



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item J, August 11, 2006
Water Resources Commission Meeting

Request for Adoption of Administrative Rules Relating to Recognition of Transfer Rules Amendments, OAR 690, Division 380 and Changes to Ground Water Registrations, OAR Chapter 690, Division 382

I. Issue Statement

The Commission is asked to adopt rules under OAR Chapter 690, Division 380 related to Water Right Transfers and OAR Chapter 690, Division 382 related to Modifications of Ground Water Registrations. The final proposed rules in Attachments 1 implement statutory authority in ORS 540.531 which allow greater flexibility for surface water to ground water point of diversion transfers and clarify other provisions of the transfer rules. The final proposed rules in Attachment 2 implement House Bill 2123 which required the Commission to adopt rules that establish the process and standards for recognizing changes in the place of use, type of use or point of appropriation for ground water claims registered under ORS 537.610.

II. Background

Prior to the adoption of HB 2123 (2005 Oregon Laws) the Commission had no authority to recognize changes in the place of use, type of use, or point of appropriation for claims to appropriate ground water that were recorded under ORS 537.610. These claims have not been adjudicated and therefore have no final determination as to the appropriateness of the claims. As such, these claims were not eligible to be changed through existing transfer laws. The legislation required the Commission to adopt rules that would establish a process and standards in which the Commission could recognize these changes.

HB 2123 also modified ORS 540.531 to provide greater flexibility for the transfer of a surface water diversion to a ground water well. To allow this type of transfer, use of ground water at the new point of appropriation must affect the surface water source "similarly" to the use of the originating surface water right. Prior to HB 2123, the ground

water also had to come from an “unconfined” aquifer. However, there are some cases where ground water from other types of aquifers (confined or semi-confined) meet the statutorily defined “similarly” test but the transfer must be denied. HB 2123 deleted the requirement that the ground water be appropriated from an “unconfined” aquifer and the proposed rule amendments in Division 380 implement those statutory changes. The proposed rule amendments in Division 380 also clarify procedures and application requirements for water right transfers.

III. Rulemaking Process

In February 2006, the Department convened a rules advisory committee (RAC) to assist in developing rules to implement the statutory changes authorized by HB 2123 (2005 Oregon Laws). A list of the RAC members is provided in Attachment 3. The RAC met four times between February and April to discuss and assist in the development of the draft rules. Staff initially proposed adding provisions related to ground water registration modifications into the Division 380 rules. However, at the urging of the RAC, a separate Division 382 for Ground Water Registration Modifications was proposed by the Department.

Notice of the public rulemaking was published in the Oregon Bulletin and hearing drafts of the proposed rules were made available on May 1, 2006. The Department held one public rulemaking hearing in Salem on May 22, 2006. No testimony was given at the hearing. However, the Department did receive twelve written comments which are provided in Attachment 4.

IV. Discussion

Issues Identified in Written Comments:

Issue – OAR 690-382-0010(2): Oregon Water Resources Congress (OWRC) and Oregon Water Utilities Council (OWUC) recommended deletion of OAR 690-382-0010(2) since clarification of the purpose of the rules is no longer required now that a separate Division has been created for Ground Water Registration Modifications (OAR Chapter 690, Division 382).

Response – OAR 690-382-0010(2) affirmed that the standards and criteria for review of applications to modify certificates of registrations are different than the standards and criteria for review of transfer applications. Staff agree with that is affirmation is no longer necessary, and this section of the rules is identified as deleted in the final proposed rules.

Issue - Definition of “water right conveyance agreement” (OAR 690-380-0100(13) and 690-382-0100(9)): OWUC and an individual recommended deleting “...that has been recorded in the deed records by the relevant county” from the definition of “water right

conveyance agreement”. The commentors also suggested changing water right to “certificate of registration” in the proposed definition in Division 382.

Response - The final proposed rules retain the requirement that a “water right conveyance agreement” be recorded in the county deed records. Recording a water right transaction constitutes notice of the transaction to any subsequent purchasers of the real property. This provides protection to the purchasers of water rights if the ownership of the real property changes. Absent clear evidence that all subsequent landowners have been notified that the interest in an appurtenant water right is not conveyed with the real property, the Department will not allow a transfer without those landowners’ consent.

However, in response to the comment, the Department has proposed OAR 690-380-4010(5)(c) and 690-382-0700(5). This change would give the Department the ability to accept other documentation demonstrating the applicant is authorized to pursue the transfer or modification. Providing this flexibility recognizes the variety of agreements into which water users have entered that convey water rights, including certificates of registration. This would include agreements pertaining to water rights that are not recorded in county deed records.

The use of the generic term “water right” in the proposed definition of “water right conveyance agreement” is intended to encompass the variety of rights to use water, including ground water registrations. The Department is not recommending any changes in response to this comment.

Issue – Add a definition of “water use subject to transfer” (OAR 690-382-100): An individual suggested including the definition of “water use subject to transfer” from OAR 690-380-0100(14) in the Division 382 rules.

Response – Other definitions from OAR 690-380-0100 are included in OAR 690-382-0100 and the Department agrees that including a definition of “water use subject to transfer” in OAR 690-382-0100 would be helpful. The definition is identified as added language in Attachment 2.

Issue – Historic Use of Ground Water Registration: Throughout their comments on the Division 382 rules, WaterWatch advocates for changes in the application and review requirements for modifications of ground water registrations to include evidence of the extent to which the registration was exercised within the last five years. They point out that this would be similar to the requirements for surface water registrations under Division 28. WaterWatch also asserts that the water user should be required to demonstrate they are ready, willing, and able to use the water.

The Oregon Water Utilities Council and other commentors strongly oppose consideration of the historic use of ground water registrations in the application review process.

Response – The RAC extensively discussed whether the Department’s review of modifications should include a quantification of the extent to which ground water had been beneficially used under the registration.

Ground water registrations represent unconfirmed claims of pre-1955 uses of ground water that eventually will be evaluated in an adjudication. At that time, the court will determine the extent to which the claim to the use of ground water is valid. Unlike surface water registrations, the Department does regulate for and against ground water registrations.

The proposed rules are drafted in a manner to make the Department’s recognition of a modification neutral with respect to whether the claim is valid. The review of the application requesting recognition of the modification is not intended to establish the validity of the claim that is represented by the certificate of registration or to quantify the claim. The approach described in the rules is consistent with the status and nature of ground water registrations and with the recommendations of most members of the RAC.

Issue – Definition of “Layered” (OAR 690-380-0100(4) and 690-382-0100(4)) and Layered Water Rights and Certificates of Registration (OAR 690-380-2240 and 690-382-0200): WaterWatch expressed concern that the definition of “layered” is limited to irrigation uses. WaterWatch suggested expanding the definition of “layered” to include all uses if proof of past beneficial use is not required. Water for Life expressed concern that the restrictions on un-layering water rights only apply to irrigation water rights.

Response – The issues associated with layering of water rights are unique to irrigation water rights. The Department has generally considered the senior irrigation water right to be the primary right and any other junior water rights appurtenant to the same lands to be supplemental. Proposed rules outlining restrictions on un-layering irrigation water rights reflect the Department’s historic approach. Staff are proposing rules addressing layered water rights to clarify and codify our existing approach in both Division 380 and 382.

Issue – Modification of Certificates of Registration (OAR 690-382-0300): WaterWatch commented that, absence a provisions addressing proof of past beneficial use of ground water registrations, the only people who can file an application should be limited to those named on the registration or the assignees and who own the land.

Response – This rule section pertains to who can file an application for recognition of a modification to a certificate of registration. The proposed rules allow a landowner or another individual or entity who has acquired the interest in the registration, either by assignment or another form of conveyance, to seek recognition of a modification. Water users have entered into a variety of agreements that convey water rights separately from the land. The Department does not recommend restricting applications for modifications to landowners only.

Issue – Existing Documentation of Modifications (OAR 690-382-0450): WaterWatch requested clarification regarding the use of any information already in the Department’s ground water registration file, and the Department’s processing of new applications for modification of that registration.

Response – Prior to these proposed rules, changes to a certificate of registration were noted by placing owner provided documentation into the original certificate of registration file. Typically, the owner was informed the documentation would be reviewed at the time of adjudication and a determination would be made by the courts. This rule section allows an applicant applying for a modification to incorporate documentation already in the original file into the modification application process by referring to it in the application. The documentation in the file typically does not include a Department evaluation of the impacts of the changes. The proposed rules do not provide exceptions to the review process for these modifications. All applications will undergo the analysis presented in the final proposed rules.

Issue –Criteria for Evaluations of Modifications Impacts to Scenic Waterways (OAR 690-382-0700(2)): OWRC, OWUC, Oregon Association of Nurseries, and individuals expressed concern about the manner by which OWRD would evaluate “injury” to Scenic Waterway flows (OAR 690-382-0700(2b)). An individual expressed the opinion that Scenic Waterway flows should not be considered in the analysis of a proposed modification.

Response – The RAC considered a number of criteria for evaluating the impacts of registration modifications on surface water. During the discussions, the RAC generally agreed that the impacts to state Scenic Waterways should be considered and the Department developed the hearing draft based on that general agreement. Staff made it clear during RAC discussions and at the hearing that injury to a Scenic Waterway would be evaluated using the same methods as used to evaluate injury to surface water rights under a ground water right transfer. The streamflow levels that have been identified as necessary for the Scenic Waterways for water right application reviews will be treated as water rights for the purposes of the injury evaluation.

Issue – Preliminary determination newspaper notice not required for a change in the point of appropriation if less than one-fourth mile (OAR 690-382-0800(5)): WaterWatch suggested that the newspaper notice be required and opportunity to comment be provided any time the point of appropriation is moved within one-fourth mile of a stream.

Response – The proposed rules require that notice of all applications for recognition of ground water registration modifications be published in the Department’s weekly public notice. This provides notice to the entities that are most likely to comment on the applications. Newspaper publication provides additional notice of the opportunity to comment on proposed point of appropriation modifications involving a change of more

that one-fourth mile. These notice provisions are consistent with the public notice requirements for water right transfers.

Issue - Criteria for the recognition of modifications (OAR 690-382-1000(1)): Many commentors asserted that the proposed rules contained an improper burden of proof with respect to the recognition of a modification. Specifically, as proposed, the Department can only approve a request for modification if the modification will not result in injury or enlargement. The commentors suggest instead that the Department approve the request unless the Department finds that injury or enlargement *will* occur.

Response – Under ORS 540.530, the Department must make an affirmative finding of no injury when approving a transfer. The criteria and findings required for recognizing a modification of a certificate of registration parallel that for approving a transfer (690-380-5000(1)). Keeping the proposed language allows the Department to use a process parallel to that in transfers.

Issue - Language Change in Preliminary Determination (OAR 690-382-0700(2b)) and Recognition of Modifications (OAR 690-382-1000(1b)) from “Department” to “Commission”: OWUC and an individual suggested that the criteria refer to the flows determined by the Commission to be necessary to meet Scenic Waterway requirements.

Response – The streamflow levels used by the Department to make findings with respect to the impact of issuance of permits on Scenic Waterways were reviewed and acknowledged by the Commission as appropriate. However, the flow levels are not adopted as rules. An applicant or other party has the opportunity in the application review process to demonstrate that other streamflow levels are more appropriate. Staff recommend that the reference to the Department be retained.

Issue - Issuance of a final order recognizing a modification of a certificate of registration (OAR 690-382-1000(4)): Many commentors suggest new language to clarify judicial review rights for final orders recognizing a modification of certificates of registration.

Response – The rule language is intended to establish that recognition of a modification is not conclusive with respect to issues to be determined in an adjudication. However, the Department’s recognition will be a final order that is subject to judicial review. The proposed rules in Attachment 2 include modifications to clarify the intent.

Issue – Commission’s authority to apply proposed criteria: Water for Life asserted that the criteria proposed in the rules are inconsistent with the statutory requirements for recognition of ground water registration modifications because ORS 537.705 requires changes in the place of use or use comply with a procedure as nearly as possible to that established in ORS 540.520 and 540.530. Water for Life also suggested that proposed rules be streamlined to more appropriately address establishing orderly application requirements, preventing enlargement, and preventing injury to other water right holders.

Water for Life proposes that the rules not be adopted at this time and that a RAC be convened to continue working on the rules.

Response – Staff are confident that the review process and criteria in the proposed rules are within the Commission’s authority. House Bill 2123 requires an adoption by rule of a process and standards to recognize changes to ground water registrations. The proposed final rules gained general agreement from a RAC that represents a broad group of interested parties.

The RAC focused much of its time to developing a streamlined process for request for modifications. The draft rules are modeled on the process that the Commission adopted in the Division 380 rules. The use of this process has allowed the Department to more efficiently process water rights transfers. The RAC members generally agreed that the final proposed rules implement an application review process that is streamlined and provides the appropriate level of review of proposed modifications of ground water registrations.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules amendments under OAR Chapter 690, Division 380 (Attachment 1) and final proposed rules under OAR Chapter 690, Division 382 (Attachment 2).
2. Adopt the final proposed rules with revisions.
3. Not adopt rules and request the Department to further evaluate the issues.

VI. Director’s Recommendation

The Director recommends that the Commission adopt the final proposed rules as provided in Attachments 1 and 2.

Attachments:

1. Final proposed rules, OAR Chapter 690, Division 380-Water Right Transfers
2. Final proposed rules, OAR Chapter 690, Division 382-Ground Water Registration Modifications
3. Members of the Rules Advisory Committee
4. Copies of Written Comments on the May 22, 2006 Hearing Draft Rules