

Oregon Water Resources Commission Meeting
February 19, 1999
Salem

Members

Nancy Leonard
Mike Jewett
Jim Nakano
Dan Thorndike
Tyler Hansell
Ron Nelson

Others

Kristi Johnson
Laura Schroeder
Mayor Gordon Anderson
Michael Downs
Bob Hawley
Kimberley Priestley
Jerry Franke
Tom McMurray
Todd Heidgerken
Gordon Burns
Ed Henricks
Don Greenwood
Bob Hunter

Staff

Geoff Huntington
Martha Pagel
Dwight French
Meg Reeves
Diane Addicott
Dave Jarrett
Tom Paul
Tom Byler
Barry Norris
Al Cook
Dick Bailey
Marc Norton
Weisha Mize

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.

Chair Leonard opened the meeting and called an executive session under ORS 192.660(1)(h) to consult with counsel regarding legal rights and duties of the Commission with regard to current litigation. All present other than department staff, legal counsel, and the press were asked to leave the room.

Following the executive session the meeting resumed with consideration of the minutes.

A. Commission Meeting Minutes

Minutes of the November and December 1998 meetings were offered to the Commission for approval. Nelson moved approval of the November 1998 meeting minutes; seconded by Nakano. Five Commissioners voted approval; Jewett abstained since he had recused himself from that meeting. Thorndike moved approval of the December 1998 meeting minutes; seconded by Jewett. All voted approval.

B. Commission Comments

Nelson reported on recent action of the Deschutes Basin Work Group. He said a draft Memorandum of Understanding (MOU) is being circulated among several state and local agencies that might be involved in mitigation. The MOU would lay out a timetable, various work groups, and tasks to be undertaken in the next 18 months. Nelson said he was invited to the state of Washington to meet with a group of irrigators to discuss the Oregon Water Trust and how it works; there is interest in that state to form a similar organization. The Oregon Water Trust recently celebrated their fifth anniversary.

Hansell said he recently spoke at the annual meeting of the Oregon Water Coalition. On January 25 Hansell chaired a public hearing in Hermiston on proposed rules to amend boundaries of the north subarea of the Butter Creek Critical Ground Water Area.

Leonard said she has been asked by the Siuslaw Forest Supervisor to serve on the Coast Range Province Advisory Committee.

C. Director's Report

Pagel said House water committee meetings are Monday, Wednesday, and Friday afternoon of each week; Senate water committee meetings are Tuesday and Thursday afternoon of each week. The Joint Committee on Stream Restoration and Species Recovery that deals primarily with Oregon Plan issues meets twice a week. Staff have been kept busy attending these meetings and monitoring bills.

Negotiation meetings are still being held on the Boeing/Inland Land permit extension issue on the Columbia River. Monthly meetings of the Klamath Alternative Dispute Resolution process are still being held; however, February's meeting was snowed out.

Pagel said she, along with Bob Meinen, Director of Oregon State Parks Department, and Jim Greer, Director of Oregon Fish and Wildlife Department, met with the Deschutes Basin Work Group to discuss ground water mitigation issues.

Geoff Huntington, Deputy Director, reviewed the forecast for upcoming Commission meetings. Nelson requested that stewardship and supply be discussed at a work session. Nakano asked that John Buckhouse from Oregon State University be invited to speak to the Commission on upland soil saturation. Nelson suggested that it might be helpful to have a presentation on the status of the Deschutes Basin ground water/surface water project.

D. Butter Creek Ground Water

Barry Norris and Marc Norton, Field and Technical Services Division, presented amendments to administrative rules for the regulation of the Butter Creek Critical Ground Water Area. Norris explained that these rules would create a new subarea to allow a small amount of irrigation to continue independent from other regulated areas.

The proposed rules were approved by the Ground Water Advisory Committee with modifications which the staff made. A public hearing was held January 25, 1999, with supportive testimony; there were no additional comments or written testimony received after the hearing.

Norris suggested the Commissioners consider one modification to the proposed rules on page 11 of the staff report. He asked that the second "the" and "same and except the" in line 6 be deleted.

Hansell moved that the proposed rules with the language change suggested by Norris be adopted; seconded by Jewett. All voted approval.

E. Conservation Reserve Enhancement Program

Dick Bailey and Weisha Mize, Resource Management Division, updated the Commissioners on this new program offered through the federal Natural Resources Conservation Service, and responded to their comments and questions.

Mize explained that the Oregon Conservation Reserve Enhancement Program (CREP) is a voluntary incentive program to enhance riparian conditions on agricultural lands along streams that provide important habitat for listed and declining salmon and trout populations. The restoration of riparian buffers will provide direct benefits to streams by providing shade, leaf and insect drop for fish food, and indirect benefits by taking up nutrients and other materials applied to adjacent agricultural fields. The CREP riparian buffer program will also provide a mechanism for participants to meet riparian area management requirements in basin specific rules pursuant to Oregon's water quality law, Senate Bill 1010.

Farmers and ranchers who agree to participate in this program will be paid to remove their land from production and plant the land in grass, shrubs, and trees. Participants may enroll for

contracts lasting 10 to 15 years. Funds will be administered through the Governor's Watershed Enhancement Board.

F. 1999-2001 Budget and Legislation Update

Tom Byler, Legislation and Rules Coordinator, briefed the Commissioners on legislative developments and pending budget requests. He said it is really too early for much action on bills. The department is scheduled to give an informational budget presentation before the Ways and Means Subcommittee on Natural Resources in the third and fourth weeks of March. Byler reviewed copies of the bill tracking log available to the Commissioners on the department web site and explained the information it contains.

Byler mentioned that the department is working with Senate and House water committees. So far, the main interest of these committees has been in land use issues. Out of the seven bills pre-session filed by the department, HB 2163 (relating to the Water Development Loan Fund) and HB 2164 (relating to exceptions to basin program restrictions) have passed out of the House water committee and the House floor and are on their way to the Senate. The remaining five bills have had initial hearings or are scheduled for hearing.

Byler talked with the Commissioners about SB 93, sponsored by Senator Tarno. Department staff have been involved in a stakeholder working group on this bill which deals with stewardship and supply.

G. Mediation Confidentiality Rulemaking Briefing

Tom Byler, Legislation and Rules Coordinator, presented this report to the Commission. He explained that the 1997 Legislative Session passed SB 160 which said if a state agency is a party to a mediation on a dispute in which that agency has regulatory authority, the negotiations are generally not confidential and could be subject to a judicial proceeding unless the agency adopts confidentiality rules pursuant to recommendations by the Attorney General's office. Byler said staff are proposing an amendment to OAR Chapter 690, Division 004, which would allow the department to participate in confidential mediations for litigation and labor agreement negotiations in a manner consistent with the state's policy on open government. In allowing mediation communications to be confidential, the proposed rules hopefully will result in a reduction in litigation costs by encouraging parties to choose mediation over litigation.

A public hearing on the proposed rules is scheduled for February 22, 1999, in Salem. Written comments will be accepted through March 8. The rules will then come before the Commission for consideration during their March 22, 1999, teleconference.

H. Grants Pass Irrigation District (GPID)

Geoff Huntington, Deputy Director, and Al Cook, Southwest Region Manager, explained that at this meeting Commissioners would not be asked to make a substantive decision on whether to lift the current stay in place on the cancellation order of the GPID permit 50957. This report is simply for informational purposes. The stay automatically went into effect when an appeal was filed by the District to challenge the Commission's final order canceling the permit. There is a process in statute that would allow the Commission to lift the stay if it is determined that substantial public harm will result. A patron of GPID requested that the Commission lift the statutorily imposed stay, which prompted this informational report.

Huntington said the staff report discusses who may request that a stay be lifted, the process for lifting a stay, and how a decision on a motion to lift a stay is appealed. A party to the contested case proceeding may file a motion with the Commission to lift a stay, but an outside observer may not. And the Commission on its own motion may consider lifting the stay; only the Commission may act to lift a stay of its own order — not the Director. The process for lifting the stay requires that the parties to the original contested case proceeding be notified and have an opportunity to be heard. If a decision were to be made to lift the current stay in this matter, an appeal would be subject to review by the Court of Appeals.

Public Comment

Laura Schroeder and Kristi Johnson, of Schroeder Law Offices representing GPID, commented and presented information on overheads. Johnson said a good place to start when looking at the process and criteria of lifting the stay is the provision of ORS 536.075(5). The statute establishes the Commission's authority to act and provides a basic framework in which to act. She said her comments would focus on what is involved in the actual determination whether a stay should be lifted. The statute would require the Commission to ask three questions — is there public harm, is that public harm substantial, and is that public harm a result of the stay. If the Commission can answer yes to all three of those questions, then the Commission could issue an order denying the stay. If the Commission cannot answer yes to those three questions, it would have to deny a motion for lifting the stay. In considering public harm Johnson said it has to be an actual public harm with evidence, not a perceived public harm. In considering if that harm is substantial, it has to be a large degree of harm. If the harm now is no greater than what it was when the permit was issued, that would not be a substantial degree of harm. If there is no proof that the public harm is a result of the stay, then the stay should not be lifted. If the public harm is that fish are being killed by the dam, then lifting the stay would not stop that public harm. There would not be a direct connection between lifting the stay and alleviating the public harm.