



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Barry Norris, Technical Services Division Administrator

SUBJECT: Agenda Item J, July 28, 2005
Water Resources Commission Meeting

Informational Report on 2004 Field Regulation and Enforcement Activities

I. Issue Statement

Each year staff provide the Water Resources Commission a report on Department field activities. This report provides information on field regulation and enforcement actions for the year 2004. *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, approximately 18 locally funded part-time and full-time assistant watermasters are located in field offices throughout the state. The assistants work with the watermaster and are typically compensated through county budgets, grants, or contracts.

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 education
- Stream gaging and measurements
- Implementation of Oregon Plan measures
- Investigation and referral of formal enforcement

- Preparation of hydrographic records
- Dam safety inspections
- Well construction compliance and enforcement
- 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 assure compliance with the terms and conditions of their water rights, and to assure 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 Enforcement 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 Enforcement Section Manager for formal enforcement action. Well construction deficiencies may also be referred to the Enforcement Section for formal enforcement actions. Formal enforcement actions are initiated by the issuance of a proposed order and may include but not limited to suspension of a well constructors license or civil penalties. Generally, most of these formal enforcement actions are settled before the case is referred to the Office of Administrative Hearings. In 2001, the Enforcement Section assumed responsibility for involuntary water right cancellations. Staff in the Enforcement Section includes a Well Construction Program Coordinator who oversees the well inspection program, including maintaining continuity among the regional well inspectors, interpretation of the administrative rules governing well construction and conducting classes for the Continuing Education Program for well constructors; one well constructor licensing program specialist; 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 used for several years and is an effective tool for prioritizing field work. The Oregon Plan also requires staff to prioritize watersheds for scheduling work activities.

The goal of field staff is to engage in pro-active water management rather than relying solely on a complaint-driven process. The Oregon Plan is a big factor moving staff to be more pro-active in high priority flow restoration areas. The directive in Attachment 2 highlights the effectiveness of education in preventing water law violations before they occur. 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 not spent responding 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, particularly those with instream water rights or minimum streamflows. If there is not adequate streamflow to meet the instream need, or if other water users or agencies bring concerns or complaints to the watermaster, the watermaster begins an investigation and takes appropriate actions such as curtailing the diversion of junior users. Only in the unusual case, 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 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 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. 2004 Surface Water Regulation

In 1998, the Department's definition of a regulatory action changed from "any action which included a requirement by the watermaster that the user change their water use activity because the use is improper or the water is needed by senior right holders" to "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." The revised definition reflects the broader spectrum of activities conducted by field staff.

In 2004, watermasters and their assistants regulated 294 stream systems, down from 436 in 2003. Regulation on the 294 streams was prompted by the watermaster's own investigation in 171 cases and by complaints in 160 cases. Actions were taken to protect instream rights in 106 cases and other senior rights in 123 cases, and to stop un-permitted use in 102 cases. Attachment 3 provides a detailed report from field staff.

Watermasters reported a total of 9,838 regulatory actions in 2004, compared to 11,737 in 2003. Of these 9,838 regulatory actions, 2,186 involved written notices, compared to 3,490 written notices in 2003. The efforts range from one action on many streams to a high of 1,160 actions on the Umatilla River. There is a large variation in total regulatory actions among the regions. The high was 4,617 for the North Central Region and the low was 873 for the South Central 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.

Statewide, compliance with water rights and regulations was approximately 97.6 percent, compared to 96.6 percent in 2003. Attachment 4 provides a regional and watermaster district breakdown of compliance rates. The Enforcement Manager continues to work with field staff to improve compliance reporting and ensure consistency and accuracy throughout the state.

Statewide, the earliest priority date regulated was 1861 on the South Fork Walla Walla River, tributary to the Walla Walla River in the Umatilla Basin, North Central Region. 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 2002, the Department adopted a new approach to implement and report Oregon Plan efforts. Each year, Watermasters identify four or five actions they will pursue in their high priority flow restoration watersheds. At the end of 2004, watermasters identified the progress they made on their action plans, their successes, and barriers to their success. Actions included inventorying significant diversions; more closely monitoring streamflows to ensure that instream rights were protected; assisting watershed councils with elimination of obstructions to fish passage; and providing assistance and support for leasing of water rights instream.

Staff are also working to expand streamflow monitoring and ensure that distribution and regulation of water needed to protect instream water rights is performed expeditiously. The instream leasing, transfer, and allocation of conserved water programs are yielding increasing quantities of water that are protected instream. The Department continues to work with the Deschutes River Conservancy, Oregon Water Trust, Klamath Basin Rangeland Trust and other organizations to promote voluntary streamflow restoration. In 2004, 572 cfs of water was dedicated instream. These flows are critical to fish recovery efforts; however, establishment of these rights does represent an increase in the regulatory workload of watermasters and field staff.

B. 2004 Well Program Activity

Well reports, or “logs,” are a physical description of well construction, alteration, abandonment, conversion, or deepening. The Department received 6,641 water supply and monitoring well reports in 2004. Of these, 1,656 were monitoring wells and 4,985 were water supply wells. The Department received 4,502 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. Attachment 5 shows the data for logs received and well inspections performed during 2004.

New construction totaled 5,239 wells, being 863 monitoring wells and 4,375 water supply wells. The regional well inspectors and field staff performed a total of 2,161 well inspections. Of that number, 1,490 inspections were conducted on new construction, representing an inspection rate of 29 percent of all new wells. Of the new wells inspected, 26 percent were water supply wells and 43 percent were monitoring wells. About 13 percent of the new water supply wells inspected were deficient and required repairs. Approximately 15 percent of the new monitoring wells were also found to be deficient; however, the majority of those were minor deficiencies and were easily corrected.

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, the request for compliance, 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 Enforcement Section for a formal enforcement. If the Department determines there is sufficient evidence to pursue the matter, a proposed order is issued which may include 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 6 contains a simplified flow chart of the enforcement process.

At any point in the process the responsible party may choose to comply. Of the 9,838 regulatory actions taken in 2004, it is significant that only nine Notices of Violation were issued by field staff, indicating that a very high degree of compliance is achieved voluntarily. In addition to the nine Notices of Violation sent by field staff in 2004, the Enforcement Section issued five formal enforcement orders, all related to well construction, resulting in a total of \$2,800 assessed in civil penalties. Four enforcements were concluded through settlement agreements or final orders and one was concluded through a final order issued by the Administrative Law Judge as a result of a contested case hearing. Attachment 7 lists formal enforcements for 2004.

Following issuance of a final order the Enforcement Section issues a press release 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. Recommendation

This report is presented to the Commission as an informational item. No Commission action is necessary.

Attachments:

1. List of Watermasters by District
2. Internal Management Directives for Establishing Enforcement Priorities
3. 2004 Surface Water Summary
4. 2004 Compliance Rate Summary by Watermaster District and Region
5. 2004 Well Construction and Inspection Summary
6. 2004 Enforcement Process Flow Chart
7. 2004 Formal Enforcements

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