

Phillip C. Ward
Director
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Re: Water Rights Transfer Application No. T-11249

Dear Mr. Ward,

Food & Water Watch, Oregon AFSCME, Bark, Sierra Club, Oregon Mission Centres of the Sisters of the Holy Names, Oregon Physicians for Social Responsibility, Environment Oregon, and Alliance for Democracy, hereby submits the following comments regarding the above referenced application. We request that the Oregon Water Resource Department and the Water Resources Commission (collectively “OWRD”) deny the permit application for Oregon Department of Fish and Wildlife’s (“ODFW”) Transfer of Point of Diversion (“POD”). If any of the water used in this change in POD ends up being used in a proposed water rights exchange, T-11109, with the City of Cascade Locks, it will 1) result in a prohibited enlargement of ODFW’s water right; and 2) could harm endangered salmon through an increase in water temperature and decrease in habitat health in Little Herman Creek and the Columbia River. Additionally transfer application 11249 should be considered in conjunction with T-11109 and T-11108 these applications are related to each other. Finally, approval of this water transfer will violate OWRD’s responsibility to manage Oregon’s publicly-owned water in the public’s interest, for the good of all Oregonians.

COMMENTS

According to the application, ODFW is seeking a Transfer of its POD for its certificated water right No. 24625. ODFW is seeking to add two additional points of diversion from two nearby groundwater sources at its hatchery in Cascade Locks.

This new application, T-11249, asks for a POD transfer of water that had been included previously in T-11108. It is our understanding that ODFW has recently split its request. An amended application for T-11108 will be submitted, with a reduction in quantity to 0.5 cfs. The water in T-11108 will then be used for a proposed water rights exchange with the City of Cascade Locks (“the City”), T-11109.

It is our understanding from conversations with OWRD staff that the water from T-11249 will be used solely to expand hatchery operations at ODFW’s Fish Hatchery. However, the process has been unclear and not well publicized. As such, and because the other permits in this area relate to a proposed water bottling plant by Nestlé, we have concerns that OWRD needs to address.



The analysis of these applications should not be allowed to be piecemealed into distinct administrative reviews. Decisions on what amounts to a linked and comprehensive project with impacts should be considered jointly. To do otherwise would be arbitrary and capricious decision-making.¹

Pursuant to Oregon Administrative Rule 690-380-4000, we are filing public comments on the application, and requests that the Department deny the application on grounds that the POD change will have adverse impacts, as described below.

This Permit Application is Invalid

Currently, there has been no publication of the amended permit application, T-11108. This application was originally published in August 2010. Based on the information currently available to the public, T-11108 seeks a POD transfer for 10.0 cfs, which is the full quantity of ODFW's certificated water right. Without such publication of the amendment, Oregon's citizens are left to wonder how ODFW has enough water for a POD transfer of 10.0 cfs, plus an additional 9.5 cfs. It is not clear that the quantity sought in the permit application for T-11108 is being reduced. This is bad process.

Furthermore, this application should be invalid, in as much as it seeks to transfer permitted water that is already the subject of another "live" permit application process. Because water rights are quantified under the Oregon Water Code, ODFW cannot transfer more water than its current water right allows.

This Transfer May Result in an Impermissible Enlargement of the Water Right

"An owner of a surface water use subject to transfer may apply for a transfer of the point of diversion to allow the appropriation of ground water."² The Water Resources Commission may approve the application if it "will not result in enlargement of the original water right or in injury to other water right holders."³

Enlargement "means an expansion of a water right and includes, but is not limited to:

- (a) Using a greater rate or duty of water per acre than currently allowed under a right . . .
- (d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation."⁴

It is unclear from the documentation as to whether there is more water available in the new points of diversion than what is currently being withdrawn by ODFW during the summer months. However, if there is more water available to ODFW at the new POD, then this POD transfer will result in an unauthorized enlargement of the water right and the permit application should be denied.

¹ Oregon Administrative Procedures Act, ORS §§ 183.480 and 183.482.

² ORS 540.531 (1).

³ ORS 540.531 (2)(B).

⁴ Or. Admin. R. § 690-380-0100(2).



Furthermore, if any of this water is later exchanged with the City of Cascade Locks under T-11109 or a new exchange application, we have additional concerns. Because ODFW is requesting ultimately the two changes in POD to facilitate its water rights exchange with the City, these permits must be considered together. And if this change in POD is approved and the exchange is approved, ODFW will be able to use more water at the new source than what is legally available and naturally available from its original source of spring water during the summer months. In its application for the exchange, ODFW states that a driving reason for the exchange is to “provide an increase in water amounts during those [summer] months, allowing increased production.”⁵ However, an increase in water would be an enlargement of ODFW’s water right and is prohibited under the Oregon Water Code.

If any of this water is used in the Exchange, the POD Transfer Will Likely Cause Detrimental Temperature and Habitat Conditions in Little Herman Creek and the Columbia River

Temperature and habitat changes present a potential second problem if this POD Transfer is linked with the exchange. Fish, particularly endangered salmon, need cooler water in order to survive.⁶

Currently, water from these springs and from hatchery operations flows into Herman Creek and, ultimately, into the Columbia River.⁷ This flowing spring water is cool and, upon entering the Columbia, acts as a thermal refuge for salmon.⁸ Research has shown the benefits of this cooler water on salmon. For example, it can help adult salmonids during upriver migration and upon arrival to prespawn holding, and can increase the carrying capacity of juveniles in thermally compromised streams and can allow the presence of salmonids in otherwise inhospitable habitats.⁹ In addition, spring-fed, cool water flows are important to Chum salmon.¹⁰

If the proposed exchange is approved, and any of this water is used in that exchange, the City’s well water would instead be used at the hatchery. As a result millions of gallons of the City’s well water would be released into Little Herman Creek and, ultimately, into the Columbia River. The City’s well water, however, is warmer during summer months than the water currently used

⁵ ODFW, Application for Water Right Exchange, Part 4 of 4: Purpose of the Proposed Exchange of Water, filed August 27, 2010. The listed purpose is to “provide an increase in water amounts during those months [April, May, June, July, August, September, October, November], allowing increased production” at the hatchery.

⁶ See, e.g., Christopher Peery, et. al., *Behavioral Thermoregulation and Slowed Migration by Adult Fall Chinook Salmon in Response to High Columbia River Water Temperatures*, 135 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 408-419 (2006); Brett High, *Temporary Staging of Columbia River Summer Steelhead in Coolwater Areas and Its Effect on Migration Rates* 135 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 519-528 (2006).

⁷ ODFW, Application for Water Rights Transfer, Part 4 of 4: Description of Water Delivery System, filed August 27, 2010.

⁸ Peery, *supra* note 6; High, *supra* note 6.

⁹ Joshua Strange, Yurok Tribal Fisheries Program, *Salmonid Use of Thermal Refuges in the Klamath River: 2009 Annual Monitoring Results 2* (April 2010), available at http://www.yuroktribe.org/departments/fisheries/documents/Thermal_Refugia_FINAL_Technical_Memo_2009_YT_FP.pdf; see also *supra* note 6.

¹⁰ Lower Columbia River Conservation and Recovery Plan for Oregon Populations of Salmon and Steelhead, 19, 141-42, (August 6, 2010), available at http://www.dfw.state.or.us/fish/CRP/docs/lower-columbia/OR_LCR_Plan%20-%20Aug_6_2010_Final.pdf.



at the hatchery.¹¹ It is well understood that warmer water has a negative impact on cold-water species such as salmon and steelhead. While the specific temperature changes and specific impacts on native fish may not be fully understood in the specific area at issue in these applications, the nature of the proposal (swapping cooler water with warmer water) makes an increase in water temperature possible in important areas of native fish habitat. In addition, the changes in where flows reach Little Herman Creek and the Columbia (as well as the timing and volume of flows) is another important issue of potential negative impact.

As the Oregon agency responsible for salmonid recovery under the Endangered Species Act, and for managing the long-term health of Oregon's native fish, ODFW has a legal obligation to demonstrate the proposed applications will not detrimentally impact the habitat upon which native fish depend. OWRD, as an action agency with respect to water management and as an executive agency with responsibilities under the Oregon Plan for Salmon and Watersheds, ODFW and OWRD have an obligation to protect these endangered species.¹² Until the above concerns have been addressed, OWRD should not approve the applications.

The POD Transfer Undermines OWRD's Responsibility to Ensure Long-Term Water Sustainability in Oregon

This water transfer T-11108, in concert with a water rights exchange, will allow the City to sell its water to Nestlé Waters North America ("Nestlé") for a water-bottling plant. By separately the transfer into two applications, T-11108 and T-11249, OWRD has even less ability to say that they will not consider the impacts of a water bottling plant in Oregon. Not only was there is a letter from the City, cc'd to Nestlé, included in the exchange application. But ODFW is now splitting up its transfer application so that one quantity of water (0.5 cfs in the amended T-11108) will be used solely for the exchange with the City. It is clear that if OWRD approves the amended POD transfer T-11108 and the water exchange application, OWRD will be facilitating the bottling of Oregon's water. It is absolutely essential that OWRD consider this as pertinent information when making its decision with regard to this application and T-11108.

By transferring a public resource – water – to a private entity, OWRD violates its mission to “restore and protect streamflows and watersheds in order to ensure the long-term sustainability of Oregon's ecosystems, economy, and quality of life,”¹³ and the public interest decision-making requirement of ORS 537.153(2). The basis for this statement is rooted in the fact that this exchange may ultimately harm the ability of the City of Cascade Locks to provide water for its citizens. It may also harm critical salmon and steelhead recovery under the ESA and Oregon Plan¹⁴.

¹¹ The water temperature of the City's well water is up to 6°F warmer, depending on the season. See, e.g., Cramer Fish Sciences for Nestlé Waters North America, *Herman Creek Cove Temperature Characterization Study Plan for Summer 2010 2* (July 2010), available at <http://www.nestlewaterspnw.com/documents/HermanCreekStudyPlan.pdf>.

¹² Oregon Endangered Species Act, ORS §§ 496.171 to 496.192 and 498.026 (2009); State of Oregon, Oregon Plan for Salmon and Watersheds, <http://www.oregon-plan.org/OPSW/coopagencies/coop.shtml> (last visited October 13, 2010).

¹³ Oregon Water Resources Department, *About Us*, http://www.oregon.gov/OWRD/about_us.shtml (May, 2007) (last visited October 13, 2010).

¹⁴ U.S. Endangered Species Act, 16 U.S.C. 1531 et. seq.; Oregon Endangered Species Act ORS 496.171-496.192.



It is unclear how long Nestlé plans to operate this facility and whether there will be a sufficient quantity of water to sustain the population of Cascade Locks. If OWRD approves the exchange without an extensive understanding of the future needs of Cascade Locks and the quantity of water that will be available in the future, it risks creating a future shortfall and jeopardizing the long-term sustainability of the water resources of the City of Cascade Locks. This would be the case regardless of the conduct of the company in question; however, Nestlé's poor track record on environmental, labor and community relations in the United States and abroad further deepens our concern over the impact of such a transfer.¹⁵

Conclusion

The State's approval of a water transfer may lead to a prohibited enlargement of ODFW's water right and possibly cause an increase in water temperature in Little Herman Creek and the Columbia River. Ultimately, the actions of ODFW and the approval of OWRD of the transfer applications and the exchange may jeopardize the long-term sustainability of Oregon's water and thus violate the mission of OWRD. We strongly urge OWRD to reject Water Rights Transfer Application No. T-11249.

Sincerely,

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¹⁵ See FOOD AND WATER WATCH. ALL BOTTLED UP: NESTLE'S PURSUIT OF COMMUNITY WATER (January 2009).

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**The organizations filing these comments would like to express particular appreciation for the truly exceptional support and assistance provided by Ms. Dawn Winalski in preparing these comments. Her work has been invaluable.