

MEMORANDUM

TO: Water Resources Commission

FROM: Barry Norris, Administrator

SUBJECT: Water Resources Commission Work Session
Agenda Item 2, August 8, 2002

Informational Report on 2001 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 2001. *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 region 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

Formal enforcements are conducted by the Department's enforcement program manager who is located in the Salem office in the Technical Services Division. The enforcement manager is responsible for enforcement policy development, carrying out formal enforcement actions, negotiating resolutions, and maintaining statewide program consistency. In 2001, the enforcement manager also assumed responsibility for involuntary water right cancellations and transfer protests. The enforcement section includes a well construction specialist who coordinates and directs the well inspection program, including coordination of the regional well inspectors and maintenance of the well program administrative rules; a well constructor licensing and compliance specialist; one well log review/Ground Water Resource Information Distribution (GRID) support position; and one 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 the "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 the 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 management guide 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

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. When voluntary compliance with a watermaster request is not achieved, formal phases of enforcement may 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 uses, 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).

The watermaster does not begin regulation or distribution until the stream has been measured and legal rights of the users are known. On stream systems where annual regulation occurs, the watermaster prepares 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 user information and can generate "distribution letters" requesting that junior users curtail their diversions.

Historically, any illegal water uses 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 the water to satisfy senior water rights cannot be provided by eliminating illegal use, 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, the watermaster often negotiates 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 can continue to receive water. The flow is shifted to each user 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 resolve problems and protect the ground water resource.

III. Discussion

A. 2001 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.

The year 2001 was a challenging one. Although there were no extraordinary enforcement actions, Oregon struggled with drought conditions over much of the state. The dry conditions likely account for the higher number of regulatory actions taken. In 2001 distribution began about three to four weeks earlier than average years.

In 2001 watermasters and their assistants regulated 478 stream systems, up from 291 in 2000. Regulation on the 478 streams was prompted by the watermaster's own investigation in 243 cases and by complaints in 235 cases. Actions were taken to protect instream rights in 162 cases, other senior rights in 154 cases, to stop un-permitted use in 117 cases and a combination of the above reasons in 43 cases. In a number of cases, no action was necessary because the water user was in compliance. Attachment 3 provides a detailed report from field staff.

Watermasters reported a total of 12,814 regulatory actions in 2001, compared to 10,567 in 2000. The efforts range from one action on many streams to a high of 1,694 actions on one stream system, Umatilla River (Attachment 3). There is a large variation in total regulatory actions between the regions. The high was 5,975 for the North Central Region and the low was 677 for the South Central Region. The main difference can likely be attributed to the existence of irrigation districts instead of individual users.

Statewide, compliance with water rights and regulations was slightly more than 98 percent, about the same as in 2000. Attachment 4 provides a regional and watermaster district breakdown of compliance rates.

In 2001 the earliest priority date regulated was 1854 — Neil Creek in the Rogue Basin, Southwest 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 (Attachment 3).

During 2001 the Department's Oregon Plan activities focused on the identification of streamflow restoration priorities statewide and implementation of flow restoration plans in the priority watersheds. Field staff are focusing efforts to protect and enhance streamflows in these priority areas. Staff have initiated a major effort to inventory significant water diversions and to assess the adequacy of headgates, measuring devices, fish screens, and fish passage devices. The inventories are being conducted in watersheds designated as high priorities for streamflow restoration.

Staff also are 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. In 2001 approximately 310 cubic feet per second 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. 2001 Well Program Activity

The well report, or "log," is a physical description of well construction, alteration, abandonment, conversion, or deepening. In 2001 the Department received 13,338 water supply, monitoring well and geotechnical hole reports. Of these, 2,143 were monitoring wells; 6,159 were water supply wells; and 5,036 were 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 2001.

New construction totaled 5,914 wells. The regional well inspectors and field staff performed a total of 2,734 well inspections. Of that number, 1,404 inspections were conducted on new construction with 17 percent of all new water supply wells and 46 percent of all new monitoring wells inspected, and a total of 24 percent of all new wells inspected. About one percent of the new water supply wells inspected were deficient and required repairs. Approximately 16 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. 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.

At any point in the process the responsible party may choose to comply. Of the 12,814 regulatory actions taken in 2001, it is significant that only 18 Notices of Violation were issued by field staff, indicating that a very high degree of compliance is achieved voluntarily. This takes a substantial investment of time by field staff.

In 2001, 18 formal enforcement orders resulted in assessments of \$23,450 in civil penalties. Sixteen were related to well construction and two were related to using water without the benefit of a water right permit. Nine of the 18 formal enforcements were concluded through settlement agreements. Both of the unpermitted use enforcements were resolved through settlement agreements. In one instance, the proposed civil penalty was settled through in-kind service to a local watershed group. There were no enforcement contested case hearings in 2001. Attachment 6 lists formal enforcements for 2001.

Following issuance of a final order, the Enforcement Section typically issues a press release in the local area. Staff believe this is an effective deterrent to repeated violations and increases public awareness of our rules and activities.

Staff believe 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. The Director and staff welcome comments and questions from the Commission and

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suggestions for additional information for future field regulation and enforcement activity reports.

Attachments:

1. List of Watermasters by District
2. Internal Management Directives for Establishing Enforcement Priorities
3. 2001 Surface Water Regulation Report
4. 2001 Compliance Rate Summary
5. 2001 Well Construction and Inspection Summary
6. 2001 Enforcements

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