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October 17, 2006

Oregon Water Resources Commission
c/o Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1266
ATTN: Rule Coordinator

Re: Comments of Miami Corporation in Response to Proposed Amendment of the Mid-Coast Basin Program (Oregon Administrative Rules Chapter 690, Division 518)

Miami Corporation ("Miami") submits these comments in response to a public notice (the "Notice") issued by the Oregon Water Resources Department (the "Department"). A copy of the Notice is attached as Exhibit A. The Notice seeks comments concerning proposed amendments to the Mid-Coast Basin Program that would reserve for multipurpose storage for future economic development the waters of three water sources (the "Amendments"). A copy of the Amendments is attached as Exhibit B. According to the Notice, written comments via mail, facsimile, or email must be received by 5 p.m. October 18, 2006. These comments are timely submitted.

The rulemaking on the Amendments stems from a request made by the city of Lincoln City (the "City") on September 20, 2005 pursuant to ORS 537.356 (the "Request"). A copy of the Request is attached as Exhibit C. On January 16, 2006, Miami timely filed written comments in opposition to the Request. Miami also provided written and oral testimony in opposition to the Request at the Oregon Water Resources Commission's (the "Commission") May 5, 2006 hearing in Hermiston, Oregon. Miami hereby incorporates its comments and testimony on the Request in these comments on the Amendments. A copy of Miami's comments and written testimony on the Request is attached as Exhibits D-F.

According to the Notice, the Request seeks "three reservations of unappropriated water for multipurpose storage for future economic development on two waterways tributary to Devils Lake and a tributary of the Salmon River north of Lincoln City." (*See* Notice at 2 (describing reservation request).) The tributary to the Salmon River that is the subject of the Request and the Amendments is the Treat River. The Request and the Amendments propose to reserve 1,250 acre-feet of unappropriated water from Treat River. (*See* Notice at 2 (describing Amendments based on Request).)

I. MIAMI'S INTEREST IN THE AMENDMENTS

Treat River, which runs through private property owned and actively managed by Miami as part of its commercial timberland operations, is one of the water sources on which the City seeks a reservation. In the Request, the City mentions that it has previously filed two water rights applications (S-73409 and R-73407) affecting Treat River (the "Treat River Applications"). However, the Request does not acknowledge that for over a decade the City and Miami have been parties to an unresolved contested case proceeding concerning the Treat River Applications, which, if approved, would give the City water rights necessary to construct an earthen dam and reservoir on Miami's property (the "Treat River Contested Case"). The City's decision not to inform the Commission of this important background and context is emblematic of the City's approach throughout its attempt to develop a municipal storage project on Treat River (the "Treat River Project").

Miami's experience protesting the Treat River Applications is the foundation for its interest in the Request and the Amendments. The Treat River Project would likely inundate 45 acres of Miami's timberlands and directly affect at least another 30 acres of Miami's timberlands through additional regulation under the Oregon Forest Practices Act (the "FPA") that would become applicable upon construction of a drinking water reservoir.[1] *See* OAR 629-620-0400 (FPA water protection rules for chemical applications). The construction of a reservoir to store water for human consumption also is likely to affect Miami's ability to actively manage the approximately 1,000-acre watershed of adjacent timberlands due to perceived concerns, founded or not, over water quality impacts to drinking water from timberland management operations.[2] (*See* map

[1] The City's reservoir application (R-73407) stated that it intended to construct a 116-foot earthen dam on Treat River that would inundate 33 acres and have a maximum depth of 102 feet. The City did not provide plans and specifications to support those statements, and Miami believes that the actual dam height would be closer to 120 feet and inundate approximately 45 acres, of which 43 acres are on Miami's property. (*See* Exhibit G.)

[2] The impacts of timberland management on water quality are complex and often uncertain. The same cannot be said for the regulatory impact of having a drinking water source near timberlands. The FPA and its regulations are most stringent when regulating the types of management allowed near such water bodies, and public concerns over the issue of water quality often extend to activities beyond the already significant and protective buffers and setbacks required by the FPA. Exhibit G demonstrates the effect of applying a 100-foot buffer around a

attached as Exhibit G.) Equally important is that Miami has a limited land base on which to conduct an economically viable forest products business, with few to no options for replacing property lost to a reservoir. The impact of the Treat River Project on Miami as a contributor to the local economy may well stretch beyond the direct loss of acreage to a drinking water reservoir. Finally, Miami also believes the Treat River Project (located near a fault line and on a sensitive stream system) would create an unacceptable risk to human life and cause unnecessary environmental damage. For these and other reasons, described in more detail below, Miami continues to oppose the City's plan to construct a dam and reservoir on its property, and specifically opposes the Amendments because, if adopted, they would facilitate those plans, and because they are inconsistent with the Commission's own policies and are not in the public interest.

These comments provide the Commission background and context not provided by the City in the Request. Miami argues that the Commission should not adopt the Amendments because there is insufficient evidence in the record to find that the Amendments are consistent with the Commission's policies, or that the Amendments are in the public interest, and Miami argues that whatever the outcome of this rulemaking, the Commission must restrain or condition its actions so as not to prejudice Miami's position in the Treat River Contested Case or any subsequent proceedings concerning Treat River.

II. THE TREAT RIVER CONTESTED CASE

As noted above, the Request does not acknowledge that the Treat River Applications are the subject of the unresolved Treat River Contested Case. Miami believes that the Commission should be fully informed of the issues and status of the Treat River Contested Case as it considers the Amendments, and Miami accordingly provides this summary.

On May 19, 1993, the City filed the Treat River Applications proposing to appropriate and store water for municipal use. The City's surface water right application sought to appropriate 9.0 cubic feet per second from the Salmon River for storage in an upstream reservoir on Treat River that would impound 1,250 acre-feet per year behind a 116-foot earthen dam. The Treat River Project would be constructed on lands owned by Miami and Dorothy Northrup; however, neither party had granted the City permission to use its property.

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drinking water source, OAR 629-620-0400(6), and the boundaries of the watershed likely affected.

On September 15, 1994, Miami filed comments opposing the reservoir application, stating that it would not allow the City to inundate its property and noting the City's failure to submit dam plans and specifications required by OAR chapter 690, division 11. On December 5, 1995, the Department issued Proposed Final Orders (the "PFOs") proposing to approve the Treat River Applications pending satisfaction of certain conditions, including the submission of plans and specifications for construction of the dam and an agreement with the Oregon Department of Fish and Wildlife ("ODFW") regarding fish screening and bypass devices.

In January 1996, the City and Miami both filed protests to the PFOs. The City protested the PFOs' conditions of approval related to both the submission of plans and specifications and the ODFW's mandated approval of fish screening and bypass devices. Miami protested the reservoir PFO on a number of grounds, including (1) the City's failure to obtain additional permits required to build the proposed reservoir and dam, (2) its failure to provide substantial evidence of available water for storage, and (3) its failure to obtain an easement or other permission to use Miami's property. In addition, Miami explained that it owns the land to be submerged by the reservoir, as well as the surrounding timberlands, which it holds and manages as a sustained-yield commercial tree farm and on which it conducts timber harvest operations. Approval of the City's proposed reservoir would inundate prime commercial timberlands that are critical to Miami's business operations. The proposed reservoir also had the potential to affect Miami's ability to manage as much as 1,000 acres of its remaining timberlands, because water quality concerns could be invoked to restrict or prohibit Miami's timber management and harvesting operations on the watershed surrounding the reservoir.

Mrs. Northrup also filed a protest of the reservoir PFO.[3] The City had proposed to construct the dam on her property just above her home. Mrs. Northrup expressed particular concern that the dam site lies along a fault line and, if constructed, the dam would pose an unacceptable risk to her home and life. (*See* map attached as Exhibit G.) As noted, the Treat River Applications did not include plans and specifications for the dam, much less an appropriate geological study to address Mrs. Northrup's concerns.

[3] Although Mrs. Northrup was not timely notified of the City's applications or the PFOs, upon learning of the contemplated reservoir and dam, Mrs. Northrup filed a protest of the reservoir PFO in March 1997. Her protest identified as errors and deficiencies in the PFO and PFO process the City's failure to notify Mrs. Northrup of the proposed project, the City's failure to submit final plans and specifications for the proposed project, the possible conflict with existing water rights, and other issues.

On March 19, 1996, Administrative Law Judge ("ALJ") Weisha Mize issued a Notice of Contested Case Hearing, scheduling a hearing on the parties' protests for September 12, 1996. The contested case hearing has since been postponed or rescheduled no fewer than eight times, frequently—and most recently—at the City's request. After the City's first request for a continuance on August 16, 1996, on the basis of a potential settlement with the protestants, many of the subsequent requests were premised on the City's claim that it was pursuing an alternative reservoir site on Rocky Creek in conjunction with the city of Newport. The City argued that a hearing on the Treat River Applications would be premature and a waste of judicial resources because the alternative site would eliminate any need to pursue the Treat River Applications. The ALJ granted each request for a continuance, and Miami agreed to the continuances because the City, through its attorney at the time, repeatedly represented that it would withdraw the Treat River Applications if it succeeded in securing the alternative site. (*See* example letter attached as Exhibit H.)

In 1999, while the contested case hearing was pending after the seventh continuance, the Oregon legislature passed House Bill ("HB") 2525, establishing a Hearing Officer Panel as a pilot project to hear contested cases from all but certain enumerated state agencies. Or Laws 1999, ch 849. The 1999 act required the Department to use hearing officers assigned from the Hearing Officer Panel to conduct contested case hearings. *Id.* § 9(1). The Department was also required to transfer to the Hearing Officer Panel "the permanent employees in the regular service of the [Department] whose job duties involve the conducting of contested case proceedings." *Id.* § 17(1). In addition, on the operative date of the act, the chief hearing officer for the Hearing Officer Panel was to assign hearing officers "to continue the conduct of and conclude proceedings pending on the operative date" of the act. *Id.* § 18.

In 2003, the legislature eliminated the sunset provision of the 1999 act, changed the name of the panel to the Office of Administrative Hearings (the "OAH"), and required all state agencies, except those now listed in ORS 183.635, to delegate responsibility for the conduct of a contested case hearing to an ALJ assigned from the OAH. HB 2526, Or Laws 2003, ch 75, § 6. HB 2526 became effective on May 22, 2003. The Department is one of the agencies required to use ALJs from the OAH.

Since the legislature created the OAH, the City has not caused the Treat River Contested Case to be heard. The City has made no effort to prosecute the case since the last continuance it requested expired on December 27, 2002. This inattention to the case raises additional procedural issues and may ultimately require dismissal of the Treat River Contested Case and denial of the Treat River Applications. In addition, it is unclear from Miami's records or the

Department's records whether the Treat River Contested Case was ever properly assigned to the OAH. *See* Letter from Mike Reynolds, Protest Program Coordinator for the Department, to Maurice L. Russell, II, Presiding Administrative Law Judge (Mar. 15, 2006) (attached as Exhibit I); Letter from Greg D. Corbin, attorney for Miami, to Maurice L. Russell, II (Mar. 24, 2006) (attached as Exhibit J). Nothing in those records demonstrates that the Department ever requested that the OAH hear the case, and according to the Department, the OAH has no record of the Treat River Contested Case. Nevertheless, the most recent continuance in the record, setting the hearing date for December 27, 2002, is captioned as being from the OAH, and is signed by ALJ Mize.

To date, the Department has been unable to determine the procedural status of the Treat River Contested Case. (*See* Exhibit I.) ALJ Mize has retired, making resolving questions concerning the status of the Treat River Contested Case more difficult. Notwithstanding the procedural uncertainties surrounding the status of the Treat River Contested Case, the underlying substantive issues remain. Miami's protest of the proposed reservoir and dam is unresolved and presents more than one valid basis for rejecting the Treat River Applications.

III. THE SETTLEMENT

In August 2005, the Department and the City, among others, entered into a Supplemental Settlement Agreement (the "Settlement") that resolved protests concerning applications for municipal use of Drift Creek (the "Drift Creek Applications"). Although much of the Settlement is devoted to resolving specific issues raised in the protests to the Drift Creek Applications, the Settlement also includes an agreement that the City will study ways to make its water use more efficient, anticipates the creation of a Municipal Water Management and Conservation Plan by the City, and includes an agreement by the City "to construct and put into operation an additional two million gallons of water storage by December 31, 2020." (Settlement ¶¶ 19, 20, 22, at 10-11.) The two million gallons of water storage is in addition to another two million gallons of storage that the City agreed to construct in the Settlement Agreement that the Settlement supplements. Thus the City has agreed to construct four million gallons of storage in an as-yet-unspecified location.

Miami was not invited to participate in the negotiations on the Settlement. Accordingly, Miami is not a party to the Settlement,[4] and the Settlement does not resolve the Treat River Contested

[4] The parties to the Settlement are the City and Kernville-Gleneden Beach Water District (collectively, the "Applicants"), Water Watch of Oregon, Oregon Council of Trout Unlimited,

Case. However, as part of the Settlement, the parties agreed that the City would request that the Commission reserve for multipurpose storage for future economic development unappropriated water of three water sources: Rock Creek, Side Creek, and Treat River. (Settlement ¶¶ 25, 27, at 12-13.) The City further agreed that if the Commission established the reservation as requested, then the City would withdraw the Treat River Applications. (Settlement ¶ 25, at 12.) The Protestants agreed to support the Request for Treat River, and the Department agreed to recommend that the Commission approve the Request and initiate this rulemaking. (Settlement ¶ 30, at 13.) In its comments in opposition to the Request, Miami argued that the Department's role in the Settlement tainted that proceeding by removing the Department from its traditional role of advising the Commission on actions it is asked to consider—here, whether to initiate this rulemaking. The Settlement obligated the Department to support the Request, thus restricting its ability to present a full analysis of the Request and Miami's comments in opposition to the Request.[5]

Miami believes the Commission should be troubled by the Settlement. First, the agreements made in the Settlement concern areas in which none of the parties own or appear to have any interest in the property affected. Specifically, the parties agreed, without consulting any affected landowner, to support the Request and the Amendments. As discussed elsewhere in these comments, at least with respect to Miami and the Treat River, the Amendments target property owned by Miami and may ultimately have a direct economic impact on Miami. Second, the Settlement, without input from or the assent of Miami, includes an agreement to resolve the Treat River Contested Case. The City and the Department would have the Commission believe that this agreement is a positive feature of the Settlement because it disposes of an outstanding contested case and leaves for another day consideration of storage on Treat River. However, it is far from certain that the City can unilaterally withdraw the Treat River Applications and dismiss the Treat River Contested Case. As discussed above, the procedural status of the Treat River Contested Case is uncertain, and there may be grounds for prejudicial dismissal of the Treat

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Northwest Environmental Defense Center, Salmon Drift Creek Watershed Council, Confederated Tribes of the Siletz Indians of Oregon, MidCoast Watersheds Council, and three individuals: Paul Katen, Wayne Hoffman, and Diane Henkels (collectively, the "Protestants"). Signatories to the Settlement are the Applicants, the Protestants, the Department, and ODFW.

[5] According to the Department, it is not similarly restricted in its ability to analyze the record for and against the Amendments. Miami would welcome a full analysis of the Amendments, the points Miami raises in these comments, and the public interest review of the Amendments required by ORS 537.358(1).

River Contested Case that supersede a withdrawal of the Treat River Applications. Moreover, a withdrawal of the Treat River Applications would require the Department to resolve the issues about the status of the Treat River Contested Case. Miami, as a party, necessarily must be involved in the resolution of the Treat River Contested Case and will participate to protect its interests and rights in that proceeding.[6] Thus it is more likely than not that considerable effort and resources will be required to resolve the Treat River Applications and the Treat River Contested Case, making the value of the Settlement to conserve resources questionable at best.

IV. THE REQUEST

The Request continues a pattern of obfuscation and incomplete analysis endemic to the City's approach to developing the Treat River Project. In the Treat River Applications, the City attempted to gloss over significant risks posed by the Treat River Project. In the Request, the City completely passes over the existence of, and the issues raised in, the Treat River Contested Case. Nearly every section of the Request ignores important information the Commission must consider to adopt the Amendments. The Request's thin treatment of important issues is particularly troubling given the scope of the water reservations proposed in the Amendments and the potential impact adopting the Amendments would have on private property owners and the public interest. The City is understandably concerned about securing an adequate water supply to meet projected growth in and around the City. Yet the City's need to plan for the future is not in itself a justification for reserving water, and the Request does not create a record on which the Commission can find that the Amendments are consistent with the Commission's own policies, or that the Amendments are in the public interest.

V. THE AMENDMENTS

The Amendments, if adopted by the Commission, would add to OAR 690-518-0020 the following language related to the Treat River:

> "(3) The water of the following streams are reserved for multipurpose storage for future economic development as allowed under ORS 537.356 with a priority date of May 5, 2006:

[6] Miami also must assent to an informal resolution of the Treat River Contested Case. ORS 183.415(5)(b) ("Any informal disposition of a contested case, other than an informal disposition by default, must be in writing and signed by the party or parties to the contested case.").

"* * * * *

"(b) A reservation of 1,250 acre-feet of unappropriated water from Treat River, tributary to Salmon River."

Proposed OAR 690-518-0020(3)(b).

In considering whether to adopt the Amendments, the Commission must keep in mind the regulatory and statutory restrictions on its ability to adopt such rules. First, the Commission has mandated that it only adopt rules compatible with its own State Water Resources Policy. *See* OAR 690-400-0000(1)(c) (Commission shall adopt rules compatible with State Water Resources Policy in divisions 400 and 410). Second, in reserving water for future economic development, the legislature requires the Commission to determine that the rule is in the public interest. ORS 537.358(1). Failure to adopt a rule in compliance with these mandates may invalidate the rule. *See, e.g.,* ORS 183.400(4)(b) (court may invalidate rule that exceeds statutory authority); *Gilliam County v. Dept. of Environmental Quality*, 316 Or 99, 106, 849 P2d 500 (1993); *Kids Against The Cut v. Wage and Hour Comm.*, 41 Or App 179, 183-84, 597 P2d 1264 (1979) ("ORS 183.400 (3)(b) provides that we shall declare a rule invalid if it 'exceeds the statutory authority of the agency.' Because the Commission did not make the determination required by [the statute], we conclude its amendment to [the rule] exceeded its statutory authority."). As is discussed below, the record for this rulemaking does not allow the Commission to find that the Amendments are compatible with State Water Resources Policy or in the public interest.

A. The Amendments Are Not Compatible with the Commission's Policies.

The Commission should consider carefully the information provided in the Request, in Miami's comments and testimony on the Request, in these comments, and in any other comments submitted, all in the context of the Commission's State Water Resources Policy.[7] OAR

[7] The Request is organized around the information requirements of OAR chapter 690, division 79. *See* OAR 690-079-0060. Division 79 is titled "Reservations of Water for Future Economic Development." These rules, which were last amended in 1993, were drafted to implement the reservation statute then in effect, *former* ORS 537.356, and do not recognize the ability of a local government such as the City to make a reservation request. OAR 690-079-0010(1) (division 79 rules establish "the procedure for *state agencies* to request reservations of water for future economic development" (emphasis added)). In 1997, the Oregon legislature amended ORS 537.356 to allow local governments to request reservations. Oregon

690-400-0000(1)(c). In particular, the Commission must find that the Amendments are compatible with the Commission's water storage policies. OAR 690-410-0080. It is the Commission's policy that the state will reserve unappropriated water for future economic development for "high priority" storage projects. OAR 690-410-0080(2)(c). To be "high priority," a project must "protect and enhance the public health, safety and welfare, and the state's natural resources." OAR 690-410-0080(2)(d). Moreover, in analyzing the Amendments, the Commission should look to its own criteria for evaluating storage projects, which include the following factors:

> "(A) Purpose (e.g., type, location and extent of use, benefits);
>
> "(B) Legal (e.g., state, federal and local legal requirements);
>
> "(C) Social (e.g., recreational, public support, cultural, historic);
>
> "(D) Technical (e.g., siting issues, public safety and structural integrity);
>
> "(E) Financial (e.g., project financing including site costs, cost sharing and repayment, and operating, maintenance and rehabilitation costs);
>
> "(F) Economic (e.g., project benefit/cost analysis);
>
> "(G) Land use (e.g., ownership, comprehensive plans, coordination);

Laws 1997, ch 445, § 1. The division 79 rules, which contemplate a contested case process for reservations of water, are now out-of-date and do not apply to the Request. Miami understands from conversations with Department staff that the Commission now uses its rules for amending basin plans, OAR chapter 690, division 500, to reserve water for particular uses. This process is governed largely by the rulemaking provisions of the Oregon Administrative Procedures Act (the "APA"), ORS 183.325-183.355. *See* ORS 536.027(1) (Commission to adopt rules in accordance with APA).

> "(H) Environmental (e.g., impacts on streamflows, fisheries, wildlife, wetlands, habitat, biological diversity, water quality and opportunities for mitigation);
>
> "(I) Other (e.g., direct and indirect impacts)."

OAR 690-410-0080(2)(g). Miami believes that the record is insufficient for the Commission to find that the Amendments are compatible with these policies. What is more, Miami urges the Commission to find that the Amendments, at least with respect to Treat River, specifically are incompatible with the Commission's water storage policies.[8]

1. The Record Does Not Support the Commission Finding a Need for or Purpose of a Treat River Reservation.

The record does not demonstrate a sufficient need or purpose for the Treat River reservation. The Request does nothing more than paraphrase the purpose of the reservation statute, ORS 537.356; that is, to provide anyone, including the City, the ability to apply for a water right at some future date for multipurpose storage, and nothing in the record to date provides any additional rationale for the Amendments. What is more, the City's benign statement of purpose

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[8] The Commission also should consider whether the Amendments are consistent with current legislative policy on municipal water development. In particular, the Commission should consider the Amendments in light of the legislature's passing of HB 3038, which extends from five to 20 years the time a municipality has to develop a municipal water right permit. As the Commission well knows, municipalities tend to plan their water needs on horizons of 20 years or more, and often desire to establish priority to water that they cannot develop within five years. After HB 3038, if the City were to apply for and obtain a municipal water right permit, it would establish its priority to the water and have 20 years in which to develop the works necessary to perfect the water right. Even if 20 years were not enough, the City could extend the permit. Thus, under current law, the City could apply for a water right permit and have 20 years or more to implement its water development plans. In light of this change in the law and the legislature's policy decision to grant municipalities the breathing space they need within the water right permit process, it is questionable whether the Request provides any benefit to the City. On the other hand, not pursuing the Request has the distinct benefit of relieving the Commission, the Department, and the public of the need to expend considerable resources in a public rulemaking for what is essentially a private request.

in the Request obscures what arguably is its true purpose: to lay the foundation for the City to develop a single-purpose municipal storage project on Miami's property. *See* OAR 690-410-0080(2)(h) (multipurpose storage is preferred over single-purpose storage). Indeed, it stretches the imagination too far to think that the City would expend resources to reserve water it does not see as important, if not critical, to its development plans. The Commission must reject the Amendments because the record is insufficient to justify the need and purpose for the Treat River reservation.[9]

2. The Record Fails to Inform the Commission of Significant Legal Issues.

The record is completely silent when it comes to legal issues facing development of a storage project on Treat River. As Miami's comments on the Request demonstrate, the City, or any other applicant, will face significant legal issues in attempting to develop a storage project on Treat River. For example, the Treat River Contested Case will need to be resolved, and Miami will oppose any application filed to develop a similar project. Also significant is that Miami, which owns the majority of the property on which a Treat River storage project would most likely be constructed, will not grant rights to the land for that purpose. That means any party attempting to develop a storage project on Treat River will need to condemn the property. Moreover, such party must obtain a variety of permits and approvals to site and construct a reservoir, including water rights, ODFW and Department of Environmental Quality approvals, Army Corps of Engineers permits, county land use approvals, and possibly federal Endangered

[9] In its comments on the Request, Miami set forth some of the information the City might provide to justify the Request. Specifically, Miami suggested that the City should analyze how the Treat River reservation fits with its projected municipal water needs and larger municipal water development plans. As Miami noted, the Settlement makes clear that the City is pursuing many other development options, and the City has committed to studying ways to increase water efficiency and to developing a Municipal Water Management and Conservation Plan. Yet the Request provides no information on how the Treat River reservation fits with these plans in terms of the benefits it will provide, when the City might need the reservoir contemplated by the Request, and to what extent Treat River is necessary to meet the City's projected water requirements. Miami urged the Commission to require the City to provide that information for the Commission, and the public in this rulemaking, to evaluate whether the Request is consistent with the Commission's policies and in the public interest. To date, no additional information on these points has been submitted to this record, making it impossible for the Commission to find that there is a sufficient need or purpose for the Amendments.

Species Act permits. Other approvals may also be required. Miami, and possibly other landowners and public interest groups, will oppose these permits and approvals. Thus it is clear that the City, or any applicant, will face significant legal hurdles to take advantage of a reservation of Treat River water. The Commission should consider whether it is in the state's interest to reserve water where such opposition and clear legal hurdles exist.

3. The Record Is Silent Regarding Public Support and Other Cultural Issues.

The record is silent on whether a multipurpose storage project on Treat River has public support or must address other cultural issues. For example, the Request provides no information about how a reservation on Treat River is viewed by landowners and residents affected by the Amendments. With respect to Treat River, in addition to Miami's opposition, it is likely that the dozens of residential landowners and businesses downstream on Treat River and Salmon River would have pointed views about the Amendments and the possibility of a dam built near a fault line upstream of their homes and property. The Commission does not have the benefit of those views, however, because the City has not informed those interested parties of the Request or attempted to gauge public support for the Request. Nor has the City or any other party provided such information for the record in this rulemaking. The Commission cannot find that there is any support, other than the City's, for the Amendments.

4. The Record Fails to Inform the Commission of Significant Technical Issues.

As mentioned above, the location identified in the Amendments for a Treat River reservation is the same location identified in the City's Treat River Applications. Also as mentioned above, that location lies near a fault line that poses a significant technical issue with respect to dam construction. The record for the Amendments does not provide the Commission with enough information to evaluate the technical challenges of constructing a storage project pursuant to the reservation proposed in the Amendments. Where, for example, would an applicant divert water for the reservoir? The Treat River Applications identified a point of diversion downstream on Salmon River. In addition, how would the City deliver water to its municipal system miles away? Will it need to construct a pipeline? If so, what would be the size, route, and technical challenges, not to mention the legal and economic feasibility, of doing so? These are just some of the technical issues that the City did not address in the Treat River Applications, that it did not address in the Request, and that are missing from this record. The Commission cannot adopt the Amendments on a record devoid of such details.

5. The Record Fails to Establish That Storage on the Treat River Is Financially Feasible or Will Provide Economic Benefits.

The record fails to justify the use of Treat River for multipurpose storage with respect to financial feasibility and economic benefits. To fully appreciate this failure, it is important to understand the significant costs and hurdles the City or any other applicant would face in developing a water storage project on Treat River. Of course, any project of such magnitude would be expensive and include the cost of designing, constructing, and maintaining a reservoir. The cost of the Treat River Project, however, is likely to far exceed these normal costs due to opposition and technical challenges.

The cost of a storage project on Treat River will be higher than normal because it is certain that such a project will be opposed at every step. As Miami's and Mrs. Northrup's protests of the Treat River Applications demonstrate, any such application will be opposed, and any applicant will be required to address serious concerns, including whether storage on Treat River is in the public interest, is protective of the environment and fish, and does not pose an unacceptable risk to human health and safety. Moreover, because Miami opposes a storage project on its land, only a government with condemnation authority (*i.e.*, the City) can obtain the land rights necessary to develop such a project. This would require condemning not only the specific dam site and lands to be inundated by the reservoir (45 acres), but also buffers required by the FPA (30 acres at 100 feet), possibly other surrounding lands to secure and maintain the reservoir site, additional lands to ensure appropriate water quality for a drinking water source (1,000 or more acres of the watershed), and possibly lands downstream of the dam and reservoir on Treat River and Salmon River in response to dam safety concerns. (*See* Exhibit G.) The value of such lands, given that they are either residential properties with homes, local businesses, or highly productive commercial timberlands, will represent a significant project cost. The project will be made more expensive by the certain contentious nature of judicial condemnation proceedings. Additional costs will be incurred at each stage of permitting a storage project in the location identified in the Request. For example, constructing a dam that ensures public safety near a fault line may be prohibitively expensive. The record provides no information on these costs for the Commission to evaluate.

Even assuming that the City could absorb the cost of constructing such a storage project, the record contains no information on whether doing so is economical when compared to other water development options available to the City. As an example, in 1994, CH2M HILL completed an environmental feasibility analysis on four water supply options for the City (the "EFA").

Memorandum from Dan Heagerty & Bob Fuller, CH2M HILL, to John McKevitt, Lincoln City Public Works Department (Feb. 2, 1994). The EFA concluded that, of the available storage sites, Side Creek was most feasible, and that the Treat River reservoir "[s]hould not be advanced at this time." *Id.* at 6. The EFA reveals that, because of the distant location of the Treat River reservoir, the City could lose up to 25 percent of its water in transmission alone. Similar losses would not occur at the Side Creek reservoir. The EFA also indicates that the Treat River reservoir would "present relatively high costs for water treatment and delivery." *Id.* at 3. A cost-benefit analysis of developing storage on Treat River would be highly valuable to the Commission and the public, but the record does not contain any information on which such an analysis could be made.

6. The Record Fails to Address Significant Environmental Issues.

The record is also silent concerning environmental impacts of a storage project on Treat River and Salmon River. Miami and ODFW have raised environmental concern over the Treat River Applications, and nothing in the Request or this rulemaking record suggests that similar concerns would not exist in any subsequent application. In particular, the impact of a storage project on resident and anadromous fish populations in Treat River and downstream in Salmon River must be considered. Clearly, the potential environmental damage from dam failure must be addressed. There also may be significant terrestrial environmental concerns associated with inundating forest lands to create a reservoir. The Commission cannot find, on this record, that the Amendments address significant environmental issues.

7. Granting the Request May Waste Scarce Resources.

Finally, in the "other" category of factors the Commission should consider, it is important to recognize that adopting the Amendments may waste resources of the Commission and the Department that would be better spent on other important water resource matters. That is so because the Request and the Amendments, with respect to Treat River, are little more than an attempt by the City to sidestep the Treat River Contested Case and enlist the Commission in the City's plan to secure by rule what it has not secured through the Treat River Applications and the Treat River Contested Case. This is evident in the terms of the Request and the Amendments. For example, the Request and the Amendments would set aside the exact amount of water (1,250 acre-feet) that the City seeks in the Treat River Applications.[10] (Request at 2.) The Request also

[10] Section 1 of the Request sets forth certain "Terms and Conditions of the Requested Reservations," including: "A reservation of 1,250 acre-feet of unappropriated water from Treat

identifies the potential location of any application the City would file after a reservation as the same location identified in the Treat River Applications. (Request at 4.) Most telling, however, is that the Request, and the Commission's adoption of the Amendments, is directly tied to the City's agreement in the Settlement to withdraw the Treat River Applications. No leap of logic is required to understand that the City is looking to have the Commission establish by rule a placeholder for the Treat River Project.

Finally, the Commission should consider the Amendments while fully aware that adopting the Amendments will not settle the issues with respect to developing storage on Treat River, and will only postpone for another day a contested case on such a project. It is certain that Miami, and possibly others, would contest any subsequent application to construct a reservoir in the location identified in the Request. The result is that no matter how the Commission acts with respect to the Amendments, it is likely the ultimate decision over development on Treat River will be made in a contested case, and much of the analysis and expenditure of resources in the Treat River Contested Case and in this proceeding will be duplicated.

B. The Amendments Are Not in the Public Interest.

The Commission must determine that the Amendments are in the public interest.[11] Oregon law requires that in adopting a rule to reserve water for future economic development, the Commission must consider the "public interest review * * * factors described under ORS 537.170." ORS 537.358(1). Those factors include:

River, a tributary to Salmon River, for multipurpose storage for future economic development." (Request at 1-2.) Application R-73407 to construct a reservoir on Miami's property seeks to impound 1,250 acre-feet of water.

[11] Contrary to the assertions of the City, this rulemaking requires an assessment of whether the reservation is in the public interest. In response to Miami's comments on the Request, wherein Miami calls into question many of the factors contributing to an assessment of the public interest, the City replies that "the comments made [in] Miami's letter are inappropriate for the reservation request proceeding and, if they should be raised at all, should be raised in subsequent water rights applications before OWRD." (*See* Exhibit K.) The City is correct in that public interest review is a necessary element of any water right application. However, despite the City's wish to forgo that review in these proceedings, it is a necessary, and legally mandated, prerequisite to granting reservations of water for future economic development. ORS 537.358(1).

> "(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
>
> "(b) The maximum economic development of the waters involved.
>
> "(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
>
> "(d) The amount of waters available for appropriation for beneficial use.
>
> "(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
>
> "(f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.
>
> "(g) The water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534."

ORS 537.170(8).

The following subsections highlight areas in which Miami believes the Amendments do not satisfy the public interest factors outlined above. For that reason, the Commission must reject the Amendments. These comments are by no means exhaustive, however, and Miami urges the Commission to be probing as it considers the Amendments.

Before turning to the specific public interest factors, Miami underscores the necessity and scope of the public interest review required by ORS 537.170. As the City points out in its reply to Miami's comments to the Request, the reservation process does not, in itself, create water rights. However, underpinning Miami's comments is its belief that by reserving water with a priority date, the Commission creates an incentive for the City to develop water storage on Treat River.

As water becomes increasingly scarce on the Oregon coast, the City and other coastal communities must move to develop the water available, and a reservation makes the water of Treat River available for such a purpose. Indeed, by its own admission, the City is using the reservation of water to "ensure that it leaves all of its long-term supply options open." (*See* Exhibit K.) And because the reservation under ORS 537.356 sets a priority date and appropriates water for a particular purpose, it tends to cement the City's path toward developing on Treat River, certainly as compared to other options for which a reservation is not in place. Although Miami appreciates the City's need to plan for its future water needs, the Commission cannot adopt the Amendments without satisfying the public interest standards of ORS 537.170. Moreover, the Commission's assessment of the public interest must necessarily consider the ramifications of development likely as a result of the reservations proposed in the Amendments. In this respect, the Commission should consider carefully the policy it wishes to announce with respect to a municipality using the reservation process to set aside water outside its jurisdictional limits. Treat River is approximately 13 miles from the City. If it is appropriate for the City to seek a reservation of water that far outside its jurisdiction, why not 25, 50, or 100 miles away? Miami submits that this reservation request requires the Commission to address when a reservation request falls outside the public interest because it is too remote from the ultimate point of use. Miami respectfully suggests that a sliding scale should apply, so that as a municipality moves farther from its jurisdiction and water delivery territory, the burden increases to justify the reservation.

1. The Amendments Fail to Maximize Economic Development.

The record does not demonstrate that the Amendments will maximize economic development. On the contrary, the Amendments may in fact hinder development. As highlighted above, any reservation would have a chilling effect on future economic investment. Potential water users face the ominous threat of the City exercising its right to develop water storage on behalf of the municipality, cutting off otherwise junior water rights. Investors cannot be expected to pursue substantial development in projects requiring water when water availability is vulnerable to the needs of a growing municipality. The water reservation in the Amendments threatens to stymie economic development in the Treat River area.

Of more immediate effect, the Amendments create uncertainty for Miami's operation of its commercial timberland and may create a disincentive to maximize economic development of Miami's property for that use. Timber production and harvest are long-term ventures that require planning and execution over decades. The Amendments make more likely that the City will attempt to develop a storage project on Treat River within the time frame of a timber growth

and harvest cycle. If the Commission adopts the Amendments, Miami will need to consider carefully whether to continue investing in that property as productive commercial timberland, which currently is its highest and best use. Thus, by adopting the Amendments, the Commission may actually create an incentive to convert the use of Miami's property away from commercial timber production.

2. The Amendments Fail to Conserve the Highest Use of the Water for All Purposes.

The Amendments fail to conserve the highest use of Treat River for all purposes. Among other things, ORS 537.170(8)(a) calls for the "protection of * * * wildlife * * * or any other beneficial use to which the water may be applied for which it may have a special value to the public." Treat River is a tributary to Salmon River, a water body supporting endangered salmon and steelhead. Endangered species have a special value to the public. The increased temperature, turbidity, and sedimentation of the river resulting from reservoir water releases on Treat River could have adverse impacts on fish, contrary to the public interest. The record does not reveal the impact on endangered species likely to result from a storage project on Treat River.

3. The Amendments Will Result in Wasteful, Uneconomic, Impracticable, or Unreasonable Use of the Waters.

Development of Treat River as a storage site is both impracticable and unreasonable. There is evidence that the Oregon coast is particularly prone to earthquakes and associated tsunamis. In 1993, the Cascadia Subduction Zone was discovered, and western Oregon was upgraded from Seismic Zone 2B to Seismic Zone 3, indicating a potential of earthquakes up to magnitude 9 on the Richter Scale occurring, on average, every 500 years. The most recent such earthquake occurred more than 300 years ago.[12] Many of the environmental studies commissioned by the

[12] *See* The Cascadia Region Earthquake Workgroup, *Cascadia Subduction Zone Earthquakes: A Magnitude 9.0 Earthquake Scenario* (2005) (attached as Exhibit L). The Cascadia Region Earthquake Workgroup ("CREW") is a "partnership of the private and public sectors, created to help our area prepare for earthquakes." *Id.* at tit p. CREW includes, among others, the Boeing Company, the University of Washington, the U.S. Army Corps of Engineers, Public Safety and Emergency Preparedness Canada, and the U.S. Geological Service. CREW stresses that "magnitude (M) 8 to 9 earthquakes have occurred in our region, and will occur again, on average, every 500 years." *Id.* "The last one was January 17, 1700." *Id.* at 2.

City predate the recognition of seismic vulnerability on the Oregon coast. The destruction resulting from a reservoir breach triggered by an earthquake could be devastating, particularly to downstream homeowners. As evidenced by the CREW study, *supra* note 12, this is a very real threat and deserves the Commission's attention. Development of a large-capacity reservoir in the Treat River basin is contrary to the public interest, yet the Amendments focus the City's efforts in precisely that direction.

Further, the distant location of the Treat River reservoir site would result in the wasteful use of state waters, contrary to the public interest as defined in ORS 537.170(8)(b).[13] As previously discussed in 1994 CH2M HILL completed the EFA. The EFA concluded that the Treat River reservoir "[s]hould not be advanced at this time." The EFA reveals that, because of the distant location of the Treat River reservoir, the City could lose up to 25 percent of its water in transmission alone. The EFA also indicates that the Treat River reservoir would "present relatively high costs for water treatment and delivery." As highlighted above, the water reservation will stymie subsequent economic development, yet the development, per the City's own study, is unwise.

4. The Amendments Are Contrary to the Public Interest Generally.

Miami has a particular interest in the outcome of these proceedings in that the Amendments threaten to vaporize more than a decade's worth of work in the Treat River Contested Case opposing the City's efforts to develop a large single-purpose storage facility on Miami's lands. The only incentive the City has to bring those proceedings to a head is its interest in preserving the Treat River Applications' priority date. The Amendments eliminate that incentive. Does the Commission have reason to believe that what is not in the public interest today will one day become so? If not, why force a repeat performance? In the event that the City decides to

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CREW's publication, *Cascadia Subduction Zone Earthquakes*, outlines the devastating scenario facing Oregon when another M9 earthquake strikes.

[13] Again, the water reservation, in and of itself, does not allow development of storage rights on the Treat River. However, it is Miami's view that the reservation focuses the City's efforts and outlines the path of future development. The City will be forced to press for storage development in locations with water available to appropriate. The Treat River is one of three reservations made by the Amendments. At the very least, the reservation encourages the *pursuit* of unwise and impracticable development.

develop its reserved water rights on the Treat River pursuant to the Amendments, Miami will oppose those efforts vociferously—again.

VI. EFFECT OF THE AMENDMENTS ON THE TREAT RIVER CONTESTED CASE

Miami respectfully cautions the Commission not to act in these proceedings in a way that prejudices Miami's position in the Treat River Contested Case, or prejudges any issues that might be raised in a challenge to any application filed after a reservation. Miami's concern stems from the parallels between the issues raised in the Treat River Contested Case and those the Commission must consider in a rulemaking to reserve the water of Treat River. For example, Miami has raised significant technical, health and safety, environmental, and public interest issues in the Treat River Contested Case. As is discussed above, the Commission necessarily must consider those same issues to evaluate the Amendments. However, it is important to note that in the Treat River Contested Case those issues are focused on the specific applications and proposal at issue. Although Miami believes the City is seeking to have the Commission reserve the water of Treat River to allow the City to develop the same Treat River Project at issue in the Treat River Contested Case, the Commission must consider the Amendments as they relate to all possible storage development options for Treat River. It is important that in evaluating the Amendments the Commission not make findings of fact, conclusions, or other statements that speak to unresolved issues in the Treat River Contested Case or that would prejudge issues that might be raised in a subsequent proceeding concerning multipurpose storage on Treat River.

VII. CONCLUSION

In light of the foregoing, the record in the rulemaking is insufficient for the Commission to find that the Amendments are compatible with State Water Resources Policy or in the public interest. Miami respectfully urges the Commission not to adopt the changes to the Mid-Coast Basin Program affecting Treat River. The Amendments come at significant cost to the public by channeling the City's efforts toward unwise water development and burdening subsequent economic development. The record fails to make any affirmative showing of the public interest served by reserving Treat River water.

Miami also respectfully urges the Commission to consider carefully the relationship between the Amendments and the Treat River Contested Case. In the event that the Commission decides to adopt the Amendments before resolution of the Treat River Contested Case, the Commission should condition its action to make clear that its findings, statements, and conclusions

concerning a reservation of water on Treat River are not binding on or otherwise to be used in any other proceeding concerning development of a storage project on Treat River. Failing to do so could improperly impinge on the contested case process and prejudice Miami and other parties to the Treat River Contested Case or subsequent proceedings. Miami submits that the Commission, like all citizen policymaking bodies, should draw clear lines between its policy role and the adjudicative role of the Department and the OAH. The Request asks the Commission to act in its policymaking role, and Miami requests that the Commission confine any action it may take to the policy arena.

Finally, in the event the Commission adopts the Amendments, Miami urges the Commission to hold the City to its bargain in the Settlement. An affirmative term of the Settlement is that the City will withdraw the Treat River Applications within 10 days of the Secretary of State's publishing the rule proposed in the Amendments. (Settlement ¶ 25.) The Commission should underscore this agreement by making clear in its finding that adoption of the Amendments is pursuant to the Settlement, and that upon adoption, the City is required to withdraw the Treat River Applications, as set forth in the Settlement.

Very truly yours,

Greg D. Corbin
Of Counsel for Miami Corporation