



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Kyle Gorman, South Central Region Manager

SUBJECT: Agenda Item E, February 25, 2009
Water Resources Commission Work Session

Deschutes Basin Ground Water Mitigation Program: House Bill 3494 Report

I. Issue Statement

This report provides an update on the Department's review of the Deschutes Ground Water Mitigation Program as required under House Bill 3494 (2005 Oregon Laws). This is informational only. No Commission action is requested.

II. Background

The Commission adopted the Deschutes Ground Water Mitigation Rules (OAR Chapter 690, Division 505) and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules (OAR Chapter 690, Division 521) in September 2002. The rules implement Senate Bill 1033 (1995, Legislative Assembly) codified as ORS 390.835 to provide for mitigation of impacts to scenic waterway flows and senior water rights, while allowing additional qualifying appropriations of ground water within the Deschutes Ground Water Study Area (OAR 690-505-0600).

House Bill 3494 (Chapter 669, 2005 Oregon Laws) directs the Department to report to the 75th Legislative Assembly, no later than January 31, 2009, on the implementation and operation of the Deschutes River Basin Ground Water Mitigation and Mitigation Bank Programs.

The 2005 Act requires that the report include a summary of:

- The cumulative rate of water appropriated under all ground water permits approved in the Deschutes River Basin after the effective date of the 2005 Act;
- The volume of water, in acre-feet, provided for mitigation; and
- The measured stream flow of the Deschutes River and its major tributaries.

The report may also include information on the progress on restoring streamflows in the Deschutes River Basin to support anadromous fish and any statutory changes needed to accomplish needed streamflow restoration.

To assist with development of the report, in May 2008 the Department convened the Deschutes Group (Group), a broad range of water users and organizations with on-the-ground experience and

an interest in water use in the Basin. This group was convened to review the implementation and operation of the Program. This review included identifying and discussing successful elements of the existing Program, opportunities to improve the Program in the future, and legislative or rule changes necessary to implement these improvements. The Group met four times over five months. In addition, subcommittees met between meetings to “frame” issues for discussion with the broader Group at each meeting. On December 10, 2008, the Department also hosted a public meeting in Bend to present the results of the draft report.

III. Discussion

A copy of the full HB 3494 Report is provided as an attachment and is available on the Department’s website. Overall, the Department’s review of the program suggests that the program has been successful in meeting its key goals: (1) to maintain flows for the Deschutes Scenic Waterway and instream water rights; (2) to facilitate restoration of flows in the middle reach of the Deschutes River below Bend; and (3) to accommodate growth through new ground water development.

Since implementation of the program, the Department has issued new ground water permits while mitigating impacts to scenic waterway flows and instream water rights. In each year that the program has been in place, sufficient mitigation has been available to meet the needs of new ground water permits. And, the amount of mitigation available, overall, has increased annually. Through mitigation, scenic waterway and instream water right flows have been maintained and, in some areas, have been improved. The benefits of the program have been significant in some areas, such as the flows restored in the Deschutes River below Bend. Overall, as a result of the program, more than 39 cubic feet per second of instream flow has been restored to the Deschutes River and its tributaries.

The mitigation program is working well but, like all regulatory programs, has room for improvement. The Deschutes Group identified a variety of opportunities to keep improving the program through rulemaking and by making new investments in the science that guides the program. Because of limited time, the Group focused their discussions on the following six issue areas:

- The zones of impact in which mitigation is provided;
- What is counted under the 200 cfs allocation cap on new ground water uses in the Deschutes Basin;
- Offset of impacts on surface water flows resulting in reduced mitigation requirements and incremental mitigation provided by municipal and quasi-municipal ground water permit holders;
- Potential water quality impacts of the mitigation program;
- Non-irrigation season mitigation and;
- Water right permits that were issued prior to rule adoption with a condition on their use to allow regulation to protect scenic waterway flows (called “7(j) conditioned water right permits”).

The following is a brief summary of each issue area and any consensus recommendations developed by the Group:

Zones of Impact

Issue Statement: Some stakeholders are concerned about OWRD requiring mitigation only in the “primary” zone of impact when groundwater pumping may impact more than one zone of impact.

Recommendation: Recommend that the Department improve their analytical tools to be able to better assess the zones of impact.

What is Counted Under the 200 cfs Allocation Cap

Issue Statement: A requirement to count all final orders issued under the mitigation rules (even those with zero mitigation obligation, non-consumptive, and offset) appears to be an unintended consequence of the current rules. The issue is whether zero mitigation obligation or non-consumptive uses, such as a closed loop heat exchange, or permits issued under an offset, should be counted under the 200 cfs cap.

Recommendation: Water allocated under the 200 cfs cap should be restored to the cap if the amount of water use authorized in the permit or final certificate is less than the amount originally approved in the final order.

Offset and Incremental Mitigation

Issue Statement: The mitigation rules allow municipal or quasi-municipal permit holders to meet a mitigation obligation by incrementally obtaining and providing mitigation using a combination of current and future instream leases, permanent instream transfers and the purchase of mitigation credits to satisfy the required mitigation over time. However, as currently written, the incremental mitigation rules do not cross-reference the offset provision, and therefore the rules currently do not allow for the use of “offset” as part of an incremental mitigation plan.

Recommendation: The rules should be modified so that the use of an offset as defined under the current rules would not be counted under the cap.

Recommendation: Recommend that the Mitigation Rules be modified so that offsets, as defined under the current rules, can be used in an incremental mitigation plan.

Water Quality

Issue Statement: Springs and ground water inflow to surface water have an impact on water quality, including temperature. However, the current mitigation program addresses only the water quantity impacts of proposed new ground water uses. In addition, there is no current process for tracking or addressing the potential cumulative impacts on water quality of the mitigation program in combination with other programs in the basin. The key issue is whether there may be a "tipping point" where reduced spring and ground water inflow resulting from all water programs will cumulatively have a negative impact on water quality in the future.

Recommendation: No recommendation was reached by the Group on water quality; however, the group did agree that more work is needed to address water quality in the context of an integrated water management plan for the Deschutes Basin. The group also agreed to continue discussions about water quality and the need for an integrated water management plan.

Non-Irrigation Season Mitigation

Issue Statement: Under the Deschutes Mitigation Rules, mitigation is calculated on the basis of the annual volume of consumptive use, rather than on a cubic foot per second basis. While the annualized volumetric approach in the rules addresses the volume of consumptive use, the rules do not address OWRD's estimate that ground water pumping impacts are uniformly distributed over all months of the year. Thus far, all mitigation water has been returned to the system during the irrigation season. While the additional flow to the system during the summer months is a positive effect, some have raised concerns about ground water pumping impacts on streamflow during the non-irrigation season.

Recommendation: While no consensus agreement could be reached, the group agreed that this issue should be addressed in a broader planning process. The group agreed to continue a dialogue about this issue beyond the forum convened for this report.

7(j) Conditioned Permits

Issue Statement: The term "7(j)" refers to a condition required by statute to be included in certain water right permits and certificates in the Deschutes Basin that were issued during the time period after Senate Bill 1033 was enacted in 1995 (amending the Scenic Waterway Act), but before the initial ground water study results were available in 1998. In the absence of technical information to determine whether a proposed use would "measurably reduce" scenic waterway flows, the statute allowed a new ground water permit to be issued with the condition that provided the ground water use could be regulated in the future if analysis of data available after permit issuance discloses the use will measurably reduce the protected scenic waterway flows. Between 1995 and 1998, the Department issued 187

permits with this condition. Studies completed in 2001 show a connection between ground water and surface water and, as a result, all new ground water right permits are now required to mitigate for the impacts of their use under the rules. The issue is whether the 7(j) condition has been triggered and, if so, how it should be implemented.

Recommendation: No consensus could be reached on this issue.

IV. Summary

The Department's review of the Deschutes Ground Water Mitigation Program suggests that the Program is meeting its overall goals. The Deschutes Group was able to identify a number of consensus recommendations for improving the program and also for addressing basin-wide, long term water management issues. At this time, the Department is interested in pursuing the recommendations for improving the program through rulemaking and will be pursuing the formation of a rules advisory committee to assist with that rulemaking. Commissioner Meloy and members of the Deschutes Group met to develop strategies to pursue the Group's recommendations related to basin-wide water management efforts.

Attachments:

Deschutes Ground Water Mitigation Program: House Bill 3494 Report

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