CITY OF Salem
AT YOUR SERVICE

MAYOR'S OFFICE
555 Liberty St. SE / Room 220 • Salem, OR 97301-3503 • Phone (503) 588-6159 • Fax (503) 588-6354

September 19, 2005

Debbie Colbert, Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street NE
Salem OR 97301-1271

SUBJECT: **HEARING DRAFT RULES, OAR CHAPTER 690, DIVISION 315**

Dear Ms. Colbert:

This letter is written in support of comments prepared by the Oregon Water Utilities Council (OWUC) on the draft Division 315 Rules being created by your Department. The City of Salem is a member of OWUC, and a copy of their comment letter is enclosed.

HB 3038 resolves many uncertainties associated with municipal permit development. Under HB 3038, municipal water suppliers now have the certainty they need to plan and make significant investments to develop long-term water supplies to support Oregon's growing populations and economic development activities as required by Oregon's land use planning laws.

In addition, HB 3038 ensures that municipal water providers continue to responsibly manage and conserve Oregon's water resources through the development and implementation of Water Management and Conservation Plans (Division 86). Also of significant importance, HB 3038 ensures that water use under the undeveloped portion of a municipal water use permit will not result in catastrophic impacts to Oregon's listed fish species.

Through the negotiations on HB 3038, OWUC members understood they had agreed to a provision that provides a one-time look at permits issued before November 2, 1998 to ensure use of the undeveloped portion of the permit would not wipe-out a run of fish. This provision was not meant to be a "no-harm" or "fish recovery" standard but an evaluation to ensure there were not catastrophic impacts on listed fish species as a result of using the undeveloped portion of the permit.

Because of this, the City of Salem does not support the hearing draft rules. We believe that the Department's proposed implementation of HB 3038 misses the mark with respect to the "maintain the persistence of listed fish species" provision.

For Salem, HB 3038 helps us preserve a very valuable water right on the Willamette River. The priority date for this water right permit is 1976 and from the beginning, the intent for this right has been for it to provide a future long-term water supply for our customers in conjunction with our North Santiam River rights. Our long-term plan is to complete the development and perfection of our water rights on the North Santiam River, and then develop and perfect our rights on the

Willamette River. Salem is currently developing a water management and conservation plan. Our tentative water demand projections show we will not need to exercise the full extent of our Willamette River right for another 50 to 100 years, nevertheless, our community will need it at some time in the future.

The City of Salem appreciates the opportunity to comment on the proposed rules. We look forward to the Water Resources Commission adopting a clear set of rules that accurately capture the intent and scope of HB 3038 and provide a clear path for moving through the permit extension process. Without the changes suggested by OWUC, the City of Salem cannot support the adoption of the draft rules.

I am asking for your favorable consideration of the comments submitted by OWUC. If you have any additional questions about our comments on the draft rules, please contact Paul Eckley at 503-361-2220.

Sincerely,

Janet Taylor

Janet Taylor
Mayor

Enclosure: OWUC Comment Letter

September 20, 2005

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street NE
Salem, OR 97301-1271

SUBJECT: COMMENTS ON DRAFT RULES, OAR CHAPTER 690, DIVISION 315

Dear Ms. Colbert:

The City of Lincoln City would like to this opportunity to comment on the September 1, 2005 draft of revisions to OAR Chapter 690, Division 315. Lincoln City is a member of the Oregon Water Utilities Council and joins in their comments dated September 19, 2005. These additional comments are submitted, however, to highlight further the reasons why the language of the draft rule, particularly the definitions, are unworkable from a municipal water supplier's perspective.

Lincoln City has experienced considerable population growth in recent years. To meet the corresponding increase in demand for water, and comply with Oregon land use planning law, the City has sought to expand its ability to provide safe, reliable drinking water to its population. The City entered into an intergovernmental agreement with the Kernville-Gleneden Beach-Lincoln Beach Water District to purchase water from them.

Prior to the City's being able to use the water, however, the District had to apply and receive a permit extension for the water rights it had a permit for, but had not yet perfected. This process took nearly a year and a half, during which time two separate settlement agreements were entered into (one with the Oregon Water Resources Department and the Oregon Department of Fish and Wildlife and one with WaterWatch of Oregon, the Siletz Tribe and other conservation organizations). The process was time-consuming and costly and in the end, the City received authority to use the District's water under limited circumstances.

If the current revisions to OAR Chapter 690, Division 315 are adopted, this process would become even more unworkable for municipal water suppliers. The current definition of "maintain the persistence of listed fish species" found in OAR 690-315-010(6)(d) is vague and circular. It equates maintaining the persistence of a population with maintaining the viability of the population. Viability is then defined as populations that are "sufficiently abundant, productive and diverse...that the Evolutionary Significant Unit as a whole will *persist* into the foreseeable future." Viability is tied to persistence, which is in turn defined as viability. This is an unworkable definition of the statutory language.

Further, the definition of viability, populations that are "sufficiently abundant, productive and diverse," is too vague to be useful. Nowhere in the regulations is a description of what is meant by "sufficiently abundant, productive and diverse." Such a vague definition, when used in relation to such an emotional issue, will only lead to increased litigation over water right extensions and increased costs for municipal water suppliers.

Municipal water suppliers have historically attempted to predict how the population they serve will grow over time. Predicting exactly where populations will grow and by how much is, of course, an inexact science. As a result, some municipal suppliers have, over time, obtained water rights for which they currently do not have a demand. Others have found that the population they serve has grown at a rate beyond which they could reasonably predict.

Transferring water from municipal suppliers who have more water than they can currently use to those municipalities who need water to provide safe and reliable drinking water to their citizens is a highly efficient option for meeting growing demands. This also can encourage effective regional water supply planning. Often, those municipal water suppliers with current excess rights must file for extensions prior to transferring their water to a municipality that needs it. The current process is adequately rigorous and an opportunity for participation in the process by the public and by ODFW already exists. Adopting the proposed circular and vague definition of "maintain the persistence of listed fish species" will only add an unnecessary level of difficulty to the process.

The City of Lincoln City, therefore, requests that proposed definition of "maintain the persistence of listed fish species" be ultimately rejected and that the definition proposed by OWUC be adopted in its place.

Sincerely,

David A. Hawker, City Manager

SOUTH FORK WATER BOARD
Combined Water Operations of Oregon City and West Linn, Oregon
15962 S. Hunter Avenue
Oregon City, OR 97045
Business Office: (503) 657-6581 Fax: (503) 656-9336
Filter Plant: (503) 657-5030

September 19, 2005

Oregon Water Resources Department
Debbie Colbert, Senior Policy Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Subject: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert:

The following comments represent the views of the South Fork Water Board. The South Fork Water Board is an ORS 190 entity owned in equal portions by the Cities of Oregon City and West Linn and is the municipal water supplier for approximately 64,000 residents.

South Fork Water Board is opposed to the draft rules in OAR 690-315. It is the contention of the South Fork Water Board that these rules are far expanded from the Legislative intent in HB 3038. The major concern is the appearance of the intent to promote fish recovery as opposed to avoiding the elimination of a fish run, which was the Legislative intent.

The South Fork Water Board strongly supports the September 19, 2005 comments submitted by the Oregon Water Utility Council (OWUC). We feel the OWUC comments clearly explain the issue and the Legislative intent.

Without the Water Resource Department's inclusion of the changes proposed by the OWUC, the South Fork Water Board cannot support adoption of the proposed rules as drafted.

Sincerely,

John Collins, General Manager (for Norm King, Chair)
South Fork Water Board

OWRD-letter-9-05.jpg

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
and the INSTITUTE FOR FISHERIES RESOURCES
Northwest Regional Office
PO 11170, Eugene, OR 97440-3370
(541)689-2000 Fax: (541)689-2500
Email: fish1ifr@aol.com

Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
Attn: Debbie Colbert

21 September 2005

Sent by email to: Debbie.L.Colbert@state.or.us

RE: PCFFA Comments on proposed changes to Division 315 Rules
in response to House Bill 3038

Dear Ms. Colbert:

We are emailing these comments on the proposed changes to Division 315 Rules now being considered in response to the recent adoption of House Bill 3038 regarding the development and planning for future municipal water supplies.

PCFFA is the west coast's largest trade association of commercial fishing families, representing the hardworking men and women who make their livelihoods by harvesting seafood, particularly Pacific salmon. As recently as 1988, the salmon fishing industry in the State of Oregon generated $275 million to the state's economy and supported nearly 14,000 family wage jobs. However, salmon cannot exist in Oregon without sufficient water kept in-stream in perpetuity for their survival and, where runs have been damaged, aggressive efforts at restoration and recovery that must also include providing sufficient in-stream flows.[1]

Loss of habitat, particularly the loss of instream water resources and instream flows, has caused many runs to decline from these former abundant levels. However, this economic target is again achievable, and recovering salmon populations to abundant harvestable levels has been the primary goal of the Oregon Plan for Salmon and Steelhead ("Oregon Plan") now embodied in state public policy. The Water Resources Department is (and should continue to be) legally committed to those goals under not only state law, but under Executive Order No. EO 99-01, which states among many other provisions that:

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[1] Lack of flows is a serious problem for salmonids in many watersheds. "Diversion of water is potentially one of the most serious factors adversely affecting salmon in western Oregon and northern California." *Status and Future of Salmon of Western Oregon and Northern California*, report by the "Botkin Commission" to the Legislatures of both California and Oregon (1995).

"Agencies of the State of Oregon will, consistent with their authorities, fully implement the state agency efforts described in the Oregon Plan and in this Executive Order." (EO 99-01 at (1))

This direction also includes the following mandates:

"Actions that state agencies take, fund and/or authorize that are primarily for a purpose other than restoration of salmonids or the habitat they depend upon will, considering the anticipated duration and geographic scope of the actions:

(A) to the maximum extent practicable minimize and mitigate adverse effects of the actions on salmonids or the habitat they depend on; and

(B) not appreciably reduce the likelihood of the survival and recovery of salmonids in the wild." (EO 99-01 at (1)(d)

Although the proposed rules are a big improvement over past practices which allowed, in some cases, full future development of municipal water use permits with absolutely no consideration of fisheries impacts, unfortunately the new proposed standard to merely "maintain persistence" of fish (as defined in OAR 690-315-0010(6)(d) and particularly as implemented in OAR 690-315-0070 and 690-315-0080) is simply not as strong as, and works at cross purposes with, the recovery standard to which the State of Oregon (and presumably the Water Resources Department as part of that government) is committed under the Oregon Plan for Salmon and Steelhead. This "maintain persistence" standard is also being defined in OAR 690-315-0010(6)(d) as far less than the minimal standard of protection required under the federal Endangered Species Act (16 U.S.C. § 1531 *et seq.*) and, where applicable, its state law ESA counterpart.

In particular, we wish to underscore three points in particular:

1. The standard of protection of "maintain persistence" must be redefined to ensure that extensions are not granted if doing so would result interfere with the recovery of listed fish species or result in "jeopardy" under the federal ESA. The state should not adopt any rules that allows it to authorize water withdrawals that would further harm listed fish species. Since the language of OAR 690-315-0010(6)(d) is vague and confusing, perhaps another term should be used to make it clear that the recovery goals and standards of the Oregon Plan are applicable. The Water Resources Department is an Oregon Plan agency and should be making every effort to ensure that ESA-listed fish are recovered and not further harmed.

2. If outside agreements are relied on by the Water Resources Department in approving extensions, those agreements must be reviewed by ODFW as the state wildlife Trustee agency to ensure that they meet the "maintain persistence" standard and the Water Resources Department must be able to enforce any conditions relied upon.

3. Such applications would probably require Section 7 ESA consultation with the National Marine Fisheries Service (NMFS) and an incidental take permit insofar as they likely impact ESA-listed salmon and steelhead populations or other federally protected aquatic species.

Fisheries protection is a major "beneficial use" of limited water resources as well as a major economic engine that creates jobs in this state that cannot be sacrificed by short-sighted policies.

Making the Div. 315 standards at least consistent with the federal ESA is mandatory, not optional. It should also be noted that state agencies can become liable for approval and implementation of rules and regulations that create jeopardy (which is also defined as diminishing the chances for recovery) for federally ESA listed threatened and endangered species under a long line of cases beginning with *Strahan v. Coxe*, 939 F. Supp 963, 977 (D. Mass. Sep. 24, 1996), *aff'd in part, vacated in part, Strahan v. Coxe*, 127 F.3d 155 (1st Cir. Oct. 9, 1997). That state agency ESA liability was recently upheld in the Federal District Court of Oregon in a case in which PCFFA was a co-Plaintiff, *Pacific Rivers Council, et al. vs. James E. Brown, Oregon State Forester* (CV 02-243-BR), as recently as December 2002.[2]

We believe that the Water Resources Department can do better by the states' fishing economy and the rural coastal communities which depend on abundant salmon production from Oregon's streams and river for their livelihoods than pushing for a protection standard that merely "maintains persistence" – a standard far below what is required for eventual ESA delisting and recovery, and yet farther below the recovery goals of the Oregon Plan. Instead, we believe that the Water Resources Department, as have all other state agencies, should commit to the much higher recovery goals of the Oregon Plan, and not sacrifice the future of our industry, the families it feeds and the jobs they produce.

Thank you for the opportunity to comment on these proposed rules. Please put these comments on the record in this proceeding. They are being emailed with a printable version of this document attached for convenience in reproducing it for the record.

Sincerely,

Glen H. Spain, J.D.
NW Regional Director
PCFFA and IFR

OWRD-Div315Comments09-21-05.doc

[2] That case was ultimately mooted by a change in the listing status of Oregon coastal coho, but the ruling prior to that change nevertheless stands as Oregon case law.

SCHWABE, WILLIAMSON & WYATT
ATTORNEYS AT LAW

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MARTHA O. PAGEL
Direct Line: Salem (503) 399-7712
E-Mail: mpagel@schwabe.com

September 21, 2005

VIA FACSIMILE AND FIRST CLASS MAIL

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer St. NE
Salem, OR 97301-1271

Re: City of Redmond Comment on Hearing Draft Rules,
OAR Chapter 690, Division 315
Our File No.: 107948/122757

Dear Ms. Colbert:

Thank you for the opportunity to provide comments on proposed rules relating to HB 3038, enacted during the 2005 Legislative Session. This letter is offered on behalf of our clients, the City of Redmond (City), but also reflects close coordination with other cities and municipal water providers. In evaluating the proposed rules, the City has worked closely with the League of Oregon Cities (LOC) and Oregon Water Utilities Council (OWUC). As part of that cooperative effort, the City hereby supports and endorses the specific wording changes included in the OWUC comments. In addition, we offer the following observations on key issues:

First, the City strongly disagrees with the definition proposed by the department for one of HB 3038's key terms: *"Maintain the persistence of listed fish species."* (Section 690-315-0010(d) of the Hearing Draft). As described in detail in the OWUC comments, this term was the subject of extensive discussion and collaborative effort in development of HB 3038. The legislative record establishes a clear intent that the term be defined with reference to the potential for extirpation of species. The department's proposed draft goes far beyond the intended meaning, and introduces new complexity and ambiguity by referring to "viability" of fish populations. We urge the department to change the definition to the wording proposed by OWUC, and to delete the definition of the new term, "viability," as currently proposed in OAR 690-315-0010(e). The OWUC definition accurately reflects legislative intent and the reasonable expectations of affected municipal providers.

Second, the City strongly supports the revised wording provided in the OWUC comment for Section 690-315-0080(f), describing the ultimate findings required of the department in acting on permit extension applications. Subsection (f) deals specifically with the findings relating to "maintaining the persistence of listed fish species," as described above. The OWUC wording more clearly identifies the three possible options/actions for the department: 1) a finding that there are fish protection agreements in place to address the statutory standard; 2) a finding that proposed additional development of the water right is consistent with the statutory standard; or 3) a finding that the proposed additional development of the water right is not consistent with the statutory standard.

Finally, the City disagrees with the department's proposed definition of the term *"Portions of the waterways affected by water use under the permit."* (Section 690-315-0010(i) of the Hearing Draft). As proposed, this definition is far broader than the clear wording of HB 3038. The legislation is clearly limited to an assessment of impacts of development on the affected "waterways," while the department's definition would include the entire "watershed." The City supports the specific changes to this definition proposed in the OWUC comments, but we would suggest further clarification to limit the focus to water courses rather than the entire drainage or watershed.

As noted above, the City also supports other changes proposed in the detailed OWUC comments.

Conclusion

The above-noted changes regarding the definition of "maintain the persistence of the species" are critical to the City, and other municipal water providers who relied upon the agreements reached through legislative negotiations and reflected in floor comments in both the House and Senate. Without changes that clearly tie this definition to the concept of preventing extirpation of the species, the City cannot support the proposed rules. We welcome the opportunity to work with OWRD staff or the Commission in further discussions, if needed, to address this concern.

Thank you, again, for this opportunity to comment.

Sincerely,

Martha O. Pagel

MOP:kdo
cc: Chris Doty
Pat Dorning
Alan Unger

September 19, 2005

Oregon Water Resources Department
Debbie Colbert, Senior Policy Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Subject: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert:

The following comments are written on behalf of the Tri-County Legislative Committee. The Tri-County Legislative Committee is comprised of representatives from various water districts in Clackamas, Multnomah and Washington Counties. The Tri-County Legislative Committee represents over 250,000 people and is a sub-committee of the Special Districts Association of Oregon.

The Tri-County Legislative Committee is opposed to the draft rules in OAR 690-315. It is the contention of the Tri-County legislative committee that these rules are far expanded from the Legislative intent in HB 3038. The major concern is the appearance of the intent to lead to fish recovery as opposed to avoiding the elimination of a fish run, which was the Legislative intent.

The Tri-County legislative Committee strongly supports the comments submitted by the Oregon Water Utility Council (OWUC). We feel the OWUC comments clearly explain the issue and the Legislative intent.

Without the Water Resource Department's inclusion of the changes proposed by the OWUC the Tri-County Legislative Committee cannot support adoption of the proposed rules as drafted.

Sincerely,

Dan Bradley, Chair
Tri-County Legislative Committee

CORVALLIS
ENHANCING COMMUNITY LIVABILITY

Public Works Department
1245 NE 3rd Street
P.O. Box 1083
Corvallis, OR 97339-1083
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September 20, 2005

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
North Mall Office Building, Suite A
725 Summer Street NE
Salem, OR 97301-1271

Re: Draft Water Permit Extension Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert,

Thank you for the opportunity to comment on the draft Water Permit Extension Rules contained in OAR Chapter 690, Division 315 that pertain to municipal water rights permits.

The City of Corvallis has a vested interest in water rights permit extension rules and processes in a manner that allows the City to extend its water rights permit to service the needs of a growing community. Corvallis' largest water right is held in permit status for water withdrawal from the Willamette River. Current water use is close to the maximum allowed under certificated rights.

City staff has reviewed the draft permit extension rules and is concerned with a number of the provisions. For example, the definition provided for "maintain the persistence of listed fish species" could be interpreted such that any water withdrawal could cause harm to a listed fish species population which would require conditioning a permit extension to mitigate any harmful effects. This was not the legislative intent of House Bill 3038 passed by the Legislature in this past session. There are many other examples. Rather than submit a lengthy list of proposed rule changes, the City goes on record in support of the suggested rule language changes proposed by the Oregon Water Utilities Council (copy attached).

Corvallis is a community with a strong environmental ethic and a history of leadership in environmental protection and resource conservation in Oregon. This includes the conservative use of water. Corvallis has had in place a proactive water management and conservation program since the late 1990's. The City recently completed an Endangered Species Act Salmon Response Plan to address Corvallis' impact on Willamette River water quality and quantity to aid in the recovery of spring Chinook Salmon in the Willamette River. The Plan focuses on modifications to City and citizen activities which, over time, will improve urban stream and Willamette River water quality. Water conservation is an integral part of this plan.

Nonetheless, Corvallis cannot satisfy the water needs of a growing community through water conservation alone. It will need to perfect its Willamette River water permit. Permit extension rules that allow that to happen in a timely manner are crucial.

Thank you for the opportunity to comment. Please contact me at 541-766-6916 if you have any questions or would like additional information.

Tom Penpraze,
Utilities Division Manager

attachment
c: Steve Rogers, Public Works Director

09-21-05 10:06 RCVD

X-Mailer: QUALCOMM Windows Eudora Version 6.2.3.4
Date: Wed, 21 Sep 2005 09:41:24 -0700
To: COLBERT Debbie L <Debbie.L.Colbert@state.or.us>
From: Ian Maitland <ian.maitland@nyu.edu>
Subject: Proposed Division 315 rules
Cc: Lisa@nyu.edu, Brown@nyu.edu, lisa@waterwatch.org,
Cheryl Thorp <thorp@harborside.com>, John Johnson <streetdog@charter.net>,
Catherine Wiley <cjw@harborside.com>,
Caroline Fitchett <karma@oregoncoast.com>,
Pat Russell <cpruss@harborside.com>
X-Spam-Checker-Version: SpamAssassin 2.63 (2004-01-11) on
kettle.wrd.state.or.us
X-Spam-Status: No, hits=1.1 required=5.0 tests=HTML_30_40,HTML_FONT_BIG,
HTML_MESSAGE,MIME_HTML_ONLY,RCVD_IN_SORBS autolearn=no version=2.63
X-Spam-Level: *

CITIZENS FOR ORDERLY DEVELOPMENT
PO Box 7102, Brookings, OR 97415 * 541 412 - 1200

Water Resources Department

Dear Debbie Colbert:

The responsibility of government and its agencies is to consider the greater public good. The rivers and waters of Oregon belong to the people. They also belong to the threatened coho salmon, fall chinook and steelhead.

In Brookings Harbor, the fishing industry is good for the economy and tourism. Overextending our natural resources and leaving future generations impoverished, should not be an option.

"Instream flow must be established at levels that allow for growth and expansion of currently weakened fish populations." (Backgrounder ODFW, Instream water rights)

The statutory "maintain persistence" standard must be clearly defined. Extentions must take into consideration future impacts on Oreogn's rapidly declining fish runs. Please do not adopt any rules that would allow the state to authorize water withdrawals that would harm listed fish species. (However all fish are important)

Any outside agreement relied on by OWRD in approving extensions must be reviewed by ODFW to make sure that it meets the "maintain persistence" standard. A method of enforcement must be secured by OWRD.

Thank you for giving Citizens for Orderly Development this opportunity to comment.

Sincerely,

Yvonne Maitland
Executive Board Member

Subject: Comment on Proposed Div. 315 Rules
To: COLBERT Debbie L <Debbie.L.Colbert@state.or.us>

The definitions in the rules regarding "maintain the persistence", "maintain the viability of listed fish species", " Evolutionarily Significant Unit" etc. should be more rigorous. Surely ODFW can come up with something better especially since they will be expected to make judgements about whether a permit does or does not "maintaint persistence".

Similarly, ODFW should be the approval authority for any outside agreements regarding "maintaining persistence" that the WRD wishes to condition a permit.

Ned Austin
63900 East Quail Haven Drive
Bend, Oregon 97701

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North Clackamas County Water Commission

TREATMENT PLANT
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September 19, 2005

Oregon Water Resources Department
Debbie Colbert, Senior Policy Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Subject: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert:

The following comments are written on behalf of the North Clackamas County Water Commission (NCCWC). The NCCWC is an ORS 190 entity comprised of the Oak Lodge Water District, Sunrise Water Authority and the City of Gladstone. The NCCWC is the treatment facility that supplies drinking water to approximately 80,000 people.

The NCCWC is opposed to the draft rules in OAR 690-315. It is the contention of the NCCWC that these rules are far expanded from the Legislative intent in HB 3038. The major concern is the appearance of the intent to lead to fish recovery as opposed to avoiding the elimination of a fish run, which was the Legislative intent.

The NCCWC strongly supports the comments submitted by the Oregon Water Utility Council (OWUC). We feel the OWUC comments clearly explain the issue and the Legislative intent.

Without the Water Resource Department's inclusion of the changes proposed by the OWUC the North Clackamas County Water Commission cannot support adoption of the proposed rules as drafted.

Sincerely,

Dave Jelinek

Dave Jelinek, Chair
North Clackamas County Water Commission
Board of Commissioners

Oregon
Theodore R. Kulongoski, Governor

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September 21, 2005

Debbie Colbert
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Comments on OAR 690-315 Rule Making

Dear Ms. Colbert:

The Oregon Department of Fish and Wildlife (ODFW) appreciates the opportunity to provide the following comments on the Water Resources Department's (WRD) OAR 690-315 rule making.

Our understanding of the need for this rule making was in response to legislative action taken this session with the passage of HB 3038 addressing different aspects of municipal water right extensions. ODFW was not a participant in the development of the legislative bill, but was invited to participate on WRD's Rule Advisory Committee (RAC). ODFW's involvement in this rule making comes about through ODFW's inclusion in the statute as an advisor to WRD on whether granting an extension of the undeveloped portion of a municipal water right would "maintain, in the portions of the waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law". The RAC was not able to come to consensus on the rule language because of the differing interpretations of what "maintain persistence of fish species" meant. ODFW's comments are based on our interpretation of what "maintain persistence of fish species" means given the agency's mission and the statutes and rules under which the department is governed.

ODFW believes the statutes and rules that pertain to and govern the type of advice ODFW could provide to WRD are contained in the following:

- Oregon Plan (ORS 541.405 (2)) provides the mission and goals for state agencies to follow when addressing watershed actions. The statute's mission reads "The mission of the Oregon Plan is to restore the watersheds of Oregon and to recover the fish and wildlife populations of those watersheds to productive and sustainable levels in a manner that provides substantial ecological, cultural and economic benefits".

- ODFW's goals for fish species are contained in its Native Fish Conservation Policy Goals (OAR 635-007-0503) and the Oregon Plan and are to:
    - Prevent the serious depletion of any native fish species;
    - Maintain and restore naturally produced native fish species; and

- Foster and sustain opportunities for sport, commercial and tribal fisheries consistent with conservation.

The legislative record shows that the use of "persistence" was based on the Oregon Plan and taken from the Coastal Coho assessment. The use of the term "persistence" in that context is a reference to a data intensive statistical analysis of the likelihood that at a given population level a species will remain viable into the future, not merely whether a population will avoid outright extinction. Unfortunately, in most cases the data does not exist to allow ODFW to do this type of analysis at the waterway level. However, ODFW staff does believe we can provide advice to WRD on the effect the use of the undeveloped portion of a municipal water right would have on fish species, but the advice would be based on our professional judgment and how we interpret the meaning of "persistence" given our mission, statutes and rules, and our application of this concept in the Coastal Coho assessment.

ODFW's interpretation of what the meaning of "maintain persistence" is to **"Do no further harm"** to the listed species of concern. This is not a recovery goal as discussed in the Oregon Plan or the Native Fish Conservation Policy (which aims at improving the population levels), but one that leaves room for municipal needs to be satisfied along with the needs of fish. The State and ODFW's goal is to recover listed species, but we are also directed to do so in a way that balances ecological, cultural and economic benefits. Listed fish species are affected by a number of differing impacts (water withdrawals from streams being one) and to recover a species requires the combined efforts and actions by many parties. ODFW does not expect to recover a species based on one action, but interprets the statutory mandate of HB 3038 to require that development of municipal water rights not be done at the further expense of the already listed species.

Given the above discussion, ODFW makes the following recommendations for changes in the proposed OAR 690-315 rules:

OAR 690-315-0010 (6) (d) "Maintain the persistence of listed fish species" means the use of the undeveloped portion of the permit in such a way as to maintain or enhance the ~~[viability]~~ current biological status of the populations of listed fish species [populations] in the portions of waterways affected by water use under the permit;"

OAR 690-315-0010 (6) (e) eliminate the definition of "Viability". Under ODFW's proposed changes, the term "Viability" would not be used and therefore does not need to be defined.

OAR 690-315-0010 (6) (i) "Portions of the waterways affected by water use under the permit" means: ~~(A) Those portions of~~ That area within the river basin, as identified by the Department pursuant to its authority under ORS 536.700, where the [use] development of the currently undeveloped portion of the permit will affect the persistence of listed fish species;
~~(B) The watershed, where use of the undeveloped portion of the permit occurs, downstream to the lower-most point within the applicable river basin as identified by the Department pursuant to its authority under ORS 536.700~~

ODFW believes this will focus the analysis to the stream level and how further water withdrawals would affect a listed fish species within that stream system.

OAR 690-315-0800: ODFW recommends that WRD seek advice from ODFW on whether "An existing fish protection agreement" does protect all life stages of a listed species that might be impacted by a water withdrawal. There are many different kinds of "fish protection agreements"; some consider all aspects of a listed species life history while others are more narrowly focused on protection of one life stage and do not assure broad protection of all life stages. Such would be the case with federal 404 permits which in many cases may only require fish passage at a diversion point by maintaining an adequate bypass flow, or focus only on protecting fish in the immediate area of a construction project.

OAR 690-315-0800 (2): ODFW appreciates the ability to ask for an extension of time to evaluate an application given the anticipated volume of permits expected to need review. ODFW will work through the applications as quickly as possible, but also wants to be able to provide WRD with accurate, useful advice.

ODFW also supports the ability to allow ODFW to provide WRD with recommended conditions to be placed in a permit to provide for the persistence of listed fish species. ODFW would like to work with municipalities to protect listed fish species and also provide for municipal water needs. ODFW sees conditions placed in a water right as a mechanism to allow use of the water within certain parameters that would also maintain the persistence of a listed fish species.

ODFW appreciates the opportunity to comment on the proposed rules, if you have questions about our comments please contact me at 503-947-6084.

Sincerely,

Richard Kepler
Water Quality/Quantity Manager

Cc: File copy

Davis Wright Tremaine LLP

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September 21, 2005

VIA E-MAIL
AND U. S. MAIL

Debbie Colbert
Senior Policy Coordinator
Water Resources Department
725 Summer St., NE
Salem, OR 97301-1271

Re: Water Right Extensions Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert:

On behalf of the City of Bend (City), we offer the following comments on the Department's proposed amendments to OAR Chapter 690, Division 315, implementing HB 3038. We appreciate the opportunity to comment.

The City was an active participant in development and negotiation of HB 3038, in support of efforts made by the League of Oregon Cities (LOC) and the Oregon Water Utilities Council (OWUC). The City shares the concerns expressed by the LOC and OWUC in the comments they each submitted on the proposed rules, and incorporates those comments by reference.

The main concern is that the proposed rules do not keep faith with the compromise reached in drafting the bill, to which compromise the Department was a party. Specifically, the definition of "maintain the persistence of listed fish species" contained in proposed OAR 690-315-0010(6)(d) and (e) expands the statutory test far beyond the agreement reached with the legislative leadership, the Department, WaterWatch and municipal water providers. The stated goal at the time was to avoid extirpation of a fish run as a result of extending undeveloped municipal water rights issued before November 2, 1998. Part of the agreement was that the legislative leaders would read this interpretation into the record in their floor speeches urging enactment, followed by a rulemaking by the Department to make it doubly clear. The legislators did their part, but the Department's proposed rules miss the mark.

The proposed definition, by contrast, creates a test of viability of populations, which could be interpreted as a prohibition on harm to the fishery. It was understood by everyone involved that so high a threshold would be nearly impossible to cross, and would lead each extension request into litigation. Indeed, were it not for the understanding that the objective is to avoid extirpation of the affected fish run, the municipal water providers would never have supported the bill.

We appreciate the Department's efforts in support of HB 3038. We also appreciate the Department's attempt to compromise between different interests in crafting the rules. However, the time for compromise was during the legislative session. The purpose of the rules at this point is to effectuate the compromise reached in enacting the bill and not to alter the central intent. It is important to recall that all of the protections for fish that existed before enactment of HB 3038 are still in place; HB 3038 is an additional layer of protection, but very narrowly drawn. In other words, this bill provides a new fish protection measure, which makes it even more important that the Department maintain the limited scope of the fish impact element of the new law.

Therefore, we urge that the Department adopt the amendments to the rules proposed by the LOC and OWUC. The City cannot support the rules as currently written.

Thank you for the opportunity to comment. Please call if you have questions or if there is further information that we can provide.

Very truly yours,

Davis Wright Tremaine LLP

Richard M. Glick

RMG:im

Cc Willie Tiffany
Paul Eckley
Tom Hickmann
Roger Prowell

CITY OF

PORTLAND, OREGON

BUREAU OF WATER WORKS

Randy Leonard, Commissioner
David G. Shaff, Interim Administrator
1120 S.W. 5th Avenue
Portland, Oregon 97204
Information (503) 823-7404
Fax (503) 823-6133
TDD (503) 823-6868

September 19, 2005

Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301-1271
ATTN: Debbie Colbert

Dear Ms. Colbert:

As you know, the City of Portland participated throughout the 2005 Legislative Session in the discussions that led finally to passage of HB 3038. The City supported the compromise contained within that bill. We also participated in the Rules Advisory Committee convened to develop Oregon Administrative Rules for Section 315 to implement HB 3038. The City has a strong commitment to both providing the highest quality drinking water to its customers while also protecting the environment, including listed fish species on the Columbia River and the Bull Run/Sandy system. It is important to the City; therefore, that rules adopted to implement the new law both protect our groundwater permits in the Columbia South Shore and are consistent with the intent of HB 3038.

The City does not propose specific changes to the language on persistence of fish species contained in Section 0010 (Definitions). As one of the participants in the legislative process, however, we do wish to make explicit our understanding of legislative intent on this point. We are confident that the intent of the legislation was not to render effectively unusable all municipal permits dated prior to November 2,1998 simply because a listed fish species exists in the affected portion of the waterway. The law does not, that is, enact a "zero effect" test for municipal permit extensions. Instead, permit extensions may be granted as long as the best available information shows that an unexercised water permit can be used without eliminating (that is, while "maintaining the persistence of") a listed or sensitive fish species within the affected portion of the waterway.

The City suggests the following specific changes to the draft rules.

1. It should be made clear that an applicant can withdraw and revise their application after it has reviewed any conditions recommended by ODF&W. This would allow the applicant to either work with ODF&W to resolve issues or conduct more detail investigations of the impact of the water use on listed or sensitive fish species. In

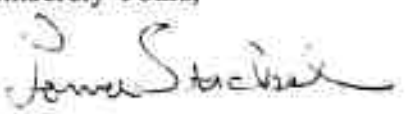
addition, applicants for groundwater extensions should be able to review the determination on potential interference made by the WRD.

2. Subsection 0080(1)(f)(B) should be redrafted to make it explicit that if an applicant has an approved Habitat Conservation Plan, a federal permit that has passed through Endangered Species Act consultation, or an approved state threatened or endangered fish plan, such a plan or permit is conclusive evidence that the development will maintain fish persistence as required for a permit extension. That was the express purpose of the language inserted into ORS 537.230(1)(c) by HB 3038. Pre-existing agreements and commitments to maintain fish species are not to be subject to further state review and additional WRD conditions. Further, it would make sense to add a subsection (C) to 0080(1)(f) that allows for a determination of no impact for groundwater permits where it has been determined that there is no potential interference with surface water or where the Department has determined that there is no significant or measurable impact on surface water sources where listed or sensitive fish species are present.

3. Subsection 0080(1)(f)(B) and 0080(2) should also be amended to clarify the proper review and analysis of ground water permits. First, WRD should only forward to ODFW those permits that are found to have a potential for surface water interference. ODFW need not sort through, and should not be required to sort through, all the ground water permits that have no potential to affect surface water. Second, the rules should direct that, when there is a *potential* for surface water effects, WRD will assess and identify the expected effects prior to forwarding the permit application to ODFW. Once WRD has conducted the hydrologic analysis and provided it to ODFW, ODFW can then assess how any predicted impacts on stream flow will affect fish. ODFW should not be expected to do the hydrologic analysis that is WRD's responsibility.

Thank you for the opportunity to comment on the proposed amendments to OAR 690, Division 315. The City appreciates the hard work that WRD has undertaken to develop these rules. We may submit specific proposed rule language to address these concerns by the close of written testimony on September 21, 2005.

Sincerely Yours,



Lorna Stickel
Water Resources Planning Manager

Cc: Randy Leonard, Commissioner of Public Safety
David G. Shaff, Water Bureau Interim Administrator
Terry Thatcher, City Attorneys Office

CITY OF
PORTLAND, OREGON
BUREAU OF WATER WORKS

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September 21, 2005

Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301-1271
ATTN: Debbie Colbert

Dear Ms. Colbert:

As noted in our written testimony on draft rules for OAR 690-315 submitted on September 19. 2005 we would like to provide a supplement to that testimony that includes some specific proposed language for the rules. This language directly addresses our already communicated technical concerns related to how existing fish agreements are used by the Department to make conclusive findings about fish persistence and how the Department provides impact assessments to ODF&W regarding groundwater permits that may potentially affect surface waters. Our language suggestions are in underlined and strikeout format based on the proposed rules developed by the Water Resources Department.

690-315-0080

(e) There is good cause to approve the extension; and

(f) For the first extension issued after June 29, 2005 for municipal water use permits issued before November 2, 1998:

(A) There are agreements regarding use of the undeveloped portion of the permit between the permit holder and a federal or state agency that include conditions or required actions that maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit. For purposes of this subsection, findings or conclusions by a federal or state agency within an approved Habitat Conservation Plan, or other agreement that provides flow conditions or other actions that will maintain the persistence of listed fish species shall be conclusive evidence that this condition has been met; or

(B) ~~If it is determined~~ The Department determines that ~~use of~~ the undeveloped portion of the permit, appropriately conditioned, can be used while ~~would not~~ maintaining the persistence of

listed fish species in the portions of the waterways affected by water use under the permit, ~~the undeveloped portion of the permit.~~

(2) The Department's finding for municipal use permits under subsection (1)(f) of this rule shall be based on data that is available at the time of the permit extension and advice of the Oregon Department of Fish and Wildlife (ODFW).

(a) The Department shall notify ODFW of each pending municipal surface water use permit extension application that is subject to subsection (1)(f) of this rule and each ground water use permit extension application subject to subsection (1)(f) for which the Department has determined there is a potential for substantial interference with surface water pursuant to OAR Chapter 690, Division 09. The Department shall provide at least 60 days for ODFW to respond prior to issuing a proposed final order under 690-315-0050. The Department may issue a proposed final order prior to 60 days if comments are received from ODFW.

(b) Upon notifying ODFW under subsection (2)(a), the Department shall also notify the applicant that its municipal permit extension application has been sent to ODFW for review.

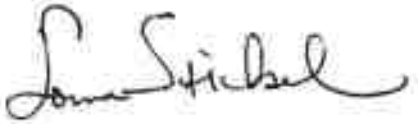
(c) For those ground water permits submitted to ODFW under this rule, the Department shall also provide to ODFW (and concurrently to the applicant) the Department's best estimate of the surface water effects, including any predicted reductions in stream flow, that would result from use of the undeveloped portion of the permit. The estimate shall be based on the best available information and appropriate scientific analysis and may include information or modeling submitted by the applicant.

(b~~d~~) ODFW shall provide its written advice to the Department on the extension application within 60 days of the Department's notice in subsection (2)(a) of this rule or notify the Department that additional time, not to exceed 120 days unless the applicant consents, will be needed to complete its evaluation.

(e~~e~~) If ODFW determines~~it is determined~~ that use of the undeveloped portion of the permit would not maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit, ODFW may recommend to the Department fishery resources protection conditions for inclusion in the proposed final order under 690-315-0050 that would provide protection to maintain the persistence of listed fish species.
(d~~f~~) The Department may place fishery resource protection conditions on the undeveloped portion of the permit in the extension proposed and final order under 690-315-0050 if the Department finds that, without such conditions, ~~at the time of the permit extension that~~ use of the undeveloped portion of the permit will not maintain, in the portions of waterway affected by water use under the permit, the persistence of listed fish species.

We hope that you find this proposed language acceptable, or something close to what we are proposing.

Sincerely Yours,



Lorna Stickel
Water Resources Planning Manager

CC: Randy Leonard, Commissioner of Public Safety
David G. Shaff, Water Bureau Interim Administrator
Terry Thatcher, City Attorney Office

League of Oregon Cities
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September 19, 2005

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert,

Thank you for the opportunity to provide comments on the department's proposed changes to OAR Chapter 690, Division 315. These changes are in response to the enactment of HB 3038 which passed in the 2005 session. As the primary sponsor of HB 3038, the League of Oregon Cities is very concerned about the proposed rules and without significant changes to reflect the legislative intent of HB 3038, **the League opposes their adoption**.

In order to coordinate extensive comments, the League has actively participated with the Special Districts Association of Oregon and individual water utilities in the creation of the Division 315 comments to be submitted by the Oregon Water Utility Council dated September 19, 2005. A copy of those comments is attached. The League supports those comments. However, I would like to highlight one section of the proposed rules of particular concern.

The League is most concerned with the new proposed definitions in OAR 690-315-0010(6)(d) & (e). HB 3038 was a very delicately negotiated piece of legislation in which all parties (Republican and Democratic legislators municipalities, environmental interests, and the department) agreed on a strict interpretation of the bill. Specifically, in Section 1(2)(c) of HB 3038 when the department issues an extension to a municipality seeking a permit extension under Division 315 rules the department must condition the permit "to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law."

This provision of the bill was only agreed to by municipalities with assurances from the Democratic and Republican leaders as well as the department that the definition of "maintain persistence of fish species" would be clarified in legislative intent and through the rule process to mean, "a forecast of future population health stated in terms of the probability of extirpation." This understanding was agreed to by all interests negotiating the bill and was in fact read into the Senate Land Use & Environment Committee record by the department and officially established as the legislative intent by the Senate Land Use and Environment Committee Chairman and House Water Committee Chairman on the floor of the Senate and House (transcripts are attached).

Tualatin Valley Water District

P.O. Box 745 • Beaverton, Oregon 97075 • Phone: (503) 642-1511 • Fax: (503) 649-27?3 • www.tvwd.org

Gregory E. DiLoreto
General Manager

Bernice Bagnall
Chief Financial Officer

Debra Erickson
Manager, Human Resources

Dale Fishback
Manager, Operations & Field Services

Todd Heidgerken
Manager, Community & Intergovernmental Relations

Brenda Lennox
Manager, Customer & Support Services

Gary Pippin
Manager, Engineering Services

September 21, 2005

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301-1271

Re: House Bill 3038
Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms Colbert:

Tualatin Valley Water District provides direct, retail water service to approximately 192,000 residents of Washington County. The District holds partially developed permits in its own name and as part of the Joint Water Commission (JWC), which is a partnership that includes the Cities of Hillsboro, Beaverton, Forest Grove, and Tigard. Tualatin Valley Water District, individually and through the Joint Water Commission, has submitted applications for extensions, which are pending and will be subject to the Rules adopted to implement House Bill 3038. The District has a deep, direct interest in assuring that Rules adopted by the Commission implement the intent of House Bill 3038. We believe the Rules, as drafted, fail to do so.

The District is a member of the Special Districts Association of Oregon and the Oregon Water Utilities Council. Those entities, along with the League of Oregon Cities, were the requestors of House Bill 3038 and were involved with all aspects of negotiation of that law. We fully endorse and adopt the comments of those organizations in regard to the proposed Division 315 Rules. We urge the Commission to adopt the amendments recommended by OWUC to assure that the Rules, as adopted, faithfully implement the clear intent of the Legislature.

Sincerely,

Todd Heidgerken
Manager, Community and Intergovernmental Relations

cc: Paul Eckley, Chair, OWUC
Willy Tiffany, League of Oregon Cities
Kevin Hanway, City of Hillsboro/Joint Water Commission
Amanda Rich, Special Districts Association of Oregon

Eugene Water & Electric Board

EWEB

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September 19, 2005

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert:

Thank you for your efforts to develop draft rules to implement HB 3038 (2005, legislative session).

EWEB supports Oregon Water Utility Council (OWUC) proposed changes to OAR Chapter 690, Division 315. EWEB is one of approximately 30 water utility members of the OWUC, a committee of the Pacific Northwest Section of the American Water Works Association. In this capacity, EWEB has worked closely with OWUC to formulate comments to the proposed OAR chapter 690, Division 315 draft rules (the specific comments will be sent to the Department by the OWUC).

EWEB followed the negotiations leading to the development of HB 3038 and is critically concerned that the Department's rules do not accurately represent the intent and scope of the legislation. Based on this understanding (along with review of floor statements from the legislative hearings), EWEB does not support the hearing draft rules as drafted. Specifically, EWEB believes that the Department's proposed implementation of HB 3038 misses the mark with respect to the "maintain the persistence of listed fish species" provision. It also appears that the Department's proposed implementation of HB 3038 may exceed the authority granted to the Department by the Legislature.

Again, EWEB appreciates the opportunity to comment on the proposed rules. Our permit extension has been in the queue for several years while work groups, rulemakings, litigation and legislation have constantly resulted in changing goal posts. EWEB looks forward to the Water Resources Commission adopting a clear set of rules that accurately capture the intent and scope of HB 3038 and provide a clear path for moving through the permit extension process.

Without incorporating OWUC suggested changes, EWEB cannot support adoption of the hearing draft rules as drafted.

Sincerely,

Tom Buckhouse, Director
Water Division
Eugene Water & Electric Board

Cc: Susie Smith, Representative, Oregon Water Resources Commission

RECEIVED
SEP 21 2005
WATER RESOURCES DEPT
SALEM, OREGON

Joint Water Commission

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150 E. Main Street
Hillsboro, OR 97123
503-681-6119

Board of Commissioners

City of Hillsboro
Will Crandall
Larry Soderholm
John Godsey

City of Forest Grove
Rod Fuiten
Carl Heisler
Victoria Lowe

City of Beaverton
Forrest Soth
Jesse Lawman
Rob Drake

City of Tigard
Dick Winn
Tom Woodruff
Craig Prosser

Tualatin Valley Water District
Greg DiLoreto
Jim Doane
Dick Schmidt

September 19, 2005

Debbie Colbert
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301-1271

Re: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert:

The Joint Water Commission (JWC), is a partnership that includes the cities of Hillsboro, Beaverton, Forest Grove and Tigard, along with the Tualatin Valley Water District. Together these agencies provide municipal water service to over 300,000 residents of Washington County. Several of the JWC members hold partially developed permits. On its own behalf and on behalf of its JWC partners, Hillsboro submitted applications for extensions of its municipal permits to the Water Resources Department initially in 2001. Those applications are still pending, and will be subject to the rules that will be adopted to implement HB 3038.

We are, therefore, vitally interested in seeing that the Commission adopt rules that faithfully implement the provisions of HB 3038. Unfortunately, the proposed draft rules fail to do so.

The Joint Water Commission fully endorses the written comments on and proposed amendments to draft rules submitted by the Oregon Water Utility Council (OWUC), and we expand on two of their points here.

OWUC's written comments recount how the Legislature, both during bill drafting negotiations and in statements on the legislative floor during the debates prior to adoption, carefully and unmistakably documented that its intent was to provide a one-time look to ensure that use of undeveloped portions of a municipal permit would not wipe out a run of fish. In establishing the standard that "the undeveloped portion of the permit is conditioned to maintain … the persistence of fish species," the bill does not establish a standard that such uses result in no harm to a fish population. Under the new law, the standard is clear that only use that of itself will result in extirpation of a population can be denied or conditioned.

The draft rules, in several regards, go beyond the authority of the statute to regulate use of permits where such use may have some impact on fish populations. OWUC's proposed amendments correct those errors, and we wholeheartedly support them.

The department's draft proposed definition of "portions of the waterways affected by water use under the permit" also contradicts the clear intent of the law. The proposed draft definition of "portions of the waterways affected by water use under the permit" implies that portions of the waterway upstream from the point of diversion could be affected by water use. That is a physical impossibility.

The relevant language in HB 3038, Section (2)(c), states: "... the permit is conditioned to *maintain, in the portions of waterways affected by water use under the permit, the persistence of fish*..." The statutory language clearly provides that the focus is to be on fish populations in the portions of the waterway affected by the water use. The water use may affect fish populations above the point of diversion, but that is not "in the portion of the waterway affected by water use" and is, therefore, not what the statute regulates; the statute regulates only uses that result in extirpation of a fish population downstream from the appropriation. To implement the intent of the statute, subsection (i) of the proposed rule should be amended as recommended by OWUC, as follows:

(i) "Portions of the waterways affected by water use under the permit" means: ~~(A) T~~those portions of the *drainage* ~~river~~ basin *at or below the point of diversion or point of appropriation* where use of the undeveloped portion of the permit *will lead to the extirpation* ~~affect the persistence of~~ listed fish species.; ~~(B) The watershed, where use of the undeveloped portion of the permit occurs,~~ downstream to the lower-most point within the applicable river basin as identified by the Department pursuant to its authority under ORS 536.700

The Joint Water Commission cannot support the draft rules as proposed by the Department. We urge the Commission to adopt the amendments recommended by OWUC, to assure that the rules as adopted faithfully implement the clear intent of the Legislature.

Sincerely,

Kevin Hanway
Interim Water Director

cc: Paul Eckley, Chair, OWUC
Willie Tiffany, League of Oregon Cities
David Winship, City of Beaverton
Rob Foster, City of Forest Grove
Gary Pippin, Tualatin Valley Water District
Brian Rager, City of Tigard

Oregon
Association of Water Utilities
12312 Silverton Rd. NE • Silverton, OR 97381 • 503-873-8353 • Fax 503-873-8538

September 15, 2005

Debbie Colbert
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 315

Thank you for your efforts to develop draft rules to implement HB 3038 (Chapter 410, 2005 Laws: Effective date June 29, 2005).

These comments are provided on behalf of the Oregon Association of Water Utilities (OAWU). OAWU is a nonprofit, independent association of water and wastewater utilities. OAWU currently has 450 regular members, 105 associate members, and 30 individual members. The membership consists of public and private water and wastewater systems such as municipalities, associations, districts, mobile home parks, schools, and businesses. By providing technical assistance, training, and industry information OAWU assists water and wastewater utilities enhance the quality of life in the communities they serve.

OAWU took part in the development of HB 3038 and carefully followed the negotiations leading to the final version that is in statute today. It is crucial to OAWU and our water utility members that the Department's rules reflect the legislature's intent as expressed at the time the bill was passed.

It is critically important that the Department's rules adhere to the definition of "maintain the persistence of listed fish species" as read into the record on both the Senate and House Floors upon passage of the bill. OAWU's understanding as stakeholders in the HB 3038 drafting process was that the language as drafted in the bill and defined by the record meant that permit extensions were to be conditioned so as to not allow the extirpation of a listed fish species on the stream from which the undeveloped portion of a permit was to be drawn. The language in the bill was not meant to be a "no harm" standard or a "recovery" standard – but an assurance that use of an undeveloped permit would not exterminate a listed species in the affected stream.

OAWU believes that the Department's proposed implementation of HB 3038 misinterprets the "maintain the persistence of listed fish species" provision and may exceed the authority granted to the Department by the Legislature.

For the above reasons, we do not support the proposed rules and wish to join in the attached comments as submitted by Chair Paul Eckley on behalf of the Oregon Water Utility Council (OWUC). The OWUC comments and suggested rule revisions precisely reflect our concerns about the draft rules.

OAWU appreciates the opportunity to comment on the proposed rules and we look forward to working with the Department to create a set of rules that accurately reflect the intent of HB 3038.

Sincerely,

Jason Green
Executive Director
Oregon Association of Water Utilities

Attachment:
OWUC Comments on Hearing Draft Rules, OAR Chapter 690, Division 315

RECEIVED
SEP 20 2005
WATER RESOURCES DEPT
SALEM, OREGON

City of Sisters

September 20, 2005

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 315

Dear Ms. Colbert,

The City of Sisters wishes to add its voice to the concerns you have received from the Oregon Water Utility Council (OWUC) and the League of Oregon Cities about the draft rules for implementation of HB 3038 adopted by the 2005 Legislature. As noted, the Department's proposed implementation of HB 3038 misses the mark with respect to the "maintain the persistence of listed fish species" provision. It also appears that the Department's proposed implementation of HB 3038 may exceed the authority granted to the Department by the Legislature.

We encourage a redraft of the rules that will provide more security for rapidly growing communities like Sisters to engage in meaningful, long term infrastructure planning.

Thank you for your consideration.

Sincerely,

Eileen Stein
City Manager

150 N. Fir Street ◻ P. O. Box 39, Sisters, OR 97759 ◻ (541) 549-6022 ◻ Fax (541) 549-0561

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September 20, 2005

Debbie Colbert
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 315

Thank you for your efforts to develop draft rules to implement HB 3038 (Chapter 410, 2005 Laws: Effective date June 29, 2005).

The Special Districts Association of Oregon (SDAO) appreciates the opportunity to comment on the draft Division 315 rules. SDAO represents over 900 special districts throughout the state, including approximately 150 municipal water utilities.

SDAO was a lead partner in the development and passage of HB 3038. It is crucial to SDAO and our water utility members that the Department's rules reflect the legislature's intent and the stakeholders' agreement as expressed at the time the bill was passed.

It is critically important that the Department's rules adhere to the definition of "maintain the persistence of listed fish species" as agreed to in the legislative negotiations on the bill and read into the record on both the Senate and House Floors upon passage of the bill. The legislative record reflects that the legislature, defined the phrase as "a forecast of future population health stated in terms of the probability of extirpation."

SDAO's understanding as stakeholders in the HB 3038 negotiation process was that permit extensions were to be conditioned so as to not allow the extirpation of a listed fish species on the stream from which the undeveloped portion of a permit was to be drawn. The standard expressed in the bill was not meant to be a "no harm", a "recovery" or a "viability" standard – but a standard that assured that use of an undeveloped permit would not exterminate a listed species in the affected stream.

SDAO believes that the Department's proposed implementation of HB 3038 misinterprets the "maintain the persistence of listed fish species" provision and may exceed the authority granted to the Department by the Legislature.

For the above reasons, **SDAO opposes the proposed rules** and wishes to join in the attached comments as submitted by Chair Paul Eckley on behalf of the

Oregon Water Utility Council (OWUC). The OWUC comments and suggested rule revisions precisely reflect our concerns about the draft rules.

SDAO appreciates the opportunity to comment on the proposed rules and we look forward to working with the Department to create a set of rules that accurately reflect the intent of HB 3038.

Sincerely,

Greg Baker

Greg Baker
Executive Director
Special Districts Association of Oregon

Attachment:
OWUC Comments on Hearing Draft Rules, OAR Chapter 690, Division 315

OREGON WATER UTILITIES COUNCIL
Pacific Northwest Section, American Water Works Association
1410 20th Street SE, Building #2, Salem, OR 97302
Ph: 503-361-2220, Fax: 503-588-6480, Cell: 503-932-6925
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September 19, 2005

Debbie Colbert

Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street NE
Salem OR 97301-1271

SUBJECT: HEARING DRAFT RULES, OAR CHAPTER 690, DIVISION 315

Dear Ms. Colbert:

Thank you for your efforts to develop draft rules to implement HB 3038 (2005 legislative session).

These comments are provided on behalf of the Oregon Water Utility Council (OWUC). OWUC is a committee of the Pacific NW Section of the American Water Works Association and represents approximately 30 water utilities in Oregon that serve approximately 90 percent of Oregon's drinking water supply. OWUC's mission is to represent water utilities in Oregon in matters of regulatory, legislative, and legal issues facing the drinking water industry. OWUC closely followed the negotiations leading to the development of HB 3038 and is critically concerned that the Department's rules accurately represent the intent and scope of the legislation.

HB 3038 resolves many years of uncertainty associated with municipal permit development. Under HB 3038, municipal water suppliers now have the certainty they need to plan and make significant investments to develop long-term water supplies to support Oregon's growing populations and economic development activities as required by Oregon's land use planning laws. In addition, HB 3038 ensures that municipal water providers continue to responsibly manage and conserve Oregon's water resources through the development and implementation of Water Management and Conservation Plans. Also of significant importance, HB 3038 ensures that water use under the undeveloped portion of a municipal water use permit will not result in catastrophic impacts to Oregon's listed fish species.

Through the negotiations on HB 3038, OWUC members understood they had agreed to a provision that provides a one-time look at permits issued before November 2, 1998 to ensure use of the undeveloped portion of the permit would not wipeout a run of fish. This provision was not meant to be a "no-harm" or "fish recovery" standard but an

evaluation to ensure there were not catastrophic impacts on listed fish species as a result of using the undeveloped portion of the permit. In other words, an evaluation to

determine whether use of the undeveloped portion of the permit would impact a listed fish species population, where stream flow is a limiting factor, to the extent that the listed fish species population would be extirpated. The words **(not the standards)** to describe this provision were taken from the Oregon Plan assessment of coastal Coho salmon. For the purposes of the negotiations on HB 3038, "maintain the persistence of listed fish species" unequivocally meant use of the undeveloped portion of the permit would not lead to extirpation of listed fish species. This is clear from the negotiations on the bill and the statements on the floor of the Senate by Senator Charlie Ringo and on the floor of the House by Representative Bob Jenson. In both chambers, the definition of "maintain the persistence of listed fish species" was read into the record to make it clear it is a measure of fish population health in terms of the probability of extirpation. Webster's Dictionary defines extirpate as "to destroy completely; wipe out."

It is in this context that OWUC does not support the hearing draft rules as drafted. OWUC believes that the Department's proposed implementation of HB 3038 misses the mark with respect to the "maintain the persistence of listed fish species" provision. It also appears that the Department's proposed implementation of HB 3038 may exceed the authority granted to the Department by the Legislature.

Specific comments by rule follow. Additions are in ***italics***. Deletions are in ~~strikethrough~~.

690-315-0010 – Definitions

690-315-0010 (d) – As described above, OWUC strongly urges the Department to develop a definition of "maintain the persistence of listed fish species" that is consistent with the intent and scope of HB 3038. Adding a new term (viability) and a number of ambiguous standards (sufficiently abundant etc.) moves the definition far from the intent and scope of HB 3038 and invites litigation. OWUC recommends 690-315-0010 (d) be modified as follows:

(d) "Maintain the persistence of listed fish species" means use of the undeveloped portion of the permit in such a way as to *not extirpate* ~~maintain the viability of~~ listed fish species populations in the portions of the waterways affected by water use under the permit.

Consistent with this modification, OWUC makes many recommendations below to replace the term "maintain the persistence" with ***will not extirpate.*** The intent of this recommendation is to modify the term "maintain the persistence," throughout the hearing draft rules.

690-315-0010 (e) – This definition of viability is not needed and should be deleted in its entirety.

690-315-0010 (f) – The reference to subsection (6) (d) should be renumbered.

690-315-0010 (h) – The proposed definition of "use of the undeveloped portion of the permit" assumes there is an "impact" on the stream from appropriation of the undeveloped portion of a ground water permit. OWUC disagrees with this assumption and urges the Department to modify the rule as follows:

(h) "Use of the undeveloped portion of the permit" means the diversion of the undeveloped portion of a surface water permit or the *appropriation of the* ~~impact on a stream from pumping the~~ undeveloped portion of a ground water permit where the Department has determined there is a ~~potential for~~ substantial interference with surface water. ~~pursuant to OAR Chapter 690, Division 09~~

As an alternative, the Department may consider a modification to 690-315-0010(h) as follows:

(h) "Use of the undeveloped portion of the permit" means the diversion of the undeveloped portion of a surface water permit or the *appropriation of the* ~~impact on a stream from pumping the~~ undeveloped portion of a ground water permit where the Department has determined there is a potential for substantial interference with surface water pursuant to *690-009-0040(4)(d).* ~~OAR Chapter 690, Division 09~~

690-315-0010 (i) The purpose of adding "in the portions of the waterways affected by water use under the permit" was to narrow the geographic extent of the "maintain persistence" evaluation and to further drive home that the evaluation was to focus on the use of water that would take place as a result of using the undeveloped portion of the permit. The definition as drafted is confusing and too broad. Also ORS 536.700 refers to "drainage basin" not "river basin." OWUC recommends the following modifications:

(i) "Portions of the waterways affected by water use under the permit" means:

~~(A)~~ Those portions of the *drainage* river basin *at or below the point of diversion or point of appropriation* where use of the undeveloped portion of the permit *will lead to the extirpation* affect the persistence of listed fish species.;

~~(B) The watershed, where use of the undeveloped portion of the permit occurs, downstream to the lower-most point within the applicable river basin as identified by the Department pursuant to its authority under ORS 536.700~~

690-315-0080 – Criteria for Department Review and ODFW Input

In terms of general comments, OWUC believes this proposed rule needs to be significantly reworked to:

- clarify that certain municipal permit extension applications do not need to be sent to Oregon Department of Fish and Wildlife (ODFW) for review and advice;
- clarify that the maintain persistence evaluation is not a "no harm" standard;
- clarify that the maintain persistence evaluation must focus on flow-related aspects of the use of the undeveloped portion of the permit, whether flow is a limiting factor for the subject listed species and whether such use would result in the extirpation of listed fish species populations; and
- provide for more opportunities for the applicant to interact with the Department and ODFW regarding the maintain persistence evaluation.

690-315-0080(f) – OWUC recommends this provision be clarified to provide for the 3 conclusions the Department can make regarding a municipal permit extension under this rule.

(f) For the first extension issued after June 29, 2005 for municipal water use permits issued before November 2, 1998:

(A) There are agreements regarding use of the undeveloped portion of the permit between the permit holder and a federal or state agency that include conditions or required actions that *protect against extirpation* ~~maintain the persistence~~ of listed fish species in the portions of waterways affected by water use under the permit; or

(B) It is determined that use of the undeveloped portion of the permit will not extirpate listed fish species in the portions of waterways affected by water use under the permit; or

~~(B)~~ *(C)* If it is determined that use of the undeveloped portion of the permit would *extirpate* ~~not maintain the persistence of~~ listed fish species in the portions of waterways affected by water use under the permit, the undeveloped portion of the permit is conditioned to *not result in the extirpation of* maintain ~~the persistence of~~ listed fish species in the portions of the waterways affected by water use under the permit.

690-315-0080(2) – Nowhere in the proposed rules is there a clear articulation of the standards associated with the maintain persistence finding to be made by the Department. Also, 690-315-0080(2) does not make a distinction between applications accompanied by an agreement with a state or federal agency and other applications. HB 3038 is unambiguous that an "agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is **conclusive** for the purpose of the finding. (*See* HB 3038 Section 1 subsection (2)(c) and Section 2 subsection (2)(c)). As proposed, 690-315-0080(2) is inconsistent with the intent of HB 3038, and by providing ODFW an

opportunity to provide advice on conclusive agreements, beyond the Department's statutory authority granted by HB 3038.

OWUC recommends the Department modify 690-315-0080(2) as follows:

(2) The Department's finding for municipal use permits under subsection (1)(f) *(B) or (C)* of this rule shall be based on data that is available at the time of the permit extension and advice of the Oregon Department of Fish and Wildlife (ODFW). *The Department's finding shall be limited to impacts related to stream flow as a result of use of the undeveloped portion of the permit and further limited to:*

(a) whether use of the undeveloped portion of the permit will affect a listed fish species where stream flow is a limiting factor for the subject listed fish species; and

(b) whether use of the undeveloped portion of the permit will result in the extirpation of the subject listed fish species population in the portions of the waterway affected by water use under the permit.

690-315-0080(2) (a) (b) (c) and (d) -

OWUC recommends the following modifications be made to address the issues raised above and to provide an opportunity for greater applicant participation. Greater applicant participation will ultimately result in greater efficiencies for the Department.

~~(a)~~ ***(c) Except for applications that meet subsection (1)(f)(A) of this rule and municipal ground water permit extension applications where the Department has determined there is not substantial interference with surface water, the*** ~~The~~ **Department shall notify ODFW of each pending municipal water use permit extension application that is subject to subsection (1)(f) of this rule and provide at least 60 days for ODFW to respond prior to issuing a proposed final order under 690-315-0050. The Department may issue a proposed final order prior to 60 days if comments are received from ODFW.**

Or alternatively:

~~(a)~~ ***(c) Except for applications that meet subsection (1)(f)(A) of this rule and municipal ground water permit extension applications where the Department has determined there is not the potential for substantial interference with surface water under 690-009-0040(4)(d), the*** ~~The~~ **Department shall notify ODFW of each pending municipal water use permit extension application that is subject to subsection (1)(f) of this rule and provide at least 60 days for ODFW to respond prior to issuing a proposed final order under 690-315-0050. The Department may issue a proposed final order prior to 60 days if comments are received from ODFW.**

(d) Upon notifying ODFW under subsection (2) (c) of this rule, the Department shall also notify the applicant that its municipal permit extension application has been sent to ODFW for review.

~~(b)~~ *(e)* ODFW shall provide its written advice to the Department on the extension application within 60 days of the Department's notice in subsection (2) ~~(a)~~ *(c)* of this rule or notify the Department that additional time, not to exceed 120 days unless the applicant consents *to more time*, will be needed to complete its evaluation.

~~(c)~~ *(f)* If *ODFW's written advice to the Department indicates* ~~advice it is determined~~ that use of the undeveloped portion of the permit would *extirpate* ~~not maintain the~~ persistence of listed fish species in the portions of waterways affected by water use under the permit *where it is determined stream flow is a limiting factor*, ODFW may recommend to the Department fishery resource protection conditions for inclusion in the proposed final order under 690-315-0050 that would ~~provide protection to~~ *protect against the extirpation* ~~maintain the persistence~~ of listed fish species.

(g) Upon receiving ODFW's written advice, the Department shall notify the applicant of any fishery resource protection conditions that may be proposed in the proposed final order under 690-315-0050. The Department's notice shall also provide the applicant an opportunity to request the Department place the permit extension application on administrative hold.

~~(c)~~ *(h)* The Department may place fishery resource protection conditions on the undeveloped portion of the permit in the extension proposed and final order under 690-315-0050 if the Department finds at the time of the permit extension that use of the undeveloped portion of the permit will *result in the extirpation of a listed fish species population in the portions of the waterway affected by water use under the permit.* ~~not maintain, in the portions of the waterway affected by water use under the permit, the persistence of fish species.~~

690-315-0080(5) – OWUC is concerned that as written, this rule may be interpreted to mean that permits issued after November 2, 1998 are subject to the "maintain persistence" evaluation under HB 3038. That is not the intent of HB 3038. OWUC recommends the rule be modified as follows:

(5) For municipal and quasi-municipal water use permits……in addition to subsections (1) *(a)* – *(e)*, (3), and (4) of this rule, the Department……

690-315-0090 - Time of Extensions

690-315-0090(3) - The wording of this rule is inconsistent with the wording of similar rules in Division 315 and more importantly, it is inconsistent with HB 3038 which refers to the "maximum rate diverted for beneficial use before the extension…" (*See* HB 3038

Section 1 subsection (2)(b)). OWUC urges the following modification to 690-315-0090(3) to ensure consistency with the statutory requirements in HB 3038:

(3) Except as provided in subsection (4) and (5), any water right permit extended under OAR .....beyond the maximum rate, **or duty if applicable**, diverted for beneficial use ***before the extension*** ~~under the permit or previous extension(s)~~ shall only be authorized upon issuance of a final order approving.....

Again, OWUC appreciates the opportunity to comment on the proposed rules. Many municipal water providers have been in the Department's permit extension queue for several years while work groups, rulemakings, litigation and legislation have constantly resulted in changing goal posts. OWUC and its members look forward to the Water Resources Commission adopting a clear set of rules that accurately capture the intent and scope of HB 3038 and provide a clear path for moving through the permit extension process.

Without the suggested changes above, OWUC cannot support adoption of the hearing draft rules as drafted.

Sincerely,

Paul Eckley, Chair
Oregon Water Utility Council

PE:SM:G:Chrono/091605PE Hearing Draft comments_1 September 19

Enclosures:

1. House Bill 3038
2. Department's Hearing Draft Rules dated 09/01/05
3. Transcript of Floor Statements by Senator Charlie Ringo and Representative Bob Jensen

cc: Oregon Water Resources Commission

Enrolled

House Bill 3038

Sponsored by Representative JENSON; Representatives ACKERMAN, ANDERSON, BARKER, BARNHART, BERGER, BEYER, BOONE, BOQUIST, BROWN, BRUUN, BURLEY, DALLUM, ESQUIVEL, FARR, FLORES, GARRARD, GILMAN, HUNT, KITTS, KOMP, KRIEGER, KROPF, KRUMMEL, LIM, MARCH, NOLAN, ROBLAN, SCHAUFLER, G SMITH, THATCHER, TOMEI, WHISNANT, WIRTH, WITT, Senators ATKINSON, BATES, BURDICK, DEVLIN, FERRIOLI, JOHNSON, KRUSE, MONNES ANDERSON, MORRISETTE, MORSE, NELSON, SHIELDS, B STARR, C STARR, WALKER, WESTLUND, WINTERS

CHAPTER .....

AN ACT

Relating to municipal water right permit extensions; creating new provisions; amending ORS 537.230, 537.250, 537.409 and 537.630; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 537.230 is amended to read:

537.230. (1) **Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute** the construction of any proposed irrigation or other work [*shall be prosecuted*] with reasonable diligence and [*be completed*] **complete the construction** within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval.

(2) The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which a permit for municipal use is issued under ORS 537.211. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years. However, the department may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions:

(a) The holder shows good cause. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right;

(b) The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by the department of a water management and conservation plan; and

(c) For the first extension issued after the effective date of this 2005 Act for a permit for municipal use issued before November 2, 1998, the department finds that the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife. An existing fish protection

agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

[(2)] **(3)** Except as provided in ORS 537.240 *[or]* **and** 537.248 **and subsection (2) of this section**, the **Water Resources** Department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year limit established in subsection (1) of this section within which irrigation or other works shall be completed or the right perfected. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

[(3)] **(4)** Except as provided in subsection *[(4)]* **(5)** of this section and ORS 537.409, upon completion of beneficial use as required under *[subsection (1) of]* this section, the permittee shall hire a water right examiner certified under ORS 537.798 to survey the appropriation. Within one year after application of water to a beneficial use or the beneficial use date allowed in the permit, the permittee shall submit a map of the survey as required by the Water Resources Department, which shall accompany the request for a water right certificate submitted to the department under ORS 537.250. If any property described in the permit is not included in the request for a water right certificate, the permittee shall state the identity of the record owner of that property.

[(4)] **(5)** The Water Resources Director may waive the requirement under subsection *[(3)]* **(4)** of this section that a permittee hire a water right examiner certified under ORS 537.798 if:

(a) The permit is a supplemental water right that shares the same distribution system and same place of use as the primary water right; and

(b) The department determines that there is sufficient information in the records of the department to determine proof of beneficial use.

[(5)] **(6)** Notwithstanding ORS 537.410, for purposes of obtaining a water right certificate under ORS 537.250 for a supplemental water right, the permittee shall have a facility capable of handling the full rate and duty of water requested from the supplemental source and be otherwise ready, willing and able to use the amount of water requested, up to the amount of water approved in the water right permit. To obtain a certificate for a supplemental water right, the permittee is not required to have actually used water from the supplemental source if:

(a) Water was available from the source of the primary water right and the primary water right was used pursuant to the terms of the primary water right; or

(b) The nonuse of water from the supplemental source occurred during a period of time within which the exercise of the supplemental water right permit was not necessary due to climatic conditions.

SECTION 2. ORS 537.630 is amended to read:

537.630. (1) **Except for the holder of a permit for municipal use, the holder of a permit issued pursuant to ORS 537.625 shall prosecute** the construction of a well or other means of developing and securing the ground water *[under a permit issued pursuant to ORS 537.625 shall be prosecuted]* with reasonable diligence and *[be completed]* **complete the construction** within a reasonable time fixed in the permit by the Water Resources Department, not to exceed five years after the date of approval of the application. **However,** the department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year period, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use. **In determining the extension, the department shall give due weight to the considerations described under ORS 539.010 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.**

(2) The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which the permit for municipal use is issued under ORS 537.625. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years.

However, the department may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions:

(a) The holder shows good cause. In determining the extension, the department shall give due weight to the considerations described under ORS 536.019 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right;

(b) The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by the department of a water management and conservation plan; and

(c) For the first extension issued after the effective date of this 2005 Act for a permit for municipal use issued before November 2, 1998, the department finds that the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife. An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

[(2)] **(3)** If the construction of any well or other means of developing and securing the ground water is completed after the date of approval of the application for a permit under ORS 537.625, within 30 days after the completion, or if the construction is completed before the date of approval, within 30 days after the date of approval, the permit holder shall file a certificate of completion with the **Water Resources** Department, disclosing:

(a) The depth to the water table;

(b) The depth, diameter and type of each well, and the kind and amount of the casing;

(c) The capacity of the well pump in gallons per minute and the drawdown thereof;

(d) The identity of the record owner of any property that was described in the application for a permit under ORS 537.625 but is not included in the certificate of completion; and

(e) Any other information the department considers necessary.

[(3)] **(4)** Upon completion of beneficial use necessary to secure the ground water as required under *[subsection (1) of]* this section, the permit holder shall hire a water right examiner certified under ORS 537.798 to survey the appropriation. Within one year after applying the water to beneficial use or the beneficial use date allowed in the permit, the permit holder shall submit the survey as required by the Water Resources Department to the department along with the certificate of completion required under subsection *[(2)]* **(3)** of this section. If any property described in the permit is not included in the request for a water right certificate, the permittee shall state the identity of the record owner of that property.

[(4)] **(5)** After the department has received a certificate of completion and a copy of the survey as required by subsections *[(2) and (3)]* **(3) and (4)** of this section that show, to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of ORS 537.505 to 537.795 and 537.992, the department shall issue a ground water right certificate of the same character as that described in ORS 537.700. The certificate shall be recorded and transmitted to the applicant as provided in ORS 537.700.

[(5)] **(6)** The procedure for cancellation of a permit shall be as provided in ORS 537.260.

[(6)] **(7)** Notwithstanding ORS 537.410, for purposes of obtaining a water right certificate under subsection *[(4)]* **(5)** of this section for a supplemental water right, the permittee shall have a facility capable of handling the full rate and duty of water requested from the supplemental source and be otherwise ready, willing and able to use the amount of water requested, up to the amount of water approved in the water right permit. To obtain a certificate for a supplemental water right, the permittee is not required to have actually used water from the supplemental source if:

(a) Water was available from the source of the primary water right and the primary water right was used pursuant to the terms of the primary water right; or

(b) The nonuse of water from the supplemental source occurred during a period of time within which the exercise of the supplemental water right permit was not necessary due to climatic conditions.

SECTION 3. ORS 537.250 is amended to read:

537.250. (1) After the Water Resources Department has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230 *[(3)]* **(4)** that shows, to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, the department shall issue to the applicant a certificate of the same character as that described in ORS 539.140. The certificate shall be recorded and transmitted to the applicant as provided in that section.

(2) When issuing a water right certificate under subsection (1) of this section in the name of a district as defined in ORS 540.505, or in the name of a government agency for a district, the department may issue the water right certificate for land not described in the permit in accordance with ORS 537.252.

(3) Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under subsection (1) of this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in accordance with the terms of the certificate, subject only to loss:

(a) By nonuse as specified and provided in ORS 540.610; or

(b) As provided in ORS 537.397.

SECTION 4. ORS 537.409 is amended to read:

537.409. (1) In lieu of the process set forth in ORS 537.140 to 537.211 for applying for a water right permit, an owner of a reservoir may submit an application to the Water Resources Department to issue a water right permit under ORS 537.211 or a certificate under ORS 537.250 according to the process set forth in this section if the reservoir:

(a) Has a storage capacity of less than 9.2 acre-feet or a dam or impoundment structure less than 10 feet in height;

(b) Does not injure any existing water right;

(c) Does not pose a significant detrimental impact to existing fishery resources as determined on the basis of information submitted by the State Department of Fish and Wildlife; and

(d) Is not prohibited under ORS 390.835.

(2) An application for a water right permit for a reservoir under subsection (1) of this section shall provide sufficient information to demonstrate compliance with the criteria set forth in subsection (1) of this section. The application shall:

(a) Include the quantity of water to be stored by the reservoir, a map indicating the location of the reservoir and the source of the water used to fill the reservoir; and

(b) Be accompanied by the fee established in ORS 536.050 (1)(q).

(3) The map required under subsection (2) of this section need not be prepared by a water right examiner certified under ORS 537.798. The map submitted with the application shall comply with standards established by the Water Resources Commission.

(4) Within 60 days after receiving an application under subsection (1) of this section, the Water Resources Department shall provide public notice of the application in the manner the department determines to be the most appropriate.

(5) Within 60 days after the department provides public notice under subsection (4) of this section, any person may submit detailed, legally obtained information in writing, requesting the department to deny the application for a permit on the basis that the reservoir:

(a) Would result in injury to an existing water right; or

(b) Would pose a significant detrimental impact to existing fishery resources.

(6) In accordance with rules established by the Water Resources Commission for an expedited public interest review process for applications submitted under this section or in response to a re-

quest under subsection (5) of this section, the department shall conduct a public interest review of the reservoir application. The review shall be limited to issues pertaining to:

(a) Water availability;

(b) Potential detrimental impact to existing fishery resources; and

(c) Potential injury to existing water rights.

(7) Within 180 days after the department receives an application for a permit under subsection (1) of this section, the department shall issue a final order granting or denying the permit or granting the permit with conditions.

(8) If the department issues an order under subsection (7) of this section denying the permit, the applicant may request a contested case hearing, which shall be conducted in accordance with applicable provisions of ORS chapter 183.

(9) If the department does not find injury or impact under subsection (6) of this section and the department issues a final order under subsection (7) of this section allowing the issuance of a permit, the order shall be subject to judicial review of orders in other than contested cases as provided in ORS chapter 183.

(10) Notwithstanding the requirement for a survey under ORS 537.230 [*(3)*] (4), a survey of the appropriation is not required for a reservoir that has a storage capacity of less than 9.2 acre-feet of water. For a reservoir qualifying under this subsection, a permittee shall submit to the department a claim of beneficial use within one year after the date of completion of construction. A claim of beneficial use for a reservoir qualifying under this subsection shall require only a written affidavit signed by the permittee that includes the following:

(a) The dimensions of the reservoir.

(b) The maximum capacity of the reservoir in acre-feet.

(c) A map identifying the location of the reservoir. The map shall comply with standards established by the Water Resources Commission. The map required under this subsection need not be prepared by a water right examiner certified under ORS 537.798.

(11) Any person applying for a secondary permit for the use of stored water from a reservoir qualifying under subsection (10) of this section shall submit a survey prepared by a water right examiner certified under ORS 537.798. The survey required under this subsection shall apply to the storage reservoir and to the secondary use of the water in the reservoir.

SECTION 5. (1) The amendments to ORS 537.230 and 537.630 by sections 1 and 2 of this 2005 Act relating to the time to commence and complete construction apply to permits issued by the Water Resources Department on or after the effective date of this 2005 Act.

(2) The amendments to ORS 537.230 and 537.630 by sections 1 and 2 of this 2005 Act apply to requests for extensions of time to complete construction or to perfect a water right made before, on or after the effective date of this 2005 Act, whether or not construction has commenced under a permit prior to the request.

(3) All final orders by the department that resulted in the issuance of a water right permit, the issuance of a water right certificate or the approval of an extension of time to complete construction or to perfect a water right for a municipal use that were issued before the effective date of this 2005 Act are not subject to challenge in an administrative or judicial proceeding with respect to the requirement to commence and complete construction within a specified period of time.

SECTION 6. This 2005 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2005 Act takes effect on its passage.

Passed by House April 14, 2005

Repassed by House June 17, 2005

.....
Chief Clerk of House

.....
Speaker of House

Received by Governor:

....., M., ..., 2005

Approved:

....., M., ..., 2005

.....
Governor

Passed by Senate June 15, 2005

.....
President of Senate

Filed in Office of Secretary of State:

....., M., ..., 2005

.....
Secretary of State

LEGISLATIVE COMMENTS ON HB 3038:

I. SENATE ENVIRONMENT AND LAND USE COMMITTEE
WORK SESSION
June 2, 2005

Tape: 1:16:59 – 1:28: 01

HB 3038A – WORK SESSION

	Matt Shields	Committee Administrator. Submits the –A7 amendments for the record **(EXHIBIT L).**
319	Willie Tiffany	League of Oregon Cities. Provides an overview of HB 3038A. Discusses the –A7 amendments.
354	Adam Sussman	Water Resources Department (WRD). Discusses the –A7 amendments.
TAPE 106, B		
020	Doug Myers	WaterWatch. Explains support for HB 3038A with the –A7 amendments. Submits written testimony **(EXHIBIT M).**
033	Sen. Beyer	Mentions that Mr. Sussman said that any new permit issued to a municipality would be a 20-year permit.
035	Sussman	Replies correct. Explains in detail.
039	Sen. Beyer	Verifies that it doesn't change a new permit issued for an irrigation district or a new permit issued for a private party. Verifies those permits are still at five years.
041	Sussman	Replies correct. Remarks on discussion at previous hearing.
055	**Sen. Burdick**	**MOTION: Moves to ADOPT HB 3038-A7 amendments dated 06/02/05.**
056		**VOTE: 5-0-0**
	Chair Ringo	**Hearing no objection, declares the motion CARRIED.**
057	**Chair Ringo**	**MOTION: Moves HB 3038A to the floor with a DO PASS AS AMENDED recommendation.**
058	Sen. Beyer	Explains opposition to HB 3038A. Expresses appreciation for the –A7 amendments.
067	Chair Ringo	Expresses astonishment that Sen. Beyer would oppose something he acknowledges as a good idea because he believes it doesn't solve enough people's problems.
068	Sen. Beyer	States he would have supported the bill if it had solved the problem for everyone.
069	Chair Ringo	Relates he would have been happy to see those amendments. Points out they were not offered.
070		**VOTE: 4-1-0**
		AYE: 4 - Atkinson, Burdick, Shields, Ringo
		NAY: 1 - Beyer
	Chair Ringo	**The motion CARRIES.**
		SEN. RINGO will lead discussion on the floor.

The following material is submitted for the record without public testimony:

	Todd Heidgerken	Special Districts Association of Oregon, Tualatin Valley Water District. Submits written testimony in support of HB 3038A **(EXHIBIT N).**
079	Chair Ringo	Closes work session on HB 3038A and re-opens work session on HB 3310A.

There are no extra comments on the issue of persistence in this work session. The written testimony here described here is based on the actual audio record. KC

II. SENATE FLOOR
THIRD READING
June 15, 2005

Approximate transcription Tape: 39:24-41:56

Ringo: HB 3038 is a very important bill to cities all over Oregon. It addresses a court decision from the Coos Bay area and that court decision threw into a great uncertainty whether old water permits were still valid. And it would have required potentially many, many cities to go through a complicated analysis, a new analysis to determine what was in the public interest. And so HB came over to the house addressing that concern. One of the issues raised was the other interests involved such as protecting the Instream waters and this concern was raised by WaterWatch. There was a work group that met that put together a compromise on this. That was a good meeting in terms of protecting the interests of the cities on their water rights, but the consideration would include also ensuring the Instream water and how that might impact recreation and fish. A particular issue, this bill has specific words that it says that the work group agreed that the definition of, "maintaining the persistence of fish", and I want to state for the record what this means, that phrase uses the definition that is contained in the Oregon plan and that means it is a forecast of future population health stated in terms of the probability extirpation. He repeats this definition. Again this was an agreement that was reached in the workgroup. I think it is a good bill for municipalities and I think it is good bill for the environment. And I urge an Aye vote.

President: Is there further discussion?

No.

No other discussion.

Vote taken.

III. HOUSE FLOOR
THIRD READING
June 17, 2005

Approximate transcription, 1pm Tape: 8:57-20:58

Jensen moves the House concur in the SA to HB 3038 and repass the bill

Similar to Senator Ringo's remarks…
HB 3038 is certainly one of the most important issues that this legislature has undertaken this session. It comes out of a court of appeals case in Coos Bay and has to do with time elements that municipalities have to perfect and use their water rights. It was a bill that underwent considerable discussion in the House Water Committee. While it was there, there was discussion on the floor when it passed originally and it went to the Senate and it had opposition from WaterWatch. As a consequence and as an effort to get WaterWatch to come on board with the bill, the Senate committee added some language that you would see in section 1, 2c and while this is not everything that we might have wanted for this particular legislation, it is acceptable language with one particular notation that we talked to the chair of the senate committee about and he agreed to and that he read into the record on the floor of the Senate before they passed the bill and I would like also to read into the record, that the understanding that was present when this agreement, when this issue was agreed to by both the cities, and municipalities water users, the Senate committee and the House Water Committee.

And that is line 5 of the 2nd page there is the use of the word, that language is that the portion of the permit is condition to maintain and that word maintain was of some concern to us, and so everyone agreed that as far as this wording is concerned the understanding is to maintain a future population health stated in terms of the probability of expiration relating to viability.

And colleagues with those comments, I urge you to concur in the Senate amendments and repass the bill.

Dingfelder: To the motion
I want to add a few brief words, I was originally a no on this bill, but I will be voting yes on this concurrence because the fix in the Senate was a good fix, the amendments really improve this bill and I want to thank the good representative for his leadership on this and thank all parties who worked so hard for days and weeks who came up with this.

Krummel: Was there any discussion on the Senate side in terms of putting this language in place with regards to standards of flows for the streams and who would set those standards of flows?

Jensen: I can't speak for the discussion on the Senate side.

Krummel: Was there any discussion on the Senate side to hydrolysis of the ground and stream waters and the affects that might have on fish species?

Jensen: I think there was considerable discussion on hydrology on both the House and Senate side, but again I did not listen to the debate over there, but I cannot imagine that the topic would not have been mentioned.

Krummel: I voted for this bill and spoke in favor on the bill on the floor. This was a good bill that left here and went to the Senate. However, I am very concerned about the language that was put in, because I see this as a back door way for activists to then turn around and sue a community for not using their water permit or a reduction of flows to a point that would keep the species from being promulgated. It is important that we maintain these flows. I am concerned that the back doorway will be utilized by the activists.

Unfortunately I will have to vote no on the concurrence.

Jensen: To close, to my friend, representative from Wilsonville, I appreciate his comments etc. in relation to his experience as mayor of Wilsonville and the problems they had and the water they needed to grow. I appreciate Dingfelder's support; however, in all honesty and sincerity this is not the bill I would have liked to have had, but as we all know when we get to controversial issues and bills this is not a body where we can always have a full loaf. It is necessary for us to work back and forth across the aisle with each other to reach a compromise and once we reach it here, then it is equally important to reach compromise in the other chamber so we can move what, in this particular case, is an extremely important bill for the growth and economic development of cities and communities large and small. It was very interesting that we had very, very small communities signing on supporting this bill and the largest community in this state lobbying us to move this bill forward. And while this is not the perfect bill I would have liked to have, this bill personifies the way that democratically-run governments work and consequently I urge you to move this motion forward.

Vote
Declared repassed

Lisa Brown
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97208

Doug Heiken
Oregon Natural Resources Council
PO Box 11648
Eugene OR 97440

September 21, 2005

Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
Attn: Debbie Colbert

Re: Draft Division 315 rules
Sent via email (Debbie.L.Colbert@state.or.us) and U.S. mail

Dear Water Resources Department:

WaterWatch of Oregon and Oregon Natural Resources Council provide these comments on the draft Division 315 rules. These rules are intended to implement a bill passed last session that lengthens the standard time allowed for development of municipal water rights and sets an important fishery protection standard for Water Resources Department ("Department") approval of municipal extensions. As you know this legislation was in response to an appellate court decision resulting from a case brought by WaterWatch regarding a municipal permit extension. As you also know WaterWatch was one of the parties involved in negotiations that led to the passage of the bill. Our central concerns with the draft rules are that: the definition of maintain persistence does not appear to be workable or consistent with the statute; the definition of affected waterways is unnecessary and not consistent with the statute; the rules need to clearly require ODFW and others to review outside agreements if used to meet the statutory standard; and any conditions from such agreements relied upon by the Department need to be enforceable by the Department.

1. The "maintain persistence" definition is inadequate and needs to be strengthened.

    a) The "maintain persistence" definition needs to clearly establish that the Department will not approve an extension if use of the undeveloped portion of the permit will harm listed fish.

House Bill 3038, passed last session by the Oregon legislature, contains a standard that is intended to protect Oregon's imperiled fish. The bill requires that in order to issue an extension

on a municipal permit issued before 1998, the Department must find that "the undeveloped portion of the permit is conditioned to maintain, in the portions of the waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law." Section 2 (2)(c). This is a one time review intended to ensure that as cities grow, at a minimum, city water use granted by extensions does not make things worse for fish. These one-time reviews are critical because they can result in long-term extensions for significant water developments on sensitive streams that are home to imperiled fish species. It will not be until after 2042, in the context of conservation plans, that a public interest review will occur for these water permits.

Maintaining the persistence of listed fish means preventing decline of those fish from their existing condition or state. This is the lowest floor that the Department can consider in authorizing water use. In fact, under the Oregon Plan (for all fish) and the federal Endangered Species Act ("ESA") (for federally listed fish) the Department should be concerned with recovery. The Oregon Plan, as codified at ORS 541.405 *et seq.*, has the mission of "restor[ing] the watersheds of Oregon and to recover the fish and wildlife populations of those watersheds to productive and sustainable levels in a manner that provides substantial ecological, cultural and economic benefits." ORS 541.405 (2)(a). In addition, the Oregon Plan specifies that it "shall focus on aiding the recovery of species listed as threatened or endangered under the federal Endangered Species Act or under ORS 496.171 to 496.192 until such time as recovery is achieved." ORS 541.405 (7). While simply maintaining persistence of such listed species certainly does not reach the Oregon Plan's goal of recovery, the Department, as an Oregon Plan agency must ensure that it implements the "maintain persistence" standard in a way that, at an absolute minimum, does not allow further harm to listed fish species. Allowing such harm would be directly in conflict with the Oregon Plan and work against the Oregon Plan efforts of the state and Oregon's citizens.

At the June 2, 2005 Senate Environment and Land Use Committee work session on HB 3038, Senator Ringo testified that "[a] particular issue, this bill has specific words that it says that the work group agreed that the definition of, 'maintaining the persistence of fish', and I want to state for the record what this means, that phrase uses the definition that is contained in the Oregon plan and that means it is a forecast of future population health stated in terms of the probability extirpation." Attachment A_3038 audio transcriptions (from WRD). "Maintain[ing] persistence" then must require maintenance of this probability. In other words, the use contemplated in the extension must not harm any listed fish in a way that would decrease the probability of their persistence, or equivalently increase its probability of extirpation, in the portions of the waterways affected by the permit.

WaterWatch testified before the Senate Environment and Land Use Committee that HB 3038, as amended "will require the Water Resources Department to deny extensions of such permits unless the extensions are conditioned to maintain populations of fish listed as sensitive, threatened or endangered under state or federal law." Attachment B_WW Senate testimony on HB 3038. Maintaining populations means not causing any decline to their current condition – or, put another way, not harming them.

b) The "maintain persistence" definition in the draft rules is unclear and does not meet the requirements of the statute.

The key fish protection standard in the 315 rules is the "maintain persistence" standard. However, the draft rules fail to clearly define this standard and thus leave open serious questions as to whether the rules properly implement the statute, meet even minimum state requirements and policy goals regarding salmon recovery, or comply with the state or federal ESAs. The "maintain persistence" requirement is found in OAR 690-315-0080 (1)(f)(B)

> (B) If it is determined that use of the undeveloped portion of the permit would not maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit, the undeveloped portion of the permit is conditioned to maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit.

The draft rules define "maintain persistence" as follows:

> (d) "Maintain the persistence of listed fish species" means the use of the undeveloped portion of the permit in such a way as to maintain the viability of listed fish species populations in the portions of waterways affected by water use under the permit;
>
> (e) "Viability" means populations of naturally produced fish comprising the Evolutionarily Significant Unit are sufficiently abundant, productive, and diverse in terms of life histories and geographic distribution that the Evolutionarily Significant Unit as a whole will persist into the foreseeable future;
>
> (f) "Population" means a group of listed fish species, as described in subsection (6)(d) of this rule, originating and reproducing in a particular time which does not interbreed to any substantial degree with any other group reproducing in a different area, or in the same area at a different time;

A key problem with this definition is that it mixes analytical scales in a way that is unworkable and does not meet the requirements of the statute. The viability definition found at (e) is from the Oregon Plan, but refers to populations of fish at the Evolutionarily Significant Unit ("ESU") scale (an example of an ESU is the range of the Oregon Coastal Coho). This is not the analytical scale at which the statute clearly requires the analysis be conducted (". . . the undeveloped portion of the permit is conditioned to maintain, in the portions of the waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law" HB 3038, Section 2 (2)(c), 537.230(3)(c) (emphasis added)). While it is of course critical to maintain persistence of listed fish at the ESU scale, that scale cannot properly be used to define "maintain persistence" at the scale of the portions of affected waterways. They are both important, but very different, scales.

Importantly, what this definition fails to clearly require is that use of the undeveloped portion of the permit not make things worse for fish. The word "maintain" means prevent decline or to

hold in the existing condition or state.[1] Thus maintaining the persistence of listed fish means preventing decline of those fish from their existing condition or state. The rules fail to clearly state this requirement.

It is also unclear why the term "population" has been inserted into the rules while not found in the statute. It does not seem necessary and seems to only confuse things.

In short, it is critical the Department clearly define "maintain persistence." The definition in the draft rules is unclear, unworkable and does not meet the requirement of the statute.

c) Using the Oregon Plan's viability metrics in the definition would be a workable solution

If the Department wants to incorporate the Oregon Plan's viability standard into the rules, a better way to do so would be to focus on the components of that standard, as ODFW is able to apply them, including based on professional judgement, at the required scale (portions of the affected waterway). We propose alternatively that, if the Oregon Plan viability standard is used, the analysis focuses on the Oregon Plan viability criteria. For example, this language could be used:

> (d) "Maintain the persistence of listed fish species" means that, in the portions of waterways affected by water use under the permit, use of the undeveloped portion of the permit will cause no net loss or declining trend in the following viability metrics:
>
> (1) abundance
> (2) productivity
> (3) persistence
> (4) distribution
> (5) diversity

The five viability criteria are found in the Oregon Plan Coho Assessment Part 1: Synthesis. Attachment C_Oregon Plan Coho Assessment excerpt. Focusing the analysis on these metrics would allow the state to more meaningfully evaluate the impacts of the proposed use.

e) Adopting a standard that allows harm to federally ESA listed fish would make the state vulnerable to violating the ESA and resultant third party ESA litigation or federal regulatory actions.

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[1] Black's Law Dictionary, Fifth Edition, defines "maintain" this way: "The term is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for subsistence or existence of; hold; hold or keep in an existing state or condition; hold or preserve in any particular state or condition; keep from change; keep from falling, declining, or ceasing; keep in existence or continuance; keep in force; keep in good order; keep in proper condition; keep in repair; keep up; preserve; preserve from lapse, decline, failure or cessation; provide for; rebuild; repair; replace; supply with means of support; supply with what is needed; support; sustain; uphold. Negatively stated, it is defined as not to lose or surrender; not to suffer or fail or decline. . . "

The federal ESA prohibits all actions that cause a "take" of an endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 3(19), 16 U.S.C. § 1532(19). Congress intended the term "take" to be defined in the "broadest possible manner to include every conceivable way" in which a person could harm or kill fish or wildlife. S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995.

The take prohibition applies only to endangered species but under § 4(d), 16 U.S.C. § 1533(d), may be extended to threatened species by regulation. National Marine Fisheries Service promulgates 4(d) rules on a species by species basis and adopted a 4(d) rule making the take prohibition applicable to several ESU's of west coast salmon and steelhead, including many that may be adversely affected by the extensions that will be reviewed under the 315 rules, that became effective in January of 2001. 65 Fed. Reg. 42,422 (July 10, 2000). U.S. Fish and Wildlife Service has extended the take prohibition by regulation to all threatened species under its jurisdiction.

The National Marine Fisheries Service, responsible for ESA listed marine species and ocean going fish including salmon, has defined "harm" by regulation to include:

> significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102.

The U.S. Fish and Wildlife Service has similarly defined harm as including:

> significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 CFR § 17.3.

"Take" is also defined to include harassment of listed species. FWS regulations define "harass" as

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The ESA "take" prohibition applies to authorization by Oregon governmental officials of actions that are reasonably certain to harm or harass listed species. In Pacific Rivers Council v. Brown, the Federal District Court ruled that the Oregon State Forester can be liable for take if the activities authorized by him harm or harass a listed species. Civ. No. 02-0243-BR, Opinion and

Order (D. Or. Dec. 23, 2002) (Attachment D_PRC v Brown Opinion Denying Motions to Dismiss1). Plaintiffs there alleged that the Oregon State Forester was violating § 9 of the ESA by authorizing clear cutting on private industrial forest lands on high landslide risk sites because that logging caused take of threatened coho. The court found that plaintiffs' allegations were sufficient to state a claim against the State Forester for violation of the ESA. This ruling is consistent with a long line of cases from other states that have found take liability for state officials authorizing activities harmful to ESA listed species.

The same liability rests with the Department if it grants a permit extension that authorizes water use that harms federally listed species. For example, if use of the undeveloped portion of a permit extended by the Department would significantly impair essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering of listed coho, chinook or steelhead, the Department could be found liable for a take under the ESA. The Department needs to ensure that the definition in the 315 rules does not expose the state to this liability.

2. The "portions of waterways affected by water use under the permit" definition is inconsistent with the statute and needs clarification.

The statute clearly specifies that the scale of analysis regarding effects of the use of the undeveloped portion of the permit is: " . . . in the portions of the waterways affected by water use under the permit" HB 3038, 537.230(3)(c)). The proposed rules contain the following definition:

> (i) "Portions of waterways affected by water use under the permit" means:
> (A) Those portions of the river basin where use of the undeveloped portion of the permit will affect the persistence of listed fish species;
> (B) The watershed, where use of the undeveloped portion of the permit occurs, downstream to the lower-most point within the applicable river basin as identified by the Department pursuant to its authority under ORS 536.700;

690-315-0010 (6)(i).

First, there appears to be no need to define "portions of waterways affected by water use under the permit." This is a self-defining term that is certainly not made any more clear or advanced in any way by the definition in the draft rules. The statute clearly requires that fish persistence be maintained in <u>any</u> portions of waterways affected by use of the undeveloped portion of the permit – not only in those portions as defined by rule. Any definition that restricts the scope of analysis in a way that excludes a portion of any affected waterway, as this one does, violates the statute. The definition in the draft rule is unnecessary and thus should simply be deleted.

In addition to being unnecessary, the draft definition is inadequate for the following reasons:

1. The draft definition fails to define watershed, which can mean anything from the catchment of a single non-perennial stream up to the catchment of the Columbia River. Is watershed intended to mean something other than river basin here? If so, what is it intended to mean? What scale of watershed would meet this definition?

2. The draft definition's (A) restricts the analysis to areas where use will affect persistence when the statute clearly requires the analysis to include all areas affected by the use. This restriction may result in preventing a cumulative or full-basin look at the impacts of the use, in violation of the statute.

3. The draft definition's (A), while improperly restricting the analysis based on effects, applies to the whole river basin, presumably as defined at ORS 536.700, but (B) seems to limit the analysis to some watershed, plus the area of the river basin that is downstream of this watershed. These seem to conflict. To the extent that the analysis is restricted to those areas downstream of some (undefined) watershed, this could miss important impacts that may occur upstream (for example, migration barriers that reduce upstream spawner access, basin-level seeding impacts from impacting especially critical spawning or rearing areas, etc.). Such restriction violates the statute.

In summary, there is no need to define "portions of waterways affected by water use under the permit." ODFW and others analyzing the potential impacts of the use of the undeveloped portion of the permits should determine the proper scale of analysis by evaluating where those potential impacts occur. Predefining this scale is unnecessary and to the extent it restricts the scale of analysis to exclude potentially affected areas, as the draft definition does, it is not in compliance with the statute.

3. The allowable use of separate "agreements" to meet the rule standard is inadequately defined.

a) The rules must explicitly require ODFW, WRD, and public review of any separate "agreements" submitted with extension applications to determine whether "agreement" conditions meet the statutory standard.

HB 3038 provides for already completed, separate agreements to be used in meeting the "maintain persistence" standard. Specifically, HB 3038 states:

> An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

Section 1(2)(c) (emphasis added).

Applicants are directed under the draft rules to submit any such agreements with their applications for extension. Draft OAR 690-315-0070 (3)(q). It is our understanding that ODFW will review such agreements to determine if they condition the use in a way that meets the "maintain the persistence" standard. This will be critical because many agreements between permit holders and state and federal agencies could relate to listed fish but not meet this standard. Section 1 of HB 3038 allows only those agreements that "include[] conditions to maintain the persistence of any listed fish species" to be used to support a finding that the agreement meets the "maintain the persistence" standard. This requirement necessarily entails an analysis by the state (ODFW) as to whether such conditions exist in agreements submitted by applicants.

The rules should explicitly include this analysis as a step in the process. This could be done in a number of ways, one of which is to make the following change to the draft rules (in italics):

> (A) There are agreements regarding use of the undeveloped portion of the permit between the permit holder and a federal or state agency that include conditions or required actions that *ODFW and WRD* have ~~has~~ determined *will* maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit; or

Draft 90-315-0080 (1)(f)(A) (edited).

Without such a determination by the state, the state would have no basis for making the required finding that use of the undeveloped portion of the permit would "maintain the persistence" of list fish.

> b) Any "agreement" conditions relied on in granting an extension must become water permit conditions and the extension approval must contain a reopener for cases where the "agreement" or agreement conditions change or cease to exist.

Under the draft rules, there is no requirement that conditions found in outside agreements that are relied on by the Department in granting extensions be made into water permit conditions or made enforceable by the Department in any way shape or form. In fact, agreement conditions relied upon by the Department, or even entire agreements, could completely disappear and under the draft rules the Department would apparently have no way to reopen the analysis to determine that the unconditioned use met or didn't meet the statutory "maintain persistence" standard. Obviously, the Department must have a way to enforce these conditions and to be able to have ODFW review any newly unconditioned use if such conditions or agreements no longer exist. It simply does not make sense, and is likely illegal, for the Department to authorize use based on conditions that could cease to exist with the Department having no provision to reopen the authorization.

4. The rules should recognize that if the Department cannot condition the permit to meet the statutory "maintain persistence" standard, it must deny the extension application.

The rules do not explicitly require the Department to deny extension is the use cannot be conditioned in a way that "maintains the persistence" of listed fish. Obviously, if use of the undeveloped portion of the permit cannot be conditioned to meet a statutory requirement that extension must be denied. An application cannot remain unapproved and not denied forever. The rules should be amended to require the Department to deny extensions that cannot be conditioned to meet the statutory standard.

5. The draft amendments to OAR 690-315-0060 (3)(b)(B) appear unsupported and should be deleted.

The draft rules include the following:

(B) The applicant **submits** *[submitted]* a *[timely]* **written** request for a contested case hearing **within 30 days after the close of the period for submitting protests.**

OAR 690-315-0060 (3)(b)(B).

It is not clear why the rules give the applicant 30 extra days beyond the close of the protest period to request a contested case. There appears to be no basis for this amendment in HB 3038. If this amendment has been added to make these rules consistent with other permitting rules, it may make sense. However, if it is specific to these rules, we have serious reservations about its validity or purpose.

Thank you for considering these comments.

Sincerely,

Lisa A. Brown
Staff Attorney
WaterWatch of Oregon

for Doug Heiken
Western Field Representative
Oregon Natural Resources Council

Attachments: (4)

Attachment A_3038 audio transcriptions (from WRD)
Attachment B_ WW Senate testimony on HB 3038
Attachment C_ Attachment C_Oregon Plan Coho Assessment excerpt
Attachment D_ PRC v Brown Opinion Denying Motions to Dismiss1

ATTACHMENT A

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Tape: 1:16:59 – 1:28: 01

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039	Sen. Beyer	Verifies that it doesn't change a new permit issued for an irrigation district or a new permit issued for a private party. Verifies those permits are still at five years.
041	Sussman	Replies correct. Remarks on discussion at previous hearing.
055	**Sen. Burdick**	**MOTION: Moves to ADOPT HB 3038-A7 amendments dated 06/02/05.**
056		**VOTE: 5-0-0**
	Chair Ringo	**Hearing no objection, declares the motion CARRIED.**
057	**Chair Ringo**	**MOTION: Moves HB 3038A to the floor with a DO PASS AS AMENDED recommendation.**
058	Sen. Beyer	Explains opposition to HB 3038A. Expresses appreciation for the –A7 amendments.
067	Chair Ringo	Expresses astonishment that Sen. Beyer would oppose something he acknowledges as a good idea because he believes it doesn't solve enough people's problems.
068	Sen. Beyer	States he would have supported the bill if it had solved the problem for everyone.
069	Chair Ringo	Relates he would have been happy to see those amendments. Points out they were not offered.
070		**VOTE: 4-1-0** **AYE: 4 - Atkinson, Burdick, Shields, Ringo** **NAY: 1 - Beyer**
	Chair Ringo	**The motion CARRIES.** **SEN. RINGO will lead discussion on the floor.**

The following material is submitted for the record without public testimony:

	Todd Heidgerken	Special Districts Association of Oregon, Tualatin Valley Water District. Submits written testimony in support of HB 3038A **(EXHIBIT N).**
079	Chair Ringo	Closes work session on HB 3038A and re-opens work session on HB 3310A.

There are no extra comments on the issue of persistence in this work session. The written testimony here described here is based on the actual audio record. KC

II. SENATE FLOOR THIRD READING June 15, 2005

Approximate transcription Tape: 39:24-41:56

Ringo: HB 3038 is a very important bill to cities all over Oregon. It addresses a court decision from the Coos Bay area and that court decision threw into a great uncertainty whether old water permits were still valid. And it would have required potentially many, many cities to go through a complicated analysis, a new analysis to determine what was in the public interest. And so HB came over to the house addressing that concern. One of the issues raised was the other interests involved such as protecting the Instream waters and this concern was raised by WaterWatch. There was a work group that met that put together a compromise on this. That was a good meeting in terms of protecting the interests of the cities on their water rights, but the consideration would include also ensuring the Instream water and how that might impact recreation and fish. A particular issue, this bill has specific words that it says that the work group agreed that the definition of, "maintaining the persistence of fish", and I want to state for the record what this means, that phrase uses the definition that is contained in the Oregon plan and that means it is a forecast of future population health stated in terms of the probability extirpation. He repeats this definition. Again this was an agreement that was reached in the workgroup. I think it is a good bill for municipalities and I think it is good bill for the environment. And I urge an Aye vote.

President: Is there further discussion?

No.

No other discussion.

Vote taken.

III. HOUSE FLOOR THIRD READING June 17, 2005

Approximate transcription, 1pm Tape: 8:57-20:58

Jensen moves the House concur in the SA to HB 3038 and repass the bill

Similar to Senator Ringo's remarks...
HB 3038 is certainly one of the most important issues that this legislature has undertaken this session. It comes out of a court of appeals case in Coos Bay and has to do with time elements that municipalities have to perfect and use their water rights. It was a bill that underwent considerable discussion in the House Water Committee. While it was there, there was discussion on the floor when it passed originally and it went to the Senate and it had opposition from WaterWatch. As a consequence and as an effort to get WaterWatch to come on board with the bill, the Senate committee added some language that you would see in section 1, 2c and while this is not everything that we might have wanted for this particular legislation, it is acceptable language with one particular notation that we talked to the chair of the senate committee about and he agreed to and that he read into the record on the floor of the Senate before they passed the bill and I would like also to read into the record, that the understanding that was present when this agreement, when this issue was agreed to by both the cities, and municipalities water users, the Senate committee and the House Water Committee.

And that is line 5 of the 2nd page there is the use of the word, that language is that the portion of the permit is condition to maintain and that word maintain was of some concern to us, and so everyone agreed that as far as this wording is concerned the understanding is to maintain a future population health stated in terms of the probability of expiration relating to viability.

And colleagues with those comments, I urge you to concur in the Senate amendments and repass the bill.

Dingfelder: To the motion
I want to add a few brief words, I was originally a no on this bill, but I will be voting yes on this concurrence because the fix in the Senate was a good fix, the amendments really improve this bill and I want to thank the good representative for his leadership on this and thank all parties who worked so hard for days and weeks who came up with this.

Krummel: Was there any discussion on the Senate side in terms of putting this language in place with regards to standards of flows for the streams and who would set those standards of flows?

Jensen: I can't speak for the discussion on the Senate side.

Krummel: Was there any discussion on the Senate side to hydrolysis of the ground and stream waters and the affects that might have on fish species?

Jensen: I think there was considerable discussion on hydrology on both the House and Senate side, but again I did not listen to the debate over there, but I cannot imagine that the topic would not have been mentioned.

Krummel: I voted for this bill and spoke in favor on the bill on the floor. This was a good bill that left here and went to the Senate. However, I am very concerned about the language that was put in, because I see this as a back door way for activists to then turn around and sue a community for not using their water permit or a reduction of flows to a point that would keep the species from being promulgated. It is important that we maintain these flows. I am concerned that the back doorway will be utilized by the activists.

Unfortunately I will have to vote no on the concurrence.

Jensen: To close, to my friend, representative from Wilsonville, I appreciate his comments etc. in relation to his experience as mayor of Wilsonville and the problems they had and the water they needed to grow. I appreciate Dingfelder's support; however, in all honesty and sincerity this is not the bill I would have liked to have had, but as we all know when we get to controversial issues and bills this is not a body where we can always have a full loaf. It is necessary for us to work back and forth across the aisle with each other to reach a compromise and once we reach it here, then it is equally important to reach compromise in the other chamber so we can move what, in this particular case, is an extremely important bill for the growth and economic development of cities and communities large and small. It was very interesting that we had very, very small communities signing on supporting this bill and the largest community in this state lobbying us to move this bill forward. And while this is not the perfect bill I would have liked to have, this bill personifies the way that democratically-run governments work and consequently I urge you to move this motion forward.

Vote
Declared repassed

ATTACHMENT B

Testimony of Doug Myers
Before the Senate Environment And Land Use Committee
On HB 3038A
June 2, 2005

Chair Ringo and members of the Committee:

For the record, I am Doug Myers, representing WaterWatch of Oregon.

As you know, WaterWatch opposed HB 3038 in the form passed by the House of Representatives, for the reasons stated in WaterWatch's testimony to the Committee on May 19, 2005.

Since the Committee's hearing, WaterWatch has engaged in ongoing negotiations with the Water Resources Department and representatives of municipal water suppliers in an attempt to reach an acceptable compromise on HB 3038. WaterWatch thanks the Department and the municipal interests, including the League of Oregon Cities, for negotiating with WaterWatch in good faith on HB 3038. WaterWatch also thanks Chair Ringo for facilitating those negotiations, and for his dedicated interest in the topic raised by HB 3038.

WaterWatch recently reached an agreement with municipal water suppliers and the Water Resources Department regarding certain amendments to HB 3038. The amendments are reflected in HB 3038-A7. With those amendments, WaterWatch no longer opposes HB 3038.

Although even with the amendments HB 3038 will still be less than ideal, it will at least explicitly require some consideration of environmental impacts before extending the time to develop a municipal appropriation permit issued before November 2, 1998. In particular, the amendments in Section 1(2)(c) and Section 2(1)(c) will require the Water Resources Department to deny extensions of such permits unless the extensions are conditioned to maintain populations of fish listed as sensitive, threatened or endangered under state or federal law. This subsection requires the Water Resources Department to consult with the Oregon Department of Fish and Wildlife in determining if an extension can meet that requirement. This provision also requires the decision to be based on all existing data, which can be brought forward in the existing agency process that allows public participation in extension proceedings. The ability of the public to participate meaningfully and effectively in extension proceedings is a critical condition of WaterWatch's support of these amendments.

Throughout our discussions with municipal interests they expressed concern any state or federally approved plan developed under the state or federal Endangered Species Act, such as Habitat Conservation Plans or other conservation agreements, be considered in extension decisions. WaterWatch supports the concept that such plans that meet or exceed the "persistence" standard in the amendments should be considered in extension proceedings. The amendments in section 1(2)(c) and Section 2(2)(c) which allow an "existing fish protection agreement between the permit holder and a state or federal agency" to fulfill this extension requirement specifically addresses this issue.

The proposed amendments assume that certain administrative rules relating to extensions remain in effect. The required environmental review in Sections 1(2)(c) and Section 2 (2)(c) will be applied only to extensions of municipal water use permits issued before November 2, 1998 because municipal permits issued after that date are subject to administrative rules that already require consideration of environmental factors in determining whether to extend the time for developing a permit. In addition, the environmental review specified Section 1 (2)(c) and Section 2 (2)(c) will be limited to the next pending or requested extension only because administrative rules for review of water conservation and management plans

for every municipal water use permit require a finding by the Department that new water withdrawals after 2042 will not impair or be detrimental to the public interest.

Thank you for the opportunity to comment on HB 3038A.

ATTACHMENT C

Oregon Coastal Coho Assessment

Part 1: Synthesis of the Coastal Coho ESU Assessment – Including:

1. **Viability Analysis**
2. **Population Bottlenecks**
3. **Evaluation of Conservation Efforts**
4. **Monitoring**
5. **Current Threats to ESU Viability**
6. **Adaptive Management Commitments**

State of Oregon[1]

May 6, 2005

[1] For reference purposes, primary authors are Jay Nicholas, Bruce McIntosh and Ed Bowles, Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon.

future population abundance based on coho recruitment data from the 1950s through 2003. All attributes were evaluated at the population level, and then rolled up for strata and ESU evaluation.

Population Viability Criteria
The following criteria were assigned to each attribute to represent viable populations. If a population failed one or more of the criteria, it was not considered viable. Part 2 of this report provides a more thorough description of criteria.

Abundance: (1) During a recent period of very poor ocean survival conditions (1993-1999), the average spawning abundance met or exceeded levels equivalent to five fish per mile.

Productivity: (2) During a recent period of very poor ocean survival conditions, the recruits per spawner (R/S) averaged at or above replacement when spawner density was less than 10 fish per mile.

Persistence: (3) The probability of averaging only one fish per mile for any three-year period over the next 100 years is no more than 5%.

Distribution: (4) Based on pooled spawner data for the recent 12-year period of poor marine survival (1989-2000), at least half of the sampling sites within a population's spawning area have at least four fish per mile for at least half of the 6th field Hydrologic Unit subbasins.

Diversity: (5) The harmonic mean of annual forecasted spawner abundance exceeds 600 spawners to avoid loss of 5% genetic variation over the next 100 years.

ESU Viability Criteria
Population viability results were rolled up to evaluate the status of the ESU. The ESU was considered viable if all of the following conditions were met: (1) at least ha lf of the independent ESU populations passed all population viability criteria; (2) at least two populations per strata passed all population viability criteria; and (3) all strata passed (i.e., met conditions 2 and 3).

Assessment of Coho Status Relative to Criteria
Based on our assessment of the status of coastal coho relative to viability criteria, the ESU is viable (Table 2). All strata passed their criteria; 14 populations passed all the population criteria, and seven populations failed at least one criterion.

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PACIFIC RIVERS COUNCIL, COAST RANGE ASSOCIATION, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AUDUBON SOCIETY OF PORTLAND, and NATIVE FISH SOCIETY,

Plaintiffs,

v.

JAMES E. BROWN, State Forester, Oregon Department of Forestry,

Defendant,

and

OREGON FOREST INDUSTRIES COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, OREGON SMALL WOODLANDS ASSOCIATION, JOHN CHRISTIE, and TILLAMOOK COUNTY,

Defendant-Intervenors.

CV 02-243-BR

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Motions to Dismiss filed by Defendant James E. Brown (#52), Defendant-Intervenors Oregon Forest Industries Council (OFIC) and American Forest & Paper Association (AFPA)(#50),[1] and Defendant-Intervenor Tillamook County (#85).[2] For the reasons that follow, the Court

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[1] OFIC is a trade organization that represents the private industrial forest landowners in Oregon, and AFPA is a national trade organization that represents the forest, pulp, paperboard, and wood products industry.

[2] Tillamook County joins in the Motion to Dismiss filed by OFIC and AFPA. OFIC, AFPA, and Tillamook County are hereinafter referred to collectively as Intervenors.

DENIES each of the Motions to Dismiss.

PLAINTIFFS' COMPLAINT

Plaintiffs, a group of environmental, commercial fishing, and tourist industry organizations, filed this citizen suit against Defendant James E. Brown, the State Forester for the Oregon Department of Forestry (State Forester). Plaintiffs allege the State Forester violated the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), *et seq.*, and its implementing regulations with respect to Oregon Coast coho salmon. Plaintiffs seek an injunction against further violations.

Oregon Coast coho salmon populations have declined precipitously over the past several decades. Habitat degradation due to logging activities has been a major factor in the decline. Based on this decline, the National Marine Fisheries Service (NMFS) declared the Oregon Coast coho salmon to be a threatened species. The ESA's "take prohibition" makes it illegal for any person to "take" a threatened species without written authorization. "Take" is defined as occurring when a person engages in or attempts to engage in activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species. Acts that significantly impact a protected species' habitat may harm members of that species and, therefore, constitute take under the ESA. Such acts may include significant

habitat modification or degradation that actually kills or injures listed fish by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding, or sheltering. The ESA's take prohibition as to Oregon Coast coho salmon became effective on January 8, 2001.

Plaintiffs allege the State Forester must review and approve clearcut logging operations on private lands in the State of Oregon pursuant to state statutes and regulations, and his approval is a prerequisite to such operations. Plaintiffs also allege the State Forester routinely approves logging operations that are likely to cause take of Oregon Coast coho salmon. Plaintiffs, therefore, seek an order from the Court that declares the State Forester violated the ESA by approving clearcut logging operations

(1) on high-risk sites where the effects of the ensuing landslides would reach coho salmon habitat;

(2) along small and medium streams used by listed coho salmon with only the minimum riparian management area protections mandated under the Oregon forest practice rules; and

(3) along small nonfish-use streams without any no-cut buffers or vegetation retention where listed coho salmon occupy or use the affected downstream waters.

In addition, Plaintiffs seek an injunction to prohibit the State Forester from approving "private industrial logging operations" in the above three circumstances without adequate protection for

threatened coho salmon. Plaintiffs define private industrial logging operations as those occurring on parcels of 5,000 or more acres of forest land owned by a single, private landowner.

STANDARDS

On a motion to dismiss under Fed. R. Civ. P. 12(b), all allegations in the complaint are considered true and are construed in the plaintiff's favor. *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir.), *cert. denied*, 120 S. Ct. 499 (1999). The court should not dismiss a complaint, thus depriving the plaintiff of an opportunity to establish his or her claims at trial, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Plaintiffs have the burden of establishing that the court possesses subject matter jurisdiction. *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770 (9th Cir. 2000). When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may consider affidavits and other evidence that support or attack the jurisdictional allegations set forth in the Complaint. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). If a plaintiff's proof of jurisdictional facts is limited to written materials, it is only

necessary for those materials to establish a *prima facie* showing of jurisdiction. *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co., Inc.*, 655 F.2d 938, 942 (9th Cir. 1981) (citing *Data Disc, Inc.*, 557 F.2d at 1284-85).

DISCUSSION

Defendant and Intervenors move to dismiss Plaintiffs' Complaint. Defendant and Intervenors assert five grounds for dismissal: 1) this action is not justiciable because the issues presented are not ripe for adjudication, 2) this action is not justiciable because Plaintiffs lack standing, 3) Plaintiffs' action is barred by the Eleventh Amendment, 4) this action is barred by the Tenth Amendment, and 5) Plaintiffs fail to state a claim.

I. Plaintiffs' Claims Are Ripe for Review.

Defendant and Intervenors contend Plaintiffs' claims are not ripe for judicial review. The doctrine of ripeness determines the appropriate timing for judicial review. Whether a claim is ripe for adjudication implicates the court's subject matter jurisdiction under the case or controversy requirement of Article III of the United States Constitution. The ripeness requirement is designed

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect

> the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Ohio Forestry Ass'n. v. Sierra Club, 523 U.S. 726, 732-33 (1998)(quotation and citation omitted). To decide whether an action is ripe for judicial review, courts must examine the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.*

Defendant and Intervenors argue Plaintiffs are improperly attacking forest regulations generally; i.e., asserting a "programmatic challenge." Defendant and Intervenors contend Plaintiffs, in effect, are attacking the sufficiency of Oregon's forest practices program because, rather than challenging any specific logging operation, Plaintiffs allege logging generally has had harmful effects on aquatic ecosystems and unspecified operations in certain watersheds have had cumulative adverse effects on salmon habitat. Defendant and Intervenors argue such an attack is not ripe based on the Supreme Court's reasoning in *Ohio Forestry.*

In *Ohio Forestry*, the plaintiff challenged a federal forest management plan developed by the National Forest Service for the Wayne National Forest in Ohio. The plan set logging goals, but it did not authorize cutting any trees. The Forest Service was required to issue permits for any logging pursuant to rules set forth in the plan. In its complaint, the plaintiff alleged the

plan wrongly favored logging and clearcutting. Plaintiff moved the court for a declaration stating the plan was unlawful and for an injunction prohibiting defendants from permitting or directing further timber harvest. *Id.*

To determine whether the plaintiff's action was ripe, the Supreme Court considered 1) whether delayed review would cause hardship to the plaintiffs, 2) whether judicial intervention would interfere inappropriately with further administrative action, and 3) whether the courts would benefit from further factual development of the issues presented. *Id.* at 733.

The Court held the plaintiff would not suffer significant hardship because the plan did "not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm." *Id.* The Court noted no trees could be cut until the agency had engaged in other administrative actions, including making decisions on individual timber sales. Accordingly, there was no hardship to the plaintiffs in delaying a decision on the plan because plaintiffs could still challenge any individual timber sale under the plan before any trees could be cut. The Court further held the provisions of the Plan

> do not command anyone to do anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations. Thus, for example, the Plan

> does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut.

Id. In addition, the Court found a decision would interfere with further administrative action because there were still opportunities in the implementation of the plan for the Forest Service to make decisions that essentially would moot the plaintiff's objections. Finally, the Court found further factual development would clarify the issues in the context of individual timber sales. *Id.* at 735-36.

Defendant and Intervenors argue this case is indistinguishable from *Ohio Forestry*. The Court, however, finds Plaintiffs' claims differ substantially from those brought by the plaintiff in *Ohio Forestry*. In their Complaint, Plaintiffs do not raise a facial challenge to state regulations, but instead challenge the State Forester's approval of three types of logging practices. Plaintiffs allege the State Forester has consistently approved the three logging practices at issue, the State Forester will continue to do so unless enjoined, and the logging practices cause take of Coho salmon. Plaintiffs further assert denial of review will cause hardship because harm is underway and ongoing. According to Plaintiffs, the State Forester has granted and is continuing to grant private timber owners the legal right to cut trees in a manner that causes harm to salmon habitat in violation of the ESA. Accordingly, the Court finds Plaintiffs have

established a hardship to the extent the State Forester permits or fails to stop logging activity that causes take of threatened salmon.

Defendant and Intervenors also argue the relief Plaintiffs seek would interfere with ongoing administrative rulemaking by the Board of Forestry. Plaintiffs, however, do not ask the Court to force the Board of Forestry to adopt new regulations nor do they seek to invalidate existing rules. Plaintiffs merely ask the Court to enjoin the State Forester from violating the ESA by approving logging operations that are likely to cause take of threatened salmon. The Court finds such an injunction would not interfere with the rulemaking activities of the Board of Forestry. The Court, therefore, concludes this matter is ripe for adjudication.

II. Plaintiffs Have Standing to Bring this Action.

Defendants and Intervenors argue Plaintiffs lack standing to bring this action. The three elements of standing are:

> First, the plaintiff must have suffered an injury in fact -an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)(ellipses and brackets in original; internal quotations and citations omitted). Plaintiffs bear the burden of establishing these elements. *Id.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

Defendant and Intervenors argue Plaintiffs lack standing because there is no causal connection between the administrative actions of the State Forester and harm to threatened salmon. In addition, Defendant and Intervenors contend the alleged injury is unlikely to be redressed by the Court's decision. Defendant and Intervenors also argue the only actions that may cause take of salmon under the ESA are "the forest operations themselves, not the administrative actions of the State Forester." To satisfy the standing requirement at this stage of the litigation, however, Plaintiffs need only allege facts that, if true, establish the requisite causal connection. The purpose of the standing doctrine is to ensure Plaintiffs have a concrete dispute with Defendant rather than to establish whether Plaintiffs ultimately will prevail against Defendant. Thus, Plaintiffs need not establish causation with the degree of certainty required for

them to succeed on the merits of a tort claim. Instead, Plaintiffs must show only "the 'reasonable probability' of the challenged action's threat to [their] concrete interest." *Hall v. Norton*, 266 F.3d 969, 976-77 (9th Cir. 2001). Plaintiffs allege the State Forester's approval of logging operations are likely to cause take of threatened salmon. The Court finds Plaintiffs' allegation is sufficient to satisfy the standing requirement at this stage of the litigation.

Defendant and Intervenors also assert Plaintiffs' alleged injury would not be redressed by the injunction Plaintiffs seek. The Court, however, is capable of crafting an adequate injunction if Plaintiffs prevail.

For purposes of the pending Motions to Dismiss, the Court concludes Plaintiffs have established standing to pursue this action.

III. The Eleventh Amendment Does Not Bar Plaintiffs' Action.

Defendant and Intervenors contend Plaintiffs' action is barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment prohibits federal courts from entertaining actions by private citizens against any state in the absence of state consent. *Almond Hill School v. United States Dept. of Agriculture*, 768 F.2d 1030, 1033 (9th Cir. 1985)(citation omitted). When the state is the real party in interest, a plaintiff cannot avoid the state's Eleventh Amendment

immunity by naming state officials as defendants rather than naming the state itself. *Natural Res. Def. Council v. Cal. Dep't. of Transp.*, 96 F.3d 420, 422 (9th Cir. 1996)(citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)). When a plaintiff brings an action against state officials alleging violations of federal law, the federal court may enjoin the official's future conduct. The Court, however, may not award retrospective relief that requires the payment of funds from the state treasury. *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183-84 (9th Cir. 1997)(citations omitted).

> Since the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law. The *Young* doctrine is premised on the fiction that such a suit is not an action against a "State" and is therefore not subject to the sovereign immunity bar. The *Young* doctrine strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, 'giving recognition to the need to prevent violations of federal law.'

Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000), *cert. den.*, 532 U.S. 958 (2001). The *Young* exception applies to violations of federal statutory rights as well as to violations of the Constitution. *Natural Res. Def. Council*, 96 F.3d at 422.

Plaintiffs seek two types of relief: A declaration that the State Forester has violated the ESA by approving clearcut logging operations in the three general circumstances previously described and an injunction enjoining Defendant from approving logging operations in those three circumstances in watersheds that contain coho salmon. Defendant asserts this relief is not allowed under *Ex parte Young* for four reasons: 1) *Ex parte Young* does not allow retrospective relief; 2) the alleged violations of the ESA are not "fairly traceable" to the State Forester; 3) the prospective relief sought is not allowed under *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); and 4) the claim is barred because the ESA's remedial structure dictates against federal court intervention.

A. Plaintiffs do not seek retrospective relief.

Plaintiffs seek a declaration that the State Forester has violated the ESA by failing to prohibit clearcut logging operations in the past. Defendant and Intervenors argue Plaintiffs' claim is barred by the Supreme Court's ruling in *Puerto Rico Aqueduct v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The Court noted:

> [T]he *Young* exception is narrow: It applies only to prospective relief, does not permit judgment against state officials declaring that they violated federal laws in the past, . . . and has no application in suits against the states and their agencies, which are barred regardless of the relief sought.

Id. at 146. Defendant and Intervenors also argue Plaintiffs' claim for declaratory relief is beyond the scope of relief permissible under the *Young* doctrine because Plaintiffs seek retrospective relief.

Plaintiffs contend they seek only an ancillary declaration in support of their request for injunctive relief, and that such relief is permitted under *Ex Parte Young.* The Ninth Circuit has held in favor of Plaintiffs' position. *See Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309-10 (9th Cir. 1993), *cert. den.*, 513 U.S. 873 (1994) (Eleventh Amendment does not bar a district court from considering defendants' past conduct as it relates to ongoing or future violations). The Court, therefore, concludes the Eleventh Amendment does not bar Plaintiffs' claim for declaratory relief.

B. The alleged violations of the ESA are "fairly traceable" to the State Forester.

Defendant and Intervenors next argue there must be "a fairly direct connection" between the officer sued and the enforcement of the state law that is challenged to maintain a suit under *Ex parte Young.* Defendant relies on *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998). In *Snoeck*, the plaintiffs filed complaints with Nevada's Commission on Judicial Fitness alleging certain improper acts by two sitting Nevada judges. Rules of the Nevada Supreme Court required the plaintiffs to keep their complaints

confidential and not to disclose the circumstances that led to the complaints. The rules also provided a contempt sanction for any violation of the confidentiality provision. Dissatisfied with these restrictions, the plaintiffs sued members of Nevada's Commission on Judicial Fitness alleging the rules violated plaintiffs' First Amendment rights. The plaintiffs sought a declaration that the rules were unconstitutionally broad on their face and as applied. The defendants moved to dismiss for failure to state a claim. The Ninth Circuit concluded the members of the Commission did not have the necessary connection to the enforcement of the Supreme Court rules and upheld the dismissal of the action. *Id.* at 987. The court held the connection must be determined under state law "depending whether and under what circumstances a particular defendant has a connection with the challenged state law." *Id.* at 986. The Ninth Circuit also held the Eleventh Amendment barred the plaintiffs' action because the Commission had no power to amend the applicable rules nor to adopt different procedures. *Id.* at 987. In addition, the court found the Commission did not have contempt power and, therefore, could not enforce the contempt sanction that the plaintiffs claimed chilled their First Amendment rights. *Id.* The Ninth Circuit stated: "The contempt chill affecting plaintiffs' constitutional rights cannot be alleviated by any pressure which the district court might seek to apply on the Commission." *Id.*

Here Defendant and Intervenors argue Plaintiffs' Complaint is directed at the rulemaking authorities (i.e., the Board of Forestry) rather than the State Forester, who has no authority to change the rules he is required to enforce. Defendant asserts "if the injunction sought by Plaintiffs were to require the State Forester to act, by denying each written plan involving one or more of the types of operations identified by Plaintiffs, the State Forester's order would be subject to appeal and reversal by the Oregon Board of Forestry. ORS 527.700." If the State Forester were to deny a written plan on the basis that it violates the ESA, the timber operator could appeal to the Board. The Board, however, would be required to overturn the State Forester's decision if the plan was in compliance with state law. This scenario, however, is unlikely. If this Court concludes the State Forester violates the ESA by approving the types of logging operations identified by Plaintiffs, the timber operator also would be on notice that the proposed operation violates the ESA. If the operator were to obtain a reversal from the Board of Forestry and proceed in the face of such a ruling by this Court, the operator would then face potential criminal liability for violation of the ESA.

Plaintiffs argue *Snoeck* is inapposite because the *Snoeck* plaintiffs sued the wrong state officials. In contrast, Plaintiffs emphasize the State Forester in this matter is "the

> officials, including Eu and Wilson. It is simply not the type of statute that gives rise to enforcement proceedings.

Id. at 704.

Like the state officials in *Eu*, the State Forester gives effect to the state statute and regulations when he reviews and approves private logging operations. Thus, Plaintiffs argue, the State Forester can be enjoined from carrying out those duties if the state law violates federal law. The Court agrees it has authority under the *Ex parte Young* exception to Eleventh Amendment immunity to enjoin the State Forester from implementing regulations that violate federal law.

C. The relief sought by Plaintiffs would not divest the state of jurisdiction to regulate the use of non-federal forest lands.

Defendant and Intervenors argue *Ex parte Young*'s exception to Eleventh Amendment immunity was narrowed by the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). In *Coeur d'Alene*, the Tribe sought an order establishing its ownership of submerged lands within its reservation and enjoining Idaho from interfering with the Tribe's ownership interests. A majority of the Court endorsed the continuing validity of the *Young* doctrine, but they agreed a quiet title action could not be maintained against the state in federal court. In *Agua Caliente*, the Ninth Circuit, relying on *Coeur d'Alene*, found relief is not available under *Ex parte Young* if

front line official with direct authority for reviewing, approving, and disapproving logging operations." Plaintiffs rely on *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992). In *Eu*, the plaintiffs sued the California Secretary of State and the Governor and challenged a state statute that limited the number of judges who could be appointed to the state court. The Los Angeles Bar Association sought a declaration that the statute violates both state and federal constitutional guarantees because the shortage of judges caused inordinate delays in civil litigation and deprived litigants of access to the courts. The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendants on the basis that the slow pace of litigation did not violate the Constitution. The court also addressed the state defendant's argument that the court lacked jurisdiction under the Eleventh Amendment. Defendants argued they were entitled to Eleventh Amendment immunity on the basis of an alleged lack of connection with enforcement of the challenged statute. The Ninth Circuit held:

> [Defendants] Eu and Wilson have a specific connection to the challenged statute. Wilson has a duty to appoint judges to any newly-created judicial positions, and Eu has a duty to certify subsequent elections for those positions. The lack of any enforcement proceeding by Eu and Wilson against the Bar Association under the challenged statute does not preclude this suit. [The Calif. statute] is currently being given effect by state

"the relief requested would be so much of a *divestiture* of the state's sovereignty as to render the suit as *one against the state itself*." 223 F.3d at 1048 (emphasis in original). The *Agua Caliente* plaintiffs sought to preclude California's imposition of sales taxes on food and beverage purchases at a tribal resort on reservation land. The district court held the case implicated core areas of state sovereignty and dismissed the case. *Id.* at 1044. The Ninth Circuit reversed and held:

> [T]he question posed in *Coeur d'Alene* is not whether a suit implicates a core area of sovereignty, but rather whether the relief requested would be so much of a *divestiture* of the state's sovereignty as to render the suit as one *against the state itself*. To interpret *Coeur d'Alene* differently would be to open a Pandora's Box as to the relative importance of various state powers or areas of state regulatory authority. The majority did not countenance such a result.

Id. at 1048.

Here Defendant and Intervenors argue Plaintiffs' action is barred because it is the functional equivalent of an action against the State. Defendant and Intervenors argue the Oregon Forest Practice Act is an important part of the State's land-use system and regulates forest practices to protect air and water quality, wetlands, natural areas, and public safety. Defendant and Intervenors contend Plaintiffs seek to compel the State to "alter the fundamental equitable balance it has struck between different land uses." Defendant contends this is not permitted

under *Coeur d'Alene*.

Defendant and Intervenors also contend the relief Plaintiffs seek "would leave the State Forester with two possible courses of action: (a) to not act at all on written plans proposing operations involving those characteristics; or (b) to deny written plans proposing forest operations with these characteristics, to the extent such plans are submitted for his review." If the Court requires the State Forester to issue orders denying written plans in the general circumstances described by Plaintiffs, "the legal effect would be to replace State regulation of broad categories of forest practices with a blanket prohibition of these land uses. Such an injunction would divest the State of its longstanding regulatory jurisdiction."

This action, however, differs from the one brought by the plaintiffs in *Coeur d'Alene* because this action will have no effect on the State's ownership of lands. Plaintiffs seek only to prevent the State Forester from approving three discrete types of logging practices that violate the ESA. The relief Plaintiffs seek would neither divest the state of all regulatory authority over private forest lands nor lead to judicial directives to rewrite the state regulations in a particular manner.

D. Plaintiffs' action is not barred by the ruling of the Supreme Court in *Seminole Tribe of Florida v. Florida*.

Defendant and Intervenors also assert Plaintiffs cannot bring an action against a state officer to enforce federal

statutes that contain comprehensive enforcement mechanisms. Defendant and Intervenors rely on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

In *Seminole Tribe*, the Supreme Court held when "Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.* at 74. Defendant and Intervenors argue the ESA contains a detailed remedial scheme similar to the Indian Gaming and Regulatory Act, 25 U.S.C. § 2701-2721 (IGRA), at issue in *Seminole Tribe*. Defendant and Intervenors further contend Congress carefully considered the states' role in implementing the ESA. Defendant and Intervenor, therefore, assert *Seminole Tribe* precludes an action based on *Ex parte Young* in this case.

The Supreme Court, however, emphasized IGRA "stands in contrast to the statutes . . . where lower courts have found that Congress implicitly authorized suit under *Ex parte Young*." *Id.* at 75 n.17. The Court cited the Clean Water Act, 33 U.S.C. § 1365 (CWA), as an example of a statute that differs from IGRA, because the CWA specifically authorizes a suit against "any person" who allegedly violates the CWA. Like the CWA, the ESA specifically authorizes a suit against "any person" who violates the Act.

The Ninth Circuit has held the Supreme Court's ruling in *Seminole Tribe* did not prohibit a citizen suit against the director of California's Department of Transportation for violation of the CWA. *Natural Res. Def. Council v. Cal. Dept. of Transp.*, 96 F.3d 420 (9th Cir. 1996). The court held:

> When Congress enacted the Clean Water Act citizen suit provision, it specified that it was legislating to the extent permitted by the Eleventh Amendment. Congress intended to encourage and assist the public to participate in enforcing the standards promulgated to reduce water pollution. To further that goal, Congress enacted the citizen suit provision so that a citizen enforcement action might be brought against an individual or a government agency. It would seem reasonable, then, that Congress implicitly intended to authorize citizens to bring *Ex parte Young* suits against state officials with the responsibility to comply with clean water standards and permits.

Id. at 424. The ESA's citizen suit provision includes language identical to the CWA. The ESA's broad definition of a "person" against whom injunctive relief may be sought explicitly includes any officers, employees, and agents of any state. 16 U.S.C. §§ 1532(13), 1540(g)(1)(A). The ESA also contains language authorizing actions "to the extent permitted by the eleventh amendment." 16 U.S.C. § 1540(g)(1)(A). In fact, the First Circuit has held specifically that *Ex parte Young* actions may be brought to enjoin continuing violations of the ESA take prohibition. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998).

Based on the Ninth Circuit's reasoning in *Natural Res. Def. Council*, this Court concludes Plaintiffs' action is not barred by *Seminole Tribe*.

IV. The Tenth Amendment Does Not Bar Plaintiffs' Action.

Defendant and Intervenors next argue Plaintiffs' action is barred by the Tenth Amendment to the United States Constitution. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Defendant and Intervenors argue the Tenth Amendment prohibits the federal government from compelling the states to enact or to administer a federal regulatory program such as the ESA. Defendant and Intervenors argue the injunction Plaintiffs seek would compel the State Forester to implement the ESA in Oregon in contravention of the Tenth Amendment. Defendant and Intervenors rely on *Printz v. United States*, 521 U.S. 898 (1997). In *Printz*, the Supreme Court examined the provision of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 925A, which directed state law enforcement officers to perform background checks on handgun purchasers. The Court held the provision to be an invalid attempt to "direct state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme." 521 U.S. at 904.

The extension of general federal statutory obligations to

states, however, poses no Tenth Amendment constitutional problem. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). The ESA imposes a general obligation on all "persons" to avoid causing take of listed species. By its plain terms, this prohibition extends to governmental entities and makes them liable in the same manner as private parties. As the First Circuit recognized, ordering a state official to stop violating federal law does not offend the Tenth Amendment. *Strahan*, 127 F.3d at 170.

V. Plaintiffs Have Stated A Claim Against the State Forester for Violation of the ESA.

Finally, Defendant and Intervenors argue Plaintiffs have failed to state a claim under the ESA. Defendant and Intervenors assert the State Forester cannot be liable as a matter of law for ESA violations allegedly committed by private parties whose actions incidentally are subject to the State Forester's authorization. Defendant and Intervenors contend a take, if any, is caused by those conducting the logging operations.

It is unlawful under the ESA for "any person" to "take" any endangered or threatened species of fish or wildlife within the United States. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "person" broadly and explicitly includes state entities and state officers among those who can be liable. 16 U.S.C. § 1532(13). The ESA expressly authorizes citizen suits "to enjoin any person, including the United States and any other governmental

instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision" of the Act. 16 U.S.C. § 1540(g)(1)(A).

Defendant and Intervenors do not dispute these basic provisions of the ESA. They argue, however, the State Forester does not cause take "by allegedly failing to regulate strictly enough to prevent it." This argument mischaracterizes Plaintiffs' action. Plaintiffs do not allege the State Forester "failed to regulate strictly enough" to prevent take. Instead Plaintiffs assert the State Forester's authorization of logging operations that are likely to result in take is itself a cause of take.

Courts repeatedly have held governmental officers may be liable for violating the take prohibition by authorizing activities undertaken by others. In *Strahan*, the First Circuit held a state official's licensing of commercial use of gillnets and lobster pots resulted in the prohibited take of the endangered right whale. The court stated "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." 127 F.3d at 163. *See also Defenders of Wildlife v. Envtl. Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989)(EPA's registration of pesticides containing strychnine

violated the ESA because endangered species died from ingesting strychnine bait, and strychnine could only be distributed pursuant to the EPA's registration scheme); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995)(county's authorization of vehicular beach access during turtle mating season exacted a taking of the turtles in violation of the ESA).

Defendant and Intervenors rely on a later opinion of the district court in the Loggerhead Turtle litigation. *See Loggerhead Turtle v. Council of Volusia Cty.*, 92 F. Supp. 2d 1296 (M.D. Fl. 2000). In this case, the plaintiffs sought to enjoin the county council from authorizing all artificial light sources that harm sea turtles on county beaches during the turtles' nesting season. As a result of a decision by the Eleventh Circuit, the county had adopted new beach lighting standards for sea turtle protection. These new standards were "designed to virtually eliminate beach illumination which may be harmful to the sea turtles' nesting habits." *Id.* at 1301. The plaintiffs, nonetheless, presented evidence that artificial beach lighting continued to result in take of sea turtles. The district court concluded the new ordinance effectively banned artificial lighting on the beach, and the plaintiffs did not allege the county was inadequately enforcing the ordinance. *Id.* at 1307. The court stated, "Plaintiffs wish to hold the County liable for

takings because its beach residents are not turning off their lights in compliance with the ordinance. This the Court is unwilling to do" because neither the ordinance nor the county's related actions violated the ESA's take prohibition. *Id.*

The Court finds the *Loggerhead Turtle* case is not helpful to Defendant. The facts of that case are substantially different from those alleged here. In contrast to *Loggerhead Turtle*, there is no state ordinance or regulation that bans all logging activity likely to cause take of salmon. Plaintiffs allege the State Forester's approval is a prerequisite to certain logging operations, and the State Forester has repeatedly approved logging operations that result in take of threatened salmon. The Court concludes, therefore, that Plaintiffs' allegations are sufficient to state a claim against the State Forester for violation of the ESA.

CONCLUSION

For these reasons, the Court **DENIES** the Motions to Dismiss filed by Defendant James E. Brown (#52), Defendant-Intervenors

OFIC and AFPA (#50), and Defendant-Intervenor Tillamook County (#85)

IT IS SO ORDERED.

DATED this _23rd_ day of December, 2002.

__/s/ Anna J. Brown_____
ANNA J. BROWN
United States District Judge

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