

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item C, May 20, 2004
Water Resources Commission Meeting

Request for Amendment of OAR Chapter 690, Division 14

I. Issue Statement

The Commission is asked to amend rules relating to Certified Water Rights Examiners and the submittal of Claims of Beneficial Use (OAR Chapter 690, Division 14). The Final Proposed Rules in Attachment 1 would achieve consistency with current statutes; update statutory and rule references; modify various definitions; add and clarify the information required in the Claim of Beneficial Use report; establish a provision for waiver of reporting and mapping standards; and make various housekeeping changes.

II. Background

The Commission's rules under OAR Chapter 690, Division 14, provide guidance regarding the certification of Certified Water Rights Examiners (CWREs). The rules also establish the criteria and standards for conducting surveys of water appropriations and the preparation of reports and maps required to describe the extent of beneficial use under a water right. Generally, Claim of Beneficial Use reports and maps, and transfer application maps must be prepared by a CWRE. The group of individuals qualified to become a CWRE include registered professional surveyors, engineers, and geologists (ORS 537.979). Currently, there are approximately 470 CWREs. Approximately 100 CWREs have submitted a Claim of Beneficial Use to the Department within the last year.

The Commission's Division 14 rules have not been updated since their initial adoption in 1988. Since 1988, numerous statutory changes have occurred which require the amendment of the Division 14 rules. For example, in 1995, ORS 537.797 was amended to include registered professional geologists on the list of individuals qualified to become a CWRE. In 1999, ORS 537.230 was amended to remove the one-year time limit for the beginning of construction of a project.

Since 1988, the Department has received thousands of Claims of Beneficial Use. The reports vary greatly in their format. This lack of consistency increases staff review time, and the lack of a specific form or format leads to omissions of information critical for staff to determine the extent of beneficial use developed and whether there has been compliance with permit or order conditions. The proposed amendments and clarification of information required, plus the emphasis on a specific form or format for the report, will make the review more efficient and will improve the quality of the information submitted to the Department.

III. Rulemaking Process

Work on the proposed rules began at the annual CWRE Workshops sponsored by the Department in October and November of 2003. At the workshops, staff shared and gathered ideas of potential changes to the rules with the CWREs. Staff also identified a group of CWREs to assist the Department in the development of the rules by serving on a Rules Advisory Committee (RAC). Between December 2003 and March 2004, the Department held two public meetings with the RAC to develop rule concepts and preliminary rule language.

Notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available on April 1, 2004. Four written comments were received and are provided in Attachment 2. In addition to the written comment period, the Department held two public rulemaking hearings in Salem on April 20, 2004. One commenter provided testimony at the public rulemaking hearings. Staff have reviewed the comments received and are proposing changes to the hearing draft rules in response to the issues identified.

Issues Identified in Written Comments and Oral Testimony:

1. Comment Submitted by Laurie Lindell

Written Comment – Amend rules to allow professional hydrologists to qualify to become CWRE: Laurie Lindell, the District Hydrologist for the Medford District of the Bureau of Land Management, proposed that the rules be amended to allow professional hydrologists to qualify to become Certified Water Right Examiners.

Response: The Department does not propose changes to the final proposed rules. The list of those qualified to become a CWRE is established by statute under ORS 537.797 and ORS 537.798. Under current law, those qualified to become a CWRE are registered professional surveyors and engineers and geologists.

2. Written Comment Submitted by Corbey Boatwright and Provided as Oral Testimony by Jean Boatwright

Written Comment and Oral Testimony – The rules contain a conflict in the reporting of unauthorized uses developed under a permit or transfer final order: Corbey Boatwright, CWRE, commented that there appears to be an internal inconsistency in the rules. Specifically, OAR 690-014-0100(3) requires that existing uses not authorized in the permit or transfer final order are be noted in the report, but not included as part of the claim. However, OAR 690-014-0020(2), which defines “Claim of Beneficial Use,” states that the Claim of Beneficial Use includes the report of the site inspection, calculations of flow, and the map. The commenter indicates that the rule should be clarified to say that the information regarding the unauthorized use(s) shall be included in the report but will not be considered for inclusion in the certificate.

Response: The Department does not propose changes to the final proposed rules. The Department does not view this as a conflict. The “Claim of Beneficial Use” is defined as the “...documents submitted to the Department requesting a certificate of water right be issued for the *authorized use or uses made.*” (emphasis added) The Department is therefore limited to only determining beneficial use for use(s) authorized by the permit or transfer order.

Written Comment and Oral Testimony – The map scale should be clarified in the description of the original scale of the county assessor’s map: Mr. Boatwright commented that OAR 690-014-0170(1) would be more clear if the words “full-size” were inserted between original and scale. This is because county assessor’s maps are now available on the internet and are not always in full scale originals.

Response: The Department proposes to address this comment in the final proposed rules. OAR 690-014-0170(1) is proposed to include the phrase “the original full-size scale.”

Written Comment and Oral Testimony – OAR 690-014-0170(4) is unclear as to the meaning of “description of fish screens”: Mr. Boatwright commented that it is often difficult to see the actual location of the fish screen in the water or to gather actual dimensions or screen sizes of the fish screens. His comments raised questions concerning map symbols to identify fish screens and meters, and the type of description the Department is looking for.

Response: The Department proposes to address this comment in the final proposed rules. OAR 690-014-0170(4) has been amended to clarify that the description refers to the location of the fish screens, by-pass devices, and measuring devices in relation to the point of diversion or appropriation.

3. Comment Submitted by WaterWatch of Oregon

Written Comment – Period of use should be included as one of the minimum requirements for the Claim of Beneficial Use: WaterWatch of Oregon commented that “period of use” should be included in OAR 690-014-0100(1) because the “period of use” is a limitation in the permit.

Response: The Department proposes to address this comment in the final proposed rules. Staff agree that the “period of use” is an important element of the report required under OAR 690-014-0100. The reference to reporting on the “period of use” has been added to OAR 690-014-0100(1).

Written Comment – The waiver language in OAR 690-014-0100(16) appears to indicate that a CWRE could request a waiver of the minimum requirements outlined in OAR 690-014-0100, including the status of conditions and limitations: WaterWatch commented that the waiver language as written is unclear as to the information for which a waiver can be requested. In addition, in order for a permit holder to prove up, they must comply with all the permit conditions. WaterWatch requested that the language be amended to clarify that the waiver applies only to information not related to a permit condition or limitation.

Response: The Department proposes to address this comment in the final proposed rules. The proposed rule was not intended to provide for waivers of information related to permit conditions or limitations. Rather, the intent of the rule is to provide flexibility to waive submittal of information already on file with the Department or in other unanticipated situations. OAR 690-014-0100(16) has been amended to clarify that waivers cannot be requested for elements relating to conditions or other limitations of the permit or transfer final order.

4. Comment Submitted by Dick Verboort

Written Comment – The accuracy of reporting a quantity of water in the Claim of Beneficial Use is to a standard beyond that which the permit is issued for: Dick Verboort, CWRE, commented that the accuracy required in the Claim of Beneficial Use report is not consistent with the quantity of water listed in the permit. The Claim of Beneficial Use report requires accuracy to three or four decimal places when the permitted amount of water has been rounded by the Department to the nearest hundredth of a cubic foot per second.

Response: The Department does not propose to change the final proposed rules to address the comment raised. The rules in Division 14 establish the elements and criteria for the Claim of Beneficial Use report including the standards for reporting on the amount of water actually appropriated.

Written Comment – In the definition of rate and duty, OAR 690-014-0020(12), the rate should be tied to the point of diversion: Mr. Verboort commented that the rate of water should be tied to the point of diversion because users typically divert and use more water than the permit allows.

Response: The Department does not propose to change the final proposed rules to address the comment raised. OAR 690-014-0020(12) seeks only to provide a definition for the term “Rate and Duty.” Permits and transfer final orders typically describe the location where the measurement is to occur. In the case of a permit to use stored water under a contract, the measurement may be at the point where the water user takes control of the stored water, miles away from where the water is diverted.

Written Comment – In OAR 690-014-0100(2), the word “specific” should be “specified”: Mr. Verboort commented that the word “specific” should be replaced by the word “specified.”

Response: The Department proposes to address this comment in the final proposed rules. Staff agree that the word “specified” should be replaced with “specific” in the context of defining development time limits established by permits or transfer final orders.

Comment – OAR 690-014-0100(13), volume “measurements” should probably be volume “computations”: Mr. Verboort commented that volume “measurements” should probably be replaced by volume “computations” as “measurements” refer to on site measurements used to determine the topographic details of a reservoir.

Response: The Department proposes to address this comment in the final proposed rules. Staff agree that the wording of OAR 690-014-0100(13) should be modified to clarify the information required in the Claim of Beneficial Use report concerning reservoir volumes. The intention of the rule is not to identify the measurement accuracy of the topographic survey; rather, it is to describe the criteria for computations and reporting for reservoir volumes. The final proposed rules reflect this clarification.

Finally, the final proposed rules reflect minor wording changes, changes to OAR 690-014-0100(15) to facilitate the electronic submittal of Claims of Beneficial Use, and an applicability provision in OAR 690-014-0005.

IV. Summary

The proposed final rules in Attachment 1 would achieve consistency with current statutes and other rules of the Commission. In addition, the rules will clarify the information required in the Claim of Beneficial Use report and make the review of those reports more efficient.

V. Alternatives

The Commission may consider the following alternatives with regard to the amendment of OAR Chapter 690, Division 014:

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

VI. Recommendation

The Director and Staff recommend that the Commission adopt the final proposed rules for OAR Chapter 690, Division 14, in Attachment 1.

Attachments:

1. Final Proposed Rules
2. Written comments on the April 1, 2004, Hearing Draft

Gerry Clark
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