



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item E, May 12, 2011  
Water Resources Commission Meeting

#### **Request for an Exception to the Willamette Basin Program by Eugene Water & Electric Board (EWEB) Pursuant to ORS 536.295**

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

Under ORS 536.295 (Attachment 1), the Water Resources Commission may, under certain circumstances, allow the Department to consider an application to appropriate water for a use not classified as an allowable use by the applicable basin program. Eugene Water & Electric Board (EWEB) has requested an exception (Attachment 2) to the Willamette Basin Program based on one or more criteria provided in the statute.

This report summarizes the information provided by the applicant, and evaluates the request against statutory criteria and rules of the Commission. The question before the Commission is whether to allow the Department to consider the application even though the use is not classified under the Basin Program. If the exception is granted, the application will then be reviewed in the same manner as any other water-right application.

#### **II. Background**

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

Commission approval of a request for an exception to a basin program allows the Department to consider an application to appropriate water for a purpose not classified as allowable by the subject basin program. An exception does not guarantee that a water right will be issued, or if it were issued, how it would be conditioned. In approving a basin program exception, the

Commission allows the Department to consider the application, notwithstanding the basin-program classification. All other aspects of the application review process remain the same. If the Commission does not grant the request, the application will continue to be processed but will likely be denied because the proposed use is not a classified use in the basin program.

### **III. Discussion**

A summary of Application S-87675, in the name of EWEB, and an evaluation of their request for an exception to the Willamette Basin Program are provided below.

#### ***A. Application summary and basis for consideration***

EWEB has applied for a permit to divert 30.9 cubic feet per second from the Willamette River for year-round municipal use (generally serving the City of Eugene and numerous surrounding Water District's areas; a copy of the application form and map is provided as Attachment 3).

The application, S-87675, was filed to provide EWEB with a secure, duplicative authorization to use water from the Willamette River as a redundant supply, while EWEB's pre-1909 surface water claim (SW-354) is awaiting adjudication of the Willamette River Basin. The 30.9 cubic feet per second of water proposed by the application will not be additive to EWEB's existing water rights; rather, any permit issued for S-87675 will be conditioned such that the permit, in combination with EWEB's existing water rights, will be limited to the maximum rate currently authorized by EWEB's existing water rights.

The exception request is necessary because the Willamette Basin Program does not allow municipal use from the main stem of the Willamette River from July 1 through October 31 (OAR 690-502-0050(1)(d)).

#### ***B. Exception request evaluation***

EWEB asserts that a basin program exception is warranted on the basis that two criteria are satisfied. Department staff believe that one of the criteria is satisfied and therefore qualifies for an exception. A review of each criterion along with staff analysis follows below.

#### **1) Summary of information provided by the applicant under ORS 536.295 (1)(d), the use is necessary to ensure public health, welfare and safety:**

EWEB is currently dependent on the McKenzie River as its sole source of supply, which presents potential health and safety risks to its customers. If EWEB's McKenzie River supply became unavailable due to mechanical problems, source contamination, or other reasons, EWEB could be left without sufficient water to meet all of its customers' needs. EWEB's in-system storage would provide sufficient water supply for as little as one day during periods of high water demand, or several days during periods of average water demand. If EWEB's stored water were depleted, it could have an insufficient water supply for human consumption purposes, such as drinking water and sanitation, and would not have sufficient pressure necessary for fire suppression.

EWEB is reluctant to invest money into further development of the Willamette River point of diversion under its pre-1909 surface water claim and the associated works without more certainty regarding its ability to use said facilities in the future.

Consequently, EWEB's ability to obtain water from the Willamette River is necessary to ensure public health, welfare and safety.

Staff analysis: A redundant water supply is essential for municipalities to ensure public health, welfare and safety.

**2) Summary of information provided by the applicant under ORS 536.295 (1)(g), the use is of an unusual nature not likely to recur in the basin, and unlikely to have been within the uses considered by the Commission:**

EWEB's application to duplicate its existing surface water registration with a municipal water use permit is of an unusual nature and unlikely to have been within the uses considered by the Commission in classifying the uses presently allowed in the basin program. EWEB asserts that the need to obtain a municipal water right permit to duplicate a pending municipal surface water registration is of unusual nature not likely to recur in the basin. Moreover, EWEB believes that it was unlikely to have been considered by the Commission at the time it classified the uses in the Willamette Basin Program. While EWEB recognizes that the Commission considered municipal purposes, it is not likely that the Commission considered duplication of a municipal claim for such a use. The Commission clearly anticipated that the stored water from the federal storage facilities would become available for purposes such as municipal use, and as a result likely did not consider the need to obtain a water use permit for live flow to duplicate an existing surface water registration.

Staff analysis: EWEB's request does not meet this exception criterion because the "use" is for municipal, which is not unusual and was considered by the Commission when the basin program was developed. The applicant has suggested that the "situation" is unusual and may not have been considered by the Commission when the basin program was formulated. Although the situation may be unusual, basin programs classify water "uses," not situations.

***C. Summary of information provided by the applicant regarding evaluation of whether the use is consistent with the general policies of the Willamette Basin Program***

EWEB's application to duplicate its existing surface water registration is consistent with the general policies for surface water and municipal water systems. The new permit would maintain a balance between in-stream and out-of-stream uses on the Willamette River because the existing in-stream water right on the relevant portion of the Willamette River protects flows between 2,000 and 2,500 cubic feet per second, which represents between 57 and 254 percent of the river's natural stream flow. The proposed duplicative permit would also preserve opportunities for economic development within EWEB's service area. Finally, the new permit will protect safe drinking water supplies for human consumption for all of EWEB's customers. Further, the new permit will support EWEB's continued coordinated water service planning because EWEB provides water to existing and dissolved water districts and the Eugene Airport and Lane Community College special service districts.

In addition to the general policies described above, EWEB is also aware of the Commission's policy objectives in restrictively classifying the Willamette River to encourage the use of stored water from the federal reservoir in the Willamette Basin. However, because this water is not currently available for municipal purposes, EWEB is unable to obtain access to any of the water stored in the federal reservoirs. Having exhausted all other feasible alternatives, EWEB must apply for a new, duplicative water right and seek an exception to the Commission's restrictive classification of the Willamette River under OAR 690-502-0050(1)(d).

Staff analysis: The Department believes that the proposed use is consistent with the general policies of the Willamette Basin Program.

**IV. Conclusion**

If the municipal use is allowed to be duplicated in a new water right, it will not add to the consumptive use of water in the basin, nor is it likely to be regulated for other water rights.

To grant an exception to a basin program under ORS 536.295, the Commission must find that the request meets at least one of the statutory criteria and that the proposed use is consistent with the

general policies of the applicable basin program. EWEB has demonstrated that the use qualifies for an exception by meeting one of two proposed criteria: 1) the use is necessary to ensure public health, welfare and safety.

The request is consistent with the general policies of the Willamette Basin Program.

## **V. Alternatives**

The Commission may consider the following actions:

1. Approve the request by Eugene Water & Electric Board for a basin-program exception because the use is necessary to ensure public health, welfare and safety; and the use is consistent with the general policies of the Willamette Basin Program. Any permit issued will for S-87675 will be conditioned such that the permit, in combination with EWEB's existing water rights, will be limited to the maximum rate currently authorized by EWEB's existing water rights and the permit will be conditioned to expire if, in the future, an adjudication affirms SWR-354.
2. Deny the request by Eugene Water & Electric Board for a basin program exception because the necessary criteria have not been met.
3. Take no action and direct staff to continue to work with the applicant.

## **VI. Recommendation**

The Director recommends Alternative 1, that the Commission approve the request by Eugene Water & Electric Board for a basin program exception because the use is necessary to ensure public health, welfare and safety; and because the use is consistent with the general policies of the Willamette Basin Program.

### Attachments:

1. ORS 536.295
2. Eugene Water & Electric Board Basin Program Exception Request
3. Copy of Application S-87675 and map

Dwight French  
503-986-0819

## Attachment 1

### ORS 536.295

**ORS 536.295 Conditions for consideration of application for use not classified in basin program.** (1) Notwithstanding any provision of ORS 536.300 or 536.340, the Water Resources Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use:

- (a) Will be of short duration during each year;
- (b) Will be for a continuous period of no longer than five years;
- (c) Is largely nonconsumptive in nature and not likely to be regulated for other water rights;
- (d) Is necessary to ensure public health, welfare and safety;
- (e) Is necessary to avoid extreme hardship;
- (f) Will provide a public benefit such as riparian or watershed improvement; or
- (g) Is of an unusual nature not likely to recur in the basin, and unlikely to have been within the uses considered by the commission in classifying the uses presently allowed in the applicable basin program including but not limited to:
  - (A) Exploratory thermal drilling;
  - (B) Heat exchange;
  - (C) Maintaining water levels in a sewage lagoon; or
  - (D) Facilitating the watering of livestock away from a river or stream.

(2) A permit granted on or before January 1, 1993, for a quasi-municipal use of water shall be considered a permit for a classified use under ORS 536.340 if at the time the application was submitted or the permit was granted, the basin program identified municipal use as a classified use.

(3) The commission by rule may determine the specific uses permitted within a classified use.

(4) In making the determination under subsection (1) of this section, the commission shall evaluate whether the proposed use is consistent with the general policies established in the applicable basin program.

(5) The Water Resources Department shall process and evaluate an application allowed by the commission under subsections (1) to (4) of this section in the same manner as any other water right application, including determining whether the proposed use would result in injury to an existing water right. [1989 c.9. 1; 1993 c.591. 1; 1999 c.703. 1]