



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 H, November 17, 2006
Water Resources Commission Meeting

Request for Adoption of Administrative Rules relating to Water Use Permits, OAR Chapter 690, Division 310 & 340

I. Issue Statement

The Commission is asked to adopt rules under OAR Chapter 690 Division 310 and 340 pertaining to water use permits. The final proposed rules are Attachments 1 and 2, respectively. The proposed rules implement House Bills 2083 and 2178 (Chapters 14 and 37, 2005 Oregon Laws) which eliminated an obsolete process for registering certain water uses and provided a new expedited process for applications for permits to use stored water exclusively. These bills were introduced last session on behalf of the Department as part of its regulatory streamlining efforts. The final proposed rules also remove a clerical error at OAR 690-310-0280.

II. Background

A. Elimination of an Obsolete Process

Leading up to the early 1990s, statutes governing water use permits provided no statutory time limits for processing permit applications. A backlog of applications—including applications for wetland, stream, and riparian restoration and storm water management—grew to a point that extended periods of time were required to process them. In 1993, HB 2107 provided a means to register proposed uses of water for these environmentally beneficial purposes, thereby allowing the use of water while the application was pending before the Department.

In 1995, SB 674 modified the standard permitting process, imposed statutory time limits for application processing, and increased application fees. These provisions allowed the Department to decrease its workload to manageable levels. As a result, the amount of time required to process all applications was dramatically reduced. This process improvement, as well as, new statutory methods to expedite water use authorizations such as limited licenses (ORS 537.143) and the alternate reservoir application process (ORS 537.409)—made the water use registration process obsolete.

In the years that followed, almost all applicants chose to use these new application processes rather than the registration process. Last year, HB 2083 (Attachment 3) repealed the now-obsolete registration process. The proposed repeal of OAR 690-340-0050 implements this statutory change.

B. New Expedited Process for Applications to Use Stored Water

HB 2178 (Attachment 4) provided a streamlined process for reviewing applications to use stored water. In part, HB 2178 recognizes that the use of water already legally stored poses a low likelihood of harm to existing users and the State's water resources. This expedited process allows the Department to issue a permit following a public comment period, if no public interest issues identified in ORS 537.170(8) are raised. Those public interests are:

- (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- (b) The maximum economic development of the waters involved.
- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- (d) The amount of waters available for appropriation for beneficial use.
- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- (f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.
- (g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

The expedited secondary process is optional. Applicants may elect to have the Department process their application under the standard application process.

The proposed adoption of OAR 690-340-0060 incorporates the expedited secondary process into rule, while the proposed amendment of OAR 690-310-0040 specifies minimum application requirements for all applications to use stored water.

C. Removal of a Clerical Error

OAR 690-310-0280 (2) and (3) appear to be out of context. OAR 690-310-0280 deals with assignment of applications, while Sections (2) and (3) of that rule relate to the issuance of permits. Section (2) is found in proper context at OAR 690-320-0070 (3) and OAR 690-330-0040 (3). Section (3), which specifies the categories of ground water applications for which the Department is to determine the potential for substantial interference with surface water, appears to be obsolete or otherwise erroneous for two reasons. First, it refers to ORS 537.620 (3), which does not relate to such reviews. Second, the Department has for many years performed such reviews for all ground water applications, as required by OAR 690-009-0040. Any rule

specifying categories of applications for which we must make a substantial interference determination (thereby implying that the Department need not perform the same review for other applications) is inconsistent with OAR 690-009-0030.

D. Outreach and public comment

Because of the limited scope of these rulemakings, the Department met with individuals, interested stakeholders and agencies, rather than convene a Rules Advisory Committee. Department staff met with the Oregon Department of Fish and Wildlife, Oregon Water Resources Congress, WaterWatch of Oregon, and U.S. Bureau of Reclamation, all of whom generally supported the proposed rules. Based on input from these organizations, internal input, and the input from Department of Justice, the Department developed a set of proposed rule changes. The Department held a public rulemaking hearing in Salem on September 18. No testimony was provided at the hearing. The written comment period closed on October 2, 2006. Two written comments were received. Copies of the written comments are included in Attachment 5.

III. Discussion

Summary of comments

1. WaterWatch of Oregon (“WaterWatch”)

WaterWatch expressed general support for the rules, and particularly for excluding the use of water stored in aquifer storage and recovery projects from the expedited secondary application rules. However, WaterWatch did express concern over the omission of a provision to allow the Department to determine that applications pose a risk to other water rights or the public interest when no comments are submitted from third parties.

The new statutory language at ORS 537.147 (2) follows:

If an applicant provides, to the satisfaction of the department, the fee and the information required by subsection (1) of this section, the department may, after public notice and a 30-day opportunity to submit comments on the application, issue a water right permit upon determining that no public interest issues as identified in ORS 537.170 (8) have been raised through the comments submitted.

Under this statute, the Department may issue a permit after several conditions are met. One of those conditions is that no public interest issues have been raised “through the comments submitted.” The Department understands the statute to mean that it may not refuse to issue a permit on the basis of public interest issues, unless those issues were raised through comments. The Department has therefore not incorporated WaterWatch’s comment into the final proposed rules.

2. Oregon Agricultural Alliance (“OAA”)

Through amendments to ORS 537.400, HB 2178 altered the application requirements for all applications to use stored water, both standard and expedited. One of the requirements of the amended statute is that applicants proposing to use stored water from a reservoir they do not own must submit documentary evidence that an agreement has been entered into with the owner of the reservoir to provide enough water for the purposes set forth in the application. The Department understands this “agreement” to be a contract with the reservoir owner. The requirement in ORS 537.400 that applications “show by documentary evidence that an agreement has been entered into with the owners for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the application” existed prior to the passage of HB 2178. However, it was not included in the minimum application requirements described in rule. The current rulemaking incorporates all minimum application requirements of ORS 537.400, both new and preexisting.

ORS 537.147 (2) says that the information provided in expedited applications must be provided “to the satisfaction of the department”. The Department of Justice has advised the Department that it has broad authority to allow applicants under the expedited process to submit a copy of their contract after the initial application is submitted, but before a permit is issued. Because there is no such provision in the standard process, documentary evidence that a contract has been signed is a minimum application filing requirement for standard applications.

OAA’s comment stated that although the new process allows applicants to obtain permits faster, it does so at the expense of the applicants’ opportunity to comment or protest. Although the expedited secondary application process is optional, OAA noted that the alternative—the standard process—may not be used until the applicant has secured a contract to use stored water. This may substantially delay applicants’ ability to file applications to use water, particularly when a contract from US Bureau of Reclamation is required. The Bureau is currently issuing only current-season contracts, and doing so on an annual basis in early summer months. OAA therefore requested that the proposed rules be amended to allow standard applications to submit the contract at any time during the application process.

The Department recognizes that this may be problematic in rare cases where an applicant desires to use stored water exclusively but does not want to use the expedited process. However, the statute requires that standard applications to use stored water be accompanied by documentary evidence that an agreement has been entered into with the reservoir owners. The Department has therefore not incorporated OAA’s comment into the final proposed rules.

IV. Summary

By removing the unnecessarily complicated wetland registration process and implementing the expedited secondary application process, this rulemaking brings our administrative rules into consistency with current statutes and streamlines processing to make overall application processing more expedient.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules under OAR Chapter 690 Division 310 (Attachment 1) and adopt the final proposed rules under OAR Chapter 690 Division 340 (Attachment 2).
2. Adopt the final proposed rules with revisions.
3. Not adopt rules and request the Department to further evaluate the issues.

VI. 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 310 - Water Right Application Processing
2. Final Proposed Rules, OAR Chapter 690, Division 340 - Water Use Authorizations
3. HB 2083 (2005)
4. HB 2178 (2005)
5. Written Comments on September 1, 2006 Hearing Draft

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WATER RESOURCES DEPARTMENT
DIVISION 310
WATER RIGHT APPLICATION PROCESSING

690-310-0040

Application Requirements

(1)(a) Each application for a permit to appropriate water shall be made to the Department on a form prescribed by the Department and shall set forth:

(A) The name and mailing address of the applicant(s);

(B) The source(s) of water from which the water is proposed to be diverted or appropriated, including the name and mailing address of any owner of the land upon which the source of the water supply is located;

(C) The amount of water to be appropriated from each source;

(D) A map of the proposed water use as set forth in the mapping requirements in OAR 690-310-0050;

(E) The nature of the proposed use(s);

(F) The name and mailing address of the owner of any lands that are not owned by the applicant and that are crossed by the proposed ditch, canal or other work even if the applicant has obtained written authorization or an easement from the owner.

(G) A statement declaring the existence of written authorization or an easement permitting access to land crossed by the proposed ditch, canal or other work. This requirement shall not apply to applications for irrigation or domestic use where the applicant would occupy state-owned submersible lands for the construction, maintenance, and operation of any structure or facility necessary for the use of water.

(H) Proposed dates for the beginning of construction, completion of construction, and complete application of the water to the proposed beneficial use;

(I) The legal description of:

(i) The property from which the water is to be diverted;

Italicized text in brackets is proposed to be removed in the September 1, 2006 hearing draft: *[example]*

Bold text was proposed new text in the September 1, 2006 hearing draft: **example**

Bold, double underlined text **example** is proposed new text in the final proposed rules.

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(ii) Any property crossed by the proposed ditch, canal or other work; and

(iii) Any property on which the water is to be used as depicted on the map;

(J) A description, including drawings if required by the Department, of the proposed means of diversion, construction, and operation of the diversion works and conveyance of the appropriated waters;

(K) Information the applicant has that describes why the amount of water requested is needed, measures the applicant proposes to prevent waste, to measure the amount of water diverted, to prevent damage to aquatic life and riparian habitat, to prevent the discharge of contaminated water to a surface stream and measures the applicant proposes to prevent damage to public uses of affected surface waters;

(L) Land use information as outlined in the Department's Land Use Planning Procedures Guide described in OAR 690-005-0035(4) or a receipt signed and dated by a local government official acknowledging the land use information request was received by the local planning Department;

(M) Signature of the applicant(s), and, if the applicant is a public agency, corporation or business, the title or authority of the person who signs the application on behalf of the entity;

(N) An oath that the information contained in the application is true and accurate;

(O) The estimated capacity of each pump in gallons per minute, and the horsepower of each pump motor;

(P) All other data concerning the proposed project and the applicant's ability and intention to construct the project, as the Department considers necessary;

(Q) Any other information required in the application form that is necessary to evaluate the application in accordance with applicable statutory requirements;

(R) If the requested water use is supplemental to an existing water use, identification of any application for a permit, permit, certificate or adjudicated right to appropriate water made or held by the applicant that is primary to the supplemental use.

(b) If the application is for a permit to appropriate ground water, in addition to the information required under subsection (a) of this section, the application shall contain:

(A) For any well already constructed, a copy of the well constructor's log, if available. If a well log is not available, or if the well is not already constructed, the proposed total depth, depth of casing and seal, and the anticipated perforation and open intervals;

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(B) The horizontal distance for each proposed point of ground water appropriation to the nearest surface water, if less than one mile, and the difference in land surface elevation between them;

(C) If the ground water is to be used for irrigation purposes, a description of the lands to be irrigated, giving the number of acres to be irrigated in each 40-acre legal subdivision;

(D) The depth to the water table, if known;

(E) The location of each well with reference to government survey corners or monuments or corners of recorded plats;

(F) The estimated capacity of each well;

(G) If the ground water does not require pumping, the rate of flow in gallons in such manner as the Commission may prescribe.

(c) If the application is to store water and to construct a reservoir, or multiple reservoirs on a single contiguous property on the same stream system, the application also shall include or be accompanied by:

(A) Preliminary plans, specifications and supporting information for the dam and impoundment area including dam height, width, crest width and surface area;

(B) Proposed dates for the beginning and completion of construction of the reservoir, the date the water will be stored and put to beneficial use and the uses to be made of the impounded water;

(C) A legal description of the property upon which the water is to be stored;

(D) A map of the proposed place of use prepared by a certified water right examiner in accordance with OAR 690-014-0150 unless the application is to construct a reservoir storing less than 9.2 acre-feet of water or with a dam less than 10 feet in height, in which case the map need not be prepared by a certified water right examiner.

(d) If the application is to appropriate stored surface water, the application also shall include or be accompanied by documentary evidence that:

(A) The applicant has provided notice of the application to the operator of the reservoir, if other than the applicant. This requirement may be satisfied by providing a copy of written notice to the operator of the reservoir, or a notarized affidavit signed by the applicant stating that notice has been provided to the operator of the reservoir;

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(B) An agreement has been entered into with the owner of the reservoir to provide enough water for the purposes set forth in the application. If the applicant is the reservoir owner, no such agreement is required. If the application is made under the expedited review process for applications to use stored water under OAR 690-340-0060, the agreement may be submitted at any time prior to permit issuance; and

(C) An agreement has been entered into with any entity delivering the stored water other than the applicant. If the application is made under the expedited review process for applications to use stored water under OAR 690-340-0060, the agreement may be submitted at any time prior to permit issuance.

[(d)](e) If for agricultural purposes, in addition to any other information required, the application shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be;

[(e)](f) Except as otherwise provided in OAR 690, division 51, if for power purposes, in addition to any other information required, the application shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied;

[(f)](g) If for municipal or quasi-municipal water supply, in addition to any other information required, the application shall give the already installed and available capacities to provide water service, present population to be served, and, as near as may be, the future requirements of the population served, and if known, the methods that may be used to meet such future requirements;

[(g)](h) If for mining purposes, in addition to any other information required, the application shall give the nature of the mines to be served, and the methods of supplying and utilizing the water.

(2) Each application for a permit to appropriate water shall be accompanied by the examination fee set forth in ORS 536.050.

(3) If the proposed use of the water is for operation of a chemical process mine as defined in ORS 517.953, the applicant shall provide the information required under this section as part of the consolidated application under ORS 517.952 to 517.987.

(4) If the department determines that the source of a proposed use of water is in or above a scenic waterway, in addition to any other information required, the applicant shall provide the information required under OAR 690-310-0260.

690-310-0280

Assignment of Application

(1) Assignment or change of ownership of application:

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(a) When a change of interest or ownership occurs in lands covered by a pending application the record holder may request, in writing, the Director to record the assignment to the new owner;

(b) Should the record holder of the application be unavailable, the current owner of the property involved may furnish proof of such ownership to the Commission to obtain ownership of the application. The Department shall also record a change in ownership to an heir or devisee under a will upon receiving proof of death of the record holder, or to a trustee upon receiving proof of a transfer to trust by the record holder. Proof of ownership of the involved lands shall include, but not be limited to one or more of the following documents:

- (A) A copy of the deed to the land;
- (B) A copy of a land sales contract;
- (C) A court order or decree; or
- (D) Documentation of survivorship of property held jointly.

[(2) Supplemental rights: Where more than one right exists, water shall be used from the primary source so long as there is sufficient quantity to satisfy the terms of the permit or certificate. Nevertheless, if requested by the applicant, a permit may be issued which describes a surface water source as supplemental to a groundwater right and shall provide that, in the interest of conserving the groundwater supplies, the supplemental right may be exercised at times when water is available from the surface water supply.]

(3) All reviews and any determinations made in accordance with this rule shall be made part of the application file and shall contain sufficient detail to allow the Director to determine how to proceed with the processing of the application, in accordance with OAR Division 310. As provided in [ORS 537.620\(3\)](#), the Department shall review the following categories of applications for permits to appropriate groundwater to determine whether the proposed appropriation would have the potential to cause interference with a surface water source, in accordance with OAR 690-09-0040:

(a) All applications that are for any proposed point of appropriation within a horizontal distance of one mile of a surface water source;

(b) All applications that are within a basin, or portion of a basin, which has any applicable closure on surface water appropriation; and

(c) All applications that are for greater than five cubic feet per second.]

Stat. Auth.: ORS 536.027

Stats. Implemented: [ORS 537.220](#) & [ORS 537.635](#)

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96

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WATER RESOURCES DEPARTMENT

DIVISION 340

WATER USE AUTHORIZATIONS

690-340-0010

Exempt Uses

The uses of water listed below do not require a water right permit under [ORS 537.211](#) or a water right certificate under [ORS 537.250](#):

(1) The statutory exemptions from permit requirements for use of groundwater include watering any lawn or noncommercial garden not exceeding 1/2 acre in area. Not more than 1/2 acre of lawn and noncommercial garden in total area may be irrigated through a group delivery system under such exemption. The statutory exemptions from permit and certificate requirements for use of groundwater include:

(a) Stockwater use;

(b) Lawn or non-commercial garden watering of not more than 1/2 acre in total can be irrigated from any groundwater source under the exemptions listed in [ORS 537.545\(1\)\(b\)](#);

(c) Single or group domestic water uses of no more than 15,000 gallons per day;

(d) Industrial or commercial water uses not exceeding 5,000 gallons per day based on peak daily use. A commercial or industrial operation shall be allowed only one well system and exemption under [ORS 537.545\(1\)\(f\)](#) on each ownership or tax lot, whichever is larger.

(2) The statutory exemptions from permit and certificate requirements for use of surface water include:

(a) Use of waste, spring or seepage waters which are exempt under [ORS 537.800](#);

(b) Water used for egg incubation projects under the Salmon and Trout Enhancement Program (STEP);

(c) Fish screens, fishways and fish by-pass structures. A fish screen, fish way or fish by-pass structure is an exempt use if it either:

(A) Is part of a hydroelectric project permitted or licensed by the Department; or

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(B) Is found to not be harmful to fish or wildlife after consultation with the Oregon Department of Fish and Wildlife and causes no injury to existing water rights.

(d) Water uses that divert water to water tanks or troughs from a reservoir for a use allowed under an existing water permit or certificate for the reservoir;

(e) Reservoirs that store less than 9.2 acre feet of water or with a dam less than ten feet in height; that are located off-channel and outside the immediate riparian area; that do not divert water directly from a natural stream, lake or other on-channel source; that were constructed before January 1, 1993; and for which a written notice is submitted under section (4) of this rule.

(3) Water used for emergency firefighting is exempt from permit and certificate requirements regardless of the source of water.

(4) To qualify as an exempt water use under subsection (2)(e) of this rule, the landowner shall provide written notice of the use to the Department on or before January 1, 1995. Such notice shall be on a form provided by the Department and signed and verified by the owner of the land or the owner's authorized agent upon which the reservoir is located. The notice shall include the following:

(a) The volume of water stored;

(b) The source of the water used to fill the reservoir;

(c) The height of the dam measured at its highest point above natural ground elevation;

(d) A U.S. Geological Survey topographic map or a tax lot map showing the location of the reservoir;

(e) Evidence that the reservoir existed on or before January 1, 1993 as described in OAR 690-340-0020; and

(f) A statement describing the off-channel nature of the reservoir.

(5) The Commission may require other information from the landowner regarding an exempt use including, but not limited to, estimates of the quantity of water used; diversion location; place of use; or photographs showing the scale of the project and the immediate area above, below and surrounding a reservoir.

Stat. Auth.: ORS 536.027, ORS 595 & [ORS 654](#)

Stats. Implemented: [ORS 537](#).141

Hist.: WRD 5-1994, f. & cert. ef. 4-13-94; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0014

690-340-0020

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Ponds in Existence Prior to January 1, 1993 (HB 2153, 1993)

(1) A landowner with an unpermitted reservoir constructed before January 1, 1993 may apply for a water right permit and continue the use of water while a decision is pending on the application. The water right application, if approved in accordance with OAR 690-011-0155 through 690-011-0185 (dated 4-13-94), will receive a priority date of January 1, 1993. In order to qualify for these benefits, an application must be filed on or before January 1, 1995. In addition to the information and fees required under OAR 690-011-0020 and 690-011-0040 (dated 4-13-94), an application shall also be accompanied by evidence that the reservoir existed before January 1, 1993. Such evidence may include:

(a) A dated aerial photograph which shows the immediate area above, below and surrounding the reservoir;

(b) An affidavit signed by the landowner or other knowledgeable person;

(c) A dated map prepared by a local, state or federal agency showing the location of the reservoir; or

(d) Construction receipts or other forms of documentation.

(2) Notwithstanding the requirements for a survey set forth in ORS 537.230, no survey of the appropriation is required for a reservoir storing less than 9.2 acre feet or with a dam less than ten feet in height. Maps submitted with the application shall be of sufficient quality and scale to establish the location of the reservoir to the nearest quarter-quarter section, township and range.

(3) Up to ten reservoirs may be included in a single application if the reservoirs existed prior to January 1, 1993; have dams that are less than ten feet in height or that store less than 9.2 acre-feet of water; are in the same drainage basin; and within the same ownership on contiguous property. For a rural fire protection district formed under ORS 478.010 or a forest protection district formed under [ORS 477.225](#), up to ten reservoirs may be included in a single application if all the reservoirs are within the boundaries of the district; are within the same drainage basin; and are an element of the district's fire protection system.

(4) A water right certificate under [ORS 537.250](#) may be issued in lieu of a permit if:

(a) The reservoir existed before January 1, 1993;

(b) The records of the Department provide satisfactory documentation to describe the location and volume of storage;

(c) Modifications or alterations to the impoundment structure are not required; and

(d) The Commission determines under section (1) of this rule that the reservoir would qualify for issuance of a permit.

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Stat. Auth.: ORS 536.027, ORS 595 & [ORS 654](#)

Stats. Implemented: ORS 595, Oregon Laws 1993, & [ORS 537.405](#) - ORS 537.409

Hist.: WRD 5-1994, f. & cert. ef. 4-13-94; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0041

690-340-0030

Limited License

(1) A request for a limited license shall be submitted on a form provided by the Water Resources Department, and shall be accompanied by the following:

(a) The fee for examination and recording, \$150 for the first point of diversion plus \$15 for each additional point of diversion; and

(b) A completed water availability statement from the local watermaster on forms provided by the department; and

(c) A site map of reproducible quality, drawn to a standard, even scale of not less than 2 inches = 1 mile, showing:

(A) The locations of all proposed points of diversion referenced by coordinates or by bearing and distance to the nearest established or projected public land survey corner;

(B) The general course of the source for the proposed use, if applicable;

(C) Other topographical features such as roads, streams, railroads, etc., which may be helpful in locating the diversion points in the field.

(2) The Director shall provide notice of the request to the public in the same manner as other water use applications, but may approve the license after 14 days from the date of mailing of the weekly public notice, upon a finding that the proposed water use will not impair or be detrimental to the public interest.

(3) Each limited license shall be limited to an area within a single drainage basin.

(4) Except for a licensee using water under a limited license issued in conjunction with an enforcement order, the licensee shall give notice to the watermaster in the district where use is to occur not less than 15 days or more than 60 days in advance of using the water under the limited license. The notice shall include the location of the diversion, the quantity of water to be diverted and the intended use and place of use.

(5) The licensee shall maintain a record of use, including the total number of hours of pumping, an estimate of the total quantity pumped, and the categories of beneficial use to which the water is applied. The record of use shall be submitted to the watermaster upon request.

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(6) The Director may revoke the right to use water for any reason described in ORS 537.143(2). Such revocation may be prompted by field regulatory activities or by any other reason.

(7) A limited license does not receive a priority date and is not protected under ORS 540.045.

Stat. Auth.: ORS 536.027, 595 & 654

Stats. Implemented: ORS 537.143 & 537.144

Hist.: WRD 6-1989(Temp), f. 9-29-89, cert. ef. 10-3-89; WRD 9-1989, f. & cert. ef. 11-20-89; WRD 16-1990, f. & cert. ef. 8-23-90; WRD 9-1992, f. & cert. ef. 7-1-92, Renumbered from 690-011-0082; WRD 5-1994, f. & cert. ef. 4-13-94; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0046; WRD 5-2004, f. & cert. ef. 6-15-04

690-340-0040

Registration of Water Use for Road Maintenance and Construction

(1) A request by a public agency to register water use for road and highway maintenance, construction and reconstruction shall be submitted on a form provided by the Water Resources Department and shall include at least the following:

- (a) The name and authorized agent of the public agency;
- (b) The address and telephone number of the agency's authorized agent;
- (c) If the source of water to be used for the agency's road maintenance or construction program:
 - (A) Is groundwater, attach copy of well log or description of the well;
 - (B) Is surface water, identify the name of the source and the stream, or river the source is tributary to.
- (d) The maximum amount of water to be used during the calendar year in gallons or acre-feet;
- (e) The maximum amount of water to be used during any 24-hour period in gallons or acre-feet;
- (f) A map indicating the location(s) of the point(s) of diversion of water to be used for road maintenance or construction (the map shall be of sufficient scale to establish the location(s) of the point(s) of diversion to the nearest quarter section, township and range);

Italicized text in brackets is proposed to be removed in the September 1, 2006 hearing draft: *[example]*

Bold text was proposed new text in the September 1, 2006 hearing draft: **example**

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Double strikethrough text in brackets [~~example~~] is proposed to be removed in the final proposed rules.

(g) A fee in the amount of \$300 (more than one point of diversion may be identified per registration); and

(h) If water is obtained from a well, conveyance or storage facility that has a perfected or certificated water right:

(A) Provide the permit or certificate number or the court decree identification of the right; and

(B) Written authorization from the owner of the right that allows use of water from the well, conveyance or storage facility.

(2) The registrant may use either a county road map or a Water Resources Department basin map to indicate the location(s) of point(s) of diversion. Counties may submit one registration for all uses within the county. State-wide public agencies shall submit one registration for each of the agencies administrative units. (the Oregon Department of Transportation shall submit one registration for each of its Regions within which road construction or maintenance water is to be used). Federal agencies with jurisdiction over roads/highways shall submit one registration for each of their administrative units.

(3) An Oregon Department of Fish and Wildlife "Requirements for Small Pump Screen", Self-Certification form shall accompany the registration form.

(4) As used in this rule, public agency means:

(a) The State of Oregon or any agency of the State of Oregon;

(b) A county or a special road district of a county;

(c) A city, town or incorporated municipality; and

(d) Any federal agency that has jurisdiction over a roadway in this state.

(5) The registration is subject to the following terms:

(a) Water use authorized by the registration shall not have priority over any existing water right;

(b) Water use authorized by the registration shall be subordinate to all future permitted or certificated water rights;

(c) Water use authorized under the registration shall not exceed 50,000 gallons from a single source during any 24-hour period;

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(d) The registration shall be valid until the public agency voluntarily withdraws the registration or the public agency fails to file the annual renewal statement as required under section (8) of this rule;

(e) No person may construct any dam, reservoir or other impoundment facility to divert water from within a designated scenic waterway;

(f) Under no circumstances may the registrant cause the water course to be dewatered to a degree that the live, continuous flow is obstructed;

(g) The department may require the public agency to cease diversion of water at any time the director has reason to believe use of water under the registration is causing a significant adverse impact upon:

(A) The affected watershed; or

(B) Any existing water right; and

(h) The registrant shall notify the watermaster for the district in which the water is to be diverted not fewer than 30 days nor more than 60 days prior to the date diversion under the registration is to be initiated. If the proposed diversion is within or above a designated scenic waterway, the registrant shall not withdraw water under the registration until the watermaster provides written findings that the proposed withdrawal will not interfere with the free-flowing character of the scenic waterway in quantities necessary for recreation, fish and wildlife uses.

(6) The registrant may authorize any person(s) to divert, transport or apply water under the registration; however, the registrant is responsible for the acts of such person(s) as authorized by the registration and these rules.

(7) The registrant shall provide copies of its registration form and map to the local office of the Oregon Department of Fish and Wildlife (ODFW) at least 30 days before water use under the registration is initiated. If sensitive, threatened or endangered aquatic species are present in the stream(s) proposed as a source(s) of water under the registration and such species may be adversely affected by withdrawal of water by the registrant, ODFW shall advise the watermaster to direct the registrant to withdraw water from an alternative location(s) or stream(s) wherein the proposed withdrawal will not cause significant adverse impact to the affected watershed.

(8) The public agency must submit an annual renewal statement on or before February 1 of each calendar year. The annual renewal statement shall be accompanied with a \$50 renewal fee and shall specify any change in:

(a) The registrant's map;

(b) The sources of water to be used;

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Double strikethrough text in brackets [~~example~~] is proposed to be removed in the final proposed rules.

(c) The maximum amount of water to be used during the calendar year or during any 24-hour period; and

(d) A map delineating any changes in the location(s) of point(s) of diversion.

Stat. Auth.: ORS 536.027

Statutes Implemented: [ORS 537.040](#)

Hist.: WRD 6-1995, f. & cert. ef. 6-10-94; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0047

[690-340-0050

Water Use Registrations for Wetland, Stream or Riparian Area Enhancement or Storm Water Management (HB 2107, 1993)

(1) Any person may apply to register a water use that would otherwise require a water right if the use is for a qualifying wetland, stream or riparian area enhancement or storm water management project. The registration process is an expedited process for obtaining a water right permit.

(2) Project Qualification Criteria:

(a) A proposed water use shall meet the following criteria to be considered for registration:

(A) The primary purpose of the proposed appropriation or impoundment of water must be for one or more of the following purposes:

(i) Wetland enhancement, except that groundwater may only be appropriated to maintain a wetland;

(ii) Stream or riparian area enhancement, including but not limited to:

(I) The construction of off-channel reservoirs, diversion or spring development to provide water for livestock and wildlife use outside of riparian areas in order to protect or enhance a riparian area; or

(II) Channel improvement or restoration that is hydraulically stable and enhances the biological conditions of the stream or riparian area; or

(iii) Management or treatment of storm water, including:

(I) Landscaping or channeling that directs run-off into small reservoirs, wetlands or treatment facilities; or

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(II) On-channel storm water treatment facilities that impound or slow water; and

(B) The project must be designed to result in one or more of the following benefits:

(i) Decreased pollutant loads to streams;

(ii) Reduced soil or bank erosion;

(iii) Reduced summer stream temperatures;

(iv) Improved riparian conditions;

(v) Improved habitat conditions for aquatic or terrestrial species;

(vi) Decreased peak or storm flows;

(vii) Increased storage capacity in the watershed

(viii) Increased streamflows during the low-flow season; or

(ix) Other wetland enhancement, stream or riparian area enhancement or storm water management benefits.

(b) If the project does not qualify according to the criteria described in this section, the proposed water use shall be processed in the same manner as a water use application under OAR Chapter 690, Division 310.

(3) Notices of Registration:

(a) A notice of registration for a water use for wetland, stream or riparian area enhancement or storm water management shall be submitted by an applicant on a form provided by the Department and shall be accompanied by the following:

(A) The information and fees required under OAR 690-310-0040, except as modified in paragraph (C) of this subsection;

(B) The name and address of each adjacent property owner and verification that each owner has been mailed a copy of the completed notice. For the purposes of this rule, "adjacent property owner" means any owner of property that shares a common boundary within 1/4 mile of a proposed project site;

(C) A map that meets the requirements of OAR 690-310-0050, with the following exceptions;

(i) The standard scale requirements shall be no less than 2 inches = 1 mile; and

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(ii) The map is required to be prepared by a certified water right examiner only when the notice of registration includes a reservoir with a proposed dam height greater than ten feet or proposed storage greater than 9.2 acre feet.

(D) A description of the proposed water use and related project, the condition the proposed project will address, and the benefits that are expected to result from the proposed project.

(b) One notice of registration may be submitted for up to ten reservoirs provided:

(A) Each reservoir stores less than 9.2 acre feet of water or includes a dam that is less than ten feet high;

(B) All of the reservoirs are located within the same drainage basin; and

(C) All of the reservoirs are located on contiguous property and are owned by the same party.

(c) The applicant is encouraged to submit copies of permits or endorsements, if any, which have been received from natural resource agencies, watershed councils, the Governor's Watershed Enhancement Board, or the Watershed Health Program.

(4) Injury to Existing Water Rights. The Department shall evaluate each notice of registration to determine whether the proposed water use would interfere with the exercise of an existing water right and the proposed use cannot be restricted so as to avoid causing injury to an existing water right.

(5) Injury to the Public Interest. The Department shall evaluate each notice of registration in accordance with OAR 690-310-0110 through 690-310-0140, as applicable.

(6) Project Benefits:

(a) In consultation with the agencies listed below, the Department shall determine if the proposed project is reasonably expected to result in wetland, stream or riparian area enhancement or storm water management benefits:

(A) The Oregon Department of Fish and Wildlife;

(B) The Oregon Department of Environmental Quality;

(C) The Oregon Department of Agriculture;

(D) The Oregon Division of State Lands;

(E) The Oregon Economic Development Department; and

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(F) Any other agency the Department considers appropriate.

(b) In order to determine if the proposed project is reasonably expected to result in wetland, stream or riparian area enhancement or storm water management benefits, the Department and consulting agencies shall consider if the proposed project is likely to result in one or more of the following benefits:

(A) Decreased pollutant loads to streams;

(B) Reduced soil or bank erosion;

(C) Reduced summer stream temperatures;

(D) Improved riparian conditions;

(E) Improved habitat conditions for aquatic or terrestrial species;

(F) Decreased peak or storm flows;

(G) Increased storage capacity in the water-shed;

(H) Increased stream flows during the low-flow season; or

(I) Other wetland enhancement, stream or riparian area enhancement or storm water management benefits.

(8) Public Notice and Comments:

(a) The Department shall include notice of registration applications for qualifying projects and a description of the proposed projects in its weekly notice described in OAR 690-310-0090;

(b) The public and state agencies shall have 30 days from the day the Department deposits the notice in the mail of the U.S. Postal Service to submit written comments.

(9) The Department shall issue a water use registration if:

(a) No written comments are received under section (8) of this rule that warrant further review, as determined by the Director;

(b) The proposed water use will not result in injury to existing water rights or the public interest, as determined under sections (4) and (6) of this rule;

(c) The Department has consulted with the agencies listed in section (7) of this rule and the project is reasonably expected to result in the wetland, stream or riparian area enhancement or storm water management benefits, as determined under section (6) of this rule; and

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(d) No issues are identified during the Department's review of the proposed water use that warrant further review, as determined by the Director.

(10) The Department shall mail a registration to the applicant and a copy of the registration to all individuals and agencies who have filed timely comments with the Department. In addition, any person may request a copy of a registration. The Department shall include notice of issuing a water use registration in the weekly notice described in OAR 690-310-0090. The notice shall include the date by which objections to the registration must be received.

(11) Objections:

(a) A 60-day objection period shall commence on the day the Department mails a registration to the applicant and other interested parties.

(b) If an objection is received that the Director determines warrants further review, the Director shall rescind the registration and the water use application process shall continue.

(c) If no objection is received that the Director determines warrants further review, the Department may presume that the registration is not opposed by any person or entity.

(12) Registration Denials. If the Director denies registration, the construction of facilities or use of water is prohibited until the applicant successfully completes the permit application process and a permit is issued.

Stat. Auth.: ORS 536.027, ORS 595 & [ORS 654](#)

Stats. Implemented: [ORS 537.017](#) to [ORS 537.032](#)

Hist.: WRD 5-1994, f. & cert. ef. 4-13-94; WRD 9-1994, f. & cert. ef. 8-11-94; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0049]

690-340-0060

Expedited review process for applications to use stored water exclusively

(1) In lieu of the application process described in OAR 690-310-0040, 690-310-0050, and 690-310-0070 through 690-310-0275, a person may apply for a permit to use stored surface water exclusively, to be evaluated through an expedited process. This process may not be used to apply for a permit to use water stored through an aquifer storage and recovery or artificial ground water recharge project under OAR Chapter 690, Division 350.

(2) In addition to the information, materials, and fees required by OAR 690-310-0040, a person applying under section (1) of this rule shall submit:

Italicized text in brackets is proposed to be removed in the September 1, 2006 hearing draft: [example]

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(a) A copy of the permit, certificate, or decree as evidence that the proposed use of the stored water is one of the authorized uses under the permit, certificate or decree that allows the storage of water; or

(b) If the storage is authorized under a permit or certificate, the permit or certificate number sufficient to allow the Department to determine that the proposed use of the stored water is one of the authorized uses under the permit or certificate that allows the storage of water; or

(c) If the storage is authorized under a decree, the name of the decree, the volume number, and the page number(s) of the decree sufficient to allow the Department to determine that the proposed use of the stored water is one of the authorized uses under the decree that allows the storage of water.

(3) Within 15 days after receiving an application, the Department shall determine whether the application contains the information required under section (2) of this rule and is complete and not defective, including the payment of all required fees. If the Department determines that the application is incomplete or defective or that all fees have not been paid, the Department shall return all fees and the application.

(4) Upon determining that an application contains the required information and is complete and not defective, the Department shall indorse on the application the date upon which the application was received for filing at the Department. The priority date for use of water not previously reserved under OAR Chapter 690, Division 79 shall be the date the application was received for filing by the Department.

(5) If an application is complete and not defective, the Department shall determine whether the proposed use is prohibited by any statute. If the proposed use is prohibited by statute, the Department shall reject the application and return all fees to the applicant with an explanation of the statutory prohibition.

(6) As soon as practicable after determining that an application is complete and not defective, that all fees have been paid, and the use is not prohibited by statute as prescribed in section (5) of this rule, the Department shall give public notice of the application in the weekly notice published by the Department.

(7) Within 30 days after the public notice prescribed in section (6) of this rule, any person may submit written comments to the Department. The 30-day comment period shall commence on the day the Department gives notice. All comments must be sent by facsimile, postmarked, or hand-delivered to the Department on or before the last day of the 30-day comment period, and shall identify:

(a) The specific public interest under ORS 537.170 (8) that would be affected by the proposed use, and

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(b) Specifically how the identified public interest would be affected.

(8) Following the end of the 30-day comment period, the Department may issue a final order and permit approving the application.

(9) If the Department determines public interest issues are raised pursuant to section (7) of this rule, the Department shall process the application as an application under ORS 537.150, and issue a proposed final order pursuant OAR 690-310-0150.

(10) At a minimum, a permit issued under subsection (8) of this rule shall be conditioned to require:

(a) Fish screens and by-pass devices and fish passage consistent with Oregon Department of Fish and Wildlife (ODFW) standards, unless the permittee submits written evidence that ODFW has determined that the devices are not necessary.

(b) A measuring device at each point of diversion authorized under the permit.

(10) Within 10 days of issuing a permit under subsection (8) of this rule, the Department shall:

(a) Provide notice of the issuance in the weekly notice published by the Department, and

(b) Send a copy of the permit to persons who have submitted comments pursuant to section (7) of this rule.

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September 26, 2006

Water Resources Department
Attn: Rule Coordinator
725 Summer Street, NE
Salem, OR 97301

Re: Division 310 & 340 Rulemaking, Expedited review for stored water applications

Dear Rules Coordinator,

Thank you for this opportunity to comment on the draft rules. WaterWatch is a nonprofit river conservation group that works to protect and restore streamflows statewide.

As we understand the intent of HB 2178, it was to allow the expedited review of applications that would pose a low likelihood of harm to existing users and public interest values of Oregon's water resources. WaterWatch did not oppose the bill as we understand the utility in allowing expedited review of applications that pose no risk to public interest values. Essentially, this is supposed to allow quick processing of "slam dunk" applications only. However, in reading over the draft rules it appears to us that a substantial omission in these draft rules is a provision to allow the WRD itself to determine that the application poses a risk to other water right holders and/or public interest values to the extent that it should be processed as a regular application. Instead, under the draft rules, only those applications that a third party comments upon can be elevated to the degree that they would require a full public interest review under the regular application processing statutes and rules.

Both common sense and a reasonable interpretation of statutory intent dictates that the WRD should retain the option to require an application to go through the regular application process if they themselves determine that the application raises some public interest issues. The WRD has a duty to protect both other water right holders and instream values, including scenic waterway flows, instream water rights, and fishery and stream values protected under the Oregon Plan. It cannot abdicate this duty through rule. Given such, the rules should be amended to retain the WRD's discretion to determine whether applications for secondary storage pose public interest issues to the degree that they should be processed as regular water rights.

Aside from this point we have no major concerns with the draft rules. We support the WRD's limitation of these rules to applications not including water stored through aquifer storage and recovery and/or artificial recharge projects. These types of storage projects are too complicated in nature to allow expedited processing.

Sincerely,

Kimberley Priestley

Oregon Agricultural Alliance
PO Box 4323
Portland, OR 97208
503-524-5174

2 October 2006

Attn: Rule Coordinator c/o Cory Engel
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1266

RE: Proposed Conceptual Amendment to OAR Chapter 690 Division 310

We address the process for two kinds of small reservoir applications: one process for "regular" small reservoirs and another for "expedited" small reservoirs.

Process for Some Regular Small Reservoir Applications

Until now, we would always recommend filing a regular small reservoir permit application. Years ago members of OAA were instrumental in gaining approval of a policy to encourage approval of small reservoir applications. The applicant must first file (1) a Reservoir Application, and then file (2) a secondary application for use of the water for Irrigation, Nursery or Agricultural Use. Once the application is filed and the fees paid, the department processes the application according to the "regular" application process – meaning that when the "proposed final order" is issued, the applicant, as well as all the government agencies notified of the application, may respond and lobby the department on their own behalf, short of filing a legally binding "appeal." An example of something the applicant may want to dispute short of appeal is the common practice of the Fish & Wildlife Department to require fish screens and "measuring devices" for reservoirs on streams which do not have fish, and/or which never had fish. With regular reservoir applications, the applicant may argue with Fish & Wildlife short of filing a protest, which is legally binding.

Process for Expedited Applications

WRD "expedites" the processing of reservoir permits by eliminating the applicant's ability to object to Fish & Wildlife's proposed conditions (fish screens/measuring devices on drainages, etc.) prior to the appeal phase. By that time, the department is committed to a certain position on the water right. If the applicant presses the appeal, and prevails, the department has spent much time and effort to lose. If the department prevails, the applicant, in some cases, has had to install structures there is no need for.

Impact of the Proposed Rules (hearing draft)

The proposed rules would eliminate the applicant's ability to head off appeals of WRD proposals to condition reservoir water rights before appeal for expedited reservoir application review, while at the same time, lengthening to a year or more the time needed for the department to approve some regular reservoir permit applications.

Which Reservoir Apps Will be Affected?

Most small reservoir applications would be impacted. Reservoir apps where the reservoir is filled by off stream uplands runoff might be affected. Now, Fish & Wildlife review is sometimes conducted without any factual support for the presence of fish resources in or near streams or drainages to be impounded. We have observed cases where Fish & Wildlife officials recommend conditions for approval of reservoir applications that fish screens be inserted into spillways of dams impounding water

from upland runoff into drainage ditches where no fish has ever been observed. We have observed Fish & Wildlife withdraw their finding that fish are in the stream after the department has already conditioned the reservoir applicant's water right to requiring fish screens!

Impact on BOR Contracts for Stored Water

More troubling to us are the impacts of this proposed rule on so-called "non-live flow" surface water applications to use water from Bureau of Reclamation (BOR) reservoirs. This is extremely important in the Willamette Valley because, in most areas, surface water rights from the Willamette River cannot be obtained. Even in these areas, however, it has been the practice of WRD to receive applications for "non-live flow" use of water stored in BOR reservoirs. While farmers have not been able to obtain surface water rights from the Willamette River for many years, they *have* been able to get contracts from BOR to use water stored in BOR reservoirs like Fall Creek, Dorena, or Detroit.

The way this has been done in the past is to (1) apply to WRD for a "non-live-flow" surface water right to use water under BOR contract from a BOR reservoir upstream on the Willamette, then (2) send a copy of the application along with a an application for a contract to BOR in Boise to apply for the contract water. The farmer would then get a contract, pay so much per acre foot of water each year, and irrigate with it. This is the only way a farmer can obtain a new surface water right from a point of diversion on the Willamette River.

The proposed amendments to the reservoir permit rules would have the effect of delaying approval of regular reservoir permits for a year or more, and allowing expedited reservoir permits to move forward, but only with the applicant's ability to refute Fish & Wildlife's findings at the appeal stage of permit processing.

***OAA Proposes Amendments to
The Hearing Draft***

OAA asks the Commission to amend the proposed new rule to allow regular reservoir permit applicants to submit evidence of a BOR contract (agreement) *at any time* during the WRD application process. There is no need for WRD to require a completed contract before it receives a regular reservoir application for non-live-flow surface water, when the rules allow expedited reservoir applicants to submit contracts at any time. To do otherwise would result in the impossible dilemma of the applicant being required to submit a copy of a non-live-flow surface water permit application (to establish a POD) as a pre-condition to getting a BOR contract, and at the same time requiring that a BOR contract be a pre-condition of WRD accepting an application for the non-live-flow surface water permit.

Thank you for your consideration.

Respectfully submitted,

Scott Ashcom
Executive Director