

MEMORANDUM

TO: Water Resources Commission and Environmental Quality Commission

FROM: Paul R. Cleary, Director, Water Resources Department
Stephanie Hallock, Director, Department of Environmental Quality

SUBJECT: Challenges and Opportunities
Joint Meeting of the WRC and EQC, June 6, 2002

I. Issue Statement

There are a number of areas where the responsibilities of the Department of Environmental Quality (DEQ) and the Water Resources Department (WRD) intersect. This staff report highlights ongoing issues that demonstrate this intersection. Meeting these challenges and others will require continued coordination and cooperation between DEQ and WRD.

II. Examples of Challenges

A. Cross Compliance Related to Siting Wells and Permitting On-site Sewage Disposal Systems

WRD has administrative rules for siting wells that prescribe setbacks from septic tanks and drain fields. Similarly, DEQ has rules for the siting of septic tanks and drain fields that prescribe setbacks from wells. Under WRD's rules, depending upon geologic and well construction circumstances, WRD can issue a special standard that allows a well driller to encroach upon the prescribed setbacks, e.g. locate a well closer to a septic tank or drain field than required. While the special standard provides compliance for the well driller with WRD requirements, it may put the landowner in violation of a DEQ permit regarding the proximity of a septic tank or drain field from a well. In these cases, the landowner can obtain an amended permit from DEQ, but statutes require that a public hearing be held, which means that the process could take several months and also requires a sizable application fee. Additionally, WRD's well construction rules do not require the identification of permitted, but yet to be constructed, on-site sewage disposal systems or prescribe setbacks from such systems. Therefore, the construction of a well could invalidate an existing on-site permit and potentially preclude the development of the parcel. WRD and DEQ need to continue working toward a reciprocal process for siting of wells and on-site disposal systems.

B. Permitting Aquatic Herbicide Use in Irrigation Systems

In March 2001, the Ninth Circuit U.S. Court of Appeals ruled that aquatic herbicide application by the Talent Irrigation District requires a National Pollutant Discharge Elimination System (NPDES) permit (*Headwaters, Inc. v Talent Irrigation District*). In response to a request from Oregon Water Resources Congress (OWRC), DEQ issued a Mutual Agreement and Order (MAO) in lieu of an NPDES permit for application of the aquatic herbicides acrolein and xylene in irrigation systems for the 2001 irrigation season. An MAO was necessary because there was insufficient time to issue a permit before the irrigation season. A key difference between an MAO and a permit is that an MAO does not provide the same legal "shield" that a permittee has when operating in compliance with an NPDES permit.

On March 29, 2002, EPA issued guidance on the Court's decision. EPA's guidance stated that the application of an aquatic herbicide consistent with the federally-approved Federal Insecticide, Fungicide, and Rodenticide Act label instructions to ensure the passage of irrigation return flow meets a legal exemption from NPDES permitting, consistent with Congressional intent. However, there is some question as to the applicability of the irrigation return flow exemption to supply systems for irrigation water. Furthermore, this guidance does not negate the Ninth Circuit Court decision.

As a result of this ambiguity, OWRC requested that DEQ expedite the issuance of individual NPDES permits to 10 irrigation districts (Klamath ID, North Unit ID, Ochoco ID, Vale ID, Owyhee ID, Owyhee Ditch Company, Hermiston ID, Stanfield ID, West Extension ID, and Westland ID). DEQ entered into a contract agreement ("receipts authority") with OWRC to expedite this work and plans to public notice the proposed permits starting in mid-May. In addition, DEQ is preparing an MAO in lieu of an NPDES permit for the 2002 irrigation season for irrigation districts that are unable to participate in this contract due to resource constraints.

In addition to aquatic herbicide application activities in irrigation systems, the Ninth Circuit Court decision implies that other aquatic pesticide application activities may need NPDES permits. These include such activities as mosquito control, weed control in lakes and ponds, and nuisance fish kill activities. EPA's March guidance did not address these activities, but other states such as California and Washington have issued NPDES general permits to cover these types of aquatic pesticide applications. To address these activities, DEQ is beginning its permit development process. General permits to cover these activities would likely be in place by early 2003, which will allow DEQ to consider any additional guidance that EPA may provide in 2002 on the Ninth Circuit Court decision.

C. Hydroelectric Application Review Teams

Hydroelectric Application Review Teams (HARTs) were established by HB 2119 in 1995. Through the coordinated effort under the HART process, the state produces a "unified state position" on the re-authorization of hydroelectric licenses. The HART

process was also designed as a forum to resolve conflicts between state agency positions on licensing and to provide utilities and citizens with one point of contact. The state position produced by the HART process may include a WRD water rights certificate, a DEQ Clean Water Act Section 401 water quality certificate, and Oregon Department of Fish and Wildlife "10j" recommendations. Other agencies such as Oregon Department of Geology and Mineral Industries, Oregon State Marine Board, Oregon Parks and Recreation Department, and the State Historic Preservation Office may also have input to the unified position.

D. Aquifer Recharge and Aquifer Storage and Recovery

Groundwater storage projects help supply water when the need is greatest by using water stored during low demand periods. There are two types of groundwater storage projects, aquifer storage and recovery (ASR) and artificial recharge (AR). Groundwater storage for ASR occurs by injection of water down a well while water for AR can either seep into the aquifer from the land surface or be injected down a well, pit, or shaft. Both types of projects are subject to water quality requirements. Specifically, aquifer recharge water must not degrade groundwater quality while water for ASR must meet drinking water standards. Artificial replenishment of underground reservoirs can provide a sustainable resource with minimal environmental impacts. The challenge is for WRD and DEQ to fully coordinate on these projects to ensure that Oregon's water resources are protected.

E. EPA Draft Temperature Guidance

In October 2001, EPA released its Draft Guidance for Developing Water Quality Temperature Criteria for public comment. This guidance is the product of over two years of discussions between EPA, NMFS, USFWS, Oregon, Washington, and Idaho, and several tribal representatives. The purpose of this initiative is to identify a common approach to temperature that can be used throughout the Pacific Northwest. Once final, DEQ will have one year to decide whether and how to incorporate the guidance into Oregon's water quality criteria.

The public comment period ended on February 22, 2002. DEQ worked with other state agencies to develop and submit a single set of comments. In general, the state supported the initiative and many of its concepts, but stopped short of endorsing much of the recommended methodology and concept application. Parts of the draft methodology were scientifically untested, would be very expensive, and would produce uncertain results. EPA received numerous other comments, expressing concerns about potential impacts to private forest lands, recommending various improvements to the process and guidance itself, and suggesting EPA look to Oregon's approach to simplify their guidance.

As a result of the comments received, EPA is currently rethinking their guidance. The final guidance, expected by the end of 2002, will likely place greater emphasis on the biological needs of salmonids and less on the thermal potential of rivers and streams.

Similarly, the final guidance will describe implementation methods in less detail than the original draft guidance. A redraft of the guidance and an additional opportunity for public comment is expected in late summer or fall.

F. Willamette Basin Reservoir System

The federal storage projects in the Willamette Basin operated by the U.S. Army Corps of Engineers provide multiple benefits for the basin. Historically, flood control, recreation, power, irrigation and water quality flow augmentation were the operational goals for the projects. Recently, spring flow targets at Salem from April through June have been incorporated into the operation to promote fish life. After June, the Corps operates the projects to meet flow targets at Albany and Salem for water quality purposes. Under low water conditions, it may be difficult to meet the multiple goals for the projects. This was a well-publicized issue during the 2001 drought due to low water levels in Detroit Lake Reservoir. Last year it was not possible to achieve summer flow targets. State agencies, including WRD, DEQ, Oregon Parks and Recreation Department, Oregon Department of Fish and Wildlife, and Oregon Department of Agriculture, negotiated with the Corps to reach agreement on a flow regime that considered multiple water use needs; but some drought impacts are unavoidable.

G. Underground Injection Systems

The construction, maintenance, and abandonment of wells requires compliance with well construction standards administered by the Water Resources Department. However, certain injection systems such as sewage drain holes and subsurface fluid distribution systems are not regulated by the Water Resources Department. In June 2001, WRD and DEQ signed a Memorandum of Agreement (MOA) regarding injection holes and how they are addressed. Under the MOA, the two agencies will coordinate activities as much as possible to ensure that these types of borings are abandoned in a manner that is protective of the resource.

III. Discussion

As these examples and others (e.g. Town of Bonanza, Deschutes Basin groundwater, Klamath TMDLs, etc.) demonstrate, the intersection in water resource authorities often coincides with inherently complex issues. Addressing these issues will be an evolving process that will require close coordination, flexibility, and creativity from DEQ and WRD.