Oregon
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MEMORANDUM

TO: Water Resources Commission

FROM: Debbie Colbert, Field Services Division Administrator
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SUBJECT: Agenda Item C, February 29, 2008
Water Resources Commission Meeting

Informational Report on 2006 and 2007 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 2006 and 2007. *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, in 2006 there were 18 locally funded part-time and full-time assistant watermasters located in field offices throughout the state and in 2007 there were 14 assistant watermasters. The assistants work with the watermaster and are typically compensated through county budgets, grants, or contracts. The 2007-2009 legislatively adopted budget included five regional assistant watermasters. The Department has filled all of those positions. These staff will be assisting watermasters with enhanced measurement of surface water diversions and streamflow, responding to ground water complaints, and other needs.

In addition to watermasters and assistants, field offices house staff such as well 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
- 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 Well Construction and Compliance Section (formerly Enforcement Section) Manager is responsible for the development of enforcement policy, 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 actions. Generally, most of these formal enforcement actions are settled before the case is referred to the Office of Administrative Hearings. In 2001, the Well Construction and Compliance Section 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, interpretation of the administrative rules governing well construction and conducting classes for the Continuing Education Program for well constructors; one Well 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 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 saved not responding to complaints, known violations, and other 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. 2006 and 2007 Surface Water Regulation

The Department's definition of a regulatory action is "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." In 2006, watermasters and their assistants regulated 345 stream systems, up from 332 in 2005. Regulation on the 345 streams was prompted by the watermaster's own investigation in 229 cases and by complaints in 195 cases. Actions were taken to protect instream rights in 149 cases and other senior rights in 141 cases, and to stop un-permitted use in 134 cases. Attachment 3 provides a detailed 2006 report from field staff. In 2007, watermasters and their assistants regulated 391 stream systems, an increase from 2006. Similar to 2006, the majority of regulation in 2007 was prompted by the watermaster's own investigation (i.e., 294 cases by watermaster investigation and 182 cases by compliant). In 2007, actions were taken to protect instream rights in 185 cases and other senior rights in 160 cases, and to stop un-permitted use in 131 cases. Attachment 4 provides a detailed 2007 report from field staff.

Watermasters reported a total of 9,763 and 13,100 regulatory actions in 2006 and 2007, respectively. Of the regulatory actions taken, 2,606 involved written notices in 2006 and 3,408 involved written notices in 2007. In both 2006 and 2007, efforts ranged from one action on many streams to a high of more than 1,600 actions on the Umatilla River tributary to the Columbia River. There is a large variation in total regulatory actions among the regions. The highest number of actions occurred in the North Central Region with an average of 5,959 actions over the two year period and the low in the South West Region with an average of 534 actions. 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 98 and 96.6 percent in 2006 and 2007, respectively. Attachment 5 provides a regional and watermaster district breakdown of compliance rates for 2006. Attachment 6 provides a regional and watermaster district breakdown of compliance rates for 2007.

Statewide, in both 2006 and 2007, the earliest priority date regulated was 1854 on Neil Creek, tributary to Bear Creek and McDonald Creek, tributary to Little Applegate River in the Rogue Basin of the South West 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 addition to their regulatory efforts, over the last ten years, watermasters have also been provided on-the-ground support for the Oregon Plan for Salmon and Watersheds. Actions include 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 flow restoration actions. More recently, our focus has been on enhanced measurement of significant points of diversions in high priority watersheds based on the Commission's Water Measurement Strategy. The inventory of significant diversions has been completed for most of the state. Based on field inspections to date, we estimate there are more than 2,200 significant diversions in these high priority watersheds. Of these, there are approximately 250 diversions that are required to measure as a condition of their permit. Of those 250, we estimate that 160 diversions are out of compliance with their permit condition. Our goal for 2008 is to bring these diversions into compliance.

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 directly with water right holders, as well as with the Deschutes River Conservancy, Klamath Basin Rangeland Trust, Oregon Water Trust, and other organizations to promote voluntary streamflow restoration. In 2006 and 2007, 868 cubic feet per second (cfs) of water was dedicated instream (excluding supplemental water rights). 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. 2006 and 2007 Well Program Activity

A Well report, or "log," is a physical description of well construction, alteration, abandonment, conversion, or deepening. In 2006, the Department received 6,849 water supply and monitoring well reports. Of these, 1,334 were monitoring wells and 5,515 were water supply wells. The Department received 9,423 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 2007, the Department received 6,787 water supply and monitoring well reports. Of these, 1,442 were monitoring wells and 5,345 were water supply wells. The Department received 9,583 geotechnical hole reports. Attachment 7 shows the data for logs received and well inspections performed during 2006. Attachment 8 shows the data for logs received and well inspections performed during 2007.

In 2006, 5,083 start cards were received for wells requiring a fee. Of that number 814 were monitoring wells and 4,269 were water supply wells. The regional well inspectors and field staff performed a total of 2,552 well inspections. Of that number, 1,891 inspections were conducted on new construction, representing an inspection rate of 36 percent of all new wells. Of the new wells inspected, 32 percent were water supply wells and 54 percent were monitoring wells. About 4 percent of the new wells inspected were deficient and required repairs.

In 2007, 5,326 start cards were received for wells requiring a fee. Of that number 818 were monitoring wells and 4,508 were water supply wells. The regional well inspectors and field staff performed a total of 1,855 well inspections. Of that number, 1,236 inspections were conducted on new construction, representing an inspection rate of 24 percent of all new wells. Of the new wells inspected, 22 percent were water supply wells and 39 percent were monitoring wells. About 2 percent of the new wells inspected were deficient and required repairs.

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 frame 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 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 9 contains a simplified flow chart of the enforcement process.

At any point in the process the responsible party may choose to comply. Of the 9,763 regulatory actions taken in 2006, it is significant that only six Notices of Violation were issued by field staff, indicating that a very high degree of compliance is achieved voluntarily. In addition to the violations sent by field staff, the Well Construction and Compliance Section issued two formal enforcement orders. Both were related to well construction and resulted in a total of $750 assessed in civil penalties. Attachment 10 lists formal enforcements for 2006.

Of the 13,100 regulatory actions taken in 2007, 13 Notices of Violation were issued by field staff. In addition to field notices, the Well Construction and Compliance Section issued nine formal enforcement orders. Seven of these were related to well construction and resulted in a total of $49,625 assessed in civil penalties. Two were related to water rights and resulted in a total of $3,250 assessed in civil penalties. Attachment 11 lists formal enforcements for 2007.

Following issuance of a final order, the Well Construction and Compliance Section issues a press release in the local area. Staff believes this is an effective deterrent to repeated violations. It also 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. 2006 Surface Water Summary
4. 2007 Surface Water Summary
5. 2006 Compliance Rate Summary by Watermaster District and Region
6. 2007 Compliance Rate Summary by Watermaster District and Region
7. 2006 Well Construction and Inspection Summary
8. 2007 Well Construction and Inspection Summary
9. Enforcement Process Flow Chart
10. 2006 Formal Enforcements
11. 2007 Formal Enforcements