

## MEMORANDUM

TO: Water Resources Commission

FROM: Barry Norris, Technical Services Division Administrator

SUBJECT: Agenda Item I, June 27, 2003  
Water Resources Commission Work Session

### **Informational Report on 2002 Field Regulation and Enforcement Activities**

#### **I. Issue Statement**

Each year staff provide the Water Resources Commission a report on Department field activities. This report provides information on field regulation and enforcement actions for the year 2002. *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, approximately 18 locally funded part-time and full-time assistant watermasters are 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
- ! Customer service and public education
- ! Stream gaging and measurements
- ! Implementation of Oregon Plan measures

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

Formal enforcements are conducted by the Department's enforcement program manager who is located in the Salem office in the Technical Services Division. The enforcement manager is responsible for enforcement policy development, carrying out formal enforcement actions, negotiating resolutions, and maintaining statewide program consistency. In 2001, the enforcement manager assumed responsibility for involuntary water right cancellations and transfer protests. The enforcement section includes a well construction specialist who coordinates and directs the well inspection program, including coordination of the regional well inspectors and maintenance of the well program administrative rules; a well constructor licensing and compliance specialist; one well log review/Ground Water Resource Information Distribution (GRID) support position; and one well identification tag program and start card support position.

#### *B. Enforcement Priorities*

Watermasters and field staff often have more work than they can accomplish. To address this problem, the Department developed the "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 the 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 management guide 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.

#### *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 survey streams within their districts, particularly those with instream water rights or minimum streamflows. If there is not adequate streamflow to meet the instream need, or if other water users or agencies bring concerns or complaints to the watermaster, the watermaster begins an investigation and takes appropriate actions such as curtailing the diversion of junior users. Only in the unusual case, when voluntary compliance with the watermaster's request is not achieved, do more 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 uses, 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 measured 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 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 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 until this goal is met. 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 assuring 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 resolve problems and protect the ground water resource.

### **III. Discussion**

#### *A. 2002 Surface Water Regulation*

In 1998 the Department's definition of a regulatory action changed from "any action which included a requirement by the watermaster that the user change their water use activity because the use is improper or the water is needed by senior right holders" to "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." The revised definition reflects the broader spectrum of activities conducted by field staff.

In 2002 watermasters and their assistants regulated 333 stream systems, down from 478 in 2001. Regulation on the 333 streams was prompted by the watermaster's own investigation in 211 cases and by complaints in 179 cases. Actions were taken to protect instream rights in 99 cases and other senior rights in 180 cases, to stop un-permitted use in 97 cases, and a combination of the above reasons in 17 cases. Attachment 3 provides a detailed report from field staff.

Watermasters reported a total of 12,156 regulatory actions in 2002, compared to 12,814 in 2001. Of these 12,156 regulatory actions, 2,972 involved written notices. The efforts range from one action on many streams to a high of 4,342 actions on one stream system in the Umatilla Basin. There is a large variation in total regulatory actions among the regions. The high was 6,227 for the North Central Region and the low was 814 for the South Central Region. Differences among regions can be attributed to the number of irrigation districts instead of individual users; the

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

Statewide, compliance with water rights and regulations was approximately 98 percent, about the same as in 2001. Attachment 4 provides a regional and watermaster district breakdown of compliance rates. The enforcement section manager continues to work with field staff to improve compliance reporting and ensure consistency and accuracy throughout the state.

Statewide, the earliest priority date regulated was 1854 — Neil Creek in the Rogue Basin, Southwest Region. The category of earliest priority regulated reflects the priority date of the oldest water right in each river system that the watermaster regulated to a diversion rate less than the maximum legal limit (Attachment 3).

During 2002, the Department adopted a new approach to implement and report its Oregon Plan efforts. Watermasters identified four or five actions they would pursue in their high priority watersheds. At the end of 2002, watermasters identified the progress they made on their action plans, their successes, and barriers to their success. In 2002, actions included inventorying significant diversions; issuing notices requiring installation of headgates and measuring devices needed for distribution purposes; more closely monitoring streamflows to ensure that instream rights were protected; assisting watershed councils with elimination of obstructions to fish passage; and providing assistance and support for leasing of water rights instream. This new adaptive management approach allows greater flexibility for field staff to prioritize their efforts and simplifies reporting requirements.

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 with the Oregon Water Trust and other organizations to promote voluntary streamflow restoration. In 2002, almost 390 cfs 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. 2002 Well Program Activity

Well reports, or “logs,” are a physical description of well construction, alteration, abandonment, conversion, or deepening. The Department received 14,404 water supply, monitoring well and geotechnical hole reports in 2002. Of these, 1,709 were monitoring wells; 5,723 were water supply wells; and 6,972 were 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. Attachment 5 shows the data for logs received and well inspections performed during 2002.

New construction totaled 5,189 wells. The regional well inspectors and field staff performed a total of 3,686 well inspections. Of that number, 1,536 inspections were conducted on new construction, representing an inspection rate of 30 percent of all new wells. Of the new wells inspected, 21 percent were water supply wells and 63 percent were monitoring wells. About two percent of the new water supply wells inspected were deficient and required repairs. Approximately 30 percent of the new monitoring wells were also found to be deficient, however, the majority of those were minor deficiencies and were easily corrected. Enforcement staff used the downhole camera to make video tapes of 14 wells to identify or confirm problems such as cascading water, breaks in the well casing, or other reporting deficiencies.

*C. Formal Enforcement Activity*

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

If compliance is not achieved following the Notice of Violation, the matter is referred through the Region Manager to the Enforcement Section. If the Department determines there is sufficient evidence to pursue the matter, a proposed order is issued which may include 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.

At any point in the process the responsible party may choose to comply. Of the 12,814 regulatory actions taken in 2002, it is significant that only 10 Notices of Violation were issued by field staff, indicating that a very high degree of compliance is achieved voluntarily. Of the 10 Notices of Violation sent by field staff in 2002, the Enforcement Section issued 6 formal enforcement orders, all related to well construction, resulting in a total of \$14,575 assessed in civil penalties. Two enforcements were concluded through settlement agreements and the remaining enforcements involved final orders. There were no contested case hearings. Attachment 7 lists formal enforcements for 2002.

Following issuance of a final order, the Enforcement Section issues a press release in the local area. Staff believe this is an effective deterrent to repeated violations and increases public awareness of our rules and activities.

Staff believe 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. The Director and staff welcome comments and questions from the Commission and suggestions for additional information for future field regulation and enforcement activity reports.

Attachments:

1. List of Watermasters by District
2. Internal Management Directives for Establishing Enforcement Priorities
3. 2002 Surface Water Regulation Report
4. 2002 Compliance Rate Summary
5. 2002 Well Construction and Inspection Summary
6. 2002 Enforcement Process Flow Chart
7. 2002 Enforcements

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**2002 SURFACE WATER SUMMARY REPORT**  
**TOTALS STATEWIDE FOR 2002**

COMPLAINTS	179
WATERMASTER INVESTIGATION	211
STREAMS REGULATED	333
REGULATORY ACTIONS	12,156
WRITTEN REGULATORY ACTIONS	2,972
ONSITE REGULATORY ACTIONS	9,184

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**REASONS FOR REGULATORY ACTION**

ILLEGAL USE	97
PROTECT INSTREAM RIGHTS	99
PROTECT SENIOR OUT-OF-STREAM RIGHTS	180
PROTECT SENIOR OUT-OF-STREAM-RIGHTS & INSTREAM RIGHTS	6
PROTECT SENIOR OUT-OF-STREAM RIGHTS/ILLEGAL USE	8
PROTECT SENIOR OUT-OF-STREAM & INSTREAM RIGHTS/ILLEGAL USE	1
PROTECT INSTREAM RIGHTS/ILLEGAL USE	2



**2002 FORMAL ENFORCEMENTS****WELL ENFORCEMENTS**

<b><u>Reason</u></b>	<b><u>Settled by</u></b>	<b><u>Penalty</u></b>
Offering services to abandon a well without a surety bond; abandonment of a well without a well constructor's license	Final Order	\$1,000
Material Misstatement of Fact on Well Logs	Settlement Agreement	\$3,750 and license suspended
Proposed Order to Refuse renewal of Monitoring Well Constructor License for non-payment of civil penalties from Final Orders in 1998 and 1999	Final Order	Refusal to renew License civil penalty not paid: \$17, 915
Proposed Order to Refuse renewal of Water Well Constructor License for non-payment of civil penalties from actions dating from 1999 to 2001	Stipulation & Final Order	\$5,525 Failure to comply will result in license suspension until all terms of Stipulation & Final Order are met
Late Start Cards, Fees & Logs; Material Misstatement of Fact on Logs; Use of a well for disposal of contaminants; commingling of waters; improper sealing of a well	Final Order	\$8,825 License suspended; Two year reporting condition for start card notification, placement of seal upon completion of license suspension
Constructing a well without a Water Well Constructor License	Final Order	\$1,000