



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

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item E, January 13, 2006
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program by the City of Monroe under ORS 536.295

I. Issue Statement

Under ORS 536.295 the Water Resources Commission may, under certain circumstances, allow the Department to consider an application to appropriate water for a use not classified as an allowable use by the applicable basin program. The City of Monroe (“the applicant”) has requested an exception to the Willamette Basin Program for their Application S-86270 indicating that use of water is necessary to ensure public health, welfare and safety and is necessary to avoid extreme hardship as provided in ORS 536.295(1)(d) and (e).

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

Commission approval of a request for an exception to a basin program does not guarantee that a permit will be issued, or if it is issued, how it would be conditioned. The Commission is not making a public interest determination on an application. In allowing a basin program exception, the Commission allows the Department to consider an application notwithstanding the basin

program classification. All other aspects of the application review process remain the same, and the Department must consider issues such as water availability, injury to existing water rights, and any other rules of the Commission. Public notice and comment opportunities are provided in the same manner as any other water right application. If the Commission does not grant a request for a basin program exception, the application is processed but will likely be denied or limited because the proposed use is not a classified use in the basin program.

III. Discussion

A. *Application Summary Basis for Consideration*

A copy of Application S-86270 is provided in Attachment 2. This application proposes to use 0.78 cubic foot per second (CFS) (350 GPM) for municipal use from a new diversion point to be constructed on the Long Tom River. A map of the area and the general location of the point of diversion are provided in Attachment 3. In the Department's initial review of the application dated July 8, 2005, the Department determined that water is available for new uses but that municipal use is not a classified use from the Long Tom River in the Willamette Basin Program.

The Willamette Basin Program states:

"Except as otherwise provided in subsection (a) of this section, the Long Tom River and tributaries are classified only for domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock, wetland enhancement and public instream uses." OAR 690-502-0090(1)(b).

An evaluation of the City of Monroe's request for an exception to the basin program are provided below:

B. *Exception request evaluation*

ORS 536.295 authorizes the Commission to allow the Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use is consistent with any one or more of seven statutory criteria (Attachment 1). The City of Monroe provided the Department with a basin program exception request on December 15, 2005 (Attachment 4). In its request, the applicant stated that the basis for its request is that the use is necessary to ensure public health, welfare and safety and to avoid extreme hardship, pursuant to ORS 536.295(1)(d) and (e).

Public health, welfare and safety

The City of Monroe's current peak day demand is 275 gallons per minute (GPM). The current water supply capacity is 113 GPM which is generated from two wells. These existing wells produce water high in both iron and manganese and require treatment. A new one million gallon storage tank allows the city to meet their peak day demand. However, the city states that relying on storage to meet peak day demands is not reliable if there is a fire or some other water system emergency.

By 2020 the city estimates that the peak day demand will reach 350 GPM. The city's application (S-86270) requests 350 GPM (0.78 cubic foot per second (CFS)). This quantity of water would allow them to meet their current peak day demand, replace existing ground water supplies, and address their 20 year water needs.

Department analysis: While the Department recognizes the need for long-term municipal water supplies, the current supply was able to keep up with existing demands during this past summer. There are other methods to address firefighting and other emergency needs for water. For example, a limited license could possibly be obtained in the event that there was an emergency interruption of service. Using water from either surface water or ground water supplies for emergency firefighting is an exempt use and does not require a permit. Because the city can meet its current needs, Department staff believe these circumstances do not meet the exception standard for public health, welfare, and safety.

Extreme hardship

As discussed in the city's request for an exception (Attachment 4, page 4) "extreme hardship" is not defined by the Commission's rules. In a previously approved request for a basin program exception, the Commission considered the term to include a situation where "the failure to allow the use would cause financial or other burdens to a water user that could not be easily overcome" (Pleasant Valley Golf Course, May 1995).

The city's request points out that "the extreme hardship analysis can include the burdens on those that depend on the water as well as the burdens on the applicant" and that "the level of financial hardship that would be caused by the denial of Application S-86270 would be extreme."

As discussed in its request, the city has evaluated other water supply options and had determined they are not feasible. The city's two existing wells produce water that is high in both iron and manganese and requires treatment prior to delivery. A third well that could add 100 GPM to the delivery system generates 2,000 parts per million of total dissolved solids and would require a new investment of over 4 million dollars plus annual costs of approximately \$650,000 to add reverse osmosis treatment to the system. The city has provided a break down of these costs in an attachment to their request for an exception. The city has also explored the option of contracting for stored water from Fern Ridge Reservoir via a contract with the Bureau of Reclamation (BOR). However, the certificate issued to the BOR for Fern Ridge Reservoir allows the BOR to issue contracts only for irrigation and not municipal use. A transfer would need to be filed by the BOR to be able to issue contracts for municipal use. The City of Monroe has said they would be interested in pursuing a contract for stored water if that option were to become available.

Department analysis: "Extreme hardship" could be interpreted as a relative term that is directly tied to the financial resources of the applicant. However, in past hardship decisions under ORS 536.295, the Commission has not focused on the applicant's financial resources, but instead has focused on whether denial of the use and the need for the applicant to seek an alternative water supply would cause a burden that is not easily overcome. In this case, staff agree that the failure

to allow the use would cause burdens to the applicant and its constituents that could not be easily overcome and that the exception is necessary to avoid extreme hardship.

2) Evaluation of whether the use is consistent with the general policies of the Willamette Basin Program

ORS 536.295(4) requires the Commission to evaluate whether the proposed use is consistent with the general policies of the Willamette Basin Program, provided in Attachment 5. In its exception request, the applicant asserts that the proposed use is not inconsistent with any of the policies of the basin program. In addition, the city lists several basin program policies that are consistent with this request (see Attachment 5, bottom of page 5).

The proposed point of diversion is not within an instream water right reach or minimum perennial streamflow. Additionally, the city has applied for a source of water that has no history of regulation and has water available for new appropriations year round. Therefore, the proposed use will not result in over-appropriation. The proposed use will help create opportunities for future economic development in the area. Also, the use would protect adequate and safe drinking water supplies for human consumption, while promoting water conservation through the development of a Water Management and Conservation Plan under OAR Chapter 690 Division 86. The use is consistent with state and local land use requirements.

Department analysis: Staff agree with the city that their application is consistent with the general policies of the Willamette Basin Program.

IV. Conclusion

To approve a basin program exception request under ORS 536.295, the Commission must find that the request meets one or more statutory criteria and the proposed use is consistent with the general policies of the applicable basin program. Staff believe that the basin program exception submitted by the City of Monroe meets the extreme hardship criterion under ORS 536.295 and that the proposed use 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 the City of Monroe for a basin program exception to avoid extreme hardship, recognizing that a permit, if issued, may be conditioned to protect the public health, safety and welfare.
2. Deny the request by the City of Monroe for a basin program exception.
3. Take no action and direct staff to continue to work with the applicant.

VI. Recommendation

Staff recommend Alternative 1, that the Commission approve the request by the City of Monroe for an exception to the Willamette Basin Program to avoid extreme hardship, recognizing that a permit, if issued, may be conditioned to protect the public health, safety and welfare.

Attachments:

1. ORS 536.295
2. Copy of Application S-86270
3. Map of Area
4. City of Monroe Exception Request
5. Willamette Basin Program General Policies

Dwight French
(503) 986-0819

ORS 536.295 Conditions for consideration of application for use not classified in basin program; rules.

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

- (a) Will be of short duration during each year;
 - (b) Will be for a continuous period of no longer than five years;
 - (c) Is largely 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.

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]

690-502-0020

Policies

Water Resources Commission and Department activities which affect the waters of the Willamette River Basin shall be compatible with the policies established in this rule. Surface water allocation, groundwater management, municipal and domestic water systems, reservoir coordination, conservation and land use coordination are important issues in the Willamette Basin. The Commission's policies on these issues are as follows:

- (1) Surface water allocation:
 - (a) Protect undeveloped streams with instream values for public instream uses;
 - (b) Seek a balance in the future appropriation of water between instream and total out-of-stream uses on those streams already significantly developed for out-of-stream purposes;
 - (c) Preserve opportunities for future economic development by reserving water for future use;
 - (d) Minimize the likelihood of over-appropriation due to new uses;
 - (e) Manage stored waters which have been released for instream purposes to meet flow needs reflected in established instream water rights;
 - (f) Allow irrigation use for the longest period possible between March 1 and October 31 provided sufficient water is available.
- (2) Groundwater management:
 - (a) Prevent excessive water level declines, restore aquifer stability in areas of decline and preserve with limited storage capacity for designated uses;
 - (b) Identify low-yield aquifers and inform local agencies of probable groundwater capacity limitations for some uses;
 - (c) Ensure safe municipal and domestic groundwater supplies by participating with the Department of Environmental Quality and the State Health Division in a formal monitoring program to document changes in quality and provide data for aquifer management;
 - (d) Minimize impairment of surface water uses resulting from hydraulic connection between groundwater and surface water;
 - (e) Encourage the development of programs for making groundwater resource information available to the public and local agencies.

- (3) Municipal and domestic water systems: Support coordinated water service planning and consolidation by water purveyors to preserve and protect adequate and safe drinking water supplies for human consumption in the Willamette Basin.
- (4) Reservoir coordination:
 - (a) Promote funding to study and implement the Willamette River Basin Review Study reconnaissance phase recommendations with significant potential to assist the state in meeting its resource management objectives;
 - (b) Formalize reservoir operation guidelines with the Corps of Engineers to meet state water management objectives and enter into a memorandum of understanding or other agreement that defines the reservoir coordination process and water management objectives.
- (5) Water conservation:
 - (a) Implement programs to eliminate wasteful water use;
 - (b) Improve the efficiency of water use through implementation of voluntary conservation measures;
 - (c) Give priority to developing subbasin conservation plans and providing public assistance in areas of known over-appropriation of surface water and groundwater and in water quality problem areas as listed by the Department of Environmental Quality.
- (6) Land use coordination: Promote effective state and local water resource planning and protection and efficient water use through coordination with land use programs.