

Water Fight on the river

Conservation group worries that fish will suffer in a potentially overdrawn Clackamas River

BY REBECCA RANDALL

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River conservation nonprofit WaterWatch contends that if the South Fork Water Board, which serves West Linn and Oregon City, is allowed to develop its water rights to the fullest extent that it could be harmful to fish in the Clackamas River. The group also protested five other recent water permits that were approved by the Oregon Water Resources Department (WRD).

Two of the permit extensions were filed by the city of Lake Oswego and three were filed jointly by the Sunrise Water Authority and North Clackamas County Water Commission – which all requested water diversion from the lower 3.1 miles of the Clackamas River. The permits total 97 million gallons per day or nearly a quarter of the summer Clackamas River flows when demand is at its peak.

The South Fork Water Board also protested all eight permit extensions – including its own three. The move is a legal one made to maintain the municipality's seniority in the region. In Oregon, water rights are given a hierarchy based on when the right was given. South Fork's rights were obtained as early as 1918, while the other municipal water users on the Clackamas all have later priority dates.

The water rights were "issued a longtime ago when there was no fish analysis and no public input," said John DeVoe, executive director of WaterWatch. "In the old days the state would just issue water rights."

In some streams, the water rights held by a municipality actually exceed the amount of water in the stream.

Traditionally municipal water rights have been held onto for long periods of time even though portions remain unused. Municipalities later "certificate" (state law requires at least 25 percent) their rights when planning for growth.

South Fork's current water system was designed for a capacity of 22 to 23 million gallons of water, and the most recent master plan, which was published in October, predicts that by 2030 parts of the system will be over capacity during peak demand in the summer. The district plans to expand the system to accommodate up to 30 million gallons within the next five years, while planning to complete expansion for 40 million gallons by 2030. The upgrades amount to \$40 million over 20 years.

"We don't see how they can use all this water," said DeVoe.

Lake Oswego, which recently partnered with Tigard, is planning to double the amount of water it draws from the Clackamas River in peak demand season to up to 38 million gallons. Its system expansions will run through West Linn beginning at Lake Oswego's water treatment plant on Kenthorpe Way and piping the water through the city into Lake Oswego.

The protests for all eight permits approved on the Clackamas River were consolidated into one case. The hearings were held in March before an administrative law judge.

Protection of fish habitat

WaterWatch's main argument is that the permit extensions when fully developed could cause low water flow, which is harmful to fish, during summer months. Currently, steelhead, spring and fall chinook and coho salmon, which live in the Clackamas River, are protected by the federal Endangered Species Act, which prohibits fish habitat modification or degradation. The basin also supports cutthroat and Western Brook lamprey and Pacific lamprey.

Since the Oregon Legislature passed a law in 2005, the Oregon Department of Fish and Wildlife (ODFW) must give advice on how to "maintain persistence," or protect, fish species on rivers before water rights for utilities are approved. Accordingly, the Water Resources Department's final order on all eight permits included conditions based on advice from ODFW.

But WaterWatch argues that ODFW advice was not followed by the WRD, said WaterWatch attorney



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South Fork Water Board, which serves West Linn and Oregon City, draws its water from the lower Clackamas River, just above the confluence with the Willamette River.

Lisa Brown.

Though ODFW advised the WRD to require municipalities to reduce water use if recommended target water flows are not met in summer months, there is no condition in the permits requiring municipalities to put into action their Water Management Conservation Plans.

WaterWatch also argues “there’s a lot of existing data that just wasn’t addressed,” said Brown.

ODFW based its recommended water flow needed to protect fish on a 1964 report — a report that is too old to be accurate, argues both the South Fork Water Board and WaterWatch. South Fork argues that the minimum recommendation exceeds what is necessary, while WaterWatch argues that it is not a high enough flow.

The question for DeVoe is: Are the recommended flows “hard or soft”? Water providers are taking the position that they are soft — simply recommended — while WaterWatch wants the state to take a harder stance on meeting the flows.

The Water Resources Department asked that water flows be measured at a gauge on the lower Clackamas River near Oregon City. If target flows over a seven-day period are not met, then water diversion must be reduced according to a formula.

WaterWatch contends that an accurate reading of water flow is impossible at the gauge near Oregon City, which is at river mile 1.72, while the intakes of both the South Fork Water Board (located at mile 1.7 downstream) and Lake Oswego (at mile 0.8 downstream) are farther downstream of the gauge. The water flow could be much lower past the intakes.

The Water Resources Department also referred to an agreement between the Clackamas River Water Providers and Portland General Electric as a basis for its approval of the permits. The Clackamas River Water Providers, a coalition of municipal water providers of which all utilities in the case are a part, has an agreement with PGE to release water at its hydro plant storage at Timothy Lake to create increased water flow during dry seasons. Timothy Lake, which is located near Mount Hood, feeds a tributary of the Clackamas River.

WaterWatch argues that the Timothy Lake agreement is unreliable because PGE’s first responsibility is to meet the requirements of its Federal Energy Regulatory Commission license, which regulates minimum and maximum flow releases in the lake. Additionally, in the summer months less water will be available.

The agreement also requires a 14-day advance notice to release any water, meaning it may not be released on time. The only remedy if PGE decides against releasing any water is a return of the Clackamas River Water Providers’ annual deposit.

WaterWatch advocated for allowing PGE to give testimony, but it was excluded from the hearing.

WaterWatch also felt that the Oregon Department of Fish and Wildlife should have analyzed a broader area of impact than the lower 3.1 miles of the Clackamas.

However, in the hearing ODFW witnesses testified that those three miles comprise less than 2 percent of the rearing habitat of fish in the lower Clackamas during the summer months. In seasons where water levels do not meet desired flows, fish will likely head upstream to better habitat or downstream into the Willamette River, they said.

“The conditions are not ideal in the Willamette,” countered DeVoe. “The Willamette is hotter water.”

Additionally, ODFW has no fish tracking data to prove that, he said.

WaterWatch attempted to include the Department of Environmental Quality in the hearings; however, the department was excluded from providing testimony. DEQ had commented in opposition to similar permit applications filed by the Clackamas Water District, which serves Milwaukie, Sunnyside and Clackamas.

The department presented data projections showing a potential increase in temperature in the river, which could be harmful to fish. It was also concerned about the water quality issues that could arise from releases from Timothy Lake in the summer.

“This region is sitting on a lot of water. The question is: Are we going to (go) to the sensitive areas for water?” said DeVoe.

Seniority

The fish aren’t the only ones with a law protecting them. Water utilities are also arguing the rule of seniority.

The WRD put the same conditions regarding persistence of fish on each of the eight permits it issued, but South Fork Water Board says that legal requirements to protect fish must be crafted within the principle of senior water rights, and that according to seniority, it should be the last agency asked to curb water usage.

“Our senior rights (indicate) that we’re the last person to be removed on the river if there needs to be a reduction,” said John Collins, general manager of the South Fork Water Board. “We feel confident that

we have preserved our right to take that issue later. There isn't any way that a manager or an elected body would concede their senior water rights."

While Lake Oswego did not formally protest the WRD decision, it has an argument for seniority, as well. One of Lake Oswego's water rights is senior to the state of Oregon's right obtained in 1968 to maintain the minimum perennial flow that needs to remain in the river for fish. Since it was obtained one year after Lake Oswego's initial water right in 1967, legally Lake Oswego's water right takes precedence over the state's right.

"Legally and technically we could continue... whether we would or not is another matter," said Joel Komarek, project director for the Lake Oswego and Tigard Water Partnership.

The seniority card has never been pulled before during a water shortage. "There's always been plenty of water in the Clackamas for everyone to use it," said Collins.

South Fork works to lead solid conservation programs, it supports the Lake Oswego and Tigard partnership and has always had a good relationship with other water providers on the Clackamas River, said Collins. "We do know that we are the stewards and people managing that resource for generations to come," he said.

Lake Oswego has recently implemented tiered water rates, as a part of its conservation efforts.

If water flows in the river were low in the summer, the water master appointed by the WRD would decide how the municipalities would reduce water use.

South Fork also argued that the 2005 law requiring municipal utilities to protect fish violates its constitutional rights by putting the burden of fish protection on municipalities. Farmers, which account for about 30 percent of water rights on the Clackamas River, are exempt from the law.

Where the argument stands

Rick Barber, an administrative law judge from the Office of Administrative Hearings, released his proposed final order on Aug. 3 affirming the state's original decision to allow all eight permit extensions with modifications.

None of the arguments stood with the judge, who found that WaterWatch had failed to prove that the measurements conducted at the gauge would be improper or that releases from Timothy Lake are essential to the persistence of fish.

Barber found that WaterWatch's arguments against advice given by the Oregon Department of Fish and Wildlife do not stand because ODFW was not a party to the hearing and did not have an order to be reviewed. He ruled that the Water Resources Department did what it is supposed to do by asking for advice and then applying it to the final order.

WaterWatch also presented data that said the flow level would drop below ODFW's numbers, but the administrative law judge did not take it into consideration.

"My opinion is the ALJ is correct and interpreted Oregon statute correctly and we are entitled to our water rights extensions," said Collins.

Barber suggested modifying the final order to include more specific guidelines on a yearly meeting between all of the water providers and ODFW. Through the hearings, it became clear to him that there was a miscommunication about what should result from the meetings. Additionally, he asked that a condition be clarified to address situations in which ODFW and the water providers do not agree.

All parties involved in the protest filed an exception to the Water Resources Department ruling in September. The director must consider those exceptions, but there is no time limit on his findings.

South Fork Water Board anticipates that the permits will all be approved by the Water Resources Department but also expects WaterWatch to file an appeal.

But, "we expect in the end to prevail," Collins said.

WaterWatch, which has been involved in similar cases throughout the state, is looking forward to the court of appeals. "When you go to the court of appeals, you get a fresh set of eyes, an objective set of eyes," DeVoe said.