in the resident biological communities in the Rogue River downstream from Medford's RWRF since 2013 has found them:

- **Oregon DEQ** concluded in a 2014 report that there are "detrimental changes in the resident biological communities for up to one mile below the Medford WWTP" and noted that "[t]he responses of the algal and macroinvertebrate assemblages were consistent with responses typically associated with nutrient enrichment." Saul Decl. Ex. 7, Hubler (2014), at NWEA000151.

- **Oregon DEQ's Jennifer Wigal**, on behalf of the agency pursuant to Fed. R. Civ. P. 30(b)(6), testified at her deposition that "we would agree that there is a biological impairment downstream of the [Medford] waste water treatment plant." Saul Decl. Ex. 4, Wigal Dep. at 42:1–14.

- **Oregon DEQ's current biocriteria lead staff Shannon Hubler** noted in 2014 that "there is clear evidence of a biocriteria violation 0.3 miles below" the RWRF "by means of detrimental changes in resident communities" and later wrote to his DEQ supervisors that "[i]n my professional opinion . . . there is ample evidence that the Medford [RWRF] is impacting biological conditions outside of the mixing zone, in violation of the biocriteria standard." Mr. Hubler reaffirmed his views at his deposition in 2019. Saul Decl. Ex. 6 at NWEA000064; Saul Decl. Ex. 8 at NWEA_DEQ_000283; Saul Decl. Ex. 7, Hubler Dep. at 76:24–77:13; 86:21–87:9.

- **The U.S. Environmental Protection Agency** added the "Middle Rogue River" (a segment that includes the RWRF outfall) to Oregon's list of "impaired waters" for biocriteria in 2018, pursuant to Section 303(d) of the Clean Water Act. Such an official designation means that the impaired segment of the river no longer meets the biocriteria standard.[9]

[9] *See* EPA, Partial Approval and Partial Disapproval of Oregon 2012 303d List, "Enclosure 4 (2018): EPA Additions to OR 2012 303d List (Excel)," *available at* https://www.epa.gov/tmdl/partial-approval-and-partial-disapproval-oregon-2012-303d-list. The accompanying Excel spreadsheet shows that the Middle Rogue River between river mile 110.7 and river mile 132.2 is listed year-round for biocriteria. *See*

- **Brown & Caldwell**, a professional engineering firm retained by the City of Medford, concluded in a 2014 report that "it appears likely that the effluent plume is discharging nutrient levels that could stimulate aquatic growth some distance from the [RWRF's regulatory mixing zone] to the complete mix condition" and noted that the number of macroinvertebrate taxa (taxa richness) "appears to be somewhat depressed downstream of the outfall." Saul Decl. Ex. 9, Brown & Caldwell (2014), at NWEA000116–117.

- **Dr. Noah Hume**, Medford's designated expert witness in this case for the liability phase, describes in his expert report (and may be called to testify about): (a) statistically significant, elevated nitrogen and phosphorus concentrations "at sites downstream of the RWRF outfall"; (b) "lower abundance and richness" of relevant indicator taxa "at least in one sampling location downstream of the RWRF, potentially indicating a localized response to the RWRF discharge" suggesting "both general perturbation and nutrient enrichment immediately downstream of the RWRF"; and (c) "nitrogen reductions from the RWRF as well as other upstream sources may reduce the potential for biostimulatory growth of algae in the Middle Rogue River both upstream and downstream of the RWRF." Saul Decl. Ex. 10, Hume Expert Report, at 40–41.

In short, even beyond Medford's stipulation, there is overwhelming and unrefuted evidence of a long-standing and ongoing violation of Oregon's biocriteria water quality standard in the Rogue River, downstream of Medford's RWRF and outside of its allowed regulatory mixing zone. Further, Medford's discharges of

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also Wigal Dep. 112:19–113:22 (discussing EPA's decision-making process). NWEA asks that the Court take judicial notice of EPA's December 20, 2018 decision to list the Middle Rogue River as impaired for the biocriteria water quality standard, as well as the other agency websites cited herein, pursuant to Fed. R. Evid. 201. *See, e.g., Century Indem. Co. v. Marine Group, LLC*, No. 3:08-CV-1375-AC, 2015 WL 5144330, at *2 (D. Or. Aug. 31, 2015) ("Government-agency websites, and the information contained therein, are matters of public record appropriate for judicial notice under Rule 201.").

nitrogen and phosphorus have and continue to "cause or contribute to" that ongoing biocriteria violation, which is a violation of Schedule A, Condition 1.e. of Medford's Permit and the Clean Water Act. NWEA is thus entitled to an order finding Medford liable for the violations alleged in claim one of its complaint.

C. Medford's Pollutant Discharges have Caused or Contributed to Violations of Oregon's Statewide Narrative Water Quality Criteria

DEQ has promulgated statewide narrative water quality criteria that are intended, in part, to protect aquatic life and ensure Oregon's rivers and streams remain free of pollution that have adverse aesthetic impacts.[10] Those criteria state in relevant part:

***

> (9) the development of fungi or other growths having a deleterious effect on stream bottoms, fish or other aquatic life, or that are injurious to health, recreation, or industry may not be allowed;
>
> (10) the creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish may not be allowed;
>
> (11) the formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry may not be allowed;

[10] According to DEQ's 2018 Oregon 303(d) Listing Methodology, the "statewide narrative criteria" are intended to protect nearly every DEQ-designated beneficial use, including aesthetic quality, boating, commercial navigation and transportation, fish and aquatic life, fishing;, public and private domestic water supply, and water contact recreation. Saul Decl. Ex. 11 at NWEA000373–375.

> (12) objectionable discoloration, scum, oily sheens, or floating solids, or coating of aquatic life with oil films may not be allowed;
>
> (13) aesthetic conditions offensive to the human senses of sight, taste, smell, or touch may not be allowed.
>
> ***

OAR 340-041-0007(9)–(13). As with the biocriteria, these statewide narrative water quality criteria are incorporated into and made enforceable by Schedule A, Condition 1.e. of Medford's Permit.

DEQ has acknowledged that compliance with the statewide narrative criteria may be assessed by a number of means, including "reports of excessive growths of invasive, non-native aquatic plants that dominate the assemblage in a water body and have a harmful effect on fish or aquatic life" or evidence showing "that algae . . . are causing other standards to be exceeded (e.g. pH, chlorophyll a, or dissolved oxygen) or impairing a beneficial use[.]" Saul Decl. Ex. 11, 2018 Oregon 303(d) Listing Methodology, at NWEA000393–394; NWEA000437.[11]

[11] These DEQ-sanctioned compliance methods are by way of example only; under the Clean Water Act, citizen suit plaintiffs may use any admissible evidence to support their claim of liability, especially those related to narrative permit conditions. *See, e.g., Domino v. Didion Ethanol, LLC,* 670 F. Supp. 2d 901, 909, 921 (W.D. Wis. 2009) (relying on witness testimony regarding observations of "floating solids discharging from defendant's pipe" to find defendant liable for violating an NPDES permit prohibition on the "discharge of floating solids or visible foam in other than trace amounts."); *Waterkeeper v. Formosa Plastics Corp.*, No. 6:17-CV-0047, 2019 WL 2716544, at *3–7 (S.D. Tex. June 27, 2019) (finding defendant had violated NPDES permit condition

Here, the following uncontroverted admissible evidence establishes that Medford is liable for violating Schedule A, Condition 1.e. of its Permit by discharging wastes that cause or contribute to Oregon's statewide narrative criteria in the Rogue River downstream of the RWRF's allowed mixing zone:

Nuisance Algae Growth (Violations of OAR 340-041-0007(9), (10), and (13)):

- Observations made by NWEA's expert witness Rick Hafele during each of his field sampling events in 2012, 2017, and 2018, in which he documented excessive growth of nuisance algae and macrophytes in the Rogue River downstream of the RWRF on each visit. Hafele Decl. at ¶¶ 45, 55 & Ex. 3, Hafele (2013), at 19.

- Observations documented in Brown & Caldwell (2014), a mixing zone report prepared on behalf of the City of Medford, in which it concluded that "the periphyton community downstream of the outfall is likely responding to nutrient enrichment, leading to greater density (but not greater biovolume) downstream of the outfall, and causing some shifts in the algal community." Saul Decl. Ex. 9, Brown & Caldwell (2014), at 5-22.

- Observations and analysis from DEQ's 2014 Rogue River Algae Reconnaissance, which states that "[a]t the site 0.3 miles below the [RWRF], algal density was high and macroinvertebrate diversity was low. . . . We also observed much higher densities of macrophytes in the main channel, downstream of the [RWRF], than we observed anywhere else in the study area. The responses of the algal and macroinvertebrate assemblages were consistent with responses typically associated with nutrient enrichment." Saul Decl. Ex. 7, Hubler (2014), at NWEA000151.

- Observations made by Medford's own expert witness, Dr. Noah Hume, who states in his expert report that the site 0.3 miles downstream from the Medford RWRF "showed signs of nuisance algal growth and reduced

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prohibiting the "discharge of floating solids or visible foam in other than trace amounts" based upon, inter alia, eyewitness testimony and photographs).

macroinvertebrate conditions" and whose "2018 study partially corroborated higher algae cover estimates and documented increased algal cell density and biovolume at locations downstream of the RWRF . . . with some potential for consequences to the aquatic food web." Saul Decl. Ex. 10, Hume Expert Report, at 24, 43.

- Testimony by NWEA member Robert Hunter, a fly-fisher who fishes on the Rogue River about 20 to 30 times per year, who states that he has seen "nuisance algae and weeds in the river and on the rocks downstream from the Medford Facility" and that he often observes "noticeably more nuisance algae and weeds in the river and along the river bottom." Hunter Decl. ¶¶ 13–14.

- Testimony by NWEA member John MacDiarmid, a local fly-fisher who fishes the Middle Rogue River near the Medford RWRF about 35 or 40 times per year, who for "many years" has observed "very apparent signs of water quality and habitat degradation immediately downstream of the Medford RWRF" such as "algae on the surface of the river, on river rocks, and on river gravels" as well as "mats of algae floating on the river surface[.]" MacDiarmid Decl. ¶ 14.

Visible Plume/Aesthetics (Violations of OAR 340-041-0007(10), (12)–(13)):

- Observations made by NWEA's expert Rick Hafele, who on each of his three site visits (in 2012, 2017, and 2018) observed and documented the RWRF's visible, foamy, discolored, and malodorous effluent plume. E.g., Hafele Decl. Ex. 3, Hafele (2013), at NWEA000001, NWEA000011 (documenting a "visual plume and surface foam" and a "distinct odor from the effluent [that] was detectable over a half mile downstream from the discharge point.").

- Observations documented by DEQ's Shannon Hubler in his 2014 Rogue River Algae Reconnaissance, which reports a visible "foam line" in the river visible for a quarter-mile downstream from the RWRF, attributable to a "lack of proper mixing" at the RWRF outfall. Saul Decl. Ex. 7, Hubler (2014), at NWEA000161.

- Observations made by Medford's expert witness Dr. Hume, who states in his expert report that "[o]bservations of surface bubbles were apparent at Site 4

> in October 2018, approximately 0.4 [river miles] downstream of the RWRF outfall," and admits that "it is plausible that accumulation of floating materials in the river may be attributed to the dissolved air in the discharge." Saul Decl. Ex. 10, Hume Expert Report, at 43–44.

- Testimony by NWEA member Robert Hunter, who states that he often observes "a foul odor, a visibly offensive foamy effluent plume, discolored water, and noticeably more nuisance algae and weeds in the river and along the river bottom." Hunter Decl. ¶ 13.

- Testimony by NWEA member John MacDiarmid, who "for many years" has "observed the RWRF's visibly discolored, foamy effluent where it enters the river and smelled foul odors from the discharge point" and states that he observes "the sustained effluent plume nearly every time" he floats that section of river. MacDiarmid Decl. ¶ 13.

These documented observations of the Medford RWRF's visible, discolored, foamy, and malodorous effluent plume, as well as the proliferation of nuisance algae and aquatic weeds immediately downstream of the RWRF's outfall, are sufficient to establish Medford's liability for its contributions to violations of Oregon's narrative criteria, OAR 340-041-0007(9)–(13), in the Rogue River, in violation of Schedule A, Condition 1.e. of its Permit and the Clean Water Act.

D. Medford has Violated, and Continues to Violate, the "Duty to Mitigate" Provision of its NPDES Permit

Medford's Permit requires it to mitigate the adverse environmental impacts of its discharges that are in violation of the Permit:

> Duty to Mitigate
> The permittee must take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit that has a

> reasonable likelihood of adversely affecting human health or the environment.
> ***

Saul Decl. Ex. 2, NPDES Permit, Schedule F, Condition A.3.

As shown above, Medford's discharges are in violation of Schedule A, Condition 1.e. of its Permit because they cause or contribute to violations of Oregon's biocriteria and statewide narrative criteria. Further, those discharges have more than a "reasonable likelihood" of adversely affecting the environment—in fact, they already have. Thus, because there are and have always been "reasonable steps" available to Medford to minimize or prevent its discharges of nutrients, its failure to do so constitutes an ongoing and repeated violation of its Permit and the Clean Water Act.[12]

Nutrient pollution is widely-studied problem for municipal wastewater treatment plants, and cost-effective treatment technology capable of reducing nutrient

[12] Although there is a paucity of case law construing the phrase "all reasonable steps" in the NPDES permitting context, several district court opinions suggest that Medford's failure to install available pollution-reducing equipment or to meaningfully reduce its unlawful pollutant discharges violates Schedule F, Condition A.3. of its Permit. *See, e.g., Puget Soundkeeper All. v. Rainier Petroleum Corp.*, No. C14-0829JLR, 2017 WL 6515970, at *8–9 (W.D. Wash. Dec. 19, 2017) (defendant failed to take "all reasonable steps" to comply with Clean Water Act consent decree where "the uncontroverted evidence shows that the Facility's discharges are at least as polluted today as when the court entered the Consent Decree."); *United States v. Municipality of Penn Hills*, 6 F. Supp. 2d 432, 437 (W.D. Pa. 1998) (defendant violated its NPDES permit where it eventually installed a "state of the art" sewage collection system after entry of the court's preliminary injunction; such late remedial actions showed the defendant previously had "feasible alternatives" to the unlawful discharges).

concentrations to very low levels has been available for decades. First, as EPA has found, significant reductions in nitrogen and phosphorus are achievable even without major capital expenditures, through the optimization of existing treatment equipment:

> No- or low-cost activities can be implemented at existing WWTPs to significantly reduce effluent nutrient discharges with minimal negative impacts on operations. In fact, in most cases, the secondary impacts are overwhelmingly positive and include energy efficiency, lower operational costs, and improved process stability.
> ***
> Low-cost nutrient reduction improvements are most feasible for activated sludge plants, where excess capacity (volumetric and/or aeration) can typically be leveraged to facilitate nitrification.

EPA, Case Studies on Implementing Low-Cost Modifications to Improve Nutrient Reduction at Wastewater Treatment Plants (Draft, August 2015).[13] That EPA study found that some facilities with pre-optimization nitrogen concentrations of about 5–6 mg/L were able to achieve nitrogen concentrations as low as 0.94 mg/L even without capital investment. *Id*. at 17.

Second, cost-effective, advanced nutrient controls have long been available for municipal wastewater treatment plants, and in fact have been widely deployed around the country. In what is perhaps EPA's most comprehensive report on the subject to date, that agency found that

[13] *Available at* https://www.epa.gov/nutrient-policy-data/case-studies-implementing-low-cost-modifications-improve-nutrient-reduction (last checked January 21, 2021). Medford's RWRF uses an "activated sludge" system. *See* Medford's Ans., Dkt. #5, ¶32.

> The capital and operation and maintenance (O&M) costs for nitrogen and phosphorus were found to vary based on numerous factors, including the types of treatment technologies and controls used and the scale of the plant (Section IV.A.1). Many of the best performing plants (in terms of final effluent concentrations achieved) utilized some form of biological nutrient removal (BNR) process paired with filtration. Unit costs for these types of systems were generally lower as the size of the plant increased. Most treatment technologies designed for nitrogen removal were reported to achieve effluent concentrations between 3 mg/L and 8 mg/L, and most treatment schemes for phosphorus removal (which typically involved one or more treatment processes) were reported to achieve effluent concentrations of 1 mg/L or less.

EPA, A Compilation of Cost Data Associated with the Impacts and Control of Nutrient Pollution (May 2015) at ES-3.[14] For that comprehensive report, EPA analyzed cost and treatment efficacy data for **370 municipal wastewater treatment plants** in the United States that have installed some combination of nitrogen or phosphorus treatment technology, finding that capital costs for nitrogen treatment "were typically less than $25 per gpd" and capital costs for total phosphorus treatment were "typically less than $22/gpd for most technologies," with economies of scale available to larger plants and co-benefits available to plants that install both nitrogen and phosphorus treatment technology. *Id*. at IV-5 and IV-12.

The Washington Department of Ecology has also done its own comprehensive study to evaluate the "effectiveness and cost of various technology upgrades" for

[14] *Available at* https://www.epa.gov/nutrient-policy-data/compilation-cost-data-associated-impacts-and-control-nutrient-pollution (last checked January 21, 2021).

nitrogen and phosphorus treatment at all municipal sewage treatment plants in Washington State, noting that in recent decades "advances have been made in treatment technology that allow much greater removal of nutrients at an economical cost." Wash. Dept. of Ecology, Technical and Economic Evaluation of Nitrogen and Phosphorus Removal at Municipal Wastewater Treatment Facilities (June 2011) at ES-1.[15] ("Washington Nutrient Evaluation") According to the Washington Nutrient Evaluation, even the most advanced and effective nutrient treatment systems, capable of consistently achieving levels of <3.0 mg/L of total nitrogen and <0.1 mg/L total phosphorus, can be achieved for a capital cost of $6.45/gpd with an added annual O&M cost of $0.33/gpd—or about $1.29M and $6.6M annually for a facility the size of Medford's RWRF. *Id*. at 16-5.[16]

Even here in Oregon, DEQ has required at least four municipal wastewater treatment facilities to reduce their phosphorus discharges to meet stringent effluent limitations. Medford's neighbor to the south, the City of Ashland, is required to meet a seasonal monthly average phosphorus limit of 1.6 pounds per day, which at Ashland's

[15] *Available at* https://apps.ecology.wa.gov/publications/SummaryPages/1110060.html (last checked January 21, 2020).

[16] Medford's RWRF is designed to treat an "average dry weather flow" of about 20 million gallons per day (mgd), but large winter storms can greatly increase the inflow to the plant—sometimes resulting in the bypass of the treatment system altogether. Medford's Ans., Dkt. #5, ¶ 32.

2.3 mgd design capacity equates to a phosphorus concentration of 0.08 mg/L. Saul Decl. Ex. 12, Ashland NPDES Permit, at 2. Clean Water Services' Rock Creek and Durham wastewater treatment plants in Washington County[17] are presently required to meet monthly median effluent limitations for total phosphorus of 0.10 mg/L and 0.11 mg/L, respectively, while its Forest Grove plant has a mass-based phosphorus limit that varies depending on the phosphorus concentration in the plant's receiving water, Rock Creek. Saul Decl. Ex. 13, Clean Water Services NPDES Permit, at 9.

Finally, affordability of advanced nutrient treatment technology is not a serious impediment for Medford. The City has an adopted biennial budget of $365,034,490 for 2019–2021; the estimated $1.29M capital expenditure for advanced nutrient treatment derived from the Washington Department of Ecology study discussed above would represent about 0.35% of that biennial budget.[18] Moreover, the City of Medford has unusually low wastewater utility rates for its residential customers, and actively

[17] Clean Water Services is a "county service facility" organized under O.R.S. Ch. 451 that operates as a public utility and provides wastewater treatment services to some 600,000 citizens of urban Washington County. *See* https://cleanwaterservices.org/about-us/ (last checked January 21, 2021).

[18] The City of Medford's Adopted Biennial Budget for 2019-2021 is available on the City's website at https://www.ci.medford.or.us/Page.asp?NavID=4351 (last checked January 21, 2021). Notably, Medford's biennial budget allocates $2,768,000 for capital improvements at the RWRF—none of which relate to nutrient pollution reductions. *Id.* Ch. 9, p. 9–26.

promotes its very low utility rates to the general public.[19] In fact, according to a 2015 survey by the Oregon League of Cities, Medford's customers pay by far the lowest wastewater rates of any city in Oregon with greater than 50,000 people, and also the lowest rates of any southern Oregon city. Oregon League of Cities, Water, Wastewater and Stormwater Rate Survey (March 2015)[20] at 96. *See also id.* at 46 (showing that as of 2015, none of Medford's rate revenue was obligated to debt service); *id.* at 92 (showing Medford's comparatively very low average wastewater rate of $15.85 per 5,000 gallons); *id.* at 109 (showing Medford has having one of the oldest wastewater treatment facilities of any of the large Oregon cities); *id.* at 127 (showing that Medford lacks "advanced treatment" capabilities, unlike some other large Oregon cities). In other words, Medford can easily accommodate even a significant capital investment and increased O&M costs and still have relatively low-to-average sewer rates compared to other Oregon cities.[21]

It is not disputed that Medford has failed to take any actions to minimize or meaningfully reduce its nutrient discharges to the Rogue River since the first Hafele

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[19] *See* City of Medford, Utility Billing, at http://www.ci.medford.or.us/SectionIndex.asp?SectionID=588 (last checked January 21, 2021).
[20] *Available at* https://scholarsbank.uoregon.edu/xmlui/handle/1794/18832 (last checked January 20, 2021).
[21] The 2011 Washington Nutrient Evaluation estimates a weighted average monthly sewer rate increase of about $28 per household to achieve the most aggressive level of nutrient reductions. *Id.* at ES–8, Table ES–3.

report was published in 2013; if anything, the average nutrient concentrations in the RWRF's effluent have increased slightly since 2008. *See* Hafele Decl. ¶ 65. Widely available and cost-effective nutrient treatment technology has long been used with great success throughout the United States. Medford's failure to take these "reasonable steps" to optimize or upgrade its RWRF to "minimize or prevent" the well-documented impacts of its nutrient discharges on the Rogue River constitute an ongoing violation of Schedule F, Condition A.3. if its Permit and the Clean Water Act.

CONCLUSION

For the foregoing reasons, NWEA is entitled to summary judgment as to liability on each of its three claims for relief against the City of Medford.

Dated January 21, 2021.

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