



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

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

### **Request for Adoption of Administrative Rules Relating to District Water Right Transfers, OAR Chapter 690, Division 385**

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

The Commission is asked to adopt and amend rules relating to district water right transfers (OAR Chapter 690, Division 385). The proposed rules implement temporary district transfer provisions enacted under House Bill 2875 by the 2005 Legislature. House Bill 2875 modified ORS 540.570 to provide districts the opportunity to temporarily (for one irrigation season) change a point of diversion for a water right in the event an emergency prevents a district from diverting the water to which it is legally entitled. The final proposed rules are included as Attachment 1.

#### **II. Background**

In October 2004 the Commission adopted OAR Chapter 690, Division 385, covering district temporary and permanent water right transfers authorized by ORS 540.570 through ORS 540.580. The Division 385 rules reorganized and renumbered Division 21 rules for district temporary transfers and incorporated extensive statutory changes enacted during the 2001 and 2003 Legislative Sessions. The Division 385 rules describe each step in the district transfer process from application criteria through review and approval for each of the three different types of district transfers: temporary, permanent, and permanent transfer of a water right for nonuse.

In January 2006, the Department convened a rules advisory committee (RAC) to assist in developing draft rules to implement the addition to the district temporary transfer statute (ORS 540.570) allowing districts the opportunity to apply for an emergency change in point of diversion in response to an emergency. A list of RAC members is provided in Attachment 2. Because the rulemaking was narrow in scope, staff proposed coordinating input and review of draft rules by e-mail and telephone with the opportunity for a final meeting if deemed necessary by the RAC. The RAC concurred with this approach and did not elect to convene a final meeting.

Notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available on May 1, 2006. Three written comments were received and are provided in Attachment 3. In addition to the written comment period, the Department held a public rulemaking hearing in Salem on May 23, 2006. No testimony was offered at the hearing.

### **III. Discussion**

#### ***Rule Highlights:***

*Definition of emergency* – HB 2875 modified ORS 540.570 to add another type of temporary transfer that a district may request. Under existing district temporary transfer rules, changes in points of diversion or appropriation only may be requested to facilitate a change in place of use. In contrast, this rulemaking establishes a process to allow a temporary change in point of diversion that is not connected with a change in place of use but addresses sudden, unforeseen damage to a diversion structure or primary conveyance canal that prevents a district from diverting water. Given this, proposed rule OAR 690-385-0100(19) defines emergency to establish simple criteria a district must satisfy to apply to temporarily change a point of diversion.

*Advance consultation* – Unlike typical transfer processes, the application process for a temporary point of diversion change in response to an emergency proposed under OAR 690-385-3200(C) requires advance consultation with applicable state agencies and local and tribal governments. Because of the disruption to water delivery, the goal is to respond rapidly to the emergency and expedite the transfer process by having the district notify and consult with regulatory agencies and other interested governments to identify and discuss regulatory requirements as well as examine the potential to injure other water rights. This allows districts to perform risk assessment and understand the issues associated with siting, installing and operating a temporary point of diversion.

*Number of successive applications* – A temporary change in point of diversion in response to an emergency provides a short-term solution to an unforeseen event that prevents a district from diverting water at an authorized point of diversion. An approved temporary transfer grants a district an alternative diversion while making repairs to the damaged point of diversion or primary conveyance canal. A series of temporary emergency transfer applications is not intended to be a long-term fix for districts or to replace a permanent change in the point of diversion. To this end, the rule proposed in OAR 690-385-3145(5) establishes a limit on the number of successive, one-irrigation season applications a district may submit in response to the same emergency while reserving flexibility to address case-specific situations.

*Fish screening conditions* – ORS 540.570 allows for changes in point of diversion provided the diversion is provided with a proper fish screen if required by the Department. The Department consults with the Oregon Department of Fish and Wildlife (ODFW) to determine whether a diversion is equipped with a proper fish screen. Proposed OAR 690-385-3145(7) prescribes that the Department shall consult with ODFW consistent with OAR

690-385-3520 and condition approval of a temporary change in point of diversion to require a proper fish screen if requested by ODFW.

*Injury to other water rights* – Approval of a transfer application requires the Department make an affirmative finding of no injury to other water rights. The Department often places conditions upon the approval of a transfer application to prevent injury to other water rights. A common condition placed on a change in point of diversion is that the new point of diversion is restricted to diverting the same amount of water that was available at the former point of diversion. This may require that the applicant maintain a measuring device at both the new and former point of diversion.

Proposed OAR 690-385-3145(8) reiterates the Department’s authority to condition approval of a transfer application as necessary to prevent injury to other water rights. Proposed OAR 690-385-3145(9) expands upon this and clarifies that if the proposed transfer affects an instream water right, the Department shall consult with the state agency with management responsibilities for the resources protected by the instream water right to develop any conditions necessary to prevent injury to the instream water right.

As with all temporary changes to water rights, the Department has explicit statutory authority to, upon determining a temporary change results in injury to other water rights, impose any conditions necessary to prevent injury or reject or revoke the change.

***Issues Identified in Written Comments:***

*Comment – OAR 690-385-3145(2):* The Oregon Water Resources Congress (OWRC) recommended that the change in point of diversion not be restricted solely to the same source of surface water, but also include ground water that is shown to be hydraulically connected to the authorized source of surface water and affects the surface water source similarly to the authorized point of diversion as described in OAR 690-385-3150(2)(a) – (d).

*Response:* The Department concurs with this recommendation and has amended the proposed rules accordingly. This would also be consistent with RAC discussions. During the RAC discussions, ODFW suggested developing rules to encourage a surface water point of diversion change to a ground water appropriation so districts could avoid issues associated with screening diversions.

*Comment – OAR 690-385-3145(6)(b):* WaterWatch recommends the proposed rules require the Department to receive written results of consultation prior to allowing diversion to commence at a new temporary point of diversion.

*Response:* The purpose of the consultation element of the rules is to help ensure that applicants are aware of other regulatory requirements related to using a new point of diversion. It would also help raise potential issues related to injury to other water rights as early as possible. The goal of consultation is to reduce the risk to the district that operation of a temporary point of diversion will be limited or halted because of injury to other water rights or for failure to satisfy other regulatory or permitting requirements. Requiring early

consultation with local, state, and tribal entities achieves this goal while maintaining the statutory intent to respond quickly to emergency situations.

*Comment - OAR 690-385:* WaterWatch also raised general concerns about the timing of district temporary transfers and the issuance of the final order allowing these changes.

*Response* – Under ORS 540.570(6) the Department has the authority to condition, reject, or revoke a temporary transfer at any time to the extent necessary to avoid injury to another water right if the Department finds the transfer causes injury to another water right. Thus, at any stage in the “life” of a temporary transfer, whether it be during application processing or after an approval order is issued, a temporary transfer is subject to administrative action should the transfer be determined to be causing injury to another water right. This authority is the fundamental tenant of district temporary transfers and allows an expeditious change in point of diversion in response to an emergency while retaining protections for existing water rights.

*Comment – OAR 690-385-3145(7):* OWRC suggested deleting the phrase “to determine whether a fish screen device is necessary for the diversion pursuant to OAR 690-385-3520” as redundant.

*Response:* Staff agree the reference to OAR 690-385-3520 is redundant. However, this redundancy serves the purpose of providing links to other rule references. In this instance, the phrase provides information about why the Department consults with ODFW and points the reader to the applicable rule. Given this, staff do not propose to modify the rule as suggested by OWRC.

In addition to the modifications described above, minor changes were made to the hearing draft to improve the readability and understanding of the process and procedures.

#### **IV. Summary**

The final proposed rules in Attachment 1 modify OAR Chapter 690, Division 385 to implement House Bill 2875. Based on further internal review and on consideration of comments received, staff propose changes to the hearing draft rules as described above and reflected in Attachment 1.

#### **V. Alternatives**

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules under OAR Chapter 690, Division 385 (Attachment 1)
2. Adopt the final proposed rules with revisions.
3. Not adopt rules and request the Department further evaluate the issues.

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## **VI. Director's Recommendation**

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

### Attachments:

1. Final proposed rules, OAR Chapter 690, Division 385 – District Water Right Transfers
2. Members of the Rules Advisory Committee
3. Copies of Written Comments on the May 1, 2006, Hearing Draft.

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