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## ***WaterWatch of Oregon, Inc. v. Water Resources Department***

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The Oregon Court of Appeals issued its long-awaited decision in *WaterWatch of Oregon Inc., v. Water Resources Department et al.*, Nos. A148870, A148872, A148874, 268 Or. App. 187 (2014) on December 31, 2014. The opinion interprets and clarifies ORS 537.230(2)(c), which requires the following condition for extensions of time to develop municipal water use permits:

For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, the department finds that the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife. An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

The decision interprets the statutory condition required for extensions by municipal water users, and guides the Oregon Water Resources Department ("OWRD") on its evaluation of conditions for extensions of time.

WaterWatch of Oregon, Inc. ("WaterWatch") sought judicial review of three final orders granting extensions of time for perfecting municipal permits held by the City of Lake

Oswego, the South Fork Water Board, and the North Clackamas County Water Commission (“Municipal Parties”). All of the permits and final orders at issue concerned the lower 3.1 miles of the Clackamas River. Following contested case hearings in 2010, OWRD conditioned the permits to comply with ORS 537.230(2)(c). WaterWatch challenged the fish-persistence conditions in the final orders on several grounds, filing a petition for judicial review with the Oregon Court of Appeals. The Court of Appeals ruled in favor of WaterWatch, stating that the record lacks substantial evidence to support OWRD’s distinction between short-term and long-term declines in persistence flows, and how short-term flow declines will affect fish persistence. The Court also held that OWRD failed to adequately explain how the conditions on the undeveloped portions of the permits will maintain the persistence of fish when the face of the final orders will not contribute to maintaining minimum persistence flows.

The Court of Appeals remanded the final orders to OWRD, and any appeal to the Oregon Supreme Court must be filed by Feb. 4, 2015.

## **I. Factual Background**

A municipal water permit holder must complete construction of any works within 20 years of obtaining the permit, and beneficially use the full amount of water by the date provided in the permit. ORS 537.230(2). A municipal permit holder may apply for an extension of time beyond the 20-year deadline if the applicant satisfies three statutory requirements: a) good cause, b) the maximum rate diverted after the extension approval is subject to a water management and conservation plan, and c) the permit is conditioned to “maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law.” ORS 537.230(2)(c).

The Municipal Parties hold water use permits with undeveloped water quantities from the lower 3.1 miles of the Clackamas River. In 2003–2006, the Municipal Parties applied for extensions of time to develop and perfect the undeveloped portions of their permits. OWRD forwarded the extension applications to the Oregon Department of Fish and Wildlife (“ODFW”) for review of the effect of development on listed fish species. In May 2007, ODFW issued identical letters to the Municipal Parties that identified target streamflows for fish persistence in each season in the relevant portion of the affected waterway, and advised OWRD to condition extension for development of the undeveloped portion of the permits to maintain the persistence of fish species consistent with the recommended flows.

ODFW identified a persistence flow of 800 cubic feet per second (“cfs”) in April, and decreasing to 650 cfs in June. July and August flows were to be 650 cfs, and ODFW noted that these flows would not be met at times. ODFW recommended reducing water use or having flow releases from Timothy Lake to maintain winter steelhead redds in early July. September to November persistence flows were to be 650 cfs to September 15, and 800 cfs after September 15, with augmentation of stream flows and reduction permitted water diversions to minimize its impact. Flows in December to March were identified to be 800 cfs, with flow-related issues perceived to be unlikely.

In 2007, OWRD issued proposed final orders (“PFOs”) granting the extensions of time. OWRD found, based on ODFW’s recommendations, that use of the undeveloped portions of the permits would not maintain the persistence of listed fish species, and therefore imposed conditions on the permits that included minimum flows on the Lower Clackamas River, an annual meeting between the Municipal Parties and ODFW for devising a strategy to maximize fishery benefits from water releases from Timothy Lake, and reduction of diversion of the undeveloped portions of permits when minimum flows are not met. ODFW concurred on the conditions.

WaterWatch and South Fork Water Board protested the PFOs. Following a contested case hearing in March, 2010, the administrative law judge (“ALJ”) issued PFOs rejecting the protests, and affirmed OWRD’s PFOs, concluding that OWRD had no option but to follow ODFW’s advice under ORS 537.230(2)(c).

OWRD issued amended PFOs in January 2011, modifying the ALJ’s PFOs by adding 35 additional findings of fact, and interpreting ORS 537.230(2)(c) to require conditions consistent with both ODFW’s advise and existing data, and deviation from ODFW’s advice when that advice recommended restrictions on water use greater than existing data demonstrates. OWRD concluded in the amended PFOs that adhering to ODFW’s advice, based on existing data, will result in maintaining the persistence of listed fish species. WaterWatch and the Municipal Parties filed exceptions, and OWRD issued final orders in April, 2011, adopting the amended PFOs.

WaterWatch petitioned the Oregon Court of Appeals for judicial review of the final orders with assignments of error that included, in part: 1) OWRD’s application of the statutory fish-persistence conditions were contrary to law, and 2) OWRD’s fish persistence findings were not supported by substantial evidence or reason. *See* ORS 183.482(8), providing that a court may reverse or remand an agency order if the court finds the agency erroneously interpreted a provision of law, or that the order is not supported by substantial evidence in the record.

## II. Interpretation of ORS 537.230(2)(c)

WaterWatch argued that OWRD interpreted ORS 537.230(2)(c) contrary to law. The Court of Appeals addressed OWRD's interpretation of ORS 537.230(2)(c) in detail, focusing on the term "maintain . . . the persistence of fish species listed as sensitive, threatened or endangered under state or federal law." The Court first determined the level of interpretation necessary under *Springfield Education Assn. v. School Dist.*, 290 Or. 217 (1980), and *Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or. 348 (2000), holding that "exact terms" are relatively precise and review of the agency's application involves only agency fact-finding. For "inexact terms" the agency and court must determine the legislature's intent. For "delegative terms" the agency has discretion to complete the general legislative policy decision. The Court determined that "maintain...the persistence of fish species" is an "inexact term," and therefore looked to legislative intent to interpret the statutory provision.

The Court, after reviewing the plain meaning of the phrase in dictionary use, concluded "that the legislature intended that the undeveloped portions of the permits be subject to conditions—that is, fulfillment of the conditions are a prerequisite to diversion of the undeveloped portions—that preserve from decline the continued existence, or endurance, of listed fish species." After reviewing the legislative history, the Court concluded:

[T]he legislature focused on the longterm preservation or endurance of fish population health in the affected waterway. That understanding is consistent with the plain language of the statute, and, thus, we conclude that the legislative intent expressed in ORS 537.230(2)(c) is that, for extension requests subject to that subsection, the department must find that the undeveloped portions of the permits are subject to conditions that preserve from decline the continued existence, or endurance, of listed fish species in the affected waterway.

The Court rejected WaterWatch's "contrary to law" argument, finding that OWRD properly interpreted conditioning the permits for long term populations health of listed fish species, and noting that ORS 537.230(2)(c) "does not express a policy that no habitat may be impaired or that no individual fish may be allowed to perish or leave."

## III. Substantial Evidence/Substantial Reason Review

"Substantial evidence exists to support a finding of fact when the record, viewed as a whole would permit a reasonable person to make that finding." ORS 183.482(8)(c). The

Court also looks at “whether the findings provide ‘substantial reason’ to support the legal conclusion reached by the agency.” *Warkentin v. Employment Dept.*, 245 Or. App. 128, 134 (2011). Upon review for substantial evidence and substantial reason, the Court analyzed WaterWatch’s claims that OWRD’s additional fish persistence findings, added in the amended proposed orders, and OWRD’s conclusion that the permits, as conditioned, will maintain the persistence of listed fish species, were not supported by substantial evidence or reason in the record.

OWRD placed three conditions on the permits, concluding that the conditions maintain the persistence of fish species: 1) ODFW’s recommended flows, 2) annual ODFW meeting and written agreement strategy to maximize fishery benefits, and 3) curtailment of diversion from September through June in proportion to the amount by which target flows are not met. WaterWatch argued, in part, that the curtailment condition would not ensure that persistence flows are met. First, curtailment is not required in the summer months, even if target flows are not being met. Second, curtailment only requires refraining from diverting a portion of the undeveloped water use in proportion to the amount by which the target flows are not being met. That portion of the undeveloped water use may be the portion of the permit not being diverted in any case and would not result in refraining from diversion.

OWRD responded that ODFW’s advice explained that the target flows will not always be met during July through October because such flows are not always met currently, and the listed species have persisted under current conditions. OWRD made a finding of fact that “short term drops below minimum streamflows...are not incompatible with maintaining the persistence of fish species.”

The Court of Appeals determined that substantial evidence did not exist in the record to support OWRD’s finding about short term deviations from ODFW’s target flows, or that the permits were conditioned to maintain the persistence of fish species. OWRD failed to present evidence of what a short-term drop in flow means rather than maintaining long-term fish persistence by failing to distinguish between time and severity of short-term drops is streamflow. The Court could not connect how timing and flow reductions would affect fish persistence, and therefore found that the missing connectors in the record failed to support the department’s final orders. The conditions on the permits also lacked substantial reason because the department failed to explain how the streamflow findings and the imposed conditions connected.

## IV. Conclusions

1. The Oregon Court of Appeals builds on the reasoning of *WaterWatch of Oregon, Inc. v. Water Resources Dep't*, 259 Or. App. 717 (2013) *rev allowed*, 355 Or. 317 (2014), citing that case for the proposition:

The text, context, and legislative history of ORS 537.230(2) indicate that the 'undeveloped portion of the permit' is to be measured by reference to the maximum rate of water applied to beneficial use before the expiration of the development deadline in the permit or last-issued extension.

The 2013 *WaterWatch* case is presently before the Oregon Supreme Court, and has been also cited in *City of Damascus v. Brown*, 266 Or. App. 416, 438 (2014) ("Thus, if the department's extension order was unlawful, then the department's order issuing the certificate was unlawful as well."). With the additional citation to the 2013 *WaterWatch* case in its opinions, the Court of Appeals stands by its analysis, and presents the Supreme Court an issue of reversal of not only the case before it, but additional cases should there be a reversal.

2. The Court clarifies that the legislature intended to have "maintain . . . the persistence of listed fish species" apply over the long-term. The Court found: "The legislative policy of the statute focuses on long-term fish population health in the affected waterway. It does not express a policy that no habitat may be impaired or that no individual fish may be allowed to perish or leave." OWRD's conditions in the permits that allowed short-term deviations from ODFW's target flows were not found to be supported by substantial evidence. However, that may be explained because there was no connection in the findings to long-term persistence. The Court was clear that ORS 537.230(2)(c) will allow for declines in flows or populations, so long as the long-term persistence endures, and the conditions will support the long-term survival of the listed fish species. Note that only listed fish species are considered in this provision; decline in unlisted fish species will not trigger the conditions of this statute.

3. ODFW's advice, without rebuttal or offers of conflicting data, will remain the standard by which OWRD's conditions' efficacy will be measured. The Court and the ALJ were not willing to substitute any judgment on minimum stream flow data reliability given by ODFW. Should any alternative propositions be needed to support a municipality's flow requirements, the data must be in the record in order to be challenged, or in order to challenge ODFW's advice.

4. The Court emphasized there must be a logical link between the facts presented, and the conclusions drawn. Should there be additional findings of fact included in a final order post-contested case, the assertions must be supported with reasoning and demonstrable links to the conclusions drawn. It is likely that this case will be cited often for the phrase, “Bare conclusions by agency experts cannot be used as a substitute for evidence presented at a contested case hearing.”

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If you would like to contribute to E-Outlook or have any comments, please contact the E-Outlook Editor, Sarah Liljefelt, at [s.liljefelt@water-law.com](mailto:s.liljefelt@water-law.com) or (503) 281-4100.