

IN THE SUPREME COURT OF THE STATE OF OREGON

WATERWATCH OF OREGON, INC.,
Petitioner,
Respondent on Review

v.

WATER RESOURCES DEPARTMENT,
OREGON WATER RESOURCES COMMISSION,
Respondents Below,

and

THE CITY OF COTTAGE GROVE,
Respondent,
Petitioner on Review

Water Resources Department
No. S42117

Court of Appeals
147071

Supreme Court
S062036

**BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES
AND THE OREGON WATER UTILITIES COUNCIL
IN SUPPORT OF PETITIONER ON REVIEW**

Brief in Support of Petition for Review of the Opinion of the Court of Appeals
dated December 11, 2013
On Judicial Review of a Final Order of the Water Resources Department

Opinion filed: December 11, 2013
Authored by: Armstrong, Presiding Judge
Concurring Judge(s): Duncan, Judge, and Brewer, Judge *pro tempore*

AMICI CURIAE INTEND TO FILE A BRIEF ON THE MERITS
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I. INTRODUCTION

The League of Oregon Cities and the Oregon Water Utilities Council (collectively “*Amici*”) file this brief in support of Petitioner City of Cottage Grove’s (“Cottage Grove”) Petition for Review. The Court of Appeals’ decision in this case threatens public water resources currently in use and hampers the ability of municipalities across the state to develop future water supplies for growing communities. Moreover, the Court of Appeals’ retroactive application of law and broad assertion of jurisdiction over unappealed administrative orders could unravel a broad range of agency decisions. The Supreme Court should accept review of this case both to secure public water supplies and to prevent additional litigation disruptive to basic day-to-day administrative decision-making.

This case arises from nearly two decades of administrative rulemaking, litigation, and legislative action concerning the ability of municipalities to exercise their existing water rights to meet growing public demand. Municipalities across the state hold permits from the Oregon Water Resources Department (“OWRD”) that are designed to secure adequate public water supplies for the municipalities’ residents over time. As municipalities grow, their demand for water and the number of ratepayers to support water development grow as well. This situation causes municipalities to put more of their permitted water to use over time. The gradual development of a water right, however, is not easily accomplished under

the use-it-or-lose-it system of water law that has developed in the western United States. Moreover, there are other competing demands for Oregon's water resources. Oregon's legal and political system therefore has struggled to find an effective mechanism to enable municipal water development alongside other water uses.

The uncertainty created by protracted legal processes has made it extremely difficult (and impossible in many cases) for municipalities to develop and use water in strict conformance with permit requirements. OWRD has attempted to develop practical solutions to this problem, and municipalities have acted in reliance on OWRD's instructions. At the same time, municipalities have continued the essential work of delivering water to their communities, as well as financing and constructing necessary water infrastructure to meet future demand.

The Court of Appeals ignored this critical historical context and, as a result, failed to appreciate the practical consequences of the court's decision. Specifically, the court did not recognize that many cities have developed substantial water resources since the late 1990s without approved permit extensions, and that this situation is a result of OWRD's decision not to process permit extension requests for many years. The Court of Appeals' interpretation of House Bill (HB) 3038 (2005) (codified as ORS 537.230) retroactively subjects this existing water use to water conservation and fish persistence requirements. This

necessarily requires temporary curtailment of existing water use in some cases and may also lead to permanent curtailment of municipal water use. This dynamic jeopardizes public water supplies and invites future litigation regarding the validity and contours of municipal water rights across the state.

The Court of Appeals' retroactive application of HB 3038's water use conditions is contrary to principles of statutory construction articulated by this Court. Although the Court of Appeals determined that the meaning of the statutory provisions at issue in this case is unclear, the court failed to follow the required interpretive methodology to determine the Legislative Assembly's intent. Because retroactive application of HB 3038's water use conditions impairs existing water rights, the Court of Appeals should have declined to apply these statutory provisions retroactively, given the lack of evidence that the Legislative Assembly intended a retroactive result.

The Court of Appeals also asserted jurisdiction over an administrative order not properly before the court — an assertion that has broad consequences for Oregon administrative law. In the water law context, the Court of Appeals' decision allows circuit courts to strike down municipal water rights certificates based on defects in earlier permit-extension orders that no person challenged. In other cases where an administrative rule or order is invalidated on judicial review, a variety of unchallenged permits issued under the invalid rule or order could also

be nullified. The Court of Appeals' decision, therefore, could lead to the unraveling of a broad array of previously unchallenged agency decisions.

Finally, the Court of Appeals' mootness decision is contrary to the judicial review scheme of the Water Rights Act and fails to recognize the factual and procedural history of this case. Under the Water Rights Act, a certificate provides "conclusive evidence" of the right to appropriate water. The Water Rights Act provides for review of water rights certificates in circuit court rather than the Court of Appeals, and Petitioner-Respondent on Review WaterWatch of Oregon, Inc. ("WaterWatch") failed to challenge Cottage Grove's certificate in circuit court. The Court of Appeals nevertheless assumed jurisdiction over Cottage Grove's certificate on the grounds that the certificate was dependent on the challenged permit extension order and that WaterWatch had no practical means of obtaining notice of OWRD's issuance of the certificate. WaterWatch, however, is a sophisticated party and had effective means of obtaining notice of the certificate. Moreover, WaterWatch had multiple opportunities both to prevent OWRD from issuing the certificate, and to properly challenge the certificate once issued. WaterWatch failed to avail itself of these opportunities. WaterWatch's failure to challenge Cottage Grove's certificate therefore mooted WaterWatch's challenge to the prior-issued permit extension order.

II. PROCEDURAL AND HISTORICAL FACTS

Amici concur with Cottage Grove’s statement of the procedural and historical facts relevant to this case.

III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Amici concur with Cottage Grove’s statement of the questions presented and with Cottage Grove’s proposed rules of law.

IV. IMPORTANCE OF QUESTIONS PRESENTED

[A] century after Oregon's water law was created, the agencies that manage water use must work harder than ever to find fair solutions. But their efforts are often stymied by legal exemptions, vague definitions and modern-day issues that the law's framers never anticipated.

Oregon Public Broadcasting, *The Oregon Story: Trapped by Law* (2014), http://www.opb.org/programs/oregonstory/water/or_water/page_2.html. Oregon’s unique contribution to western water law, known as the Oregon System, is the “settlement of disputes in the courts.” *Id.* That is why the proper role of the courts in the Water Rights Act is so crucial.

Governor Kitzhaber said recently: “From my first legislative water committee, 25 years ago, I have recognized the importance of water in almost every aspect of our lives. There is increased pressure for this natural resource all over the world, and Oregon is certainly no exception.” Oregon Integrated Water Resources Strategy, at v, (August 2012), *available at*

http://www.oregon.gov/owrd/pages/law/integrated_water_supply_strategy.aspx.

Yet this Court has only twice in the past quarter-century clarified the state's water law. *See Fort Vannoy Irr. Dist. v. Water Resources Comm'n*, 345 Or 56, 188 P3d 277 (2008); *Teel Irr. Dist. v. Water Res. Dept.*, 323 Or 663, 919 P2d 1172 (1996). The need for clarification of the law is now as critical as the need for the resource the use of which the law governs.

This Court was poised to address this vital portion of the Water Rights Act in 2005 when the Legislative Assembly passed HB 3038. *WaterWatch of Oregon Inc. v. Water Resources Commission*, 339 Or 275, 119 P3d 221 (2005) (vacating Court of Appeals' decision and remanding for further proceedings in light of HB 3038). The time has now come for that review.

The Court of Appeals acknowledged that "this is a close case." *WaterWatch of Oregon, Inc. v. Water Resources Dept.*, 259 Or App 717, 735, 316 P3d 330 (2013). Close cases on issues of such importance should be decided by *this* Court.

This case presents essential questions of water law, and also has broad implications for other areas of administrative agency decision-making. The merits of this case present an issue of statutory construction regarding the baseline of municipal water use above which to apply water conservation and fish persistence requirements. The Court of Appeals' decision sets the baseline retroactively as the rate of water use at the end of the previous permit cycle. Because many

municipalities by necessity increased their water use following the end of their previous permit cycle due to protracted state legal processes, the Court of Appeals' decision jeopardizes the availability of water that is currently in use across the state. The Court of Appeals' decision also sets the stage for future litigation regarding the status and appropriate use of this water. In addition, the decision undermines future water supply planning and financing by creating uncertainty regarding the scope of municipal water rights.

This result is contrary to the Growing Communities Doctrine of western water law, a doctrine reflected in HB 3038. The Growing Communities Doctrine reconciles the principles of prior appropriation with the special circumstances of municipal water suppliers by allowing municipal water suppliers to hold water rights in anticipation of future needs. *See, e.g., City and County of Denver v. Sheriff*, 105 Colo 193, 202, 96 P2d 836, 841 (1939) ("it is not speculation, but the highest prudence on the part of the City to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable time") Janis Carpenter, *Water for Growing Communities*, 27 *Env'tl L* 127, 134-35 (1997). HB 3038 reinforced the principles of the Growing Communities Doctrine by allowing municipalities to develop their existing water rights on an extended, predictable schedule. The Court of Appeals' interpretation

of HB 3038, however, undermines these principles by impeding municipal planning and growth.

This case also raises important questions regarding the scope of judicial review of agency orders under the Oregon Administrative Procedures Act (“APA”). The Court of Appeals’ decision allows Oregon courts to take jurisdiction over a broad range of unchallenged agency decisions that are related to challenged orders. This result undermines basic systems of agency decision-making and could unfairly injure individuals and organizations that have relied on unchallenged final permits.

V. ARGUMENT

A. The Court of Appeals ignored the historical context of HB 3038 and, as a result, adopted an interpretation that produces an absurd result.

Nearly two decades of administrative rulemaking, litigation and legislative action provide important context to this case. The Court of Appeals ignored this historical context and, as a result, failed to appreciate the consequences of the court’s decision. Given the purpose of HB 3038, the Legislative Assembly could not have intended the absurd result ordered by the Court of Appeals.

1. This case must be viewed in its historical context.

The Water Rights Act reflects the prior appropriation doctrine of western water law. Under this doctrine, water rights are gained through the application of water to beneficial use. Conversely, water rights may be lost through non-use.

Consistent with these common law principles, the Water Rights Act historically required all water granted under a permit to be placed into use within five years. The Act, however, allowed OWRD to issue extensions of water permits “for good cause shown.” *See former* ORS 537.230 (2003). Because municipalities across Oregon historically secured water permits sufficient to accommodate future population growth, municipalities needed regular permit extensions in order to maintain their water rights. OWRD therefore had a practice of issuing extensions to municipal permit holders every five years as a matter of course.

This situation changed in the late 1990s after Oregon Department of Justice gave new advice to OWRD on the legal requirements for granting extensions. (Item 66, 611-19). In response to this advice, OWRD convened a rules advisory committee to conduct a comprehensive review of the municipal permit extension process. This review generated a series of rule changes that were not complete until November 2005. During the lengthy period of administrative rule development, OWRD suspended all applications for permit extensions and did not require municipal permit holders to submit new extension applications. (Item 97, 1123). Municipalities across the state relied on these instructions from OWRD.

After OWRD had made initial administrative changes to the municipal permit extension process, but before enactment of HB 3038, WaterWatch initiated litigation to force changes in municipal water right permitting. In what became

known as the “*Tenmile Creek*” case, the Court of Appeals held that the Coos Bay North Bend Water Board (“CBNB”) was not entitled to a water right permit under ORS 537.230 because CBNB did not plan to begin physical construction of its water diversion infrastructure within five years of receiving its permit. *See WaterWatch of Oregon Inc. v. Water Resources Commission*, 193 Or App 87, 88 P3d 327 (2004), *vacated and remanded*, 339 Or 275, 119 P3d 221 (2005).

The 2005 Legislative Assembly responded to the *Tenmile Creek* decision with HB 3038, which amended ORS 537.230 to allow municipal water suppliers up to 20 years to commence and complete construction of water diversion works pursuant to permits issued after the effective date of the act. This legislation also allowed municipal water suppliers to apply for extensions of time beyond the 20 years to complete construction or to perfect a water right. *See* 2005 Or Laws ch 410, § 1.

HB 3038 further established the special procedures at issue in this case for municipal water providers already holding water right permits for which an extension is required. Specifically, HB 3038 requires permit extensions to be “conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use *before the extension* only upon approval by [OWRD] of a water management and conservation plan.” *Id.* (codified at ORS 537.230(2)(b)) (emphasis added). For municipal water permits issued before November 2, 1998,

HB 3038 also requires the first new permit extension issued after June 29, 2005 to include a finding that “*the undeveloped portion of the permit* is conditioned to maintain . . . the persistence of fish species listed as sensitive, threatened or endangered under state or federal law.” *Id.* (codified at ORS 537.230(2)(c)) (emphasis added).

Meanwhile, municipalities continued the essential work of delivering water to their communities and developing infrastructure to meet anticipated demand. Cottage Grove is typical of Oregon municipalities in that the perfection of its water right was tied to the expansion of its water treatment plant. Once Cottage Grove completed this infrastructure work, the city had the physical capacity to beneficially use its full water right. (Item 74, 815-859).

WRD’s protracted rulemaking and the *Tenmile Creek* litigation effectively prevented many municipalities from perfecting their water rights in compliance with their permits. In order to obtain a water right certificate, a municipal water supplier must show beneficial use consistent with the terms of its permit. *See* ORS 537.250(1); OAR 690-014-0100(2). Municipal permits include deadlines for the commencement and completion of construction, and for completing beneficial use of all water granted in the permit. Because OWRD generally did not process permit extension applications during the rulemaking and *Tenmile Creek* litigation, many municipalities ran past the dates prescribed in their permits to apply water to

beneficial use, preventing these municipalities from perfecting their water rights consistent with the development deadlines in their permits. Municipal water providers, however, continued to develop their water systems to meet anticipated demand with the understanding that OWRD would later provide formal approval of this water use through appropriate permit extensions and certificates. The history in Cottage Grove follows this pattern.

2. The Court of Appeals' decision jeopardizes existing water supplies, a result the Legislative Assembly could not have intended.

The Court of Appeals' decision does not consider the cause or the implications of the permit cycle issue faced by municipalities across the state. Instead, the court implied that its retroactive application of HB 3038 water use conditions was necessary to prevent Cottage Grove from becoming a model for municipalities to suddenly build new infrastructure to make full use of their permitted water – all in an attempt to circumvent the requirements of HB 3038 for fish protection and water conservation. *See WaterWatch v. OWRD*, 259 Or App 717, 741, 316 P3d 330 (2013). This reasoning ignores the history described above and does not reflect the reality of municipal water supply development on which the Legislative Assembly based HB 3038.

Cottage Grove's prior permit cycle ended in 1999, during the time in which OWRD was not processing permit extension applications. The fact that Cottage

Grove, after the construction date the city's permit, completed its water treatment plant and made full use of its permitted water by 2008, reflects the years of OWRD inaction on municipal extensions created by the legal processes described above. Many other municipalities have similarly developed their water systems and increased their water use significantly over an extended period of time following the end of their previous permit cycle. The Water Rights Act does not place a deadline on OWRD approval of permit extensions, and OWRD does not have the resources to timely process permit extension applications. As a result, many municipalities have water in use that is now in limbo because of the Court of Appeals' decision. The court's decision may also force municipalities to adopt expensive and unexpected retrofits of water infrastructure to meet fish persistence requirements.

The Court of Appeals denied that its decision jeopardizes water developed after the end of a permit cycle, but that is the logical consequence of the decision. In a footnote near the end of its opinion, the Court of Appeals addressed *Amici's* argument on this issue and stated:

That is, nothing in this opinion requires a city to cease using water that has been applied to beneficial use after its permit has expired or prohibits a city from increasing its water use pending departmental approval of an extension application. We hold only that those actions are not considered "development" for purposes of ORS 537.230(2)(c) and do not occur "before the extension" for purposes of ORS 537.230(2)(b). We express no opinion

as to whether such actions would otherwise be prohibited under the Water Rights Act, a question that is not before us.

Id. at 742, n.25. This explanation ignores the fact that water conservation and fish persistence requirements in most cases will operate to reduce the amount of water available for municipal purposes. In circumstances where additional water has been placed into use following the end of a permit cycle, the Court of Appeals’ opinion retroactively reduces the volume or rate of flow available for municipal use if it is later determined that the water use does not meet conservation or fish persistence standards.

Moreover, the Court of Appeals’ interpretation of the water conservation provision HB 3038 creates an additional requirement for temporary curtailment of water developed after the end of a permit cycle in some cases. HB 3038 requires permit extensions to be “conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use *before the extension* only upon approval by [OWRD] of a water management and conservation plan.” ORS 537.230(2)(b) (emphasis added). The Court of Appeals interpreted “the extension” in this provision to refer retroactively to the prior permit extension. *See WaterWatch*, 259 Or App at 742 n.25. Therefore, in municipalities without OWRD-approved water conservation plans, any water developed after the end of the municipality’s prior permit cycle would be subject to curtailment until OWRD

approved both a permit extension and a water conservation plan for that municipality.

Even if the fish persistence and water conservation standards do not permanently require a reduction in water use in a particular case, the Court of Appeals' decision still places a cloud of uncertainty over existing municipal water use that must be resolved through additional regulatory process.

As noted by the Court of Appeals, the purpose of HB 3038 was to address concerns raised by the *Tenmile Creek* litigation regarding "the viability of existing municipal permits and the ability of municipalities to plan for future water supply." *Id.* at 738. The Court of Appeals' decision is contrary to this legislative purpose by creating uncertainty regarding the viability of existing municipal permits and jeopardizing the ability of municipalities to meet current as well as future water demands.

Finally, the Court of Appeals' statutory construction is not necessary to prevent municipalities from evading water conservation and fish persistence requirements. OWRD may refuse to certificate a water right if a municipality delays applying for a permit extension in order to develop water free of the requirements of HB 3038. As the Court of Appeals has previously recognized, the determination of whether a water right has been perfected is a matter of legislative delegation to OWRD. *See Hale v. Water Resources Department*, 184 Or App 36,

43, 55 P3d 497 (2002) (applying *Springfield Educational Association v. Springfield School District No. 19*, 290 Or 217, 228-29, 621 P2d 547, 555-56 (1980) to uphold OWRD certification decision). OWRD therefore has the authority and discretion to ensure appropriate application of HB 3038.

Moreover, the APA and Water Rights Act provide remedies for improper certification of a water right. In WaterWatch's case, that remedy is an action in circuit court in the form of a challenge to an order in other than a contested case. *See* ORS 183.484; ORS 537.250; Certificate of Water Right 86670, *available at* http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=170378 (explaining appeal process to challenge Cottage Grove's certificate).¹ The Court of Appeals' decision therefore ignores OWRD's regulatory authority as well as the judicial review scheme created by the APA and the Water Rights Act.

B. The court's method of statutory interpretation is improper given the retroactive effect of the court's decision.

Because the Court of Appeals did not acknowledge the retroactive effect of its decision, the court did not consider the proper method of statutory interpretation concerning the retroactivity of statutes. As with any statute, legislative intent is the touchstone for judicial interpretation of potentially retroactive legislation. *See*

¹ The Water Rights Act allows permit applicants and junior water rights holders affected by a certificate to request a contested case hearing to challenge the validity of the certificate. *See* ORS 537.260(3); 537.410-445. Others may bring a challenge to a certificate as an order in other than a contested case.

Whipple v. Howser, 291 Or 475, 480-82, 632 P2d 782 (1981). However, the Court of Appeals has repeatedly noted that if a statute lacks a retroactivity clause, then “the legislative record is typically silent and of no assistance.” *Portland General Electric Company v. Mead*, 235 Or App 673, 681, P3d 1048 (2010); *Strizver v. Wilsey*, 210 Or App 33, 37, 150 P3d 10 (2006); *Lovinger v. Lane County*, 206 Or App 557, 566, 138 P3d 51 (2006); *State ex rel Juvenile Dept. of Multnomah County v. Nicholls*, 192 Or App 604, 609, 87 P3d 680 (2004).

There is no clear retroactivity clause in HB 3038 regarding application of the water conservation and fish persistence requirements of the statute. Section 5(2) of the statute does apply these water use provisions generally to permit extension applications that were pending before OWRD prior to the effective date of HB 3038. *See* 2005 Or Laws ch 410 § 5(2) (uncodified). But HB 3038 does not say that the water use conditions apply prospectively to future water development under an extended permit or that the conditions apply retroactively to previously developed water. Specifically, HB 3038 refers to “the extension” and “the undeveloped portion of the permit” but does not specify which permit extension is relevant for measuring the development of a water right. *See id.* § 1 (codified at ORS 537.230(2)).

This Court “assume[s] that the legislature intends its amendments to existing legislation to apply prospectively unless the legislature signals an intention to

apply an amendment retrospectively.” *Black v. Arizala*, 337 Or 250, 271, 95 P3d 1109 (2004). In addition, statutes that are “procedural or remedial” presumptively apply retroactively, whereas statutes that are “substantive” are presumed to apply prospectively only. *See Joseph v. Lowery*, 261 Or 545, 549, 495 P2d 273 (1972).

To determine whether a particular statute is procedural or remedial, as opposed to substantive, Oregon courts “avoid invoking the terms as mere labels and strive to examine meaningfully the substance of the legislation.” *Strizver*, 210 Or. App. at 38 (citing *Joseph*, 261 Or. at 547). As explained by this Court, the basic test for whether a law is “substantive” concerns whether retroactive application of the statute will “impair existing rights, create new obligations or impose additional duties with respect to past transactions.” *Joseph*, 261 Or at 547 (quoting *Kempf v. Carpenters & Joiners Local Union*, 229 Or 337, 343, 367 P2d 436 (1961)).

The Court of Appeals recognized the ambiguity of the Legislative Assembly’s intent as to when the water conservation and fish persistence requirements of HB 3038 should apply. Specifically, the court stated that “the

specific timing question at issue here was not directly addressed in public hearings on the bill[.]”² *WaterWatch*, 259 Or. App. at 735, 741.

Nevertheless, the Court of Appeals did not evaluate the statute using the interpretive methodology set forth in *Black*, *Joseph*, and *Kempf*, and did not “examine meaningfully” the effect of the provisions at issue in this case on existing municipal water rights. Given the ambiguity regarding legislative intent and the fact that retroactive application of HB 3038’s water use conditions impairs existing water rights, the Court of Appeals’ interpretation was in error.

C. The court’s assertion of jurisdiction over an order not before the court could unravel a broad range of agency decisions.

The Court of Appeals reached beyond the permit extension order before the court to invalidate the water rights certificate subsequently issued by OWRD to Cottage Grove. The court asserted jurisdiction over the certificate under ORS 183.486(1)(b), which allows for “ancillary relief * * * to redress the effects of official action wrongfully taken or withheld.” *See WaterWatch*, 259 Or App at

² The Court of Appeals relied significantly on the more general legislative history of HB 3038, primarily on statements in the legislative record made by *WaterWatch*. *See WaterWatch*, 259 Or. App. at 739-40. *WaterWatch*’s opinion of HB 3038 does not constitute persuasive evidence of legislative intent. *See Linn-Benton-Lincoln Educ. Ass’n v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 569, 989 P2d 25 (1999) (explaining that witness statements “are not direct expressions of legislative intent”); *Murphy v. Nilsen*, 19 Or App 292, 296, 527 P2d 736 (1974) (stating that testimony from persons interested in the legislation “is incompetent” for the purpose of determining legislative intent).

729. The court made this decision despite the fact that the APA and the Water Rights Act provide for judicial review of water rights certificates in circuit court as orders in other than contested cases. *See* ORS 183.484; ORS 537.250. This decision by the Court of Appeals has broad consequences for municipal water rights as well as for other types of administrative agency decisions.

In the water rights context, the Court of Appeals' decision primes the pump for litigation regarding future municipal water rights certificates. Many future municipal water rights certificates will be based on permit extension decisions that were issued after the enactment of HB 3038 or will be issued in the future. The Court of Appeals' decision allows challenges to future water right certifications in circuit court on the basis that OWRD did not adequately condition prior permit extensions, even if those prior extensions were not timely challenged. Just as the Court of Appeals ignored APA procedures and timelines for challenging a water certificate, circuit courts will be empowered to ignore APA and Water Rights Act provisions that require permit extensions to be challenged through contested cases and the Court of Appeals. *See* ORS 183.482; OAR 690-315-0060 and 0100 (providing for contested cases on protests of water permit extensions).

These certificate challenges could result in cancellation of municipal water rights due to long-resolved, technical permit cycle issues resulting from the period of legal uncertainty preceding HB 3038 and related OWRD rulemaking. This

prospect adds another layer of risk and uncertainty to municipal water rights holders.

The Court of Appeals’ decision also threatens to unravel other types of tiered and sequential agency decisions. For example, the Oregon Department of Environmental Quality (“ODEQ”) issues general permits to cover various categories of activities that create discharges to air and water. These general permits may be issued as orders in other than contested cases. *See, e.g.*, ORS 468B.050 and OAR 340-045-0033 (allowing ODEQ to issue general water discharge permits as orders); ORS 183.310(6)(a)(C) (defining ODEQ permits issued under ORS 468B.050 as “orders” for purposes of the APA). Individuals and organizations sometimes must apply to ODEQ for coverage under these general permits, and these applications are subject to public comment periods in some cases. In response to an application and public comments, ODEQ issues an order allowing or denying an applicant’s coverage under the general permit. *See, e.g.*, ODEQ 1200-C General Permit for stormwater discharge; *available at* <http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes1200c/permit.pdf> (requiring application and 14-day public comment period for construction activities disturbing more than five acres of land).

The Court of Appeals’ decision in the instant case allows circuit courts reviewing general permits to invalidate subsequently-issued coverage orders, even

if an individual coverage order was not timely challenged. This result creates a risk that business activities conducted under general permits may be deemed unlawful, even if the coverage order authorizing the activity was not specifically challenged and the business operated in accordance with the general permit and in reliance on DEQ's permit coverage decision.

The Court of Appeals' interpretation of ORS 183.486(1)(b) has even broader implications when a court invalidates an agency rule in response to a challenge to an order implementing the rule. The APA allows a court to determine the validity of a rule in the context of a challenge to an agency order applying the rule. *See* ORS 183.400(2). If a court strikes down a rule in this circumstance, the Court of Appeals' interpretation of ORS 183.486(1)(b) arguably allows the court to also invalidate any and all agency authorizations issued pursuant to the rule, even if those authorizations were not timely challenged and could not otherwise be adjudicated by the court. Such a scenario could dismantle entire systems of agency decision-making and create widespread collateral damage to permit holders that have relied on issued permits to conduct their business affairs.

In sum, the Court of Appeals' assertion of jurisdiction over an agency order not properly before the court creates a dangerous precedent with far-reaching implications to administrative law. This situation further justifies the Court's review of this case.

D. The court’s mootness decision fails to recognize the practicalities and procedural history of this case.

The Court of Appeals’ mootness decision ignores the judicial review scheme of the Water Rights Act and fails to recognize the factual and procedural history of this case. Under ORS 537.270, an unchallenged water right certificate provides “conclusive evidence of the priority and extent” of a water right. Except for water users affected by a certificate,³ anyone wishing to appeal a certificate must do so in circuit court under APA procedures governing challenges to orders in other than contested cases. *See* ORS 183.484; ORS 537.250; ORS 537.260(3). In the instant case, WaterWatch failed to bring a timely challenge to the certificate issued by OWRD to Cottage Grove. Under the Water Rights Act and APA, therefore, WaterWatch’s challenge to Cottage Grove’s permit extension is moot.

Despite these statutory requirements, the Court of Appeals held that WaterWatch’s challenge to the permit extension was not moot because the certificate was predicated on the extension and WaterWatch did not have sufficient notice of OWRD’s issuance of the certificate. OWRD, however, acted within its discretion to issue the certificate as the agency charged with implementing the Water Rights Act. *See Hale*, 184 Or. App. at 42-44. Moreover, WaterWatch had

³ See footnote 1, *supra*.

ample notice and opportunity both to prevent issuance of the certificate and to bring a timely challenge to the certificate after OWRD issued the certificate.

The procedural history of this case illustrates the propriety of OWRD's certification decision. On August 19, 2008, OWRD issued a proposed final order ("PFO") approving the City's application for an extension of time to perfect its municipal water right. The PFO, however, also concluded that there was no remaining undeveloped portion of the City's water right, meaning that the City had perfected its water right.

Thereafter, WaterWatch twice contested the PFO. WaterWatch first appealed the PFO to an Administrative Law Judge ("ALJ"), but was unsuccessful in the ensuing contested case hearing. WaterWatch next filed exceptions to the ALJ's Proposed Order with OWRD, but OWRD rejected them and instead issued a Final Order on September 14, 2010, that ratified the ALJ's decision and reflected the original PFO. WaterWatch's unsuccessful challenges to OWRD's permit extension decision therefore delayed issuance of Cottage Grove's certificate for two years after OWRD had concluded that Cottage Grove had fully perfected its water right.

Given this delay and the outcome of the contested case, OWRD appropriately issued the certificate to Cottage Grove on October 15, 2010. The Water Rights Act states that OWRD "shall issue" a water rights certificate in

response to an application “that shows, to the satisfaction of [OWRD] that an appropriation has been perfected in accordance with the provisions of the Water Rights Act[.]” ORS 537.250. Nothing in the Water Rights Act requires OWRD to withhold a certificate from an applicant until all possible appeal periods related to a different OWRD decision have run. OWRD therefore had discretion to issue a water right certificate to Cottage Grove following the ALJ’s decision and OWRD’s issuance of the Final Order on the permit extension. *See Hale*, 184 Or App at 41 (noting that the Legislative Assembly “delegated substantial latitude” to OWRD to make certification decisions).

WaterWatch should have anticipated that OWRD would issue a certificate to Cottage Grove following issuance of the September 14, 2010, final order, given the nature of that order. WaterWatch is a sophisticated party that closely monitors and regularly challenges OWRD decisions. *See, e.g., Tenmile Creek*, 193 Or App 87; *WaterWatch of Oregon, Inc. v. Boeing Agri-Industrial Co.*, 155 Or App 381, 963 P2d 744 (1998); <http://waterwatch.org/programs/watch-dogging-oregons-water-use/watch-dogging-program> (stating that WaterWatch “tracks the actions of [OWRD]” and that WaterWatch “monitors and challenges . . . water allocation decisions”). Moreover, as evidenced by the *Tenmile Creek* litigation and the HB 3038 proceedings, WaterWatch had been actively working for years to curtail municipal water rights.

Yet WaterWatch failed to take advantage of two opportunities to prevent OWRD from issuing the certificate to Cottage Grove. First, WaterWatch could have filed exceptions to the September 14, 2010, Final Order with the Water Resources Commission. *See* ORS 537.173. WaterWatch did not do this.

Second, WaterWatch could have swiftly appealed the Final Order on the permit extension to the Court of Appeals and asked that court to stay issuance of the certificate under ORS 183.482(3) and ORS 536.075(5). Because WaterWatch waited until after OWRD had issued the certificate to appeal the permit extension order, the Court of Appeals lacked authority to stay the certificate.

Once OWRD issued the certificate to Cottage Grove, WaterWatch had two opportunities to challenge the certificate properly. First, WaterWatch had the right to ask OWRD to reconsider its issuance of the certificate. *See* OAR 137-004-0080. Second, WaterWatch could have challenged the certificate in circuit court as an order in other than a contested case under ORS 183.484. WaterWatch did neither of these things and instead brought a collateral attack on the certificate in the Court of Appeals by challenging OWRD's Final Order on the permit extension. This was not a proper avenue to challenge the certificate.

Finally, the Court of Appeals is incorrect in asserting that WaterWatch had no effective means of notice of OWRD's issuance of the certificate. WaterWatch was intimately familiar with the status Cottage Grove's water right because

WaterWatch had been litigating this matter for two years before OWRD issued the certificate to Cottage Grove. Once OWRD issued the orders approving Cottage Grove's permit extension and rejecting WaterWatch's exceptions to the extension, WaterWatch could have simply inquired with OWRD regarding the status of the certificate. WaterWatch failed to do so despite WaterWatch's stated program of "tracking" OWRD's actions.

VI. CONCLUSION

For the foregoing reasons, *Amici* League of Oregon Cities and the Oregon Water Utilities Council respectfully request that this Court grant the City of Cottage Grove's Petition for Review.

Dated this 12th day of March, 2014.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b); (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5998 words and further certify that (3) this brief complies with the minimum type size limitation pursuant to ORAP 5.05(4)(f) and (4) the font size is 14 point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 12th day of March, 2014, I filed the foregoing BRIEF OF AMICI CURIAE LEAGUE OF OREGON CITIES AND THE OREGON WATER UTILITIES COUNCIL IN SUPPORT OF PETITIONER ON REVIEW with the State Court Administrator by using the court's electronic filing system, and I hereby certify that I served copies of the above document to the following parties by eFile through the State Court Administrator, if applicable, or, if not applicable, by U.S. Postal Service, first class mail:

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