

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item C, November 20, 2003
Water Resources Commission Meeting

Director's Report

I. Commission Follow Up

Umatilla Ground Water: Over the last several years, Umatilla County has been updating its comprehensive land use plan. As part of the update, the Department of Land Conservation and Development (DLCD) required that the plan address use of ground water within designated Critical Ground Water Areas (CGWAs) as a Goal 5 significant resource. To meet this requirement, the Umatilla County Planning Commission proposed an overlay zone that would deny building permits where water use is dependent on groundwater within the CGWAs.

On October 23, 2003, the Planning Commission held a public hearing to consider the proposed overlay zone. Approximately 350 people attended the meeting. DLCD gave a presentation indicating that, due to recent statutory changes, the County is no longer required to address ground water use in the CGWAs in their comprehensive plan update. The Planning Commission voted to table the proposed overlay zone and to appoint a task force to identify alternate approaches to addressing ground water resources in the CGWAs. Following this vote, OWRD Ground Water staff gave a presentation on the status of ground water resources in the CGWAs. During public testimony, members of the community indicated a strong desire to appropriate additional mainstem Columbia River water to offset declining ground water supplies in the Umatilla Basin.

Well Construction Continuing Education: In February 2003, the Commission adopted rules requiring continuing education for well constructors. As part of the continuing education program, the Department provided training courses at four locations around the state (Baker City, Bend, Roseburg, and Salem) during October 2003. Each session lasted four hours and was approved by the Continuing Education Committee for a maximum of 4 credits. By rule, well constructors are required to obtain 14 credits during each 2-year licensing period. Approximately 68 people participated in the training which covered topics such as well constructor licensing, submittal of start cards, submittal of well reports, requirements for well identification by constructors, the well inspection program, requirements for landowner permits, requirements of the continuing education program, map reading, local ground water issues, general water right

information, and using the Department's website databases. Feedback from attendees has been positive. The Department will provide a similar training at least once each year.

II. Current Events

Current Water Conditions: Water conditions were generally drier than normal during the 2003 water year ending September 30. Statewide, streamflow ranged from near normal to dry. Of the 27 irrigation reservoirs monitored statewide, the average carryover entering the 2004 water year is 37% of average. This compares with 49% of average last year. Precipitation for the 2003 water year ranged from 80% to 90% of normal statewide.

The Surface Water Supply Index is a composite of water availability indicators computed for 14 basins in the state. All 14 basins currently have a negative index which indicates drier than normal conditions.

CWRE Workshops: In late October and early November, the Department hosted four workshops to a total of 120 Certified Water Right Examiners (CWRE), consultants, and local Department staff. The workshops were hosted in LaGrande, Bend, Roseburg and Salem. The workshops are designed to provide CWRE's with additional knowledge and updates on Department programs. This year's workshop included a review of the new transfer rules, water-related 2003 legislation, and an introduction to the Department's new CWRE Resources Webpage.

GWAC Subcommittee: The Department has convened a subcommittee of the Commission's Ground Water Advisory Committee (GWAC) to develop policy direction relating to long-term and cumulative effects of new ground water rights on surface water. The subcommittee has met twice and has focused on the "hydraulic connection" between ground water and surface water. The subcommittee will meet again in January 2004 to continue the discussion of "hydraulic connection." Staff will provide the subcommittee a description of information used to make a finding of "hydraulic connection." Subcommittee members plan to continue meeting through 2004.

National Fish and Wildlife Foundation Grant: In October 2003, the Department received an \$88,000 grant from the National Fish and Wildlife Foundation (NFWF) Columbia Transaction Program. Under the grant, the Department will be partnering with the Walla Walla Basin Watershed Council to provide technical assistance on applications for allocations of conserved water in the Walla Walla Basin. The goal is to help local water users and others complete these voluntary flow restoration projects in the basin. As part of grant, on October 23, 2003, the Department hosted a training on completing conserved water applications. Several groups associated with the NFWF program participated in the training, and the Department hopes to offer the training to a broader audience in the future.

OWRC Water Law Conference: The Oregon Water Resources Congress (OWRC) hosted its annual water law conference in Beaverton on October 16 and 17, 2003. Department staff presented an update on water-related 2003 legislation and upcoming rulemakings and participated on a panel discussion of agency-perspectives of the 2003 legislative session.

Customer Service Plan: During budget hearings in the 2003 Legislative Session, the Department received feedback that a performance measure of customer service satisfaction would be a valuable addition to its existing measures. In response to this feedback and the Governor's Executive Order on Regulatory Streamlining, the Department has developed a customer service assessment plan. Over the next year, the Department will be implementing a three-pronged approach to quantify customer satisfaction including random surveys, web-based surveys, and focus groups. The Department is also developing a customer service performance measure.

III. Rulemaking

Repeal of Divisions 3, 11, and 26: The Department intends to initiate rulemaking to repeal OAR Chapter 690, Divisions 3, 11, and 26, relating to time lines for processing applications and filing spring registrations. Statutory changes over time have made these rules outdated and unnecessary. The Department anticipates presenting the repeal action to the Commission at the March 2004 Commission meeting.

Lakeview Area Special Area Standards: The Federal Department of Energy has identified ground water in an area of an old uranium processing mill as potentially hazardous for human consumption. The site is located immediately north of Lakeview. Both the Town of Lakeview and Lake County have adopted ordinances that require well users to comply with state well construction standards. Based on recommendations from the State Department of Energy, the Department has proposed rules creating special area well construction standards (OAR Chapter 690, Division 200). The special area well construction standards would require new wells to be constructed with casing and seal to a minimum depth of 250 feet below land surface. In October 2003, staff presented the proposed rules to GWAC. A public rulemaking hearing on the proposed rules was held October 13 in Lakeview. Oregon Department of Energy staff were in attendance to provide technical assistance to OWRD staff. Approximately 8 people attended the hearing, and three testified. The comment period ended October 31. Staff will likely present formal proposed rules for special area well construction standards at the Commission's January 2004 meeting.

Senate Bill 820 Rulemakings: Senate Bill 820, passed during the 2003 legislative session, contained provisions that provide new “temporary transfer” tools for irrigation districts. These changes require the Department to review and update OAR Chapter 690, Division 21, relating to irrigation district temporary transfers. The Department has formed a Rules Advisory Committee (RAC) which held its first meeting on November 6, 2003. Department staff anticipate two or three additional RAC meetings with proposed rules developed for public hearing by April 2004.

Senate Bill 820 also contained provisions allowing greater flexibility to change a point of diversion from surface water to ground water in the Deschutes Ground Water Study Area. It also contained provisions to allow temporary changes in place of use and type of use from irrigation to municipal use in the Deschutes River Basin. The bill requires that the Commission adopt rules implementing these Deschutes Basin provisions by March 31, 2004. A Deschutes Basin RAC was formed and met three times during September and October, 2003, to develop rules under OAR Chapter 690, Division 380 relating to transfers. The Department is scheduling the public notice, comment, and hearing opportunities and will present proposed final rules to the Commission at its March 2004 meeting.

IV. Litigation Update

Kerivan et al v. Oregon Water Resources Commission

Oregon Court of Appeals – In September 1999, a number of water right holders on Sucker Creek in Josephine County submitted affidavits of non-use and requested that the Department initiate cancellation of certain irrigation water rights on Sucker Creek. The Department returned the affidavits explaining that the irrigation water rights sought to be canceled for non-use were already canceled in connection with their transfer to instream use in 1998 and early 1999. The water users sought judicial review in Josephine County Circuit Court of the Department’s refusal to initiate cancellation proceedings. The Circuit Court upheld the Department’s action.

On July 9, 2003, the Court of Appeals affirmed the opinion of the Josephine County Court and concluded “ the newly issued water right certificates are conclusive evidence of the priority and extent of the appropriation” and that the “department’s refusal to act was proper.” On October 14, 2003, Kerivan et al filed a petition for review with the Supreme Court.

Marks v. Water Resources Department

Umatilla County Circuit Court – In May 2002, legal action was filed in Umatilla Circuit Court against the Department challenging its regulation of a water user for using water without a water right. A hearing to determine “trial readiness” is scheduled for November 13, 2003. While legal action is still pending, the landowners have deepened an existing well and filed a water right application to cover lands that have been irrigated.

Brayman et al v. Lewis et al

Harney County Circuit Court – This involves several legal challenges to the watermaster’s regulation of water in Foley Slough, a distributary channel of the Silvies River in Harney County. A trial has been scheduled for November 24, 2003 in Burns.

Zyryanoff v. Water Resources Commission

Polk County Circuit Court – This case involves the Judicial Review of a Department Final Order issuing a “remaining right certificate” as part of a water right transfer. No trial date has been set.

William R. McCormack v. Oregon Water Resources Commission

Oregon Court of Appeals - In August 2002 William McCormack, the protestant to instream water right application IS-70606 on Bear Creek, tributary of the Crooked River, submitted a petition seeking judicial review of the Commission’s final order approving the instream water right. At its April 2003 meeting the Commission withdrew its final order for reconsideration. The final order on reconsideration was filed with the Court on June 23, 2003.

WaterWatch et al v. Oregon Water Resources Commission

Oregon Court of Appeals – In November 2002, WaterWatch of Oregon and thirteen other individuals, businesses, and organizations filed a petition for Judicial Review of the Commission’s Deschutes Ground Water Mitigation rules and Mitigation Bank and Mitigation Credit rules (OAR Chapter 690, Divisions 505 and 521). Petitioners submitted their brief June 26, 2003. The Department filed its brief on November 5, 2003. Oral argument before the Court will be scheduled after petitioners submit their final brief.

V. Commission/Board Schedules	Location	Date
Environmental Quality Commission (EQC)	Portland	Dec. 4 & 5, 2003
Oregon Watershed Enhancement Board (OWEB)	TBA	Jan. 2004
Land Conservation and Development Commission (LCDC)	Salem	Dec. 2 & 3, 2003
Parks and Recreation Commission	Salem	Jan. 8, 2004 (Tent.)
Fish and Wildlife Commission	Salem	Dec. 12, 2003
Board of Agriculture	Corvallis	Dec. 3 & 4, 2003
State Land Board	Salem	Dec. 9, 2003
Board of Forestry	Salem	Dec. 15, 2003