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November 24, 2014

BY HAND DELIVERY

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

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Re: Petition for Reconsideration: LL-1533 (Red Flat Nickel Corp.)

Dear Director Byler:

This Petition for Reconsideration ("Petition") is filed pursuant to ORS 183.484(2) and OAR 137-004-0080 on behalf of the applicant, Red Flat Nickel Corp. ("Red Flat Nickel").

I. Background

The Petition seeks withdrawal and reconsideration of the Final Order issued on September 30, 2014, for LL-1533, an application requesting a limited license for mineral exploration drilling. The application proposed use of up to 10 gallons per minute ("gpm") from an unnamed creek that is tributary to Taylor Creek, in Curry County. The source of water and proposed location of use are on federal lands within the Siskiyou National Forest, managed by the U.S. Forest Service. The project is being undertaken pursuant to mining claims held by Red Flat Nickel.

Temporary use of water was requested to support a mineral exploration drilling operation that was proposed for some time during the period of Summer 2014 until the Fall of 2018. However, the actual use of water would occur during a period of only about 60 days after drilling commences. The start of drilling, in turn, is dependent upon successful completion of a federal environmental review process currently underway pursuant to requirements of the National Environmental Policy Act ("NEPA"). The applicant expects the NEPA process to be completed within about one year.

The temporary use requested under LL-1533 is, in essence, a request to renew a limited license previously approved by OWRD for the same short-term use at the same site. Application LL-1445 was submitted by Red Flat Nickel on January 24, 2013, and approved on February 13, 2013, for the period from March 31, 2013 through November 1, 2013. Red Flat Nickel was unable to conduct the exploratory drilling during the authorized time period because of delays in the NEPA review that is still underway with the Forest Service. As a result, Red Flat Nickel submitted Application LL-1533 to provide additional time in which to complete the NEPA review and begin exploratory work.

II. Standing

Pursuant to ORS 183.480, any person adversely affected or aggrieved by a final order of an agency, or any party to the proceeding, is entitled to judicial review. Under OAR 137-004-0080, any person who is adversely affected or aggrieved may file a petition for reconsideration within 60 calendar days after the date of the order. Petitioner is the applicant and as such is a party to the agency proceeding and is adversely affected and aggrieved by the Final Order denying the application.

III. Grounds for Reconsideration and Argument

Red Flat Nickel requests withdrawal and reconsideration of the Final Order on the following grounds:

A. Water Availability

The conclusion that water is not available is overly broad and not supported by substantial evidence in the record. Finding of Fact #5 correctly confirms that the Department's Water Availability Reporting System ("WARS") shows water is available year-round in the downstream waters of Taylor Creek. The finding also notes that WARS does not have information for the unnamed tributary identified as the proposed source in this application. Based on a single site visit on September 19, 2014 – during the lowest flow period of the year – OWRD determined as a conclusion of law that water is not available for the proposed use at any time during the year. The findings and conclusion do not address the fact that stream flow within the unnamed tributary is adequate to support the proposed use during most months of most years, and that applicant's actual use of water will be for a very short period of time while exploratory geotechnical holes are constructed. The single-day site visit relied upon by OWRD does not provide substantial evidence upon which to base the conclusion of law that water is not available, and the proposed use could be conditioned to take place during periods of the year when adequate flows are available. The findings and conclusion for LL-1533 are also inconsistent with OWRD's finding in connection with Red Flat Nickel's previously approved limited license, LL-1445. In approving that application, OWRD found that water was available for the requested use and that the proposed use would not impair or be detrimental to the public interest

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B. Division 33 Analysis

The Department's findings of fact and conclusion of law relating to the requirements of Division 33 rules for the protection of sensitive, threatened and endangered species are not based on substantial evidence in the record, and are not consistent with the specific procedures and standards prescribed in the Division 33 rules.

Finding of Fact #7 (p. 2) describes OWRD's evaluation under the Division 33 rules, focusing on comments received from the Department of Environmental Quality ("DEQ"). The finding describes DEQ comments relating to certain standards contained in rules adopted by the Environmental Quality Commission to govern programs administered by the DEQ, including the following summary:

"The DEQ recommended denial of the application because, given the sparse data available on flows and temperatures, it is not possible to recommend appropriate conditions to mitigate the likely impacts of the proposed use on water quality and sensitive, threatened and endangered fish species under OAR 690-033-0340(2)."

The related conclusion of law states:

"Based upon its findings and comments received (principally from the Oregon Department of Environmental Quality), the Department finds that with the data available there is no basis for appropriate conditions that can be applied to mitigate likely impacts to water quality and sensitive, threatened, and endangered species (OAR 690-033-0340(2))."

Final Order, p. 4, Conclusion of Law #2

As an initial concern, it is not clear upon what evidence the OWRD conclusion is based. The Department states the finding is based "principally" on comments from DEQ, but it is unclear what other comments or evidence the Department may have considered. The applicant is entitled to know. To the extent OWRD relied on DEQ comments, the record shows that agency's comments bear no relation to the standards expressed in the Division 33 rules. The DEQ comments relate to general water quality temperature standards to be applied by the DEQ in matters relating to compliance with water quality permitting – not water right applications. The DEQ rules cited in Finding of Fact #7 expressly apply to certain "discharges" into regulated streams, not to diversions of water from those streams. *See, e.g.* OAR 340-041-0004(3)(c) (temperature criterion applies to certain "new or increased discharges"). The Department also assumes non-compliance with the DEQ temperature standard, even though the record shows no temperature data for the unnamed stream involved in the limited license application.

Further, although the OWRD findings and conclusion of law are expressly based on requirements of the Division 33 rules, the record shows OWRD failed to comply with the specific standards and interagency review process mandated by those rules. Under Division 33, if OWRD determines the proposed water use will occur in an area that may affect the habitat of sensitive, threatened or endangered species, the Department is directed to seek input from an



“interagency review team” comprised of staff from the Departments of Agriculture, Environmental Quality, Fish and Wildlife, Water Resources and other state natural resources agencies as appropriate. (OAR 690-033-0330 (2) and 690-033-0010(5).) The specific standards to be applied by the interagency review team are: (a) for threatened and endangered fish species, “no loss of essential habitat as defined in OAR 635-415-0005(4),” and (b) for sensitive species, “no net loss of essential habitat.” If the interagency review team cannot identify conditions that meet the standards, the rules direct that the “team” shall recommend denial unless the “team” concludes the proposed use would not harm the species. Under OAR 690-033-0340, the Department is further directed to follow the recommendations of the interagency review team in determining whether the presumption is established pursuant to OAR 690-310-0110 or 690-310-0130 (rules applicable to the review of new water right applications, not applications for limited license water use authorization).

In this case, the OWRD record shows no comments from an interagency review team, as required under OAR 690-033-0330, and no findings relating to the specific standards expressed in the rule regarding whether the proposed use will result in a loss of essential habitat for threatened or endangered species or net loss of essential habitat for sensitive species. The Department’s final order does not identify which species are at issue and how the proposed water use will affect the habitat. If such findings were made, the Division 33 process requires further findings as to whether the proposed use will, in fact, cause harm to the listed species. None of this analysis occurred and the specific rule cited under Division 33 as the basis for denial of the application (690-033-0340(2)) is not applicable to requests for limited licenses.

Additionally, it is not clear the Division 33 rules should apply at all to this limited license application. Under OAR 690-033-0310(1), the rules do not apply to limited license requests “for less than 120 days.” In this case, the actual use of water will occur over a relatively short period of time – approximately 60 days.

C. Public Interest Determination

The Department’s ultimate conclusion relating to the public interest is not based on substantial evidence in the record and reflects improper analysis and application of the legal standards. Based on its findings and conclusions relating to water availability, and under the Division 33 rules, OWRD reaches the ultimate conclusion that, “Pursuant to OAR 690-340-0030(2), the Department therefore has determined that the proposed water use will impair or be detrimental to the public interest.” Final Order, p. 4, Conclusion of Law 3. As described above, the underlying findings and conclusions relating to water availability and potential impacts to sensitive, threatened and endangered species are not based on substantial evidence, and reflect faulty analysis. As a result, the final conclusion is similarly flawed. The record does not support a finding that the proposed use of water for the limited purpose of constructing exploratory boreholes will impair or be detrimental to the public interest, and the conclusion is inconsistent with the determination made in connection with LL-1445, the limited license previously approved by OWRD.

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D. Potable Water for use in Geotechnical Boreholes

Finding of Fact #9 faults the applicant for failing to include a plan to ensure the "potability" of water to be used in the subsurface, stating "surface water to be used in geotechnical boreholes must be potable as required by OAR 690-240-0014." However, nothing in the limited license application form or instructions provided by OWRD gave notice of the need to provide such information, and OWRD did not request any such additional information from the applicant. Nor was this issue raised in connection with the applicant's previously-approved limited license. If asked, the applicant easily could have provided information to demonstrate compliance. Alternatively, the limited license could have been conditioned to require compliance with the standard.

E. Inconsistent with Past Practice

The Final Order fails to explain why the decision is inconsistent with past agency practice. As noted above, in February, 2013, OWRD approved Limited License LL-1445, which authorized use of the same unnamed stream, in the same amounts, for the same purposes as requested under LL-1533. The period of use authorized in LL-1445 was from March 21, 2013 through November 1, 2013, but Red Flat was unable to make use of water during that period because the Forest Service NEPA review was still underway. As a result, the previous limited license expired, and Red Flat re-applied under LL-1533. Pursuant to ORS 183.484(5)(b)(C), an agency's decisions must be consistent with past practice unless the inconsistency is explained. In this case, the Department makes no reference whatsoever to the prior approval, and offers no explanation as to why the decision on LL-1533 was inconsistent with the prior decision.

For the foregoing reasons, Petitioner respectfully requests that the Director withdraw and reconsider the Final Order to deny the limited license application LL-1533.

Sincerely,



Martha O. Pagel

MOP

cc: Jonathan Paisner
Obie Strickler, RG
Tim Wallin ✓
Dwight French

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