



Oregon

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Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item C, November 19, 2009
Water Resources Commission Meeting

**Request for Adoption of Rules Providing Guidance and Standards
Necessary for Landowners to Meet the Exempt Groundwater Use
Recording Requirements of Senate Bill 788, OAR Chapter 690,
Division 190 and the Suspension of OAR Chapter 690, Division 180**

I. Issue Statement

The Department requests that the Commission adopt final proposed rules (OAR Chapter 690, Division 190) to provide the guidance and standards necessary for landowners to meet the exempt groundwater use recording requirements of Senate Bill 788 (Chapter 819, 2009 Oregon Laws). In addition, the Department requests that the Commission suspend the temporary rules (OAR Chapter 690, Division 180) that were put in place to support landowner compliance with SB 788 until permanent rules could be adopted.

II. Background

Senate Bill 788, passed in 2009 by the Oregon Legislative Assembly, was signed by the Governor on July 23, 2009. SB 788 (Chapter 819, 2009 Oregon Laws) directs the Oregon Water Resources Commission (Commission) to adopt rules to implement provisions of the bill that require owners of land on which an exempt groundwater use well is drilled to file the exempt groundwater use with the Oregon Water Resources Department (Department). This filing includes a map showing the exact location of the well on the tax lot and a recording fee of \$300. The map submitted by the landowner must be prepared in accordance with standards established by the Department. The bill provides that the map and \$300 recording fee must be submitted to the Department no later than 30 days after the well is completed.

SB 788 directs moneys collected through the exempt groundwater recording fee to be used for the purposes of evaluating ground water supplies, conducting ground water studies, carrying out ground water monitoring, processing ground water data and for the administration and enforcement by the Department of the provisions of the bill related to landowner recordation of exempt groundwater use and submission of a recording fee to the Department.

On July 30, 2009 the Commission adopted temporary rules, contained in OAR Chapter 690, Division 180, to provide standards and guidance by which affected landowners could meet the requirements of SB 788 prior to the adoption of permanent rules. The Commission amended the temporary rules on September 2, 2009. The temporary rules expire on December 27, 2009.

The Department began development of the permanent rules (OAR Chapter 690, Division 190) shortly after the Commission adopted the temporary rules on July 30, 2009. The Department's process for developing the permanent rules is discussed in Section IV of this report.

III. Discussion

In passing SB 788 with an emergency clause provision, the Oregon Legislative Assembly expressed a need for the Department to immediately implement the mapping, recording and fee provisions of SB 788 to ensure that the Department could more effectively manage the state's ground water resources to preserve the public health, welfare and safety of Oregon's citizens. By express provision, SB 788 takes effect July 1, 2009. The Commission adopted temporary rules (OAR 690 Division 180) on July 30, 2009 to implement the exempt use recording provisions of SB 788, stating in rule that the recording of exempt uses was required for wells completed on or after July 1, 2009.

In response to a legal challenge to the July 1, 2009 effective date of the temporary rules, the Commission amended OAR Chapter 690, Division 180 on September 2, 2009 to only apply to wells completed on or after July 23, 2009, the date SB 788 was signed by the Governor. This action was taken in order to limit, as much as possible, the expenditure of fees to respond to the legal challenge and to instead devote these resources to maintaining programs during an extended period of significant budget challenges.

As noted earlier, the temporary rules contained in OAR Chapter 690, Division 180 expire on December 27, 2009. The Department is recommending that the Commission, by Order, suspend the temporary rules from the date the Commission's action is filed with Oregon Secretary of State through December 27, 2009. If the Commission were to take this action, the temporary rules would no longer be effective during the period of suspension.

The Department is recommending that the Commission coordinate adoption of the permanent rules (OAR Chapter 690, Division 190) with the suspension of the temporary rules (OAR Chapter 690, Division 180). If adopted by the Commission, the permanent rules would become effective upon filing with the Oregon Secretary of State. Filing the permanent rules and the Commission's Order to suspend the temporary rules with the Oregon Secretary of State on the same day would have the effect of the permanent rules going into effect on the same day that the temporary rules are suspended.

IV. Rulemaking Process

A Rules Advisory Committee (RAC) was appointed by the Department to assist with the development of permanent rules. The Department used the members of the Commission's Ground Water Advisory Committee as its RAC. The RAC met on August 28, 2009 and a public hearing draft of the proposed rules was prepared by staff based on input from the RAC.

The Department submitted a Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact to the Secretary of State on August 14, 2009 for publication on September 1 in the *Oregon Bulletin*. In addition to the opportunity to provide written comment, public hearings were held in Salem on September 22nd, Pendleton on September 29th and Bend on September 30th. The public comment period extended from September 1, 2009 through October 15, 2009.

Twenty-one written comments were received and are included as Attachment 2. The Department's response to the public comments is included as Attachment 3. The hearing draft rules were modified to address the following comments:

- The sentence under OAR 690-190-0005(1) was modified to clarify that the proposed rules apply to the those provisions in ORS 537.545 "relating to the recording of exempt groundwater use."
- The sentence under OAR 690-190-0005(2)(a) was reworded for clarity to read, "Any owner of land on which a well is completed after July 22, 2009, to allow groundwater use for purposes that are exempt under ORS 537.545."
- The paragraph under OAR 690-190-0005(2)(b) was reworded for clarity to read, "Each new well that is completed or existing well that is converted to allow groundwater use for purposes that are exempt under ORS 537.545. This includes wells that are drilled to replace an existing well."
- The paragraph under OAR 690-190-0005(3) was added for clarity.
- The definition of "converting" under OAR 690-190-0010(1) was modified to reference the definition provided in statute.
- The definition of "department" under OAR 690-190-0010(2) was modified for consistency.

- The definition of “director” under OAR 690-190-0010(3) was modified for consistency.
- The definition of “recording” under OAR 690-190-0010(4) was modified for clarity and consistency.
- A definition for “well identification number was added under OAR 690-190-0010(7) for clarity.
- The section under OAR 690-190-0100 was modified for clarity.
- The sentence under OAR 690-190-0200(1) was modified for clarity to read, “If the Department determines that a landowner has not met the requirements of these rules, the Department shall notify the landowner of the specific nature of the requirements that have not been met.
- The section under OAR 690-190-0200(2) was added under this section for clarity to read “The Department shall, within 60 days of receipt of the map and fee, notify the landowner of the recording requirements that have not been met.”
- The section under OAR 690-190-0200(3) was modified for clarity.

The Ground Water Advisory Committee (GWAC), which advises the Commission on rules for development and protection of ground water (ORS 536.090), met on October 9, 2009 to discuss the draft rules. GWAC unanimously recommended that the Commission adopt the final proposed rules with the following modifications:

- Clarifying OAR 690-190-0100 Recording Requirements.
- Clarifying OAR 690-190-0005(2) as it pertains to replacement wells.

V. Summary

The final proposed rules in Attachment 1 provide the guidance and standards necessary for landowners to meet the exempt groundwater use recording requirements of Senate Bill 788 (Chapter 819, 2009 Oregon Laws). The Order to suspend the temporary rules contained in OAR Chapter 690, Division 180, together with the adoption of the permanent rules contained in OAR Chapter 690, Division 190, provide the means to effectively transition from the temporary to the permanent rules.

VI. Alternatives

The Commission may consider the following alternatives:

1. Adopt the final proposed rules in Attachment 1 and approve the Order to suspend OAR Chapter 690, Division 180 in Attachment 4
2. Adopt modified final proposed rules
3. Not adopt the final proposed rules and request the Department further evaluates the issues

VII. Recommendation

The Director recommends Alternative 1 that the Commission adopt the final proposed rules as contained in Attachment 1 and approve, by Order (Attachment 4), the suspension of OAR Chapter 690, Division 180.

Attachments:

1. Final Proposed Rules “ Exempt Groundwater Use Recording Requirements”, Chapter 690, Division 190
2. Written comments received
3. OWRD’s responses to written and oral comments received
4. Order suspending OAR Chapter 690, Division 180

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