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August 10, 2022

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Director Tom Byler
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

RE: New Columbia River Mitigated Water Right Permit Applications

Dear Director Byler,

Please find enclosed two new applications for Columbia River mitigated water right permits. These applications follow numerous discussions with you, your staff, and many stakeholders. If approved, the permits resulting from these applications would replace the existing permits, with the objectives of re-setting the authorized place of use for Columbia River mitigated water rights; simplifying the administration surrounding the measurement, accounting, and reporting of the diversion and use of mitigated water; and modifying several terms and conditions in the existing permits that have proven to be unnecessary or unworkable based now on several years of experience.

The detail surrounding the new place of use and the consolidation of the existing permits into two stand-alone permits is set forth in the applications themselves. A key change is that we have identified an exterior boundary within which lands would be eligible to receive water under the permits, while in any given year the actual acreage receiving water would be much less. This approach is similar to what is provided for in ORS 545.091, and we believe it will reduce the long-term administrative burden on the permit holders, the water users, and the Department as these permit applications represent the start to our permanent mitigation program and mitigation program boundary.

In addition, we wanted to highlight our proposed changes to several terms and conditions included in the existing permits. Set forth below are redlines of current condition language along with an explanation of the proposed change. We believe this detail may help to expedite the Department's review and consideration of our applications, and we look forward to discussing these matters further with you and your staff.

"1. Measurement Devices and Recording/Reporting of Annual Water Use Conditions:

"A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter with telemetry at each point of diversion from the Columbia River ~~and any other location as directed by the Watermaster.~~ In addition, each irrigation district customer is required to install a totalizing flow meter at each re-diversion point from the common delivery system (each turn-out) and other locations as may be required by the Watermaster. The measuring devices need to be approved by the Watermaster prior to installation. The permittee and individual landowners shall maintain the required devices in good working order."

DISCUSSION: The language proposed for deletion above has introduced uncertainty as to what the permit holders are responsible for measuring. We would propose that this be worked out and agreed upon up front at the time of permit issuance, so that there is no confusion around what is being expected and required for measurement as water is developed and delivered over time.

“C. The permittee shall keep a complete record of the rate of flow and volume of water diverted and shall submit a report, which includes water-use measurements, to the Department annually and no later than February 14 of each year, or more frequently as may be required by the Director. Further, the Director shall require the permittee to report general water-use information, including the place and nature of use of water under the permit and documentary evidence that use of this water in conjunction with existing water rights for said lands did not exceed an average duty of 3.5 acre feet per acre. The documentary evidence shall include a listing of how many acre-feet each irrigation district customer used along with the associated number of acres irrigated.”

~~“The permittee shall also make raw data/information (the rate of flow and total volume of water diverted) from the telemetered measuring devices at the PODs available to the Department in near-real time.”~~

DISCUSSION: Similar to other water rights in the basin, an average duty would allow for exceedances of 3.5 acre feet per acre on some acres, which would be off-set on an annual basis by duties of less than 3.5 acre feet on other acres. Depending on soils, crop rotation, precipitation, and other factors, this sort of flexibility is necessary to ensure water is being used with maximum efficiency. Of course, having an average per acre duty will not change the maximum instantaneous rate of withdrawal. The deletion of the requirement to make raw data/information to the Department in near-real time is being proposed based on our recent discussions with Department staff. We understand there is little utility in having the Department receive the diversion data in near-real time, given the raw data does not differentiate between the many water rights authorizing diversion at the PODs, and thus does not enable the Department to regulate in real time. The data, which are provided as part of the other reporting requirements, requires interpretation and assessment, and removing this requirement would make the new permits consistent with other permits in the basin. In short, ending this requirement would remove a significant burden on the permit holders, which is providing no benefit to the management of the resource.

“2. In the interest of preserving the groundwater supplies, water use described under this permit as supplemental to a groundwater right, may be used as the primary supply when surface water is available for use under this permit. If water under this permit is supplemental to a primary groundwater right, and the water under the permit is used as the primary supply, then the primary groundwater right cannot be transferred separately from the supplemental water under this permit to another place or character of use. As provided for in Condition 7 below, where the primary groundwater right is deficient, then the water use under this permit shall be considered a second primary supply, whereby the primary groundwater right and secondary primary supply may be transferred separately to another place or character of use.”

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AUG 17 2022
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DISCUSSION: The proposed language is consistent with Department policy such that when a primary water right is deficient, more than one primary water right may be assigned to the same ground at the same time, without the water rights becoming “married” for transfer purposes.

“6. The amount of water used for primary or supplemental irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of not to exceed ONE-SIXTIETH of one cubic foot per second and an average duty of 3.5 acre-feet for each acre irrigated during the irrigation season of each year. Notwithstanding the above sentence, in those instances in which water under this permit is effectively being diverted through POD D and utilized for irrigation on lands within the following areas:

“Sections 32 and 33 of Township 5 North, Range 28 West (all lying west of the Umatilla River); Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 29, and 30 of Township 4 North, Range 28 West (all lying west of the Umatilla River); and Sections 12, 13, 24 and 25 of Township 4 North, Range 27 West, all inside the boundary of Westland Irrigation District (WID);

then where such lands have pre-existing appurtenant water rights that provide for a higher cumulative total than ONE-SIXTIETH of one cubic foot per second and/or 3.5 acre feet for each acre irrigated during the irrigation season of each year, then the use of water under this permit on such lands shall instead be limited based on the following:

“For pre-existing primary and/or any supplemental rights on lands within the WID boundary that DO NOT subscribe to water made available from internal WID transfers resulting from this permit, and where such pre-existing primary and/or supplemental rights allow for a cumulative total of up to ONE-FORTIETH of one cubic foot per second and/or up to 4.5 acre feet per acre for each acre irrigated during the irrigation season of each year, then the use of water under this permit on such lands shall be limited to the same pre-existing cumulative total of up to ONE-FORTIETH of one cubic foot per second and/or up to an average duty of 4.5 acre-feet for each acre irrigated during the irrigation season of each year.

“For pre-existing primary and/or supplemental rights on lands within the WID boundary that DO subscribe to water made available from internal WID transfers resulting from this permit, such rights shall be limited to a cumulative total of up to ONE-SIXTIETH of one cubic foot per second and an average duty of 3.5 acre feet for each acre irrigated during the irrigation season of each year.”

DISCUSSION: Same proposed change as discussed above.

“7. When submitting a claim of beneficial use, the permittee may request that water under this permit that is identified as supplemental in the permit be certificated as primary irrigation, if the underlying primary water rights have been diminished to supplemental, canceled, or are deficient (i.e., where the underlying primary water rights are deficient up to ONE-SIXTIETH of one cubic foot per second and/or deficient up to 3.5 acre feet per acre).”

DISCUSSION: No proposed changes to this condition. We are including it here, as this condition is referenced in the proposed changes to Condition 2 above.

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“9. For this permit, withdrawals will be considered mitigated and at or above the point of impact if:

“****

“B. Withdrawals within the upper John Day Pool from River Mile 252270 to McNary Dam are mitigated with maximum instantaneous rate approved by the permit above their points of withdrawal or within the upper John Day Pool between River Mile 252270 and the McNary Dam (about River Mile 292).”

DISCUSSION: The referenced River Mile is proposed for change in order to include the Willow Creek Diversion and correct what we believe to be an error of the previous applications. We continue to believe that John Day Dam should be the downstream mitigation boundary for John Day pool diversions as the condition is intended to address mitigation pool impacts, not real time flow impacts at the point of diversion.

“16. The permittee or subsequent certificate holder shall provide an annual report to the Department by February 14 of each year. Items "A" and "B" must be submitted for the life of the permit and certificate. The report must be submitted to the Water Right Services Division and the Watermaster and include the following:

“A. Activity from the previous irrigation season: The permittee or certificate holder must report the total volume of water used in acre-feet for each use allowed under the permit, the total number of acres irrigated by each use and the instantaneous maximum amount (in CFS) pumped at the point(s) of diversion. A map shall be submitted showing the location of the acres irrigated by quarter-quarter and whether the use was primary or supplemental. The Report shall include the total number of primary acres, supplemental acres and deficient water right acres that were served by the permit. The report shall also include documentary evidence of mitigation water in place for the maximum instantaneous rate allowed by the permit for the previous year.”

DISCUSSION: We would propose replacing the above with the following: “The permittee or certificate holder shall report monthly volumes of water use to the Water Resources Department on an annual basis. The information shall be available to the State as a public record at any time. Further, the Director may require the water user to report general water use information, including the place and nature of use of water under the permit.” This language tracks monitoring and reporting conditions in other basin water rights. We would propose this more general approach, given district oversight of the water right permits or certificates, similar to other monitoring and reporting requirements established by the Department for districts.

“B. Planned activity for the next irrigation season: The permittee shall submit a map that indicates the location of acres to be irrigated by quarter-quarter. The map shall show underlying water rights and shall indicate which acres are going to be irrigated as primary and as supplemental irrigation and show the locations of any additional uses authorized by the permit. The report shall also include documentary evidence of mitigation water for the full instantaneous rate of the permit that will be in place for the next year. The irrigation season will be delayed by one day for every day that the annual report is submitted late to the Department.”

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AUG 12 2022

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DISCUSSION: Similar to the discussion point above, we would propose either no mapping requirement at all, or simply confirmation that delivery will be within the exterior district boundary.

“C. Water qualifying as permanent under a permanent Oregon mitigation program Permanent mitigation is required within 30 years of permit issuance. Until permanent mitigation is in place, the permit holder shall include a report indicating the steps taken in the past year and planned for the next year to acquire permanent mitigation credits. This report is due annually on February 14 starting with the February 14 report that is between three and four years from the date of permit issuance.”

DISCUSSION: We understand that the Department will be developing a permanent mitigation program for our basin soon. The permit condition should be written in a way to take into account what qualifies under the program.

“D. In addition to the reporting requirements of a through c above, in those instances in which water under this permit is effectively being diverted through POD D and utilized for irrigation on lands within the following areas:

“Sections 32 and 33 of Township 5 North, Range 28 West (all lying west of the Umatilla River); Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 29, and 30 of Township 4 North, Range 28 West (all lying west of the Umatilla River); Sections 12, 13, 24, and 25 of Township 4 North, Range 27 West, all inside the WID boundary (referred to below as the WID Audit Lands); then the following additional reporting requirements shall apply to those lands:

“***.”

DISCUSSION: We are proposing a minor change here for clarification.

“17. In addition to existing enforcement mechanisms, if the Department determines that the permittee or certificate holder has exceeded the maximum authorized rate of diversion, the diversion of water will be reduced by an equal amount of water during the same time period as to when the infraction occurred the next year. Development of a Permanent Mitigation program is required to replace temporary mitigation within 30 years of permit issuance. This water right expires if a permanent mitigation program and water qualifying under the program is not secured within 30 years of permit issuance.”


“18. Before proof can be made, water qualifying as permanent under a permanent mitigation water program must be legally protected. When the Department issues a certificate the rate will not exceed the amount of permanent mitigation that has been provided.

DISCUSSION: These proposed changes are consistent with above the proposed change, which is intended to take into account the Department’s anticipated rulemaking.

We look forward to discussing our applications with you and these matters with you further.

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Sincerely,



Jake Madison, Chair

Mid-Columbia Water Commission

CC: Mid-Columbia Water Commission, Northeast Oregon Water Association, East Improvement District, Columbia Improvement District, Westland Irrigation District, Umatilla County

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