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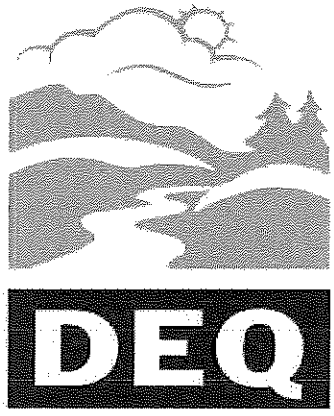
OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 11/19/1991



State of Oregon
Department of Environmental Quality

Before the State of Oregon
Environmental Quality Commission

In re:	)	
	)	
The Matter of Appeal	)	
from the Director's	)	Notice of Reconsideration
Denial of a Section	)	and Hearing
401 Certification for	)	
Hydroelectric Project.	)	

On November 8, 1991, the Environmental Quality Commission granted the City of Klamath Falls' petition for reconsideration. The Commission has not determined, however, the specific issue or issues to be reconsidered. A special meeting has been scheduled in this matter. The meeting will be held at 1:30 pm on November 19, 1991. The meeting will be held at Fish and Wildlife Commission hearing room, 2501 SW First Avenue, Portland, Oregon.

The Commission may take any or all of the following actions at the November 19, 1991 meeting:

1. Determine the specific issue or issues that it will reconsider based upon the petition for reconsideration filed by the City of Klamath Falls.

2. Determine the specific issue or issues that it will reconsider based upon any motion for reconsideration filed by the Department or Conservation Parties and served on the individual Commissioners, the Department and the parties on or before November 15, 1991.

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3. Hear evidence offered to rebut ex parte communications disclosed during the Commission's November 8, 1991 meeting or thereafter.

4. Render a decision.

Any additional written argument from the Department or parties on issues relating to the City's petition for reconsideration must be filed and served on the individual commissioners on or before the close of business on November 15, 1991. The Commission does not anticipate that it will hear oral argument, but it reserves the right to put questions to counsel for the Department and the parties.

DATED this 12 day of November, 1991.

Larry Knudsen for
William Wessinger, Chairman
Environmental Quality Commission

CERTIFICATE OF SERVICE BY MAIL

I certify that on November 12, 1991, I served the foregoing NOTICE OF RECONSIDERATION AND HEARING upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Richard Glick
Davis Wright Tremaine
2300 First Interstate Tower
Portland, OR 97201

Karl Anuta
Jolles, Sokol & Bernstein
721 SW Oak Street
Portland, OR 97205

Kurt Burkholder
Assistant Attorney General
Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201

LARRY KNUDSEN
Assistant Attorney General

STATE OF OREGON

ENVIRONMENTAL QUALITY COMMISSION

In the Matter of Appeal from Director's Denial of § 401 Certification for Salt Caves Hydroelectric Project	))))	ORDER

On June 5, 1990, the City of Klamath Falls (City) applied to the Oregon Department of Environmental Quality (DEQ) for water quality certification of the Salt Caves Hydroelectric Project. On February 7, 1991, the Director of DEQ denied certification, based on his determination that the project would violate the Temperature, Fungi, and Anti-Degradation water quality standards. The City requested a contested case hearing. The Conservation Parties[1] subsequently requested and were granted party status. DEQ withdrew its Fungi standard determination during the contested case proceeding.

This contested case was conducted by a hearings officer appointed by the Environmental Quality Commission (EQC). Direct and rebuttal testimony and documentary evidence were received by written pre-hearing submissions. A hearing for the cross-examination of witnesses was concluded on June 7, 1991.

Upon consideration of the Hearings Officer's proposed order, exceptions to the proposed order, and the parties' post-

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1 The Northwest Environmental Defense Center, Oregon Natural Resource Council, Save Our Klamath River, Oregon Rivers Council, Oregon Trout, Inc., and Sierra Club petitioned for party status together and are referred to as the Conservation Parties.

hearing briefs and oral argument before the EQC, the EQC issues this order.

Findings of Fact

1. The proposed Salt Caves hydroelectric project would be located on the Klamath River immediately downstream of the existing J.C. Boyle hydroelectric project. The project would include construction of a concrete wall across the tailrace of the existing J.C. Boyle powerhouse. The wall would divert water discharged from the J.C. Boyle powerhouse into a power conduit, forebay, and penstocks leading to the Salt Caves powerhouse, located approximately ten miles downstream from the J.C. Boyle powerhouse. The diverted water would be returned to the Klamath River via discharge from the Salt Caves powerhouse.

2. Operation of the Salt Caves project would be tied directly to operation of the J.C. Boyle project. When the J.C. Boyle project is operating--that is, when water is diverted out of the J.C. Boyle reservoir and downstream through a canal and tunnel to be discharged from the J.C. Boyle powerhouse--water would be available for use in the Salt Caves project. Flows in the Salt Caves diversion reach (i.e., the approximately ten miles of river between the J.C. Boyle powerhouse tailrace and the Salt Caves powerhouse) would essentially be the same as flows in the lower portion of the upstream J.C. Boyle diversion reach (the river from the J.C. Boyle dam downstream to the J.C. Boyle powerhouse). Those flows would consist of the 100 cubic feet per second (cfs) of water currently released at the J.C.

Boyle dam, plus 250-300 cfs contributed by springs in the J.C. Boyle diversion reach, for a combined total of 350-400 cfs. This flow would vary when additional water is spilled at the J.C. Boyle dam because of high water. The Salt Caves project would also release high-volume, short-duration "peaking" flows into the Salt Caves diversion reach for whitewater rafting, either for 16 days (City application) or 32 days (FERC) during the summer. Present flows in the Salt Caves diversion reach when the J.C. Boyle project is operating vary from approximately 1,650 cfs in the summer to 2,800 cfs in the winter.

3. The proposed project's diversion of water would result in a number of water quality changes in the Salt Caves diversion reach. Water temperatures would be warmer in the winter and cooler in the summer, due to the dominance of spring water inflow from the J.C. Boyle reach. Nutrients would be reduced because of the diversion of nutrient-enriched J.C. Boyle reservoir waters. Periphyton growth would be affected. Water-borne food supply for trout from upstream sources and food supply produced for trout within the Salt Caves diversion reach might also be affected, although the evidence conflicts on whether the total trout food supply would be reduced.

4. The evidence when viewed as a whole does not lead to the conclusion that the Salt Caves project would have an adverse effect on the fishery.

5. In the winter, operation of the Salt Caves project would divert from the Salt Caves diversion reach the colder

reservoir waters otherwise released from the J.C. Boyle powerhouse during power generation. This would allow the warmer spring waters from the J.C. Boyle diversion reach to dominate flows in the Salt Caves diversion reach. As a result, winter water temperatures in the Salt Caves diversion reach would increase at times by more than 0.5°F. Existing winter water temperatures in the reach range from 33°F to 54°F.

Ultimate Findings of Fact

1. On balance, the impacts of the Salt Caves project's water quality changes on trout would not be adverse to the trout or the fishery.

2. The Salt Caves project would at times result in an increase in the Klamath River's water temperature of greater than 0.5°F when existing water temperatures are 57.5°F or less.

Conclusions of Law

1. Under Arnold Irrigation District v. DEQ, 79 Or App 136 (1986), DEQ must issue the water quality certification sought by the City unless DEQ finds that the proposed project would violate a water quality standard adopted by the state under authority of the federal Clean Water Act and state law.

2. The Salt Caves project would not violate the Anti-Degradation standard, as set forth in OAR 340-41-026(1), 340-41-962, and 340-41-965(1), because water quality changes caused by the project would not adversely affect a designated beneficial use on the Klamath River.

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3. The Salt Caves project would violate the Temperature standard, as set forth in OAR 340-41-962(2)(b)(A), because the project would increase water temperatures by more than 0.5°F when receiving waters are 57.5°F or less.

4. The violation of any water quality standard by a proposed activity requires denial of water quality certification under the federal Clean Water Act, 33 USC § 1341, and under state law, ORS 468.732. The decision of the DEQ Director denying certification was correct as a matter of law.

Discussion

Regarding the Anti-Degradation standard, DEQ submitted evidence that trout growth would be reduced in the Salt Caves diversion reach as a result of the cumulative water quality impacts of the proposed project. DEQ argues that this reduced trout growth should be viewed as adverse because, among other things, of its being inconsistent with the characteristics of trout in the Salt Caves reach and the popularity of large trout with anglers. DEQ also argues that the EQC should give deference to the judgment of the Oregon Department of Fish and Wildlife that reduced trout growth would be adverse. The City, on the other hand, disputes the assertion that the project would result in reduced trout growth, and submitted evidence that the project would bring the benefits of greater trout production and age-class distribution. It is the EQC's judgment that the evidence, viewed as a whole, does not support

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DEQ's contention that the proposed project would have an adverse effect on the trout fishery.

As to the Temperature standard, the City argues that the standard requires two showings before a violation can be found: (1) an increase in temperature exceeding 0.5°F, and (2) an adverse impact on a beneficial use resulting from such temperature increase. Contrary to the City's argument, it is the EQC's opinion that the Temperature standard is absolute as a matter of law. That is, the standard is violated by an increase exceeding the prescribed numeric criterion; no additional showing of adverse impact to a beneficial use is required. This application of the Temperature standard is based on the standard's plain meaning, rulemaking history, and regulatory context. The Temperature standard is one of many water quality standards incorporating absolute numeric criteria, the exceedance of which constitutes a per se violation.

The EQC applied this legal interpretation of the Temperature standard in making the above conclusion of law that the standard would be violated by the Salt Caves project. The EQC also applied this legal interpretation in considering the evidence produced by the parties concerning the impacts of the temperature increase on Klamath River trout to be irrelevant to the Temperature standard.

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Order

The EQC adopts the Hearings Officer's proposed order. It is ordered that the Director's decision denying water quality certification for the Salt Caves hydroelectric project is affirmed.

DATED this 21st day of October, 1991.

William W. Wessinger
Chairman
Environmental Quality Commission

Notice

You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order. Judicial review is available pursuant to the provisions of ORS 183.482, to the Oregon Court of Appeals.

ENC
11/18/91

STANDARDS AND BENEFICIAL USE
A HYPOTHETICAL EXAMPLE

ENVIRONMENTAL QUALITY STANDARDS	SITUATION I	SITUATION II
Standard 1	Meets Standard	Violates Standard
Standard 2	Meets Standard	Better Than Sit I
Standard 3	Meets Standard	Better Than Sit I
Standard 4	Meets Standard	Better Than Sit I

Possible outcomes:

1. Current and prospective beneficial use will be diminished if situation II is permitted to occur.

2. Current and prospective beneficial uses will be enhanced or not diminished if situation II is permitted to occur.

Possible attitudes toward the enforcement of standards:

1. If standards apply in a particular situation, they should be enforced. This has the effect of creating multiple of objectives in natural resource management. In this case the enhancement or maintenance of beneficial use is one objective and the maintenance of standards becomes another objective. With multiple objectives, choices may have to be made between and among objectives in particular circumstances. With situation II and outcome 2 above, enforcement of the standard will diminish beneficial use. This has the effect of elevating in importance the maintenance of standards above beneficial use.

2. The enforcement as well as the setting of standards will consider the effect of enforcement on beneficial use. If standards apply, one or more standards are violated by a proposed action, but beneficial use is not diminished or enhanced, enforcement of standards may be considered on a case by case basis.

Policy issues that follow from the above:

1. Standards may be found to not apply in a particular circumstance and set aside on that basis. This may require a policy decision.

2. If a standard is relevant and applies, a policy decision may be required to decide if beneficial use will be diminished, not diminished, or enhanced if an action is taken.

    a. If standards are to be applied independent of beneficial use effects, no action will be permitted that violates a standard and the standard will be enforced.

    b. If beneficial use is not diminished or enhanced by a proposed action and one or more standards are violated by such an action, the enforcement of standards in that circumstance may require a policy decision.

    (See attached diagram.)

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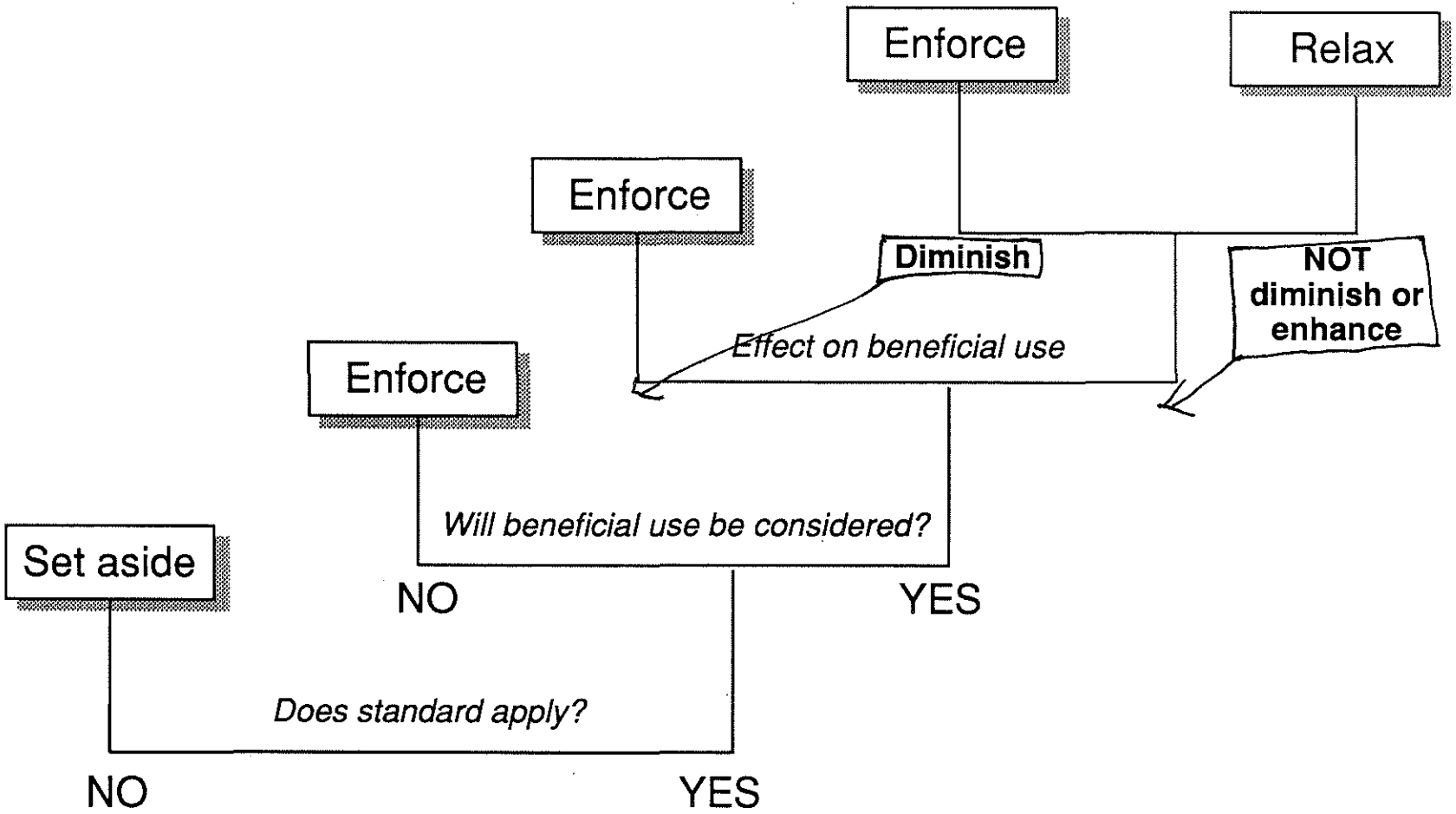

Decision Diagram of the Application of Standards of a Proposed Resource Use