



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

725 Summer Street NE, Suite A

Salem, OR 97301-1271

503-986-0900

FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item I, June 4, 2010
Water Resources Commission Meeting

Request for Adoption of Deschutes Basin Water Management Rules, OAR Chapter 690, Division 522, to operate in conjunction with the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505, and Deschutes Basin Mitigation Bank and Mitigation Credit Rules, OAR Chapter 690, Division 521

I. Issue Statement

The Commission is asked to adopt OAR Chapter 690, Division 522 rules, which are intended to operate in conjunction with the Deschutes Ground Water Mitigation Rules in OAR Chapter 690, Division 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Chapter 690, Division 521. The proposed rules are intended to provide additional flexibility and clarity to the Deschutes Ground Water Mitigation Program. They would change how the Department counts new ground water permit applications under the allocation cap and would allow unused mitigation credits to be reassigned. The proposed rules also clarify how municipal and quasi-municipal permit holders provide mitigation under incremental development plans and also allow them additional flexibility to use “offsets” to move mitigation credits between permits. The final proposed rules are provided in Attachment 1.

II. Background

In the Deschutes Basin above Lake Billy Chinook, mitigation must be provided prior to new ground water permits being issued. The Deschutes Ground Water Mitigation Rules (Division 505, Section 0500 through Section 0630) and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules (Division 521) provide a set of tools that applicants can use to establish mitigation and thereby obtain new ground water permits from the Department. The Mitigation Program Rules were affirmed under House Bill 3494 (Chapter 669, 2005 Oregon Laws). House Bill 3494 (Chapter 669, 2005 Oregon Laws) directed the Department to report to the 75th Legislative Assembly on the implementation and operation of the Deschutes River Basin Ground Water Mitigation and Mitigation Bank Program. To assist with the development of that report, the Department convened the Deschutes Work Group, which was made up of a broad range of water users and organizations with an interest in water use in the Basin. Along with other

recommendations, the Deschutes Work Group identified a few initial opportunities to help improve the program through rulemaking. A report incorporating these recommendations was provided to the Legislative Assembly in January 2009, and a copy of this report is provided in Attachment 2. Following the conclusion of the HB 3494 Deschutes Work Group process, the Department committed to move forward with rulemaking on the few items the Work Group agreed could help improve the program. Other recommendations of the Deschutes Work Group may be addressed through a larger basin water management planning effort.

In accordance with OAR 690-505-0500, the amount of new groundwater use that can be authorized in the Deschutes Ground Water Study Area under the mitigation program is limited to a cumulative total of 200 cubic feet per second (an allocation cap). Currently, once a Final Order and/or permit are issued, the rate of use approved is deducted from the allocation cap. The rules do not provide a mechanism to restore the rate associated with a groundwater use to the allocation cap if the use is reduced, withdrawn or cancelled after the Final order and/or Permit are issued. The Deschutes Work Group identified that the rules may have unintended consequences by not being able to restore unallocated water to the allocation cap and recommended restoration of water to the cap in cases where the rate of use is permanently reduced after the Final Order is issued.

The Department has also identified additional circumstances under which water originally allocated under the cap may become available. For example, to date, three permits have been cancelled, three applications have been withdrawn after the Final Order was issued, and three Final Orders have expired without mitigation being provided. These uses, total approximately 1 cubic foot per second, which is still deducted from the allocation cap.

The Deschutes Work Group also recommended that the rate associated with the portion of a new groundwater use, "offset" by the cancellation of an existing groundwater use, not be debited under the allocation cap. Under the current rules, an existing groundwater right may be cancelled to "offset" the impacts on surface water flows of a new groundwater use. The concept is to substitute an existing groundwater right, which is cancelled, for a new use with no increase in impacts on surface water flows.

In addition, the Deschutes Work Group recommended that municipal and quasi-municipal permit holders should be allowed to include the use of "offsets" as part of their incremental development plans. Under the Mitigation Rules, municipal and quasi-municipal permit holders are allowed to satisfy their mitigation requirements by providing mitigation consistent with an incremental development plan. The incremental development plan allows them to provide mitigation over time as the groundwater use is developed. Presently, an "offset" may not be used as a tool for mitigation under an incremental development plan once the permit has been issued.

The Mitigation Rules require that the cancellation of an existing groundwater use to "offset" the impacts of a new use occur prior to the new ground water permit being issued. For most permits, this approach is consistent with the requirement that mitigation also be provided in advance of a permit being issued. However, as noted above, municipal and quasi-municipal permit holders

are allowed to develop their mitigation sources over time consistent with an incremental development plan once the permit has been issued.

III. Discussion

Prior to convening the RAC, Department staff developed a draft set of rules that represent select areas where the House Bill 3494 Deschutes Work Group reached consensus. Based upon consultation with the Attorney General's office, the Department developed the draft rules as a new division, Division 522.

On November 3, 2009, the Department convened a Rule Advisory Committee (RAC) to assist the Department in reviewing the proposed Division 522 rules. A list of RAC members is provided in Attachment 3. The same organizations that participated in the Deschutes Work Group also participated in the RAC.

At the RAC meeting, the Department raised, for consideration by the RAC, a recommendation to include additional provisions in the draft rules to address the validity and reassignment of mitigation credits. While this was not an original recommendation of the HB 3494 Work Group, Department staff identified this as an area under the mitigation program that could use some improvement. Presently, under the Deschutes Mitigation Bank and Mitigation Credit Rules (Division 521), mitigation credits are considered used and no longer available once assigned to a groundwater application or permit. There is no mechanism under the rules to reassign credits when an application is withdrawn, the groundwater use is reduced, or if the permit, or subsequent certificate, is cancelled.

During RAC discussions, additional provisions were also suggested, one recommendation was to include a provision to clarify how municipal and quasi-municipal permit holders may grow into each stage of development identified in an incremental development plan. Under the current rules, the Department has identified that mitigation needs to be provided in advance of each stage of development. The provision would allow mitigation to be provided within each stage to coincide with development of the ground water use. The Department also suggested an additional provision to require that annual reporting under these permits include the volume of water use and identification of the source of mitigation and/or "offset."

A second recommended change was to include a provision to allow municipal and quasi-municipal permit holders that have more than one permit to be able to reassign (trade) mitigation credits between permits. Both of the proposed changes are included in the draft rules.

Notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available December 31, 2009.

The proposed rules were presented to the Ground Water Advisory Committee (GWAC) on January 29, 2010. GWAC members did not express any objections to the proposed rules.

The Department held a public rulemaking hearing in Bend on February 3, 2010. No testimony was provided at the public rulemaking hearing. The public comment period closed on February 19, 2010. One written comment in favor of the proposed rules was received from Central Oregon Cities Organization and is provided in Attachment 4.

Presently, 123 cfs has been deducted from the 200 cfs allocation cap for Final Orders and new permits issued under the Mitigation Program, leaving a balance of 77 cfs. Modifications made to the groundwater use after the Final Order and/or permit have been issued total just over 1 cfs. While, at this time, this is a small amount, there is another 74 cfs of applications pending that still have not been deducted from the allocation cap.

The proposed rules adjust how permits and final orders, issued under the Deschutes Mitigation Program, are deducted from the 200 CFS allocation cap. Water would be credited back to the allocation cap in instances where an application is withdrawn or modified after the final order is issued or when the final order expires. The Department would also be able to restore to the allocation cap the rate associated with the cancellation (in part or in full) of a permit or subsequent certificate. In addition, the Department would also no longer be required to debit from the allocation cap the rate associated with the portion of a proposed use that is "offset" by the cancellation of an existing ground water use.

The proposed rules also provide greater flexibility to municipal and quasi-municipal permit holders by allowing them to "grow" into each stage of development described in the incremental development plan on file with the Department provided the use is not increased without providing the corresponding mitigation. Applicants would also be required to report annually on the volume of water used and the source of mitigation.

In addition, municipal and quasi-municipal permit holders would be able to include "offsets" as part of their incremental development plans. Currently, if applicants want to use an offset, being cancellation of an existing groundwater right in favor of a new one, this needs to be done before a permit may be issued. The proposed modification would allow applicants with incremental development plans to incorporate offset as part of their overall plan.

Finally, the proposed rules provide for reassignment of mitigation credits that may no longer be needed for a proposed or existing use authorized under the Mitigation Rules. Presently credits are used and no longer available once assigned to a groundwater use. Mitigation credits are generally purchased by groundwater users for assignment to their particular groundwater application and/or permit. The proposed change would allow mitigation credits to be re-assigned if the groundwater use to which they were originally assigned goes away or is reduced. In addition, the proposed change would allow holders of municipal or quasi-municipal permits to swap credits between permits provided that the mitigation requirements are consistent. This would allow greater flexibility to the assignment and use of mitigation credits purchased by groundwater applicants and permit holders.

IV. Summary

The final proposed rules in Attachment 1 (Deschutes Basin Water Management, OAR Chapter 690, Division 522) clarify the accounting and mitigation requirements for the Department and new permit holders and are consistent with the State's goal of reducing the fiscal impact of regulations.

The final proposed rules fit within staff capabilities.

V. Alternatives

The Commission may consider the following alternative actions:

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

VI. Recommendation

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

Attachments:

1. Final Proposed Rules
2. HB 3494 Legislative Assembly Report
3. Rule Advisory Committee
4. Written Comments Received
5. Summary of Changes to existing Mitigation Rules