IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

NORTHWEST ENVIRONMENTAL ADVOCATES,

Case No. 1:18-cv-00856-CL

Plaintiff,

v.

FINDINGS AND RECOMMENDATION

CITY OF MEDFORD,

Defendant.

CLARKE, Magistrate Judge.

Plaintiff Northwest Environmental Advocates brings this citizen suit against the City of Medford alleging violations of the Clean Water Act caused by the City's Regional Water Reclamation Facility. The case comes before the Court on cross motions for summary judgment. On May 11, 2021, the Court held a telephonic oral argument hearing on the motions. Plaintiff is entitled to summary judgment on the First Claim for relief. A dispute of material fact prevents either party from obtaining summary judgment on the Second or Third Claims for relief. Therefore, Plaintiff's motion (#34) should be GRANTED in part and DENIED in part, and the defendants' motion (#40) should be DENIED.

INTRODUCTION

The defendant, the City of Medford ("the City") discharges treated municipal wastewater to the Rogue River from the City's Regional Water Reclamation Facility ("the Facility"). The discharges are authorized and regulated by a National Pollutant Discharge Elimination System ("NPDES") permit ("Permit") issued by the Oregon Department of Environmental Quality ("DEQ") pursuant to the federal Clean Water Act ("CWA" or the "Act"). In this CWA citizen suit, Plaintiff Northwest Environmental Advocates ("NWEA") alleges that discharges from the Facility are violating the Permit by contributing to conditions in the Rogue River that do not meet certain water quality standards.

The City has stipulated with NWEA that discharges from the Facility are contributing to exceedances of one of those water quality standards: the biocriteria standard, OAR 340-041-0011. Chase Decl. Ex. 7. The City, however, has not stipulated to the magnitude or geographic or seasonal extent of biocriteria exceedances or the City's contributions to those exceedances, nor has it stipulated that it is contributing to exceedances of any other water quality standard. Further, the City has not stipulated that its contributions constitute a violation of the Permit or that it has violated the Permit in any other way.

REGULATORY BACKGROUND

With certain exceptions, the Clean Water Act prohibits the discharge of pollutants into waters of the United States, including discharges of municipal wastewater, unless the discharge is authorized by an NPDES permit issued by the U.S. Environmental Protection Agency or a delegated State. *See* 33 U.S.C. §§ 1311(a), 1342(a)-(b), 1362. In Oregon, EPA has delegated the authority to issue NPDES permits to DEQ. *See* Or. Rev. Stat. ("ORS") § 468B.035(1); Or. Admin. R. ("OAR") 340-045-0010(13), -0015(2).

"The NPDES permit program is the 'centerpiece' of the Clean Water Act[.]" *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 673 F.3d 880, 891 (9th Cir. 2011) (citation omitted), *rev'd on other grounds* 568 U.S. 78 (2013). It is through NPDES permits that the CWA's broadly stated objectives to reduce discharges of pollutants and protect water quality can be translated into specific discharge limits and requirements for individual dischargers. To that end, NPDES permits must be conditioned as needed to ensure that authorized discharges comply with the requirements of the CWA and EPA's implementing regulations. *See* 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.41–122.50. These requirements include discharge limits based on the use of specified minimum levels of pollution control technologies (e.g., "secondary treatment" for municipal wastewater, 33 U.S.C. § 1311(b)(1)(B)); discharge limits as necessary to meet instream water quality standards, *see id.*, § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1); and discharge monitoring and reporting requirements, *see* 40 C.F.R. § 122.48.

The CWA provides that "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of. . . an effluent standard or limitation under [the CWA]." 33 U.S.C. § 1365(a)(1). For purposes of this provision, an "effluent standard or limitation" includes an NPDES "permit or condition thereof." *Id.*, § 1365(f)(6). In an action based on the alleged violation of NPDES permit conditions, a court has the authority, inter alia, to enforce those conditions. *See id.* § 1365(a), (d). A court, however, has no authority to enforce requirements beyond the permit and its conditions, including instream water quality standards that are not reflected in a permit condition. *See Nw. Env'tl Advocates v. City of Portland*, 56 F.3d 979, 989-90 & n. 11 (9th Cir. 1995) (holding that water quality standards may be enforced in a CWA citizen suit only to the extent that those standards are implemented through NPDES permit conditions).

FACTUAL BACKGROUND

a. The City's NPDES Permit

DEQ last renewed the City's Permit on December 13, 2011. Complaint ¶ 3. The Permit nominally expired on November 30, 2016 but remains in effect until DEQ takes final action on the City's pending Permit renewal application. Compl. ¶ 43; *see also* Chase Decl. Ex. 1 at 3 (ODEQ Depo. 11:17-24). DEQ is actively working on developing the renewed Permit. The 2021 NPDES Individual Permit Issuance Plan shows that the renewed Permit is "on schedule" to be issued this year. Chase Decl. Ex. 3 (DEQ Work Plan). On January 8, 2021, DEQ provided the City with an applicant review draft of the renewed Permit. Hagemann Decl. ¶ 2. This draft is the immediate precursor to issuance of a draft permit for public comment and then, following the public comment period, the final permit. *See* OAR 340-045-0035(5), (8).[1]

The Permit authorizes discharges of treated wastewater from the Facility to the Rogue River at river mile (RM) 130.5. Chase Decl. Ex. 2. Schedule A of the Permit includes numeric discharge limits for several pollutants, including "five-day biochemical oxygen demand" (BOD5) and "five-day carbonaceous biochemical oxygen demand" (CBOD5) (both are measures of the degree to which nutrients in the wastewater may cause lower dissolved oxygen levels in waterbodies by stimulating microorganisms that consume oxygen); total suspended solids (TSS); heat; E. coli bacteria; pH; chlorine; and ammonia. *See id.* Ex. 2 at 5. Schedule B of the Permit includes extensive discharge monitoring and reporting requirements for these and other pollutants. *Id.* Ex. 2 at 7-15. Other Permit schedules include Schedule C ("Compliance Schedule" for discharges of heat), Schedule D ("Special Conditions" addressing miscellaneous

[1] At the time of oral argument, the parties noted that the draft permit had been issued and the public comment period had closed, making issuance of the final permit even more imminent than at the time of briefing.

issues), Schedule E ("Pretreatment Activities" regulating discharges into the Facility), and Schedule F ("General Conditions"). *Id.* Ex. 2 at 15-34.

b. Plaintiff's Claims

Plaintiff does not allege that the City has violated any of the Permit's numeric discharge limits. Plaintiff alleges only that the City has violated Schedule A, Condition 1.e. of the Permit (hereinafter referred to as "Condition A.1.e."). *See* Compl. ¶¶ 55-62. Condition A.1.e. provides:

> e. Permit Shield and Regulatory Mixing Zone
>
> 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 allowable mixing zone that is within 2 feet upstream to 30 feet downstream of the point of discharge. Chase Decl. Ex. 2 at 5.

Plaintiff's First Claim for Relief alleges that discharges from the Facility have violated Condition A.1.e. by contributing to violations of Oregon's narrative biocriteria water quality standard, OAR 340-041-0011, which provides:

> Waters of the State must be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities.

Plaintiff alleges that discharges containing excess nitrogen and phosphorous from the Facility have contributed to detrimental changes in the resident biological communities in the Rogue River downstream of the City's regulatory mixing zone. Compl. ¶¶ 55-62.6

Plaintiff's Second Claim for Relief alleges that discharges containing excess nitrogen and phosphorous from the Facility have violated Condition A.1.e. by contributing to violations of

several other narrative water quality standards codified at OAR 340-041-0007(9)-(13), which provide:

> (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;
>
> 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.

Plaintiff alleges that nutrient-rich discharges from the Facility have contributed to conditions in the Rogue River downstream of the City's regulatory mixing zone that do not meet these standards. Compl. ¶¶ 63-70. The factual bases for Plaintiff's Second Claim for Relief, to the extent that they differ from those for Plaintiff's First Claim, rest on alleged observations of aesthetic conditions in the river associated with the Facility's discharge since DEQ last renewed the Permit in 2011. *See id.*, ¶¶ 3, 13, 26, 50, 53, 74.

Plaintiff's Third Claim for Relief alleges that the City failed to respond to the alleged violations of Condition A.1.e., and that the City thereby violated Schedule F, Condition A.3 of the Permit (Condition F.A.3.), which requires the City to take "all reasonable steps to minimize or prevent any discharge . . . in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment." Because there can be no violation of

Condition F.A.3. in the absence of a violation of some other Permit condition, Plaintiff's Third Claim for Relief depends on establishing a violation of Condition A.1.e.

Pursuant to the parties' stipulation, the Court approved bifurcation of this case into two phases: liability and remedy. Thus, this opinion will address only the issue of whether Plaintiff has established a violation of the Permit and the CWA.

LEGAL STANDARD

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)).

DISCUSSION

The parties bring cross motions for summary judgment. For the reasons below, Plaintiff should be granted summary judgment on the First Claim. A dispute of material fact prevents summary judgment as to the Second and Third Claims.

1. Plaintiff is entitled to summary judgment on the First Claim.

Plaintiff's First Claim for Relief alleges that the City's discharges are violating Permit Condition A.1.e. by contributing to violations of Oregon's biocriteria standard, OAR 340-041-0011, in the Rogue River downstream of the City's mixing zone. The plain language of Condition A.1.e. prohibits causing or contributing to violations of the biocriteria standard.

Additionally, looking beyond the plain meaning to the extrinsic evidence, it is clear that Condition A.1.e was meant to prohibit such contributions. Because the City has stipulated to these contributions, Plaintiff is entitled to summary judgment on the First Claim.

a. The plain language of Permit Condition A.1.e is unambiguous and prohibits violations of Oregon's water quality standards, including the biocriteria standard contained in OAR 340-041-0011.

Courts interpret NPDES permits in the same manner as a contract or other legal document. *See Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("NRDC"); *City of Portland*, 56 F.3d at 986. The terms of an NPDES permit "are to be given their ordinary meaning, and when the terms . . . are clear, the intent of the parties must be ascertained from the permit itself." *NRDC*, 725 F.3d at 1205 (brackets omitted) (quoting *Klamath Water Users Protective Ass'n v. Patterson*, 204, F.3d 1206, 1210 (9th Cir. 1999)). If, however, the permit's language is ambiguous, we may turn to extrinsic evidence to interpret its terms. *Piney Run Pres. Ass'n*, 268 F.3d at 270 (citation omitted).

Permit Condition A.1.e broadly prohibits all waste discharges "that cause or contribute to a violation of water quality standards in OAR 340-041 applicable to the Rogue Basin." OAR 340-041 includes OAR 340-041-0011, which is the basis for Plaintiff's First Claim, providing that "Waters of the State must be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities." The parties refer to this provision as the "biocriteria standard." Thus, at the outset, Plaintiff's interpretation of Condition A.1.e is correct, and the biocriteria standard can be enforced through Condition A.1.e.

Condition A.1.e includes two exceptions to its broad prohibition – the Permit Shield exception and the Mixing Zone exception: no wastes may be discharged that cause or contribute to a violation of any water quality standard, "except as provided for in OAR 340-045-0080 [the

Permit Shield] and the ... regulatory mixing zone." The parties agree that the second exception means that any violation of the Permit or the CWA must take place outside the defined Mixing Zone. The parties do not agree on the Permit Shield exception, however, and this is the crux of the dispute as to the First Claim. Defendant proposes that the Permit Shield exception incorporates the substance and details of the Permit Shield, giving as much force to its provisions as to the words of Condition A.1.e itself. Plaintiff, by contrast, proposes that the reference to the Permit Shield is merely meant to codify the basic notion that a permittee who is in compliance with a permit is considered to be in compliance with the CWA and state law. For the reasons below, the Court finds that Plaintiff's interpretation is reasonable, and the defendant's is not.

The Permit Shield provision provides in relevant part: "A permittee in compliance with... [an] NPDES permit during its term is considered to be in compliance for purposes of enforcement" with specified provisions of the CWA and state law, including ORS § 468B.048 (providing for water quality standards) and "water quality basin standards." OAR 340-045-0080(1). The plain meaning of this provision is clear: compliance with the Permit means compliance with the CWA and state law.

However, as the defendant points out, the Permit Shield's specified provisions of state law include OAR 340-041-011, the biocriteria standard. The defendant would thus interpret the Permit Shield as an exemption from compliance with OAR 340-041-0011. Moreover, the specified provisions of the CWA and state law referenced by the Permit Shield also include virtually all of the state water quality standards, only providing an exception for: (a) Toxic effluent standards and prohibitions imposed under Section 307 of the CWA, and OAR Chapter 340, Division 41; (b) Standards for sewage sludge use or disposal under Section 405(d) of the

CWA; or (c) Groundwater quality protection requirements as specified in OAR Chapter 340, Division 40. OAR 340-045-0080(1).[2]

The defendant's interpretation of Condition A.1.e would provide for both broad inclusion and broad exclusion of nearly all the same water quality standards. This is not reasonable. Why would the drafters prohibit the permittee from causing or contributing to a violation of any state or federal water quality standard in OAR 340-041, only to immediately grant blanket protection from just such a violation? Interpreted this way, the exception would entirely swallow the rule. Such an interpretation is disfavored. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001); *see also Nat'l Tea Co. v. Ryan Aviation Corp.*, 578 F. Supp. 291, 294 n.8 (N.D. Ill. 1984) (rejecting an interpretation of the phrase "except as provided for" that would permit "the exception to swallow up the rule itself.").

The Court finds that the Plaintiff's interpretation is more reasonable. Condition A.1.e broadly and unambiguously prohibits discharges that cause or contribute to a violation of water quality standards, and it references the Permit Shield to acknowledge the protection afforded a permittee who is in full compliance with these terms and the other terms of the permit. This interpretation still gives meaning to the Permit Shield exception because the defendant is protected from an enforcement action for violating any water quality standards inside its mixing zone, or for discharges of pollutants in concentrations below the numeric effluent limits proscribed in Schedule A of its Permit.

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[2] Plaintiff argues that the four exceptions contained in the Permit Shield are not even enforceable through Condition A.1.e because they are not "water quality standards in OAR 340-041." The Court finds this argument persuasive and further evidence of the unreasonableness of the City's interpretation of this provision.

This interpretation also aligns with decisions by other courts, which have held that "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." *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chicago*, 175 F. Supp. 3d 1041, 1051 (N.D. Ill. 2016). *See also Ohio Valley Env't Coal., Inc. v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673, 679 (S.D.W. Va. 2015), *aff'd sub nom. Ohio Valley Env't Coal. v. Fola Coal Co., LLC*, 845 F.3d 133 (4th Cir. 2017) (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.").

b. Even if the language of Condition A.1.e were ambiguous, extrinsic evidence supports the interpretation that the Permit requires compliance with the water quality standards in OAR 340-041.

The plain language of Condition A.1.e is unambiguous and clearly prohibits contributions to exceedances of Oregon's biocriteria and statewide narrative criteria. Even if it were ambiguous, however, extrinsic evidence of DEQ's contemporaneous intent and DEQ's own regulations support the same interpretation.

One of the Court's "obligations in interpreting an NPDES permit is 'to determine the intent of the permitting authority.'" *Cty. of Los Angeles*, 725 F.3d at 1207 (*quoting Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 270 (4th Cir. 2001)). Thus, in construing the relevant language, the Court should "give significant weight to any extrinsic evidence that evinces the permitting authority's interpretation of the relevant permit." *Id.* (*citing City of Portland*, 56 F.3d at 985). An agency's interpretation may reasonably be conveyed through its response to public comments regarding the underlying agency decision, and that interpretation warrants a high degree of deference. *Lambert v. Saul*, 980 F.3d 1266, 1276 (9th Cir. 2020).

Here, upon issuing the Permit, DEQ stated that:

> Schedule A, condition 1.e of the permit prohibits violation of water standards except within the regulatory mixing zone that extends from 10 feet above the outfall to 300 feet below the outfall.

Second Saul Decl., Ex. 1 at 15. DEQ's explanation is unambiguous; it contains no limiting language and no reference to Oregon's permit shield rule.[3]

Moreover, DEQ's own mixing zone rule provides that DEQ "suspend all or part of the water quality standards . . . in the defined mixing zone" only under certain specified conditions, including that the permittee does not "cause or significantly contribute to . . . [e]xceedances of any other water quality standards under normal annual low flow conditions." OAR 340-041-0052(2)(b). Further, mixing zones are required to be "as small as feasible" and must "[m]inimize adverse effects on the indigenous biological community." *Id.* That rule cannot meaningfully coexist with a reading of the Permit that blatantly allows water quality standards violations outside of the mixing zone. Therefore, even if the Court looks to extrinsic evidence of DEQ's intent in issuing the Permit, the evidence supports the plain language interpretation of Condition A.1.e above.

c. Based on the defendant's stipulation, the City of Medford is in violation of Condition A.1.e of the Permit.

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[3] The defendant points to DEQ's lack of enforcement action against the City, as well as more recent statements indicating that the Facility is in compliance with the Permit. The Oregon Supreme Court has held that the more relevant basis for determining the intent behind a DEQ decision is "the record leading up to it," not the "post-hoc explanation of what DEQ's decision meant" found in later testimony from an agency employee. *Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London*, 341 Or. 128, 137 (2006). Here, the Court finds that, to the extent there is a conflict between DEQ's contemporaneous 2011 interpretation of Condition A.1.e. and the agency's more recent statements, the former should control. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (declining to defer to an agency's "current interpretation" of a rule that "runs counter to the intent at the time of the regulation's promulgation."

The defendant, the City of Medford, has stipulated to the fact that discharges from the Facility are contributing to exceedances of Oregon's biocriteria standard. Based on this stipulation, and the above plain language of Condition A.1.e, the Court finds that the defendant is in violation of this provision of the Permit. Plaintiff is therefore entitled to summary judgment on the First Claim for relief.

2. A dispute of material fact prevents either party from obtaining summary judgment as to the Second Claim.

Plaintiff's Second Claim for Relief alleges that discharges from the Facility have violated Condition A.1.e. by contributing to violations of several other narrative water quality standards codified at OAR 340-041-0007(9)-(13). For the reasons discussed above, the Court finds that Condition A.1.e does prohibit these contributions, and the Permit Shield does not protect the defendant from being held liable for such violations. However, unlike the First Claim, the defendant has not stipulated to the factual issues regarding the discharges from the Facility or the impacts to the water quality downstream. Plaintiff's specific claims for narrative water quality violations fall into two broad categories. (1) observations of "nuisance algae," "aquatic weeds," and "macrophytes" (aquatic plants) in the river downstream of the Facility's mixing zone, which NWEA asserts are violations of OAR 340-041-0007(9), (10), and (13); and (2) aesthetic observations of a "visible plume" and a "foul odor" downstream of the Facility's mixing zone, which NWEA asserts are violations of OAR 340-041-0007(10), (12), and (13). Because the defendant raises a dispute of material fact as to both categories, summary judgment as to the Second Claim should be denied.

a. The defendant raises questions of material fact as to the first category of narrative water quality violations.

With respect to the first category, Plaintiff submits observations of "excessive growth of nuisance algae and macrophytes"; "greater density" of periphyton due to "nutrient enrichment"; high "algal density" due to "nutrient enrichment"; "nuisance algal growth and reduced macroinvertebrate conditions"; "higher algae cover estimates and documented increased algal cell density and biovolume"; "nuisance algae and weeds"; and "algae on the surface of the river, on river rocks, and on river gravels." Defendant asserts that these allegations and the evidence supporting them do not carry Plaintiff's burden to show "deleterious" effects, or aesthetic conditions that are "offensive," as required by the regulations at issue. *See, e.g.*, OAR 340-041-0007(9) (prohibiting "growths" that have "a deleterious effect on stream bottoms, fish or other aquatic life" or that are "injurious to public health, recreation, or industry"); OAR 340-041-0007(10) (prohibiting "conditions" that are "deleterious to fish or other aquatic life"); OAR 340-041-0007(13) (prohibiting "[a]esthetic conditions" that are "offensive to the human senses of sight, taste, smell, or touch"). The Court is not convinced by this argument. Plaintiff's claims and evidence, if undisputed, sufficiently show the deleterious effects and offensive aesthetics necessary under the regulations.

However, the defendant's evidence raises a question of fact as to causation because, if true, it shows that "the accumulations of algae and aquatic plants in the river downstream of the Facility are comparable to those that can be found in the river at several locations upstream of the Facility. Leavy Decl. ¶ 14.

b. The defendant raises questions of material fact as to the second category of narrative water quality violations.

With respect to the second category, Plaintiff submits observations and characterizations of aesthetic conditions, such as a "visible, foamy, discolored, and malodorous effluent plume"; a

visible "foam line"; "surface bubbles"; a "foul odor, a visibly offensive foamy effluent plume, discolored water"; and "visibly discolored, foamy effluent."

Defendant again disputes that Plaintiff has carried its burden on summary judgment, as there must also be some evidence that these sights and smells have some adverse effect on the recreational or other human uses of the river. *See, e.g.*, OAR 340-041-0007(10) (prohibiting "tastes or odors" that "affect the potability of drinking water or the palatability of fish or shellfish"); OAR 340-041- 0007(12) (prohibiting "objectionable discoloration, scum, oily sheens, or floating solids"); OAR 340-041-0007(13) (prohibiting "[a]esthetic conditions offensive to the human senses of sight, taste, smell, or touch"). The Court remains unconvinced by this argument. Plaintiff's claims and evidence, if undisputed, sufficiently show sufficiently objectionable effects as required by the regulations.

However, the defendant again disputes the factual allegations themselves. For instance, defendant submits that the effluent plume is visible only because it contains "bubbles caused by the entrainment of air as it is discharged through the Facility's outfall pipe to the river." *See* Leavy Decl. ¶ 11. The effluent is not "discolored," does not contain scum or floating solids, and has turbidity levels comparable to those of the river upstream of the discharge. *See id.* ¶¶ 8-12. Defendant claims that, were it not for the entrained air bubbles, the plume would not be visually discernible in the river at all. *See id.* In other words, although the plume is visible, air bubbles are inherently not "offensive" or "objectionable." The Court finds this evidence raises a sufficient question of fact to preclude summary judgment.

Defendant also disputes the factual allegation regarding the reported "foul" odors, or any odors, coming from the wastewater discharged into the river. Defendant submits that, as the final step in the treatment process, the wastewater is disinfected with sodium hypochlorite and then

dechlorinated with sodium bisulfite just before it is discharged to the river. Leavy Decl. ¶ 4. This produces a slightly "bleachy" or "clean" smell that can sometimes be discerned directly adjacent to the outfall before the wastewater mixes with the river but that cannot be smelled in the river downstream of the Facility's mixing zone. *Id.* ¶¶ 4-5. This is not the type of smell reported by Plaintiff's declarants. Defendant claims that there are, however, sources of potentially "foul" odors in the area other than the Facility's discharge to the river. These include livestock on farms adjacent to the river, *id.* ¶ 6, and odors from operations at the Facility itself that are not associated with the treated wastewater discharge to the river, *id.* ¶ 7. Defendant notes that these odors may travel through the air from the Facility and could be discernible on the river, *id.*, although, apart from the Complaint in this proceeding, the defendant claims it is not aware of any recent citizen complaints about odor from the Facility or its wastewater. Hagemann Decl. ¶ 9.

Finally, defendant raises a material question as to the location of the alleged violations and asserts that Plaintiff has not shown that any of them take place outside of the Facility's 300-foot mixing zone. Though Plaintiff's declarants describe the odors as occurring nearby the Facility, the defendant claims that a reasonable juror could conclude that these observations could be taking place directly near the outfall, within the mixing zone. *See* Hunter Decl. ¶ 13 (observes odor "when [he] float[s] past the [Facility's] outfall"); ¶ 15 (common for people to notice the odor when "floating by the" Facility); MacDiarmid Decl. ¶ 13 (smells "foul odors from the discharge point").

The Court, examining the evidence submitted in the light most favorable to the non-moving party, finds that the defendant has raised genuine issues of material fact such that reasonable factfinder could conclude that (1) any odor from the City's discharge is not "offensive" or "foul," (2) that such odor emanates from a source other than the City's wastewater

discharges, or (3) that any such odor was detected within the regulatory mixing zone and therefore does not constitute a violation of Condition A.1.e.

Because there is a genuine dispute of material fact regarding whether the Facility's discharges have caused or contributed to violations of the narrative water quality standards in OAR 340-041-0007(9)-(13), summary judgment as to Plaintiff's Second Claim for relief should be denied.

3. Summary judgment as to the Third Claim should be denied.

Plaintiff's Third Claim for Relief alleges that the City has violated Permit Condition F.A.3 by failing "to take all reasonable steps to minimize or prevent" the violations of Condition A.1.e alleged in its First and Second Claims for Relief. A question of material fact exists as to this claim, and neither party is entitled to summary judgment.

Permit Condition F.A.3 provides: "The permittee must take all reasonable steps to minimize or prevent any discharge … in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment." The only violation for which Plaintiff is entitled to summary judgment is the First Claim, therefore Claim Three is only available if Plaintiff shows that the City did not take reasonable steps to avoid violating the biocriteria standard. Defendant has raised a question of fact as to the steps the City has taken, and the steps it should take, that would be reasonable to minimize the exceedances of the biocriteria standard or reduce the discharges of nitrogen and phosphorous into the Rogue River.

Plaintiff submits evidence of what other facilities around the country have done in order to show what the City could have done, but Plaintiff has not shown that these steps were or would have been reasonable for the City. Moreover, the defendant submits evidence explaining "why the City cannot yet reasonably be expected to have further reduced its nutrient discharges."

Defendant claims that any further reduction in discharges of nutrients "cannot be achieved without substantial changes in, and additions to, the Facility's treatment systems that will require enormous capital expenditures, significant increases in annual operating costs, and years to design and construct. A recent study estimated that the changed would require capital costs ranging from $65.9 million to $182.9 million, and annual operating costs ranging from $1.62 million to 2.91 million. Additionally, the DEQ is currently examining the issue and it will address the nutrient concerns when it renews the defendant's permit. Defendant claims that without knowing what specific nutrient limits will ultimately be included in the renewed Permit, it would have been imprudent and unreasonable for the City to begin designing and constructing treatment systems to reduce nutrients before the renewed Permit is issued. The Court finds these factors persuasive in considering whether the defendant acted reasonably.

Because there is at least a genuine dispute of fact regarding whether the City took reasonable steps to respond to a violation of Permit Condition A.1.e, summary judgment on Plaintiff's Third Claim for relief is inappropriate and should be denied.

4. Both parties' motions to strike the other's declarations should be denied.

Both parties submit objections to the other's declarations and move to strike. These motions should be denied. The defendant objects to portions of the declarations of John MacDiarmid and Robert Hunter, filed by the Plaintiff in support of its motion for summary judgment, on the grounds that they contain improper opinion testimony. Similarly, Plaintiff objects to portions of the declarations of Dustin Hagemann and Johnny Leavy, filed by the defendant in support of their motion and their response to Plaintiff's motion, on the grounds that the declarations contain inadmissible expert testimony, lack proper foundation, and contain inadmissible hearsay. Essentially, both parties seek to use their members' or their employees'

declarations as both factual lay witness testimony regarding the condition of the river upstream and downstream of the Facility and expert testimony regarding the environmental impacts of the discharges and the water treatment systems at issue. Each party challenges whether the other parties' declarants are qualified to give the statements submitted.

Ultimately, as discussed above, the portions of the declarations from both parties that the Court relies upon are the factual allegations and disputes regarding the condition of the river upstream and downstream from the Facility. These factual disputes are based upon each witness's own personal knowledge and observations, and they are admitted by the Court, not as evidence on scientific or technical matters, but as observations of the changes and the impacts caused by the Facility's discharges into the Rogue River. Both parties' motions should therefore be denied, and all evidence be admitted for purposes of this motion. If the case proceeds to trial, Court should reevaluate whether it is all admissible for trial purposes.

RECOMMENDATION

For the reasons above, Plaintiff's motion (#34) should be GRANTED in part and DENIED in part, and the defendant's motion (#40) should be DENIED. Plaintiff is entitled to summary judgment on its First Claim for relief. A dispute of material fact prevents either party from obtaining summary judgment on the Second and Third claims for relief. Both parties' motions to strike the other's declarations should be denied.

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is entered. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* FED. R. CIV. P. 72, 6. Parties are advised that the failure to file objections within

the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 9 day of June, 2021.

MARK D. CLARKE
United States Magistrate Judge