

Attachment E: Staff Analysis of Exceptions

I. Protestant's Exceptions to Findings of Fact: Protestant made two exceptions to findings of fact in the Proposed Order.

Exception 1: Protestant asserts that Finding of Fact 4 is inconsistent with the Administrative Law Judge's (ALJ's) statement that fact issues remain with respect to whether and to what extent applicant's current operation of the spillway causes inundation of C.C. Meisel's property. (Protestant's Exceptions to Proposed Order (hereinafter "Protestant's Exceptions") pg. 3.)

Applicant's Response: Applicant responds that issues of dam safety differ from issues of trespass. (Applicant's Response to Protestant's Exceptions to Proposed Order (hereinafter "Applicant's Response") pg. 6.)

Department's Response and Recommendation: Finding of Fact 4 is supported by the evidence in the record and provides: "[t]he only time that operation of the waterworks could reasonably have been seen as threatening to person or property was during the widespread flooding that occurred in February 1996." (Proposed Order, pg. 3.) Since 1996, however, an emergency spillway has been constructed such that the events of 1996 will not be repeated, and the Department has determined that the reservoir and spillway meet its dam safety requirements.

Protestant asserts that Finding of Fact #4 is inconsistent with a later statement in the order which provides "[i]ssues of fact remain, including whether and the possible extent of inundation beyond premises subject to the easement." (Proposed Order, pg. 10.) This statement is based on the Third Affidavit of Tom Miller in which Mr. Miller stated that a trespass may occur if waters ever exceed the capacity of the spillway and inundate premises not subject to the easement.¹

Although the ALJ found that there may be a factual dispute about whether incidental flooding could occur over or beyond the spillway, this assertion does not present an issue of dam safety the concerns of which demand a spillway in order to prevent dam failure. The statements, therefore, are not inconsistent. *The Department recommends that this exception be denied.*

Exception 2: Protestant asserts that Finding of Fact 5 is inconsistent with the ALJ's assertion that "neither OWRD nor the administrative law judge have the authority to determine whether TDM's present use of the property exceeds the scope of the easement granted." (Protestant's Exceptions pg. 3.)

¹ The possibility of this trespass occurring, however, can be addressed by conditioning TDM's permit such that the spillway is only used in the event that inflow into the quarry exceeds the capacity of the 10" pipe that evacuates the reservoir.

Department's Response and Recommendation: Finding of Fact 5 is correct as to the evidence in the record and refers to the face of the easement documents and affidavits in the record. The evidence as to the face and "scope" of the easement is unrebutted. The ALJ is correct in finding that the Department is not required to look beyond the face of the easement document to consider whether a contract was fraudulently formed or was breached. Nor does the ALJ have the authority to determine what the intent of the parties was as to language in the easement beyond what is presented in the plain language of the easement. The ALJ states as much when he provides "OWRD lacks the authority to determine the extent of the easement granted except by looking at the four corners of the document." (Proposed Order, pg. 11.) When the ALJ provided that "neither OWRD nor the administrative law judge have the authority to determine whether TDM's present use of the property exceeds the scope of the easement granted," the ALJ is referring to protestant's assertions that TDM's use of the spillway is in essence trespassing on their lands. Issues of whether an easement is or is not being used according to its terms is not material as to the Department's determination as to whether an easement does or does not exist. *This exception should be denied.*

II. Exceptions to Statements in the Discussion: Protestant takes exception to thirteen statements made in the ALJ's discussion. Statement numbers are as referenced in Protestant's Exceptions.

Exceptions to Statements 1 – 7: Protestant identifies seven statements in the discussion section of the Proposed Order that it argues lead it to the conclusion that the ALJ erred when he determined that protestant did not timely raise issues regarding applicant's authority to operate the spillway and reservoir. (Protestant's Exceptions pgs. 3 – 6.)

Applicant's Response: Protestant had an opportunity to clarify specific arguments as they related to issues raised in the protest at the prehearing conference where the ALJ made a final determination of the issues for the contested case hearing, but did not do so. (Applicant's Response pgs. 4 – 5.)

Department's Response and Recommendation: ORS 537.170(5) provides that each person submitting a protest shall raise "all reasonably ascertainable issues and submit all reasonably available arguments" by the close of the protest period. Failure to raise an issue before the close of the protest period or failure to provide "sufficient specificity to afford the Water Resources Department an opportunity to respond to the issue precludes judicial review based on that issue." *Id.*

In the Proposed Order, the ALJ determines that two issues were not timely raised:

1. ORS 537.211 and TDM's authority to operate "a perpetually overflowing spillway" over Meisel's property.
2. ORS 537.211 and TDM's storage of water in quantities allegedly greater than contemplated by the parties in their water right agreement.

Notwithstanding that the ALJ finds that these issues are precluded, the Proposed Order analyzes these issues and finds that they fail as a matter of law. (Proposed Order, pgs. 9 – 11.) The Department concurs with the Proposed Order’s findings that these issues fail as a matter of law.

The Department recommends that the Final Order note the ALJ’s analysis and conclusions with regard to these issues but not make any finding on this issue. The Department does not see a need to address whether or not the ALJ correctly precluded the two issues because these arguments failed to raise issues material to the Department’s consideration of these applications. *This exception should be denied.*

Statements 8 & 9: With respect to dam safety, protestant asserts that no easement exists for lands occupied by the emergency spillway and argues that “[w]ithout an easement to allow continued operation of the spillway, TDM Co. could not continue to operate the dam in compliance with dam safety requirements.” Protestant also asserts that it did make an argument as to dam safety in its motions – contrary to a statement providing otherwise in the Discussion section of the Proposed Order. (Protestant’s Exceptions pgs. 6 – 8.)

Applicant’s Response: Applicant concurs with the Proposed Order and argues that evidence that water flows over a spillway engineered to accomplish that result does not create a genuine issue of material fact as to dam safety. Nor do legal complaints concerning the scope of an easement. Applicant asserts that it would stipulate to a permit condition that would forbid using the spillway except under circumstances when inflow to the quarry exceeds the outflow capacity of the 10” water transmission pipe.

Department’s Response and Recommendation: The Proposed Order correctly states that the Department has found that the dam and spillway at Muhs Quarry are consistent with the dam safety requirements of ORS 540.350 and ORS 537.400(4). The Department concurs with the Proposed Order that protestant has not asserted any evidence showing that there is a legitimate concern regarding the safety of applicant’s dam structure and reservoir management capabilities. *This exception should be denied.*

Statements 10 and 11: Protestant argues that issues of fact remain that are material to a determination regarding the operation of Muhs Quarry spillway and to determining compliance with ORS 537.211. (Protestant’s Exceptions pg. 8 – 9.)

Applicant’s Response: Protestant presents no evidence that rebuts the ALJ’s finding that the spillway structure lies entirely within the easement. Although protestant argues that theoretically circumstances could result in water passing over the spillway onto premises not covered by the easement, protestant is willing to stipulate to a permit condition that will decrease the likelihood of such event occurring in the future. (Applicant’s Response pgs. 7 – 9.)

Department’s Response and Recommendation: ORS 537.211 provides that the Department may issue a final order for application R 83820 whether or not an

easement exists for the spillway. Notwithstanding this, the Proposed Order has found that based on the face of the easement document, an easement exists for all works necessary for the operation of the facility. The question of whether water has ever or will ever flow over or from the spillway onto lands not covered by the easement is an issue that is not material to the Department's consideration of these applications. Nonetheless, the Department recommends including the following permit condition:

The permittee shall not use the emergency spillway on this reservoir unless water inflow into the reservoir exceeds the outflow capacity of the 10" water transmission pipe that serves as an outflow for this reservoir.

The Department recommends that this exception be denied.

Statement 12: Protestant argues that it did not "abandon" arguments regarding breach of contract as the Proposed Order suggests, rather, protestant responded with additional arguments as were raised in applicant's opening brief. (Protestant's Exceptions pgs. 8 – 9.)

Applicant's Response: Applicant states that the gist of protestant's argument is that applicant lacks an easement, not that the easement has been breached. (Applicant's Response pg. 7.)

Department's Response and Recommendation: The Department does not see a need to address whether or not the ALJ correctly precluded the issues protestant argued in their briefs because these argument have not raised any issues of fact material to the Department's consideration of these applications. *This exception should be denied.*

Statement 13: Protestant asserts that the question of whether applicant has the legal authority to undertake its current operation of the reservoir and spillway is material to protestant's protest and thus any issues of fact as may remain in dispute are also material. (Protestant's Exceptions pgs. 9 – 10.)

Applicant's Response: See above discussion regarding dam safety above at pg. 3. (Applicant's Response pgs. 6 – 9.)

Department's Response and Recommendation: Protestant excepts to the following statement in the Proposed Order, arguing that the current operation of the spillway is material because ORS 537.211 requires an easement for the spillway and because it bears on the issue of whether issuance of the permits will contravene Meisel's rights as a landowner to exclude others from its property. (Protestant's Exceptions pgs. 9 – 10.) The statement protestant excepts to is as follows:

Under this theory, issues of fact remain regarding current operation of the spillway, with one party contending that water flows into areas not

included in the easement, and the other party contending to the contrary. Even if these issues were material to the protest, I would not be able to enter an order in Meisel's favor on this issue because they are disputed. OAR 137-003-0580(6). These issues are not material because OWRD lacks the authority to determine the extent of the easement granted except by looking at the four corners of the document. * * * Neither the OWRD nor the administrative law judge have the authority to determine whether TDM's present use of the property exceeds the scope of the easement granted.

Proposed Order, pg. 11.

Contrary to protestant's assertions, ORS 537.211 does grant the Department authority to issue a final order without an easement or written authorization. However, the Department could find that it can issue a permit for the proposed use, because based on the record, an easement exists for the spillway. The Department is not likely to withhold issuance of a permit based on conjecture that at some point in the future water may or may not overflow the spillway and flow onto property adjacent to it. The Department may condition such a permit as it issues so as to decrease the likelihood of such occurrence. *The Department recommends that this exception be denied.*

III. Exceptions to Order Section of the Proposed Order: Protestant makes seven exceptions to the Order section in the Proposed Order. Statement numbers are as referenced in Protestant's Exceptions.

Statement 14: Protestant files an exception to the conclusion that applicant's motion for summary judgment is granted for the reasons asserted in its exceptions 1 – 13 above. (Protestant's Exceptions pg. 10.)

Applicant's Response: Applicant disagrees for reasons discussed above. (Applicant's Response pg. 9.)

Department's Response and Recommendation: The Department concurs with the Proposed Order in part and disagrees in part and recommends that the Order be amended as follows (strikeout is deleted, underlined is inserted):

1. ~~Issues related to the extent of the easement not asserted by Meisel were not stated as reasons for the protest and may not now be considered.~~ Assertions that the Agreement and the Grant have been terminated based on material breaches by the Applicant or that issuance of the permits would be in contravention of Meisel's legal rights or prejudicial in pending circuit court litigation are dismissed as moot.
2. Issues regarding alleged trespass are not material to the Department's determination that applicant has provided the required easement for the purposes of ORS 537.211.

3. Meisel has presented no evidence of "legitimate" concerns regarding dam safety or the safety of applicant's reservoir management capabilities.

This exception should be denied.

Statement 15: Protestant asserts that it did not raise any issues in this contested case proceeding that it had not already raised in its protest. (Protestant's Exceptions pg. 10.)

Applicant's Response: Applicant disagrees for reasons provided above. (Applicant's Response pg. 9.)

Department's Response and Recommendation: The Department does not see a need to address whether or not the ALJ correctly precluded issues raised in protestant's briefs as these arguments did not raise issues of fact that are material to the Department's consideration of these applications. *This exception should be denied.*

Statement 16: Protestant argues that it has presented evidence of legitimate concerns regarding applicant's ability to comply with the Department's dam safety requirements. (Protestant's Exceptions pg. 10.)

Applicant's Response: For the reasons it specified above, the applicant disagrees. (Applicant's Response pg. 9.)

Department's Response and Recommendation: The Department concurs with the Proposed Order's findings that protestant has presented no evidence of "legitimate" concerns regarding dam safety. *This exception should be denied.*

Statement 17: Protestant takes exception to the ALJ's denial of its Motion for Ruling on Legal Issues. (Protestant's Exceptions pg. 10.)

Applicant's Response: Applicant asserts that the ALJ correctly denied protestant's Motion for Ruling on Legal Issues (Applicant's Response pg. 9.)

Department's Response and Recommendation: *For the reasons specified above, the Department recommends that this exception be denied.*

Statement 18: Protestant points out a typographical error in the cite for ORS 537.211. Protestant reasserts that the application is not consistent with ORS 537.211. (Protestant's Exceptions pgs. 10 – 11.)

Applicant's Response: Applicant agrees with correction of typographical error in cite. (Applicant's Response pg. 9.)

Department's Response and Recommendation: The Final Order should provide as follows:

Protestant C.C. Meisel Co. Inc.'s Motions for Legal Rulings are **DENIED**.

1. ORS 537.2311 does not prohibit issuance of Applicant TDM's proposed permits.

This exception should be allowed.

Statement 19: The Protestant requests the ALJ to remand the Proposed Final Order for applications R 83820 and S 83821 with instructions that the Department either: 1) include a permit condition requiring applicant to demonstrate that applicant has authority or easement to operate the emergency spillway; or 2) deny the permit application on the grounds that applicant does not have an easement. (Protestant's Exceptions pg. 11.)

Applicant's Response: Applicant asserts that it has provided the Department with sufficient proof or authorization for access to the reservoir and spillway. (Applicant's Response pg. 9.)

Department's Response and Recommendation: ORS 537.173 provides that exceptions to proposed orders are filed with the Water Resources Commission, not the Administrative Law Judge who issued the Proposed Order. The Department concurs with the Proposed Order's recommendation to issue a final order dismissing the protests of applications R 83820 and S 83821.

With regard to protestant's request for insertion of a permit condition requiring applicant to demonstrate that they have authority or easement to operate the emergency spillway, the Department makes two observations.

First, ORS 537.211 provides that "the department may issue a final order approving the application [in the absence of written authorization or an easement] if the approval includes a condition requiring the applicant to obtain such written authorization, or easement or ownership of such land and to provide the department with a copy of the written authorization, easement or evidence of ownership." Such relief as protestant seeks is not appropriately issued in a permit condition. Further, the Department sees no need for such condition in a final order as may issue for these applications.

Second, with regard to the Department's ability to issue a permit for application R 83820, the ALJ has reviewed the easement and has reached the conclusion that the Department does not have the authority to determine the scope of an easement beyond what is presented by a plain reading of the face of the easement. (Proposed Order, pg. 10) The ALJ has also determined that the easement in the record supports issuance of a permit. *Id.* The ALJ also determined that disputes

regarding whether TDM's present use of the property exceeds the scope of the easement granted are not disputes for the Department to hear. In processing applications, the Department will consider whether or not an easement exists and will look to the face of an easement document to make that determination. *This exception should be denied.*

Statement 20: Protestant takes exception to the ALJ's dismissal of its protest and requests the Water Resources Commission to remand the protests to the ALJ with instructions to hold a contested case hearing to address the questions of fact that remain regarding its protest. (Protestant's Exceptions pgs. 11 – 12.)

Applicant's Response: This matter should not be remanded to the ALJ for the reasons stated above. (Applicant's Response pg. 10.)

Department's Response and Recommendation: Any issues of fact as remain are not material to a determination of whether the Department may or may not issue a final order or permit for applications R 83820 and S 83821. (*See also*, discussion immediately above.) *The Department recommends that this exception be denied*

IV. Exception to the Conclusion Stated in the Proposed Order:

Protestant provides that if the Water Resources Commission concludes that neither the ALJ nor the Department has the authority to resolve a dispute regarding the applicant's easement, the Commission should order the ALJ to stay the contested case hearing until that matter is resolved by a court of competent jurisdiction. (Protestant's Exceptions, pg. 12.)

Department's Response and Recommendation: Protestant has failed to assert how civil matters as may need resolution would be prejudiced by dismissal of its protests and approval of these applications. These applications have been on hold for five years pending resolution of issues between protestant and applicant in the civil courts. Further holding these applications pending resolution of issues immaterial to the Department's consideration of these applications would misallocate limited staff resources and promote a policy of arbitrarily staying applications at the protestant's request. *This exception and request should be denied.*