



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item G, October 28, 2005
Water Resources Commission Meeting

Request for Adoption of Administrative Rules, OAR Chapter 690, Division 315 – Water Right Permit Extensions

I. Issue Statement

The Commission is asked to adopt rules under OAR Chapter 690 Division 315 pertaining to water right permit extensions. The final proposed rules are Attachment 1. The proposed rules implement House Bill 3038 (Chapter 410, 2005 Oregon Water Laws) which adjusted the standards the Department uses to review certain applications for extensions of time filed by holders of municipal use permits. The proposed final rules also clarify the process for submitting protests on extension proposed final orders (PFOs).

II. Background

The issuance of a water right permit triggers statutory timelines for constructing the associated works and making full beneficial use of the water. If construction is not complete or full beneficial use is not attained within the statutory timelines (generally five-years), the Department can grant an extension of time upon a finding of “good cause.” An extension of time can be granted for the reasonable time necessary to complete construction or apply the water to full beneficial use.

Historically, the Department has interpreted and applied the statutory permit development timelines differently for municipal use permits in terms of the “construction” requirement. Specifically, the Department has not interpreted the development timelines to require holders of municipal (surface water) use permits to initiate construction of works within five years of permit issuance. (ORS 537.230)

Recently, in a case before the Oregon Court of Appeals, the Court concluded that the surface water permit development timelines, specifically the requirement to begin construction within five years, applies to municipal water use permits. Moreover, the Court concluded that the statutory term “construction” means dirt-and-shovel type work as compared to planning, raising revenue or other associated efforts.

The Court's interpretation raised significant concern by the holders of these yet to be developed permits that past actions by the Department (permit issuance or extension issuance) could somehow be deemed invalid. Second, the Court's conclusion that a holder of a municipal water use permit must begin dirt-and-shovel construction within five years presents a significant obstacle to reasonable planning for future water supply. House Bill 3038 established a statutory timeline of 20 years to commence and complete construction for new surface water and ground water permits for municipal use. The bill also ensured that previous actions by the Department to issue municipal use permits and extensions are valid with respect to construction timelines.

House Bill 3038 also adjusted the statutory standards the Department uses to review applications for extensions of time filed by holders of municipal use permits. It requires that all municipal permit extensions be conditioned to require a Department approved Water Management and Conservation Plan (OAR Chapter 690 Division 86) prior to diverting water beyond the maximum amount currently beneficially used by the municipality. It clarified that, in determining permit extensions for municipal use permits, the Department shall give due weight to the considerations in ORS 539.010(5). The legislation also required that, for the first extension issued after June 29, 2005 (the effective date of the bill) for a municipal use permit issued before November 2, 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 listed fish species.

Following passage of the bill, the Department organized a Rules Advisory Committee to assist in the development of amended rules related to water right permit extensions (OAR Chapter 690, Division 315). Committee members are listed in Attachment 2 and included groups that participated in the legislative crafting of HB 3038 and the Oregon Department of Fish and Wildlife (ODFW), the advisory agency identified in the legislation. The committee met twice, focusing their discussion on rule changes to implement HB 3038.

Based on input from the RAC, Department staff, and the Department of Justice, the Department developed a September 1, 2005 hearing draft of proposed rules for permit extensions (Division 315). The Department held public rulemaking hearings in Salem on September 19, 2005. Oral testimony was provided by three organizations. Attachment 3 is a summary of oral testimony provided at the public rulemaking hearings. The written comment period closed on September 21, 2005. Twenty-two written comments were received. Attachment 4 is a copy of the written comments.

III. Discussion

A. Proposed Final Rule Highlights

Based on an analysis of the public comment the Department has developed the final proposed rules for Division 315 in Attachment 1.

Highlights of the proposed rules regarding municipal use permit extensions:

- Implement HB 3038 by requiring approval of a water management and conservation plan under OAR Chapter 690 Division 86 prior to diverting water beyond the maximum amount currently beneficially used by a municipality. OAR 690-315-0090.
- Implement HB 3038 by requiring holders of municipal use permits issued on or after June 29, 2005 to provide evidence of actions taken to begin actual construction of the project. OAR 690-315-0070(3)(d).
- For the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998, implement HB 3038 by requiring the Department to condition extensions to maintain the persistence of listed fish species in the portions of waterways affected by use under the permit where streamflow is a limiting factor for listed fish species. OAR 690-315-0080(1)(f).
- For the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998, implement HB 3038 by providing a process for soliciting advice from ODFW on whether use of the undeveloped portion of a municipal use permit will maintain the persistence of listed fish species. OAR 690-315-0080(2).
- For the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998, provide opportunities for municipal use permit holders to interact with the Department and ODFW as our agencies implement the maintain persistence provision and prior to issuance of a proposed final order and final order on the extension application. OAR 690-315-0080(2)(b) and (2)(e).

Highlights of the proposed rules regarding protests on extension proposed final orders include:

- Add a definition for the term “protest” for the purposes of water right permit extensions. OAR 690-315-0010(5).
- Clarify terminology and process for submitting a protest on a proposed final order on an extension application to provide greater consistency with other rule divisions. OAR 690-315-0060.

Issues identified in public comments on the hearing draft regarding the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998:

Maintain the persistence of listed fish species

The Rules Advisory Committee discussed possible rule definitions for “maintain the persistence of listed fish species” but was not able to reach consensus on a definition. As a result, in the hearing draft of the rules, the Department proposed a definition that was based in part on the RAC discussion and in part on terminology used in a recent assessment for Oregon Coastal Coho.

The hearing draft of the rules defined “maintain the persistence of listed fish species” as “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.” September 1, 2005 Hearing Draft OAR 690-315-0010(6)(d). The Department went on to define “viability” based on the recent Oregon Coastal Coho Assessment and to define “population” based on Oregon Plan statutes.

The definition of maintaining persistence was a central issue identified in the written and oral comments received on the hearing draft of the rules. Municipalities and those representing municipal water providers felt the proposed definition applied a standard beyond the statutory intent while conservation groups and some individuals felt that the definition did not meet the minimum standard required by the statutory language.

Oral and written comments from the Oregon Water Utilities Council (OWUC), League of Oregon Cities (LOC), Oregon Association of Water Utilities (OAWU), Special Districts Association of Oregon (SDAO), and a number of individual and regional municipal water providers opposed the Department's proposed definition. They suggested that, based on the legislative record for HB 3038, maintain persistence of listed fish species is use of the undeveloped portion of the permit in such a way as to "not extirpate" listed fish species. They also asserted that during the legislative discussion of the bill maintaining the persistence of listed fish species was not intended to be a "no harm" or "recovery" standard. Finally, they requested that the Department clarify that the maintain persistence evaluation focus on flow-related aspects of the use of the undeveloped portion of the permit and where flow is a limiting factor for the subject listed species.

WaterWatch of Oregon, the Oregon Natural Resources Council (ONRC), and the Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources felt the Department's definition needed to be strengthened to prevent any harm to listed fish species or any decline to their existing condition or state. They suggested that, based on the legislative record, maintain persistence means use of the undeveloped portion of the permit "will cause no net loss or declining trend" in "viability metrics" such as abundance, productivity, persistence, distribution, and diversity. ODFW also commented that maintain persistence should be a "do no further harm" standard.

In response to comments, the Department is proposing to delete the definition of "maintain the persistence of listed fish species" and related definitions that were included in the hearing draft of the rules. In lieu of a definition and based on comments received by OWUC, the Department has adjusted the hearing draft to clarify that the conditions to maintain persistence be included where streamflow is a limiting factor for listed fish species. OAR 690-315-0080(2). The Department has over 100 applications for municipal use permits pending. We believe that the proposed final rules provide sufficient clarification to move forward with review of these applications. We also recommend that the Department report back to the Commission after one year on implementation of the rules and specifically on the conditions to maintain the persistence of listed fish species recommended by ODFW on individual extension applications.

Portions of waterways affected

In the hearing draft of the rules, the Department based the definition of the "portions of the waterways affected by water use under the permit" on the RAC discussion. However, several comments were received from OWUC and other municipal interests suggesting clarification of this definition. WaterWatch and ONRC also commented that the definition of portions of waterways affected be deleted and that the Department defer to ODFW in making this determination.

The final proposed rules clarify that the portions of the waterways affected by water use include the portion of the drainage basin at or below the location of the diversion. OAR 690-315-0010(6)(f). This definition is consistent with our understanding of ODFW's approach to this analysis.

Agreements with federal and state agencies

HB 3038 provided that agreements with federal and state agencies that include conditions to maintain the persistence of listed fish species would be conclusive evidence for the Department's finding under the maintain persistence provision. In the hearing draft of the rules, the Department proposed to share any agreements provided by a municipal use permit holder with ODFW for their advice as to whether it includes conditions to maintain the persistence of listed fish species. OWUC and other municipal interests expressed opposition to this approach. They recommended that the Department make this determination without soliciting advice from ODFW. ODFW, WaterWatch, ONRC, the Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources, and other commenters expressed support for a process that provides for ODFW review of these agreements.

The Department is not proposing any changes in response to comments by municipal interests. Our staff are not trained to review these types of agreements to determine whether conditions or actions identified in the agreements would maintain the persistence of listed fish species. The proposed final rules allow the Department to share these agreements with ODFW and receive their input on whether they include conditions to maintain the persistence of listed fish species. OAR 690-315-0080(2).

WaterWatch and ONRC commented that conditions or actions included in an agreement with federal or state fish agencies should be included as permit conditions. The Department is not proposing any changes in the draft rules based on this comment. Agreements that include conditions to maintain the persistence of listed fish species will be referenced in the final order approving an extension and will be made part of the record.

Ground water permits for municipal use

HB 3038 applied to the first extension of time issued after June 29, 2005 for surface water and ground water municipal use permits issued before November 2, 1998. Under hearing draft and the proposed final rules, "use of the undeveloped portion of the permit," includes the undeveloped portion of ground water permits where the Department has determined there is the potential for substantial interference with surface water pursuant to OAR Chapter 690 Division 09. OAR 690-315-0010(6)(e). OWUC and other municipal interests preferred that the maintain persistence provision only apply to ground water permits with substantial interference with surface water.

No changes were made in response to these comments. Since use of the undeveloped portion of the ground water permit has not yet occurred, the Department cannot determine whether there actually is substantial interference with surface water as OWUC suggests. We must rely on analysis by our hydrogeologists to determine if there is the potential for substantial interference as provided for in the Division 09 rules.

OWUC and other municipal interests also asserted that the “portion of the waterway affected by water use under the permit” defined in OAR 690-315-0010(6)(f) for ground water permits should be at or below the point of appropriation of the undeveloped portion of the ground water permit downstream to the lower-most portion within the applicable river basin. The Department is not proposing any changes in response to these comments. The portion of the waterway affected by the “use” of a ground water permit with the potential for substantial interference with surface water would not be the point of appropriation (i.e. the well location) identified in the permit but rather the location where the impact on the stream would occur as a result of pumping the undeveloped portion of a ground water permit. Further, for the purpose of evaluating whether use of the undeveloped portion of a ground water permit will maintain the persistence of listed fish species on a waterway, the Department must evaluate the potential impact on the relevant surface water source.

Processing extensions

OWUC and other municipal interests commented that they would like opportunities for the applicant to interact with the Department and ODFW regarding the maintain persistence evaluation. In particular, they requested an opportunity to review the Department’s determination of the potential for substantial interference for ground water permits, notification when the Department forwards their extension application to ODFW for its advice, an opportunity to review proposed conditions for maintaining the persistence of listed fish species, and an opportunity to place an extension application on administrative hold after review of any proposed conditions to maintain the persistence of listed fish species. In response to these comments, the Department has adjusted the hearing draft of the rules to provide these review and notice opportunities. OAR 690-315-0080.

Other Changes and Corrections

OWUC and other municipal interests recommended that OAR 690-315-0080(1)(f) be clarified to provide for the three conclusions the Department can make regarding a municipal permit extension under this rule. The Department has modified the hearing draft of the rules in response to these comments. OAR 690-315-0080(1)(f) clarifies that the Department can find that 1) there are agreements that include conditions to maintain the persistence of listed fish species; 2) the use of the undeveloped portion of the permit will maintain the persistence of listed fish species; or 3) the use of the undeveloped portion of the permit is conditioned to maintain the persistence of listed fish species.

Issues identified in public comments on the hearing draft regarding protests on extension proposed final orders:

Protests on Extensions

In the hearing draft of the rules, the Department is proposing to amend rules to clarify the fee and request for contested case hearings for municipal extensions. WaterWatch and ONRC commented that they are concerned that the changes proposed in OAR 690-315-0060(3)(b)(B) would allow applicants 30 extra days beyond the close of the protest period to request a contested case hearing.

The Department is not proposing any changes in the final proposed rules in response to this comment. The actual protest period remains 45 days for everyone. The proposed change addresses what OWRD must do after the close of a protest period when a protest is filed. The Department proposed this change in order to make the extension protest process consistent with the protest process for surface and ground water permits, as set forth in ORS 537.153(8)(b)(B) and ORS 537.621(9)(b)(B), as well as OAR 690-310-0170. The proposed language is essentially the same provision as OAR 690-310-0170 allowing applicants to request a contested case hearing 30 days after the close of protest period for surface and ground water permits.

B The final proposed rules reflect the Department's statutory requirements

The final proposed rules implement new statutory provisions under HB 3038 by requiring that all municipal permit extensions be conditioned to require a water management and conservation plan prior to diverting water beyond the maximum amount currently beneficially used by the municipality. The final proposed rules also implement HB 3038 by requiring that the Department find that the undeveloped portion of a municipal use permit will maintain or is conditioned to maintain the persistence of listed fish species for the first extension issued after the effective date of the bill for a permit for municipal use issued before November 2, 1998.

C. The final proposed rules advance the Department's co-equal goals of protecting streamflow and addressing Oregon's water supply needs

The final proposed rules further the Department's co-equal goals of stewardship and supply. The rules provide a new, one-time look at municipal use permits issued before November 2, 1998 to ensure use of the undeveloped portion of the permit will maintain the persistence of listed fish species. By allowing for extensions of municipal use permits, the rules also recognize the importance for securing long-term municipal water supplies. They also assure that all municipal use permits are developed in a fashion that emphasizes a commitment to water conservation and management.

D. The final proposed rules fit within staff capabilities

The Department has over 100 pending extension applications for municipal use permits and intends to utilize existing staff to implement the proposed Division 315 rules. For this reason, it is important that the Department rely on existing expertise at ODFW to gain advice on resource protection conditions to maintain the persistence of listed fish species and to solicit their input on existing fish agreements that include conditions to maintain the persistence of listed fish when applying the proposed amendments to the rules.

To help staff and municipalities move forward under new extension rules, the Department is also proposing to "batch" extension applications by municipality and by ODFW district biologist region. This "batching" approach will assist ODFW in their review of pending applications where their advice is needed. This approach will also assist municipalities so that they can track multiple extensions and water management and conservation plan requirements as we move forward.

E. The final proposed rules provide for adaptive management

The final proposed rules provide an adaptive management approach to municipal use permit extensions by providing additional notice and administrative hold opportunities for municipalities so these applicants can work with ODFW as they consider fishery resource conditions to maintain the persistence of listed fish species. In the spirit of adaptive management, the Department is also recommending that it report back on the implementation of these rules in one year, with particular attention to conditions proposed and included on extensions applications to maintain the persistence of listed fish species.

IV. Alternatives

The Commission may consider the following alternative actions:

1. Adopted the proposed rules under OAR Chapter 690 Division 315 (Attachment 1).
2. Adopt the proposed rules with revisions.
3. Not adopt rules and request the Department to further evaluate the issues.

V. Recommendation

The Director recommends that the Commission adopt the proposed final rules as provided in Attachment 1.

Attachments:

1. Final Proposed Rules, OAR Chapter 690, Division 315 - Water Right Permit Extensions
2. Rules Advisory Committee members
3. Summary of Hearing Comments
4. Copies of Written Public Comment on September 1, 2005 Hearing Draft

Debbie Colbert
503-986-0878

**Rules Advisory Committee
OAR Chapter 690 Division 315 – Water Right Permit Extensions**

Rules Advisory Committee

Lisa Brown
WaterWatch of Oregon

Kelly Burnett
Oregon State University

Rick Glick
Davis Wright Tremaine LLP

Rick Kepler
Oregon Department of Fish and Wildlife

Lorna Stickle
Portland Water Bureau

Adam Sussman
CHM2 Hill

Willie Tiffany
League of Oregon Cities

Department Participants

Debbie Colbert
Senior Policy Coordinator

Dwight French
Water Rights and Adjudication
Administrator

Tom Paul
Deputy Director

Phil Ward
Director

**Transcription of Oral Testimony
Water Right Permit Extensions Public Rulemaking Hearing**

**September 19, 2005 – 12:00 pm
Salem, Oregon**

This hearing is now in session and is being tape-recorded to maintain a permanent record.

My name is Lisa Jaramillo and I am the Hearings Officer. Today is September 19, 2005 and the time is approximately 12:04pm.

The purpose of this hearing is to provide an opportunity for public comment on proposed rules in OAR Chapter 690 Division 315 relating to municipal water use permit extensions. The proposed rules implement statutory changes from the 2005 legislative session. Specifically, the proposed rules adjust the standards the department uses to review applications for extensions of time filed by holders of municipal water use permits and clarifies that holders of municipal water use permits may not develop additional water under their permit until the department approves a water management and conservation plan. The department is also proposing to amend rules to clarify the fee and request for future contested case hearings for municipal extensions. The department has worked with the Rules Advisory Committee in developing these proposed rules. Any final rules will be adopted by the Oregon Water Resources Commission.

In addition to presenting oral comments at this hearing, anyone may submit written comments until 5 pm on September 21, 2005, which is the close of the public comment period. Send comments to Debbie Colbert at Oregon Water Resources Department, 725 Summer Street NE , Suite A, Salem, OR 97301-1271; or fax comments to 503.986.0903, attention Debbie Colbert; or email comments to Debbie.L.Colbert @ wrd.state.or.us. Comments received after 5pm, September 21, 2005 will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. The Water Resources Department will not respond to questions during this hearing. After the close of public comment period, department personnel will prepare a staff report, which will be available from the department. I will begin taking comments now.

The first one is Paul Eckley, Oregon Water Utilities Council. (mark 0 – 24)

“Hi, My name is Paul Eckley and I am representing the Oregon Water Utilities Council as Chairman this year. Thank you for this opportunity to provide comments on your draft rules. The Oregon Water Utilities Council is an association that represents about 30 water utilities in Oregon that represent about 90% of Oregon’s drinking water supply. House Bill 3038 resolves many years of uncertainty associated with municipal permit development. Under this law, 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 population and economic development activities as required by Oregon land use planning laws. Through the negotiations on this house bill, 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. In other words, an evaluation to determine whether use of the undeveloped portion of the

permit would impact listed fish species population where stream flow is a limiting factor to the extent that the listed fish species population would be extirpated.

It is in this context that OWUC does not support the hearing rules as drafted and 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. We are submitting about 7 pages of testimony and some enclosures today and I would only like to cover maybe a few of them. One of them under the definition 690-315-0010: Definition of maintain the persistence of listed fish species. We are recommending that that be changed to mean the use of the undeveloped portion of the permit in such a way as to not extirpate listed fish species population, populations in the portions of the waterways affected by water use under the permit. We have some other suggestions under the title and some alternatives under the definition of the use of the undeveloped portion of the permit in our written testimony and also in the definition of portions of the waterways affected by water use under the permit. Under section 80, criteria for Department review and ODFW input, the process section, we are wishing that these rules would clarify that certain municipal permit applications do not need to be sent to ODFW for review and advice, that they would clarify that the maintain persistence evaluation is not a no harm standard, that the rules would 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, finally the rules would provide for more opportunities for the applicant to interact with the Department and ODFW regarding the maintain persistence evaluation.

Under the process, we are suggesting a third category, under subsection F, titled b: And I will read that, It is determined that the use of the undeveloped portion of the permit will not extirpate listed fish species in the portion of the waterways affected by water uses under the permit. Or then what was b is now c. If it is determined that use of the undeveloped portion of the permit would extirpate listed fish species in the portions of the waterway affected, by water use under the permit, the undeveloped portion of the permit is conditioned to not result in the extirpation of listed fish species in the portion of the waterways affected by water use under the permit. And lastly, we had some comments under subsection 80 of 690- 315 and I won't read those in.

We do have some suggestions on recommending modifications be made to address the issues raised about the process by applicants and to provide for greater opportunity of applicant participation. I won't read those into the record, although they are in our written testimony. Lastly, under section 690-315-90, Time of Extensions, we are suggesting under subsection 3, a change under subsection 3, except as provided in subsections 4 and 5, any water right permit extended under OAR etc. beyond the maximum rate or (we added this) duty if applicable diverted for beneficial use before the extension shall only be authorized upon an issuance of a final order approving etc.

Again, OWUC appreciates the opportunity to comment on the proposed rules. Our 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. But without these suggested changes, OWUC cannot support adoption of the hearing rules as drafted.

Thank you." (mark 27- 77)

Lisa Jaramillo: Thank you. Next is Willie Tiffany

“Thank you. For the record, I’m Willie Tiffany, Senior Staff Associate with the League of Oregon Cities. The League of Oregon Cities represents all populated cities, 240 of them in the state of Oregon. The League was very involved with Oregon Water Utility Council, Special Districts Association of Oregon and individual water utilities in the creation of the OWUC comments on the bill and we wholeheartedly support those comments.

I am going to highlight one section that Mr. Eckley just raised that is of particular concern for us and that is proposed rules Division 315 0010 definition 6d and that is the definition of maintain persistence of fish species. As the major proponent or one of the major proponents of HB 3038 last session, we were actively engaged in the negotiation on this process and worked with the opponents of that legislation to try and satisfy their issues. When asked what was the biggest concern, before that section of the bill was added, the opponents of the bill, indicated they were afraid that an extension or the development of one of these extended permits may wipe out or extinguish a fish species. So, we in good faith did agree to insert a section within the bill, in HB 3038, which would require a permit to be conditioned to maintain the persistence of a fish species. However, it was very, very clear by all parties, the Department, Republican and Democratic legislators, municipal water suppliers, environmental interests, on what that definition meant and it was read into the record several times. I will read it in here: maintain persistence of a fish species under HB 3038 was intended to mean a forecast of future population health stated in terms of the probability of extirpation. This definition was not only read into the record by the Department in the Senate committee, but also on the floor by the Chairman of the Senate Environment and Land Use Committee and in the House by the Chairman of the House Water Committee. We believe the proposed rules and specifically Division 315 00-10, sub 6d go well beyond the intent of HB 3038. In fact, in the proposed rules, that definition defines maintain persistence, as maintaining the viability of fish species. We interrupt that to be a no impact standard to go well beyond the intent the legislation which was not to extinguish a fish species. Without the change in this section of the rules, the League of Oregon Cities is very opposed to the proposed rules and asks that the Department change those rules and specifically change that definition as Mr. Eckley read into the record. We would like to see sub d, 315-0010 sub 6d to say maintain the persistence of listed fish species means the use of the undeveloped portion of the permit in such a way as to not extirpate listed fish species populations, in portions of the waterways affected by water use under the permit. If that change is made subsection e, again 315-0010 subsection e the definition of viability is not necessary and that should also be deleted. Without those changes, we cannot support the rules. Thank you.” (mark 78- 113)

Lisa Jaramillo: Thank you. Next is Lorna Stickel.

“Hi, I am Lorna Stickel. For the record, I am the Water Resources Planning Manager for the Portland Water Bureau and I also participated along with other municipalities in the legislative session and also was on your rules advisory committee. The city is going to submit a letter today that has some conceptual materials in it. But based on just receiving this morning the OWUC language we are going to reserve also the possibility of submitting some further suggestions in a couple of places on some technical issues related to these rules that would augment the OWUC language. (?) The city has a strong commitment to providing the highest quality drinking water to customers while protecting the environment including listed fish species on the Columbia and Bull Run Sandy systems. And it’s important to the city that the rules that are adopted implement the new law and both protect our groundwater permits on the Columbia south shore and are consistent with the intent of HB 3038. We don’t have any proposed specific changes to the language on persistence of fish species contained in the definitions; again we are waiting for materials from OWUC. But as one of the participants in this process and in the legislative process, we wish to make explicit our understanding of the 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 of 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 maintain the persistence of a listed or sensitive fish species within the affected portion of the waterway. So, basically we agree with the OWUC take on what the legislative intent of this legislation was. We have a couple of specific suggestions and some of the OWUC language covers these and in a couple of instances it does not quite go far enough.

First, (I have three points) First, it should be made clear that an applicant can withdraw and revise their application after it is reviewed any conditions recommended by ODFW. This would allow the applicant to either work with ODFW to resolve issues or to conduct more detailed investigations of the impact of the water use on listed fish species. In addition, applicants for groundwater extensions should be able to review the determination on potential interference made by the department.

Two, in subsection 80 1F (b) we think this should be redrafted to make it explicit and this is the language on the agreements. That if an applicant has an approved habitat conservation plan, a federal permit that is 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 permit extension. That was the express purpose of the language that was inserted into HB 3038. Pre existing agreements and commitments to maintain fish species are not subject to further state review and additional WRD conditions. Further, it would make sense to add a subsection c, and having seen today the OWUC language, it is very similar to what the b is that they have suggested. that allows for a determination of no impact for groundwater permits where it has been determined there is no potential interference with surface water or where the department has determined there is no significant or measurable impact on surface water sources where listed or sensitive fish species are present. Obviously, the same thing could be true for surface water permits where there are no listed fish species or you have determined that there is no impact.

Three, again in subsection 80 1 F (b) and 82 should be amended to clarify the proper review and analysis of groundwater permits. First, WRD should only forward to ODFW those permits that are found to have a potential for surface water interference. They do not need to sort through and should not be required to all of the groundwater permits that have no potential to affect surface water. Second, the rules should direct when there is a potential for surface water affects that WRD will assess and identify the expected affects prior to forwarding the permit application to ODFW. Once the department has conducted the hydrologic analysis and provided it to ODFW, they can then assess how any predicted impacts on stream flow will affect fish.

Thanks for the opportunity to provide comments to you as a public hearing and again we may provide some further additional language to clarify these points that we have raised.” (mark 116-172)

Lisa: Thank you. I have called the names of everyone who submitted registration cards. Is there anyone who would like to comment? It does not look like it. If not, we will hold until 1 until we adjourn.

It is now 1pm. Thank you for providing your comments. The hearing is adjourned.

**September 19, 2005 – 5:00 pm
Salem, Oregon**

This hearing is now in session and is being tape-recorded to maintain a permanent record.

My name is Lisa Jaramillo and I am the Hearings Officer. Today is September 19, 2005 and the time is approximately 5:04pm.

The purpose of this hearing is to provide an opportunity for public comment on proposed rules in OAR Chapter 690 Division 315 relating to municipal water use permit extensions. The proposed rules implement statutory changes from the 2005 legislative session. Specifically, the proposed rules adjust the standards the department uses to review applications for extensions of time filed by holders of municipal water use permits and clarifies that holders of municipal water use permits may not develop additional water under their permit until the department approves a water management and conservation plan. The department is also proposing to amend rules to clarify the fee and request for future case hearings for rules for extensions. The department has worked with the Rules Advisory Committee in developing these proposed rules. Any final rules will be adopted by the Oregon Water Resource Commission.

In addition to presenting oral comments at this hearing, anyone may submit written comments until 5 pm September 21, 2005, which is the close of the public comment period. Send comments to Debbie Colbert at Oregon Water Resources Department, 725 Summer Street, Suite A, Salem, OR 97301-1271, or fax comments to 503.986.0903, attention Debbie Colbert or email comments to Debbie.L.Colbert @ wrd.state.or.us. Comments received after 5pm, September 21, 2005 will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. The Water Resources Department will not respond to questions during this hearing. After the close of public comment period, department personnel will prepare a staff report, which will be available from the department. It is now 5:05 pm and no one showed up to this session of the rulemaking hearing beginning at 4pm today. So, at this time the hearing is adjourned. Hi This is Lisa Juul Jaramillo 5:25pm, still no one has arrived at this last session. It is 6pm. No one came during the 4 to 6 pm session. The hearing is now adjourned by Lisa Juul Jaramillo and it is September 19, 2005.