

Oregon Water Resources Commission
Meeting
September 13, 2002
Salem

WRC Members:

Dan Thorndike
Ron Nelson
Tyler Hansell (by phone)
Jim Nakano
Susie Smith

WRD Staff

Paul Cleary
Cindy Smith
Shannon O'Fallon
Adam Sussman
Meg Reeves
Greg Nelson
Laura Snedaker
Tom Paul
Dave Jarrett
Bruce Moyer
Kyle Gorman
Fred Lissner
Juno Pandian
Rick Cooper
Barry Norris
Tracy Eichenlaub
Dwight French
Bob Rice
Donn Miller
Diane Addicott

Others

Ed Henricks
Kimberley Priestley
Jack Menendez
Aubrey Russell
John Frewing
Susan Hammond
Roger Bachman
Patrick Dorning
Michelle McSwain
Darrell Pieper
Barbara Pieper
Brad Taylor
Roger Prowell
Harold Shepherd
David Newton
Jerry Fletcher
Ray Hartwell
Bruce Aylward
Peter Mohr
Neil Bryant
Rex Barber
Doug Riggs
Brad Harper
Mary Zemke
Vern Bowers
Douglas MacDougal
Dan Henningan
Martha Pagel
Cathy VanHorn
Anita Winkler
John Williams

Written material submitted at this meeting is part of the official record and on file at the Oregon Water Resources Department, 158 12th Street NE, Salem, Oregon 97301-4172. Audiotapes of the meeting are on file at the same address.

At this meeting the Commissioners were asked to adopt amendments to the Deschutes Basin Program, OAR Chapter 690, Division 505 (ground water mitigation rules); and to adopt Deschutes Basin Mitigation Bank and Mitigation Credit Rules, OAR Chapter 690, Division 521.

Commissioner Nelson stated for the record that he is the Secretary/Manager of the Central Oregon Irrigation District in the Deschutes Basin; and that District has several water rights on the Deschutes River. He also is the outgoing Chair of the Deschutes Resources Conservancy, a volunteer organization dedicated to the restoration of the Deschutes River.

Director Cleary opened the meeting by welcoming everyone to the celebration of completing a seven-year effort to guide implementation of Senate Bill 1033 passed by the 1995 Legislature and House Bill 2184 passed in 2001. He described three common ground objectives that were used as guideposts throughout the rulemaking process: protection of existing scenic waterway and instream flows; restoration of flows in the Middle Deschutes and tributaries; and accommodation of growing water demands and future supply needs. Cleary mentioned some of the challenges and successes in arriving at the rules, and thanked all the parties who helped craft them.

Meg Reeves, Deputy Director; and Adam Sussman, Senior Policy Coordinator, used a PowerPoint presentation as they described the need for the rules, how the rules evolved, and the major highlights of the rules.

Public Comment

Roger Bachman, Oregon Trout, said that as a former Commissioner he has long been concerned about the amount of ground water being pumped for irrigation. He believes the Deschutes Basin could serve as a model for the management of water to protect native fish, but is concerned that these rules may not be adequate to do the job.

Aubrey Russell, Oregon Trout, spoke in opposition to the rules based on the concern that timing should be a basic component of mitigation. He believes that under the rules instream flows would not necessarily be achieved or protected.

Jack Menendez told the Commissioners he had previously submitted his comments in writing. He expressed concern that it is not possible for a causal relationship to be found between a project and reduced flow on the river. The rules do not say that mitigation can only consist of conserving consumptive use. Piping and lining are mentioned in the 521 rules, but piping and lining canals would not be a consumptive use and would actually take water out of the river downstream. He asked that the use of agricultural water rights for mitigation only be used to mitigate for agricultural consumption.

Darrell Pieper said he has attended most of the public hearings on these rules. He shared his concerns regarding how the one cfs trigger described in Senate Bill 1033 might be measured using current stream gaging technologies and related measurement errors.

John Frewing, former Water Resources Commissioner, encouraged the Commission to delay adoption of the rules to allow for more public input and time to resolve substantive questions. He believes the rules are not sufficiently conservative and do not provide assurance for minimum flows. He suggested that fees be tied to this program to support Department staff work.

Neil Bryant spoke in support of rule adoption. He asked that the proposed rules set a limit of 180 days for the Department to take action on approval or denial of mitigation plans. He asked that the word "measured" be inserted before "representative base period flows" in the last line of 690-505-0500(3); and that language be added in 690-505-0605(2) and (11) to ensure the applicant that mitigation is determined during the permit issuance process and not at a later date. In 690-505-0615(7) Bryant suggested deleting the word "maximize" and replacing it with "enhance."

Roger Prowell, City of Bend, spoke in support of adopting the rules to address both the water supply and flow restoration needs of the Basin.

John P. Williams, representing We Care, said he has submitted written comments. He expressed concern that canal lining and piping is listed as a conservation measure in 690-521-0200. He does not agree that this is a given method of conservation.

Martha Pagel, attorney representing Jim and Nancy Cowen, and Bob and Betty Dunn, expressed frustration at not being able to submit her prepared written comments. She recommended wording changes be considered in 690-505-0600(4) to clarify that if someone wants to provide mitigation as an alternative to regulation it would be considered on a case-by-case basis. She noted that people who have a ground water permit with conditions dealing with previously implemented mitigation would have to offer up additional mitigation. She asked that mitigation measures that have been previously implemented would satisfy this requirement. She asked for clarification of localized impact in 690-505-0605(5). She agreed with Bryant's comments regarding 690-505-0615(7). In 690-505-0620(2) she asked for more flexibility than a five-year

limit to implement mitigation following final order issuance depending upon the project complexities.

Harold Shepherd, Northwest Environmental Defense Center, spoke in support of the rule objectives but is not sure they are necessary with existing state/federal law and rules. Regulation is already in effect for situations where there is substantial interference between ground water and surface water. The Scenic Water Act requires that the free flowing character of the river be maintained. He expressed concern that these mitigation rules would reflect a move from a system based on sound science toward a market-driven system.

Kimberley Priestley, WaterWatch, spoke in opposition to the rules and asked that the Commission delay action on them for further review. She expressed concerns that the rules lack language regarding timing of mitigation; fail to provide a sound standard of review for mitigation projects; fail to call for regulation of or full mitigation by holders of water rights issued since 1995; fail to ensure that mitigation fully offset impact; fail to require replacement water; are not consistent with other rules of the Commission as mandated by the Scenic Waterway Act; fail to ensure that mitigation occurs where the impact occurs; violate the Instream Water Rights Act by allowing already issued final orders for instream water rights resulting from conservation projects to be claimed as mitigation; and allow paper water to qualify as mitigation.

Rex Barber, Water For Life, came forward to speak in support of the proposed Division 521 rules, although he questioned the need for any rules to implement Senate Bill 1033. He agreed with the comments and suggestions of Bryant and Pagel regarding the Division 505 rules.

Peter Mohr, Workers for the Environment, Clean Air and Renewable Energy and IBEW 280, expressed disappointment that written comments were not accepted at this meeting. He shared concerns mentioned previously by others regarding the rules and suggested that the rules be more specific for future interpretation.

Michelle McSwain, representing the U.S. Forest Service and Bureau of Land Management (BLM), expressed appreciation for the hard work put into the proposed rules. She shared concerns included in the May 28, 2002, rule comment letter from the Forest Service and BLM to the Department.

Mary Zemke, representing Stop Cogentrix; and Vern Bowers, President of Crooked River Ranch, spoke in opposition to the rules because they do not provide protection for ground water and existing rights. Cleary offered them a copy of the Division 9 and Division 310 rules which pertain to ground water protection and new permit application processing.

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Clearly clarified that the proposed rules establish a process, standards, and criteria. They do not impose new obligations beyond what people already have; they do not relieve anyone of obligations they already have; and they do not answer every potential site-specific question that may be raised. The rules do provide opportunity for public and resource agency input that will address site-specific questions and issues related to a specific permit or proposed mitigation project.

Following Commission discussion, Hansell moved to adopt the proposed rules amending OAR Chapter 690, Division 505; and establishing OAR Chapter 690, Division 521, with the following changes: insert “may” after “mitigation projects” in 690-505-0610(3) and in 690-521-0300(1); in 690-505-0615(7) and in 690-521-0300(7) delete “maximize” and insert “enhance” and add “and make the most effective use” following “resource benefits.” Nelson seconded the motion; all voted approval.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Diane K. Addicott
Commission Assistant