



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Mike Ladd, Acting Field Services Division Administrator
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SUBJECT: Agenda Item B, August 26, 2010
Water Resources Commission Meeting

Informational Report on 2009 Field Regulation and Enforcement Activities

I. Issue Statement

This is an informational report by staff to the Water Resources Commission on Department field activities. This report provides information on field regulation and enforcement activities for 2009. *This is an informational report only; no Commission action is required.*

II. Background

A. *Field and Enforcement Structure and Duties*

Watermasters have the responsibility for ensuring the distribution of water according to the system of prior appropriation. The Department's 20 watermasters are housed in five regional offices and in 15 satellite offices located throughout the state. Attachment 1 is a list of Department watermasters and their locations. In addition to watermasters, in 2009 there were 18 locally funded part-time and full-time assistant watermasters located in field offices throughout the state. The assistants work with the watermaster and are typically compensated through county budgets, grants, or contracts.

In addition to watermasters and assistants, field offices house staff such as well inspectors, water right inspectors, water right specialists, hydrographers, hydrologists, and hydrogeologists. Day-to-day actions are carried out by field staff whose activities include:

- Surface and ground water regulation
- Installation of measuring devices
- Customer service and public outreach
- Stream gaging and measurements
- Implementation of Oregon Plan measures
- Investigation and referral of formal enforcement activities

- Preparation of hydrographic records
- Dam safety inspections
- Well construction compliance and enforcement activities
- Final proof surveys, mapping and proposed certificate preparation
- Field assistance to other Department divisions
- Water right transfer application processing

These day-to-day field activities involve working with water users to ensure compliance with the terms and conditions of their water rights, and to ensure water is being used as efficiently and effectively as possible.

The Well Construction and Compliance Section Manager is responsible for enforcement policy development, carrying out formal enforcement actions, negotiating resolutions, and maintaining statewide program consistency. When voluntary compliance in the field fails, regulatory actions are subsequently referred to the Well Construction and Compliance Section Manager for formal enforcement action. Well construction deficiencies may also be referred to the Well Construction and Compliance Section for formal enforcement action. Formal enforcement is initiated by the issuance of a proposed order and may include suspension of a well constructor's license or assessment of civil penalties. Generally, most formal enforcement actions are settled before the case is referred to the Office of Administrative Hearings. In 2001, the Well Construction and Compliance Section Manager also assumed responsibility for involuntary water right cancellations.

Staff in the Well Construction and Compliance Section includes a Well Construction Program Coordinator who oversees the well inspection program, including maintaining continuity among the regional well inspectors, and interpretation of the administrative rules governing well construction. The program also includes one Well Licensing Program Specialist who oversees the well constructor licensing program and the Continuing Education Program for well constructors; a Well Log Review Support Position; a Well Identification Tag Program and Start Card Support Position; and an Exempt Use Well Program Coordinator.

B. Setting Enforcement Priorities

Watermasters and field staff often have more work than they can accomplish. To address this problem, the Department developed "Internal Management Directives for Establishing Enforcement Priorities" to assist staff in setting priorities for enforcement actions. A copy of the directive is included as Attachment 2. The directive includes some of the factors field staff use when they prioritize enforcement activities. The directive has been used for several years and is an effective tool for prioritizing field work. The Oregon Plan also requires staff to prioritize watersheds for scheduling work activities.

The goal of field staff is to engage in pro-active water management, rather than relying solely on a complaint-driven process. The Oregon Plan is a big factor moving staff to be more pro-active in high priority flow restoration areas. The directive in Attachment 2 highlights the effectiveness of education in preventing water law violations before they occur. Water users are more likely to voluntarily comply when they are knowledgeable about their rights and responsibilities, and

when users and field staff know what to expect from each other. Time not spent responding to complaints, known violations, and other high priority assignments can be used for public education activities.

Many of the Department's regulatory actions are resolved upon notice to the responsible party. If compliance is not achieved at this stage, the watermaster may issue a Notice of Violation, which specifies the nature of the violation, time frames within which compliance is expected, and the consequences for failure to comply voluntarily.

If compliance is not achieved subsequently, the matter is referred through the Region Manager to the Well Construction and Compliance Section Manager for a formal enforcement action. If the Department determines there is sufficient evidence to pursue the matter, a proposed order is issued which may include assessment of civil penalties. The violator has a specified period to request a contested case hearing. If no hearing is requested, a final order is issued and enforced. Attachment 6 contains a simplified flow chart of the enforcement process.

C. Surface Water Regulation

Regulation, or distribution of surface water, is the initial phase of enforcement and can be triggered in a variety of ways. Watermasters regularly monitor streams with instream water rights or minimum streamflows. If streamflow is not adequate to meet the instream need, or if other entities lodge complaints to the watermaster, the watermaster begins an investigation and takes appropriate actions such as curtailing or shutting off any illegal use then regulates the diversion of junior users. Only in the unusual case, when voluntary compliance with the watermaster's request is not achieved, do formal phases of enforcement begin.

Water is distributed in the order of the relative priority date of the various water users, regardless of the type of beneficial uses involved. The oldest rights get the water first unless the right is specifically subordinated to junior users, as in the case of some rights to use water for hydroelectric power. The type of use becomes important only when conflicting uses have the same priority date. In this case, a domestic use would have preference to all others, and an agricultural use would have preference to a manufacturing use (ORS 540.140).

Watermasters do not begin regulation until streamflow has been determined and legal rights of the users are known. On stream systems where annual regulation occurs, watermasters prepare distribution maps showing the location of the rights, priority date, and other necessary information. This may involve several hours or days of effort depending on the volume of rights in the area. In some districts the watermaster has a database of water right information and is able to electronically generate "distribution letters" requesting that junior users curtail their diversions.

Historically, unauthorized uses of water discovered during this process are addressed first. In addition to uses without a water right, illegal uses include exceeding the limit of a right or violating a condition of a right, such as an unauthorized point of diversion. If eliminating illegal use does not provide the water to satisfy senior water rights, the watermaster will require junior right holders to reduce or discontinue their use. If no junior rights exist, or if these actions do not

provide the necessary additional water, the watermaster will advise the affected user of the situation.

During regulation, watermasters often negotiate voluntary reductions, rotations or compliance schedules with water users. Often senior right holders volunteer to use less than their entitlement so that junior users are not completely shut off. In a rotation, groups of users agree to pool their rights so each participant may receive the amount of water "...to which they are collectively entitled" (OAR 690-250-0080). The flow is shifted to each user in the rotation in time proportional to each user's fraction of the collective water rights.

The most critical element in ensuring regulatory success is the trust users have in the watermaster's knowledge, consistency and integrity. When a high level of trust is attained, the amount of time spent by the watermaster on a particular stream is minimized, and voluntary compliance tends to be the norm. Where the watermaster is involved annually in regulating a particular stream system, both the watermaster and the users are well aware of existing water rights and generally know what to expect from each other.

D. Regulation of Well Construction

Regulation of well construction can be initiated several ways. Generally, the process begins with receipt of a "Notice of Beginning of Well Construction" known as the "Start Card." After the start card is received by the Department, the well inspector or watermaster may make a site visit. Field staff attempt to inspect at least 25 percent of all new wells. Well inspections may also be initiated by complaints or inquiries from the public, or an investigation by the well inspector. Well inspectors work closely with drillers to informally resolve problems to protect ground water from contamination, waste and loss of artesian pressure.

III. Discussion

A. 2009 Surface Water Regulation

Since 1998, the Department has defined a regulatory action as "any action that causes a change in use or maintenance or a field inspection that confirms that no change is needed to comply with the water right, statute or order of the Department." This definition reflects the broad spectrum of activities conducted by field staff.

In 2009, watermasters and their assistants regulated 392 stream systems, down from 411 in 2008. Regulation on the 392 streams watermaster investigations in 323 cases and by complaints in 256 cases. Actions were taken to protect instream rights in 201 cases and other senior rights in 206 cases, and to halt un-permitted use in 172 cases. Attachment 3 provides a detailed report from field staff.

Watermasters reported a total of 11,527 regulatory actions in 2009, compared to 10,918 in 2008. Of these 11,527 regulatory actions, 3,310 involved written notices. The efforts range from one action on many streams to a high of 1,333 actions on the Umatilla River in Morrow and Umatilla Counties in northeastern Oregon. There is a large variation in total regulatory actions among the regions. Differences among regions can be attributed to the number of irrigation districts instead

of individual users; the number of water management tools implemented such as rotation agreements, exchanges, and stored water delivery; the length of regulation season; water availability; and number of points of diversion.

In 2009, statewide, compliance with water right conditions and regulation requirements was approximately 94 percent, the same as in 2008. Attachment 4 provides a regional and watermaster district breakdown of compliance rates for 2009. The Well Construction and Compliance Section Manager continues to work with field staff to improve compliance reporting and ensure consistency and accuracy throughout the state.

In 2009, statewide, the earliest priority date regulated was 1857 on the Little Applegate River, tributary to the Applegate River in the Rogue Basin, South West Region.

Staff are also working to expand streamflow monitoring and ensure that distribution and regulation of water needed to protect instream water rights is performed expeditiously. The instream leasing, transfer, and allocation of conserved water programs are yielding increasing quantities of water that are protected instream. The Department continues to work directly with water right holders, as well as with the Deschutes River Conservancy, Klamath Basin Rangeland Trust, Fresh Water Trust, and other organizations to promote voluntary streamflow restoration. In 2009, 1,457 cubic foot per second (cfs) (excluding supplemental water rights) of water was dedicated instream. These flows are critical to fish recovery efforts; however, establishment of these rights does represent an increase in the regulatory workload of watermasters and field staff.

B. 2009 Well Program Activity

Well reports, or “logs,” are a physical description of well construction, alteration, abandonment, conversion, or deepening. In 2009, the Department received 4,528 well logs: 1,161 for monitoring wells and 3,367 for water supply wells. The Department received 6,810 geotechnical hole reports. A geotechnical hole is a cased or uncased, permanent or temporary (less than 72 hours) “hole” constructed for the purpose of evaluating subsurface data or information.

In 2009, 3,292 start cards were received: 638 for monitoring wells and 2,654 for water supply wells. The regional well inspectors and field staff performed a total of 1,991 well inspections. Of that number, 1,413 inspections were conducted on new construction, representing an inspection rate of 47 percent of all new wells. Of the new wells inspected, 40 percent were water supply wells and 54 percent were monitoring wells. About 6 percent of the new wells inspected were deficient and required repairs. Attachment 5 shows the data for logs received and well inspections performed during 2009.

C. Formal Enforcement Activity

A very high degree of compliance was achieved voluntarily, in 2009, 11,514 regulatory actions were taken. Only 11 Notices of Violation were issued by field staff. In addition to the 11 Notices of Violation sent by field staff in 2009, the Well Construction and Compliance Section Manager issued one formal enforcement order, related to water rights, and three formal enforcement orders related to well constructors, resulting in civil penalties in the amount of \$8,825. Attachment 7 lists the formal enforcement for 2009.

Following issuance of a final order the Well Construction and Compliance Section Manager issues a press release to the media in the local area. Staff believes this is an effective deterrent to repeated violations and increases public awareness of our rules and activities.

Staff believes it is critical for the Department to maintain a firm, consistent, and fair posture on water law and well construction violations. This minimizes the number of formal enforcements and allows staff to be as efficient as possible in enforcing the water laws in the field.

IV. Recommendation

This report is presented to the Commission as an informational item. No Commission action is necessary.

Attachments:

1. List of Watermasters by District
2. Internal Management Directives for Establishing Enforcement Priorities
3. 2009 Surface Water Summary
4. 2009 Compliance Rate Summary by Watermaster District and Region
5. 2009 Well Construction and Inspection Summary
6. Enforcement Process Flow Chart
7. 2009 Formal Enforcements

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