

Oregon Water Resources Commission  
Subcommittee Meeting  
May 19, 1997  
Salem

Members

Mike Jewett  
John Frewing  
Ron Nelson

Others

Richard Allan  
Karl Anuta  
Karen Russell  
Howard Arnett  
Bill Cook  
Stephanie Burchfield  
Renee Moulun  
David Riley  
Steve Warila

Staff

Martha Pagel  
Geoff Huntington  
Steve Sanders  
Weisha Mize  
Kimberly Grigsby  
Diane Addicott

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At the May 12, 1997, meeting of the Water Resources Commission, a subcommittee was formed for the purpose of providing recommendations to the full Commission on issues arising from exceptions which were filed to the revised proposed order in a contested case on three water use applications filed by Meadows Water Company. Prior to this subcommittee meeting, the parties jointly requested that the pending exceptions be grouped and considered together based on commonly shared policy issues. The staff report presented to the subcommittee in draft form is arranged according to the following categories: 1) method of calculating water availability; 2) surface water availability; 3) ground water interference; 4) public interest considerations posed by sensitive fish stocks; 5) sufficiency of permit conditions; and 6) other/miscellaneous exceptions.

The subcommittee considered arguments presented by all of the parties to the proceeding. After five hours, the subcommittee adjourned from the public meeting and deliberated on the issues presented. The recommendations attached are the result of the subcommittee deliberations and will be presented to the full Commission at the May 30, 1997, meeting.

Respectfully submitted,



Diane K. Addicott  
Commission Assistant

**1. Method of calculating water availability.** The subcommittee recommends finding that the Department's method for calculating water availability in its current model is reasonable. With respect to the permits at issue in this proceeding, the subcommittee does not recommend adjustments to the Department's model as proposed by the pending exceptions.

The subcommittee does recommend however, that Department staff present a briefing to the full Commission on how unperfected municipal and other existing consumptive water rights are incorporated into the current water availability mode, and how recent opinions from the Attorney General's Office are reflected in the model methodology. It is our view that the full Commission would benefit from a discussion of the underlying assumptions of the model and when additional data is accepted and integrated into Department calculations of water availability.

**2. Surface water availability.** The subcommittee recommends finding that surface water is available for the months indicated by the Department's water availability model calculations.

**3. Ground water interference.** The first question generally posed by the exceptions is whether substantial interference to the East Fork of the Hood River will result from the applicant's proposed use of ground water. The subcommittee recommends finding that substantial interference exists pursuant to Division 9 of Department rules.

The second question examined by the subcommittee was whether flow mitigation provided by conditions requiring discharge from the applicant's waste water treatment plant is sufficient. The subcommittee's recommendation on this issue is that generally, the proposed discharges from the waste water treatment plant are sufficient mitigation to offset impacts to surface water flow during the three months in which ground water will be used. That said, however, the subcommittee recommends that the permit be conditioned to require Meadows Water Company to time releases from the waste water treatment plant to coincide with the approximate, natural low point of recorded diurnal flows for the receiving stream. The subcommittee does not recommend requiring that the applicant maintain continuous releases in order to provide adequate mitigation.

**4. Public interest considerations posed by sensitive fish stocks.** This category presents the policy issue of whether or not it is in the public interest to allow the proposed water withdrawals in light of flow related habitat concerns posed by the presence of sensitive fish stocks. The subcommittee is concerned about the adequacy of the overall mitigation measures of the pending permit applications in the face of continued uncertainty about the flow level necessary to support the biological needs of sensitive fish stocks in the stream reach and enhance the potential for recovery of these stocks. This concern exists despite the presence of a senior instream water right downstream from the applications at issue. In light of this concern, the subcommittee recommends the full Commission hear oral argument by the parties on this issue. Options available to the Commission include: grant the permit application without further conditions based on a finding that the public interest has been satisfied; deny the permit application based on a finding that public interest in protecting and restoring at risk fish stocks warrants doing so; or grant the permit subject to additional conditions which the Commission finds will adequately protect the existing fishery resource.

**5. Adequacy of permit conditions.** Several exceptions were filed by the parties challenging the sufficiency of various permit conditions proposed on the ground water and surface water withdrawals. Of those, the subcommittee makes the following recommendations.

a. **Condition S6** relating to installation of a gaging station. There was considerable discussion on both sides of the question about whether to require the applicant to install and maintain a gaging station to monitor a down river, senior instream water right. It is the subcommittee's recommendation that the proposed permit include conditions requiring the installation and maintenance of a gaging station (or stations) at a time and at location(s) Department staff believe are reasonably necessary to monitor the senior instream water right. The subcommittee makes this recommendation with the understanding that the purpose of installing the gaging station(s) is to measure the impact of the applicant's withdrawals on the senior instream water right.

b. **Condition G16** of the revised proposed order requires a ground water monitoring program be conducted by the applicant. Staff recommended modifications to this condition to which permit opponents objected. After considering arguments, the subcommittee recommends acceptance of the staff recommendation as follows:

At the request of the Department, [Prior to the use of the well,] the permittee [must] shall obtain approval from the Department for a monitoring program. The permittee shall retain the services of a groundwater geologist licensed in Oregon. [The permittee shall] and cause the geologist to submit a plan for monitoring groundwater and surface water to the Department for approval. The plan shall provide for a long-term monitoring program which shall be conducted in a manner that will assist the Department in detecting interference with surface water, should it occur.

c. **Conditions S11 and G15** of the revised proposed order require preparation of a municipal conservation plan. The subcommittee recommends that permit conditions require compliance with Commission rules found at OAR Division 86 pertaining to completion of a municipal conservation plan. The subcommittee recommends that the applicant be required to complete a satisfactory plan as a prerequisite to diverting water.

d. **Conditions S5, S8, G2, and G10** collectively address measurement of return flows from the applicant waste water treatment plant. The subcommittee recommends permit conditions be modified to explicitly require measurement of return flows from the applicant's waste water treatment plant in a manner that will ensure the Department's ability to verify compliance with terms and conditions of the permit.

- e. The subcommittee recommends adding permit conditions to maintain the Department's discretion to reopen the permit for review and modification in the event the applicant's corresponding waste water discharge permit issued by the Oregon Department of Environmental Quality is amended.
- f. *Condition G5* requires a series of pump tests of an applicant's ground water well to obtain static water level measurements. Permit opponents argue for requiring annual pump tests as part of this condition (see FOMH 52; revised proposed order G5). After considering arguments by the parties, the subcommittee recommends denial of the exceptions.

6. *Other/miscellaneous exceptions.* In addition to the five substantive categories, the subcommittee heard discussion and considered other exceptions pertaining to terms found in the revised proposed order. Our recommendations with respect to these exceptions which the parties raised as warranting specific attention by the subcommittee are set forth below.

- a. *Applicant exception 3B—location of senior instream water right.* In this exception, the applicant asserts that the location of the existing senior instream water right recorded on the certificate was inappropriately changed by the Department when the recording error was discovered after issuance. After considerable discussion, the subcommittee is comfortable that the recording of the incorrect location is best termed as "scrivener's error" by the Department, and this exception by the applicant therefore should be denied.
- b. *Motions to supplement the record.* Several exceptions were filed by the parties requesting to supplement the hearing record with additional evidence. The subcommittee recommends that the Commission deny all exceptions requesting to supplement the hearing record at this stage in the proceedings.

7. *Exceptions regarding burden of proof determinations.* Exceptions were filed by the parties challenging how the hearings officer elected to allocate the burden of proof on different evidentiary issues. After reviewing the record and considering the presentations of the parties, the subcommittee has concluded that there is no evidentiary issue pending which requires an explicit determinations of where the burden of proof lies with respect to the different parties.