STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
*15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490*

June 9, 2011

Watts Brothers Farms
Attn: Troy Grimes – VP Finance
PO Box 1900
Pasco WA 99302-1900

Re: Temporary Change Authorization for 2011 season only for Surface Water Permit No. 16571(D). Temporary Change Authorization Number: **CS4-16571(D)P@2**
**ConAgra Foods Lamb Weston Inc (aka Watts Bros Farms)**

DECISION: This TEMPORARY CHANGE AUTHORIZATION (CS4-16571(D)P@2) to add a point of diversion to Government Lot 1 of Section 4, of T. 4 N., R. 24 E.W.M., and transfer 145 acres of the place of use to the S½S½ of Section 27, of T. 5 N., R. 24 E.W.M. and the N½N½ Section 34, T. 5 N., R. 24 E.W.M., all in Benton County, at a maximum instantaneous diversion rate of 3.23 cfs and a maximum quantity of 536.2 ac-ft is granted subject to the following provisions and conditions:

## Measurements, Monitoring, Metering and Reporting

1. An approved measuring device shall be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use", Chapter 173-173 WAC.

2. The diversion used under this authorization shall be metered for instantaneous and for cumulative quantities. Water use data under this temporary authorization shall be separated from any other water use data from other rights using the same source meter. recorded weekly. The maximum rate of diversion and the annual total volume shall be submitted to Ecology by January 31st of 2012. Ecology is requiring the recording and reporting of meter data as described above to collect seasonal information for compliance (WAC 173-173-080).

3. The following information shall be included with each submittal of water use data: owner, contact name if different, mailing address, daytime phone number, WRIA, Temporary Authorization No., source name, monthly meter readings which include annual quantity used and maximum rate of withdrawal, purpose of use, and period of use.

## Department of Fish and Wildlife

4. No dam or weir shall be constructed in connection with this diversion.

5. The intake(s) shall be screened in accordance with Department of Fish and Wildlife screening criteria. http://www.wdfw.wa.gov/reg/regions.htm

## Quantity Limits, Flow and Regulation

6. This change does not authorize an enlargement of those quantities in cubic feet per second or acre-feet per year as described in Surface Water Permit No. 16571(D).

7. One hundred forty-five acres of the original place of use of Surface Water Permit No. 16571(D) shall be fallowed for the duration of the 2011 irrigation season, unless other water rights are dedicated to the transferred 145 acres. I rrigation occuring during the 2011 irrigation season (February 15 to October 31) in the portion of the original place of use of Surface Water Permit No. 16571(D) transferred under this authorization without coverage from a different water right shall constitute a violation of the terms of this authorization, and will result in its immediate termination. Other enforcement actions, including but not limited to fines and/or penalties, may also follow as a result of a violation.

## Schedule and Inspections

8. This Seasonal Change Authorization shall expire at the end of the 2011 irrigation season, being October 31, 2011, at which time the transferred 145 acres in place of use shall revert back to that described under Surface Water Permit No. 16571(D).

9. Department of Ecology (Ecology) personnel, upon presentation of proper credentials, shall have access at reasonable times, to the project location, and to inspect at reasonable times, records of water use, wells, diversions, measuring devices and associated distribution systems for compliance with water law.

## General Conditions

10. You are advised that the issuance of this seasonal change by Ecology does not convey a right of access to, or other right to use land, which you do not legally possess. Obtainment of such a right is a private matter between the applicant and the owner of the land.

11. Use of water under this authorization shall be contingent upon the water right holder's maintenance of efficient water delivery systems and use of up-to-date water conservation practices consistent with established regulation requirements and facility capabilities.

12. Nothing in this authorization shall be construed as satisfying other applicable federal, state, or local statutes, ordinances or regulations

13. Ecology assumes no liability for the purchase and/or construction of any permanent facilities in conjunction with this seasonal change authorization. Applicants for seasonal change should not construe that a seasonal change will result in the granting of a permanent change of water right.

14. The quantities authorized through this seasonal change do not represent a full tentative determination as to the extent and validity of the subject water right. A full tentative determination would take place at the time a permanent change application is acted upon or during the certification process, and may result in the quantities authorized under the water permit being reduced to reflect actual historic beneficial use of water under the permit.

## YOUR RIGHT TO APPEAL

You have a right to appeal this decision to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this decision. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of this document:

- File your appeal and a copy of this document with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this document on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.
- Serve a copy of your appeal and this decision in paper form – by mail or in person. (See address below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

## ADDRESS AND LOCATION INFORMATION

| Street Addresses | Mailing Addresses |
|---|---|
| **Department of Ecology**<br>Attn: Appeals Processing Desk<br>300 Desmond Drive SE<br>Lacey, WA 98503 | **Department of Ecology**<br>Attn: Appeals Processing Desk<br>PO Box 47608<br>Olympia, WA 98504-7608 |
| **Pollution Control Hearings Board**<br>1111 Israel RD SW Ste 301<br>Tumwater, WA 98501 | **Pollution Control Hearings Board**<br>PO Box 40903<br>Olympia, WA 98504-0903 |

*For additional information visit the Environmental Hearings Office Website: http://www.eho.wa.gov*
*To find laws and agency rules visit the Washington State Legislature Website: http://www1.leg.wa.gov/CodeReviser*

DATED this 9th of June, 2011.

Mark C. Schuppe
Operations Manager

MCS:TP:gh
110621

Enclosure: *Your Right to Be Heard*
*Water Measurement Requirements – Form 1*

By Certified Mail: 7007 2560 0001 7675 5523

Cc: Tim Reierson
Yakama Nation

**Analysis**

Background: During water right mapping efforts in 2008, Office of Columbia River staff noticed a potential compliance issue in the area of Canoe Ridge, located approximately nine miles west of Paterson, WA. The landowner at the time, Watts Brothers Farms, was contacted and temporary change authorizations addressed the issue for the 2009 irrigation season. For the 2010 irrigation season, a single, discrete temporary change application was submitted to Ecology on March 25, 2010, to address the issue. That application was given water right control number CS4-16571(D)P@1. For the 2011 irrigation season, an application almost identical to the 2010 season was submitted on January 18, 2011, and is the subject of this analysis.

ConAgra Foods Lamb Weston, Inc, (ConAgra) now owns Surface Water Permit No. 16571(D) and land at the proposed place of use, and submitted the instant application. ConAgra and Zephyr Ridge Vineyards own the portion proposed for change. ConAgra intends to transfer 145 acres that have been historically irrigated under Surface Water Permit No. 16571(D) to the area of unauthorized use on Canoe Ridge. At full build out, this Permit authorizes the diversion of 20.88 cubic feet per second (cfs) and up to 3982 acre-feet (ac-ft) from the Columbia River. The source at the proposed site is the Columbia River; approximately 12 miles downstream. This analysis pertains to 145 acres proposed for transfer from Surface Water Permit No. 16571(D) for the 2011 irrigation season only.

Water Right Attributes: The attributes of Surface Water Permit No. 16571(D) are as follows:

| | |
|---|---|
| **Priority Date:** | February 4, 1971 |
| **Source:** | Columbia River (Lake Umatilla) |
| **Quantities:** | 20.88 cfs, 3982 ac-ft/yr |
| **Season of Use:** | February 15 to October 31 |
| **Purpose of Use:** | Irrigation of 937 acres |
| **P.O.D:** | SW¼NE¼ of Sec. 8, T. 5 N., R. 26 E.W.M. |
| **Place of Use:** | 937 acres of irrigated land located in Sections 16, 22, and 27; the S½S½ and the E½E½ of Section 33; and Section 34, all in T. 6 N., R. 26 E.W.M., Benton County, Washington. (Additional, more specific descriptions are given on the Permit). |

Proposal Attributes: The proposed seasonal change is intended only for the 2011 irrigation season. The attributes of the proposal are as follows:

| | |
|---|---|
| **Priority Date:** | Subject change application received January 18, 2011 |
| **Source:** | Columbia River (Lake Umatilla) |
| **Quantities:** | Transfer 3.23cfs and 616.3 ac-ft from permitted amount above |
| **Season of Use:** | No change |
| **Purpose of Use:** | No change; transfer 145 acres to a different place of use |
| **P.O.D.:** | Add one diversion in GL1 of Section 4, T. 4 N., R. 24 E.W.M. |
| **Place of Use:** | Transfer 145 acres to the S½S½ of Section 27 and the N½N½ of Section 34 both in T. 5 N., R. 24 E.W.M. from areas owned solely by ConAgra and Zephyr Ridge Vineyards within the existing place of use. |

Legal Requirments: This change application is subject to the provisions of RCWs 90.03.380 and 90.03.390. Under RCW 90.03.380, the place of use and point of diversion of a water right that has been put to beneficial use may be changed if the change can be made without detriment or injury to existing rights.

Note: For this change proposal, neither additional acres are proposed to be irrigated nor is there an added purpose of use; an annual consumptive quantity assessment is not triggered.

Under RCW 90.03.390, seasonal or temporary changes in point of diversion or place of use can be made provided such change can be made without detriment to existing rights and requires the permission of the watermaster of the district or of the department.

Under RCW 43.21C.035 and Chapter 197-11 WAC this temporary change is exempt from a SEPA review.

*RCW 90.03.380 (tentative determination of extent and validity)*:

ConAgra proposes to transfer 3.23 cfs and 616.3 ac-ft to irrigate 145 acres from Surface Water Permit No. 16571(D) to a new place of use. Quantities proposed for this temporary change are to be "acre for acre" according to the application. Review of aerial photography of the place of use of Surface Water Permit No. 16571(D) taken in 1996, 2006, and 2009 indicates that the 937 acres could have been irrigated under this Permit. Other, overlapping rights obfuscate a clear determination. Water right accounting maps supplied by the applicant's consultant, as required by a provision in Change Authorization No. CS4-28590C, show all 937 acres being used under Surface Water Permit No. 16571(D) for years 2006, 2007, 2008, and 2009. The applicant has also supplied a 1992 aerial photography map outlining 937 acres irrigated under this Permit at that time.

Historic evidence for full beneficial use under this Permit exists. As this Permit is still in the Proof of Appropriation stage, the Permit is required to be pursued with due diligence under RCW 90.03.320, to avoid cancelation. Note that Ecology received an extension request to submit a Proof of Appropriation for the subject permit on April 29, 2010. Due to complexities in sorting out processing of an erroneously filed assignment to a related Permit (Surface Water Permit No.16571(A)), the two-year extension request remains in processing. Assuming favorable processing, the new deadline to submit a Proof of Appropriation for the subjectPpermit would be October 1, 2012.

The original Report of Examination (ROE) for this Permit written by former Ecology Geologist, William R. Smith, and signed June 22, 1971, notes that *"Although the standard allocation of water is 0.02 cubic foot per second per acre, approval for 944 cubic foot per second has been made on the basis that such amount is the designed capacity of the systems."* This rate proceeded unaltered to Permit. Dividing the instantaneous rate (Qi) on the original Permit (944 cfs) by the number of acres authorized (42,345 acres) results in 0.0223 cfs/acre. Given that 145 acres are proposed for transfer, a corresponding 3.23 cfs would be associated with this acre-for-acre transfer (145 acres * 0.0223 cfs/acre). While the 1998 Supreme Court decision in *Ecology v. Theodoratus* runs contrary to basing the Qi on system capacity alone, subsequent splits off of the original permit appear to maintain the original 0.0223 cfs/acre allotment. This includes the subject "D" Permit now proposed for change. This Temporary Change

Authorization, if approved, continues this practice under the premise that the certification process is the more appropriate means for final Qi determination. Curiously, a letter in the original Permit file (Surface Water Permit No. 16571(A)) indicates that the original diversion rate (Qi) derives from a 0.022 cfs per acre allotment, and that the annual quantity derives from a 4.2 ac-ft per acre allotment (Fred Rajala letter dated June 17, 1991).

The annual quantity (Qa) discussed in the original ROE for this Permit (signed June 22, 1971) contemplated the irrigation of "sugar beets and other crops", which were assigned a water requirement of 51.4 inches per acre (which includes a 30 percent loss due to system inefficiencies). This equates to 4.28 ft per acre. The original Permit authorizes 181,376 ac-ft per year for the irrigation of 42,345 acres, so we see that this water requirement carried through to Permit (181376 / 42,345 = 4.28). The applicant's consultant indicates that sugar beets are no longer being grown. Today, mainly rotational cropping is the norm at both the existing and proposed places of use. Double-cropping and cover cropping is a common practice here too. Due to the spatial and temporal variation in crop types, double-cropping patterns, and possible cover crops, the water requirement and Qa of Surface Water Permit No. 16571(D) would remain unaltered for this Temporary Change Authorization.

As with the Qi, the certification process is likely the more appropriate means for final Qa determination. Maintaining the 4.28 ac-ft per acre average water requirement given on the original, 1971 Permit, the 145 acres proposed for change would require 620.6 ac-ft. Surface Water Permit No. 16571(D), the subject Permit, a split off of the original, was alloted only 4.25 ac-ft per acre, and as such a maximum of 616.3 ac-ft are proposed, and would be available, for change. However, due to timing in application submittal for the 2011 season and Public Notice requirements, this change authorization could not issue prior to the 2011 season. As such, Ecology is able to authorize only a pro-rated quantity from the date of issuance. This quantity was calculated from Washington Irrigation Guide monthly data for their Richland station for potatos as illustrated in Table 1 below:

**Table 1:** Annual Quantity Calculation

| | May | June | July | August | September | Total |
|---|---|---|---|---|---|---|
| WIG Potatoes | 1.45 | 5.06 | 11.73 | 9.44 | 3.00 | 30.68 |
| % of WIG total | 5% | 16% | 38% | 31% | 10% | 100% |
| WIG % of 616.3 ac-ft | 30.8 | 98.6 | 234.2 | 191.1 | 61.6 | 616.3 |
| **Mid-June approval date** | 0 | 49.3 | 234.2 | 191.1 | 61.6 | **536.2** |

From the above, the author makes the tentative determination that, for a mid-June approval date, it appears 145 acres, 3.23 cfs, and 536.2 ac-ft, would be available for change under RCW 90.03.380.

*RCW 90.03.380 and RCW 90.03.390 (detriment or injury to existing rights)*:

This change application proposes to add a point of diversion to a location pproximately 12 miles downstream from the existing point of diversion, both drawing directly from the Columbia River. The proposed point of diversion would still divert from the same surface water body, Lake Umatilla (backwater held by John Day Dam on the Columbia River). Adding a point of diversion to a water permit to a location within the same pool the existing diversion draws from would not reduce the availability of water to intervening water users. The change application does not propose to increase the season of use or involve the withdrawal of ground water.

*RCW 90.03.280 (public notice)*:

In accordance with RCW 90.03.280, public notice of this seasonal change proposal was published in the Tri-City Herald on March 3 and March 10 of 2011. There were no protests received during the 30 day protest period.