

Oregon Water Resources Commission Meeting
July 10, 1998
Klamath Falls

Members

Nancy Leonard
Mike Jewett
John Frewing
Tyler Hansell
Ron Nelson
Dan Thorndike

Staff

Martha Pagel
Geoff Huntington
Diane Addicott
Tom Byler
Tom Paul
Bob Main
Dick Bailey
Rebecca Geisen
Dwight French
Del Sparks
Gary Ball
Dick Bailey
Bob Main

Others

Roger Bachman
James R. Ottoman
Kimberley Priestley
Jan Lee
Anita Ward

Written material submitted at this meeting is part of the official record and on file at the Oregon Water Resources Department, 158 12th Street NE, Salem, Oregon 97310. Audiotapes of the meeting are on file at the same address.

A. Commission Meeting Minutes

Minutes of the May 1998 meeting were offered for consideration by the Commission. Hansell asked that the draft minutes of the May 14, 1998, work session be corrected to refer to Dr. Jim Anderson consistently as "Dr." throughout the document. Nelson moved that the minutes be approved as corrected; seconded by Hansell. All approved.

B. Commission Comments

Hansell thanked those who planned and hosted the previous day's tour — it was very interesting. He said he has been asked to speak at the October 1998 annual Well Construction convention in Pendleton. In June, Hansell was confirmed by the Senate for reappointment to the Commission. He hopes the staff and Commission will consider future discussions of the definition of mitigation; ways to provide for increased water use, over time, in Oregon; the 30 million acre feet Columbia River reservation in the basin plan; and clarification of flow augmentation figures by the National Marine Fisheries Service. Hansell also suggested that the Commission consider special recognition to communities for their local water-related efforts and projects — all agreed

this would be a good idea.

Frewing received notice of the Fifth Biennial Governor's Watershed Enhancement Board Conference on Watershed Planning to be held in Ontario October 14-16. He hopes some staff members and Commissioners will be able to attend.

Nelson announced that Lisa Karnop-Nye has been hired as Executive Director of the Deschutes Basin Resource Conservancy. The Conservancy would like to be on the meeting agenda for the September Commission meeting.

Thorndike thanked Ron Nelson for his work on the Stewardship and Water Supply Workshop held July 2nd in Salem. He announced that next week in Medford there will be a ceremony for removal of the Jackson Street Dam; Secretary of Interior Bruce Babbitt is expected to attend.

C. Director's Report

Martha Pagel reviewed the previous day's work session and tour. An issue that came up at the work session was the need to coordinate with the state of California on Klamath Basin issues. Pagel said that outreach has begun — she met with representatives of the California Water Resources Department and the California Water Policy Control Board in Sacramento on June 19th. The California Water Resources Department is represented on the Klamath River Compact Commission by Bill Bennett; Bennett has also attended many of the Klamath Alternative Dispute Resolution sessions.

Pagel said she attended an interstate meeting in Seattle July 1st with state water department representatives from Washington, Idaho and Montana, and Donna Darm from NMFS, regarding the Columbia Basin flow augmentation program and the NMFS biological opinion.

Geoff Huntington gave an Oregon Plan update. A recent federal court decision ruled that NMFS's decision not to list coho salmon in the northern ESU was based on an insufficient record and an inadequate reading of the Endangered Species Act. Judge Stewart ruled that the Oregon Plan lacked adequate assurance that the measures being taken would provide for the long-term survival of the species proposed for listing. The judge was clear that she did not believe the Endangered Species Act allows for consideration of voluntary actions as a basis not to list a species — Huntington said this would take away a state's ability to management a recovery and restoration of a species on its own terms. NMFS must make a formal decision by August 3rd whether to now list coho in the northern ESU. The state of Oregon is appealing Judge Stewart's decision to the Ninth Circuit Court of Appeals. The immediate impact to the Oregon Plan is funding — approximately \$15 million would be funded from a timber tax assessment contingent upon a "no list" in the northern ESU. If there is ultimately a decision to list by NMFS, by statute the timber tax revenue will not be available unless there is a stay on the effect

of the opinion by the Ninth Circuit Court pending their review.

Huntington reviewed an agenda forecast for the September and November meetings with the Commissioners.

Pagel reported that a Stewardship and Water Supply workshop was held July 2nd in Salem. Information will be shared on the workshop during Agenda Item I of this meeting.

Pagel announced that Kent Searles, Eastern Region Manager, will be retiring the end of August. Charlotte Haynes, Administrator, Resource Management Division, has resigned to take a position with Oregon State University. Haynes will continue to work for the Department on a half-time basis through the summer. Dick Bailey, Administrator, Water Rights/Adjudications Division, will be acting administrator in Resource Management until that position is permanently filled. Dwight French, Manager of the Water Right Permits Program, will be the acting administrator in the Water Rights Division.

D. Model Rules for Procedure

Tom Byler, Director's Office, presented this report requesting the Commission adopt by reference the Attorney General's revised Uniform and Model Rules and amend OAR 690-01-005 to reflect that adoption. Two procedural rules for petitioners seeking stays of final orders in contested cases which have been appealed to the Court of Appeals would be excluded because of the automatic stay provision in ORS 536.075(5).

After discussion, Nelson moved for adoption of the Attorney General's September 1997 version of the Model Rules with the exception of OAR 137-03-090 to 137-03-092 and amendment of OAR 690-01-005 to reflect this adoption; seconded by Jewett. All voted approval.

Further into the meeting, this item came up again for discussion regarding the effective date of the Model Rules. Thorndike moved to rescind the vote previously taken and to consider adoption of the rules at a future meeting; seconded by Nelson. All voted approval.

E. Request for Waivers from Accuracy Standards for Water Use Reporting

Gary Ball, Field and Technical Services Division, presented this item for the Commission's consideration. Two requests for waiver from water use reporting accuracy have been received — one from Beaver Slough Drainage District; one from Fat Elk Drainage District.

To qualify for a waiver, a water right holder must show that complying with the accuracy requirement will cause economic hardship and the information submitted will not materially aid water management. Beaver Slough and Fat Elk Drainage Districts utilize unique inlet structures.

The cost associated with measuring and reporting on this type of structure would greatly exceed that of a traditional canal or ditch conveying a similar volume of water. In addition, the cost of reporting in comparison to the Districts' annual budget would impose a severe fiscal burden on the Districts. Staff believe the cost would cause the Districts economic hardship as defined by the Water Use Reporting rules.

The characteristics of a diversion structure based on tidal and river stage changes make flow measurement difficult and the Districts most likely could not meet the 15 percent accuracy reporting requirement. In addition, the potential for distribution to the affected reach of the Coquille River is extremely low so staff believe the Districts' measurement data would not materially aid water management for distribution purposes.

Public Comment

Kimberley Priestley, WaterWatch, said she is unfamiliar with the hydrology of this particular area and the measurements or technology. She urged the Commissioners, if they decided to grant the waivers, to adopt Alternative 2, Proposed Order B, as a temporary waiver to be reviewed by the Commission in five years, and that the Order be amended to require that a conservation and management plan be developed by the Districts. Perhaps in the future measurement and reporting might be necessary. (tape 2, mark 64)

Gary Ball asked the Commission to adopt Alternative 1 of the staff report, granting the waivers and requiring staff to review the local conditions every five years to determine if conditions have changed to the extent that the waivers should be rescinded. Hansell moved to adopt Alternative 1; seconded by Jewett. All voted approval.

F. Permit Extension Rules Briefing

Dwight French, Acting Administrator for the Water Rights Division, and Tom Byler, Legislation and Rules Coordinator, presented this update to the Commissioners. French distributed copies of the recently mailed notice of re-opening of the public comment period of these proposed rules.

The general intent of this rulemaking is to bring the rules into conformance with advice on the permit extension process received last year from the Attorney General's office. Written comments received during the initial public comment period indicated a wide range of concerns about the proposed rules. The re-opening of the public comment period will allow further discussion with the Commissioners and allow staff time to consider an alternative approach to the rules.

Major issues related to the proposed rules include time limits for an extension; good cause for granting an extension; public notice/comment and protest opportunity; and community water

supply concerns. French continued to explain changes made to the draft rules that were then available for public comment. Byler said that these newly-revised draft rules provide staff the flexibility to carry out the intent of the statute and the advice of the Attorney General. With adoption of these rules, the water rights staff could then begin processing pending applications. Pagel explained that this is a compromise — if no agreement is reached on the rules because of a significant disagreement about what the statute says, then agency policy would be developed based on a track record of decisions made on a case-by-case basis. Internal agency guidance would be the statute and the Attorney General's Advice.

Byler said staff are planning to establish a small focus group to help develop bill language that would create a task force to address community water supply issues. This focus group will work to provide some framework in terms of the goals and identification of issues among the variety of interest groups.

Public Comment

Kimberley Priestley, WaterWatch, said that in August 1997 WaterWatch strongly supported the Commission's direction to the Department to undertake this rulemaking on the entire gamut of extension issues. At that time, there was acknowledgment on all sides that this would be a contentious undertaking; that this rulemaking would not be easy and that consensus would probably never be reached. The rules that went to hearing reflect this. As expected, no one is entirely happy with the rules, but given the nature of extensions it would have been difficult, if not impossible, to get agreement. The rules necessarily had to reflect a compromise and they do. WaterWatch commends the Department for tackling these tough issues. Given this, WaterWatch is very disappointed with the Department shying away from the broader rulemaking that does address the hard issues. Priestley said the state is dodging the issues. The best place to make policy is in rulemaking. The Department most likely will face controversy on future extension decisions and would be in better shape to support their decisions if they did have rules backing those decisions. Given this, Priestley said WaterWatch is concerned with the revised version distributed this morning. This bare bones version is a step backwards — even the status quo is better than the bare bones version. Today without any changes to the rules or the statutes there is beginning construction within one year; a one year time limit on extensions and a five year time limit on municipal extensions; and while there is no clear provision for public involvement, there has been historical acknowledgment by the Department that others have an interest in extensions. With this newly-revised version, beginning construction is gone; the one year time limit on extension is gone; and there is no certainty on public involvement. The net result is that the permittee will be granted a huge expansion with regard to time to develop the project, while at the same time there will be much less opportunity for the public to be involved. WaterWatch believes this will have huge impacts on the resource. From a resource standpoint, this is a step in the wrong direction. If the Commission does approve today's version of the draft rules, WaterWatch asks that a more comprehensive public involvement process be included. Strong