



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Debbie Colbert, Field Services Division Administrator
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SUBJECT: Agenda Item K, June 10, 2009
Water Resources Commission Meeting

Informational Report on 2008 Field Regulation and Enforcement Activities

I. Issue Statement

This is an informational report on Department field regulation and enforcement activities for 2008. *This is an informational report only; no Commission action is required.*

II. Background

A. Field and Enforcement Structure and Duties

Watermasters have the responsibility for ensuring the distribution of water according to the system of prior appropriation. The Department's 20 watermasters are housed in five regional offices and in 15 satellite offices located throughout the state. Attachment 1 is a list of Department watermasters and their locations. In addition to watermasters, the Department relies on locally-funded assistant watermasters that are located in field offices throughout the state. These assistants work with the watermaster and are typically compensated through county budgets, grants, or contracts. In 2008 there were 10 locally-funded assistant watermasters. This is a significant decrease from a high of 37 locally-funded assistants in 1981. To offset some of these staffing declines, five new assistant watermaster positions were included in the Department's 2007-09 budget with one assigned in each of the five regions of the Department.

In addition to watermasters and assistants, field offices house staff such as well inspectors, water right inspectors, water right specialists, hydrographers, hydrologists, and hydrogeologists. Day-to-day actions are carried out by field staff whose activities include:

- Surface and ground water regulation
- Customer service and public outreach
- Stream gaging and measurements
- Implementation of Oregon Plan measures

- Investigation and referral of formal enforcement activities
- Preparation of hydrographic records
- Dam safety inspections
- Well construction compliance and enforcement activities
- Final proof surveys, mapping and proposed certificate preparation
- Field assistance to other Department divisions
- Water right transfer application processing

These day-to-day field activities involve working with water users to ensure compliance with the terms and conditions of their water rights, and to ensure water is being used as efficiently and effectively as situations allow. While many of these activities fall under the definition of enforcement, they typically fall short of formal remedies such as civil penalties.

The Well Construction and Compliance Section Manager is responsible for enforcement policy development, carrying out formal enforcement actions, negotiating resolutions, and maintaining statewide program consistency. When voluntary compliance in the field fails, regulatory actions are subsequently referred to the Well Construction and Compliance Section Manager for formal enforcement action. Well construction deficiencies are also referred to the Well Construction and Compliance Section for formal enforcement action. Formal enforcement is initiated by the issuance of a proposed order and may include suspension of a well constructor's license or assessment of civil penalties. Generally, most formal enforcement actions are settled before the case is referred to the Office of Administrative Hearings. In 2001, the Well Construction and Compliance Section Manager assumed responsibility for involuntary water right cancellations. Staff in the Well Construction and Compliance Section includes a Well Construction Program Coordinator who oversees the well inspection program, including maintaining continuity among the regional well inspectors, and interpretation of the administrative rules governing well construction. The section also includes one Well Licensing Program Specialist who conducts classes and oversees the Continuing Education Program for well constructors, a Well Log Review Support Position, and a Well Identification Tag Program and Start Card Support Position.

B. Enforcement Priorities

Watermasters and field staff often have more work than they can accomplish. To address this problem, the Department developed "Internal Management Directives for Establishing Enforcement Priorities" to assist staff in setting priorities for enforcement actions. A copy of the directive is included as Attachment 2. The directive includes some of the factors field staff use when they prioritize enforcement activities. The directive has been in use for several years and is an effective tool for prioritizing field work.

The goal of field staff is to engage in proactive water management rather than relying solely on a complaint-driven process. Water users are more likely to voluntarily comply when they are knowledgeable about their rights and responsibilities, and when users and field staff know what to expect from each other. Time saved by not having to respond to complaints, known violations, and other high priority assignments can be used for public education activities.

C. Surface Water Regulation

Regulation, or distribution of surface water, is the initial phase of enforcement and can be triggered in a variety of ways. Watermasters regularly survey streams within their districts with instream water rights or minimum streamflows. If streamflow is not adequate to meet the instream need, or if other entities lodge complaints to the watermaster, the watermaster begins an investigation and takes appropriate actions, such as curtailing or shutting off the diversion of junior users. Only in unusual cases, when voluntary compliance with the watermaster's request is not achieved, do formal phases of enforcement begin.

Water is distributed in the order of the relative priority date of the various water users, regardless of the type of beneficial uses involved. The oldest rights get the water first unless the right is specifically subordinated to junior users, as in the case of some rights to use water for hydroelectric power. The type of use becomes important only when conflicting uses have the same priority date. In this case, a domestic use would have preference to all others, and an agricultural use would have preference to a manufacturing use (ORS 540.140).

Watermasters do not begin regulation until streamflow has been measured and legal rights of the users are known. On stream systems where annual regulation occurs, watermasters prepare distribution maps showing the location of the rights, priority date, and other necessary information. This may involve several hours or days of effort depending on the volume of rights in the area. In some districts, the watermaster has a database of water right information and is able to generate "distribution letters" requesting that junior users curtail their diversions.

Historically, unauthorized uses of water discovered during this process are addressed first. In addition to uses without a water right, illegal uses include exceeding the limit of a right or violating a condition of a right, such as having an unauthorized point of diversion. If eliminating illegal use does not provide the water to satisfy senior water rights, the watermaster will require junior right holders to reduce or discontinue their use until this goal is met. If no junior rights exist, or if these actions do not provide the necessary additional water, the watermaster will advise the affected user of the situation.

During regulation, watermasters often negotiate voluntary reductions, rotations, or compliance schedules with water users. Often senior right holders volunteer to use less than their entitlement so that junior users are not completely shut off. In a rotation, groups of users agree to pool their rights so each participant may receive the amount of water "...to which they are collectively entitled" (OAR 690-250-0080). The flow is shifted to each user in the rotation in time proportional to each user's fraction of the collective water rights.

The most critical element in assuring regulatory success is the trust users have in the watermaster's knowledge, consistency, and integrity. When a high level of trust is attained, the amount of time spent by the watermaster on a particular stream is minimized, and voluntary compliance tends to be the norm. Where the watermaster is involved annually in regulating a particular stream system, both the watermaster and the users are well aware of existing water rights and generally know what to expect from each other.

D. Regulation of Well Construction

Regulation of well construction can be initiated several ways. Generally, the process begins with receipt of a “Notice of Beginning of Well Construction” known as the “Start Card.” After the start card is received by the Department, the well inspector or watermaster may make a site visit. Field staff attempt to inspect at least 25 percent of all new wells. Well inspections may also be initiated by complaints or inquiries from the public, or an investigation by the well inspector. Well inspectors work closely with drillers to informally resolve problems and protect ground water.

III. Discussion

A. 2008 Surface Water Regulation

The Department’s definition of a regulatory action includes “any action that causes a change in use or maintenance or a field inspection that confirms that no change is needed to comply with the water right, statute or order of the Department.” This definition attempts to reflect the broad spectrum of activities conducted by field staff.

In 2008, watermasters and their assistants regulated 411 stream systems, up from 391 in 2007. Regulation on the 411 streams was prompted by the watermaster’s own investigation in 309 cases and by complaints in 225 cases. Actions were taken to protect instream rights in 193 cases, to protect other senior rights in 168 cases, and to stop un-permitted use in 173 cases. Attachment 3 provides a detailed report from field staff.

Watermasters reported a total of 10,918 regulatory actions in 2008, compared to 13,100 in 2007. Of these 10,918 regulatory actions, 3,230 involved written notices, compared to 3,408 written notices in 2007. Efforts range from one action on many streams to a high of 1,315 actions on the Umatilla River tributary to the Columbia River. There is some variation in the total regulatory actions among the regions. The high was 5,181 for the North Central Region, and the low was 699 for the South West Region. Differences among regions can be attributed to the number of irrigation districts instead of individual users; the number of water management schemes such as rotation agreements, exchanges, and stored water delivery; the length of regulation season; water availability; and number of points of diversion. The category of “earliest priority regulated” reflects the priority date of the oldest water right in each river system that the watermaster regulated to a diversion rate less than the maximum legal limit. In 2008, statewide, the earliest priority date regulated was 1854 on Neil Creek, tributary to Bear Creek in the Rogue Basin, South West Region.

In 2008, statewide, compliance with water rights and regulations was approximately 94 percent, compared to approximate 97 percent in 2007. Attachment 4 provides a regional and watermaster district breakdown of compliance rates for 2008.

In addition to their regulatory efforts, watermasters continue to provide on-the-ground support for the Oregon Plan for Salmon and Watersheds. In recent years, these efforts have focused on

implementing the Commission's Water Measurement Strategy to increase measurement of significant diversions in high priority watersheds. Our goal in 2008 was to bring those diversions that are required to measure as a condition of their permit into compliance with those conditions. Of the approximately 250 diversions with conditions, nine diversions are still out of compliance or are not on an approved work plan toward compliance. Watermasters will continue to seek voluntary compliance for these diversions, where possible. Where voluntary compliance cannot be achieved, watermasters will be regulating those diversions or issuing notices of violation with possible assessment of civil penalties.

B. 2008 Well Program Activity

Well reports, or "logs," are physical descriptions of well construction, alteration, abandonment, conversion, or deepening. In 2008, the Department received 5,699 water supply and monitoring well reports. Of these, 1,344 were monitoring wells and 4,355 were water supply wells. The Department received 9,067 geotechnical hole reports. A geotechnical hole is a cased or uncased, permanent or temporary (less than 72 hours) "hole" constructed for the purpose of evaluating subsurface data or information.

In 2008, 4,109 start cards were received for wells requiring a fee. Of that number, 725 were monitoring wells and 3,384 were water supply wells. The regional well inspectors and field staff performed a total of 2,427 well inspections. Of that number, 1,781 inspections were conducted on new construction, representing an inspection rate of 44 percent of all new wells. Of the new wells inspected, 42 percent were water supply wells and 47 percent were monitoring wells. About 4 percent of the new wells inspected were deficient and required repairs. Attachment 5 shows the data for logs received and well inspections performed during 2008.

C. Formal Enforcement Activity

Many of the Department's regulatory actions are resolved upon notice to the responsible party. If compliance is not achieved at this level the watermaster may issue a Notice of Violation. This written notice specifies the nature of the violation, time frames within which compliance is expected, and the consequences for failure to comply voluntarily.

If compliance is not achieved following the Notice of Violation, the matter is referred through the Region Manager to the Well Construction and Compliance Section Manager for a formal enforcement action. If the Department determines there is sufficient evidence to pursue the matter, a proposed order is issued, which may include assessment of civil penalties. The violator has a specified period to request a contested case hearing. If no hearing is requested, a final order is issued and enforced. Attachment 2 includes a simplified flow chart of the enforcement process.

At any point in the process, the responsible party may choose to comply. Of the 10,918 regulatory actions taken in 2008, it is significant that only eight Notices of Violation were issued by field staff, indicating that a very high degree of compliance is achieved voluntarily. In addition to the eight Notices of Violation sent by field staff in 2008, the Well Construction and Compliance Section Manager issued one formal enforcement order related to water rights,

resulting in a civil penalty in the amount of \$1,500. Attachment 6 lists the formal enforcement for 2008.

Following issuance of a final order, the Well Construction and Compliance Section Manager issues a press release to the media in the local area. Staff believes this is an effective deterrent to repeated violations and increases public awareness of our rules and activities.

Staff believes it is critical for the Department to maintain a firm, consistent, and fair posture on water law and well construction violations. This minimizes the number of formal enforcements and allows staff to be as efficient as possible in enforcing the water laws in the field.

IV. Conclusion

This report is provided to the Commission as an informational item.

Attachments:

1. List of Watermasters by District
2. Internal Management Directives for Establishing Enforcement Priorities
3. 2008 Surface Water Summary
4. 2008 Compliance Rate Summary by Watermaster District and Region
5. 2008 Well Construction and Inspection Summary
6. 2008 Formal Enforcement

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