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January 28, 2011

BY HAND DELIVERY

Mr. Phil Ward
Director
Oregon Water Resources Department
725 Summer St NE Ste A
Salem, OR 97301-1271

Re: Petition for Reconsideration of Final Order and Permit for Application G-17395
(Seven Hills Properties, LLC)

Dear Phil:

This Petition for Reconsideration is filed pursuant to ORS 536.075, ORS 183.484 and OAR 137-004-0080 on behalf of our client, the City of Milton-Freewater ("City") to request reconsideration of the above-referenced Final Order and Permit issued by the Oregon Water Resources Department ("OWRD") on January 13, 2011.

I. Standing

The Final Order and Permit authorize Seven Hills Properties, LLC ("Seven Hills") to use 16.82 cubic feet per second ("cfs") from four wells located within a five-mile radius of the City's municipal wells. The applicable basin program requires OWRD to follow certain procedures to ensure that new ground water applications will not interfere with the City's wells. See OAR 690-507-0030(3)(a)(B). OWRD failed to follow the required procedures in issuing the Final Order and Permit and has thereby placed the City's wells at risk of interference. Accordingly, the City is adversely affected by the Final Order and Permit, is entitled to judicial review under ORS 183.484, and therefore is entitled to petition for reconsideration under OAR 137-004-0080.

Alternatively, the City requests OWRD to reconsider the Final Order and Permit, on its own initiative, pursuant to ORS 184.484 and OAR 137.004-0080(5).

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II. Background:

On June 3, 2010, an application was submitted in the name of Seven Hills requesting use of 16.82 cubic feet per second of ground water from four existing wells for the proposed use of "storage for irrigation." Each of the wells is located within a five-mile radius of municipal wells owned by the City.

The applicable basin program for the Walla Walla River Subbasin of the Umatilla Basin provides:

Ground water from the basalt reservoir in a five-mile radius around any municipal well of the cities of Athena, Helix, Milton-Freewater, and Weston is classified for municipal, group domestic and statutorily exempt ground water uses (see definition) only. Other uses may be permitted if it is documented that a barrier to ground water movement separates a proposed well from municipal wells and there will be no interference with municipal wells. Applications for other uses of ground water within a five-mile radius of a municipal well shall automatically be referred to the Commission for review and consideration of public interest unless the affected city affirms that it is in favor of the proposed appropriation. This classification applies only when the affected city(ies) have a full-time conservation program in effect.

OAR 690-507-0030(3)(a)(B)

On July 16, 2010, OWRD issued an Initial Review that included a determination that the proposed use "is allowable under the Umatilla Basin Program." (Initial Review, p. 1.) The Initial Review made no reference to the above-cited requirement of the Umatilla Basin Program.

On October 26, 2010, OWRD issued a Proposed Final Order recommending approval of the application and issuance of a permit. The Proposed Final Order included no further discussion of the basin program requirements but stated a Conclusion of Law that the proposed use "is allowed in the Umatilla Basin Program...." (Proposed Final Order, p. 3.)

On January 13, 2011, OWRD issued a Final Order and Permit. The Final Order included a statement that "the Department's continuing evaluation reveals that the Proposed Final Order (PFO) requires modification to correctly describe the classification of proposed use" under the basin program rules. (Final Order, p. 2.) The Final Order states further:

The wells requested under this application are located within a five-mile radius of the City of Milton-Freewater (City). Under OAR 690-507-0060(3)(a)(B), groundwater use from the basalt reservoir within a five-mile radius around any municipal well of the City of Milton-Freewater could be limited to only municipal uses, group domestic uses, or statutorily exempt groundwater uses if the City has *an approved water management and*

conservation plan in effect. The City's water management and conservation plan expired on October 1, 2010; therefore OAR 690-507-0060(3)(a)(B) will not affect this application.

(Final Order, p. 2 (emphasis added).)

We assume OWRD intended to cite OAR 690-507-0030(3)(a)(B) in the above finding.

For the reasons set forth below, the City objects to the finding contained in the Final Order and requests reconsideration of the Final Order and related Permit.

III. Grounds for Reconsideration:

A. The Final Order erroneously characterizes and interprets the applicable basin program rule by determining that the rule applies only if the City has "an approved water management and conservation plan in effect." The department's analysis equates this requirement with an approved plan under its Division 86 rules for Water Management and Conservation Plans. In fact, the basin program rule requires a "full-time conservation program" which the City does have in effect. Accordingly, the basin program rule does apply to the application and OWRD failed to make required findings.

B. Even if the rule were properly interpreted to require that the City have in effect an approved water management and conservation plan under the Division 86 rules, the City's approved plan *was* in effect when the application was filed. Accordingly, OWRD had a duty to make additional findings and refer the application to the Water Resources Commission before taking further action. Further, if OWRD had properly applied the rule prior to issuance of the Final Order, the potential impacts of the impending "expiration" of the City's approved Water Management and Conservation Plan could have been identified and addressed.

C. The Final Order and Permit establish an erroneous precedent that is harmful to the City's interests in connection with other pending applications.

Further argument on each of these grounds is provided below.

IV. Argument

A. *The Final Order erroneously characterizes and interprets the applicable basin program rule by determining that the rule applies only if the City has "an approved water management and conservation plan in effect."*

The basin program rule makes no reference to an "approved water management and conservation plan." The rule specifies that a City must have in effect a "full-time conversation program." There is no requirement that such a program be "approved" or that it be conformed to the specific requirements of OWRD rules in Division 86. This is clear by the plain wording of the rule itself. Equally persuasive is the simple fact that the Division 86 rules did not exist when the basin program provision was adopted. At that time, there was no such thing as an "approved

water management and conservation plan.” In 1988, the Water Resources Commission approved the Umatilla Basin Section of the Oregon Water Plan, which included the first iteration of the current wording of OAR 690-507-0030(3)(a)(B). Under the Plan’s “guidelines,” uses were limited within a five-mile radius of the City and other identified municipalities “[w]hen full-time, municipal, water conservation programs” were in effect. (See p. 13 of the Plan). As of 1992, the Commission had adopted the current wording – “full-time conservation program” – by administrative rule. See OAR 690-507-030(3)(a)(B)(Effective May 14, 1992). The Division 86 rules were later adopted in 1994.

For at least the past decade, the City has had in effect a “full time conservation program.” Elements of the City’s conservation program are described in its Division 86 Water Management and Conservation Plan; however, the City’s implementation of its conservation program did not begin with approval of the Water Management and Conservation Plan by OWRD, and it did not cease or “expire” on October 1, 2010.

B. Even if the rule were properly interpreted to require that the City have an approved water management and conservation plan in effect, the City’s approved plan was in effect when the application was filed.

As described above, the City strongly disagrees with an assertion that the wording in the basin program rule requires approval of a Water Management and Conservation Plan under the Division 86 rules. However, at the time the application was filed, there is no question that the City’s “approved water management and conservation plan” was in effect. Accordingly, the proposed use was not allowed under the basin program rule without first making additional factual findings about the physical characteristics of the well(s) and then either obtaining consent from the City or referring the application to the Water Resources Commission for further action. The department failed to make the correct finding in the Initial Review, and should not have continued to process the application until the additional requirements were satisfied.

This mistake in failing to notice or properly apply the rule was compounded with issuance of the Proposed Final Order in October, 2010. By failing to identify the applicable basin program rule, OWRD did not provide adequate notice to the City and others who could be adversely affected by the proposed action. If OWRD had determined at that point that the expiration of the City’s Water Management and Conservation Plan resulted in nullification of the basin program limitation, OWRD had a duty to provide notice to the City and to include specific findings describing its rationale. Had such findings been made, the City would have been on notice to file a protest.

By the time the Final Order was issued in January, 2011, OWRD appears to have realized the mistake in failing to apply the appropriate basin program rule. The analysis in the Final Order attempts to cure the fatal flaw with a finding that the City’s Division 86 Water Management and Conservation Plan had “expired” on October 1, 2010. However, the department cannot overcome the need to comply with the procedural requirements of the basin program rule merely by holding back on issuance of the Proposed Final Order and Final Order until after the city’s Water Management and Conservation Plan expired. We note, as well, that

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the Final Order makes no mention of the fact that the City submitted a plan update in December, 2010 that is currently pending before OWRD. If the department had made the appropriate findings and taken the required action at the Initial Review stage, the City could have expedited the submission of its updated Division 86 Plan.

C. *The Final Order and Permit establish an erroneous precedent that is harmful to the City's interests in connection with other pending applications.*

The issue presented in this case regarding interpretation of OAR 690-507-0030(3)(a)(B) has a direct bearing on at least two other applications that are known to be currently pending before OWRD: Application G-16364 in the name of Joe Frazier, and Application G-16359 in the name of Les Peterson. Both of these applications were proposed for denial on the basis of the basin program limitation and in each case the applicant has filed a protest with OWRD and requested a contested case hearing. The City has an interest in both of these pending applications that will be adversely affected by the erroneous findings in the Seven Hills Final Order regarding interpretation of the basin program rule.

V. Conclusion

For the reasons described above, the Final Order and Permit should be withdrawn and reconsidered.

Sincerely,



Martha O. Pagel

MOP:kdo

cc: Linda Hall, City of Milton-Freewater
Dwight French, OWRD ✓
Seven Hills Properties, LLC
Tom Paul, OWRD

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