



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

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

Request for Adoption of Amendments to Instream Water Right Rules, OAR Chapter 690, Division 77

I. Issue Statement

The Commission is asked to adopt amendments to OAR Chapter 690, Division 77 relating to instream water rights. The proposed rules provide greater consistency with the water right transfer rules (OAR Chapter 690, Division 380), incorporate other general housekeeping changes, and clarify the standards for state agency applied instream water rights. The final proposed rules also clarify the provisions and processes affecting instream water rights established by instream transfers, instream leases, and allocations of conserved water. The final proposed rules are provided in Attachment 1.

II. Background

OAR Chapter 690, Division 77 sets forth standards for reviewing and approving instream water right transfers, instream leases, conversion of minimum perennial streamflows, and agency requested instream water rights. During the fall 2005, the Department met with stakeholders that regularly use the instream leasing, instream transfer, and allocation of conserved water programs to discuss the effectiveness of these programs in fulfilling the Department's goal of restoring and protecting streamflows and watersheds (e.g., Deschutes River Conservancy (DRC), Oregon Water Trust (OWT), Klamath Basin Rangeland Trust, Columbia Basin Water Transactions Program, and Walla Walla Watershed Alliance). Various suggestions to improve these programs were offered by these stakeholders. Based on this input, the Department committed to convening a Rules Advisory Committee (RAC) to review the Division 77 rules to address some of their suggestions.

Reviewing the Division 77 rules also gave the Department an opportunity to reconcile inconsistencies between the water right transfer rules (OAR Chapter 690, Division 380) with the Division 77 instream water right rules. Specifically, in 2003, the Department amended and renumbered its water right transfer rules, repealing OAR Chapter 690, Division 15 and adopting Division 380 rules. The existing Division 77 rules refer to Division 15 and contain duplicate provisions and processes previously provided in Division 15.

In addition to these housekeeping changes, the Department also needed to propose changes to Division 77 to reflect a recent settlement agreement. In 2005, the Department was a party to the Steen's Mountain Settlement Agreement relating to agency applied instream water rights, specifically instream water right applications IS-84562 and IS 84563. Three state agencies can apply for instream water rights: Oregon Departments of Fish and Wildlife (ODFW), Department of Environmental Quality (DEQ), and Oregon Parks and Recreation Department (OPRD). As part of the settlement agreement, the Department is fulfilling its obligation to propose Division 77 amendments that require written documentation of how the state agency applying for an instream water right has complied with the requirements contained in its own administrative rules for instream water rights.

In January 2006, the Department convened a RAC to participate in this review and update of the Division 77 rules. A list of RAC members is provided in Attachment 2. The RAC met on three occasions from January through March 2006.

The RAC reached agreement on the majority of the changes discussed. Consensus was not reached on two issues involving instream water rights established through the transfer, lease, or allocation of conserved water processes: 1) clarification of when an instream water right amount can exceed the estimated average natural flow, and 2) whether an instream water right reach can extend downstream from the source stream into the receiving stream, if quantity of water to be protected instream as part of the instream right is not a measurable portion of the receiving stream.

At the conclusion of the RAC process, notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available May 1, 2006. In addition to the opportunity to provide written comment, the Department held public rulemaking hearings in Salem on May 24 and in Bend on May 25, 2006. No testimony was provided at the public rulemaking hearings. The public comment period closed on June 8, 2006. Eight written comments were received and are provided in Attachment 3.

III. Discussion

Rule Highlights

Consistency with Division 380 – The proposed rules would streamline the Division 77 rules to be consistent with the new Division 380 transfer rules. They would also eliminate references to Division 15 (replaced by Division 380) and duplicative requirements. For example, the proposed rules would only list only those specific requirements and process related to instream transfers that augment the Division 380 requirements and identify that the application is otherwise processed pursuant to Division 380.

Instream Leasing – The proposed rules would clarify the instream leasing process. The existing rules describe the submission of instream leasing “agreements” which the parties to the lease,

including the Department, signed. Since 2000, the Department has not been signing these agreements, but instead has been issuing final orders to approve the lease agreements. The proposed rule modifications change the language in the rules to recognize the practice of issuing orders and also to change the reference from lease agreements to lease applications. The proposed rules also separate out the application and the processing requirements for instream leases.

Split Season Instream Leases – The proposed rules would eliminate the one-year limitation on split season instream use leasing, and would allow split season instream use leases to be for same duration of any lease (i.e. up to five-years) with renewability. The rules also propose a review of the split season instream program no later than 2014.

State Agency Instream Water Right Applications – The proposed rules incorporate a provision of the Steen’s Mountain Settlement Agreement previously mentioned. The proposed rules require state agencies applying for instream water rights to document compliance with their own instream water right rules. As part of this documentation, agencies would have to describe to the Department the methods used to determine the requested flows.

Rate Limitations on Instream Water Rights – Water rights are generally limited to the amount that can be beneficially used without waste. When water rights are proposed to be leased, transferred, or protected instream through an allocation of conserved water, the Department evaluates whether the instream flow will provide a beneficial use. In the current rules, beneficial use is generally assumed to be up to the estimated average natural flow of the stream. “Estimated average natural flow” is defined in OAR 690-077-0010(10) and means the average natural flow for a given month based on Department records. In general, the Department has used the 50 percent exceedance value to determine the estimated average natural flow.

The current rules allow an exception for “periodic flows” above estimated average natural flow that are “significant” for the public use. However, the existing rules do not provide the applicant or the Department with clear guidance as to how to determine whether a flow other than that for fish passage might be significant for the public use. The proposed rules would clarify how instream transfers, leases, and the instream component of allocations of conserved water can exceed the estimated average natural flow.

The RAC generally agreed that where flows above the estimated average natural flow are significant for fish or other public uses, that those flows should be allowed. However, the RAC was not able to reach consensus on how to determine if flows were significant for fish or other public uses. While the RAC was not able to reach consensus on a standard, the Department was able to work with OWT and Oregon Farm Bureau (OFB) to develop a compromise standard for the hearing draft of the rules.

The proposed rule provides a presumption that flows are significant for the specified time period where ODFW has determined that flows are needed for fish or where the stream is listed as water quality limited and DEQ has provided scientific information demonstrating that increased flows

would improve water quality. The final proposed rules also provide a side-board that the presumption only applies when the flow amount does not exceed the amount of a state agency instream application.

General Housekeeping Changes – In addition to the modifications described above, the Department has proposed several general housekeeping changes to the rules, including corrections of typos, grammar and terminology, updated rule or statutory references, adding a table of contents, incorporating a definition of instream transfer, clarifying references to time-limited instream transfers, and updating or clarifying rule section titles.

Issues Identified in Written Comments

1. General Comments

Comment – Definition of “Water Purveyor”: The Oregon Water Resources Congress suggested that the reference to “water right owner” in OAR 690-077-0010(33) be modified to reflect the variety of arrangements between water purveyors and parties served by those purveyors, and to be consistent with the Department’s other administrative rules.

Response: The Department concurs and proposes “water right holder” in the final proposed rules. This change would also be consistent with the Division 380 transfer rules.

For consistency throughout the Division 77 rules, the Department has also modified “owner” of a water right at OAR 690-077-0076(1) and “owner of the land to which the subject water right is appurtenant” at OAR 690-77-0076(2) to water right holder.

Under the modifications to OAR 690-077-0076(2), if the water right holder is not the landowner, they may submit a copy of the deed for the land along with either a written affidavit from the landowner, a water right conveyance agreement, or other information to demonstrate the holder of the subject water right is authorized to pursue the lease. This change would clarify who can apply for a lease and would provide greater consistency with the Division 380 transfers rules.

Comment – General Statement on Instream Water Rights: OAR 690-077-0015(1) states that instream water rights can not impair permitted, certificated, or decreed water rights vested prior to the date of the instream water right. The rule was modified in the hearing draft to address comments raised by WaterWatch during the RAC discussion. However, in their written comments, WaterWatch requested to maintain the existing language or clarifying what “established” means. OWT also proposed clarifying what “established” means, and the DRC indicates that the need for the language change is unclear.

Response: Clarifying what “established” means would require additional consultation with stakeholders and others. For this reason, the Department concurs with WaterWatch and is proposing to maintain the existing language in the final proposed rules.

Comment – Redundancy in OAR 690-077-0075(2)(c): OWT identified that there is a duplicative cross-reference in OAR 690-077-0075(2)(c).

Response: The Department concurs and has modified the final proposed rules in response to this comment.

2. Comments Related to Clarifying When the Estimated Average Natural Flow Can be Exceeded

Comment: Water For Life expressed strong concerns with OAR 690-077-0015(5) which would create a presumption under certain circumstances that would allow the estimated average natural flow to be exceeded. WaterWatch states that OAR 690-077-0015(4) and (5) should be deleted since nothing in the Instream Water Right Act allows limitations of instream water rights in this manner. ODFW describes a number of reasons as to why the estimated average natural flow level may need to be exceeded, including flows needed to clear a sand bar for migration, channel maintenance flows, and access to additional habitat which may make the stream system more productive (especially in desert streams). ODFW suggests that instead of giving the ODFW flow restoration priority watersheds presumption for exceeding the estimated average natural flow, that ODFW could submit written justification describing the benefits associated with the increased flows. OWT supports the proposed language and describes their inability to meet the standards of the existing rule, even with a letter from ODFW. DRC supports the proposed language, but, along with Schroeder Law Offices, point out that the rule construction makes the subsection difficult to comprehend. Schroeder Law Offices also identified that the terms “conserved water” and “significant” as used in the proposed rule are not defined.

Response: The comments received reflect the range of disagreement within the RAC. The hearing draft represented a compromise approach based on ideas from OWT and OFB. In response to the concerns raised by ODFW and Water For Life, the final proposed rule allows the Director to make a finding different than the presumption. In response to the DRC and Schroeder Law Offices, the Department restructured that section of the rules to make it more readable.

ODFW also raised the issue of allowing the estimated average natural flow to be exceeded in areas with junior instream water rights to allow for a more reliable source of instream flow. By providing criteria for exceeding the estimated natural flow, the Department believes that this will allow senior instream water rights to be established in areas where junior instream water rights already exist at levels that meet or are just below the estimated average natural flow level.

In response to Schroeder Law Offices, the phrase “allocation of conserved water” as used in this section of the rules is identified as a project that may establish instream water rights under ORS 537.455 through 537.500 (OAR Chapter 690, Division 18) in the General Provisions section of Division 77 (OAR 690-077-0000).

3. Comments Related to Stream Reach Length

Comment: DRC and WaterWatch indicate that the current limitation in OAR 690-077-0015(8) against protecting an instream water right from the source stream into the receiving stream, unless it is a measurable amount in the receiving stream, is inconsistent with statute. Both believe that the existing language should be deleted and that instream transfers should be approved, if there is no injury, even if the quantity is not measurable in the receiving stream.

Response: Under existing rule, an instream water right can be protected from the point of diversion of the original right downstream to the mouth of the source stream. It can be protected a shorter distance to protect for injury or enlargement. It can be protected for a longer reach past the mouth of the source stream if it is a “measurable” portion of the receiving stream. Although there was extensive discussion of the “measurability” provision by the RAC, no consensus was reached.

In general, the restoration community was in favor of either eliminating this rule (which is unchanged since it was adopted in 1988 as part of the original Division 77 rules) or in favor of an alternative developed by the DRC that was based on cumulative restoration impacts and level of stream gaging in the watershed. The water right holder community was generally opposed to changing the rule, and was concerned about potential regulation of downstream users not previously regulated in the receiving stream.

Because of these divergent views, the RAC did not reach consensus and the Department did not propose any changes in the hearing draft or in the final proposed rules. This is an issue that can be revisited at future rulemakings.

4. Miscellaneous Comments Related to Instream Leasing

Comment – Application Requirements: DRC suggested deleting the requirement describing the compensation involved in the lease transaction under OAR 690-077-0076(3)(h).

Response: The Department concurs. The Department does not need this information for its lease application review and, does not request it on instream lease applications.

Comment – Application Requirements: DRC suggested deleting the requirement under OAR 690-077-0076(4) encouraging irrigation districts to develop pooled lease applications. They agreed that we may want to encourage this behavior, but do not believe that it is appropriate to include it in this application section of rules.

Response: The Department concurs that encouraging pooled lease applications does not belong in the application section of the rules. The final proposed rules move this language to the general provision area for instream transfers and leases under OAR 690-077-0065(2).

Comment – Leasing of Supplemental Water Rights to Instream Use: Schroeder Law Offices raised concerns with regard to OAR 690-077-0076(1)(c) that splitting off supplemental use from the primary use for the purposes of instream leasing is considered enlargement.

Response: OAR 690-077-0076(1)(c) identifies that a secondary water right for use of stored water established by permit, certificate or court decree may be leased instream for a specified time period, not to exceed five years. The Department does not consider this enlargement and the proposed modification was solely a renumbering of the lease application section.

Other Changes Proposed to the Hearing Draft

Based on internal review, the final proposed rules have been updated for consistency with the concurrent Division 2 rulemaking related to contested cases. The final proposed rules also would remove the requirement to notice any water purveyors listed on a lease, since by rule water purveyor are a required party to the lease (OAR 690-077-0076(2)(b)). Additionally, the final proposed rules modify the “water quality limited” definition under OAR 690-077-0010(34) to correctly cite DEQ’s Water Quality Standards rules (OAR 340-041) so that all water bodies considered to be impaired would be included.

IV. Summary

The final proposed rules in Attachment 1 (Instream Water Rights, OAR Chapter 690, Division 77) provide greater consistency with the water right transfer rules (Division 380), clarify the standards for state agency applied instream water rights, and streamline and clarify general provisions affecting instream water rights. The proposed modifications would eliminate the one-year restriction on split season instream use leases and would clarify rate limitations on instream transfers, leases, and the instream component of allocations of conserved water may be exceeded. Comments on the Department’s hearing draft have been considered and, where appropriate, changes have been made.

The final proposed rules support the Department’s goal to restore and protect streamflows and watersheds. The rules fit within staff capabilities, especially since they streamline and clarify the requirements for instream leases and transfers. The final proposed rules provide for adaptive management, by providing a review of the split season instream use leasing program by 2014. The final proposed rules are consistent with the State’s goal of regulatory streamlining and reducing the fiscal impact of regulations.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachment 1.
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

VI. Recommendation

The Director recommends that the Commission adopt the final proposed rules in Attachment 1.

Attachments:

1. Final Proposed Rules
2. Rule Advisory Committee
3. Written Comments Received

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