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Via Electronic Mail: nirvana.cook@oregon.gov
Members of the Water Resources Commission
C/O Director's Office
Water Resources Department
725 Summer Street, NE,
Suite A
Salem, Oregon 97301

RE: Agenda Item M, Friday 6-17-22 Commission Meeting

Dear Members of the Commission;

I represent Nunzie Gould. Ms. Gould has a case pending in Deschutes County Circuit Court, where the automatic statutory stay that is at issue in this proposed Rule is functioning to protect the already severely declining groundwater levels in the Deschutes River Basin. Absent that stay, the water at issue in that case would currently be available for consumption/use by a developer, for construction of yet another massive Golf Course Destination Resort in the high desert of Central Oregon near Cline Buttes, which is a bit north and east of Bend.

So far, we have not seen the Staff Report or the proposed Rule. However, based on the statement in the Agenda of what is being proposed, **Ms. Gould strongly opposes the proposed Temporary Rule.** I urge you not to agree to adopt the proposed Rule, and certainly not to adopt it in a fashion that allows it to be applied retroactively.

The proposed Temporary Rule should not be adopted, for at least the following reasons:

- 1. The Rule allegedly seeks to “clarify” an existing ORS in a way that is inconsistent with the statute in question.**

The Rule attempts to interpret ORS 536.075(5), which creates an automatic statutory stay upon filing of a lawsuit against the agency, to **only** apply to Regulatory Orders of the agency. However, that is not what the statute actually says.

The statute clearly makes the stay applicable to enforcement of **all** Final Orders of the agency. And the statute defines “Final Order” to mean **any** Order recognized as such in the Oregon Administrative Procedures Act (APA) - ORS 183.310. That is expressly stated in ORS 536.075(11)(d).

The statute does **not say** that only “regulatory” final order’s are subject to the automatic stay. It instead clearly references all “final orders” and it defines such orders without regard to whether they are regulatory or otherwise.

The agency cannot lawfully, by Rule, insert language into a statute that the Legislature did not put there - particularly when doing so would make the statute say or mean something it does not currently say. Nor can the agency lawfully adopt a Rule that is contrary to the what a statute actually says. This Rule proposes to do both.

In Subsection (7) and in (8) of the statute, the Legislature addressed regulatory orders. The Legislature provided an express process for those types of Orders. There would be no need for these two subsections - which were just recently added in the 2021 session - if the automatic stay in (5) **only** applied just to regulatory Orders.

Moreover, the description of regulatory Orders in (7) shows that the Legislature knew and understood the difference. They understood that some Orders are regulatory, and that those would fall w/in (7) and (8), and others were non-regulatory. The Legislature did not refer to regulatory Orders anywhere else in the statute, other than in the (7) provisions.

The Legislature clearly intended the statute to apply to all Final Orders, not just regulatory Final Orders. That is the only logical way to read the statute and to make all of the parts of the statute make sense and work with each other.

2. There is no actual “emergency” that would justify adoption of a Temporary Rule, rather than either pursuing a normal rulemaking, or a change to the statute.

In other words, there is no basis for a finding that failure to adopt the Temporary Rule now, will result in “serious prejudice to the public interest.” That is what the APA - specifically ORS 183.335(5) - requires in order for this Commission to adopt of a Temporary Rule of this sort, rather than doing a regular rule making.

Application of the statutory automatic stay to non-regulatory final order is **not** a rampant “problem.” Nor is there any sort of crisis that would justify creating a state wide emergency rule on this issue.

The stay is, instead, doing precisely what the Legislature intended it to do. It is preventing challenged agency Permits from allowing the use of a public resource held in trust by this agency for the citizens of Oregon - the waters of this state - while a challenge to the Permit(s) is being litigated.

That is not a serious prejudice to the public interest. To the contrary, that is something that is actually **in the public interest**.

For purposes of non-regulatory Orders, if the agency erred in issuing a Permit then allowing use (i.e. not applying the automatic stay) would allow someone to deplete and harm the public water resource of the state. If the agency action is held to have

been unlawful, the water would have already been used. The public would have been harmed - irreparably - by the agency action.

The safer, and the more responsible thing to do, as a fiduciary of an asset held in trust for future generations, is to protect the public resource. That is, to stay its use, while there is a determination made whether the Permit was lawfully issued. That is precisely what the Legislature provided for in (5) of ORS 536.075.

If the agency thinks that the changes to the law proposed by this Temporary Rule are needed, it should propose a Bill to the Legislature to change the way the automatic stay statute reads. Whether that is really good public policy I think people could debate.

I personally think that the charge of this Commission, and the Department, is to manage the publicly owned water resources of this state in a way that protects current and future generations. That approach would be consistent with an automatic stay in non-regulatory Orders. That is exactly what the law **should** provide for. Once the water is used, you cannot get it back.

Perhaps others disagree. That is a policy issue that the Legislature needs to hash out - not something that can or should be determined in a Temporary emergency Rule adopted by an agency.

Moreover, to the extent that the agency is concerned about a Permit where it thinks the statutory stay would create serious harm, the agency already has the tools to address that exact issue. The automatic stay was mandated by the Legislature in Subsection (5) of ORS 536.075. In the very next Subsection, (6), the Legislature also provided a mechanism for the agency to find that an automatic stay is denied.

If the agency believes that a particular Permit situation is dire, then all that it - or this Commission - has to do is follow the already existing law and make the findings provided for in the existing statute. In short, there is no emergency here that would justify adoption of a Temporary Rule that would effect all citizens of the state.

Adopting the proposed rule would repeat the error made by the agency in *WaterWatch v. Oregon Water Resources Commission*, 97 Or App 1, 775 P.2d 1118 (1989). There, the Commission adopted, at the Department's request, a Temporary Rule that supposedly clarified a prior allegedly ambiguous rule about John Day River minimum stream flows.

However, in reality, as the Court held in finding the adoption unlawful, the prior rule was not actually ambiguous. *Id.* 97 Or App at 6-8. Instead, the agency was found to have made a change in policy, which is something you can do - but only through regular rule making - not through a Temporary Rule.

3. The Rule, if adopted, should not be retroactive.

Even if a valid reason existed to adopt the proposed Temporary Rule (which as far as we can tell it does not) and even if hypothetically the proposed Rule was not

inconsistent with the statute it purports to interpret, there is still no basis for making the Rule have retroactive application. Adoption of a Rule that applies retroactively would be completely unfair to parties that have relied on the existing law.

There is no factual or legal reason to apply such a Rule retroactively. This is not case where this is the first time the statutory stay has been used to challenge an agency Order, regulatory or otherwise. In fact, there were so many regulatory Order stays at one point some years back, that the Department created a spread sheet to try to track them all. Yet this Temporary Rule would do nothing to the regulatory Orders. It would only effect non-regulatory Orders.

There is no valid reason for making such a Rule retroactive. The agency has never before articulated the position it now proposes to take. There is no “problem” that already exists that needs solving with such an approach.¹ The members of the public deserve to be able to rely on existing law, not have the proverbial rug pulled out from under them by a sudden switch in agency policy or practice.

We will provide more thoughts, if any are needed, once we see the Staff Report and language of the Rule.

Sincerely,

/s/ Karl G. Anuta

Karl G. Anuta

KGA
c: Client

¹ As noted, if there is a specific Permit that is an issue, the tools do deal with that in a prompt manner already exist in the statute.