BEFORE THE WATER RESOURCES DEPARTMENT
STATE OF OREGON

In the Matter of the Consolidated Case Involving Applications for Extension of Time for: Permit S-32410, Modified by Permit Amendment T-8538, Application S-43365, in the Name of City of Lake Oswego; and Permit S-37839, Application S-50819, in the Name of City of Lake Oswego, Permit S-3778, Application S-5942, in the Name of South Fork Water Board; Permit S-9982, Application S-11007, in the Name of South Fork Water Board; and Permit S-22581, Application S-28676, in the Name of South Fork Water Board, Permit S-46120, Modified by Permit Amendment T-7434, Application S-60632, in the Name of Sunrise Water Authority and North Clackamas County Water Commission; Permit S-35297, Modified by Permit Amendment T-7389, Application S-47144, in the Name of North Clackamas County Water Commission; and Permit S-43170, Modified by Permit Amendment T-7434, Application S-57226, in the Name of North Clackamas County Water Commission, *Applicants,* vs. WaterWatch of Oregon, Inc.; and South Fork Water Board, *Protestants.*	)	REVISED FINAL ORDER INCORPORATING PROPOSED ORDER IN CASE INVOLVING SOUTH FORK WATER BOARD PERMITS S-22581, S-3778, S-9982 OAH Case Nos.: WR 08-004; WR 08-005; WR 08-006; WR 08-007; WR 08-008; WR 08-009; WR 08-010; WR 08-011.

RIGHT TO JUDICIAL REVIEW: This is a final order in a contested case. It is subject to judicial review in Oregon Court of Appeals Case No. A148874, pursuant to the provisions of ORS 183.482(6).

Pursuant to ORS 183.482(6), on May 8, 2013, the Oregon Water Resources Department withdrew for reconsideration the Corrected Final Order Incorporating Proposed Order in Case Involving South Fork Water Board Permit S-9982, issued April 26, 2011, and the Order on Reconsideration Modifying the Final Order Incorporating Proposed Order in Cases Involving South Fork Water Board Permits S-22581, S-3778, S-9982. The purpose of the withdrawal was

to correct the erroneous withdrawal of the April 20, 2011, order (which had already been superseded by the April 26, 2011, order) and to withdraw the April 26, 2011, order to correct the printing errors which misstated the conditions applicable to Permit S-22581, S-3778 and S-9982. This order is the operative final order for purposes of judicial review in Oregon Court of Appeals Case No. A148874.

On reconsideration, the Department issues this Revised Final Order Incorporating Proposed Order in Case Involving South Fork Water Board Permits S-22581, S-3778, S-9982 (Issued on Reconsideration, May 8, 2013) correcting the printing errors, and reverses the Order on Reconsideration Modifying the Final Order Incorporating Proposed Order in Case Involving South Fork Water Board Permits S-22581, S-3778, S-9982, issued April 20, 2011.

The "CONDITIONS FOR PERMIT S-22581" section contained in Footnote 1 of the April 26, 2011 order erroneously listed the conditions for Permit S-9982.

Except as expressly stated herein, the Oregon Water Resources Department adopts and incorporates by reference the attached Corrected Final Order Incorporating Proposed Order in Case Involving South Fork Water Board Permit S-9982.

ORDER

The Corrected Final Order Incorporating Proposed Order in Case Involving South Fork Water Board Permit S-9982 is modified to **strike** that part of Footnote 1 reading:

"CONDITIONS FOR PERMIT S-22581

1. ***Development Limitations***

   Diversion of water beyond 3.0 cfs under Permit S-9982 shall only be authorized upon issuance of a final order approving a WMCP under OAR Chapter 690, Division 86. A WMCP shall be submitted to the Department within 3 years of an approved extension of time application. Use of water under Permit S-9982 shall be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

   The deadline established in this PFO for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of this order may also meet the WMCP submittal requirements of other Department orders.

2. ***Conditions to Maintain the Persistence of Listed Fish***

   a. *Prior to diversion of any water beyond 3.0 cfs under Permit S-9982, a permit amendment must be approved by the Department in accordance*

with ORS 540.510 to relocate (1) the current authorized POD on the South Fork Clackamas River located in the SWSW, Section 29, Township 4 South, Range 5 East, W.M., and (2) the current authorized POD on Memaloose Creek located in SESW Section 29, Township 4 South, Range 5 East, W.M. to POD(s) located within the lower 3.1 miles on the mainstem of the Clackamas River.

b. *Use of water beyond 3.0 cfs under Permit S-9982 may only be made from water diverted within the lower 3.1 miles on the mainstem of the Clackamas River, and only if available at the original points of diversion located on the South Fork Clackamas River and Memaloose Creek.*

c. *Minimum fish flow needs on the Lower Clackamas River as recommended by ODFW are in Table 1, below, and are to be measured at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent.*

d. *In cooperation with other members of the Clackamas River Water Providers, SFWB must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. This is of particular significance when augmenting stream flow during the period of July 1 through November 30.*

e. *From the first Monday in September through June 30 the maximum total amount of the undeveloped portion of the Permit S-9982 that can legally be diverted shall be reduced in proportion to the amount by which the flows shown in Table 1 are not met based on a seven day rolling average of mean daily flows (measured on the Clackamas River at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent), as illustrated in the examples below.*

Example 1:

On June 15, the last seven mean daily flows were 750, 725, 700, 650, 625, 600 and 575 cfs. The seven day rolling average is 661 cfs. The maximum total amount of the undeveloped portion of the permit that could legally be diverted under this permit would not be reduced because the 7 day average of mean daily flows is greater than the 650 target flow for June 15.

Example 2:

If on June 15, the average of the last seven mean daily flows was 578 cfs, then the target flows would be missed by 11% (100 – [(578/650) 100)]. If the maximum total amount of the undeveloped portion of the permit that can legally be diverted under this permit is 10 cfs, then the maximum total amount of the undeveloped portion of the permit that could be legally*

diverted under this permit would be reduced by 11%. The maximum total amount of the undeveloped portion of the permit that could be legally diverted under the permit under this condition would be 8.9 cfs (10-[10 x 0.11] = 8.9).

Table 1[1]

MINIMUM FISH FLOW NEEDS ON THE LOWER CLACKAMAS RIVER MEASURED AT USGS GAGE 14211010, CLACKAMAS RIVER NEAR OREGON CITY, OREGON	
Month	*Cubic Feet per Second*
June – August	*650*
September	*650/800*[2]
October – May	*800*

[1] *Table 1 was called Table 2 in the Proposed Final Order (PFO)*

[2] *650 cfs Sept. 1 through Sept. 15 and 850 cfs September 16 through September 30"*

The stricken text is **replaced** by the following:

CONDITIONS FOR PERMIT S-22581

1. **Development Limitations**

Diversion of water beyond 22.4 cfs under Permit S-22581 shall only be authorized upon issuance of a final order approving a WMCP under OAR Chapter 690, Division 86. A WMCP shall be submitted to the Department within 3 years of an approved extension of time application. Use of water under Permit S-22581 shall be consistent with this and subsequent WMCPs approved under OAR Chapter 690, Division 86 on file with the Department.

The deadline established in this PFO for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of this order may also meet the WMCP submittal requirements of other Department orders.

2. **Conditions to Maintain the Persistence of Listed Fish**

a. Minimum fish flow needs on the Lower Clackamas River as recommended by ODFW are in Table 1, below, and are to be measured at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent.

b. In cooperation with the holders of Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, the permittee must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. It is OWRD's intent that ODFW and the permittees shall reach agreement on the strategy. However, if after making a good faith effort ODFW

and the permittees are unable to reach agreement on a strategy ODFW shall devise the strategy. In either case, the strategy shall be documented in writing and the permittees shall comply with the strategy. The annual meeting and resulting strategy may cover issues other than Timothy Lake releases that are relevant to both use under Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, and to listed fish species; however, the strategy may include actions pertaining to such issues only upon mutual agreement by ODFW and the permittees.

c. From the first Monday in September through June 30 the maximum total amount of the undeveloped portion of the Permit S-22581 that can legally be diverted shall be reduced in proportion to the amount by which the flows shown in Table 1 are not met based on a seven day rolling average of mean daily flows (measured on the Clackamas River at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent), as illustrated in the examples below.

Example 1:

On June 15, the last seven mean daily flows were 750, 725, 700, 650, 625, 600 and 575 cfs. The seven day rolling average is 661 cfs. The maximum total amount of the undeveloped portion of the permit that could legally be diverted under this permit would not be reduced because the 7 day average of mean daily flows is greater than the 650 target flow for June 15.

Example 2:

If on June 15, the average of the last seven mean daily flows was 578 cfs, then the target flows would be missed by 11% (100 – [(578/650)* 100)]. If the maximum total amount of the undeveloped portion of the permit that can legally be diverted under this permit is 10 cfs, then the maximum total amount of the undeveloped portion of the permit that could be legally diverted under this permit would be reduced by 11%. The maximum total amount of the undeveloped portion of the permit that could be legally diverted under the permit under this condition would be 8.9 cfs (10-[10 x 0.11] = 8.9).

Table 1[1]

MINIMUM FISH FLOW NEEDS ON THE LOWER CLACKAMAS RIVER MEASURED AT USGS GAGE 14211010, CLACKAMAS RIVER NEAR OREGON CITY, OREGON	
Month	Cubic Feet per Second
June – August	650
September	650/800[2]
October – May	800

[1] Table 1 was called Table 2 in the Proposed Final Order (PFO)

[2] 650 cfs Sept. 1 through Sept. 15 and 800 cfs September 16 through September 30

A typographical error in Table 1, footnote 2 in the conditions for Permit S-3778 and for Permit S-9982 is corrected as follows: Footnote 2: 650 cfs Sept. 1 through Sept. 15 and 800 cfs September 16 through September 30.

DATED: May 8, 2013

Dwight French, Water Right Services Division, Administrator,
for Phillip C. Ward
Director, Oregon Water Resources Department

BEFORE THE WATER RESOURCES DEPARTMENT
STATE OF OREGON

In the Matter of the Consolidated Case Involving Applications for Extension of Time for: Permit S-32410, Modified by Permit Amendment T-8538, Application S-43365, in the Name of City of Lake Oswego; Permit S-37839, Application S-50819, in the Name of City of Lake Oswego; Permit S-3778, Application S-5942, in the Name of South Fork Water Board; Permit S-9982, Application S-11007, in the Name of South Fork Water Board; Permit S-22581, Application S-28676, in the Name of South Fork Water Board; Permit S-46120, Modified by Permit Amendment T-7434, Application S-60632, in the Name of Sunrise Water Authority and North Clackamas County Water Commission; Permit S-35297, Modified by Permit Amendment T-7389, Application S-47144, in the Name of North Clackamas County Water Commission; Permit S-43170, Modified by Permit Amendment T-7434, Application S-57226, in the Name of North Clackamas County Water Commission, *Applicants,* vs. WaterWatch of Oregon, Inc.; and South Fork Water Board, *Protestants.*	)	CORRECTED FINAL ORDER INCORPORATING PROPOSED ORDER IN CASE INVOLVING SOUTH FORK WATER BOARD PERMIT S-9982 OAH Case Nos.: WR 08-004; WR 08-005; WR 08-006; WR 08-007; WR 08-008; WR 08-009; WR 08-010; WR 08-011.

RIGHT TO JUDICIAL REVIEW: This is a final order in a contested case. It is subject to judicial review pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within sixty (60) days from the service of the final order.

Except as expressly stated herein, the Oregon Water Resources Department ("OWRD") adopts and incorporates by reference the attached Amended Proposed Order dated January 31, 2011, GRANTING, WITH CONDITIONS[1], the extension applications for Permits S-22581, S-3778, and S-9982. The Amended Proposed Order is attached.

Because the Amended Proposed Order incorporates certain portions of the Proposed Order in this matter, the Proposed Order is also attached.

OWRD received exceptions to this Amended Proposed Order from WaterWatch. OWRD makes the following modifications to the Amended Proposed Order based upon the exceptions received.

1. OWRD modifies the first paragraph of the "Modifications to 'Common Issues Exhibits' subsection" as follows. To avoid confusion, OWRD reprints the paragraph as it appears in the Amended Proposed Order:

"The final sentence in the subsection is modified as follows, with additions in underline. 'WW 4, 11, 12, 31-34, and 42 were not admitted into evidence at the hearing. Offers of proof were not made with respect to WW 4, 11, 12, and 42, as required by OAR 137-003-0610(5). OWRD has no basis for reconsideration of the ALJ's decision with respect to these exhibits. An offer of proof was made with respect to WW 31-34. As described below in the "Offers of Proof" section, OWRD now admits WW 31-34 into the record and will accord them the appropriate weight."

OWRD modifies this paragraph as follows, with deletions shown in strikethrough, and additions in bold:

"The final sentence in the subsection is modified as follows, with additions in underline. 'WW 4, 11, 12, 31-34, and 42 were not admitted into evidence at the hearing. **An offer** ~~Offers~~ of proof **was** ~~were~~ not made with respect to WW 4, ~~11, 12, and~~ 42, as required by OAR 137-003-0610(5). OWRD has no basis for reconsideration of the ALJ's decision with respect to **this exhibit** ~~these exhibits~~. An offer of proof was made with respect to WW 31-34. As described below in the "Offers of Proof" section, OWRD now admits WW 31-34 into the record and will accord them the appropriate weight."

Reason for modification: WaterWatch contended in its exceptions to the Amended Proposed Order that offers of proof had been made with respect to WW 4, 11, and 12. After reviewing the portions of the transcript cited by WaterWatch, OWRD agrees that offers of proof were made with respect to these exhibits. Because OWRD finds that the ALJ properly excluded WW 4, 11, and 12, however, OWRD makes no further modifications to the Amended Proposed Order with respect to these exhibits.

2. In its Amended Proposed Order, OWRD modified a subsection of the Proposed Order's "OPINION" section, which is entitled "5. The Persistence of Listed Fish." In its exceptions to the Amended Proposed Order, WaterWatch argues that in making these modifications, OWRD inappropriately deleted findings of historical fact that appeared in this subsection. Having reviewed WaterWatch's argument, OWRD finds most of these assertions without merit (because the findings were in fact not deleted, because they were incorporated within OWRD's "Additional Findings of Fact" in the Amended Proposed Order, or because the asserted findings of fact were instead legal conclusions). However,

OWRD has identified two findings of fact in this subsection that were inadvertently deleted, and hereby incorporates them in this Final Order:

a. "Both agencies [OWRD and ODFW] agree that the conditions placed in the PFOs were not the verbatim advice given by ODFW."
b. "There was apparently a miscommunication between the agencies (OWRD and ODFW) and municipalities concerning what would come from those meetings."

3. OWRD has identified a typographical error in footnote #4, of the Amended Proposed Order. OWRD corrects this error, as follows (deletions shown in strikethrough, additions in underline):

"It is important to note that ODFW is not either a party or a participant to this proceeding. As a result, only OWRD's obligations are at issue in this proceeding. This means that parties may not seek to alter ODFW's advice, or question ODFW's ~~OWRD's~~ authority to issue the advice, in this proceeding. Instead, a party must submit "existing evidence" in an attempt to demonstrate that the weight of the evidence requires conditions different from those concurred with, or recommended by ODFW as consistent with its advice."

Reason for modification: ODFW is responsible for issuing the advice, not OWRD.

ORDER

The extension of time for Permit S-3778, therefore, is approved subject to conditions contained herein. The deadline for completing construction is extended to October 1, 2050. The deadline for applying water to full beneficial use is extended to October 1, 2050.

The extension of time for Permit S-9982, therefore, is approved subject to conditions contained herein. The deadline for completing construction is extended to October 1, 2038. The deadline for applying water to full beneficial use is extended to October 1, 2038.

The extension of time for Permit S-22581, therefore, is approved subject to conditions contained herein. The deadline for completing construction is extended to October 1, 2049. The deadline for applying water to full beneficial use is extended to October 1, 2049.

DATED this 26 day of April, 2011.

Dwight French, Water Right Services Administrator
for Phillip C. Ward
Director, Oregon Water Resources Department

[1] The conditions for Permits S-22581, S-3778 and S-9982 as amended by this order and the ALJ's proposed order of August 2, 2010, and OWRD's Amended proposed order of January 1, 2011 are as follows:

CONDITIONS FOR PERMIT S-22581

1. **Development Limitations**
Diversion of water beyond 3.0 cfs under Permit S-9982 shall only be authorized upon issuance of a final order approving a WMCP under OAR Chapter 690, Division 86. A WMCP shall be submitted to the Department within 3 years of an approved extension of time application. Use of water under Permit S-9982 shall be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

The deadline established in this PFO for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of this order may also meet the WMCP submittal requirements of other Department orders.

2. **Conditions to Maintain the Persistence of Listed Fish**

a. Prior to diversion of any water beyond 3.0 cfs under Permit S-9982, a permit amendment must be approved by the Department in accordance with ORS 540.510 to relocate (1) the current authorized POD on the South Fork Clackamas River located in the SWSW, Section 29, Township 4 South, Range 5 East, W.M., and (2) the current authorized POD on Memaloose Creek located in SESW Section 29, Township 4 South, Range 5 East, W.M. to POD(s) located within the lower 3.1 miles on the mainstem of the Clackamas River.

b. Use of water beyond 3.0 cfs under Permit S-9982 may only be made from water diverted within the lower 3.1 miles on the mainstem of the Clackamas River, and only if available at the original points of diversion located on the South Fork Clackamas River and Memaloose Creek.

c. Minimum fish flow needs on the Lower Clackamas River as recommended by ODFW are in Table 1, below, and are to be measured at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent.

d. In cooperation with the holders of Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, the permittee must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. It is OWRD's intent that ODFW and the permittees shall reach agreement on the strategy. However, if after making a good faith effort ODFW and the permittees are unable to reach agreement on a strategy ODFW shall devise the strategy. In either case, the strategy shall be documented in writing and the permittees shall comply with the strategy. The annual meeting and resulting strategy may cover issues other than Timothy Lake releases that are relevant to both use under Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, and to listed fish species; however, the strategy may include actions pertaining to such issues only upon mutual agreement by OWFW and the permittees.

e. From the first Monday in September through June 30 the maximum total amount of the undeveloped portion of the Permit S-9982 that can legally be diverted shall be reduced in proportion to the amount by which the flows shown in Table 1 are not met based on a seven day rolling average of mean daily flows (measured on the Clackamas River at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent), as illustrated in the examples below.

Example 1:

On June 15, the last seven mean daily flows were 750, 725, 700, 650, 625, 600 and 575 cfs. The seven day rolling average is 661 cfs. The maximum total amount of the undeveloped portion of the permit that could legally be diverted under this permit would not be reduced because the 7 day average of mean daily flows is greater than the 650 target flow for June 15.

Example 2:
If on June 15, the average of the last seven mean daily flows was 578 cfs, then the target flows would be missed by 11% (100 – [(578/650)* 100)]. If the maximum total amount of the undeveloped portion of the permit that can legally be diverted under this permit is 10 cfs, then the maximum total amount of the undeveloped portion of the permit that could be legally diverted under this permit would be reduced by 11%. The maximum total amount of the undeveloped portion of the permit that could be legally diverted under the permit under this condition would be 8.9 cfs (10-[10 x 0.11] = 8.9).

Table 1[1]

MINIMUM FISH FLOW NEEDS ON THE LOWER CLACKAMAS RIVER MEASURED AT USGS GAGE 14211010, CLACKAMAS RIVER NEAR OREGON CITY, OREGON	
Month	Cubic Feet per Second
June – August	650
September	650/800 [2]
October – May	800

[1] Table 1 was called Table 2 in the Proposed Final Order (PFO)

[2] 650 cfs Sept. 1 through Sept. 15 and 850 cfs September 16 through September 30

CONDITIONS FOR PERMIT S-3778

1. **Development Limitations**
Diversion of water beyond 5.0 cfs under Permit S-3778 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86. A WMCP shall be submitted to the Department within 3 years of an approved extension of time application. Use of water under Permit S-3778 shall be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

The deadline established in this PFO for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of this order may also meet the WMCP submittal requirements of other Department orders.

2. **Conditions to Maintain the Persistence of Listed Fish**

a. Prior to diversion of any water beyond 5.0 cfs under Permit S-3778, a permit amendment to relocate the current authorized Point of Diversion (POD) on the South Fork Clackamas River located in NWSW Section 29, Township 4 South, Range 5 East, W.M. to a POD(s) located within the lower 3.1 miles on the mainstem of the Clackamas River, must be approved by the Department in accordance with ORS 540.510.

b. Use of water beyond 5.0 cfs under Permit S-3778 may only be made from water diverted within the lower 3.1 miles on the mainstem of the Clackamas River, and only if available at the original point of diversion located within the NWSW, Section 29, Township 4 South, Range 5 East, W.M.

c. Minimum fish flow needs on the Lower Clackamas River as recommended by ODFW are in Table 1, below, and are to be measured at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent.

d. In cooperation with the holders of Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, the permittee must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. It is OWRD's intent that ODFW and the permittees shall reach agreement on the strategy. However, if after making a good faith effort ODFW and the permittees are unable to reach agreement on a strategy ODFW shall devise the strategy. In either case, the strategy shall be documented in writing and the permittees shall comply with the strategy. The annual meeting and resulting strategy may cover issues other than Timothy Lake releases that are relevant to both use under Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, and to listed fish species; however, the strategy may include actions pertaining to such issues only upon mutual agreement by OWFW and the permittees.

e. From the first Monday in September through June 30 the maximum total amount of the undeveloped portion of the Permit S-3778 that can legally be diverted shall be reduced in proportion to the amount by which the flows shown in Table 1 are not met based on a seven day rolling average of mean daily flows (measured on the Clackamas River at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent), as illustrated in the examples below.

Example 1:
On June 15, the last seven mean daily flows were 750, 725, 700, 650, 625, 600 and 575 cfs. The seven day rolling average is 661 cfs. The maximum total amount of the undeveloped portion of the permit that could legally be diverted under this permit would not be reduced because the 7 day average of mean daily flows is greater than the 650 target flow for June 15.

Example 2:
If on June 15, the average of the last seven mean daily flows was 578 cfs, then the target flows would be missed by 11% (100 – [(578/650)* 100)]. If the maximum total amount of the undeveloped portion of the permit that can legally be diverted under this permit is 10 cfs, then the maximum total amount of the undeveloped portion of the permit that could be legally diverted under this permit would be reduced by 11%. The maximum total amount of the undeveloped portion of the permit that could be legally diverted under the permit under this condition would be 8.9 cfs (10-[10 x 0.11] = 8.9).

Table 1[1]

MINIMUM FISH FLOW NEEDS ON THE LOWER CLACKAMAS RIVER MEASURED AT USGS GAGE 14211010, CLACKAMAS RIVER NEAR OREGON CITY, OREGON	
Month	Cubic Feet per Second
June – August	650
September	650/800[2]
October – May	800

[1] Table 1 was called Table 2 in the Proposed Final Order (PFO)

[2] 650 cfs Sept. 1 through Sept. 15 and 850 cfs September 16 through September 30

CONDITIONS FOR PERMIT S-9982

1. **Development Limitations**

Diversion of water beyond 3.0 cfs under Permit S-9982 shall only be authorized upon issuance of a final order approving a WMCP under OAR Chapter 690, Division 86. A WMCP shall be submitted to the Department within 3 years of an approved extension of time application. Use of water under Permit S-9982 shall be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

The deadline established in this PFO for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of this order may also meet the WMCP submittal requirements of other Department orders.

2. **Conditions to Maintain the Persistence of Listed Fish**

a. Prior to diversion of any water beyond 3.0 cfs under Permit S-9982, a permit amendment must be approved by the Department in accordance with ORS 540.510 to relocate (1) the current authorized POD on the South Fork Clackamas River located in the SWSW, Section 29, Township 4 South, Range 5 East, W.M., and (2) the current authorized POD on Memaloose Creek located in SESW Section 29, Township 4 South, Range 5 East, W.M. to POD(s) located within the lower 3.1 miles on the mainstem of the Clackamas River.

b. Use of water beyond 3.0 cfs under Permit S-9982 may only be made from water diverted within the lower 3.1 miles on the mainstem of the Clackamas River, and only if available at the original points of diversion located on the South Fork Clackamas River and Memaloose Creek.

c. Minimum fish flow needs on the Lower Clackamas River as recommended by ODFW are in Table 1, below, and are to be measured at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent.

d. In cooperation with the holders of Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, the permittee must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. It is OWRD's intent that ODFW and the permittees shall reach agreement on the strategy. However, if after making a good faith effort ODFW and the permittees are unable to reach agreement on a strategy ODFW shall devise the strategy. In either case, the strategy shall be documented in writing and the permittees shall comply with the strategy. The annual meeting and resulting strategy may cover issues other than Timothy Lake releases that are relevant to both use under Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, and to listed fish species; however, the strategy may include actions pertaining to such issues only upon mutual agreement by OWFW and the permittees.

e. From the first Monday in September through June 30 the maximum total amount of the undeveloped portion of the Permit S-9982 that can legally be diverted shall be reduced in proportion to the amount by which the flows shown in Table 1 are not met based on a seven day rolling average of mean daily flows (measured on the Clackamas River at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent), as illustrated in the examples below.

Example 1:
On June 15, the last seven mean daily flows were 750, 725, 700, 650, 625, 600 and 575 cfs. The seven day rolling average is 661 cfs. The maximum total amount of the undeveloped portion of the permit that could legally be diverted under this permit would not be reduced because the 7 day average of mean daily flows is greater than the 650 target flow for June 15.

Example 2:
If on June 15, the average of the last seven mean daily flows was 578 cfs, then the target flows would be missed by 11% (100 – [(578/650)* 100)]. If the maximum total amount of the undeveloped portion

of the permit that can legally be diverted under this permit is 10 cfs, then the maximum total amount of the undeveloped portion of the permit that could be legally diverted under this permit would be reduced by 11%. The maximum total amount of the undeveloped portion of the permit that could be legally diverted under the permit under this condition would be 8.9 cfs (10-[10 x 0.11] = 8.9).

Table 1[1]

MINIMUM FISH FLOW NEEDS ON THE LOWER CLACKAMAS RIVER MEASURED AT USGS GAGE 14211010, CLACKAMAS RIVER NEAR OREGON CITY, OREGON	
Month	Cubic Feet per Second
June – August	650
September	650/800 [2]
October – May	800

[1] Table 1 was called Table 2 in the Proposed Final Order (PFO)

[2] 650 cfs Sept. 1 through Sept. 15 and 850 cfs September 16 through September 30

BEFORE THE WATER RESOURCES DEPARTMENT
STATE OF OREGON

In the Matter of the Consolidated Case Involving Applications for Extension of Time for: Permit S-32410, Modified by Permit Amendment T-8538, Application S-43365, in the Name of City of Lake Oswego; Permit S-37839, Application S-50819, in the Name of City of Lake Oswego; Permit S-3778, Application S-5942, in the Name of South Fork Water Board; Permit S-9982, Application S-11007, in the Name of South Fork Water Board; Permit S-22581, Application S-28676, in the Name of South Fork Water Board; Permit S-46120, Modified by Permit Amendment T-7434, Application S-60632, in the Name of Sunrise Water Authority and North Clackamas County Water Commission; Permit S-35297, Modified by Permit Amendment T-7389, Application S-47144, in the Name of North Clackamas County Water Commission; Permit S-43170, Modified by Permit Amendment T-7434, Application S-57226, in the Name of North Clackamas County Water Commission, *Applicants,* vs. WaterWatch of Oregon, Inc.; and South Fork Water Board, *Protestants.*	)	AMENDED PROPOSED ORDER IN CASES INVOLVING SFWB PERMITS S-22581, S-3778, S-9982 OAH Case Nos.: WR 08-004; WR 08-005; WR 08-006; WR 08-007; WR 08-008; WR 08-009; WR 08-010; WR 08-011.

On August 2, 2010 the Administrative Law Judge ("ALJ") issued a Proposed Order with respect to applications for the extension of time to apply water to beneficial use under Permit Numbers S-22581, S-3778 and S-9982. Due to the proposed extent and nature of modifications to the ALJ's Proposed Order, the Oregon Water Resources Department issues this Amended Proposed Order.

OWRD adopts certain sections of the Proposed Order without modification, as follows. OWRD adopts the Statement of the Case without modification. Within the Common Issues Hearing section, OWRD adopts the following subsections without modification: The Parties, Representation, Consolidation, Manner of Taking Testimony, The Hearings, and Briefing. OWRD adopts the Case Specific Hearing section without modification. Within the Evidentiary Hearings section, OWRD adopts the following subsections without modification: Case Specific Exhibits, Limitation on Testimony, and Motions to Strike Written Testimony. OWRD adopts the section Statement of Issues without modification. OWRD adopts the Conclusions of Law section without modification.

OWRD has modified the following sections of the Proposed Order. Within the Common Issues Hearing section, OWRD has modified the following subsections: Summary Determination Process and Objections to Written Testimony. OWRD has also added a new subsection, entitled "Exceptions," within the Common Issues Hearing Section. Within the Evidentiary Rulings section, OWRD has modified the following subsections: Common Issues Exhibits and Offers of Proof. OWRD has modified the Findings of Fact section, the Opinion section, the Summary section, and the Order section.

The modifications made herein do not affect the conclusion that the permit extensions should be granted, but they do provide for certain modifications to the annual meeting condition. Detailed descriptions of the modifications to the above-described sections and subsections, along with the reasons therefore, are provided below.

MODIFICATIONS TO CERTAIN SUBSECTIONS OF THE "COMMON ISSUES HEARING" SECTION

Modifications to the "Summary Determination Process" subsection: The final sentence of this subsection is modified as follows, with modifications shown in underlined text: "The findings and conclusions in both the RMSD and the Order Clarifying RMSD are hereby incorporated into this decision, except to the extent that they are modified as described herein." **Reason for modification**: Neither the ALJ's Proposed Order nor this Amended Proposed Order adopt the legal conclusions reached in the RMSD in their entirety.

Modifications to the "Objections to Written Testimony" subsection: The third sentence in this subsection is modified as follows, with deletions in strikethrough and additions in underline: "The only objections to written testimony were presented by JMP ~~and SFWB~~, moving to strike portions of ~~John Davis'~~ Jonathan Rhodes' testimony about climate change, and by SFWB, moving to strike portions of testimony by WaterWatch's witness John Davis regarding water demand issues." **Reason for modification:** Clarification of the record. The JMP filed an objection to Jonathan Rhodes' testimony, not John Davis' testimony. SFWB did not file an objection to Jonathan Rhodes' testimony, but did file an objection to portions of John Davis' testimony.

Addition of "Exceptions" subsection: OWRD adds the following subsection to the Common Issues Hearing section: "Exceptions: Exceptions to the Proposed Order were filed by OWRD on August 31, 2010, and by WaterWatch, the Joint Municipal Parties and the South Fork Water Board on September 1, 2010. OWRD inadvertently failed to request that the ALJ include an opportunity and deadline for responses to exceptions in the Right to File Exceptions section of the Proposed Order. Upon discovering this oversight, OWRD corrected it by letter to the parties dated September 14, 2010, and provided an opportunity to file responses by October 1, 2010. WaterWatch and the South Fork Water Board filed responses on October 1, 2010.

In its response to exceptions, WaterWatch objects to the timing and manner of OWRD's announcement of an opportunity to file responses to exceptions, and requests that OWRD issue amended proposed orders in these matters. WaterWatch does not cite to any precedent or provision of law or rule to support this argument. Nonetheless, due to the extent and nature of the changes proposed by OWRD to the Proposed Order, OWRD hereby exercises its discretion to issue an amended proposed order with respect to these permit extension applications. A further period for exceptions (but not responses to exceptions) is provided for in the Notice of Opportunity to File Exceptions section of this amended proposed order." **Reason for addition**: To fully reflect the record, and to address WaterWatch's objection to the timing and nature of OWRD's announcement of an opportunity to file responses to exceptions to the Proposed Order.

MODIFICATIONS TO CERTAIN SUBSECTIONS OF THE "EVIDENTIARY RULINGS" SECTION

Modifications to the "Common Issues Exhibits" subsection: The final sentence in the subsection is modified as follows, with additions in underline. "WW 4, 11, 12, 31-34, and 42 were not admitted into evidence at the hearing. Offers of proof were not made with respect to WW 4, 11, 12, and 42, as required by OAR 137-003-0610(5). OWRD has no basis for reconsideration of the ALJ's decision with respect to these exhibits. An Offer of proof was made with respect to WW 31-34. As described below in the "Offers of Proof" section, OWRD now admits WW 31-34 into the record and will accord them the appropriate weight."

In addition, the following paragraphs are added to the "Common Issues Exhibits" subsection: "Although not addressed in the Proposed Order, WaterWatch objects in its exceptions to the "exclusion" of Exhibits WW 43 and 44. In WaterWatch's exceptions, these exhibits are described as an audio recording of a meeting between representatives of OWRD, ODFW and WaterWatch concerning the fish persistence conditions (WW 43) and a transcript of this meeting produced by or for WaterWatch (WW 44). As an initial matter, it is not clear that these exhibits were formally offered at the hearing. Objections were made at hearing to use of the transcript as an aid to cross-examination. Although counsel for WaterWatch requested an explanation for their exclusion, and was provided one by the ALJ, the ALJ also states that the transcript "hasn't been offered." Vol. 1,

381:4-6. In the transcript, WaterWatch's counsel agrees with this statement, and no subsequent offer was made. *Id.* at 381:7; *see generally* 368:24 through 386:6. No offer was made with respect to the recording. To the extent that they were "offered," during the hearing the ALJ provided two grounds for refusing to consider them: first, because WaterWatch had failed to provide them to all parties in advance of the hearing, and second, because the exhibits were not within the scope of Mr. Kepler's testimony, and thus were inappropriate subjects for cross-examination.

No offer of proof was made with respect to these exhibits, as is required by rule. OAR 137-003-0610(5). Therefore, even if the exhibits were properly offered, OWRD has no basis for reconsideration of the ALJ's decision with respect to these exhibits.[1]"
Reason for modifications: To describe and explain OWRD's determination with respect to WaterWatch's exceptions to the ALJ's exclusion of certain exhibits offered by WaterWatch.

Modifications to the "Offers of Proof" subsection: The third through fifth paragraphs of this subsection are deleted in their entirety and replaced with the following: "OAR 137-003-0610 requires that an offer of proof made for excluded evidence be accepted. The offer of proof concerning the testimony of Esler is accepted, and will travel with the record in this proceeding for the purposes of review. OWRD has reviewed the offer of proof with respect to the testimony of Esler and concludes that the ALJ appropriately excluded his testimony, for the reasons given by the ALJ.

WaterWatch's offer of proof is also accepted with respect to Exhibits WW 31-34. OWRD has reviewed Exhibits WW 31-34 and has determined that it is appropriate to admit them.

These exhibits were excluded because the ALJ's Rulings on Motions for Summary Determination concluded that ODFW and OWRD did not have to consider the effects of climate change on the persistence of fish, because ORS 537.230(2)(c) does not contain a requirement to consider climate change issues. The Proposed Order also noted that the administrative rules governing the extension applications do not provide for the consideration of climate change. Finally, the Proposed Order stated that while in other cases ODFW might want to consider the effects of climate change in its advice to OWRD, it did not do so in this case, and so OWRD does not have to consider climate change in issuing the orders on these extension applications.

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[1] Even if an offer of proof had been made, the exhibits were not timely submitted. The parties to this proceeding agreed to a schedule and procedures for the offering of evidence. Exhibits were to be presented with written direct and rebuttal testimony, and the in-person hearing was limited to the cross-examination of witnesses. WaterWatch's counsel asserted that the exhibits were relevant because they addressed the consistency of ODFW's advice with OWRD's conditions. OWRD's direct testimony and accompanying exhibits addressed this issue. Affidavit of Rick Kepler; OWRD Cons. A-3. Exhibits offered for the purpose of rebutting this testimony or impeaching the credibility of the testifying witness with respect to this issue were required to have been submitted with rebuttal testimony. Where all parties have agreed to procedures and deadlines in a contested case, failure to abide by these procedures and deadlines is a proper basis to strike filings or exclude evidence. To find otherwise would defeat the purpose of establishing procedures and deadlines and undermine the orderly conduct of the proceedings. WaterWatch has provided no justification for its failure to timely submit these exhibits.

As is discussed in detail below, OWRD's finding on fish persistence is to be based both on ODFW's advice and on "existing data." While ORS 537.230(2)(c) may not explicitly define "existing data" to include data pertaining to the effects of climate change on streamflows, the statute does not exclude such data either. The question is whether such data are relevant to a determination on fish persistence, and they may be, depending on the facts of a given case.

In addition to ORS 537.230(2)(c), OAR 690-315-0080(2) further defines the "existing data" that OWRD may consider in making its fish persistence finding. The rule provides that the fish persistence finding "shall be limited to impacts related to streamflow as a result of use of the undeveloped portion of the permit and further limited to where, as a result of use of the undeveloped portion of the permit, ODFW indicates that streamflow would be a limiting factor for the subject listed fish species." The rule limits the scope of OWRD's finding to streamflow effects resulting from "the use of the undeveloped portion of the permit." The rule does not, however, define the baseline condition of the river against which the additional effects of the use of the undeveloped portion of the permit will be considered. OWRD interprets its rule to permit data pertaining to the effects of climate change on future streamflow to be considered as a part of the baseline river condition.

As a result of these legal conclusions, Exhibits WW 31-34 are at a minimum relevant to the determination of the fish persistence issues in this case, and may be admitted for consideration.[2]" **Reasons for modifications:** To clarify that offers of proof made by WaterWatch are accepted, as required by rule, and to describe and explain OWRD's decision to admit WaterWatch's Exhibits WW 31-34.

MODIFICATIONS TO THE "FINDINGS OF FACT" SECTION

Additional Findings of Fact

OWRD makes the following additional findings of fact pertaining to the "common issues" (fish persistence) portion of the hearing. These findings are applicable to each of Permit Numbers S-22581, S-3778 and S-9982. They are assigned numbers beginning with the number following the last finding of fact made by the ALJ (to reiterate, even though the ALJ prepared separate findings of fact sections for each permit, these additional findings of fact are applicable to all of the permits covered by this Amended Proposed Order).

48. OWRD finds that the undeveloped portions of the permits, as conditioned, will maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit.

[2] OWRD finds it unnecessary in this proceeding to determine whether the use of the term "data" in ORS 537.230(2)(c) provides a limitation on the type of information upon which it may base its fish persistence finding. It is conceivable that the term could require that such information constitute or reflect scientific measurements, computations, or analysis. Because, as discussed below, Exhibits WW 31-34 do not provide sufficient evidence to alter the fish persistence conditions, it is unnecessary to address this question here.

49. OWRD's finding is based upon ODFW's advice and existing data.
50. ODFW's recommended minimum streamflows are 650 cfs during the months of June, July and August, and the first two weeks in September. ODFW's recommended minimum streamflows are 800 cfs during the remainder of the year. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
51. ODFW's recommended streamflows are required on a long-term basis to maintain the persistence of listed fish species in the lower 3.1 miles of the Clackamas River. Test. of Kepler.
52. ODFW's recommended minimum streamflows are not presently met on some occasions during the months of July, August, September and early October. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
53. Listed fish species presently tolerate short-term streamflows below the minimum recommended streamflows, and will likely continue to do so. Test. of Kepler.
54. The short-term drops below minimum streamflows predicted by Jonathan Rhodes are not incompatible with maintaining the persistence of listed fish species. Test. of Kepler.
55. The lower 3.1 miles of the Clackamas River represent less than 2% of the available rearing habitat in the Clackamas River basin, and is the least desirable rearing habitat within the basin. Test. of Kepler.
56. The testimony of Charles Huntington and Jonathan Rhodes, submitted by WaterWatch, addresses the hydrology and habitat of the lower 3.1 miles of the Clackamas River during the period July through October. Test. of Huntington and Rhodes.
57. Climate change is likely to result in an increase in streamflow in the lower 3.1 miles of the Clackamas River during the months of January through March, and a decrease in streamflow in this river reach during the months of April through September. Climate change is not likely to alter the streamflow in this river reach during the months of October and November. Ex. Common WW 33.
58. Quantification of increases and reductions in streamflow resulting from climate change is highly dependent upon the assumptions used in the creation of models analyzing streamflows resulting from a changed climate. Ex. Common WW 33.
59. Climate change may result in increased or reduced streamflows in the lower 3.1 miles of the Clackamas River during some months of the year, but these increases or decreases do not affect the minimum streamflows recommended by ODFW to maintain the persistence of listed fish species. Test. of Kepler.
60. Streamflow in the lower 3.1 miles of the Clackamas River during the period April through June is typically "well over" (typically more than 200 cubic feet per second above) the minimum streamflow values recommended by ODFW. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
61. A fish count conducted at sites in the lower 3.1 miles of the Clackamas River in August and early September of 2008 and 2009 found small numbers of steelhead and Chinook. Test. of Huntington.
62. The lower 3.1 miles of the Clackamas River is likely to be "avoided by most species of concern during the warmest time periods in July and August." OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.

63. Reducing streamflows below levels typically experienced in the lower 3.1 miles of the Clackamas River during the later part of the summer may cause certain individual fish to either leave this reach of river to find better habitat, or be unable to do so and not survive. Test. of Huntington.
64. The use of Timothy Lake releases that are available to the permit holders will not always be sufficient to raise streamflows in the lower 3.1 miles of the Clackamas River to the minimum streamflows recommended by ODFW. ODFW's advice acknowledges this fact and ODFW took this into account when concurring with OWRD's fish persistence conditions. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1; Test. of Kepler.
65. The amount of water available to the permit holders from Timothy Lake under an agreement with Portland General Electric will vary from year to year. In some years there may not be any water available to the permit holders under this agreement. ODFW is aware of this fact and took it into account when concurring with ODFW's fish persistence conditions. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1; Test. of Kepler.
66. ODFW intended the strategy resulting from the annual meeting between the municipalities and ODFW to be documented in writing. Test. of Kepler.
67. ODFW intended that the municipalities and ODFW will reach mutual agreement on an annual strategy to maximize fishery benefits from any available releases of stored water from Timothy Lake; however, ODFW intends to devise the strategy itself if the municipalities and ODFW are unable to reach agreement on a strategy after good faith effort. Test. of Kepler.
68. ODFW intended that the annual meeting may cover issues other than Timothy Lake releases that are relevant to both use under the permits and to listed fish species; however, ODFW intends that the strategy include actions pertaining to such issues only upon mutual agreement by ODFW and the municipalities. Test. of Kepler.
69. Timothy Lake sits roughly 23 miles upstream from the lower 3.1 miles of the Clackamas River. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
70. Releases of water from Timothy Lake affect the entire reach of the Clackamas River downstream from the Lake, and not just the lower 3.1 miles of the River. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1; Test. of Kepler.
71. The timing and manner of releases from Timothy Lake can have detrimental effects on listed fish species. A release of Timothy Lake water, followed by a poorly timed shut-off of that release, could dewater spawning areas and strand fish for the entire reach of Clackamas River downstream of Timothy Lake. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
72. ODFW's fish persistence advice is based upon persistence of listed species in the lower 3.1 miles of the Clackamas River, and does not reflect fish flow needs further up the Basin. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
73. During the summer months, most of the habitat available to maintain the listed fish species is upstream from the lower 3.1 miles of the Clackamas River. Test. of Kepler.
74. During the period from the first Monday in September through June 30th, if the minimum fish persistence flows are not met, the municipalities must reduce their

diversions by the percentage by which the fish persistence flows are not being met, based on a seven-day rolling average of mean daily flows (e.g., if the fish persistence flows are being missed by 10%, the municipalities must reduce their diversion under the undeveloped portions of the permits by 10% from the maximum amount legally permitted). OWRD Ex. Cons. A-1.

75. During the period from July 1st through the day prior to the first Monday in September, OWRD's fish persistence conditions permit continued diversion of the undeveloped portions of the permit when the recommended streamflows are not being met. OWRD Ex. Cons. A-1.
76. Fish persistence flows are required to be measured at USGS Gage 14211010, on the Clackamas River near Oregon City. OWRD Ex. Cons. A-1.
77. USGS Gage 14211010 sits upstream of one of the City of Lake Oswego's points of diversion. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1.
78. ODFW was aware that USGS Gage 14211010 sits upstream of one of the City of Lake Oswego's points of diversion, and took this fact into account when issuing its advice and in concurring that OWRD's fish persistence conditions will maintain the persistence of listed fish species within the lower 3.1 miles of the Clackamas River. Test. of Kepler.
79. In preparing its advice, ODFW did not rely upon the portion of a Clackamas River hydrology report authored by Annear and Wells that WaterWatch's hydrology expert, Jonathan Rhodes, challenged as erroneous. OWRD Exs. S22581 A-1, S-3778 A-1, and S-9982 A-1; Ex. Common WW-41.
80. Jonathan Rhodes' testimony assumes that the permit holders in this case will continuously and simultaneously divert the full value of the undeveloped portions of their permits; this assumption is not supported by actual patterns of municipal water use. Test. of Robison.
81. Mr. Rhodes' testimony characterizes the years 2000-2005 as "average water years" for the Clackamas River. This characterization is not supported by the available flow data, which shows that this time period was drier than normal for the Clackamas River. Test. of Robison.
82. Mr. Rhodes' testimony overestimates the frequency with which monthly flows, on average, will not reach fish persistence target flows.

Reasons for additional findings of fact: As described below in OWRD's modifications to the Opinion section of the Proposed Order, OWRD disagrees with the ALJ's conclusion that OWRD must accept ODFW's advice on fish persistence in all circumstances, even if the weight of the evidence as demonstrated by "existing data" were to merit conclusions different than those reached in ODFW's advice. As a result of the ALJ's conclusion, the ALJ found no need to make detailed findings of fact pertaining to the evidence in the record concerning the persistence of listed fish species. OWRD's conclusion that it is appropriate to consider "existing data" in addition to ODFW's advice means that OWRD has made additional findings of fact pertaining to that data. In addition, OWRD has decided that certain documents pertaining to climate change, which were submitted by WaterWatch but excluded by the ALJ, should have been admitted into the record. OWRD therefore makes findings of fact pertaining to WaterWatch's climate change evidence. Finally, OWRD has made additional findings of fact to more fully set

forth the evidence on the record pertaining to the annual meeting condition, the location of Timothy Lake, location of the gage used to determine Clackamas River flows for the purposes of the permit conditions, and the scope of ODFW's advice.

Modifications to findings of fact

OWRD accepts the findings of fact made by the ALJ, and does not modify them here, with one exception. The ALJ's finding of fact numbers 14, 30, and 45 are identical, because the ALJ chose to repeat the findings of fact pertaining to the issues common to each permit (the fish persistence issues) in each of the permit-specific findings of fact sections, rather than creating a separate "common" issues finding of fact section. OWRD modifies finding of fact numbers 14, 30, and 45 as follows, with deletions shown in strikethrough.

"After receiving the ODFW Advice in each case, the Department drafted conditions for each PFO with the intention of including the advice recommendations in the PFO. ~~Although the Department understood that it was required to follow the ODFW Advice,~~ both agencies took the opportunity to discuss the recommendations and come up with conditions that would protect the fish habitat but also allow the municipalities to develop the water."

Reason for modified finding of fact: A preponderance of the evidence in the record does not support the conclusion that OWRD "understood that it was required to follow the ODFW advice."[3] The testimony cited to by the ALJ for the finding of fact is made by an ODFW employee, Rick Kepler, and does not constitute substantial evidence of OWRD's "understanding" of the meaning of ORS 537.230(2)(c), or of an OWRD policy to interpret the statute in that manner. OWRD's interpretation of ORS 537.230(2)(c) with respect to the consideration of ODFW's advice and "existing data" is set forth herein.

MODIFICATIONS TO THE "OPINION" SECTION

[3] ORS 183.650(3) provides the standard for an agency's modification of a historical finding of fact made by an ALJ assigned from the OAH. ORS 183.650(3) currently provides that an agency may modify a historical finding of fact only if the agency determines that there is "clear and convincing evidence" in the record that the finding was wrong. However, this standard is inapplicable to this proceeding. ORS 183.650(3) was amended by 2009 Or Laws Ch 866, § 8. Prior to this amendment, ORS 183.650(3) provided that an agency could modify a historical finding of fact if the ALJ's finding was not supported by a "preponderance of the evidence" in the record. 2009 Or Laws Ch 866, limits the applicability of the amended form of ORS 183.650(3) to "hearings for which an administrative law judge is assigned from the Office of Administrative Hearings on or after the effective date of this 2009 Act." 2009 Or Laws, Ch 866, § 9. The effective date of the act is August 4, 2009. The first involvement in this case by an ALJ assigned from the OAH occurred on February 5, 2009, prior to the effective date of the act. On that date, ALJ Barber (who remained the ALJ throughout the contested case proceeding) issued an Order Granting Motions for Consolidation and for an In-Person Prehearing Conference. Although the OAH did not send a separate notice of assignment of ALJ to the parties or OWRD, it is clear from the ALJ's Order on February 5, 2009, that he had been assigned to this proceeding on or before February 5, 2009. As a result, OWRD applies the "preponderance of the evidence" standard for modification of historical findings of fact in this proceeding. OWRD assumes without deciding that the findings of fact described above are historical findings of fact.

OWRD adopts the introductory paragraphs of the "Opinion" section without modification.

Modifications to the "Standing to Protest" subsection: The final paragraph of this subsection is modified as follows, with deletions in strikethrough and additions in underline.

"As noted above, the Department has chosen to allow contested case hearings for municipal extensions. ~~It treats municipal extensions like any other application for a water right, allowing protests freely. Its interpretation of the statute is plausible, and I defer to the Department's interpretation. *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132 (1994). Therefore, SFWB's standing argument must fail.~~ The Administrative Procedures Act, which applies to this contested case proceeding, states explicitly that the definition of "party" includes"[e]ach person or agency named by the agency to be a party," as well as "[a]ny person requesting to participate before the agency as a party…which the agency determines either has an interest in the outcome of the agency's proceeding or represents a public interest in such result." ORS 183.310(7). This provision does not conflict with ORS 537.230, which is silent on the issue of party status. As a result, it is within OWRD's discretion, as constrained by OAR 690-315-0060(1), to grant WaterWatch party status in this proceeding." **Reason for modification**: To more precisely reflect the rationale for granting party status to WaterWatch in this proceeding, and for rejecting SFWB's argument with respect to standing.

"WaterWatch's contentions" subsection: OWRD adopts this subsection without modification.

"The Pivotal Issue" subsection: OWRD adopts this subsection without modification.

"1. The Application Process" subsection: OWRD adopts this subsection without modification.

"2. Actual Construction" subsection: OWRD adopts this subsection without modification.

Modifications to the "3. Whether the Requested Time is Reasonable and the Project Can Be Completed in the Time Period" subsection: The second, third, and fourth paragraphs of this subsection are deleted in their entirety and replaced with the following:

"Specifically, the evidence shows that it is more likely than not that SFWB can apply water to full beneficial use by the end of the extension period, based on a combination of SFWB's future demand within its own service area and agreements to serve the demand of other entities. These agreements are detailed in the findings of fact made in the Proposed Final Orders for the SFWB permits, which the ALJ incorporated into the findings of fact in the Proposed Order.

Municipalities may apply water to lands that are not appurtenant. ORS 540.510(3). Additionally, the Oregon Water Resources Commission's policy governing

municipal water supply and conservation supports water supply efforts that by necessity incorporate regional water supply agreements. OAR 690-086-0010(6). Nothing prohibits OWRD from considering these water supply agreements when it considers the length of the extension period requested or the ability to apply water to full beneficial use by the end of that period.

WaterWatch's testimony focuses primarily on statements made and evidence that the entities with whom SFWB has supply agreements *may not* use this water in the future. But the agreements exist, and provide for the ability of the other entities to use water as stated by SFWB. Under the circumstances, this is substantial evidence that SFWB will be able to put water to full beneficial use by the end of the extension period.

WaterWatch also challenges SFWB's evidence that it will require an additional 15.5 cfs for industrial uses by the end of the extension period. Projection of future demand is inherently uncertain. OWRD finds SFWB's evidence that there are industrial uses that could require this additional quantity of water credible, and therefore finds that application of 15.5 cfs for industrial purposes can be completed during the extension period.

Finally, WaterWatch challenges the finding in the PFO that the time requested for extension is reasonable. WaterWatch's argument is based on the total length of time since the SFWB initially applied for the permits.

WaterWatch's contends that the requested extensions are at odds with the doctrine of prior appropriation, which forms the basis for Oregon's water allocation statutes and which provides that development of beneficial uses shall be completed within a reasonably diligent period of time.

The concept of a "reasonably diligent" period of time is a flexible one, accounting for circumstances pertaining to the development of the water use. The vast majority of the caselaw pertaining to reasonable diligence concerns development of water for irrigation. Depending on the size and complexity of the irrigation development, lengthy periods of time have sometimes been allowed by the courts, provided that there is evidence that the user has been diligent in working towards completion of the project.

. Use of water for municipal purposes has its own unique development challenges, including the need to serve uncertain but increasing residential, commercial and industrial demands, and the need to develop treatment plants to serve these demands. SFWB has submitted evidence both that it has been diligent in its past development of water, and that the time requested for extension is reasonable under the circumstances. WaterWatch is therefore effectively asking for a declaration that the time requested by SFWB is unreasonable as a matter of law. OWRD concludes that the caselaw does not support such a determination." **Reasons for modifications**: To more fully address arguments made by the parties; to provide a more detailed rationale for concluding that the project can be completed and water fully beneficially applied by the end of the requested extension period, and that the time period requested is reasonable.

Modifications to the "4. Good Cause" subsection: The subsection is deleted in its entirety and replaced with the following:

"ORS 537.230(2)(a) requires OWRD to find that "good cause has been shown" in order to approve an application for extension. OWRD's rules implementing this provision set forth a list of factors that OWRD "shall consider." OAR 690-315-00080(3).

The RMSD concluded that OWRD had presented evidence demonstrating that OWRD considered each of the factors as required, and that WaterWatch presented no evidence to the contrary. The rules do not require that OWRD make a distinct determination that each of the factors has been established, or weighs in favor of granting an extension application. The RMSD accurately concluded that, provided that OWRD considers each of the listed factors, the determination of whether good cause exists is a matter committed to OWRD's discretion. Because WaterWatch did not present evidence that OWRD had abused its discretion during the summary determination briefing, the RMSD correctly held that good cause was established as a matter of law." **Reason for modifications**: To more completely describe OWRD's "good cause" determination process as applied to the facts in this case.

Modifications to the "5. The Persistence of Listed Fish" subsection: OWRD adopts the introductory paragraphs in this subsection without modification. The remainder of this subsection, which continues until the beginning of "The Protests" subsection, is deleted in its entirety and replaced with the following:

"The Proposed Order concludes that OWRD must craft conditions consistent with ODFW's advice. ORS 537.230(2)(c) provides in relevant part that OWRD must find 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 shall base its finding on *existing data and upon the advice of the State Department of Fish and Wildlife*." (Emphasis added.) The Proposed Order states that "[t]he word 'shall' in [ORS 537.230(2)(c)] leaves the Department with no option but to follow the advice from ODFW." Proposed Order at 29. This interpretation of ORS 537.230(2)(c) effectively reads the words "existing data" out of the statute, because it gives "existing data" no relevance independent of ODFW's advice. It would require OWRD to follow ODFW's advice even if the "existing data" in a given case demonstrates by a preponderance of the evidence that conditions consistent with ODFW's advice would be insufficient to maintain the persistence of listed fish species. On the other end of the spectrum, it would require OWRD to follow ODFW's advice even when "existing data" demonstrates by a preponderance of the evidence that ODFW's advice requires restrictions on water use greater than necessary to maintain the persistence of listed fish species.

When interpreting a statute, the interpretation should not "omit what has been inserted," and when the statute has multiple provisions, the interpretation "is, if possible, to be adopted as will give effect to all." ORS 174.010. In this instance, it is possible to ascribe meaning to both "existing data" and "the advice of the State Department of Fish and Wildlife."

ORS 537.230(2)(c) establishes two sources of information upon which OWRD must base its fish persistence finding. Those sources of information (ODFW's advice and

"existing data") will either be consistent or inconsistent. When ODFW's advice and existing evidence are consistent, OWRD must adopt conditions consistent with that advice and existing data. However, if ODFW's advice requires restrictions on water use greater than the existing data demonstrates, by a preponderance of the evidence, is necessary to maintain the persistence of listed fish species, OWRD *may* deviate from ODFW's advice. In this circumstance, OWRD may adopt conditions that, based on the existing data, are sufficient to maintain the persistence of listed fish species. And in a case where existing data demonstrates, by a preponderance of the evidence, that conditions consistent with ODFW's advice would be insufficient to maintain the persistence of listed fish species, OWRD *must* deviate from ODFW's advice. In this case, OWRD must adopt conditions that will maintain the persistence of listed fish species, as supported by existing data.

In the case of these extension applications, OWRD made the required finding that the undeveloped portions of the permits at issue are conditioned to maintain the persistence of listed fish species. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1. OWRD's finding, and the conditions supporting the finding, is based upon ODFW's advice pertaining to fish flows needed to maintain the persistence of listed species.[4] *Id.* ODFW's advice letter is in turn based upon existing data. *Id.* OWRD's finding is therefore based on the two sources of evidence that it is permitted – and required – to consider. ODFW concurred that OWRD's conditions are consistent with ODFW's advice.[5] OWRD Cons. Ex. A-3. This constitutes substantial evidence that OWRD's finding and conditions will result in the maintenance of the persistence of listed fish species. As a result, OWRD established a prima facie case showing compliance with ORS 537.230(2)(c).

Any party wishing to challenge the validity of OWRD's fish persistence finding or conditions may, pursuant to ORS 537.230(2)(c), submit "existing data" as evidence in this proceeding in an attempt to demonstrate that the weight of the evidence requires a different set of conditions. WaterWatch submitted evidence on this issue, but its evidence is insufficient to require the alteration of the fish persistence conditions. WaterWatch's evidence is addressed below.

WaterWatch's evidence

1. Evidence pertaining to the period November 1 through June 30

[4] It is important to note that ODFW is not either a party or a participant to this proceeding. As a result, only OWRD's obligations are at issue in this proceeding. This means that parties may not seek to alter ODFW's advice, or question OWRD's authority to issue the advice, in this proceeding. Instead, a party must submit "existing evidence" in an attempt to demonstrate that the weight of the evidence requires conditions different from those concurred with, or recommended by ODFW as consistent with its advice.

[5] WaterWatch argues that, notwithstanding ODFW's explicit concurrence, OWRD's conditions are inconsistent with ODFW's advice. The evidence does not support WaterWatch's contention. ODFW sent an email to OWRD concurring that the conditions are consistent with ODFW's advice, and Mr. Kepler testified to this consistency. The only area where the conditions failed to fully set forth the ODFW advice are with regard to certain mechanics of the annual meeting condition. OWRD has addressed these mechanics and revised the annual meeting condition consistent with ODFW's advice, as described in "The Annual Meeting Condition" subsection, below.

WaterWatch's evidence pertains both to the habitat needs of listed species and to the hydrological conditions of the lower Clackamas River. However, evidence of both types is primarily confined to the period between July and October. The sole exception is a study that looks at year-round hydrologic impacts of climate change in the Upper Clackamas River Basin. The study suggests potential increased streamflow during the winter months, and potential decreases to streamflow from April through September.[6] However, there is no evidence that connects the potential decreases suggested by the study during the period April through June to an inability to maintain the persistence of listed species in the lower Clackamas. In addition, ODFW's advice indicates that flows during the April through June period are typically "well over" (typically more than 200 cfs above) the minimum streamflow values, and "there should not be instances where streamflow is not meeting targets." OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1. Even assuming some decrease in streamflow resulting from climate change, a preponderance of the evidence indicates that the conditions will maintain the persistence of listed fish species during the period November 1 through June 30.

2. Evidence pertaining to fish habitat

WaterWatch submitted testimony by Charles W. Huntington pertaining to habitat conditions for listed species in the lower 3.1 miles of the Clackamas River. Mr. Huntington's testimony is primarily based on observations of the river during August to early September in 2008 and 2009, along with testimony more generally about habitat conditions present in the "summer" or "later summer" through "early fall." His observations indicate the current presence of small numbers of steelhead and Chinook in the lower 3.1 miles of the Clackamas River during August and September. This finding is consistent with ODFW's advice. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1. ODFW concluded that "[t]the lower 3.1 miles of the Clackamas represent less than 2% of the available rearing habitat in the basin and is the least desirable rearing habitat within the basin." ODFW also concluded that "this lower reach probably would be avoided by most species of concern during the warmest time periods in July and August." *Id.*

Mr. Huntington's testimony indicates that certain individual fish presently tolerating the later summer habitat provided by the lower 3.1 miles of the Clackamas River might, due to further reduced streamflows, either leave this reach of river to find better habitat or be unable to do so and not survive. Mr. Huntington states that if this occurs, "it would be an unfavorable consequence because it would reflect a loss of functional habitat." Test. of Huntington. However, Mr. Huntington does not state that this potential movement or loss of certain *individual* fish during a portion of the year (a portion of the year in which listed species are predisposed to avoid the lower 3.1 miles of the Clackamas River due to existing poor habitat conditions) poses a threat to the persistence of any listed fish *species*, either in the lower 3.1 miles of the Clackamas River, or the Clackamas River as a whole.

[6] The other exhibits and testimony submitted by WaterWatch pertaining to climate change address are not scientific studies, and deal with streamflow issues in only a broad and general fashion. As such, they are not entitled to significant weight in this proceeding. However, they appear to be consistent with the general conclusions reached in this report.

3. Evidence pertaining to hydrologic conditions

WaterWatch also submitted evidence pertaining to hydrologic conditions in the lower 3.1 miles of the Clackamas River. Specifically, WaterWatch submitted testimony by Jonathan Rhodes that attempts to estimate the likelihood that ODFW's recommended fish persistence flows will be missed, assuming full development and use of the permits, during the months of July through October. Mr. Rhodes concludes that these flow levels are likely to be missed more frequently during these months than is assumed by a similar analysis referenced in ODFW's advice. As noted above, WaterWatch also submitted a study that looks at year-round hydrologic impacts of climate change in the Upper Clackamas River Basin, and suggests the potential for future decreased streamflow from April through September.

Mr. Rhodes' testimony suffers from a fundamental problem. Even assuming the complete accuracy of his conclusions, they are unconnected to substantial evidence that persistence of listed species would not be maintained by OWRD's fish persistence conditions. As described above, Mr. Huntington's testimony does not establish that reduced streamflows during the July through October period would result in an inability to maintain the persistence of listed fish species.

In addition, ODFW's advice contemplates that the target flows will not always be met during the July through October period. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1. Indeed, the advice recognizes that they are not always met presently, and that the listed species have persisted under these conditions. *Id.* Rather, ODFW has stated that the target flows are what are required on a *long-term*, rather than short-term basis for persistence of listed fish species. Test. of Kepler (stating that the fish persistence flows are what is necessary to maintain the population "over time" and that "short term reductions in habitat may be tolerated by a population"). ODFW believes that the fish persistence conditions are sufficient to mitigate for the additional diversions contemplated under the permits. Mr. Kepler testified that the short-term drops below target flows predicted by Mr. Rhodes are not incompatible with maintaining the persistence of listed fish species. Test. of Kepler ("Kepler Rebuttal"). WaterWatch provided no evidence to the contrary.[7]

WaterWatch's evidence pertaining to alterations in hydrological conditions as a result of climate change suffers from this same flaw. The report relied upon by WaterWatch concludes that climate change is likely to result in increased streamflows in the Upper Clackamas Basin during the winter months, with decreased streamflows during the remainder of the year. The authors acknowledge that determining the magnitude of specific increases or decreases in streamflow is highly dependent upon the assumptions used to generate the models of potential future streamflow. WW Common 33 at 152 (using journal's pagination). As with Mr. Rhodes' testimony, though, there is insufficient evidence to establish that the predicted summertime decreases in streamflow will result in the fish persistence conditions failing to maintain the persistence of listed fish species.

Nor does the climate change report require the alteration of the fish persistence flows recommended by ODFW. Mr. Kepler testified that existing climate change reports

[7] In addition to this fundamental flaw, Mr. Rhodes' analysis also likely overestimates the number of years in which monthly flows, on average, will not reach fish persistence target flows.

or models "may predict that the necessary flows will be present in the Clackamas River more often or less often than they are currently, but they don't enlarge or reduce the minimum necessary flows." Affidavit of Rick Kepler (attached to OWRD MSD).

The Annual Meeting Condition

The one exception where the written conditions failed to fully incorporate the ODFW Advice concerns the nature of the annual meeting that each of the municipalities must have with ODFW. One of the fish persistence conditions included in the PFOs require the municipality to meet annually with ODFW to develop a plan to "maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake." All parties agree that the meetings are required under the PFOs. However, the condition in the PFOs does not include certain details concerning the conduct and outcome of the meeting that ODFW employee Rick Kepler has testified should be incorporated into the condition.

First, the condition did not address whether the strategy developed in the meeting should be reflected in writing. Mr. Kepler testified that ODFW intended the strategy to be documented in writing, and OWRD agrees.

Second, the condition did not address the possibility that ODFW and a municipality might not reach agreement on a strategy. Mr. Kepler testified that, while it was ODFW's intent to reach agreement, in the event that agreement could not be reached, ODFW would be responsible for devising the strategy. OWRD agrees with this approach.

Third, the condition did not address whether the annual meeting was intended to or could include discussions and strategies concerning other issues that are relevant to the municipalities' water use and to listed fish species. Mr. Kepler testified that ODFW intended that the annual meeting could include such discussions and strategies. Transcript Vol. 1 at 289-91. However, the evidence does not support the conclusion that ODFW intended to impose any strategies pertaining to these other issues unilaterally on the municipalities. Transcript Vol. 1 at 289-90 (Mr. Kepler stated that the municipalities "may not need to" take action based on discussion of other topics at the annual meeting, such as the reduction of water use, unless the municipalities agreed to do so). As a result, any strategies pertaining to these other issues must be agreed upon by the municipalities and ODFW in order to be incorporated into the written plan.

As a result of evidence that provides a greater level of detail with respect to the conduct and outcome of the annual meeting, OWRD revises the annual meeting condition as follows:

> In cooperation with the holders of permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839, the permittee must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. It is OWRD's intent that ODFW and the permittees shall reach agreement on the strategy. However, if after making a good faith effort ODFW and the permittees are unable to reach agreement on a strategy, ODFW shall devise the strategy. In either case, the strategy shall be documented in writing and the permittees shall comply with the strategy. The

annual meeting and resulting strategy may cover issues other than Timothy Lake releases that are relevant to both use under Permits S-46120, S-35297, S-43170, S-22581, S-3778, S-9982, S-32410 and S-37839 and to listed fish species; however, the strategy may include actions pertaining to such issues only upon mutual agreement by ODFW and the permittees."

Reasons for modification: To more completely and accurately describe and explain the legal requirements for making the "fish persistence" finding required by ORS 537.230(2)(c), and to explain the application of those requirements to the facts in this case. In addition, to more completely describe the changes to the annual meeting condition that OWRD proposes based on the evidence in the record.

MODIFICATIONS TO "THE PROTESTS" SUBSECTION

The two introductory paragraphs in this subsection are adopted without modification.

Modifications to subsection "1. Whether the Proposed Final Orders ("PFOs") are in error because use of the undeveloped portions of the permits, as conditioned in the PFOs, will not maintain the persistence of listed fish....": The first three paragraphs in this subsection are adopted without modification. Starting with the paragraph that begins "WaterWatch's argument is based upon ODFW testimony about fish habitat....", the remainder of the subsection is deleted and replaced with the following:

"As an initial matter, ODFW is not a participant in this proceeding, and ODFW's conduct is therefore not directly at issue. Instead, the question is whether OWRD's finding that the permits are conditioned to maintain the persistence of listed fish is supported by a preponderance of evidence.

ODFW's advice is explicitly based upon fish persistence in the lower 3.1 miles of the Clackamas River, and does "not reflect fish flow needs further up the Basin." OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1.

ODFW's advice discussed other portions of the Clackamas River and the Willamette River for two reasons. First, ODFW considered the relationship between the lower 3.1 miles and river reaches upstream and downstream for the purpose of explaining existing usage of the lower 3.1 miles by listed fish. In this case, this demonstrates that the lower 3.1 miles represent a very small percentage of the total available habitat during the summer months, that the habitat is presently undesirable during these months, and that there is presently habitat upstream and downstream to which fish can move during these months.

Second, ODFW looked at the effect of Timothy Lake releases, which could be used by the permit holders to meet the fish persistence flows, on fish habitat both within the lower 3.1 miles of the Clackamas River and within the entire reach of the Clackamas River downstream of Timothy Lake. Mr. Kepler testified that the reason for this evaluation is that "in the summertime, most of that habitat that's going to sustain those fish and maintain their persistence" is above the municipalities' points of diversion in the lower 3.1 miles. Transcript, Vol 1 at 303:1-3. The potential use of the Timothy Lake

releases to satisfy permit conditions therefore bears directly on fish persistence in the lower 3.1 miles by affecting the streamflows in this reach, and indirectly by affecting streamflows in upstream reaches of the Clackamas that serve as the vast majority of the habitat for listed species during the summer months.

There is nothing in the rule that prevents ODFW, as the circumstances warrant, from looking at more than just the affected waterway to determine what the effect is on that portion of the waterway. ODFW looked upstream as well as downstream, and determined that the conditions approved by OWRD would maintain the persistence of listed fish." **Reasons for modifications**: To more completely describe the role of ODFW in this proceeding; to more fully describe the evidence on the record pertaining to ODFW's consideration of the lower 3.1 miles of the Clackamas River, and the relationship of the upstream and downstream river reaches, in issuing ODFW's Advice.

Modifications to subsection "a. Whether PFO conditions allow reductions in streamflows below those needed to maintain the persistence of fish....": This subsection is deleted in its entirety and replaced with the following:

"During the summer months, the conditions permit continued diversion of the undeveloped portions of the permit when the recommended streamflows are not being met. During the remainder of the year, when the recommended streamflows are not being met the permit holders must reduce their diversion by a percentage equivalent to the percentage by which the recommended streamflows are missed (e.g., if streamflows are below the recommended level by 10%, the permit holders must reduce their diversion of the presently undeveloped portions of the permits by 10%).

As discussed in detail above, the evidence demonstrates that, while conditions will not completely prevent the recommended streamflows from being missed on occasion, the fish persistence conditions as a whole are consistent with maintaining the persistence of listed fish species." **Reason for modifications**: To more completely and accurately describe the evidence on the record pertaining to the effect of the fish persistence conditions.

Subsection "b. Whether the PFOs fail to include required mitigation." OWRD adopts this subsection without modification.

Modifications to subsection "c. Whether the PFOs fail to include a mechanism to prevent dessicating salmon redds." This subsection is deleted in its entirety and replaced with the following:

"Neither the statute nor the rules specifically require a "mechanism to prevent dessicating salmon redds." The relevant question is whether the permits are conditioned to maintain the persistence of listed fish species. As described above, they are.

However, it is worth noting that the annual meeting condition is intended in part to prevent the dessication of salmon redds, by providing ODFW with control over Timothy Lake releases to prevent dessication." **Reasons for modifications**: To more completely and accurately describe the legal standard and the evidence on the record pertaining to this issue.

Modifications to subsection "d. Whether the PFOs improperly utilize a compliance point that is above two of the points of diversion." This subsection is deleted in its entirety and replaced with the following:

"The evidence shows that the compliance point identified by ODFW and OWRD, located at USGS Gage 14211010, is above the point of diversion for Lake Oswego. ODFW took this fact into account when issuing its advice, and concurred that OWRD's conditions are consistent with maintaining the persistence of listed fish species. WaterWatch has failed to present evidence sufficient to demonstrate that the relationship between the Lake Oswego point of diversion location and US Gage 14211010 will result in the failure of the conditions to maintain the persistence of listed fish species." **Reason for modification**: To more completely and accurately describe the legal standard and the evidence on the record pertaining to this issue.

Modifications to subsection "[e.] Whether the State incorrectly relied on Annear and Wells to conclude that the persistence of listed fish will be maintained....": This subsection is deleted in its entirety and replaced with the following:

"The ALJ correctly resolved the Annear and Wells issue that was framed in the RMSD, which is whether the ODFW relied on the Annear and Wells study to determine flow needed to maintain the persistence of listed fish. WaterWatch filed exceptions on the ground that the issue as framed in the RMSD is not the same as the issue raised by WaterWatch. The issue raised by WaterWatch is "[w]hether the State incorrectly relied on Annear and Wells to conclude that the persistence of listed fish will be maintained."

As previously noted, ODFW is not a participant in this proceeding, and ODFW's conduct is therefore not directly at issue. Instead, the question is whether OWRD's finding that the permits are conditioned to maintain the persistence of listed fish is supported by a preponderance of evidence.

WaterWatch submitted evidence prepared by its hydrology expert, Jonathan Rhodes, that a portion of the Annear and Wells report may result in underestimation of the frequency with which the recommended fish persistence flows will be missed during the period July through October. WaterWatch argued that its own streamflow estimates, as prepared by Mr. Rhodes, were more reliable and entitled to greater evidentiary weight. However, as discussed above, ODFW did not rely upon the portion of the Annear and Wells report criticized as erroneous by Mr. Rhodes. Further, Mr. Kepler testified that even if ODFW had relied upon Mr. Rhodes' analysis in its advice, it would not have altered ODFW's conclusion that the fish persistence conditions were sufficient to maintain the persistence of listed fish species. Test. of Kepler." **Reasons for modification**: To more completely and accurately describe ODFW's role in this proceeding, and the legal standard and the evidence on the record pertaining to this issue.

Modifications to subsection "f]. Whether the State incorrectly relied upon the Timothy Lake agreement to conclude that the persistence of listed fish will be maintained....": OWRD adopts the first three paragraphs of this subsection without modification. The fourth paragraph is deleted in its entirety and replaced with the following:

"The annual meeting condition, as revised in this amended proposed order, mandates that ODFW and the permit holders develop an annual strategy to manage

available Timothy Lake releases. The quantity of water releases from Timothy Lake that are available to the permit holders under an agreement with PGE will vary from year to year. It is possible that in some years no releases will be available to the permit holders.

ODFW's advice states that Timothy Lake releases may help to meet the recommended fish persistence flows under certain circumstances. But the advice also acknowledges that these releases will not be sufficient to meet the flows in all circumstances. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1.

Without the Timothy Lake portion of the annual meeting condition, the permit holders would have a right to make use of the Timothy Lake releases available under the agreement with PGE as they see fit. ODFW's advice expressed concern that the use of these flows to avoid curtailment under the fish persistence conditions, followed by a sudden shut-off of these releases, could result in the dewatering of spawning areas created as a result of the releases and the stranding of listed fish. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1. Timothy Lake sits roughly 23 miles upstream from the lower 3.1 miles of the Clackamas River. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1. As a result, releases of water from Timothy Lake affect the entire reach of the river downstream from the Lake, and not just the lower 3.1 miles. Timothy Lake releases therefore affect a much greater percentage of the total habitat available in the Clackamas River than do the permit holders' diversion, which are confined to the lower 3.1 miles. A release of water from Timothy Lake, followed by a poorly timed shut-off of that release, could dewater spawning areas and strand fish for this entire reach. OWRD Exs. S-22581 A-1, S-3778 A-1, and S-9982 A-1.

By giving ODFW a say in the timing and quantity of Timothy Lake releases, the annual meeting condition aids in maintaining the persistence of listed fish species. There is no support in the record for a conclusion that relying on the ability to manage Timothy Lake releases is incorrect or inappropriate." **Reasons for modifications**: To more completely and accurately describe the legal standard and the evidence on the record pertaining to this issue.

Modifications to subsection "[g]. Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed how the anticipated impacts of climate change will affect the persistence of listed fish....": This subsection is deleted in its entirety and replaced with the following:

"As previously noted, ODFW is not a participant in this proceeding, and ODFW's conduct is therefore not directly at issue. Instead, the question is whether OWRD's finding that the permits are conditioned to maintain the persistence of listed fish is supported by a preponderance of evidence.

ORS 537.230(2)(c) requires the fish persistence finding to be based on ODFW's advice and existing data. ODFW's advice did not explicitly mention climate change data or evidence, although Mr. Kepler testified that it would not have affected ODFW's recommended streamflows. WaterWatch submitted evidence pertaining to the effects of climate change on streamflow in the lower Clackamas. The ALJ excluded this evidence. As described above, OWRD has admitted this evidence and considered it in the issuance of this amended proposed order, but concluded that the evidence submitted by WaterWatch does not require alteration of OWRD's conditions or finding pertaining to listed fish species." **Reasons for modification**: To more completely and accurately

describe ODFW's role in this proceeding, and the legal standard and the evidence on the record pertaining to this issue.

Modifications to subsection "[h]. Whether the PFOs lack any adaptive management strategy that would allow for revisiting the conditions if fish persistence is not being maintained....": This subsection is deleted in its entirety and replaced with the following:

"ORS 537.230(2)(c) does not require the use of adaptive management strategies to address fish persistence, so it is irrelevant whether the conditions lack such a strategy. Nonetheless, the annual meeting condition provides for management of Timothy Lake releases that is adapted to the year's streamflow conditions, and permits discussion of other issues related to the permit holders' use of water." **Reasons for modification:** To more completely and accurately describe the legal standard and the evidence on the record pertaining to this issue.

Subsection [i] and Subsections 2 and 3: These subsections are adopted without modification.

Subsections 4 and 5, pertaining to the Endangered Species Act: These subsections are deleted in their entirety and replaced with the following:

"The RMSD correctly determined that issues pertaining to compliance with the federal Endangered Species Act is outside the scope of this proceeding, which is for the purpose of determining compliance with state law." **Reason for modification:** The RMSD correctly addressed these issues, and the further consideration of these issues in the Proposed Orders was unnecessary.

Subsection "6. Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed the impacts of climate change....": This subsection is deleted in its entirety and replaced with the following:

"This issue is addressed in the section pertaining to Protest Issue 1.g., above." **Reason for modification:** To reflect OWRD's determination that it is appropriate to admit and consider certain WaterWatch exhibits pertaining to climate change.

Subsections 7 through 19: These subsections are adopted without modification.

MODIFICATIONS TO THE "SUMMARY" SECTION

Items 1 and 2 in the Summary Section are deleted in their entirety and replaced with the following. Deletions are shown in strikethrough and additions in underline. The remainder of the section is adopted without modification.

1. ~~All of the PFOs are conditioned to maintain the persistence of listed fish in the lower Clackamas River, and the conditions are consistent with the ODFW Advice received in each case, with one exception;~~ OWRD properly found that the undeveloped portions of

the permits are conditioned to maintain the persistence of listed fish species, consistent with ODFW's advice, with the following clarification:

2. ~~The conditions in each PFO should be amended to: a) require a written record of the annual meeting to be kept; and b) to include a provision addressing how to resolve situations where ODFW and the municipality cannot agree on all factors at the annual meeting;~~ The annual meeting condition is revised as described in "The Annual Meeting Condition" subsection, above;

MODIFICATIONS TO THE "ORDER" SECTION

This section is modified as follows, with deletions shown in strikethrough and modifications shown in underline:

~~I propose the Oregon Water Resources Department issue the following order:~~ The Oregon Water Resources Department proposes to issue the following order:

That the ~~Proposed and Final Orders~~ Proposed Final Orders in Permits S-22581, S-3778 and S-9982 as amended, are AFFIRMED AS MODIFIED, and the extension applications for these permits are GRANTED, WITH CONDITIONS.

DATED this 31ST day of January, 2011.

Phillip C. Ward
Director, Oregon Water Resources Department

RIGHT TO FILE EXCEPTIONS

This Amended Proposed Order is issued by Oregon Water Resources Department pursuant to OAR 137-003-0655(3). As provided in OAR 137-003-0650 and OAR 690-002-0175, if the recommended action in the proposed order is adverse to any party or the Water Resources Department, the party or Department may file exceptions. Parties must file their exceptions within 30 days following the date of service of this Amended Proposed Order. Exceptions must be served on each of the parties and filed with the Department at:

Attn: Patricia McCarty
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, Oregon 97301
Patricia.e.mccarty@wrd.state.or.us

Exceptions may be filed via mail, electronic mail at the address above, or hand-delivery. Exceptions sent through the US Postal Service shall be considered filed on the date postmarked. Exceptions sent by e-mail or hand-delivered are considered filed when received by the agency.

Exceptions are legal or factual arguments illustrating legal or factual error in the Amended Proposed Order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. Exceptions must clearly and concisely identify the portions of the Amended Proposed Order excepted to, and cite the appropriate portions of the record or Commission policies that are the basis for the modifications sought in the exceptions. .

The Water Resources Director must consider any exceptions to the Amended Proposed Order before issuing a final order.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON WATER RESOURCES DEPARTMENT

In the Matter of the Consolidated Case Involving Applications for Extension of Time for:	
	OAH Consolidated Case Nos.: WR 08-004 through 08-011
Permit S-32410, Modified by Permit Amendment T-8538, Application S-43365, in the Name of City of Lake Oswego;	
Permit S-37839, Application S-50819, in the Name of City of Lake Oswego;	**PROPOSED ORDER IN CASES INVOLVING SOUTH FORK WATER BOARD**
Permit S-3778, Application S-5942, in the Name of South Fork Water Board;	**Permit S-3778 WR 08-011**
Permit S-9982, Application S-11007, in the Name of South Fork Water Board;	**Permit S-9982 WR 08-010**
Permit S-22581, Application S-28676, in the Name of South Fork Water Board;	**Permit S-22581 WR 08-009.**
Permit S-46120, Modified by Permit Amendment T-7434, Application S-60632, in the Name of Sunrise Water Authority and North Clackamas County Water Commission;	
Permit S-35297, Modified by Permit Amendment T-7389, Application S-47144, in the Name of North Clackamas County Water Commission;	
Permit S-43170, Modified by Permit Amendment T-7434, Application S-57226, in the Name of North Clackamas County Water Commission,	
Applicants,	
and	
City of Tigard,	
Intervenor,	
vs.	
WaterWatch of Oregon, Inc.; and South Fork Water Board,	
Protestants.	

STATEMENT OF THE CASE

This Proposed Order is one of three issued at the same time. Together, the three orders decide the issues raised when WaterWatch and South Fork Water Board (SFWB) protested the granting of eight municipal extension applications with points of diversion in the lower 3.1 miles of the Clackamas River.

The issues in the three Proposed Orders have been grouped based on the applicant. This order addresses three applications for extension filed by the SFWB. The others address the extension applications filed by Lake Oswego and North Clackamas County Water Commission (NCCWC). Each Proposed Order addresses "common issues," primarily the effect of the municipal extensions on threatened and endangered fish species in the Clackamas River, and each Proposed Order also decides any case-specific issues involving each applicant.

COMMON ISSUES HEARING

The Parties. On November 20, 2007, the Oregon Water Resources Department (OWRD, or the Department), issued Proposed and Final Orders (PFOs) that granted extensions of municipal water rights in the following cases:

City of Lake Oswego (LO)
- **WR 08-008** (Permit S-32410, modified by Permit Amendment T-8538, Application S-43365);
- **WR 08-006** (Permit S-37839, Application S-50819);

South Fork Water Board (SFWB)
- **WR 08-011** (Permit S-3778, Application S-5942);
- **WR 08-010** (Permit S-9982, Application S-11007);
- **WR 08-009** (Permit S-22581, Application S-28676);

NCCWC/Sunrise Water Authority (SWA)
- **WR 08-004** (Permit S-46120, modified by Permit Amendment T-7434, Application S-60632);
- **WR 08-005** (Permit S-35297, modified by Permit Amendment T-7389, Application S-47144); and
- **WR 08-007** (Permit S-43170, modified by Permit Amendment T-7434, Application S-57226).

On January 4, 2008, WaterWatch and SFWB filed protests in all eight cases.

Representation. Throughout the proceedings, the Department and the parties have been represented by counsel. WaterWatch has been represented by Lisa Brown; SFWB has been represented by the Schroeder Law Offices, PC (Laura Schroeder, Colm Moore)[1]; The Joint Municipal Parties (JMP) consisting of LO, SWA and NCCWC, have

[1] Mr. Moore is no longer associated with the Schroeder firm at the time this decision is being written.

been represented by Bateman Seidel (Jeff Ring, Karen Reed, Christine Zemina); and the Department has been represented by Assistant Attorneys General Renee Moulun and Jesse Ratcliffe.

Consolidation. On November 20, 2008, the eight cases were referred to the Office of Administrative Hearings (OAH), together with OWRD's motion to consolidate the matters to address common issues in all eight cases (the "common issues" case). On February 5, 2009, the motion to consolidate was granted and a pre-hearing conference was set. The conference was ultimately held on June 23, 2009, after the Department's Order on Petition for Party Status was issued.[2]

By common agreement, the parties were given until July 31, 2009 to develop an agreed list of issues for hearing. WaterWatch, the Department and JMP agreed upon a joint statement of issues; SFWB did not agree with the phrasing of the issues, and submitted its own similar list.

Summary Determination Process. All parties made use of the Summary Determination process, as set forth in OAR 137-003-0580. Motions for Summary Determination were filed on November 30, 2009, responses were filed on or before December 14, 2009, and replies were filed on or before December 21, 2009.

A Ruling on Motions for Summary Determination (RMSD) was issued on January 4, 2010. After motions for clarification were filed, an Order Clarifying Ruling on Motions for Summary Determination was issued on February 3, 2010. The findings and conclusions in both the RMSD and the Order Clarifying RMSD are hereby incorporated into this decision.

Manner of Taking Testimony. By agreement of the parties, direct and rebuttal testimony of all witnesses was presented in written (affidavit) form, and the in-person hearing was limited to cross-examination only. The following witnesses presented testimony, written and/or oral:

Direct Testimony: OWRD: Dwight French, Ann Reece, Rick Kepler
SFWB: John Collins, Robert Long, Kathy Aha[3]
WW: Jonathan Rhodes, Charles Huntington, John Davis
JMP: Dennis Koellermeier, Joel Komarek, Tim Jannsen, John Thomas
Rebuttal Testimony: OWRD: Kepler, George Robeson
SFWB: Long
WW: Rhodes, Huntington, Davis, Lisa Brown[4]
JMP: Robert Annear, Les Williams

[2] Pursuant to the Order on Party Status, the City of Tigard (also represented by Bateman Seidel) was granted intervenor status for the common issues case and the joint municipal parties (JMP) were granted party status in all eight of the extension proceedings.
[3] SFWB's witnesses presented testimony in the common issues case and in the SFWB case.
[4] Ms. Brown, counsel for WaterWatch, did not testify substantively in the case.

Cross-examination: Rhodes, Huntington, Annear, Williams, Collins, French, Robeson, Kepler, Long, Reece, Jannsen, and Komarek. [5]

With a few exceptions (where a party submitted written direct or rebuttal testimony as an exhibit) the Direct Written Testimony (DWT) and Rebuttal Written Testimony (RWT) documents have not been marked as exhibits but have been treated in this proceeding as the sworn testimony of the witness.

Objections to Written Testimony. Some objections to written testimony were presented in writing before the hearing and at the beginning of the hearing, and the requests were taken under advisement. The parties were given until March 19, 2010, to file any responses to the objections concerning written testimony. The only objections to written testimony were presented by JMP and SFWB, moving to strike portions of John Davis' testimony about climate change. For the reasons set forth below, the motions to strike are denied.

The Hearings. The hearings were held March 1 through 3, 2010, at the OAH offices in Salem. Pursuant to a Case Management Memorandum filed by the Department, the issues common to all eight cases were tried together (the "common issues" hearing), but the case-specific issues were bifurcated into three separate hearings held the same week. The "common issues" cross-examination hearing was held on March 1 and 2, 2010; the SFWB hearing was held on March 2; the NCCWC/SWA hearing was held on March 3; and the Lake Oswego hearing was also held on March 3, 2010. The cross-examination hearings ended on March 3, 2010, and the record was held open for written closing arguments. A corrected transcript of the proceedings was received on April 14, 2010.

In all of the hearings, Mr. Ratcliffe represented OWRD; Ms. Schroeder and Mr. Moore represented SFWB; Mr. Ring, Ms. Reed and Ms. Zemina represented the JMP; and Lisa Brown represented WaterWatch.

Briefing. After the hearing, a written briefing schedule was developed and followed, with briefing as follows: Initial briefs from OWRD and all parties were received on April 23, 2010. The final briefs were received on May 10, 2010, and the hearing record was closed on that date.

CASE SPECIFIC HEARING

As noted, this Proposed Order decides the issues concerning the extension applications filed by SFWB. The decision considers the evidence presented in the Common Issues hearing as well as that presented in the SFWB hearing. If an appeal is taken concerning just these permits, the record should include the common exhibits and

[5] Collins was cross-examined in the common issues case and the SFWB case. Long testified in the SFWB case, Jannsen in the NCCWC case, Komarek in the Lake Oswego case, and Reece in all three case-specific hearings.

written testimony, the case-specific exhibits and testimony, the transcript of both hearings, and the written arguments of counsel.[6]

EVIDENTIARY RULINGS

Common Issues Exhibits. OWRD offered Exhibits A1 through A6,[7] all of which were admitted without objection. JMP offered Exhibits JMP 1 through JMP 23, all of which were admitted without objection. SFWB offered no exhibits in the common issues hearing. WaterWatch offered Exhibits WW1 through WW 35, 37, 38, 41, and 42. WW1-3, 6, 10, 21-30, 35, 37, 38, and 41 were admitted without objection; WW5, 7, 8, 9 (demonstrative only), and 13-20 were admitted over objection. WW4, 11, 12, 31-34, and 42 were not admitted into evidence.

Case Specific Exhibits. In the SFWB case, OWRD offered Exhibits A1 through A2 and SFWB offered Exhibits 1 through 11; all were admitted without objection. WaterWatch offered exhibits WW1 through WW6. Exhibits WW1, 2, and 3 were admitted into evidence, and Exhibits WW4 through 6 were not admitted.

Limitation on Testimony. Before the common issue hearing began, SFWB filed a motion to quash a subpoena issued by WaterWatch to John Esler, a PGE employee, requiring Esler to provide direct testimony at the cross-examination hearing. SFWB and JMP objected to his testimony because WaterWatch had not presented written direct or rebuttal testimony from Esler. Allowing his oral direct testimony, they argued, would violate the agreement between the parties that all direct testimony would be presented in writing and only cross-examination would be allowed at hearing.

At the prehearing conference in this case, the parties (including WaterWatch) all agreed that direct and rebuttal testimony would be presented in writing, and that the hearing would be reserved for cross-examination only. Because of this agreement, I quashed the subpoena. Allowing Esler to testify on direct at hearing would have violated that agreement.

If Esler had testified, the other parties would not have been prepared to cross-examine him and would have been prevented (by the agreement) from presenting direct evidence to rebut his testimony, if necessary. The agreement to limit the hearing to cross-examination would have been negated; it would have led to unnecessary delay, and it would have defeated the purpose of requiring written direct and rebuttal in the first place. Esler was accordingly not allowed to testify.

Offers of Proof. After the hearing was over, WaterWatch submitted a written "offer of proof" concerning Esler's testimony and some climate-related exhibits (Exhibits

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[6] All of the documents in the case, including exhibits, written testimony and procedural documents, are found in seven large binders supplied by OWRD and two binders supplied by JMP. There is also a transcript of the hearings.

[7] Consolidated Exhibits A5 and A6, offered by OWRD, and all of their exhibits in the case-specific matters, are provided on a CD that is included in the binders described above.

WW31-34), which were excluded from evidence. The offer of proof was the subject of further objections by SFWB, who filed a Motion to Strike.

The offer of proof contended that Esler should have been able to testify, and presented an affidavit from Esler stating that PGE would only allow him to testify if subpoenaed to the hearing.[8] However, WaterWatch's assertion does not change my ruling. The fact that WaterWatch was able to obtain an affidavit from Esler and present it in this offer of proof shows that WaterWatch could have presented direct written or rebuttal testimony earlier, in the same fashion that all other parties presented their evidence.

Further, the timing of the written offer of proof bears comment. Rather than being presented orally at the time of my ruling, the written offer of proof was made *after* the evidentiary record closed. The offer seems timed only to have the Esler affidavit in the file for purposes of any appeal. The offer of proof is stricken, although it will be kept with the file. The subpoena was properly quashed.

The motion to strike is also granted as to Exhibits WW31-34, in which WaterWatch seeks to present a "high level summary of the points that the excluded exhibits, WW-31 through 34, would establish if admitted[.]" However, the ruling on the admissibility of the excluded documents has already been addressed and will not be changed at this point. As SFWB notes, the documents remain in the documentary file in the event that a reviewing court disagrees with my ruling. Furthermore, there is no basis to admit a summary of excluded exhibits into evidence.

Finally, WaterWatch seeks to strike portions of the record made by other parties if WW31-34 are not admitted. The motion is denied as untimely. WaterWatch had no objection to the documents they now seek to strike when they were offered at the time of the hearing, and did not raise this objection until well after the evidentiary record had closed.

Motions to Strike Written Testimony. Before the hearing, SFWB and JMP objected to portions of WaterWatch's written testimony, arguing it should be stricken in light of the rulings in the RMSD and the Order Clarifying RMSD. However, because the issues are clear enough that I am able to differentiate which portions of the testimony are relevant and which are not, and because I do not want to disturb the context of each expert's testimony, I am not going to strike the selected portions. The motions are denied.

STATEMENT OF ISSUES

As noted above, there was some disagreement on the wording of the issues presented in the hearings. All of the parties except SFWB agreed to a list of issues;

[8] WaterWatch did not indicate, at the time of the hearing, that PGE would only allow Esler to testify if subpoenaed. I do not interpret that position by Esler's employer to preclude the presentation of written direct testimony via affidavit, as he ultimately did for the offer of proof.

SFWB presented a separate list of issues that is substantially similar. For completeness sake, I am presenting both lists:

Issues Agreed to by All Parties Except SFWB:

1. Whether the Proposed Final Orders ("PFOs") are in error because use of the undeveloped portions of the permits, as conditioned in the PFOs, will not maintain the persistence of listed fish as required by ORS 537.230.

a. Whether the PFO conditions allow reductions in streamflows below those needed to maintain the persistence of listed fish;

b. Whether the PFOs fail to include required mitigation;

c. Whether the PFOs fail to include[e] a mechanism to prevent dessicating salmon redds;

d. Whether the PFOs improperly utilize a compliance point that is above two of the points of diversion;

[e].[9] Whether the State incorrectly relied on Annear and Wells to conclude that the persistence of listed fish will be maintained;

[f]. Whether the State incorrectly relied upon the Timothy Lake agreement to conclude that the persistence of listed fish will be maintained;

[g]. Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed how the anticipated impacts of climate change will affect the persistence of listed fish;

[h]. Whether the PFOs lack any adaptive management strategy that would allow for revisiting the conditions if fish persistence is not being maintained;

[i]. Only with regard to SFWB Permits * * * S-3778 and S-9982, whether the PFOs should contain more specific conditions regarding any movement of the point of diversion downstream.

2. Whether the conditions to maintain the persistence of listed fish in the PFOs are supported by substantial evidence, because the recommended target fish flows are set too high and are not related to the persistence of listed fish because:

a. The 1964 Oregon Department of Fish and Wildlife ("ODFW") Report is insufficient to establish flows that form the basis of OWRD's fish persistence conditions.

[9] The numbers in editorial parentheses were changed from the original numbering system because the original mistakenly began repeating subsection references, such as "b." and "c."

3. Whether the condition in the PFOs that requires an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with Portland General Electric for the release of stored water from Timothy Lake constitutes improper third-party governmental interference in a private contract.

4. Whether OWRD was required in the PFOs to evaluate or address whether approval of the permit extensions would violate the federal Endangered Species Act's prohibition on the take of a listed species.

5. Whether approval of the permit extensions as proposed in the PFOs would violate the federal Endangered Species Act's prohibition on the take of a listed species.

6. Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed the impacts of climate change on the resources at risk from the additional water withdrawals from the Clackamas River under the PFOs.

7. Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed the requirements of the Clean Water Act and the Oregon Department of Environmental Quality's Total Maximum Daily Load allocations.

8. Only with regard to [NCCWC] Permits S-35297 [and] S-46120, Lake Oswego [permit] S-37389 and SFWB S-22581: Whether the PFOs improperly delay making certain determinations required by the extension statutes to later Water Management and Conservation Plan orders.

9. Whether the PFOs are in error in finding and concluding that the applicants can apply the water at issue to full beneficial use by the end of the applicable extension periods.

10. Whether the PFOs are in error in finding and concluding that the applicants can complete the construction of the contemplated water development projects by the end of the applicable extension periods.

11. Whether the PFOs are in error in finding and concluding that there is good cause to issue the extensions:

a. Whether the PFOs are in error in finding that applicants have developed their permits with reasonable diligence and good faith;

b. Whether the PFOs are in error in finding that there is a market and present demand for the water;

c. [Not applicable to this proceeding]

12. Only with regard to Permits Lake Oswego S-37839, Lake Oswego S-32410, SFWB S-22581, SFWB S-9982 and SFWB S-3778: Whether the PFOs are in error in finding that the time requested to apply the water to full beneficial use is reasonable.

13. Whether ORS 537.230, as applied to SFWB in the PFOs for Permits S-3778, S-9982 and S-22581, violates the US Constitution's Fifth Amendment and procedural due process and equal protection provisions.

14. Whether the PFO for Permit SFWB S-22581 is in error in proposing to issue an extension with SFWB also develops Permits S-9982 and S-3778.

15. Whether the PFOs for Permits SFWB S-9982 and SFWB S-3778 are in error in proposing to issue extensions after issuance of Permit SFWB S-22581.

16. Whether the PFO for Permit SFWB S-3778 is in error in finding that SFWB has diverted 5 cubic feet per second under that permit.

17. [Not applicable to this proceeding]

18. [Not applicable to this proceeding]

19. [Not applicable to this proceeding]

SFWB Statement of the Issues[10]

SF1. Whether the PFOs condition the use of the undeveloped portion of the permits, so as to maintain the persistence of listed fish in the portion of the waterways affected by water use under the permits, as limited by the following sub-issues:

a. Whether the PFOs allow significant water withdrawals when flows identified by ODFW are not met, and if so whether this is inconsistent with ORS 537.230(2)(c);

b. Whether OWRD and ODFW relied on the Annear and Wells Model to conclude that fish persistence will be maintained, and if so whether such reliance is inconsistent with ORS 537.230(2)(c);

c. Whether the State relied on water that might be produced by the Timothy Lake agreement in its conclusion that the persistence of listed fish will be maintained, and if so whether such reliance is inconsistent with ORS 537.230(2)(c);

[10] I am adding a prefix to the SFWB issues to prevent duplication when the issues are compared below. SFWB's first issue, therefore, is designated SF1, and the listing of the case-specific issues will be CS1, etc.

d. Whether OWRD and ODFW are required to evaluate the anticipated impacts of climate change on streamflow when conditioning the permits to maintain the persistence of listed fish species under ORS 537.230(2)(c);

e. Whether the PFOs lack a mechanism to prevent desiccating salmon redds, and if so whether this is inconsistent with ORS 537.230(2)(c); and

f. Whether the PFOs lack an adaptive management strategy that would allow for revisiting the conditions if fish persistence is not being maintained, and if so whether this is inconsistent with ORS 537.230(2)(c);

g. Only with regard to Permits S-3778 and S-9982 in the Name of [SFWB]: Whether the PFOs should contain more specific conditions regarding any movement of the point of diversion downstream.

SF2. Whether the persistence conditions in the PFOs are supported by substantial evidence, because the recommended minimum fish flows are set too high and the fish flows are not related to the persistence of listed fish because:

a. The 1964 ODFW Report is insufficient to establish flows that form the basis of the Department's fish persistence conditions.

SF3. Whether the condition in the PFOs that requires an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with Portland General Electric for the release of stored water from Timothy Lake constitutes improper third-party governmental interference in a private contract.

SF4. Whether OWRD and ODFW, through the issuance of the extension PFOs, authorized an action that will result in the take of a species listed under the federal Endangered Species Act.

SF5. Whether the PFOs are deficient and the extensions should be denied because they fail to include findings or conclusions of law demonstrating that the agency evaluated the impacts of climate change on the resources at risk from additional water withdrawals from the Clackamas River.

SF6. Whether OWRD was required to address the Clean Water Act and the Oregon Department of Environmental Quality's (DEQ's) Total Maximum Daily Load allocations and whether OWRD can authorize water withdrawals that further degrade the water quality of the Clackamas River.

SF7. Whether the Department improperly delayed analysis required by the extension statutes, by conditioning the PFOs with a requirement that the increased use under the permits will be based upon a subsequently developed and approved Water Management and Conservation Plan. (Issue not raised for SFWB Permits S-3778, S-9982, and Lake Oswego Permit S-32410).

SF8. Whether ORS 537.230, as drafted, violates procedural due process, equal protection and the 5th Amendment of the United States Constitution.

SF9. Whether the PFOs are in error in finding that the permit holders can apply water to full beneficial use by the end of the extension period.

SF10. Whether the PFOs are in error in finding that the permit holders can complete construction of the project by the end of the extension period.

SF11. Whether the PFOs are in error in finding that the permit holders have demonstrated "good cause" to support issuance of the extensions.

a. Whether the PFOs are in error in finding that the permit holders have developed their permits with reasonable diligence and good faith.

b. Whether the PFOs are in error in finding that there is a market and present demand for water.

SFWB Case-Specific Issues

CS1. [Not applicable to this proceeding]

CS2. Regarding Lake Oswego Permits [all], and SFWB Permits [all]:

a. Whether the various time limits allowed for development of the water rights in the extension PFOs for the above-listed permits are unreasonable and in violation of applicable law.

CS3. [Not applicable to this proceeding]

CS4. [Not applicable to this proceeding]

CS5. [Not applicable to this proceeding]

CS6. Regarding SFWB permits [all]:

a. Whether the PFO for SFWB Permit S-22581 is in error in proposing to issue an extension while SFWB also develops permits S-9982 and S-3778.

b. Whether the PFOs for permits S-9982 and S-3778 are in error in proposing to issue extensions after issuance of Permit S-22581.

CS7. Regarding SFWB Permit S-3778:

a. Whether the PFO is in error in concluding that SFWB has diverted 5 cubic feet per second (cfs) under this permit.

CS8. Regarding SFWB Permit S-9982:

a. Whether SFWB's agreement to move the point of diversion under this permit to a point that is 3.1 miles lower on the Clackamas River is consistent with "persistence" of listed fish species.

FINDINGS OF FACT

Findings of Fact in Permit S-3778

I adopt the Findings of Fact made by OWRD in the PFO, restating some with application to the issues in this case, with the following additions and clarifications:

1. Permit S-3778, granted to the City of Oregon City on May 11, 1918, authorizes the use of up to 20.0 cfs of water from the Clackamas River, a tributary of the Willamette River, for municipal use. Construction of the water development project was to be completed by May 11, 1923, and complete application of water was to be made on or before October 1, 1943. (Ex. A1 at 1).[11]

2. On January 20, 1983, Permit S-3778 was assigned from Oregon City to SFWB. (Ex. A1 at 105).

3. Ten prior permit extensions have been granted for Permit S-3778. The most recent extension request extended the completion dates for construction and full application of water to October 1, 2000. (Ex. A1 at 109-133).

4. Because municipal extensions were the subject of legislative action and administrative rulemaking over a period of several years, the Department placed all pending Applications for Extension of Time for municipal and quasi-municipal permits on hold and did not require municipal permit holders to submit applications for extension of time until the new rules were adopted. (Test. of Reece).

5. Municipal and quasi-municipal water use permit extension rules (OAR 690-315-0070 through 690-315-0100) initially became effective on November 1, 2002. They were amended, and the amendments became effective on November 22, 2005.

[11] In the Findings of Fact, references to Exhibit A1 refer to the Exhibit A1 *in that case* rather than to Consolidated A1, unless otherwise noted.

6. On December 26, 2003, SFWB submitted an Application for Extension of Time, along with a $250.00 application fee, to the Department, requesting an extension of time from October 1, 2000 to October 1, 2050. (Ex. A1 at 156). The application was not returned. The City submitted additional information to supplement their application on December 20, 2004, June 9, 2005, June 12, 2005, June 24, 2005 and November 7, 2006. (*Id.* at 201-249).

7. When SFWB filed its application, its various submissions included: information concerning the work that had been done to develop the water right; the plans for completing the build-out within the extension period; and information concerning the good cause factors. (Ex. A1, A2).

8. Once the application was complete, OWRD began to review the extension request to determine if an extension should be granted. The Department did not examine whether actual construction on the water right had begun within a year of the initial application because the "actual construction" factor does not apply to municipal extensions. (Test. of Reece; ORS 537.410(2)).

9. The Department examined SFWB's plan to develop the undeveloped portion of the water right, and also reviewed its plans for full development on or before October 1, 2050. Based upon the information provided by SFWB, the Department concluded that the extension request was reasonable and the remaining work could be completed within the time requested. (Test. of Reece).

10. The Department also examined the application under the "good cause" standard, to determine whether there was good cause to approve the extension. The Department looked at SFWB's diligence, the cost to appropriate and supply the water, its good faith, the market and present demands for water, the income necessary to achieve a reasonable return on the investment and the possibility that other governmental requirements had delayed completion. The Department also reviewed whether there were events outside the control of SFWB that contributed to the delay and need for an extension. After reviewing the information, the Department determined that SFWB had good cause to seek the extension of time. (Test. of Reece).

11. When the Department examined this extension request, it was also reviewing seven others, all of which are part of these contested case hearings. All eight municipal permits have places of diversion within the lower 3.1 miles of the river. Before approving the extensions, the Department was required to seek the advice of the Oregon Department of Fish and Wildlife (ODFW), to see if conditions to the extensions would be necessary to protect the fish in the area. (Test. of Reece).

12. On November 9, 2006, pursuant to statute, OWRD sent all eight applications to ODFW for ODFW's review of the effect of the extensions (the development of the undeveloped portions of the permits) on the fish population and habitat. (Ex. A1 at 274).

13. On May 1, 2007, ODFW sent its written Advice to OWRD, for its consideration in preparing conditions for the extensions. ODFW concluded that the use of the undeveloped portions of the water rights would not maintain the persistence of the listed fish unless conditions were placed on the extension approvals. (Ex. A1 at 256).

14. After receiving the ODFW Advice in each case, the Department drafted conditions for each PFO with the intention of following the advice recommendations in the PFO. Although the Department understood that it was required to follow the ODFW Advice, both agencies took the opportunity to discuss the recommendations and come up with conditions that would protect the fish habitat but also allow the municipalities to develop the water. (Ex. A1 at 276; Test. of Kepler, French).

15. When OWRD completed its interpretation of the ODFW Advice in the conditions of the draft PFOs, it returned the drafts to ODFW to see if ODFW agreed that the written conditions were consistent with the Advice. After review, ODFW concurred that the fish persistence conditions reflected the advice it had given. (Common Ex. 3).

16. On November 20, 2007, OWRD issued PFOs in all eight cases, granting the extensions of time. (Ex. A1 at 286).

Findings of Fact in Permit S-9982

I adopt the Findings of Fact made by OWRD in the PFO, restating some with application to the issues in this case, with the following additions and clarifications:

17. Permit S-9982, granted to the Cities of Oregon City and West on January 19, 1931, authorizes the use of up to 30.0 cfs of water (20.0 cfs from the South Fork Clackamas River, a tributary of the Willamette River, and 10.0 cfs from Memaloose Creek, a tributary of the Clackamas River), for municipal use. The permit did not contain construction or full application dates. (Ex. A1 at 1).

18. The cities formed the South Fork Water Board (SFWB), formerly the South Board Water Commission, to administer Permit S-9982 (and their other water rights). (Ex. A1 at 54).

19. No previous extensions have been requested for Permit S-9982. In January 2004, OWRD advised SFWB that the extension request it had filed was unnecessary because the permit did not contain construction or beneficial use dates. (Ex. A1 at 90). In August 2004, following advice it received from the Attorney General, the Department advised SFWB that it would need to undergo the extension process on the permit. (*Id.* at 153).

20. Because municipal extensions were the subject of legislative action and administrative rulemaking over a period of several years, the Department placed all pending Applications for Extension of Time for municipal and quasi-municipal permits on hold and did not require municipal permit holders to submit Applications for Extension of Time until the new rules were adopted. (Test. of Reece).

21. Municipal and quasi-municipal water use permit extension rules (OAR 690-315-0070 through 690-315-0100) initially became effective on November 1, 2002. They were amended, and the amendments became effective on November 22, 2005.

22. On August 3, 2006, SFWB submitted an Application for Extension of Time, along with a $250.00 application fee, to the Department, requesting an extension of to October 1, 2038. (Ex. A1 at 189). The application was not returned. The City submitted additional information to supplement their application on July 24, 2003, April 18, 2005, January 17, 2006, November 7, 2006, May 15, 2007, and May 22, 2007. (*Id.* at 223-254).

23. When SFWB filed its application, its various submissions included: information concerning the work that had been done to develop the water right; the plans for completing the build-out within the extension period; and information concerning the good cause factors. (Ex. A1 at 189-254).

24. Once the application was complete, OWRD began to review the extension request to determine if an extension should be granted. The Department did not examine whether actual construction on the water right had begun within a year of the initial application because of legislative changes that the Department interprets to mean that the "actual construction" is inapplicable to municipal extensions. (Test. of Reece).

25. The Department examined SFWB's plan to develop the undeveloped portion of the water right, and also reviewed its plans for full development on or before October 1, 2038. Based upon the information provided by SFWB, the Department concluded that the extension request was reasonable and the remaining work could be completed within the time requested. (Test. of Reece).

26. The Department also examined the application under the "good cause" standard, to determine whether there was good cause to approve the extension. The Department looked at SFWB's diligence, the cost to appropriate and supply the water, its good faith, the market and present demands for water, the income necessary to achieve a reasonable return on the investment, the possibility that other governmental requirements had delayed completion, and whether there were events outside the control of SFWB that contributed to the delay and need for an extension. After reviewing the information, the Department determined that SFWB had good cause to seek the extension of time. (Test. of Reece).

27. When the Department examined this extension request, it was also reviewing seven others, all of which are part of these contested case hearings. All eight municipal permits have places of diversion within the lower 3.1 miles of the river. The Department was required to seek the advice of the Oregon Department of Fish and Wildlife (ODFW), to see if conditions to the extensions would be necessary to protect the fish in the area. (Test. of Reece).

28. On November 9, 2006, pursuant to statute, OWRD sent all eight applications to ODFW for ODFW's review of the effect of the extensions (the development of the undeveloped portions of the permits) on the fish population and habitat. (Ex. A1 at 257).

29. On May 1, 2007, ODFW sent its written Advice to OWRD, for its consideration in preparing conditions for the extensions. ODFW determined that the use of the undeveloped portions of the water rights would not maintain the persistence of the listed fish unless conditions were placed on the extension approvals. (Ex. A1 at 258).

30. After receiving the ODFW Advice in each case, the Department drafted conditions for each PFO with the intention of including the advice recommendations in the PFO. Although the Department understood that it was required to follow the ODFW Advice, both agencies took the opportunity to discuss the recommendations and come up with conditions that would protect the fish habitat but also allow the municipalities to develop the water. (Ex. A1 at 280; Test. of Kepler, French).

31. When OWRD completed its interpretation of the ODFW Advice in the conditions of the draft PFOs, it returned the drafts to ODFW to see if ODFW agreed that the written conditions were consistent with the Advice. After review, ODFW concurred that the fish persistence conditions reflected the advice it had given. (Common Ex. A3).

32. On November 20, 2007, OWRD issued PFOs in all eight cases, granting the extensions of time. (Ex. A1 at 290).

Findings of Fact in Permit S-22581

I adopt the Findings of Fact made by OWRD in the PFO, restating some with application to the issues in this case, with the following additions and clarifications:

33. Permit S-22581, granted to the South Fork Water Commission (the predecessor to SFWB) on January 22, 1954, authorizes the use of up to 60.0 cfs of water from the Clackamas River, a tributary of the Willamette River, for municipal use. Construction of the water development project was to be completed by October 1, 1955, and complete application of water was to be made on or before October 19, 1956. (Ex. A1 at 1).

34. Nine prior permit extensions have been granted for Permit S-22581. The most recent extension request extended the completion dates for construction and full application of water to October 1, 1999. (Ex. A1 at 9-235).

35. Because municipal extensions were the subject of legislative action and administrative rulemaking over a period of several years, the Department placed all pending Applications for Extension of Time for municipal and quasi-municipal permits on hold and did not require municipal permit holders to submit Applications for Extension of Time until the new rules were adopted. (Test. of Reece).

36. Municipal and quasi-municipal water use permit extension rules (OAR 690-315-0070 through 690-315-0100) initially became effective on November 1, 2002. They were amended, and the amendments became effective on November 22, 2005.

37. On December 10, 1999, SFWB submitted an Application for Extension of Time, along with a $100.00 application fee, to the Department, requesting an extension of time to October 1, 2074. The application was placed in pending status awaiting the changes in the law noted above. On December 26, 2003, SFWB submitted a new application, requesting an extension from October 1, 1999 to October 1, 2049. (Ex. A1 at 236). The application was not returned. The City submitted additional information to supplement their application on June 9, 2005 and November 7, 2006. (*Id.* at 271-309).

38. When SFWB filed its application, its various submissions included: information concerning the work that had been done to develop the water right; the plans for completing the build-out within the extension period; and information concerning the good cause factors. (Ex. A1 at 236-309).

39. Once the application was complete, OWRD began to review the extension request to determine if an extension should be granted. The Department did not examine whether actual construction on the water right had begun within a year of the initial application because of legislative changes that the Department interprets to mean that the "actual construction" is inapplicable to municipal extensions. (Test. of Reece).

40. The Department examined SFWB's plan to develop the undeveloped portion of the water right, and also reviewed its plans for full development on or before October 1, 2049. Based upon the information provided by SFWB, the Department concluded that the extension request was reasonable and the remaining work could be completed within the time requested. (Test. of Reece).

41. The Department also examined the application under the "good cause" standard, to determine whether there was good cause to approve the extension. The Department looked at SFWB's diligence, the cost to appropriate and supply the water, its good faith, the market and present demands for water, the income necessary to achieve a reasonable return on the investment, the possibility that other governmental requirements had delayed completion, and whether there were events outside the control of SFWB that contributed to the delay and need for an extension. After reviewing the information, the Department determined that SFWB had good cause to seek the extension of time. (Test. of Reece).

42. When the Department examined this extension request, it was also reviewing seven others, all of which are part of these contested case hearings. All eight municipal permits have places of diversion within the lower 3.1 miles of the river. The Department was required to seek the advice of the Oregon Department of Fish and Wildlife (ODFW), to see if conditions to the extensions would be necessary to protect the fish in the area. (Test. of Reece).

43. On November 9, 2006, pursuant to statute, OWRD sent all eight applications to ODFW for ODFW's review of the effect of the extensions (the development of the undeveloped portions of the permits) on the fish population and habitat. (Ex. A1 at 312).

44. On May 1, 2007, ODFW sent its written Advice to OWRD, for its consideration in preparing conditions for the extensions. ODFW determined that the use of the undeveloped portions of the water rights would not maintain the persistence of the listed fish unless conditions were placed on the extension approvals. (Ex. A1 at 345).

45. After receiving the ODFW Advice in each case, the Department drafted conditions for each PFO with the intention of including the advice recommendations in

the PFO. Although the Department understood that it was required to follow the ODFW Advice, both agencies took the opportunity to discuss the recommendations and come up with conditions that would protect the fish habitat but also allow the municipalities to develop the water. (Ex. A1 at 363; Test. of Kepler, French).

46. When OWRD completed its interpretation of the ODFW Advice in the conditions of the draft PFOs, it returned the drafts to ODFW to see if ODFW agreed that the written conditions were consistent with the Advice. After review, ODFW concurred that the fish persistence conditions reflected the advice it had given. (Common Ex. A3).

47. On November 20, 2007, OWRD issued PFOs in all eight cases, granting the extensions of time. (Ex. A1 at 313)..

CONCLUSIONS OF LAW

The PFOs issued on November 20, 2007 should be affirmed, with modifications concerning the annual meeting requirement with ODFW.

OPINION

There are eight municipal extension approvals at issue in these proceedings. OWRD approved all eight extensions, issuing Proposed and Final Orders (PFOs) on November 20, 2007. WaterWatch and SFWB filed protests in all eight cases, with WaterWatch contending that the extensions should not be granted.[12]

Most of WaterWatch's protest issues concern whether the PFOs adequately condition the extensions to maintain the persistence of the fish in the river that are considered threatened or endangered under state or federal law. However, the fish persistence issue is just one of the criteria that an applicant must meet in order to obtain the extension it requested.

This opinion will briefly address a "standing" issue raised by SFWB, then will summarize WaterWatch's contentions in the cases. Next, it will address the extension criteria found in OAR 690-315-0080. It is the analysis under this rule, and not the many issues and sub-issues pertaining to the listed fish, that will be determinative in this case.

[12] SFWB's protests have changed over time, having originated as specific protests concerning the PFOs but having morphed into an objection to any entity, including SFWB, being able to file a protest in an extension case. The SFWB protest is addressed herein.

Standing to Protest. Before addressing the extension applications filed in this case, I will address SFWB's argument that neither it nor WaterWatch has the standing to contest the approval of municipal extensions. SFWB argues that no party should be able to contest the approval of the extensions in these cases:

> SFWB contends that parties other than the extension applicant and OWRD should not have standing to protest a PFO issued for a municipal extension. ORS 537.230 is the extension statute. It contains the Legislature's delegation to OWRD (through the Oregon Water Resources Commission) to conduct the municipal extension process according to the terms of the statute.
>
> * * * The statute, however, does not provide standing for parties other than the applicant and OWRD to challenge OWRD's determination in an extension proceeding. ORS 537.230 does not address standing or protests at all.
>
> In the context of the statute, it makes sense that only applicant and OWRD should be party to any dispute over the agency's decision on the application. The permit subject to extension has already proceeded through the permitting process and was approved by OWRD. The municipal extension process is intended only to ensure that the water permit holder is continuing to develop the water right with due diligence and has shown good cause for an extension.

(Closing brief at 16).

Although SFWB correctly notes that there is nothing in the municipal extension statute that requires a contested case hearing in municipal extension cases, the administrative rules allow for such hearings and for the involvement of interested parties. OAR 690-315-0100. The Department contends that it is proper to allow interested parties to protest extensions just like any other water right.

There are two reasons why SFWB's interpretation must be rejected in this case. First, this argument was not part of SFWB's initial protest and is therefore untimely. However, because the issue of standing could be construed jurisdictional, and potentially not subject to a timeliness challenge, I proceed to the second reason why the argument fails.

As noted above, the Department has chosen to allow contested case hearings for municipal extensions. It treats municipal extensions like any other application for a water right, allowing protests freely. Its interpretation of the statute is plausible, and I defer to the Department's interpretation. *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132 (1994). Therefore, SFWB's standing argument must fail.

WaterWatch's contentions. WaterWatch contends that none of the eight PFOs should have been approved, primarily because of fish persistence issues. Its position is perhaps best summarized by the last paragraph of its final brief:

> Home to four fish species protected under the Endangered Species Act, [the Clackamas River] is a river we must not take for granted. Due to large amount of water at issue, under the permits here, it is absolutely critical to get this one right. * * * Overwhelming evidence in the records shows that the PFOs do not do that. The eight PFOs must be remanded to OWRD to correct the deficiencies.

(Responsive Brief at 63). Among other things, WaterWatch contends that the PFOs are not conditioned to maintain the persistence of listed fish, that OWRD did not follow the ODFW Advice provided in each case, that ODFW did not provide the correct advice in each case, and that none of the applicants need all of the water in the undeveloped portion of their permits.

However, both the nature of the review and the evidence presented in the hearings leads me to conclude that many of the issues raised by WaterWatch miss the point.

The Pivotal Issue. Although these contentions by WaterWatch focus most of the attention on issues concerning the persistence of listed fish, the underlying question in each case is more basic: whether each applicant has met the criteria for granting an extension, as set forth in OAR 690-315-0080, which states:

> **Criteria for Department Review of Extension Applications for Municipal and Quasi-Municipal Water Use Permits**
>
> (1) 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:
>
> (a) The application is complete, including the fee specified in ORS 536.050. The Department shall return any incomplete or deficient applications to the applicant, and shall specify the deficiency;
>
> (b) The applicant began actual construction on the project, as defined in 690-315-0020(3)(d), within the time period, if any, required under the applicable statute;
>
> (c) The time requested to complete construction or apply water to full beneficial use is reasonable;
>
> (d) The applicant can complete the project within the time period requested for the extension; and, if the request is for more than 50 years

that the estimated demand projection is consistent with the amount and types of lands and uses proposed to be served by the permit holder;

(e) There is good cause to approve the extension; and

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

(2) The Department's finding for municipal use permits under subsection (1)(f) of this rule shall be based on existing data and advice of the Oregon Department of Fish and Wildlife (ODFW). The Department's finding shall be limited to impacts related to streamflow as a result of use of the undeveloped portion of the permit and further limited to where, as a result of use of the undeveloped portion of the permit, ODFW indicates that streamflow would be a limiting factor for the subject listed fish species:

(a) Except for municipal ground water permit extension applications where the Department has determined there is not the potential for substantial interference with surface water under OAR chapter 690 division 9, the Department shall notify ODFW of each pending municipal water use permit extension application that is subject to subsection (1)(f) of this rule and provide at least 60 days for ODFW to respond prior to issuing a proposed final order under 690-315-0050. The Department may issue a proposed final order prior to 60 days if comments are received from ODFW.

(b) Upon notifying ODFW under subsection (2)(a) of this rule, the Department shall also notify the applicant and, within 10 days, give public notice in the weekly notice published by the Department that the

municipal permit extension application has been sent to ODFW for review.

(c) For ground water permits submitted to ODFW under this rule, the Department shall provide to ODFW and the applicant the Department's estimate of surface water impacts that would result from use of the undeveloped portion of the ground water permit.

(d) ODFW shall provide its written advice to the Department on the extension application within 60 days of the Department's notice in subsection (2)(a) of this rule or notify the Department that additional time, not to exceed 120 days unless the applicant consents to more time, will be needed to complete its evaluation.

(e) ODFW may recommend to the Department fishery resource protection conditions for inclusion in the proposed final order under OAR 690-315-0050 that would provide protection to maintain the persistence of listed fish species if its written advice to the Department indicates that:

(A) Use of the undeveloped portion of the permit would not maintain persistence in the portions of the waterways affected by water use under the permit; and

(B) As a result of the use of the undeveloped portion of the permit, streamflow would be a limiting factor for the listed fish species.

(f) Upon receiving ODFW's written advice, the Department shall notify the applicant and any persons that requested notification of any fishery resource protection conditions that may be proposed in the proposed final order under OAR 690-315-0050. The Department's notice shall also provide the applicant an opportunity to request the Department place the permit extension application on administrative hold.

(g) The Department may place fishery resource protection conditions on the undeveloped portion of the permit in the extension proposed and final order under 690-315-0050 if the Department finds that, without such conditions, use of the undeveloped portion of the permit will not maintain, in the portions of waterway affected by water use under the permit, the persistence of listed fish species.

(3) The Department's determination of good cause shall consider:

(a) Whether the applicant has demonstrated reasonable diligence in previous performance under the permit;

(b) The cost to appropriate and apply the water to a beneficial purpose;

(c) The good faith of the appropriator;

(d) The market and present demands for water or power to be supplied;

(e) The income or use that may be required to provide fair and reasonable returns on investment;

(f) Whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right; and

(g) Any events over which the water right permit holder had no control and which delayed development under the permit.

(4) In determining reasonable diligence and good faith of the holder of a municipal or quasi-municipal water use permit, the Department shall consider activities associated with the development of the right that may include, but are not limited to: water management planning; conservation planning; development of a water master plan for the Oregon Health Division; planning of a diversion system; demand forecasting; flow or water quality monitoring; source evaluation; entry into intergovernmental agreements for water delivery; property acquisition; engagement in governmental permitting or project financing; procurement of planning, design, or construction services; surveying; and any physical work performed toward completion of the system and development of the right.

(5) For municipal and quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to subsection (3)(d) above, in addition to subsections (1)(a)-(e), (3), and (4) of this rule, the Department shall also consider, but is not limited to, the following factors:

(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;

(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);

(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;

(d) Economic investment in the project to date;

(e) Other economic interests dependent on completion of the project; and

(f) Other factors relevant to the determination of the market and present demand for water and power.

OAR 690-315-0080(Emphasis added).

The lengthy rule is quoted in its entirety to demonstrate that the extension process is an arduous one. The persistence of listed fish is only one factor to be looked at in the process of determining whether the extension applications should be approved.. Each applicant must provide information to meet the criteria, and the Department must review it all to determine whether the extension should be granted. Summarizing the rule, there are essentially five criteria to be evaluated by the Department when deciding whether to grant a municipal extension. Those criteria are:

- Is the application complete with all fees paid?
- Did the applicant begin actual construction within the required time?
- Is the time requested in the extension reasonable and can applicant complete the work in the time requested?
- Has applicant established good cause for the extension? and
- Does the requested extension affect the persistence of listed fish?

A review of the evidence and arguments in this case shows that some of the criteria are hotly contested, such as the fish persistence issues, while some are not contested at all. I will address all of the criteria, giving appropriate weight to each criterion based upon the issues raised by the parties.

1. The Application Process. OWRD accepted all eight applications along with the filing fees. By rule, OWRD is required to return any application that is incomplete or fails to include the filing fee. Because all eight applications were processed by the Department, I infer that all were in proper form and that all fees were paid.

2. Actual Construction. In all eight PFOs, the Department determined that municipal extensions were not subject to the same actual construction standard. This analysis is correct. ORS 537.410(2).[13] Therefore, although WaterWatch argues the lack of actual construction in Permit S-37839, there is no basis to deny the extension.

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[13] That statute states:
(1) Whenever the owner of a permit to appropriate the public waters of Oregon fails to commence actual construction work within the time required by law, * * * the Water Resources Commission may cancel the permit on the records in the Water Resources Department as provided in ORS 537.410 to 537.450.

(2) However, permits issued by the commission to * * * municipal corporations for municipal uses or purposes * * * are not subject to cancellation under the provisions of ORS 537.410 to 537.450.

3. Whether the Requested Time is Reasonable and the Project Can Be Completed in the Time Period. The Department reviewed all of SFWB's submissions, including the past history of the permits and the plans to develop the water in the extension period. Ms. Reece testified about the process that was used to determine whether the time was reasonable and whether the project can be completed in the time period. SFWB presented the testimony of Mr. Long to demonstrate the efforts and the plans being made. I find both witnesses credible and knowledgeable, and rely on their testimony.

In response, WaterWatch only offers its own opinion—in argument rather than evidence—that the time is unreasonable and the project cannot be completed. This evidence is insufficient to carry WaterWatch's burden of showing that its position is correct.

In essence, both sides are engaging in prognostication—attempting to determine what will happen in the next 20 to 30 years. This prognostication is seemingly required by the statute and administrative rule. WaterWatch reads the future to show less growth and a resultant lesser need for water. SFWB has presented evidence of what it plans to do. The Department concluded that SFWB's development plan was reasonable, and reasonably designed to be accomplished in the extension period.

Moreover, the Department's conclusion is a practical one. The Department has taken the reasonable approach of giving the City an opportunity to develop the undeveloped portion of an already permitted water use. I accept SFWB's evidence of its ability to complete the project and use the water in the time period.

4. Good Cause. In the RMSD, I addressed WaterWatch's protests concerning the Department's "good cause" analysis. The Department is required to determine whether each municipality has shown good cause for the extension, using the criteria in the rule.

Good cause is a determination that has been granted to the Department under ORS 537.230, and the Department has created administrative rules that describe the factors to be reviewed. My review of that decision looks to whether the Department followed the criteria in the rule. If it did follow the criteria, I will not substitute my judgment for that of the Department.

Here, the evidence shows that the Department addressed the good cause issue in each of the PFOs, utilizing the criteria in OAR 690-315-0080(3), quoted above. The PFOs made findings of fact, in every case, addressing those factors. The Department concluded that good cause had been shown, and that conclusion is reasonable. Although WaterWatch has protested the Department's finding of good cause in each case, it has not presented any evidence in support of those protests.

Therefore, even if I was required to substitute my judgment for that of the Department on the good cause issue in these cases, I would find that the applicant had established good cause based upon a preponderance of the evidence.

5. The Persistence of Listed Fish. As noted, WaterWatch's protests in the eight extension cases primarily concern the fish persistence criteria enacted by the Legislature and codified in ORS 537.230. In the lower 3.1 miles of the Clackamas, there are several species of fish that are listed as threatened, endangered or critical under either the state or federal Endangered Species Act. They include cutthroat trout, winter steelhead, spring and fall Chinook, and coho salmon. (Ex. A2 at 2, Common). The enactment of ORS 537.230 has made it clear that the Legislature is concerned about the effects of municipal water uses on the listed fish in the region.

In each of the PFOs, the Department included the following conditions to maintain the persistence of listed fish:

> a. Minimum fish flow needs on the Lower Clackamas River as recommended by ODFW are in Table 2, below, and are to be measured at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent.
>
> b. In cooperation with other members of Clackamas River Water Providers, [the entity] must have an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with PGE for the release of stored water from Timothy Lake. This is of particular significance when augmenting stream flow during the period of July 1 through November 30.
>
> c. From the first Monday in September through June 30 the maximum total amount of the undeveloped portion of the Permit [number] that can be legally diverted shall be reduced in proportion to the amount by which the flows shown in Table 2 are not met based on a seven day rolling average of mean daily flows (measured on the Clackamas River at USGS Gage Number 14211010, Clackamas River near Oregon City, Oregon, or its equivalent), as illustrated in the examples below.

(*E.g.*, Ex. A1 at 366, S-22581). The "minimum fish flow" needs in Table 2 are 650 cfs from June 1 through September 15, and 800 cfs for the rest of the year. The conditions in all of the other PFOs are substantially the same.

a. The Nature of the Review. There is a substantial disagreement about the type of review that is to be done on the fish persistence issues. As noted, WaterWatch requests that I make an independent decision concerning the fish persistence issues. To that end, it has presented testimony and documents to show that the fish persistence analysis by ODFW and the conditioning of the PFOs by OWRD were in error. WaterWatch has attacked the analysis for, among other things, failing to include a DEQ

analysis, failing to address the effects of climate change, and simply being wrong on the science of the fish in the region.

OWRD argues for a different type of review, best expressed in its opening argument:

> ODFW's role is to provide advice concerning measures to "maintain...the persistence" of listed fish species. OWRD is then responsible for "basing" its finding on existing data and ODFW's advice. In other words, OWRD has an obligation to do one of two things: (1) ensure that its finding, and any associated conditions, are consistent with ODFW's advice, or (2) to the extent that there is any inconsistency with ODFW's advice, explain that inconsistency and demonstrate that the conditions are nonetheless, based on existing evidence, sufficient to maintain the persistence of listed fish species.
>
> In the case of these extension applications, OWRD's findings and conditions were based upon ODFW's advice, which in turn was based upon existing data.

(Closing Brief at 4).

In OWRD's view, it is bound by the statutory requirement that it "shall" apply the ODFW Advice in setting the conditions to maintain the persistence of listed fish. The pivotal issue is statutory: did the Department properly follow the statutory and administrative requirements when considering fish persistence? OWRD argues that it followed the requirements of the statute and the administrative rule, and it further argues that such a finding should end the inquiry.

OWRD's argument is based on the language of ORS 537.230(2)(c), which states:

> 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 shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife.* An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

(Emphasis added).

After reviewing the statute and the arguments of the parties, I agree with OWRD's interpretation of what it must do, and of what the nature of the review must be in the case.

The statute requires OWRD to base its fish persistence finding on "existing data" and on the ODFW Advice. The word "shall" in the statute leaves the Department with no option but to follow the advice from ODFW. *Benzinger v. Dept. of Insurance and Finance*, 107 Or App 449 (1991)(use of the word "shall" in a statute connotes the imperative and generally requires compliance).

Because of this requirement, the nature of the review is different. The issue becomes, as OWRD has indicated, whether the Department based its persistence of fish findings on the ODFW Advice and other existing data. If it correctly applied the statute and rule, then I will affirm the persistence conditions in the PFOs.

WaterWatch's approach does not work in an administrative hearing. It seeks to go behind the advice process to show that ODFW utilized bad information and improper studies when it presented its advice to OWRD. However, even assuming that WaterWatch proved ODFW was wrong, there would be no recourse in this hearing. ODFW is not a party to the hearing and does not have an order to be reviewed. WaterWatch suggests that I could remand the case. Assuming I had the power to remand the case—and no procedural basis for such a remand has been presented—the only remand would be to OWRD, not to ODFW. If that happened, the statute would still require OWRD to apply the advice given by ODFW.

OWRD is correct. The appropriate review is to determine whether it has followed the criteria set forth in the statute and the administrative rule. The review does not include an examination of whether ODFW's Advice was correct or incorrect. An examination of the record shows that the Department followed the dictates of the rule and statute in all eight cases:

OWRD sought the advice of ODFW. The Department was required to obtain the advice of ODFW concerning what conditions needed to be placed upon the municipalities' extensions as they sought to develop the undeveloped portions of their water rights. Once the Department received that advice, it was required to condition any extension upon that advice and any other pertinent existing data.

In each of the eight cases presented here, the Department followed the statutory requirements and obtained an official Advice from ODFW. The advice consisted of target streamflows and conditions to be applied at certain times of year. The advice was roughly the same in every case, primarily because the eight permits were all located in the same stretch of the river.

OWRD prepared conditions based upon that advice. When OWRD received the ODFW Advice letters, it prepared sets of conditions to be incorporated into the eight

PFOs. The conditions were designed to incorporate the ODFW Advice with the needs of the municipalities.

If OWRD had stopped at that point and issued the PFOs (granting extensions) without further review, there would be some controversy concerning whether OWRD's interpretation of the ODFW Advice was accurate. Both agencies agree that the conditions placed in the PFOs were not the verbatim advice given by ODFW, so some interpretation would be involved and interested parties could question whether that interpretation differed from the initial advice in any significant way.

However, in these cases OWRD went a step farther.

ODFW approved OWRD's conditions as written. After attempting to interpret the ODFW advice while writing the PFO conditions, the Department sent the draft PFO conditions back to ODFW to see if the OWRD language caught the essence of the ODFW advice. ODFW agreed that the conditions, as written, carried out the advice it had provided. Rick Kepler acknowledged that

> [ODFW] concurs that the Water Resource Department's proposed conditions for the Clackamas River municipal extensions are consistent with the fish persistence advice provided earlier by ODFW.

(Common Ex. A3).

In its brief, WaterWatch argues that this short email cannot be sufficient to establish that the OWRD conditions in the PFOs actually incorporates the ODFW Advice. I disagree. This statement by Kepler, the person primarily responsible for drafting the ODFW Advice—a witness who presented written testimony and was cross-examined at hearing—is solid evidence that ODFW found the conditions to be sufficient for the persistence of listed fish.

The evidence shows that the Department relied upon the ODFW Advice and applied it to each of the PFOs. The efficacy of that application is shown by ODFW's agreement that the conditions captured its advice (with one exception, noted below). As OWRD argued, the inquiry about the persistence of listed fish stops there.

The Department has followed the statute. Because the Department has followed the procedures set forth in ORS 537.230 to determine whether the municipal extensions should be approved, I conclude that the PFOs in this case should be affirmed, with one modification (based upon testimony at hearing).

The Annual Meeting. The one exception where the written conditions failed to incorporate the ODFW Advice concerns the nature of the annual meeting that each of the municipalities must have with ODFW. Each of the conditions concerning listed fish requires the municipality to meet annually with ODFW to develop a plan to make sure that the use of the currently undeveloped portions of the municipal permits is done in a

way that protects the listed fish. All agree that the meetings are required under the PFOs. However, there was an apparent miscommunication between the agencies (OWRD and ODFW) and municipalities concerning what would come from those meetings.

First, although OWRD anticipated an informal meeting with no written conclusions, ODFW intended that there be a written agreement from the meetings—something that the State and the municipalities could look at and use as their guideline for that year. After the evidence was presented, OWRD agreed that a written record of the meeting was appropriate.

Second, although the conditions are written to require a meeting in which ODFW and the municipality agree as to what should be done in a given year, the condition should be clarified to address the situations in which ODFW and the municipality are not able to reach an agreement.

It is clear that situations could arise in the coming years where the interests of ODFW and the municipalities could diverge. Although the concept of consensus is an important one and it is to be hoped that the annual meeting will lead to a unified plan for the year, WaterWatch correctly argues that the PFOs should have a provision for what to do when the parties disagree. Based upon the importance the Legislature has placed on maintaining the persistence of listed fish, the PFO conditions should be clarified to require the municipalities to accede to ODFW's fish persistence standards if agreement cannot be reached.

THE PROTESTS

The foregoing analysis of the criteria set forth in ORS 537.230 demonstrates that each of the applicants has presented the requisite evidence to justify granting the requested extensions of time. It is this statutory determination that is important.

However, because the contested case also contemplates a response to the specific protests filed in each case, I will address each of the issues raised by the parties.[14]

1. **Whether the Proposed Final Orders ("PFOs") are in error because use of the undeveloped portions of the permits, as conditioned in the PFOs, will not maintain the persistence of listed fish as required by ORS 537.230.** ***[SF1. Whether the PFOs condition the use of the undeveloped portion of the permits, so as to maintain the persistence of listed fish in the portion of the waterways affected by water use under the permits, as limited by the following sub-issues].***

Contrary to the many sub-issues raised by WaterWatch concerning the persistence of listed fish, the key issue concerning fish persistence is whether OWRD has followed the statutory mandate in conditioning the municipal extensions upon fish persistence. As more fully explained above, the evidence shows that the Department followed the

[14] The contest issue lists have been combined, with SFWB's issues included in italics and editorial parentheses.

dictates of the statute. According to the Advice provided by ODFW and incorporated into the PFOs, the use of the undeveloped portion of the permits has been properly conditioned to maintain the persistence of listed fish.

SFWB's version of the contest issue, quoting from the statute about the "portion of the waterways affected by water use under the permits," highlights a sub-issue raised by WaterWatch.

"Portion of the waterways." WaterWatch argues that the ODFW advice given to the Department is "illegal" because the agency misinterpreted the meaning of the phrase "portions of the waterways affected by water use under the permit." WaterWatch correctly indicates that the phrase is defined by rule:

> (f) "Portions of waterways affected by water use under the permit" means those portions of the drainage basin at or below the point of diversion for a surface water permit or the location of impact on a stream from a ground water permit where the Department has determined there is a potential for substantial interference pursuant to OAR chapter 690, division 9 downstream to the lower-most point within the applicable river basin as identified by the Department pursuant to its authority under ORS 536.700[.]

OAR 690-315-0010(5)(f). WaterWatch contends that ODFW was looking at the entire Clackamas sub-basin when it gave its advice, rather than focusing on the area in question.

WaterWatch's argument is based upon ODFW testimony about fish habitat, but the argument takes the testimony out of context. When looking at the possible effect of the municipal extensions on the lower 3.1 miles of the Clackamas, ODFW witnesses testified that those three miles comprised less than two percent of the rearing habitat for the fish in the lower Clackamas during the summer months. They further testified that, in seasons where the water levels did not meet the desired flows, the fish coming to that area would either head upstream to better habitat, or head downstream into the Willamette River. (Test. of Kepler).

WaterWatch argues that ODFW's consideration of other parts of the Clackamas River was improper because it could only look at the lower 3.1 miles as it made its determination. However, the experts testified that focusing on just the lower 3.1 was artificial, and that it was necessary to look at the river as a unit, taking into account both upstream and downstream habitat.

Although WaterWatch declares the ODFW Advice "illegal" because it considers fish habitat up and downstream, that argument is confusing. Because these cases involve the lower 3.1 miles of the Clackamas, by definition there is no "downstream" except the Willamette River. ODFW took the waters of the Willamette into account, and also considered fish migration to the regions just above the lower 3.1.

There is nothing in the rule that prevents ODFW from looking at more than just the affected waterway to determine what the effect is on that portion of the waterway. ODFW looked upstream as well as downstream, and determined that the conditions approved by OWRD would maintain the persistence of listed fish.

a. Whether the PFO conditions allow reductions in streamflows below those needed to maintain the persistence of listed fish; ***[a. Whether the PFOs allow significant water withdrawals when flows identified by ODFW are not met, and if so whether this is inconsistent with ORS 537.230(2)(c)]*****;**

As addressed above, the Department has followed the statutory procedures for obtaining the ODFW Advice and applying it to each of the PFOs in these cases. WaterWatch does not believe that the ODFW Advice (or OWRD's interpretation of that advice) properly conditions the water use. I disagree.

The statutory process requires the Department to rely upon the Advice from ODFW, either by itself or with other "existing data." ORS 537.230(2)(c). ODFW concluded that there were target streamflows for different times of the year. It also recognized that those target streamflows are not always reached, especially in dry years, so ODFW also added conditions requiring annual meetings to address how to respond to any shortfalls in the target flows.[15]

The Department presented evidence to show how that mechanism would work, and has required the municipalities to meet yearly with ODFW to determine the plan for that year. Therefore, I conclude that the PFO conditions do not allow reductions below those needed to maintain the persistence of listed fish.

b. Whether the PFOs fail to include required mitigation;

There is no indication in the statute that mitigation is required at any level of the municipal extension process. Neither protestant has presented evidence or argued any basis to require mitigation in the case.

c. Whether the PFOs fail to include a mechanism to prevent dessicating salmon redds; ***[e. Whether the PFOs lack a mechanism to prevent desiccating salmon redds, and if so whether this is inconsistent with ORS 537.230(2)(c)]*****;**

The PFOs require an annual meeting to determine what, if any, decisions need to be made about the use of the undeveloped portions of the permits. Witnesses from the Department and from ODFW testified about the importance of the annual meetings in terms of "shaping" the streamflows in the upper reaches of the river to avoid having too

[15] Although WaterWatch considers these meetings to be solely to address possible discharges from Timothy Lake, and language in the PFOs could be read to support that interpretation, the hearing record indicates that the meetings are intended to address more than just Timothy Lake. They are, in essence, an opportunity for ODFW, OWRD and the municipalities to work out the competing water needs and interests in light of current water conditions and availability.

little or too much water over the salmon redds. Thus, the PFOs do contain a mechanism for protecting the salmon redds.

> **d. Whether the PFOs improperly utilize a compliance point that is above two of the points of diversion;**

The evidence shows that the compliance point identified by ODFW and OWRD, located at USGS Gage 14211010, is above the points of diversion for Lake Oswego. Although WaterWatch assumes that this fact precludes a correct determination of the levels of streamflow, the Department's witnesses testified otherwise. WaterWatch has failed to prove that the measurements occurring at the gage are improper or affect the determination of streamflows.

> [e].[16] **Whether the State incorrectly relied on Annear and Wells to conclude that the persistence of listed fish will be maintained;** ***[b. Whether OWRD and ODFW relied on the Annear and Wells Model to conclude that fish persistence will be maintained, and if so whether such reliance is inconsistent with ORS 537.230(2)(c)];***

In the RMSD, at Page 9, I determined as a matter of law that the ODFW Advice did not incorrectly rely on Annear and Wells. I will not repeat that opinion here.

> [f]. **Whether the State incorrectly relied upon the Timothy Lake agreement to conclude that the persistence of listed fish will be maintained;** ***[c. Whether the State relied on water that might be produced by the Timothy Lake agreement in its conclusion that the persistence of listed fish will be maintained, and if so whether such reliance is inconsistent with ORS 537.230(2)(c)];***

The RMSD also addressed this issue in some detail, and concluded that releases from Timothy Lake, while a possible contributor to shaping the flows of the lower Clackamas, are not essential to meeting the fish persistence standard.

There was some confusion arising from my ruling on that issue because of comments made in the RMSD about times when water levels go below the target flows of 650 and 800 cfs. Based on my initial reading of the conditions, I concluded that the target flows of 650 and 800 must be met. In years or seasons when they were not met, I believed, the cities would be required to cut back.

After receiving motions for clarification from both sides of the issue, I concluded there was still a question of fact about the PFO conditions required. The matter was held over for hearing, with the comment that "At the very least, this position would need evidence in support for me to accept it as accurate." (Order Clarifying RMSD, at 2).

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[16] The numbers in editorial parentheses were changed from the original numbering system because the original mistakenly began repeating subsection references, such as "b." and "c."

At hearing, the applicants presented evidence to show that the PFOs do contemplate seasons when the flows drop below the target flows and that the conditions in the PFOs address what is to be done when the target flows are not reached. I am convinced that the PFO conditions adequately cover that circumstance, not just by requiring curtailment but also by requiring an annual meeting with ODFW to work any issues out.

> [g]. **Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed how the anticipated impacts of climate change with affect the persistence of listed fish;** ***[d. Whether OWRD and ODFW are required to evaluate the anticipated impacts of climate change on streamflow when conditioning the permits to maintain the persistence of listed fish species under ORS 537.230(2)(c)]***;

As noted in the RMSD, considering climate change is not one of the criteria listed in the municipal extension administrative rule. There may be certain cases, thinking hypothetically, where ODFW might want to consider the effects of climate change on fish habitat and incorporate climate change into its Advice to OWRD. Climate change information was not included in the ODFW Advice in the eight cases at issue here, so there was no reason for OWRD to address the matter in its PFOs.

> [h]. **Whether the PFOs lack any adaptive management strategy that would allow for revisiting the conditions if fish persistence is not being maintained;** ***[f. Whether the PFOs lack an adaptive management strategy that would allow for revisiting the conditions if fish persistence is not being maintained, and if so whether this is inconsistent with ORS 537.230(2)(c)]***;

Although not specifically identified as an "adaptive management strategy" by any party in the proceedings, it is clear that the annual meetings between ODFW and the municipalities will allow for adjustments to take place depending on streamflow and weather conditions. The meetings will not necessarily involve a "revisiting" of the conditions, but may require occasional temporary limitations on use of the undeveloped portions of the permits.

> [i]. **Only with regard to SFWB Permits * * * S-3778 and S-9982, whether the PFOs should contain more specific conditions regarding any movement of the point of diversion downstream.**

2. Whether the conditions to maintain the persistence of listed fish in the PFOs are supported by substantial evidence, because the recommended target fish flows are set too high and are not related to the persistence of listed fish because: a. The 1964 Oregon Department of Fish and Wildlife ("ODFW") Report is insufficient to establish flows that form the basis of OWRD's fish persistence conditions. ***[SF2. Whether the persistence conditions in the PFOs are supported by substantial evidence, because the recommended minimum fish flows are set too high and the fish flows are not related to the persistence of listed fish because: a. The 1964 ODFW Report is***

insufficient to establish flows that form the basis of the Department's fish persistence conditions.]

This protest, raised by SFWB, was not argued at any point in the proceeding. In closing argument, SFWB indicated the issue was not being pursued.

3. **Whether the condition in the PFOs that requires an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with Portland General Electric for the release of stored water from Timothy Lake constitutes improper third-party governmental interference in a private contract.** *[SF3. Whether the condition in the PFOs that requires an annual meeting with ODFW to devise a strategy to maximize fishery benefits that can be derived from the agreement with Portland General Electric for the release of stored water from Timothy Lake constitutes improper third-party governmental interference in a private contract].*

This protest, raised by SFWB, was not argued at any point in the proceeding. In closing argument, SFWB indicated the issue was not being pursued.

4. **Whether OWRD was required in the PFOs to evaluate or address whether approval of the permit extensions would violate the federal Endangered Species Act's prohibition on take of a listed species.**

5. **Whether approval of the permit extensions as proposed in the PFOs would violate the federal Endangered Species Act's prohibition on take of a listed species.** *[SF4. Whether OWRD and ODFW, through the issuance of the extension PFOs, authorized an action that will result in the take of a species listed under the federal Endangered Species Act].*

The approval of the extensions has not been shown to be a taking of any species, or to violate federal or state standards. ODFW designed their Advice to assure the maintenance and persistence of the listed fish in the lower Clackamas River, while also allowing the municipalities to continue to develop the water needed for the growing communities along the river. This is the procedure the Legislature designed, and it is the procedure that was followed. (*See* RMSD at 13). WaterWatch has not presented any competent evidence to show that there has been a take of any listed species.

6. **Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed the impacts of climate change on the resources at risk from the additional water withdrawals from the Clackamas River under the PFOs.** *[SF5. Whether the PFOs are deficient and the extensions should be denied because they fail to include findings or conclusions of law demonstrating that the agency evaluated the impacts of climate change on the resources at risk from additional water withdrawals from the Clackamas River].*

As described above and in the RMSD, climate change is not a factor that needed to be addressed in these cases.

7. **Whether OWRD was required to evaluate or address and, if so, whether OWRD incorrectly evaluated or addressed the requirements of the Clean Water Act and the Oregon Department of Environmental Quality's Total Maximum Daily Load allocations.** ***[SF6. Whether OWRD was required to address the Clean Water Act and the Oregon Department of Environmental Quality's (DEQ's) Total Maximum Daily Load allocations and whether OWRD can authorize water withdrawals that further degrade the water quality of the Clackamas River].***

Again, there was no requirement for the Department to consider TMDLs or the Clean Water Act when reviewing the extension applications. There is no evidence that it was necessary in this case.

8. **Only with regard to [NCCWC] Permits S-35297 [and] S-46120, Lake Oswego [permit] S-37389 and SFWB S-22581: Whether the PFOs improperly delay making certain determinations required by the extension statutes to later Water Management and Conservation Plan orders.** ***[SF7. Whether the Department improperly delayed analysis required by the extension statutes, by conditioning the PFOs with a requirement that the increased use under the permits will be based upon a subsequently developed and approved Water Management and Conservation Plan. (Issue not raised for SFWB Permits S-3778, S-9982, and Lake Oswego Permit S-32410)].***

Presumably, this protest is based on the following language from the PFO in S-22581 (the only one of the listed cases being decided here):

> Diversion of water beyond 22.4 cfs under Permit S-22581 shall only be authorized upon issuance of a final order approving a WMCP under OAR Chapter 690, Division 86.

(Ex. A1 at 327). That provision is, in turn, necessitated by OAR 690-086-0100, which states in part:

> (1) Municipal water suppliers are encouraged to prepare water management and conservation plans, but are not required to do so unless a plan is prescribed by a condition of a water use permit; a permit extension; or another order or rule of the Commission.
>
> (2) Water management and conservation plans submitted in order to comply with a permit extension order issued after November 1, 2002, are subject to the requirements of these rules.

Thus, a WMCP is contemplated and encouraged by the administrative rules. No party has established that the WMCP requirement delays any part of the extension

approval process. If anything, the requirement suggests that the Department wants to make sure that any diversion of the undeveloped portions of the permitted water is done in an orderly and permissible fashion.

9. **Whether the PFOs are in error in finding and concluding that the applicants can apply the water at issue to full beneficial use by the end of the applicable extension periods.** ***[SF9. Whether the PFOs are in error in finding that the permit holders can apply water to full beneficial use by the end of the extension period].***

WaterWatch contends that SFWB has failed to prove that it can apply the water to full beneficial use before the end of the extension period. This issue was addressed more fully above, and will not be repeated here.

10. **Whether the PFOs are in error in finding and concluding that the applicants can complete the construction of the contemplated water development projects by the end of the applicable extension periods.** ***[SF10. Whether the PFOs are in error in finding that the permit holders can complete construction of the project by the end of the extension period].***

I have more fully addressed this argument in the discussion of the rule criteria, above.

11. **Whether the PFOs are in error in finding and concluding that there is good cause to issue the extensions:**

a. **Whether the PFOs are in error in finding that applicants have developed their permits with reasonable diligence and good faith;**

b. **Whether the PFOs are in error in finding that there is a market and present demand for the water;**

c. **[not applicable in this proceeding]**

[SF11. Whether the PFOs are in error in finding that the permit holders have demonstrated "good cause" to support issuance of the extensions.

a. Whether the PFOs are in error in finding that the permit holders have developed their permits with reasonable diligence and good faith.

b. Whether the PFOs are in error in finding that there is a market and present demand for water].

I have addressed the good cause aspect in my discussion of the criteria in the administrative rule above, and will not repeat that information here.

12. **Only with regard to Permits Lake Oswego S-37839, Lake Oswego S-32410, SFWB S-22581, SFWB S-9982 and SFWB S-3778: Whether the PFOs are in error in finding that the time requested to apply the water to full beneficial use is reasonable.** ***[PS2. Regarding Lake Oswego Permits [all], and SFWB Permits [all]: a. Whether the various time limits allowed for development of the water rights in the extension PFOs for the above-listed permits are unreasonable and in violation of applicable law].***

WaterWatch argues that SFWB is seeking more water than it needs, that it has included "winter water" being sold to another entity (NCCWC) in the equation of the amounts needed, and that the methods for using the water intended by SFWB are "impermissible." (WW Brief at 70-73). I have already addressed this issue at length in my discussion of the Department's review, above.

WaterWatch also argues that the PFOs are in error when they allowed extensions of time on S-3778 and S-9982 because the extension allow SFWB 132 years and 107 years, respectively, to develop its water rights. (WW Brief at 78). However, OWRD was aware of the overall time involved from the time of the permit until the extension date, and did not deny the extensions on that basis. There is nothing in the record other than WaterWatch's opinion to show that the time period is too long, and I accept the Department's conclusion that the recent extensions are reasonable under the circumstances.

13. **Whether ORS 537.230, as applied to SFWB in the PFOs for Permits S-3778, S-9982 and S-22581, violates the US Constitution's Fifth Amendment and procedural due process and equal protection provisions.** ***[SF8. Whether ORS 537.230, as drafted, violates procedural due process, equal protection and the 5th Amendment of the United States Constitution].***

SFWB raised the constitutional issue primarily as a protest to the PFOs in the three SFWB cases. I addressed the matter in the RMSD, inviting any party questioning the constitutionality of the statute to present its evidence at hearing. No party presented evidence concerning the constitutionality of the statute, and there is nothing on the face of the statute that would appear to violate the cited constitutional provisions. Accordingly, I consider the constitutional protest to be without merit.

14. **Whether the PFO for Permit SFWB S-22581 is in error in proposing to issue an extension with SFWB also develop[ing] Permits S-9982 and S-3778.**

15. **Whether the PFOs for Permits SFWB S-9982 and SFWB S-3778 are in error in proposing to issue extensions after issuance of Permit SFWB S-22581.**

WaterWatch argues issues 14 and 15 as if they are two sides of the same coin. The argument is that the water right in S-22581 makes the two earlier water rights (both of which are undergoing transition in their place of diversion), unnecessary. There is

some correspondence in Exhibit A1 that suggests SFWB considered abandoning those earlier rights at one point. However the Department found, and I agree, that there has never been an actual intent to abandon Permits S-3778 or S-9982.

Accordingly, each permitted right has been examined on its own merit.

16. Whether the PFO for Permit SFWB S-3778 is in error in finding that SFWB has diverted 5 cubic feet per second under that permit.

WaterWatch has failed to present any evidence or argument in support of this contention, and it is considered withdrawn.

17. [not applicable in this proceeding]

18. [not applicable in this proceeding]

19. [not applicable to this proceeding]

SUMMARY

In summary, extensions to the municipal permits that are at issue in these cases (all involving SFWB) were both properly granted by OWRD. SFWB met each of the criteria set forth in the statute and administrative rule, and OWRD's evaluation process matched the requirements of the administrative rule.

Contrary to WaterWatch's arguments in these cases, the approvals of the extensions were expressly conditioned on maintaining the persistence of listed fish. The Department followed the criteria in the administrative rule, and its determination in each case is supported by the preponderance of the evidence. Therefore:

1. All of the PFOs are conditioned to maintain the persistence of listed fish in the lower Clackamas River, and the conditions are consistent with the ODFW Advice received in each case, with one exception;

2. The conditions in each PFO should be amended to: a) require a written record of the annual meeting to be kept; and b) to include a provision addressing how to resolve situations where ODFW and the municipality cannot agree on all factors at the annual meeting;

3. The Department correctly followed the municipal extension guidelines set forth in the administrative rules. The Department approved each of the eight extensions, and its decision in each case is supported by a preponderance of the evidence.

ORDER

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

That the Proposed and Final Orders in Permits S-3778, S-9982 and S-22581 are AFFIRMED AS MODIFIED.

Rick Barber, Administrative Law Judge
Office of Administrative Hearings

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.

CERTIFICATE OF MAILING

On 2nd day of August 2010, I mailed the foregoing: **PROPOSED ORDER IN CASES INVOLVING SOUTH FORK WATER BOARD** in Reference Nos. WR 08-004 – WR 08-011 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

Jesse Ratcliffe, AAG
Oregon Dept. of Justice
Natural Resources Section
1162 Court Street NE
Salem, Or 97301 – 4096

WaterWatch of Oregon, Inc
Attn: Lisa Brown
213 SW Ash St., Suite 208
Portland, OR 97204

South Fork Water Board
Attn: John Collins, General Manager
15962 S. Hunter Avenue
Oregon City, OR 97045

City of Lake Oswego
Attn: Joel B. Komarek
PO Box 369
Lake Oswego, OR 97034

N Clackamas County Water Commison
Attn: Dan Bradley, General Manger
14496 SE River Road
Milwaukie, OR 97267 - 1199

Sunrise Water Authority
Attn: John D. Thomas, General Manger
10602 SE 129th Avenue
Portland, OR 97236

Karen Reed
Bateman Seidel
888 SW Fifth Avenue, Suite 1250
Portland, OR 97204

Laura Schroeder
Colm Moore
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1915 N.E. 39th Avenue
PO Box 12527
Portland, OR 97212-0527

Misty Fragda
Administrative Assistant

CERTIFICATE OF FILING/SERVICE

I certify that on April 26th, 2011 I served the Oregon Water Resources Department's CORRECTED FINAL ORDER INCORPORATING PROPOSED ORDER IN CASE INVOLVING SOUTH FORK WATER BOARD PERMIT S-9982 by electronic mail and first class mail, postage prepaid to the following, by depositing the same in the United States Post Office at Salem, Oregon.

Jeff W. Ring Bateman Seidel 888 SW Fifth Avenue, Suite 1250 Portland, OR 97204 jwring@batemanseidel.com	Representing: North Clackamas County Water Comm. Sunrise Water Authority Lake Oswego City of Tigard
Christopher D. Crean Beery, Elsner & Hammond, LLP 1750 SW Harbor Way Suite 380 Portland, OR 97201-5106 chris@gov-law.com	Representing: South Fork Water Board
Lisa Brown WaterWatch of Oregon 213 SW Ash Street, Suite 208 Portland, OR 97204 lisa@waterwatch.org	Representing: WaterWatch of Oregon

Jesse Ratcliffe Assistant Attorney General General Counsel Division, NRS Oregon Department of Justice 1162 Court Street NE Salem, OR 97301-4096 jesse.d.ratcliffe@doj.state.or.us	**HAND DELIVERED** Patricia McCarty Protest Program Coordinator Oregon Water Resources Department 725 Summer Street NE, Suite A Salem, OR 97301 patricia.e.mccarty@wrd.state.or.us

DATED this 26th day of April, 2011.

Patricia McCarty

Patricia McCarty
OREGON WATER RESOURCES DEPARTMENT