



MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item M, June 17, 2022
Water Resources Commission Meeting

Adoption of Temporary Rules to Clarify Applicability of Automatic Stay Associated with Petition for Judicial Review under ORS 536.075

I. Introduction

During this agenda item Doug Woodcock, Deputy Director, and Renee Moulun, Assistant Attorney in Charge, will present a request to amend OAR Chapter 690, Division 002 to adopt temporary rules that clarify the application of the automatic stay provision in ORS 536.075(5).

The clarifications provided by these temporary rules do not affect a person's right to seek a stay of a final order under the Oregon Administrative Procedures Act for non-regulatory orders.

II. Background

A. Parties have a right to appeal final orders of the Department or Commission

ORS 536.075 governs the review of final orders issued by the Oregon Water Resources Commission or the Water Resources Department. It states in relevant part, that any party affected by a final order in other than contested case issued by the Commission or the Department may appeal the final order to the Circuit Court. Any party affected by a final order in a contested case issued by the Commission or Department may appeal the order to the Court of Appeals. ORS 536.075(1).

B. Filing an appeal stays the Department's ability to compel compliance with the order under review

ORS 536.075(5) states that consistent with the provisions of the statute, the filing of a petition for review of a final order in the Circuit Court or in the Oregon Court of Appeals "shall stay enforcement of the final order."¹

¹ ORS 536.076(6) – (8) identify the processes for denying a stay and describe the service requirements to enact the automatic stay provisions for final orders that regulate off a diversion, appropriation or other use of surface or groundwater in favor of a senior existing water right of record or determined claim. These provisions are not interpreted by this proposed temporary rule.

The Department interprets the phrase “enforcement of the final order” to mean that the Department must refrain from enforcing or compelling compliance with an order while it is under review in the court.

For example, if the Department issued a final order that regulates off a junior water user to provide water to a senior water right, the junior water user could petition the circuit court for review of the regulatory order. The filing and service of the petition for review would automatically preclude the Department from enforcing compliance with the order during the pendency of the review of the order in the court. The junior water user could thus continue using water during the appeal. The automatic stay could only be lifted if the Department or the Commission determined that substantial public harm would result from the continued stay of the order.

C. The automatic stay does not apply where the final order is permissive

The Department more commonly observes the operation of ORS 536.075(5) in the context of petitioners seeking review of regulatory orders that shut off junior water users to meet a call for water by a senior water right. Increasingly, however, petitioners seeking review of final orders assert that the automatic stay provision applies to Department orders that authorize and allow the transfers of existing water rights. Petitioners assert that the act of filing a petition for review of an order allowing a transfer stays the effect of the order, meaning that the holder of the transfer order is precluded from using water at the new point of appropriation or place of use while the order is under review in the court.

However, based on a reading of the text of ORS 536.075(5), the Department clarifies that it does not “enforce” or compel compliance with the terms of final orders that constitute permissive grants or approvals by the agency.² For example, the Department does not compel compliance with a transfer order to require that the transfer take place. Instead, as provided in the proposed rules, ORS 536.075(5) applies only to regulatory orders for which the Department or Commission may compel compliance.

Examples of orders that are not enforced by the Department include orders allowing or denying a request for a limited license, a water right permit for any type of use, a certificate, a permanent or temporary transfer of water, an in-stream lease, an in-stream transfer, or a permit amendment. Orders granting well construction licenses are another type of order that authorizes or permits the named person to conduct the activities specified in the license.

The activities allowed by these types of permissive orders are not “enforced” by the Department. For example, if a person is granted a permit to appropriate and use water, the water use permit does not compel the holder to appropriate water. Instead, the permit only authorizes such action should the holder choose to exercise it. If the holder of a permit fails to appropriate and apply water to beneficial use the permit may be subject to cancellation for non-use. But in no case will the holder be compelled by the Department to make the appropriation of water in the first instance. Likewise, an order allowing use of water under a transfer, or lease of water rights, does not compel the user to implement those changes authorized by the department. Instead, it permits the holder to exercise the activity at the holder’s discretion. Because the Department

² The Department may nonetheless compel compliance with the terms and conditions of a water right through a regulatory order.

may not compel a person to exercise the activity allowed by a permissive order, ORS 536.075(5) does not enact an automatic stay if judicial review of the order is sought.

D. The rule clarifies that the automatic stay applies only to regulatory orders

As described in the draft rule, orders that direct the named person to act or to cease an action in order to bring under the control of the Department the waters of the state are regulatory orders. Other orders that direct the named person to come into compliance with the law or with an order of the Department or Commission are also regulatory orders. Examples of regulatory orders include, but are not limited to, orders regulating off water users to meet a call by a senior water right holder(s), headgate notices issued pursuant to ORS 540.310, orders requiring compliance with the terms or conditions of a water right, orders requiring compliance with well construction standards, notices of violation, or final orders in contested case assessing civil penalties. Orders that deny an application requesting appropriation or use of water are not regulatory orders, because they do not direct or compel a particular action or compel cessation of a certain action. Similarly, orders that deny or revoke a license application are not regulatory orders because they deny an application to exercise a privilege as opposed to requiring an action or cessation of an action.

The Department's position, as provided in the draft temporary rules, is that only regulatory orders of the Department or Commission may be enforced and that the automatic stay provision comes into effect only when a petitioner is challenging a regulatory order of the Department or Commission. Put another way, the Department must only cease enforcing an order where the underlying order compels a named person to come into compliance with the law or compels payment of a civil penalty.

Clarifying that the automatic stay provision in ORS 536.075(5) does not apply to orders other than regulatory orders will not preclude persons from seeking a stay of a final order pursuant to the Oregon Administrative Procedures Act.³ Where a person seeks judicial review of a Department or Commission order a stay may still be obtained even if an automatic stay may not be obtained.

III. Overview of Rule

These proposed temporary rules, OAR 690-002-1000 to -1020, are contained in Attachment 1. These proposed rules will clarify that ORS 536.075(5) applies only to the enforcement of regulatory orders of the Department or Commission. The rule defines *enforcement* and *regulatory order(s)*, and further describes which types of orders are or are not subject to the stay provisions of ORS 536.075.

IV. Temporary Rulemaking Requirements and Justification

Pursuant to ORS 183.335(5), an agency may temporarily adopt, amend, or suspend a rule without prior notice or hearing. In order to file a temporary rulemaking, an agency must prepare a written statement that:

- Indicates the specific consequences that would result from a failure to adopt, amend, or suspend the rule and why these consequences would constitute a serious prejudice;

³ See OAR 137-004-0090; ORS 183.482; OAR 137-003-0690 – 0700.

- Identifies who would suffer these consequences;
- Explains how failure to take immediate rulemaking action would cause these consequences; and
- Explains how the temporary rulemaking will avoid or mitigate these consequences.

A temporary rule is immediately required to address the confusion regarding when the stay provision in ORS 536.075(5) is applicable. The Department has determined that its failure to act promptly to clarify which orders are stayed by operation of ORS 536.075(5) will result in serious prejudice to the interest of persons whose orders are under review in the Circuit Court where petitioners assert that their orders are stayed. The lack of policy clarity on this point will result in serious prejudice to those persons who hold water use authorizations but have not used water in light of assertions by petitioners that they may not make use of that water because of the operation of ORS 536.075. In light of the serious drought conditions covering much of this state, the inability to use water where such use is authorized will seriously prejudice the interests of those persons who have been granted authority to use water but are precluded from doing so because they do not know whether using water as authorized by the order would or would not be lawful.

V. Conclusion

While the Department is considering whether to bring forward permanent rules for adoption to clarify the provisions of ORS 536.075, there is an immediate need to eliminate confusion about the applicability of the automatic stay provisions. Adoption of the proposed temporary rule will mitigate the consequences identified above and allow the Department time to undertake the permanent rulemaking process to adopt these temporary provisions.

VI. Alternatives

1. Adopt the temporary rule, OAR 690-002-1000 to -1020, as contained in Attachment 1.
2. Modify and adopt the temporary rule in Attachment 1.
3. Decline to adopt the temporary rule and instead wait for Department staff to bring forward a permanent rule for adoption at a future meeting.

VII. Recommendation

The Director recommends Alternative 1, to adopt the temporary rule OAR 690-002-1000 to -1020, as contained in Attachment 1.

Attachments:

1. OAR 690-002-1000 to -1020 Proposed Temporary Rule

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Temporary Rules Interpreting the Applicability of ORS 536.075(5)

OAR 690-002-1000

Purpose

OAR 690-002-1000 to -1020 clarifies that ORS 536.075(5) applies only to the enforcement of regulatory orders of the Oregon Water Resources Commission or the Oregon Water Resources Department.

Rule Summary: This rule identifies the purpose of 690-002-1000 to -1020.

Statutory Authority: ORS 536.027

Statutes Implemented: ORS 536.075

OAR 690-002-1010

Definitions

For the purposes of 690-002-1000 to -1020 unless the context requires otherwise:

- (1) “Commission” means the Oregon Water Resources Commission.
- (2) “Department” means the Oregon Water Resources Department.
- (3) “Enforcement” means the act of compelling observance of, or compliance with, any law administered by the Department or order of the Department or Commission.
- (4) “Regulatory order(s)” means any order that directs the named person to act or requires cessation of an action in order to bring under the control of the Department or the Commission the waters of the state or to otherwise direct the named person to come into compliance with any law the Department or Commission administers, or any order of the Department or Commission. Examples of regulatory orders include, but are not limited to, orders regulating off water users to meet a call by a senior water right holder(s), headgate notices issued pursuant to ORS 540.310, orders requiring compliance with well construction standards, notices of violation, and final orders in contested case assessing civil penalties.
- (5) “Waters of this state” has the meaning provided in ORS 536.007(12).

Rule Summary: This rule defines the terms used in 690-002-1000 to -1020.

Statutory Authority: ORS 536.027

Statutes Implemented: ORS 536.075

OAR 690-002-1020

Applicability of ORS 536.075(5)

(1) The stay provision in ORS 536.075(5) applies only to regulatory orders issued by the Department or Commission that are subject to enforcement by the Department or the Commission.

(2) Orders that authorize or allow the activity specified in the order are not regulatory orders of the Department or Commission, including but not limited to:

(a) Any order that denies or authorizes the appropriation or use of the waters of this state as specified in an order of the Department or Commission;

(b) Any order that denies or authorizes a change of use of water, change in point of diversion, change in point of appropriation, or any other change as specified in an order of the Department or Commission;

(c) Any order of the Department or Commission that denies or approves a well constructor's license;

(d) Any order that allows or denies a special well construction standard; or

(e) Any order that approves or denies a Water Management and Conservation Plan as provided in OAR 690-086.

Rule Summary: This rule clarifies the type of order that is subject to the automatic stay provision in ORS 536.075(5).

Statutory Authority: ORS 536.027

Statutes Implemented: ORS 536.075