

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of:)	
Application for Extension of Time for)	FINAL ORDER IN CONTESTED
Permit S-42117, Water Right Application)	CASE
S-55338 in the Name of the City of)	
Cottage Grove,)	
<i>Applicant,</i>)	OAH Case No.: WR-09-003
)	OWRD Case No.: S-42117
WaterWatch of Oregon,)	
<i>Protestant.</i>)	

I. PROCEDURAL HISTORY

On August 19, 2008, the Oregon Water Resources Department (“OWRD” or “department”) issued a proposed final order (“PFO”) which proposed the approval of the application for the extension of time filed by the City of Cottage Grove (“Cottage Grove”) to perfect certain water rights. WaterWatch of Oregon, Inc. (“WaterWatch”) filed a timely protest to the PFO on October 3, 2008. On March 3, 2009, OWRD referred this matter to the Office of Administrative Hearings (“OAH”).

On May 11, 2009, a telephonic prehearing conference was held. Administrative Law Judge (ALJ) Joe L. Allen presided over the conference. OWRD was represented at the prehearing conference by Renee Moulun, Assistant Attorney General. Cottage Grove was represented by Sean Kelly, Attorney at Law. WaterWatch was represented by Lisa Brown, Attorney at Law. At the conference, the parties agreed to a prehearing schedule that included discovery and most motion filing deadlines. The parties also agreed to a hearing date and location. On May 18, 2009, ALJ Allen issued a prehearing order establishing those motion filing deadlines not established at the May 11, 2009 prehearing conference.

On May 19, 2009, OWRD filed a Motion for Order on Issues seeking to clarify the issues in this matter. On June 16, 2009, ALJ Allen issued a ruling identifying the issues for hearing enumerated as Issues 1 through 8.

On June 22, 2009, OWRD filed a motion seeking summary determination of Issues 1, 4 and 6. On the same date, WaterWatch filed a motion seeking summary determination of Issues 1, 2 and 3. The City of Cottage Grove filed a motion seeking summary determination of Issues 1 through 8. All motions were timely filed. On August 5, 2009, the ALJ issued a consolidated ruling on the parties’ and the agency’s motions for summary determination. In the August 5, 2009 ruling, the ALJ granted summary determination in favor of OWRD on Issues 1, 4 and 6. In addition, the ALJ granted summary determination in favor of Cottage Grove on Issue 1 as well as Issues 4 through 8. The ALJ denied WaterWatch’s motion for summary determination in its entirety.

Evidentiary Findings “Exception #2”: The APO omitted two exhibits offered by WaterWatch and accepted into evidence. (WaterWatch Exceptions, pgs. 5 – 6.)

WaterWatch is correct that the APO omitted reference to WaterWatch Exhibits 229 and 230, listed on WaterWatch’s August 7, 2009 Exhibit List, which were both accepted into evidence.¹ This exception is allowed.

C. WaterWatch’s Exceptions to Findings of Fact in the Amended Proposed Order

Findings of Fact “Exception #4”: The APO is incorrect in its finding of fact that municipal and quasi-municipal permits were not required to submit new applications for permit extensions. (WaterWatch Exceptions, pgs. 6 – 7.)

WaterWatch cites to a letter from OWRD employee Lisa Juul, dated January 12, 2003, to the City as proof that Cottage Grove failed to submit a timely extension. (WaterWatch Exhibit 217.) However, during the period between 1997 and 2005, OWRD was engaged in litigation that affected how it processed extensions and assisted with legislation to amend the law governing extensions of time for municipal permits. *WaterWatch of Oregon v. Water Resources Commission*, 339 Or 275, 119 P3d 221 (2005). During this time, OWRD placed all pending Applications for Extension of Time for municipal permit holders on administrative hold and did not require municipal water use permit holders to submit Applications for Extension of Time until new rules were adopted. While rules initially became effective on November 1, 2002, the rules were later amended and finally became effective on November 22, 2005. The letter referred to by OWRD informed municipalities with unperfected permits that they must fill out an enclosed questionnaire and submit it to the department such that the department could subsequently take appropriate action on the permit. The letter does not direct the City of Cottage Grove to submit an application for an extension of time as WaterWatch asserts. This exception is denied.

D. WaterWatch’s Exceptions to Conclusions of Law in the Amended Proposed Order

WaterWatch made two exceptions to the APO’s Conclusions of Law.

Conclusions of Law “Exception #1”: WaterWatch argues that the APO incorrectly concludes that there is no undeveloped portion of the permit because water developed after the expiration of the last-granted extension may not be considered water beneficially used for the purpose of determining whether there is an undeveloped portion of the permit. (WaterWatch Exceptions, pgs. 7 – 8.) Because WaterWatch also raised this argument in terms of exceptions to the Opinion section of the APO, this argument is addressed in Section E responses to Exceptions to Opinion 2 and 3(c) and (d) below.

Conclusion of Law “Exception #2”: WaterWatch argues that for the reasons described in its exceptions to the Opinion section as provided in its Exceptions 3 and 4, the conclusions of

¹ The Exhibits 229 and 230 admitted into evidence should not be confused with two later-offered documents that were also labeled Exhibit 229 and Exhibit 230. These documents, both authored by GSI Water Solutions, Inc. were not allowed into evidence.

Friends of Bill Bradbury v. Dept. of Justice, 219 Or App 395, 409; 182 P.2d 303 (2008)); (WaterWatch Exceptions, pg. 13.) Contrary to WaterWatch's assertions, the department does not merely reiterate the relevant text of the relevant statute in its rule defining "undeveloped portion of the permit." Rather, the department interprets an inexact term delegated to it by the legislature. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 621 P2d 547 (1980). The department does not "mimic" the statute because it uses the words "undeveloped portion of the permit" to identify the term it defines. OAR 690-315-0010(6)(g). Nor is the definition's reference to "beneficial use before the extension" mere repetition of statutory terms as WaterWatch asserts. Instead, "beneficial use before the extension" is incorporated into the definition in contextual reference to other portions of the rule that clarify what information a municipality must provide to establish whether it has fully developed its permit as of the date of the application. OAR 690-315-0010(6)(g); 690-315-0070(3)(g). Because identification of statutory terms for the purpose of defining them, and reference to statutory terms in the context of other rules serve an interpretive as opposed to reiterative function, the department is entitled to deference of its interpretation of the inexact terms used in ORS 537.230(2). This exception is denied.

Opinion "Exception #3(b)": The department's interpretation of the phrase "before the extension" as provided in OAR 690-315-0010(6)(g).

WaterWatch argues that the phrase "before the extension" must be interpreted to mean the last extension allowed by the department. However, the department's interpretation that the words "before the extension" refer to the current extension being considered by the department, not the last extension allowed by the department, is supported by the plain text of the rule. OAR 690-315-0010(6)(g); *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1984). In addition, the department's interpretation is supported by the text of ORS 537.230(2) which refers to considerations the agency must make in determining whether to allow a presently-pending extension request. The text of ORS 537.230(2) states that the department "may order and allow an extension of time to complete construction or perfect a water right beyond the time specified in the permit" if:

(a) The holder shows good cause. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion or construction of the right;

(b) The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by the department of a water management and conservation plan; and

(c) For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, the department finds that the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. The department

department has many mechanisms for addressing a permit holder's use of water inconsistently with a permit's terms, there is no support for asserting that water that is beneficially used after expiration of the development deadline is not beneficial use for the purpose of permit development. This exception is denied.

Opinion "Exception #3(e)": The water diverted on July 10, 2008 was not diverted for beneficial use.

WaterWatch asserts that the water diverted by Cottage Grove on July 10, 2008 was not diverted for beneficial use because a portion of the water was diverted into a municipal storage reservoir. (WaterWatch Exceptions, pgs. 17 – 18.) The APO correctly determined that a preponderance of evidence in the record supports a finding that the City diverted water for "all water uses usual and ordinary" to municipal water systems. OAR 690-315-0010(29). Further, as was discussed extensively in briefing, as a matter of law, "municipal use" includes more than just instantaneous *per capita* consumption of water. This exception is denied.

Opinion "Exception #4": The APO is in error for not conditioning the permit extension on the development of a Division 86 Water Management and Conservation Plan (WaterWatch Exceptions, pgs. 18 – 19.)


As discussed in the APO, because there is no undeveloped portion of the permit, OWRD is not required or authorized to condition the permit extension at issue upon development of a Division 86 plan. This exception is denied.

III. ORDER

The OWRD adopts the attached Amended Proposed Order which is incorporated by reference herein. With one exception as noted above, WaterWatch's exceptions are denied.

The OWRD grants the extension to time to perfect Permit S-42117 from October 1, 1999 to October 1, 2013.

DATED this 14th day of September, 2010.


Phillip G. Ward, Director
Oregon Water Resources Department

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT**

IN THE MATTER OF:)	
APPLICATION FOR EXTENSION OF)	AMENDED PROPOSED ORDER¹
TIME FOR PERMIT S-42117, WATER)	
RIGHT APPLICATION S-55338 IN THE)	
NAME OF THE CITY OF COTTAGE)	
GROVE,)	
<i>Applicant</i>)	
)	
vs.)	
)	
WATERWATCH OF OREGON, INC.,)	OAH Ref. No: WR-09-003
<i>Protestant.</i>)	OWRD Case No: S-42117

PROCEDURAL HISTORY

On August 19, 2008, the Oregon Water Resources Department (OWRD) issued a proposed final order (PFO) which proposed the approval of the application for the extension of time filed by the City of Cottage Grove (Cottage Grove) to perfect certain water rights. WaterWatch of Oregon, Inc. (WaterWatch) filed a timely protest to the PFO on October 3, 2008. On March 3, 2009, OWRD referred this matter to the Office of Administrative Hearings (OAH).

On May 11, 2009, a telephonic prehearing conference was held. Administrative Law Judge (ALJ) Joe L. Allen presided over the conference. OWRD was represented at the prehearing by Rene Moulin, Assistant Attorney General. Cottage Grove was represented by Sean Kelly, Attorney at Law. WaterWatch was represented by Lisa Brown, Attorney at Law. At the conference, the parties agreed to a prehearing schedule that included discovery and motion filing deadlines. The parties also agreed to a hearing date and location.

On May 19, 2009, OWRD filed a Motion for Order on Issues seeking to clarify the issues in this matter. On June 16, 2008, ALJ Allen issued a ruling identifying the issues for hearing enumerated as Issues 1 through 8.

On June 22, 2009, OWRD filed a motion seeking summary determination of Issues 1, 4, and 6. On the same date, WaterWatch filed a motion seeking summary determination of Issues

¹ This Amended Proposed Order is being issued to include exception language erroneously omitted from the Proposed Order issued December 8, 2009. No other changes have been made to the Proposed Order.

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1, 2, and 3. The City of Cottage Grove filed a motion seeking summary determination of Issues 1 through 8. All motions were timely filed. On August 5, 2009, the ALJ issued a consolidated ruling on the parties' motions for summary determination. In the August 5, 2009, ruling the ALJ granted summary determination in favor of OWRD on Issues 1, 4, and 6. In addition, the ALJ granted summary determination in favor of Cottage Grove on Issue 1 as well as Issues 4 through 8. The ALJ denied WaterWatch's motion for summary determination in its entirety.

On August 7, 2009, the parties filed and exchanged exhibits and written direct testimony of all witnesses. On August 28, 2009, the parties filed and exchanged written rebuttal testimony. The parties filed and served cross-examination witness lists on September 1, 2009.

On September 15, 2009, a hearing was convened on the remaining issues (Issues 2 and 3 in the protest). The hearing was held at the OAH offices in Salem Oregon with ALJ Allen presiding. The parties appeared through their respective counsel. John Davis appeared as a witness and testified on behalf of WaterWatch. Raymond E. Pardee and Jan Wellman appeared as witnesses and testified on behalf of Cottage Grove. Dwight French appeared and testified on behalf of OWRD. The evidentiary portion of the record closed at the conclusion of the hearing. The parties filed written closing arguments on October 30, 2009 and written responses on November 13, 2009. The hearing record closed on November 13, 2009.

ISSUES

1. Whether the PFO is in error in its findings and conclusions that there is no undeveloped portion of this permit pursuant to OAR 690-315-0010(6)(g), and in failing to evaluate this extension pursuant to ORS 537.630(2)(c) and OAR 690-315-0080(1)(f).

2. Whether the PFO is in error for failing to condition use of the undeveloped portion on the development of a Division 86 plan. OAR 690-086-0010 through 0920.

EVIDENTIARY RULINGS

Exhibits 106, 210, 213, 214, 217, 219, and 228, offered by WaterWatch were admitted into the record without objection. OWRD and Cottage Grove objected to Exhibits 215 and 218 as irrelevant. The objections were overruled and Exhibits 215 and 218 were admitted into the record.

Exhibits A1-A9, offered by OWRD, and Exhibits 101, 102, 110, and 111, offered by Cottage Grove, were admitted into the record without objection.²

On November 3, 2009, over six weeks after the close of the evidentiary portion of the record in this case. WaterWatch filed a Motion to Supplement the Record and to Reconsider the Ruling Excluding Mr. French's Affidavit of July 6, 2009. WaterWatch provides no basis to establish good cause for its failure to file the documents at the hearing. OAR 137-003-0530(1).

² The parties offered consecutively numbered exhibits throughout prehearing motions. Exhibits not identified in sequence were not offered at the hearing.

Further, WaterWatch provided no valid basis for reconsideration of the exclusion of Mr. French's July 6, 2009 affidavit. As such, WaterWatch's motion is hereby denied in its entirety.

FINDINGS OF FACT

1. The City of Cottage Grove holds permit S-42117 (permit), issued by the Oregon Water Resources Department on November 14, 1977. Under the permit, Cottage Grove is authorized to divert up to 6.2 cubic feet per second (cfs) of water from the Row River for municipal use. (Test. of Wellman, dated August 6, 2009, at 2; Ex. A1 at 2.)

2. According to the permit, Cottage Grove was required to complete construction of a water development project by October 1, 1979 and make complete application of water on or before October 1, 1980. (Ex. A1 at 2.)

3. Between 1977 and 1999, OWRD granted multiple extensions to the permit to allow Cottage Grove to complete construction of a water treatment plant on the Row River and make full application of the water claimed in the permit. The last extension granted by OWRD expired on October 1, 1999. (Ex. A1 at 3.)

4. Sometime prior to October 1, 1999, due to protracted rulemaking proceedings regarding permit extensions, OWRD suspended all applications for extension of time and did not require municipal permit holders to submit new applications for permit extensions. OWRD's new rules became effective November 22, 2005. (Ex. A1 at 3.)

5. In November 2007, Cottage Grove completed an enlargement of the Row River Water Treatment Plant (RRWTP) designed to accommodate a new membrane filtration system. In May 2008, Cottage Grove completed construction of a larger diversion structure which allowed it to divert up to 6.2 cfs of water. (Test. of Pardee, dated August 6, 2009, at 4; Test of Wellman, dated August 6, 2009, at 4.)

6. On December 11, 2007, Cottage Grove submitted an application for extension of time to perfect water rights under the permit. On January 30, 2008, Cottage Grove requested its application be placed on administrative hold. OWRD granted this request. (Exs. A1 at 3, A6, and A7.)

7. On July 10, 2008, Cottage Grove diverted 6.2cfs of water into the RRWTP over a period of approximately six hours. The purposes of the diversion included meeting end user demands, storage for fire suppression, and filling Cottage Grove's finished water reservoirs to ensure maintenance of minimum line pressure necessary for proper functioning. (Test. of Pardee, dated August 6, 2009, at 3; Test. of Wellman, dated August 6, 2009, at 2; Ex. A4 at 3-4.)

8. On or about August 4, 2008, Cottage Grove requested OWRD remove the administrative hold from the application for extension and continue processing the application. At this time, Cottage Grove provided information to OWRD supplementing its original application. (Exs. A1 at 3 and A4 at 1.)

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9. In addition to uses identified in its administrative rules, OWRD also considers uses aimed at maintaining municipal water systems, including flushing lines and maintaining system pressure, to be valid municipal uses of water. (Affidavit of French, dated August 7, 2009, at 1.)

CONCLUSIONS OF LAW

1. There is no undeveloped portion of the permit and therefore no basis exists for evaluating the extension pursuant to ORS 537.630(2)(c) and OAR 690-315-0080(1)(f).
2. There is no basis for conditioning the extension on the development of a Division 86 plan.

OPINION

WaterWatch of Oregon, Inc. asserts the PFO granting Cottage Grove's extension of time to perfect water rights under permit S-42117 was issued in error. As the proponent, WaterWatch has the burden to prove this position by a preponderance of the evidence. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The arguments put forth by WaterWatch are convoluted, at best. Nonetheless, at the bottom, each hinges on interpretation of administrative rules promulgated by OWRD. WaterWatch asserts OWRD's interpretation is erroneous and advocates for an alternate, more restrictive, interpretation. As the proponent of this position, WaterWatch bears the burden. As set forth below, WaterWatch failed to meet its burden.

1. There is no undeveloped portion of the permit.

In its protest, WaterWatch argues the PFO is in error in finding there is no undeveloped portion of the permit at issue. To support this argument, WaterWatch asserts Cottage Grove's one time diversion of 6.2 cfs is insufficient to show "development" of water under the permit. OWRD disagrees. OWRD interprets the diversion rate as an instantaneous rate at any given time. At the hearing, WaterWatch asserted this was not a factual issue, but rather a legal issue of whether OWRD's interpretation of the terms "undeveloped portion of the permit," "beneficial use," and "before the extension" contained in OAR 690-305-0010(6)(g) are permissible.

OAR 690-315-0010(6)(g) defines "undeveloped portion of the permit" as, "the portion of the permit that is the difference between the maximum rate, or duty if applicable, specified in the permit and the maximum rate, or duty if applicable, diverted for beneficial use before the extension." OWRD interprets the term "beneficial use" to include municipal uses. In addition, OWRD interprets the phrase "before the extension" to mean prior to the extension under consideration at a given time. Under OWRD's interpretation of this rule, in order to show there

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was no undeveloped portion of the permit, Cottage Grove was required to show it diverted the maximum rate of water for municipal use, at some time, on or before the date of the currently pending extension.

WaterWatch asserts such interpretation is erroneous. Instead, WaterWatch advocates for an interpretation of OAR 690-315-0010(6)(g) that would measure beneficial use as only *per capita* consumption by end users rather than all municipal uses identified by Cottage Grove. This is contrary to the terms of the permit and the governing rules promulgated by OWRD. The allowable use of water under permit S-42117 is identified as "municipal." The term "municipal water use" is defined by OAR 690-300-0010 (29) which provides, in relevant part:

"Municipal Water Use" means the delivery and use of water through the water service system of a municipal corporation for *all water uses usual and ordinary to such systems*. Examples of these water uses shall include but are not limited to domestic water use, irrigation of lawns and gardens, commercial water use, industrial water use, fire protection, irrigation and other water uses in park and recreation facilities, and street washing. * * *
(Emphasis added.)

At the hearing, WaterWatch failed to show the uses identified by Cottage Grove were not usual and ordinary to municipal water systems. Cottage Grove, on the other hand, provided evidence to indicate the water diverted under the permit was allocated to several municipal uses including domestic and commercial uses, fire protection, and storage designed to maintain pressure in the water lines necessary for proper functioning.

WaterWatch also argues in favor of measuring any undeveloped portion of the permit at the time of expiration of the last extension granted by OWRD. Under this interpretation, WaterWatch argues OWRD should measure the undeveloped portion of the permit as of October 1, 1999. This, however, requires the insertion of a term or terms specifically identifying a prior or "last" extension granted by OWRD. Under OWRD's interpretation, the relevant time period is that of the extension currently under consideration. I cannot find a basis for replacing the agency's interpretation with one so limited in scope as suggested by WaterWatch. To do so would require the addition of one or more terms not included in the administrative rule. This is not the role of the ALJ. *See*, ORS 174.010.

An agency's interpretation of its own validly promulgated administrative rule is entitled to deference unless "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law * * *." *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Pursuant to *Don't Waste Oregon*, an agency's interpretation is erroneous and therefore not entitled to deference only if it is: 1) implausible; 2) inconsistent with the wording of the rule; 3) inconsistent with the context of the rule; or 4) inconsistent with any other source of law. 320 Or at 142. The interpretation of OAR 690-315-0010(6)(g) asserted by OWRD is plausible, not inconsistent with the wording or context of the rule nor any other source of law. As such, OWRD's interpretation is entitled to deference.

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Permit S-42117 allows Cottage Grove to divert up to 6.2 cfs for municipal purposes. In the PFO, OWRD found that, as of the date of the currently pending extension, Cottage Grove had diverted 6.2 cfs of water into the RRWTP. OWRD further determined that this water was diverted for various municipal uses provided for in the permit. At the hearing, WaterWatch failed to prove, by a preponderance of the evidence, Cottage Grove did not divert 6.2 cfs for municipal purposes. Accordingly, OWRD found, and I agree, there is no undeveloped portion of the permit under OAR 690-315-0010(6)(g).

WaterWatch further argues OWRD erred in failing to evaluate the permit extension pursuant to ORS 537.630(2)(c)³ and OAR 690-315-0080(1)(f).⁴ However, each of these sections

³ ORS 537.630(2) provides, in relevant part:

The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which the permit for municipal use is issued under ORS 537.625. * * * the department may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions:

* * * * *

(c) For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, the department finds that the *undeveloped portion of the permit* is conditioned to maintain * * * the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. * * *. (Emphasis added.)

⁴ OAR 690-315-0080(1), provides, in relevant part:

In order to approve an application for an extension of time for municipal and quasi-municipal water use permits holders to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, the Department shall find:

* * * * *

(f) For the first extension issued after June 29, 2005 for municipal water use permits issued before November 2, 1998:

(A) There are agreements regarding use of the *undeveloped portion of the permit* between the permit holder and a federal or state agency that include conditions or required actions that maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit; or

(B) It is determined that use of the *undeveloped portion of the permit* will maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit; or

(C) If it is determined that use of the *undeveloped portion of the permit* would not maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit, the undeveloped portion of the permit is conditioned to

of the statute and administrative rule presuppose an undeveloped portion of the permit at issue. Cottage Grove has shown by a preponderance of the evidence it has completed construction of its diversion and distribution works, RRWTP. Further, Cottage Grove has demonstrated it diverted the full rate of water allowed under its permit for municipal use. Cottage Grove has also shown each of these conditions was satisfied prior to July 10, 2008, the date of the currently pending extension. Accordingly, there is no undeveloped portion of the permit. Because no undeveloped portion of the permit exists, there is no basis for evaluating the permit extension application under ORS 537.630(2)(c) and OAR 690-315-0080(1)(f).

2. *There is no need to condition the permit extension on the development of a Division 86 plan.*

OAR 690-315-0090 (3) mandates development of a Water Management and Conservation Plan (WMCP or Division 86 plan) for the undeveloped portion of a permit when such permit is extended under OAR 690-315-0070 to OAR 690-315-0100. Such plans are governed by OAR chapter 690, division 086.

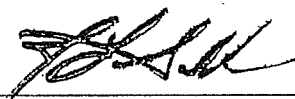
Because there is no undeveloped portion of the permit, OWRD is not required or authorized to condition the permit extension at issue upon the development of a Division 86 plan.

ORDER

I propose the Oregon Water Resource Department issue the following order:

1. There is no undeveloped portion of the permit. The PFO granting Cottage Grove's permit extension is not in error.

2. There is no basis for conditioning the permit extension on the development of a Division 86 plan.



Joe L. Allen, Administrative Law Judge
Office of Administrative Hearings

Date: December 15, 2009

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maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit. (Emphasis added.)

RIGHT TO FILE EXCEPTIONS

Pursuant to OAR 137-003-0655(4) and OAR 690-002-0175, if the recommended action in the proposed order is adverse to any party the party may file exceptions. Exceptions must be in writing, and clearly and concisely identify the portions of the proposed order excepted to.

Parties must file their exceptions within 30 days following the date of service of the proposed order. Exceptions must be served on each of the parties and filed with the Oregon Water Resources Department as follows:

Oregon Water Resources Department
Patricia McCarty
725 Summer St. NE, Suite A
Salem, OR 97301
FAX: (503) 986-0930

Exceptions may be filed via mail, facsimile, or hand delivery. Exceptions sent through the U.S. Postal Service shall be considered filed on the date postmarked. Exceptions sent by facsimile or hand-delivered are considered filed when received by the agency. The Director must consider any exceptions to the proposed order prior to issuing a final order.

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CERTIFICATE OF MAILING

On 15th day of December 2009 I mailed the foregoing **AMENDED PROPOSED ORDER** in Reference No. WR-09-003 by depositing a copy of said document in the US Post Office at Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

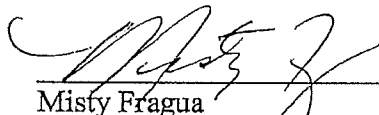
Patricia McCarty
Oregon Water Resources
725 Summer St. N.E., Suite "A"
Salem, OR 97301

Lisa Brown
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204

Sean D. Kelly
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City of Cottage Grove
Jan Wellman, Public Works Director
400 Main Street
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Misty Fragua
Administrative Assistant

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on September 14, 2010, I served the FINAL ORDER IN
CONTESTED CASE by certified mail to the parties at the addresses listed below:

Sean D. Kelly
Ackley, Melendy, Kelly LLP
30 North Fifth Street
P.O. Box 725
Cottage Grove, OR 97242

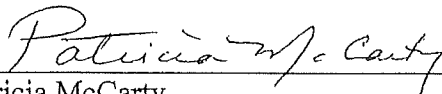
City of Cottage Grove
Jan Wellman, Public Works Director
400 Main Street
Cottage Grove, OR 97424

Lisa Brown
WaterWatch of Oregon, Inc.
213 S.W. Ash Street, Suite 208
Portland, OR 97204

By first class mail:

Renee Moulun
Sr. Asst. Attorney General
Oregon Department of Justice, NRS
1162 Court Street NE
Salem, OR 97301-4096

Dated this 14th day of September 2010.



Patricia McCarty
Agency Representative