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June 8, 2006

Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
ATTN: Rule Coordinator

RE: Proposed Amendments to OAR Chapter 690, Division 77

On behalf of members, Water for Life respectfully submits the following comments on the Department's proposed rules amending OAR Chapter 690 Division 77. Water for Life strongly objects to the proposed rules and encourages the Commission to consider whether they are capable of withstanding legal scrutiny before adopting them in current form.

Proposed Rule

Water for Life's opposition arises from language found at OAR 690-077-0015(5) of the hearing draft, which provides:

For in-stream water rights established through in-stream transfers, leases, or allocations of conserved water, it is presumed that flows that exceed the estimated average natural flow or natural lake levels are significant for the applied public use, if the flow does not exceed the maximum amount of an in-stream water right application applied for under OAR 690-077-0020 for the same reach or portion thereof, and for the same public use, and

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- (a) For the specified time period that flows are requested to exceed the estimated average natural flow or lake level, the stream is in an ODFW flow restoration priority watershed;
- or
- (b) The stream is listed as water quality limited and DEQ has provided scientific information that demonstrates that increased flows would improve water quality.

As may be seen, the proposed rule would create a presumption that flows in excess of the estimated average natural flow are significant for a public use if (a) the mechanism for requesting the in-stream water right is through an in-stream transfer, lease, or allocation of conserved water, (b) a state agency has previously requested a quantity of water in excess of the estimated natural flow on the same reach for the same public use, and: (c) the reach is located on a stream that is in a ODFW flow restoration priority watershed, or (d) the stream is listed as water quality limited and DEQ has provided scientific information that demonstrates increased flows would improve water quality. The estimated average natural flow is the average amount of water that exists in a stream if there are no appropriations of water from the stream. Thus, the proposed rule essentially creates a presumption that an in-stream water right request for more water than the stream would contain in its pristine and natural state is “significant” for the public use applied for. This presumption directly conflicts with Oregon in-stream water right statutes that limit in-stream water rights to the minimum quantity of water necessary to support a public use.

Oregon In-stream Water Right Statutes

The text and context of Oregon’s in-stream water right statutes evidences a legislative intention for in-stream water rights to be limited to the minimum quantity of water necessary to protect recreation, conservation, pollution abatement, navigation, or other public use.

The legislative intent to limit in-stream water rights to the minimum quantity of water necessary to support a public use is well illustrated by the statutory process through which in-stream water right certificates are issued. Under Oregon statutes, a certificate for an in-stream water right cannot be issued until the Director of the Water Resources Department has issued a final order approving the in-stream water right request. *See*, ORS 537.341; ORS 537.343; ORS 637.349. This is true regardless of whether the in-stream right is being established through a state agency request, transfer, lease, or allocation of conserved water. In every case, the Director must issue a final order in accordance with ORS 537.343.

The authority granted to the Director of the Water Resources Department in ORS 573.343 provides compelling evidence that the legislature intended for in-stream water rights to be limited to the minimum quantity of water necessary to support a public use. The statute provides:

1. A proposed final order issued under ORS 537.170(6) for an in-stream water right certificate may include any condition the Water Resources Director considers necessary, but which is consistent with the intent of ORS 537.332 to 537.360. The proposed final order may:
 - (a) Approve the in-stream water right for the quantity of water requested;
 - (b) Approve the requested in-stream water right for a lesser quantity of water; or
 - (c) Reject the requested in-stream water right.
2. If the director reduces or rejects the in-stream water right as requested, or conditions the in-stream water right, the director shall include a statement of findings that sets forth the basis for the reduction, rejection or conditions. The director shall be the final authority in determining the level of in-stream flow necessary to protect the public use.
3. After the director issues a final order approving an in-stream water right, the Water Resources Department shall issue a certificate for an in-stream water

Subsection (1) of ORS 537.343 provides the Director with discretion, in every instance, to approve, reduce and approve, or reject an in-stream water right request. An in-stream water right certificate cannot be issued unless the applicant has first obtained a final order from the Director of the Water Resources Department pursuant to ORS 537.343. *See*, ORS 537.341; ORS 537.349. Therefore, the Director is afforded, in every instance, the authority to “approve the requested in-stream water right for a lesser quantity of water.” *See*, ORS 537.343(2).

The Director’s authority to reduce every in-stream water right request is a strong indication the legislature intended in-stream water rights to be limited to the minimum quantity of water necessary to support a public use. The legislature would not have granted the Director authority to reduce in-stream water right requests if the legislature did not want to impose a limitation on the amount of water allocated to in-stream flows. In the absence of a limitation, there would be no reason to vest the Director with authority to reduce in-stream water right requests. As a review of the statutes reveals, the one and only limitation the legislature could possibly have had in mind was “the minimum quantity of water necessary to support the public use.” No other standard is evidenced or suggested by the statutes.

In addition, it is clear from the statutes that the legislature intended the limitation on in-stream water right requests to apply to all in-stream water right requests. If the legislature did not intend for the Director to limit all in-stream water rights requests to the minimum quantity of water necessary, the legislature would only have vested the Director with authority to reduce in-stream requests in certain cases. Instead, the legislature granted the Director authority to reduce all in-stream water right requests.

The legislative intention to limit in-stream water rights to the minimum amount necessary to support a public use is further revealed by subsection (2) of ORS 537.343. Subsection (2) provides that the Director shall be the “final authority in determining the level of in-stream flow necessary to protect the public use.” The

term “in-stream flow,” employed in ORS 537.343(2), is specifically defined as the “minimum quantity of water necessary to support the public use requested by an agency.” *See*, ORS 537.332(1). Thus, it is beyond dispute that the definition of “in-stream flow” manifests a legislative intention to limit in-stream water rights, requested by an agency, to the minimum quantity of water necessary to support a public use.

It may be suggested, however, that the definition of “in-stream flow” does not evidence a legislative intention to limit in-stream water rights established through transfers, leases, or allocation of conserved water to the minimum quantity of water necessary to support the public use in question. Such an argument would be based on the fact that the definition of “in-stream flow” references a public use “requested by an agency.” Under this view, in-stream water rights requested by someone other than a state agency are not subject to the limiting language contained in the definition of in-stream flow. An argument of this nature is unable to withstand objective analysis.

First, the term “in-stream flow,” as it is used in ORS 537.343, is immediately followed by the word “necessary.” The term “necessary,” which is used throughout the in-stream water right statutes, means “absolutely needed” in the context in which it is used and is suggestive of minimal, as opposed to optimal. *See Merriam Webster Online Dictionary*.

Second, the definition of “in-stream flow,” taken in context, fails to suggest that water rights requested by a state agency are limited to the minimum quantity of water necessary to support a public use and that in-stream water rights established by other mechanisms are not so limited. If this were indeed the legislative intent, the legislature would not have subjected all in-stream water rights to ORS 537.343 which grants the Director the discretion to reduce any and all in-stream water right requests and makes the Director the “final authority in determining the level of in-stream flow necessary to protect the public use.” Regardless of the precise meaning

of the term “in-stream flow,” the foregoing sentence is plainly limiting in nature and vests the Director with authority to reduce all in-stream water right requests in accordance with some limiting standard. As stated above, the “minimum quantity of water necessary to support a public use” standard is the only limitation appearing in the statutes. Therefore, a court reviewing the matter would be likely to conclude the one and only limiting standard expressed in the statutes was the standard the legislature had in mind when it vested the Director with authority to limit all in-stream water right requests. Therefore, it is appropriate to conclude that all in-stream water rights are limited to the minimum quantity of water necessary to support the public use in question.

Existing Administrative Rules Implement Statutory Policy

As discussed above, Oregon in-stream water right statutes limit in-stream water rights to the minimum quantity of water necessary to support a public use. In furtherance of this objective, current administrative rules, which are carried forward into the hearing draft at OAR 690-007-0015(4), provide:

If natural stream flow or natural lake levels are the source for meeting in-stream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system, except where periodic flows that exceed the natural flow or level are significant for the public use applied for. An example of such an exception would be high flow events that allow for fish passage or migration over obstacles.

As may be seen, OAR 690-007-0015(4) provides that in-stream water rights shall not exceed the estimated natural average flow except where periodic flows that exceed the natural flow are “significant” for the public use applied for. The existing rule indicates that a flow in excess of the estimated natural average flow is “significant” for the public use applied for, if for example, an excess flow would allow for fish passage or migration over obstacles. In accordance with this rule, a

two-prong analysis is currently used to determine the in-stream flow that should be allowed under an in-stream water right. If the in-stream flow requested is less than or equal to the estimated average natural flow, a lesser standard of review is employed and the requested flow will typically be granted. However, if the in-stream flow requested exceeds the estimated average natural flow, a heightened standard of review is employed and the requestor must demonstrate that the flow in excess of estimated average natural flow is “significant” for a public use.

Existing administrative rules do not prohibit in-stream water rights in excess of the estimated natural flow. Instead, existing administrative rules require showing that flows in excess of the estimated average natural flow are “significant” (i.e. necessary) for achieving the public use the in-stream water right is designed to serve. The purpose of the significance requirement is to prevent state agencies from systematically requesting in-stream water rights for more water than would be present in the stream absent of any appropriation, while still allowing state agencies to receive such water when quantities in excess of the estimated natural flow are the minimal quantity of water necessary to support the public use requested.

The need for the existing rule came to light in 1995 when Water for Life reviewed all of the completed in-stream water right technical reviews for Douglas, Lane, Curry, and Baker counties. The analysis demonstrated the Oregon Department of Fish and Wildlife had requested in-stream water rights for amounts that exceeded the estimated average natural flow in one or more months for 138 of the 155 applications reviewed (89%) Furthermore, the analysis demonstrated that the Water Resources Department had proposed granting the Oregon Department of Fish and Wildlife in-stream water rights in amounts equal to or greater than the estimated average natural flow in one or more months for 135 of the 155 applications reviewed (87%).

The current provisions found at OAR 690-077-0015(4) were adopted to end the WRD’s systematic practice of approving ODFW’s requests for optimal flows

rather than reducing ODFW's requests, in accordance with statute, to the minimum quantity of water necessary for the public use applied for.

Proposed Rules Conflict With Statutory Framework

The proposed rules set forth at OAR 690-077-0015(5) do not limit in-stream water rights established through transfer, lease, or allocation of conserved water to the minimum quantity of water necessary to support a public use. Instead, the rules create a presumption that flows in excess of the estimated natural flow are "significant" for a public use, and therefore permissible under OAR 690-007-0015(4), if certain conditions are satisfied, namely:

1. An excess flow has previously been requested by a state agency; and
 - (a) The stream is in an ODFW flow restoration priority watershed, or
 - (b) DEQ provides scientific information that increased flows will increase water quality and the stream is listed as water quality limited. See, OAR 690-077-0015(5).

The "conditions" set forth at OAR 690-007-0015(5) are designed to undermine and circumvent the requirement contained in OAR 690-007-0015(4) that flows in excess of the estimated natural flow must be "significant" for a public use. The fact that "conditions" set forth in OAR 690-007-0015(5) are designed to undermine and circumvent the requirement contained in OAR 690-007-0015(4) may be seen by considering the discussion of OAR 690-077-0015(4) in the preceding section. As that discussion reveals, ODFW systematically requests in-stream flows exceeding the estimated natural flow. In fact, a review of ODFW's administrative rules reveals that ODFW rules direct the agency to request in-stream water rights for optimal quantities of water rather than the minimum quantity of water necessary to support a public use. See, OAR Chapter 635 Division 400. Thus, ODFW's systematic requests for optimal quantities of water do not demonstrate, in any proper sense, that an individual's subsequent request for an in-stream water right in excess of the estimated average natural flow is the minimum quantity of water necessary to support the public use applied for. While ODFW is free to make

requests for optimal quantities of water for in-stream flows under its own administrative rules, the Director of the Water Resources Department is statutorily required to reduce such requests to the minimum quantity of water necessary to support the public use requested by the agency. *See*, ORS 537.343; ORS 537.332(2).

A rule effectively stating that the minimum quantity of water necessary to support the public use requested is the optimal quantity of water previously requested by ODFW in an ODFW restoration watershed is nothing more than a transparent effort to undermine and circumvent the statutory requirement that in-stream water rights be issued for the minimum quantity of water necessary to support a public use. The fact that a state agency has previously requested an optimal quantity of water on a given stream has no bearing on whether a subsequent request for an in-stream water right in excess of the estimated natural flow is justified on the grounds that it is the minimum quantity of water necessary to support the public use.

Likewise, the fact that an individual has requested an in-stream water right exceeding the estimated average natural flow in an ODFW restoration watershed has no proper bearing on whether the quantity of water requested is the minimum quantity of water necessary to support the public use. It does not inevitably follow that a quantity of water in excess of the estimated average natural flow is the minimum quantity of water necessary to support the public use simply because the stream in question is in an ODFW restoration watershed or because DEQ has provided scientific information that increased flows would improve water quality.

Considering the interrelationship between OAR 690-077-0015(4) and OAR 690-077-0015(5) of the hearing draft helps illustrate the point. Suppose ODFW makes a request for an in-stream water right in excess of the estimated average natural flow in an ODFW flow restoration watershed on June 1, 2006. It is subsequently determined that ODFW has failed to show that the request for an

excess quantity of water is “significant” for the public use applied for under OAR 690-007-0015(4). The Director of the Water Resources Department, in accordance with ORS 537.343, determines that a quantity of water slightly below the estimated average natural flow is the minimum quantity of water necessary to support the public use and issues a final order granting ODFW’s in-stream water right for this reduced amount.

On July 1, 2006, an individual decides to transfer a quantity of water exceeding the estimated average natural flow into an in-stream water right. The reach and public use in question are identical to the reach and public use associated with ODFW’s prior June 1st request. It is determined, in accordance with OAR 690-007-0015(5) of the hearing draft, that the individual’s request for excess water is “significant” for the public use because the individual’s request (a) does not exceed the maximum amount of in-stream water previously requested by ODFW (b) is for the same public use, and (c) the stream is in an ODFW flow restoration priority water shed. In this situation, is the Director exercising his authority under ORS 536.343, supposed to conclude that the individual’s request is for the minimum quantity of water necessary to support the public use even though the Director previously determined that ODFW’s June 1st request exceeded the minimum quantity of water necessary? Although illogical, this is indeed what the proposed rules seek to require.

As may be seen, the proposed rules are designed to obfuscate and circumvent the statutory requirement that in-stream water rights are to be limited by the Director to the minimum quantity of water necessary to support the public use. The proposed rules, designed to grant individual’s the ability to transfer more water in-stream than would be found in the stream in its natural and pristine state, clearly conflict with Oregon’s statutory framework and should be rejected by the Commission.

Final Note

Underlying the proposed language at OAR 690-007-0015(5) of the hearing draft is the implicit legal assertion that Oregon’s in-stream water right statutes impose limitations on agency requested in-stream water rights that do not apply equally to in-stream water rights created through in-stream transfers, leases, or allocations of conserved water. Under this theory, agency requested in-stream water rights are limited to the minimum quantity of water necessary to support the public use requested but other requests for in-stream water rights are not.

That the proposed rules embody this theory may be seen by examining the interrelationship between OAR 690-007-0015(4) and OAR 690-007-0015(5) of the hearing draft. The text set forth in OAR 690-007-0015(4) is an existing rule that has been carried forward. It currently applies to all in-stream water rights regardless of whether they are agency requested or established through in-stream transfer, lease, or allocation of conserved water.

If the Department’s proposed revisions are adopted, the operation of OAR 690-007-0015(4) will differ depending on whether the in-stream water right in question is agency requested or requested through in-stream transfer, lease, or allocation of conserved water. If the in-stream water right in question is agency requested, and the request is for a quantity of water exceeding the estimated average natural flow, the request will only be granted if the requesting agency demonstrates the excess water is “significant” for the public use in question. *See*, OAR 690-077-0015(4). If the in-stream water right in question is requested through in-stream transfer, lease, or allocation of conserved water, it will be presumed the excess water is “significant” for the public use in question if the “conditions” set forth in OAR 690-077-0015(5) are satisfied.

The differential treatment of agency requested in-stream water rights and in-stream water rights requested through in-stream transfer, lease, or allocation of conserved water suggests the Department is taking the view that agency requested

water rights are limited to the minimum quantity of water necessary to support the public use requested but other requests for in-stream water rights are not. Water for Life encourages the Department to consider the extent to which the proposed rules assert this legal position. For the reasons stated in the preceding discussion of Oregon's in-stream water right statutes, a rule implicitly based on a legal position of this nature would not be well founded.

Water for Life appreciates the opportunity to comment on the proposed rules amending OAR Chapter 690 Division 77.

Sincerely,

/s/

Helen Moore
Executive Director