

## MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item E, January 15, 2004  
Water Resources Commission Meeting

### **Turner Energy Center Water Right Application, EFSC Process, and Request for Exception to the Willamette Basin Program**

#### **I. Issue Statement**

Turner Energy Center (TEC) is working through the Energy Facility Siting Council (EFSC) process to site a gas fired co-generation facility in Turner located in Marion County (Attachment 1). As part of the siting process, TEC is seeking a water right permit for the use of wastewater for industrial use (Application S-85704). The use of wastewater is not a “classified” use under the Willamette Basin Program; therefore, TEC has requested an exception to the Commission’s basin program rules under ORS 536.295. This report describes the EFSC process; summarizes the basin program exception information provided by TEC; and evaluates the request against statutory criteria and rules of the Commission.

Because this application is part of the EFSC process, EFSC will make the final determination on the water right permit. In making its final determination, EFSC is seeking the Commission’s input on TEC’s request for a basin program exception. Commission input is requested for use by staff in developing the Department’s final recommendations to EFSC on TEC’s application S-85704. *This is an information report only; no formal Commission action is required.*

#### **II. Background**

##### **A. EFSC Process**

TEC has requested this basin program exception as part of its application for a new water use permit (S-85704). TEC’s water use permit application is part of its larger application to EFSC for a site certificate. Under ORS 469.401(3), EFSC makes the decision on state-issued permits and other state decisions requested as part of a site certificate application, including decisions on water use permits and basin program exceptions. As a result, the Commission is asked only to comment on the exception request rather than make a final decision. Staff will use the Commission’s input to submit a recommendation on the exception and on the water use permit to EFSC. The Water Resources Department (Department) has been working closely with EFSC staff throughout this process.

Normally, the Commission would take public comment on the exception request and the Department would take public comment on the water use application. However, all public comment on the request and the application will occur under the EFSC process. EFSC staff will issue a “draft proposed order” on the site certificate application, which will include a recommendation on TEC’s basin program exception request and its water use permit application. Under the EFSC process, a public hearing conducted by an independent hearing officer will then be held on the draft proposed order. At the hearing, members of the public can provide testimony on any part of the draft proposed order, including the basin program exception request and the water use permit application. Department staff or Commissioners also have the opportunity to testify should they so choose. Ultimately, the EFSC process includes the revision of the draft proposed order into a final order, a contested case, and an EFSC decision.

### **B. Basin Program Exception**

Basin programs are administrative rules adopted by the Commission that prescribe future allowable uses of water. The act of specifying the allowable future beneficial uses is called “classification” and is authorized under ORS 536.340. Classifying beneficial uses in a basin program involves an analysis of basin-specific data and substantial public involvement. However, under ORS 536.295, the Commission may allow the Department to consider an application for a use not “classified” in a basin program if the use meets one of the criteria under subsection (1) of ORS 536.295 provided in Attachment 2. The Commission must also evaluate whether the proposed use is consistent with the general policies of the applicable basin program.

Approval of a request for an exception to a basin program does not guarantee that a water right will be issued, or if it were issued, how it would be conditioned. The Commission is not making a public interest determination on the application, and in this case, is only providing input for staff to use in final recommendations to EFSC. The final recommendations to EFSC will include a review of issues such as water availability, injury to existing water rights, and any other rules of the Commission. Public notice and comment opportunities are provided by EFSC as described above.

### **III. Discussion**

A summary of Application S-85704 in the name of TEC and an evaluation of their request for an exception to the Willamette Basin Program are provided below:

### **A. Application Summary and Basis for Consideration**

The primary water source for the Turner Energy Center project is a proposed transfer of 7.6 cubic feet per second (cfs) from the Norpac Foods facility to TEC (file number T-9501). In addition to a change in place of use, the transfer also seeks to change the type of use from “cannery use” to “industrial use.” This water right, certificate number 66271, has a priority date of October 24, 1983.

As a backup water source, TEC has applied for a permit to divert 7.6 cfs of wastewater for industrial use. The Santiam Water Control District (SWCD) originally filed the application on behalf of TEC and has since assigned the application to TEC. The TEC water right application is provided as Attachment 3. The wastewater sought is first diverted by Norpac Foods in Stayton from the North Santiam River and used for non-contact cooling water. Currently, the Norpac wastewater is discharged into a canal that takes the water into Mill Creek, a tributary of the Willamette River. Under TEC’s application, Norpac’s wastewater would be discharged into a pipeline that feeds a canal controlled by the Santiam Water Control District and delivered to TEC. Maps showing Norpac and TEC are provided in Attachment 4. The proposed TEC facility is located approximately six miles from Norpac Foods.

The Commission’s Willamette Basin Program (OAR Chapter 690, Division 502) classifies the applicable reach of the North Santiam River for domestic, livestock, irrigation, municipal, industrial, agricultural, commercial, power, mining, recreation, fish life, wildlife, pollution abatement, wetland enhancement, and public instream uses from September 1 through June 30. Only domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses are classified from July 1 through August 31 (OAR 690-502-0110 (1)[b]). The use of wastewater is not a classified use in the Willamette Basin Program

### **B. Exception Request and Evaluation**

1) Summary of information provided by the applicant under ORS 536.295(1).

ORS 536.295 provides that the “Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use” is consistent with any one of seven statutory criteria. TEC provided the Department with a basin program exception request via email on December 19, 2003, and by U.S. mail on December 23, 2003. The request, provided as Attachment 5, discusses how the application may qualify for consideration under four of the statutory criteria.

- a) The use will be of short duration each year.

TEC's application is for a supplemental water right that is meant to be an emergency backup source in the event that their primary water source is not available. TEC's primary water right has a priority date of October 24, 1983, and has never been regulated to satisfy senior water rights. Even during the recent droughts in 1987, 1992 and 2001 it was not necessary to regulate water rights on the North Santiam River.

*Department analysis:* It is unlikely that the proposed supplemental wastewater use, if approved, will be needed. Regulation of TEC's planned primary water right is very unlikely. In the unlikely event that TEC's primary right became unavailable, it is reasonable to assume that the supplemental wastewater use would occur for a short duration.

- b) The use is necessary to avoid extreme hardship.

TEC asserts that it may not be possible to secure project financing without a backup water supply. The project will provide economic benefits to the state and local community (e.g., construction, goods, services, employment, tax revenues) as well as provide another electrical source to the Northwest electrical grid.

*Department analysis:* The Department appreciates that a backup water source would be needed to make the project feasible and to secure financing. While alternative designs or supply sources are possible, finding an alternative to the readily available proposed wastewater (supplemental) right could be a significant hardship for TEC.

- c) The use will provide a public benefit such as riparian or watershed improvement.

TEC's proposed use of wastewater would reduce the amount of heated water entering the Salem Ditch and discharging into Mill Creek. Chinook salmon and steelhead are known to occur in Mill Creek downstream of Salem Ditch. If the proposed use of wastewater is approved, heated water from Norpac Foods will run through several miles of canals and past the new power plant, where it will be available for backup use if needed. When the water is not used at TEC, it will enter into Mill Creek much cooler than it does now. In addition, TEC's water reuse plan calls for a total of 16 fish screens to be installed at each Santiam Water Control District canal that enters Mill Creek, its tributaries, and the Salem Ditch. Keeping fish out of the ditch network will improve their chances for survival. The plan also establishes a minimum water flow in the Salem Ditch from mid-April through August and provides improvement to riparian areas in nearby McKinney Creek and Turner Bypass.

*Department analysis:* The Oregon Department of Fish and Wildlife (ODFW) has expressed concerns that TEC's proposed use of Norpac wastewater will reduce flow in the stretch of Mill Creek between Norpac's current discharge and the proposed TEC discharge. Norpac's water right does not require them to return their wastewater to any particular source. ODFW's comments will be considered by EFSC in its process. The Department has not received comments from the Department of Environmental Quality (DEQ) on whether the project as a whole will provide a public benefit such as riparian or watershed improvement.

Staff believe the proposed water use will provide a public riparian and watershed benefit because of the installation of fish screens, establishment of a minimum flow in Salem Ditch, riparian area improvements, and cooling of Norpac's wastewater before it enters Mill Creek.

- d) The use is of an unusual nature not likely to recur in the basin, and unlikely to have been within the uses considered by the Commission in classifying the uses presently allowed in the applicable basin program including but not limited to: (A) Exploratory thermal drilling; (B) Heat exchange; (C) Maintaining water levels in a sewage lagoon; (D) Facilitating the watering of livestock away from a river or stream.

TEC suggests that the Commission did not consider the use of reclaimed wastewater when the basin program was developed and that the set of facts related to this application are unique and not likely to recur in the basin.

*Department analysis:* TEC's request does not meet this exemption criteria element as the "use" is for industrial use, which is not unusual and was considered by the Commission when the basin program was developed. The applicant has suggested that the "situation" is unusual and was not considered by the Commission when the basin program was formulated. Staff agree that this particular situation, using wastewater as a backup source for a new energy facility, is unusual. However, basin programs classify water "uses" and not situations.

## 2) Consistency with the General Policies of the Willamette Basin Program.

In determining whether to allow TEC's request, ORS 536.295 requires an evaluation of the proposed use for consistency with the general policies of the Willamette Basin Program (ORS 536.295[4]). Those policies are set forth in OAR 690-502-0020 and provided in Attachment 6.

Staff believe that the proposed use is consistent with the applicable general policies because the use would not contribute to over-appropriation and because it seeks a balance between out-of-stream use and public instream use. The proposed wastewater will rarely if ever be used, and TEC's water use plan provides a permanent minimum bypass flow in the Salem Ditch from mid-April through August which will provide a public benefit to Mill Creek. For these reasons, staff believe this request is generally consistent with the applicable surface water policies of the Willamette Basin Program.

#### **IV. Conclusion**

To approve a basin program exception request under ORS 536.295, EFSC, in place of the Commission, must find that the request meets at least one of the statutory criteria and evaluate whether the proposed use is consistent with the general policies of the applicable basin program. Staff believe that TEC has demonstrated that their proposed use of wastewater meets one or more of the criteria under ORS 536.295 (e.g., use provides a public benefit) and is generally consistent with the applicable policies of the Willamette Basin Program.

No action is required; this is an informational report only. However, Commission input is requested for use by staff in developing the Department's final recommendations to EFSC on TEC's application S-85704.

#### Attachments:

1. General Location Map: Turner
2. ORS 536.295
3. Copy of Application S-85704
4. Map of Norpac Foods and TEC
5. TEC Exception Request
6. Willamette Basin Program General Policies

Dwight French  
503-986-0819