KARL G. ANUTA
LAW OFFICE OF KARL G. ANUTA, P.C.
735 SW FIRST AVENUE, 2ND FLOOR
PORTLAND, OREGON 97204
(503) 827-0320
FACSIMILE (503) 386-2168

TRIAL ATTORNEY
LICENSED IN
OREGON & WASHINGTON

E-MAIL
KGA@INTEGRA.NET

June 15, 2022

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;

As my previous letter indicated, I represent Ms. Nunzie Gould. We have a case pending in Deschutes County Circuit Court, where the automatic statutory stay is functioning to protect the already severely declining groundwater levels in the Deschutes River Basin.

Yesterday evening we were provided with the Staff Report for the proposed Rule. I am now providing Supplement Comments on behalf of Ms. Gould on this agenda item.

Ms. Gould continues to strongly opposes the proposed Temporary Rule. I continue to urge you not to agree to adopt the proposed Rule.

These comments are provided as additions to the points made in my letter dated June 13, 2022 (all of which remain unrebutted in this Staff Report). Please be sure to read both sets of comments, as these comments supplement, rather than repeat, our prior comments.

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

4. The proposed Rule attempts, in the guise of interpretation, to insert words into a statute that do not exist there.

The proposed Rule assumes that the statutory reference to "enforcement" of an Order applies only to enforcement **by the Department**. The statute does not say that. The statute is not limited to enforcement **by** the agency. If that is what the Legislature had intended, it would have used the words "by the Department." It did not do so.

A final order can be enforced by a court, or by a private party. The interpretation sought by the agency ignores this fact. It seeks to add words that are not present in the

statute, and to do so in a way that changes both the meaning and the effect of the statute.

5. The proposed Rule attempts to create new legal obligations that the Legislature has not imposed.

The Staff Report claims (p.4, §D, ¶3) that adopting the proposed emergency rule "will not preclude persons from seeking a stay of a final order..." That is absolutely not true.

The Staff Report cites, in footnote #3, to three sections of Oregon law. However, none of those apply to non-contested case Orders such as a transfer, or to issuance of a Limited License (or other similar use authorizations).

The first Rule cited in the Staff Report - OAR 137-004-0090 - provides for a possible stay **only** when there has been a Petition to Reconsider of a Final Order filed by the person seeking the stay. It specifically states:

> "...any person **who petitions for reconsideration** may request **the agency to stay the enforcement** of the agency order that is the subject of the petition." (emphasis added)

A person opposing a transfer or a use authorization that has been issued by the Department - such as Ms. Gould - is not required by law to file a Petition for Reconsideration. They **may** do so, but there is no existing requirement in the Oregon Administrative Procedures Act (APA) that they do so before filing suit.

But if this Rule is adopted, the agency will have created a situation where a Petition For Reconsideration **must** be filed in order to request what is currently an automatic statutory stay. That would impose a legal obligation that does not exist currently in the APA or anywhere in Oregon law. That is not appropriate, and even if it was, it is not something that can or should be done on an emergency basis.

Moreover, as highlighted, OAR 137-004-0090 only provides for a potential stay of enforcement **by of the agency**. As the Staff Report makes clear, the Department does not "enforce" permissive Orders. Thus, the Rule the Staff Report points to **only** allows someone to seek a stay of Regulatory Orders, not to all the other non-contested case Orders issued by the agency.

6. The proposed Rule attempts to remove a remedy that currently exists in the law, a remedy that makes total sense when dealing with public resource. The agency does not have the authority to strip from some members of the public a remedy that the Legislature created and that currently exists.

The Rule as proposed would leave someone who chooses in the future to challenge an agency authorization to transfer or use water, with no mechanism to

effectively protect the public's water from consumption/use during the judicial review of the authorization. As outlined in my earlier comments, the existence of an automatic stay makes total sense as a way to protect the public water resources during the time a use authorization is being challenged.

As I also outlined, there is already a specific statutory process - ORS 536.075(6) - that allows the agency to lift the automatic stay, if the agency makes the appropriate findings. This proposed Rule would completely undermine the carefully thought out approach that the Legislature chose when it created ORS 536.075.

Returning to the alleged authority cited footnote #3 of the Staff Report, ORS 183.482 **only** applies to Contested Case Orders. That statute does indeed contain provisions for obtaining a stay. However, there are no similar provision in the non-contested case Order section of the APA - ORS 183.484 under which non-contested case orders must be challenged. Similarly, OAR 137-003-0690 - 077 also only apply to contested case orders.

The Legislature wrote the statute in a way that makes it apply to **all** Final Orders, not just to regulatory Final Orders. The proposed Rule would remove the protections created by the statute. That is not only unlawful, it is also bad public policy. The Commission should reject the request that it engage in such activity.

7. The Staff Report itself provides further evidence that there is no "emergency" or "serious prejudice" that would justify adoption of a Temporary Rule.

As noted in the my prior comments, there is no basis here for a finding by the Commission that a Temporary Rule is needed. To make such a finding, the Commission must be persuaded that there is "...**serious prejudice** to the public interest or the interest of the parties concerned..." *See,* ORS 183.335(5).

Nothing in the Staff Report shows that **serious prejudice** to the public interest exists without the proposed rule. There is no substantive explanation provided in the Staff Report as to why and how there is suddenly an "immediate" need for this dramatic change in policy and practice.

The Staff Report does not provide any data on how often the automatic stay provision has been invoked in non-regulatory orders. Nor does it provide even one, much less a host, of examples of where this has occurred. If such evidence existed, the Staff Report no doubt would have included it. The lack of such evidence is telling.

The Staff Report also does not provide any sense of when the automatic stays situations have occurred, and why there is or was allegedly "serious prejudice" to the public interest created by the existence of the automatic stay. Nor does the Staff Report address whether, in each of those situations, the agency has (or has not) chosen to use the specific process that was created by the Legislature as part of the same statute - specifically ORS 536.075(6) - for the agency to lift the automatic stay. Without that information, there is no basis for the Commission to make the "serious prejudice"

findings that are needed to lawfully justify a Temporary Rule.

As I noted in my prior comments, the Commission has previously made a similar error. *See, WaterWatch v. Oregon Water Resources Commission,* 97 Or App 1, 775 P.2d 1118 (1989). The Commission should not make the same mistake again.

The Staff Report seeks to justify the Temporary Rule on the grounds that there is allegedly a "lack of policy clarity on this point" and the Rule is supposedly needed to "address confusion regarding when the stay...is applicable." Staff Report p.4, 1st full ¶. That is not a legitimate basis for a finding of "serious prejudice."

The Oregon Supreme Court specifically addressed that very issue in *Friends of the Columbia Gorge v. Energy Facility Siting Counsel,* 366 Or 78, 456 P.3d 65 (2020). There the Oregon Supreme Court reviewed a Temporary Rule that has been challenged and held:

> "...**legal uncertainty, without more, is insufficient.**"

Id. 366 Or at 92 (emphasis added). The court the went on to point out that the reason this was so, was that the Legislature wanted to limit the use of Temporary Rulemaking. The court stated:

> "Regulated entities undoubtedly prefer legal guidance sooner rather than later. But if providing regulated entities with immediate guidance were, by itself, sufficient, then agencies would be able to justify temporary rulemaking whenever they adopt regulations implementing new statutes. That would allow temporary rulemaking to be commonplace, rather than exceptional, and would be therefore inconsistent with legislative intentions. Thus, to justify temporary rulemaking based on a need to provide...legal guidance, an agency must point to serious prejudice that will result from delaying legal guidance during the time that it takes to complete a reasonable permanent rulemaking process..."

Id. 366 Or at 92-93.

To return to a point made in my previous comments, to the extent that the agency is concerned about a specific transfer or use authorization 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. Then in Subsection (6) of the same statute the Legislature provided a relief valve or mechanism for the agency to find that an automatic stay should be denied.

If the agency believes that a particular situation creates "serious prejudice" to the public interest, then the agency - or this Commission - should follow the already existing law and make the findings provided for in the existing statute to lift that stay.

8. The Staff Report provide not justification for creating a Temporary Rule that applies retroactively.

As I outlined in my previous comments, there is no valid reason to apply such a Rule retroactively. The members of the public deserve to be able to rely on existing law, not have the agency try to interfere in existing lawsuits, to change the dynamics or results in those cases. A sudden switch in agency policy and practice should not be applied retroactively, and the agency provides no substantive reason for doing so in this particular instance.

Sincerely,

/s/ *Karl G. Anuta*

Karl G. Anuta

KGA
c: Client