



2843 NW Lolo Dr., Ste. 200 | Bend, OR 97703
Phone: (541) 647-2930
www.colw.org

June 15, 2022

Oregon Water Resources Commission
c/o Nirvana Cook
725 Summer Street NE, Suite A
Salem, OR 97301

**Re: *June 17, 2022 Water Resources Commission Meeting
Agenda Item M***

Dear Chair Reeves, Vice-Chair Quaempts, and Commissioners:

On behalf of Central Oregon LandWatch ("LandWatch") thank you for the opportunity to comment on Agenda Item M for the Oregon Water Resources Commission's June 17, 2022, meeting. We respectfully urge the Commission to reject the proposed temporary rule relating to ORS 536.075(5), the subject of a recent Memorandum from Director Thomas M. Byler ("Byler memo.") Our specific comments are below.

1. *Byler memo is not well-founded in law*

The Byler memo urges the Oregon Water Resources Commission to adopt a rule related to ORS 536.075(5). That statute was revised in 2021, Ch. 354 (H.B. No. 2244). As revised, the statute provides:

current ORS 536.075(5)

Except as provided in subsections (6) and (7) of this section, the filing of a petition for review in either the circuit court or the Court of Appeals shall stay enforcement of the final order.

This language rewords but preserves the meaning of former ORS 536.075(5):

former ORS 536.075(5)

The filing of a petition in either the circuit court or the Court of Appeals shall stay enforcement of the order of the commission or the department unless the commission or the department determines that substantial public harm will result if the order is stayed.



The Byler memo's interpretation of ORS 536.075(5) cannot be reconciled with the Court of Appeals' interpretation of the same statute.

In *WaterWatch of Oregon, Inc. v. Water Res. Dep't*, 259 Or App 717, 730, 316 P3d 330, 337 (2013), the Court of Appeals held:

"Subsection (5) [of ORS 536.075] provides, in turn, that—in contrast to ORS 183.482—the filing of a petition for judicial review of an order of the department stays enforcement of the order. ORS 536.075(5). Thus, it is clear that the legislature intended to preserve our jurisdiction to review the merits of a final order of the department before its implementation."

The Court of Appeals interprets the legislative intent of ORS 536.075(5) to be the preservation of the jurisdiction of the Court of Appeals to review the merits of an appealed final order of the Oregon Water Resources Department ("department"), without respect to what kind of order it is.

In *TPC, LLC v. Oregon Water Res. Dept.*, 308 Or App 177, 189-190, 482 P3d 121, 128 (2020), the Court of Appeals contrasted judicial review under ORS 536.075(5) with judicial review under ORS chapter 539. The Court explained that under ORS 536.075(5), the filing of a petition for judicial review stays enforcement of an order. By contrast under ORS chapter 539, determinations of the department remain in full force and effect from the date of entry in the records of OWRD unless stayed by a bond:

"ORS 536.075(5) provides that the filing of the petition for judicial review stays enforcement of the order, 'unless the commission or the department determines that substantial public harm will result if the order is stayed.'" *Id.* at 189.

"Unlike for judicial review under ORS 536.075, for stream adjudications under ORS chapter 539, '[t]he determination of the [OWRD] shall be in full force and effect from the date of entry in the records of [OWRD], unless [stayed by a bond under] ORS 539.180.' ORS 539.130(4)." *Id.* at 190.

In *TPC*, the Court of Appeals equates the term "enforcement" with being "in full force and effect." *Id.* The Byler memo significantly misinterprets the term "enforcement". The term does not concern the behavior of the department, e.g. to "compel compliance."

Rewriting ORS 536.075(5) as interpreted by the Court of Appeals provides:



current ORS 536.075(5)

Except as provided in subsections (6) and (7) of this section, the filing of a petition for review in either the circuit court or the Court of Appeals shall stay *the state of being in full force and effect* of the final order.

former ORS 536.075(5)

The filing of a petition in either the circuit court or the Court of Appeals shall stay *the state of being in full force and effect* of the order of the commission or the department unless the commission or the department determines that substantial public harm will result if the order is stayed.

The Byler memo is inconsistent with the Court of Appeals interpretations of ORS 536.075(5). The statute does not distinguish between "regulatory" and other types of orders. Rather, it applies equally to all orders and provides for all orders under ORS 536.075 that they shall not be in full force and effect, rather they shall be stayed, upon the filing of a petition in the circuit court or Court of Appeals.

The Oregon Water Resources Commission is bound by interpretations of the Court of Appeals until the interpretation is changed by the Court of Appeals or overturned by the Oregon Supreme Court. The Oregon Water Resources Commission is not free to adopt a rule based on an interpretation of a statute that directly contradicts the interpretation of the statute by the Court of Appeals.

As interpreted by the Court of Appeals, ORS 536.075(5) is a matter of jurisdiction. It does not, as the Byler memo mistakenly states, regulate the behavior of the department or distinguish between types of final orders.

The Byler memo further misinterprets ORS 536.075(5) by inserting terms into the statute omitted by the legislature, in violation of ORS 174.010. The terms "regulatory" "regulatory orders" "compel compliance" "automatic stay" and "orders that are not enforced by the Department" do not appear in ORS 536.075(5).

ORS 174.010

In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.



Proceeding as it does from a significant misunderstanding of ORS 536.075(5), the memo for Agenda Item M should be disregarded by the Oregon Water Resources Commission.

2. *Inadequate notice*

LandWatch objects to the inadequate notice provided for this agenda item. LandWatch did not find a copy of a staff report or other explanation of Agenda Item M available before late Tuesday, June 14, 2022.

There is no need for a temporary rule or immediate action concerning ORS 536.075(5). While the wording of ORS 536.075(5) has altered over time, its meaning has remained unchanged since its adoption in 1985. Orders of the department have been stayed upon the filing of an appeal to the circuit court or the Court of Appeals for almost four decades. There is no evidence, as the memo suggests, that "confusion" has ever resulted from the statute or that in 37 years there has been a "lack of policy clarity" regarding ORS 536.075(5). If there ever was such a lack of clarity, it was resolved by the Oregon Court of Appeals when it interpreted the statute in *WaterWatch of Oregon, Inc.*, 259 Or App at 730 and again in *TPC, LLC*, 308 Or App at 190, *supra*.

The legislature explicitly conditioned ORS 536.075(5) on the risk of "substantial *public* harm." The statute is not conditioned on the risk to "the interests of [private] persons whose orders are under review in the Circuit Court" referred to in the Byler memo. The interests of such persons are not implicated by ORS 536.075(5),(6), or (7).

The Court of Appeals' interpretation of the intent of the legislature is dispositive. ORS 536.075(5) has nothing to do with so-called regulatory orders or actions to be taken by the department under various imaginary circumstances.

There is no need for the Oregon Water Resources Commission to take any action, and no justification for taking action in a hurried manner with inadequate public notice.

3. *Inadequate alternatives*

The legislature vested the power to adopt water rules in the Oregon Water Resources Commission, not in the Water Resources Director.

/

/



ORS 536.027

(1) In accordance with the applicable provisions of ORS chapter 183, the Water Resources Commission shall adopt rules and standards to perform the functions vested by law in the commission.

ORS 536.025

(2) Except for the commission's power to adopt rules, the commission may delegate to the Water Resources Director the exercise or discharge in the commission's name of any power, duty or function of whatever character, vested in or imposed by law upon the commission.

The alternatives prepared for the Oregon Water Resource's Commission in the Byler memo suggest it is the other way around. The alternatives offered reduce the Commission's role to that of venturing an opinion on what time and in what manner the rule announced by the Director will be adopted.

The alternatives presented in the Byler memo are limited to:

- 1) Adopt the temporary rule, OAR 690-002-1000 to -1020, as contained in Attachment 1.
- 2) Modify and adopt the temporary rule in Attachment 1.
- 3) Decline to adopt the temporary rule and instead wait for Department staff to bring forward a permanent rule for adoption at a future meeting.

Since the memo in its entirety is based on a grave misinterpretation of the applicable law, the three alternatives should be rejected. Instead the Oregon Water Resources Commission is urged to adopt a fourth alternative:

4. Reject the memo and decline to adopt any rule based on it, whether temporary or permanent.

Conclusion

The Oregon Water Resources Commission should defer to the Court of Appeals' interpretation of ORS 536.075(5) and take no action. The Court of Appeals interprets the statute to refer to the jurisdiction of the Court of Appeals over orders that are appealed to a circuit court or the Court of Appeals. It concerns whether such orders are stayed or "in full force and effect."

The Oregon Water Resources Commission is bound by the Court of Appeals' interpretation of ORS 536.075(5) and may not adopt rules contrary to that interpretation until and unless the interpretation is revised by the Court of Appeals or overturned by the Oregon Supreme Court.



Thank you for your attention to these views.

Sincerely,

/s/ Carol Macbeth

Carol Macbeth

Staff Attorney

Central Oregon LandWatch

