



# Oregon

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

**SUBJECT:** Agenda Item H, July 28, 2005  
Water Resources Commission Meeting

### **Request for an Exception to the South Coast Basin Program by Coos Bay North Bend Water Board under ORS 536.295**

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

The South Coast Basin Program currently classifies uses allowed from Pony Creek above Lower Pony Creek Dam for municipal purposes only. The Coos Bay North Bend Water Board (“CBNBWB”) has applied to use water from the spillway of its municipal reservoir for a minor hydroelectric project.

Under ORS 536.295 the Water Resources Commission may, under certain circumstances, allow the Department to consider an application to appropriate water for a use not classified as an allowable use by the applicable basin program. CBNBWB has requested an exception to the South Coast Basin Program as use of water would be largely non-consumptive in nature and not likely to be regulated for other water rights, and is necessary to ensure public health, welfare and safety; as provided in ORS 536.295(1)(c) and (d).

The question before the Commission is whether to allow the Department to consider the application even though the use is not classified under the basin program. If the exception is granted, the application will then be reviewed in the same manner as any other minor hydroelectric application.

#### **II. Background**

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

Commission approval of a request for an exception to a basin program does not guarantee that a permit will be issued, or if it were issued, how it would be conditioned. The Commission is not making a public interest determination on an application. In allowing a basin program exception, the Commission allows the Department to consider an application notwithstanding the basin program classification. All other aspects of the application review process remain the same, and the Department must consider issues such as water availability, injury to existing water rights, and any other rules of the Commission. Public notice and comment opportunities are provided in the same manner as any other water right application. If the Commission does not grant a request for a basin program exception, the application is processed but will likely be denied or limited because the proposed use is not a classified use in the basin program.

### **III. Discussion**

#### **A. Application Summary**

The CBNBWB is applying for a hydroelectric project that is less than 100 horsepower in size. This would be considered a "minor project" under ORS 543. A copy of the application is provided in Attachment 1.

The applicant proposes to divert 0.45 cubic feet per second (cfs) of water from the spillway of Upper Pony Creek Reservoir, tributary to Pony Creek. The Project would use 55 feet of hydraulic head and a Pelton wheel system to generate 2.8 theoretical horsepower for an on-site video monitoring system that is a necessary part of the Emergency Action Plan for the dam safety program for the reservoir. The proposed pipeline will have a length of 10 feet and a diameter of 3 inches. The pelton wheel will provide 24-volt DC output to a battery. The estimated cost of the project is \$12,000.

The point of diversion is located within the SW ¼ SW ¼ Section 28, Township 25 South, Range 13 West, W.M. There are no neighbors within 300 feet of the proposed project. All water would be returned to the spillway.

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

The rules for the South Coast Basin Program provide:

690-502-017 (7) The waters of Pony Creek above lower Pony Creek Dam and Ferry and Geiger Creeks above the Ferry Creek -- Geiger Creek confluence are classified for municipal use.

CBNBWB provided the Department with a basin program exception request on June 23, 2005 (Attachment 2). ORS 536.295 authorizes the Commission to allow the Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use is consistent with any one or more of seven statutory criteria (Attachment 3).

As discussed in Attachment 2, CBNBWB's request for an exception includes the following:

- The use of the water would be non-consumptive. All waters would be returned to the spillway for use by the CBNBWB in its municipal water system (ORS 536.295 (1)(c).)
- The use is necessary to maintain the monitoring system, which is part of the Emergency Action Plan for the dam at the reservoir. The Emergency Action Plan is required by the Water Resources Department as part of the reservoir permit. Therefore, the use is necessary to ensure public health, welfare and safety as provided for by ORS 536.295(1)(d).

*Department analysis:* The Department agrees that the use of this water would be nonconsumptive since all waters would be diverted and then returned to the existing spillway. The use is also not likely to be regulated for other water rights. The Department also notes that the power to operate the video system contributes to the operation of the monitoring system, which is a vital component of the emergency Action Safety Plan for the reservoir and municipal water system.

#### C. General Policies of the South Coast Basin Program

ORS 536.295(4) requires the Commission to evaluate whether the proposed use is consistent with the general policies of the South Coast Basin Program (OAR Chapter 690, Division 517, provided in Attachment 4).

The South Coast Basin Program does not have a section that contains any general policies. It is difficult to make a case that this use is either consistent or inconsistent. We can determine though, that this proposed use is not inconsistent with any general policies of the South Coast Basin Program.

One rule of the program does make a partial link, and, it could be read to be consistent with the proposed use as it would make another use of stored water:

OAR 690-517-0000(10) The planning, construction and operation of any structures or works for the utilization of water in accordance with the aforementioned classifications are to conform with the applicable provisions of ORS 536.310, including but not restricted to the recommendation of the multiple-purpose concept.

(ORS 536.310, provided in Attachment 5)

#### **IV. Conclusion**

To approve a basin program exception request under ORS 536.295, the Commission must find that the request meets one or more statutory criteria and the proposed use is consistent with the general policies of the applicable basin program. Staff believe that the basin program exception submitted by Coos Bay North Bend Water Board meets the criterion under ORS 536.295 and that the proposed use is consistent with the general policies of the South Coast Basin Program.

#### **V. Alternatives**

The Commission may consider the following actions:

1. Approve the request by CBNBWB for a basin program exception, recognizing that a permit, if issued, may be conditioned to protect the public health, safety and welfare.
2. Deny the request by CBNBWB for a basin program exception.
3. Take no action and direct staff to continue to work with the applicant.

#### **VI. Recommendation**

Staff recommend Alternative 1, that the Commission approve the request by CBNBWB for an exception to the South Coast Basin Program recognizing that a permit, if issued, may be conditioned to protect the public health, safety and welfare.

Attachments:

1. Copy of CBNBWB Application
2. CBNBWB request for exception to basin program
3. ORS 536.295
4. South Coast Basin Program General Policies
5. ORS 536.310

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**ORS 536.295 Conditions for consideration of application for use not classified in basin**

**program; rules.** (1) Notwithstanding any provision of ORS 536.300 or 536.340, the Water Resources Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use:

- (a) Will be of short duration during each year;
  - (b) Will be for a continuous period of no longer than five years;
  - (c) Is largely non-consumptive in nature and not likely to be regulated for other water rights;
  - (d) Is necessary to ensure public health, welfare and safety;
  - (e) Is necessary to avoid extreme hardship;
  - (f) Will provide a public benefit such as riparian or watershed improvement; or
  - (g) Is of an unusual nature not likely to recur in the basin, and unlikely to have been within the uses considered by the commission in classifying the uses presently allowed in the applicable basin program including but not limited to:
    - (A) Exploratory thermal drilling;
    - (B) Heat exchange;
    - (C) Maintaining water levels in a sewage lagoon; or
    - (D) Facilitating the watering of livestock away from a river or stream.
- (2) A permit granted on or before January 1, 1993, for a quasi-municipal use of water shall be considered a permit for a classified use under ORS 536.340 if at the time the application was submitted or the permit was granted, the basin program identified municipal use as a classified use.
- (3) The commission by rule may determine the specific uses permitted within a classified use.
- (4) In making the determination under subsection (1) of this section, the commission shall evaluate whether the proposed use is consistent with the general policies established in the applicable basin program.
- (5) The Water Resources Department shall process and evaluate an application allowed by the commission under subsections (1) to (4) of this section in the same manner as any other water right application, including determining whether the proposed use would result in injury to an existing water right. [1989 c.9 §1; 1993 c.591 §1; 1999 c.703 §1]

**536.310 Purposes and policies to be considered in formulating state water resources program.** In formulating the water resources program under ORS 536.300 (2), the Water Resources Commission shall take into consideration the purposes and declarations enumerated in ORS 536.220 and also the following additional declarations of policy:

(1) Existing rights, established duties of water, and relative priorities concerning the use of the waters of this state and the laws governing the same are to be protected and preserved subject to the principle that all of the waters within this state belong to the public for use by the people for beneficial purposes without waste;

(2) It is in the public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the state as a whole;

(3) That adequate and safe supplies be preserved and protected for human consumption, while conserving maximum supplies for other beneficial uses;

(4) Multiple-purpose impoundment structures are to be preferred over single-purpose structures; upstream impoundments are to be preferred over downstream impoundments. The fishery resource of this state is an important economic and recreational asset. In the planning and construction of impoundment structures and milldams and other artificial obstructions, due regard shall be given to means and methods for its protection;

(5) Competitive exploitation of water resources of this state for single-purpose uses is to be discouraged when other feasible uses are in the general public interest;

(6) In considering the benefits to be derived from drainage, consideration shall also be given to possible harmful effects upon ground water supplies and protection of wildlife;

(7) The maintenance of minimum perennial stream flows sufficient to support aquatic life, to minimize pollution and to maintain recreation values shall be fostered and encouraged if existing rights and priorities under existing laws will permit;

(8) Watershed development policies shall be favored, whenever possible, for the preservation of balanced multiple uses, and project construction and planning with those ends in view shall be encouraged;

(9) Due regard shall be given in the planning and development of water recreation facilities to safeguard against pollution;

(10) It is of paramount importance in all cooperative programs that the principle of the sovereignty of this state over all the waters within the state be protected and preserved, and such cooperation by the commission shall be designed so as to reinforce and strengthen state control;

(11) Local development of watershed conservation, when consistent with sound engineering and economic principles, is to be promoted and encouraged;

(12) When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use, and thereafter other beneficial purposes in such order as may be in the public interest consistent with the principles of chapter 707, Oregon Laws 1955, under the existing circumstances; and

(13) Notwithstanding any other provision of this section, when available supplies of water are insufficient in the South Umpqua River to provide for both the needs of human consumption pursuant to a municipal water right and the maintenance of previously established minimum stream flows, preference shall be given to the municipal needs if the municipality adopts and enforces an ordinance restricting use of the water so obtained to direct human consumption uses. [1955 c.707 §10(3); 1979 c.170 §1; 1987 c.546 §1]

**Note:** The Legislative Counsel has not, pursuant to 173.160, undertaken to substitute specific ORS references for the words “chapter 707, Oregon Laws 1955,” in 536.310 and 536.330. Chapter 707, Oregon Laws 1955, enacted into law and amended the ORS sections which may be found by referring to the 1955 Comparative Section Table located in Volume 18 of Oregon Revised Statutes.