



WaterWatch of Oregon

Protecting Natural Flows In Oregon Rivers

June 15, 2022

Oregon Water Resources Commission
c/o Director's Office
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

RE: Agenda Item M, Temporary Rulemaking to Clarify Applicability of Automatic Stay Associated with Petition for Judicial Review under ORS 536.075

Dear Chair Reeves, Members of the Commission:

WaterWatch of Oregon submits these comments in opposition to OWRD's proposed temporary rules that would assert that automatic stays associated with petitions for judicial review under ORS 536.075 only apply to enforcement of regulatory orders.¹ We oppose the proposed rules for a number of reasons:

1. The proposed rules are inconsistent with statute

There is no language in the statute that would support the supposition that the automatic stay provisions of ORS 536.075(5) apply only to enforcement of regulatory orders.

The staff report does not include as an attachment the statute in question. We have attached the most recent version of the law, as embodied in HB 2244 which passed in the 2021 session, for your convenience. As you will see, ORS 536.075(5) is nested within 11 subsections. Relevant to the decision before the Commission are Sections (5), (6), (7), (8) and (11). As you can see in the attached, Section (5) reads:

(5) Except as provide 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.

ORS 536.075(5) (*emphasis added*). Section (5) is not limited to regulatory orders; it applies to all final orders. Section (11) states that "final order" has the meaning given that term in ORS 183.310. ORS 183.310 is not limited to regulatory orders. Section (6) also does not distinguish regulatory orders; it applies to all orders. Section (7) is the first place in statute that distinguishes regulatory orders from other orders. Section (8) also is specific to regulatory orders. Long story short, statutory construction is very clear that Sections (5) and (6) apply to all orders, and the only narrowing to regulatory orders is found in process directions of Sections (7) and (8).

¹ WaterWatch notes for the record that the public was given less than 48 hours to review the proposed temporary rules and accompanying staff report and rational and submit written comments. This makes it very difficult for the public to digest what is being proposed, let alone develop comprehensive comments for Commission consideration.

In sum, basic statutory construction refutes the OWRD's interpretation that Section (5) was only intended to apply to regulatory orders. As such, the proposed temporary rule that would narrow application of Section (5) to enforcement of regulatory orders only is not supported by statute.

2. Temporary rules are unwarranted

The APA has robust standards for rulemakings. Deviations from this are very narrow. Under ORS 183.335(5)² an agency may only "adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the agency prepares:

- (a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;
- (b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;
- (c) A statement of the need for the rule and a statement of how the rule is intended to meet the need;
- (d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection; and
- (e) For an agency specified in ORS 183.530, a housing cost impact statement as defined in ORS 183.534."

The rationale provided in section IV of the staff report does not meet these standards.

Rather than set forth facts to support the finding required by (a), the Staff Report largely parrots the language of the necessary statutory finding by stating serious prejudice will occur. No specifics are provided. The Commission is given no insight as to the facts or the prejudice claimed.

That there is "confusion regarding when the stay provision in ORS 536.075(5) is applicable", which appears to be the over-arching rationale for this rulemaking, does not rise to the level of resulting in serious prejudice to the public interest or the interest of the parties concerned.

The staff report does invoke drought, but does so in a vacuum by stating "In light of the serious drought conditions covering much of this state the inability to use water where such use is authorized will seriously prejudice the interests of those persons who have been granted authority to use water but are precluded from doing so because they do not know whether using water as authorized by the order would or would not be lawful." This statement is meaningless without facts to support it. The statute requires the agency to state "the specific reasons for its findings of prejudice" and has not done so. ORS 183.335(5)(a). In fact, some fact situations would lead to the exact opposite conclusion regarding drought (e.g. if it's a new development going in in an area where drought is already impacting senior users). Moreover, it should be noted that in places like the Klamath basin severe and continuing drought has had a devastating effect on water rights, including instream flow rights, yet the OWRD did not make a finding of serious prejudice to bring rules to address the problems associated with stays on regulatory

² The Staff Report's paraphrasing of this statute does not provide adequate legal direction to the Commission. The staff report should have included actual statutory direction..

orders issued to protect those water rights. This further undermines the unsupported claim of prejudice OWRD has put forward here.

In whole, we do not believe the OWRD's staff report meets the standards required for a temporary rulemaking. The agency has failed to articulate any "serious prejudice to the public interest or the interest of the parties concerned" sufficient to justify the promulgation of temporary rules.

3. The statute allows for relief of stays upon a finding of significant public harm

Relief from stays is already provided for in statute. This is a critical piece of information for the Commission to have in front of it as it deliberates the decision in front of it.

Specifically, Section (6) reads:

(6) If the commission or department determines that substantial public harm will result from staying the final order, the commission or department may deny the stay. The denial shall be in writing and shall specifically state the substantial harm that will result from staying the final order. Notwithstanding any contrary provision of law, if the petitioner requests a hearing on the denial:

(a) The court shall hold the hearing not more than 21 days after the request is made; and

(b) The denial shall remain in effect until the hearing has been held and the court has issued a decision concerning the denial. (*Emphasis added*)

If there is a substantial public harm being caused by a stay, there is no need for an "emergency" rule to address that stay as this can be achieved under existing statute.

4. The staff report appears to misstate the availability of stay provisions in the APA for orders in other than contested cases

The last paragraph of Section D of the staff report states that "Clarifying that the automatic stay provision in ORS 536.075(5) does not apply to orders other than regulatory orders will not preclude persons from seeking a stay of a final order pursuant to the Oregon Administrative Procedures Act". "Where a person seeks judicial review of a Department or Commission order a stay may still be obtained even if an automatic stay may not be obtained." Cites provided in the Staff Report footnote are: OAR 137-004-0090; ORS 183.482; OAR 137-003-0690-0070.

In looking at ORS 183.482 (cited in staff report), the stay allowed in that section of law applies only to orders in a contested case hearing. ORS 183.484 (not cited in staff report) governs orders in other than a contested case hearing and does not provide for a stay. OAR 137-004-0090 (cited in staff report) does allow for stays in other than contested case hearings but only in conjunction with a petition for reconsideration to the agency.

Further explanation by the OWRD regarding its statement about stay provisions under the APA for orders in other than a contested case hearing is needed. The statutory cites provided to not corroborate this claim.

5. The proposed rules do not address the larger problem associated with automatic stays and regulatory orders

The invocation of the automatic stay has largely been used in the Klamath basin by water users seeking to halt OWRD regulation of junior irrigation water rights in favor of the senior tribal instream rights. While the harm to tribal instream rights certainly meets the statutory standard of “significant public harm” that would allow the Department or Commission to deny the stay, the Department rarely invoked the relief valve allowed by statute to provide relief in those instances. The Department also, to our knowledge, never brought the issue related to stays on regulatory orders in the Klamath to the Commission for Commission resolution via a commission determination, temporary rule or otherwise.

In light of that, that this temporary rulemaking to address an undisclosed fact situation has been deemed to result in “serious prejudice” to persons whose orders are under review - without also addressing the longstanding problems associated with stays to regulatory orders - appears to demonstrate an unfair and disparate treatment of tribal and instream rights.

6. Rulemakings of far more consequence to the state as a whole are on hold; moving this to the front of the line does not advance longstanding management needs of statewide importance

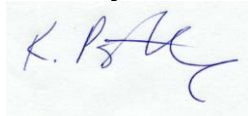
Over the past several Commission meetings, the OWRD has reported that they do not have staff resources to attend to all necessary rulemakings. Because of this, rulemakings that are critical to proper management of our state’s water resources have been put on hold, including but not limited to Div 10 (critical groundwater areas) and Div 77 (Instream Water Rights).

That the stay issue has jumped to the front of the line with virtually no public or Commission discussion is not good process, especially since the temporary rules appear to be directed to a very small subset of private interests and not actual urgent issues that need to be resolved to better direct statewide management.

Conclusion: WaterWatch urges rejection of the proposed temporary rules. The rules do not meet the standards that would allow adoption of temporary rules, are contrary to statute, and do not address the broader issues related to stays of regulatory orders.

Thank you for the opportunity to comment.

Sincerely,



Kimberley Priestley
Senior Policy Analyst

Attachment

Enrolled House Bill 2244

Sponsored by Representatives WILDE, SANCHEZ; Representatives ALONSO LEON, BYNUM,
CAMPOS, GRAYBER, MARSH, MEEK, PHAM, REYNOLDS, RUIZ, SALINAS (Presession filed.)

CHAPTER

AN ACT

Relating to orders issued by the Water Resources Commission or Water Resources Department for which judicial review is pending; creating new provisions; and amending ORS 536.075.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 536.075 is amended to read:

536.075. (1) Any party affected by a final order other than contested case issued by the Water Resources Commission or Water Resources Department may appeal the **final** order to the Circuit Court of Marion County or to the circuit court of the county in which all or part of the property affected by the **final** order is situated. *[The review shall]* **Review of the final order must** be conducted according to the provisions of ORS 183.484, 183.486, 183.497 and 183.500. *[A]* **The first page of the final order** *[other than contested case issued by the Water Resources Commission or the Water Resources Department]* must state *[on the first page of the order]* that the **final** order is a final order other than contested case, that the **final** order is subject to judicial review under ORS 183.484 and that any petition for judicial review of the **final** order must be filed within the time specified by ORS 183.484 (2). Any order other than contested case issued by *[the Water Resources Commission or by the Water Resources Department]* **the commission or department** that does not comply with the requirements of this section is not a final order.

(2) Any party affected by a final order in a contested case issued by the *[Water Resources Commission or the Water Resources Department]* **commission or department** may appeal the order to the Court of Appeals.

(3) An appeal under subsection (2) of this section shall be conducted as provided in ORS 183.482 except as specifically provided in *[subsections (4), (5) and (6) of]* this section.

(4) The petition **for review** shall state the facts showing how the petitioner is adversely affected by the **final** order and the ground or grounds upon which the petitioner contends the **final** order should be reversed or remanded.

(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 *[of the commission or the department]*.

(6) **If** *[unless]* the commission or *[the]* department determines that substantial public harm will result *[if]* **from staying** the **final** order *[is stayed]*, **the commission or department may deny the stay.** *[If the commission or the department denies the stay,]* The denial shall be in writing and shall specifically state the substantial public harm that will result from *[allowing the stay]* **staying the final order. Notwithstanding any contrary provision of law, if the petitioner requests a hearing on the denial:**

(a) **The court shall hold the hearing not more than 21 days after the request is made; and**

(b) **The denial shall remain in effect until the hearing has been held and the court has issued a decision concerning the denial.**

(7) **Enforcement of a final order that regulated off a diversion, appropriation or other use of surface or ground water in favor of a senior existing water right of record or senior determined claim:**

(a) May only be stayed on appeal if the petition for review is served on the commission or department and proof of the service is filed with the court.

(b) Is not stayed if the commission or department denies the stay under subsection (6) of this section.

(8) If the commission or department receives service of a petition for review pursuant to subsection (7) of this section, not more than five business days after receiving the service the commission or department shall send the petition to the person or federally recognized Indian tribe that made the call for water to enforce the senior existing water right of record or senior determined claim.

[(6)] (9) The review by the Court of Appeals under subsection (2) of this section shall be on the entire record forwarded by the commission or department. The court may remand the case for further evidence taking, correction or other necessary action. The court may affirm, reverse, modify or supplement the order appealed from, and make such disposition of the case as the court determines to be appropriate.

[(7)] (10) The provisions of this section [shall] do not apply to any proceeding under ORS 537.670 to 537.695 or ORS chapter 539.

[(8)] (11) For the purposes of this section[, "final order" and "contested case" have the meanings given those terms in ORS 183.310.];

(a) "Contested case" has the meaning given that term in ORS 183.310.

(b) "Determined claim" means a water right determined and established in an order of determination certified by the Water Resources Director under ORS 539.130.

(c) "Existing water right of record" has the meaning given that term in ORS 540.045.

(d) "Final order" has the meaning given that term in ORS 183.310.

SECTION 2. The amendments to ORS 536.075 by section 1 of this 2021 Act apply to petitions filed on or after the effective date of this 2021 Act.

Passed by House April 26, 2021

Received by Governor:

Repassed by House June 8, 2021

.....M.,....., 2021

Approved:

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

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Kate Brown, Governor

Passed by Senate June 7, 2021

Filed in Office of Secretary of State:

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Peter Courtney, President of Senate

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Shemia Fagan, Secretary of State