

MEMORADUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item E, October 11, 2002
Water Resources Commission Meeting

Request for Adoption of Administrative Rules, OAR Chapter 690, Division 315 – Permit Extensions for Municipal and Quasi-Municipal Water Use Permits – and OAR Chapter 690, Division 86 – Water Management and Conservation Plans

I. Issue Statement

The Commission is asked to adopt rules under OAR Chapter 690, Division 315 pertaining to permit extensions for municipal and quasi-municipal water use permits and OAR Chapter 690, Division 86 pertaining to water management and conservation plans. The final proposed rules are Attachment 1. The proposed rules are the culmination of a multi-year effort by the Department and the Community Water Supply Work Group to develop a permit extension process that addresses the issues unique to development of community water supplies.

II. Background

The Community Water Supply Work Group was formed in November 1998 in response to issues arising from a complex rulemaking on water right permit extensions. Changes to the permit extension rules were prompted by advice from the Attorney General's (AG) office in 1997. Prior to the advice, the Department granted permit extensions for one year for non-municipal uses or five years for municipal uses. The AG advice interpreted ORS 537.230 to require the Department to authorize permit extensions for the period of time needed to complete development, rather than for fixed one or five year increments. The advice also provided guidance on the criteria and standards used to review extension applications. In August 1997, staff recommended the Commission initiate rulemaking to address the single issue of the time period for which an extension could be authorized. However, based on public comment, the Commission directed staff to undertake a comprehensive review of the extension process and recommend appropriate rules.

In response to the Commission's request, staff worked with a Rules Advisory Committee (RAC) to review the extension program and develop proposed rules. In October 1998, in order to strike a compromise between polarized interests, the Commission simultaneously adopted two versions

of permit extension rules. One version — OAR Chapter 690, Division 320 — was applicable through June 30, 2001. The second version — OAR Chapter 690, Division 315 — became effective on July 1, 2001. The Division 320 version made primarily procedural changes to the rules already in effect. Delaying the effective date of the more comprehensive Division 315 rules to July 1, 2001, gave permit holders nearly two and one-half years to prepare for their implementation.

During the 1998 permit extension rulemaking, both staff and municipal stakeholders agreed that municipal permit extension issues were unique, warranting a separate rule development process to focus on their resolution. In order to move forward with the Division 315 and Division 320 rules, the Department and municipal stakeholders struck a compromise. The municipal stakeholders agreed to move forward with the Division 315 and 320 rules if they provided an express exemption for municipal use permits until July 1, 2001. For its part, the Department committed to convene a work group to review permit extension and other issues related to community water suppliers and recommend changes, where appropriate, to current laws and rules. The Community Water Supply Work Group was formed in November 1998 to accomplish this task.

In December 2000, in order to provide the work group more time to develop recommendations on community water supply issues, the Commission extended the exemption for municipal use permits until July 1, 2003. Currently, there are approximately 120 municipal and quasi-municipal water use permit extension applications pending.

In April 2002, staff and a subcommittee of the Community Water Supply Work Group briefed the Commission on the status of the work group, outstanding issues, and the Department's concept for moving forward with rulemaking. (*See Attachment 2, Work Session, April 11, 2002*). The April 2002 discussion before the Commission amplified that total consensus on how to proceed was unlikely. The discussion also prompted Chair Thorndike to suggest that two members of the Commission meet with a subcommittee of stakeholders and staff to get "grounded" in the issues and discuss alternative rule concepts.

Following the April 2002 meeting, Commissioners Smith and Rasmussen met on two occasions with staff and stakeholders. Based on Commission, stakeholder, natural resource agency and Community Water Supply Work Group input, staff developed a July 1, 2002 hearing draft of proposed rules for permit extensions (Division 315) and water management and conservation plans (Division 86).

Two public rulemaking hearings were held on the proposed rules on July 24, 2002 in Salem. Four individuals provided oral testimony. The written comment period closed on August 7, 2002. Approximately 35 letters or e-mails were received providing comment. Attachment 3 is a summary of public comment. Attachment 4 is a copy of the written comments.

III. Discussion

Based on an analysis of the public comment the Department has developed the final proposed rules for Division 315 (permit extensions) and Division 86 (water management and conservation plans) in Attachment 1. Following are highlights of the proposed rules.

A. *Rule Highlights*

Water Right Permit Extensions for Municipal and Quasi-Municipal Water Use Permits (Division 315)

The final proposed Division 315 rules apply to all extension applications, both pending and future, by holders of municipal and quasi-municipal water use permits seeking additional time to complete construction and/or apply water to beneficial use. The rules set forth application requirements, criteria for Department review and criteria for determining time of extension. The proposed rules also link the authorization to increase diversion of water under a permit extension to the submittal and approval of a water management and conservation plan under OAR Chapter 690, Division 86.

Comments on the rules focused on their applicability to pending extension applications, the standards used to evaluate “good cause” for an extension, and the length of extensions.

- The final proposed rules apply to municipal and quasi-municipal water use permit extension applications requesting additional time to complete construction and/or apply water to full beneficial use that have not yet received a Proposed Final Order, regardless of the date the application was submitted. (*See* OAR 690-315-0010(4)).

A handful of commenters were concerned that the rules do not allow holders of previously submitted extension applications to be processed under the rules in effect at the time of application submittal. Staff are not recommending a modification to address this comment. Staff believe the new extension rules – linking a permit extension to the development of a water management and conservation plan – are the only sensible way to address the issues surrounding development of community water supplies, and serve as a benefit to the water supplier and the resource. As a matter of law, the Commission is not precluded from applying the final proposed rules to pending extension applications.

- OAR 690-315-0070 sets out the application requirements for municipal and quasi-municipal permit extensions. Based on public input, this rule was modified to require that the applicant provide evidence of actions to begin construction, evidence of compliance with permit and previous extension conditions, and evidence of the maximum rate of water diversion.

Significant public input was provided on the requirements to provide an estimated demand projection and justification for the time extension requested. Some commenters suggested demand forecasts in extension applications should be based only on “recognized needs

forecasting methods” and should not exceed 20 years. Conversely, several water suppliers commented that permit extensions of less than 50 years would be an insufficient time to develop a community water supply. In response, the final proposed rules require the applicant to provide a description of the methodology used in the demand projection. They also require that extension requests for greater than 50 years include “documentation that the demand projection is consistent with the amount and types of available lands within the applicable existing acknowledged Urban Growth Boundary.” (See OAR 690-315-0070(3)(k) and (m)).

- Under existing statute, for good cause shown, the Department shall order and allow an extension of time. ORS 537.230(2) and 537.630(1). In evaluating good cause, the Department must consider the factors set out in ORS 539.010(5). The final proposed rules under OAR 690-315-0080 describe the criteria for Department review of municipal and quasi-municipal permit extension applications, including the statutory factors under ORS 539.010(5). (See OAR 690-315-0080(3)).

Environmental interest commenters were concerned that the good cause criteria in the proposed rules are inconsistent with those applied to other water users. However, staff have been advised by the Attorney General’s Office that the Commission has discretion in evaluating what constitutes “good cause” while giving due weight to the considerations described under ORS 539.010(5). Therefore, as long as there is a rational basis for treating differently situated water users differently, the Commission can have separate criteria for different types of water users. Here, the Commission is exercising its discretion to recognize the difference between the development of a long-term community water supply and other water uses. As a matter of policy, this is consistent with numerous statutory provisions that recognize the unique nature of municipal water uses.

- Based on public input OAR 690-315-0090 was modified to clarify the relationship of a permit extension and the requirement to develop a water management and conservation plan. A major element of this rule (and of the proposed new process) is the provision that, with certain exceptions, permits extended under the final proposed rules shall be conditioned to require that “diversion of water beyond the maximum rate diverted under the permit or previous extension shall only be authorized upon issuance of a final order approving a water management and conservation plan under OAR Chapter 690, Division 86.” The required plan must be submitted within three years of extension application approval. (See OAR 690-315-0090(3)).

In response to concerns about a “one-size-fits-all” approach, the rules contain exceptions to the requirement to develop a water management and conservation plan. A plan is not automatically required for permit holders serving a population of less than 1,000 or for permit holders that can complete construction and apply the water to beneficial use within 5 years. (See OAR 690-315-0090(3)).

- Finally, OAR 690-315-0100 provides that complete applications will be processed under existing rules regarding notice, issuance of a proposed final order and hearing rights. Some

commenters were concerned that the final proposed extension rules do not require “diligence check-ins” and specific consequences, such as permit cancellation for failure to demonstrate diligent development of a permit. Staff are not recommending any changes to 690-315-0100 because municipal and quasi-municipal permit holders will be required to submit five-year benchmarks and progress reports under OAR Chapter 690, Division 86, and it is not necessary to restate the Department’s existing statutory authority regarding permit cancellation.

Water Management and Conservation Plans (Division 86)

The proposed modifications to Division 86 reorganize the rules to improve readability for both municipal and agricultural water suppliers; however, they do not substantively modify provisions related to agricultural water suppliers. For municipal water suppliers, the final proposed rules strengthen the linkage between permit extensions and the requirement to develop a water management and conservation plan. They provide clear approval criteria and more specific requirements, based on size of the water supplier and resource concerns, related to conservation measures and water use development. The proposed rules also require benchmarks and progress reports for evaluating the implementation of certain conservation measures, and establish standards for determining the quantity of water that may be diverted under a municipal or quasi-municipal water use permit extended under OAR Chapter 690, Division 315.

Comments on the rules were mostly rule-specific technical comments. General concerns were voiced regarding the Department’s ability to evaluate the plans in a timely fashion, a “one-size-fits-all” approach to water conservation and management, applicability of the rules, and the use of benchmarks instead of deadlines and proscriptive standards.

- 690-086-0100 was added to the final proposed rules to address input regarding applicability. Several commenters were concerned that changing the existing rules “mid-stream” for permit holders developing a plan as the result of a permit condition would cost them lots of money with little benefit. The final proposed rules apply immediately to water management and conservation plans submitted to comply with a permit extension order issued after adoption of the proposed rules. However, for the next year, plans being developed for other reasons can be submitted under the standards and rules in the current (1994) water management and conservation plan rules. (*See* OAR 690-086-0100(2) and (3)).
- The final proposed rules incorporate the concept of “benchmarks” which allows the Department to work with water suppliers to identify current and future conservation activities and projects taking into account the specific circumstances of the water supplier. Some environmental interest commenters were concerned that benchmarks would not yield conservation results in a timely manner and should be replaced with hard deadlines. In response, the rules have been modified to incorporate and strengthen the use of benchmarks. The term benchmark has been defined, the purpose and use of benchmarks has been clarified, the specific requirements of a “progress report” on benchmarks has been described, and a provision has been added that requires public notice of progress reports and an opportunity for public review and comment. (*See* OAR 690-086-0030(2), OAR 690-0120(3)(4) and (5)).

- The original water management and conservation plan rules were designed to avoid a “one-size-fits-all” approach by providing communities the opportunity to assess the feasibility of a variety of conservation measures. During the development of water management and conservation plan rule amendments staff have recognized the variations in the analytical capabilities of communities and have refined this approach by developing size and resource issue “screens.” In the criteria for plan approval under OAR 690-086-0130(7)(a) and in the water conservation elements under OAR 690-086-0150(5) and (6) small water providers are specifically exempt from certain requirements. Based on input from environmental interest commenters, the size of water suppliers exempt from certain requirements has been lowered from 2,500 to 1,000. (*See* OAR 690-086-0130(7)(a) and OAR 690-086-0150(5) and (6)).
- A major concern of environmental interest commenters was a proposed provision under OAR 690-086-0910(2) that required the Department, under certain circumstances, to give deference to information provided by the water supplier. This provision has been stricken from the final proposed rules.
- Under the provisions for preliminary review of draft plans, the Department is required to complete its review within 90 days. (*See* OAR 690-086-0910(4)). Significant public input was provided voicing concern that the Department will be unable to review the numerous plans required in a timely fashion. For municipal water suppliers, the specific concern is their ability to increase diversion under an extended permit. For agricultural water suppliers, the concern is that approval of a plan is necessary to take advantage of certain statutory transfer provisions, specifically ORS 540.572.

To address public input, the proposed rules have been modified. The final proposed rules provide that if the Department fails to meet the 90-day review deadline (1) for the purposes of ORS 540.572 related transfers, a plan submitted by an agricultural water supplier is deemed approved for a limited period of time, and (2) for municipal water suppliers whose diversion is limited by an extension order that requires an approved water management and conservation plan, the Director may, by order, allow the diversion of a specified quantity of water in order to prevent harm to the public welfare, safety and health. (*See* OAR 690-086-0910(6)).

B. The final proposed rules reflect the Department's statutory requirements

The final proposed rules implement the numerous existing statutory provisions that promote the maximum beneficial use of water and require use of water without waste. (*See* ORS 536.220, 537.120 and 540.610).

As described above, under existing statute the Department, for good cause shown, shall order and allow an extension of time to complete construction and/or apply water to beneficial use. In adopting the final proposed rules, the Commission is exercising its discretion to recognize the difference between the development of a long-term community water supply and other water uses and is fulfilling its statutory obligation to evaluate and act on permit extensions.

The final proposed Division 86 rules are designed to ensure that water is used efficiently and that potential impacts on other resources are considered during water right development.

C. The final proposed rules advance the Department's co-equal goals of protecting streamflow and addressing Oregon's water supply needs

Stakeholders and the Department have consistently agreed that the extension rules adopted in 1998 did not suit the needs of community water suppliers. The final proposed rules address this concern and Oregon's water supply needs by providing community water suppliers a process and structure to plan for the long term. However, the opportunity for flexibility and long term planning is directly linked to the requirement that diversion of water under an extended permit is contingent upon an approved water management and conservation plan - a plan that demonstrates a commitment to efficient use of the resource and a rigorous analysis of water demand, thus advancing streamflow protections. The new extension rule requirements are a major shift from previous extension requirements for community water suppliers and, in the Department's view, a gain for the resource over previous requirements.

D. The final proposed rules fit within staff capabilities

The Department intends to utilize existing staff to implement the proposed Division 315 permit extension rules. Like many stakeholders, the Department is concerned about the workload of reviewing as many as 200 Division 86 plans over the next three years. To address this concern a number of steps have been taken and a number of options are being explored. As described above, the Division 86 rules now provide potential temporary relief for water suppliers whose plan is not timely reviewed by the Department. In addition, staff believe that the new structure of the rules will make it easier for water suppliers to understand the rule requirements, resulting in better quality plans and quicker staff review time. Given the potential workload, for plans that do not meet the rule requirements, staff intend to work with suppliers making good faith efforts to comply, but will need to deny or return the plan rather than spend countless hours coaxing the supplier to submit needed improvements. This approach will encourage and reward good faith efforts as opposed to the current process that some would argue encourages foot dragging.

In terms of staffing, the Department is hopeful that additional staff resources will be available as a result of proposed fee adjustments, including a proposed fee for the submittal of a water management and conservation plan. Discussions are also on going regarding the structure of staff currently responsible for reviewing plans. Finally, stakeholder groups have indicated their interest in getting the Department statutory "receipts authority" which would allow a water supplier and the Department to enter into an agreement for expedited review of a plan by additional staff or outside contractors paid for by the water supplier. Stakeholder groups have also indicated a willingness to partner with the department in providing technical services, outreach and "model plans" to enhance plan accuracy and quality.

E. The final proposed rules provide for adaptive management

The final proposed rules provide an adaptive management approach to permit extensions in three ways. First, based on input from environmental interests the final proposed Division 86 rules will be reviewed by the Commission in three years and every three years thereafter. (*See* OAR 690-086-0010). Second, for any request to increase diversion under an extended permit after January 1, 2042 the Department is required to find that the additional diversion will not impair or be detrimental to the public interest. (*See* OAR 690-086-0130(8)). Finally, the water management and conservation planning approach is designed to identify productive conservation measures and, through progress reports and plan updates, to modify the measures based on experience. This approach gives the Department and the Commission the opportunity to keep doing those things that are working well and adjust those things that are not working.

IV. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the proposed rules under OAR Chapter 690, Division 315 and OAR Chapter 690, Division 86 (Attachment 1).
2. Adopt the proposed rules with revisions.
3. Not adopt rules and request the Department to further evaluate the issues.

V. Director's Recommendation

The Director recommends Alternative 1, that the Commission adopt the final proposed rules in Attachment 1.

Attachments:

Attachment 1. Final Proposed Rules, OAR Chapter 690, Division 315 (Permit Extensions) and OAR Chapter 690, Division 86 (Water Management and Conservation Plans).

Attachment 2. Agenda Item, Work Session, April 11, 2002 (without attachments)

Attachment 3. Summary of Public Comment on July 1, 2002 Hearing Drafts – Division 315 and 86.

Attachment 4. Copies of Written Public Comment on July 1, 2002 Hearing Draft (provided to the Water Resources Commission and available to others upon request).

Summary of Public Comment on July 1, 2002 Hearing Draft Division 315 & 86 Rules

A. *Water Providers*

General Comments

- Since in-depth analysis needs to take place under Division 86, the analysis for an extension under Division 315 should be expedited and simple. Concern about applicants being required to provide repetitive and/or conflicting information and that joining Division 315 and 86 will make for a more confusing, lengthy permit extension process.
- This is a major policy shift for the Department and places many new requirements on water providers. Technical and financial assistance will be needed for some.
- References to “additional amounts of water” in both sets of rules needs to be clarified.
- Concern about a “one-size-fits-all” approach and that small providers may not have the data to meet the rule requirements.

Division 315 (Extensions)

- Municipal and quasi-municipal extension applicants should have the option of proceeding under the rules in effect at the time of application.
- There should be a short form process for small entities.
- There should be a time limit for Department review of extensions.

Division 86 (Water Management and Conservation Plans)

- Concern about the Department having staff resources to evaluate plans in a timely fashion.
- Division 86 plans require four elements. The Department should require certain elements based on conservation record, time of extension request and size of water supplier and diversion.
- Financial decisions regarding conservation should be left to water providers.
- Proposed Division 86 rules need to address the status of existing approved plans or plans that are currently being developed.
- The terms “benchmark” and “public interest” used in Division 86 should be defined.
- Concern that “benchmark” review is a re-opener and unclear about the effect of not meeting a “benchmark.”

B. Agencies

Oregon Department of Fish & Wildlife

General Comments

- Every effort should be made to use the state's water without waste and with maximum efficiency to maintain adequate flows to support instream values.
- Water Management and Conservation plans should be implemented before additional water use is allowed under an extension and plans should be updated on a regular basis.
- The rules should set out clear standards and not allow water suppliers to speculate on future growth to the detriment of instream values.

Division 315 (Extensions)

- There should be a Division 33-type (inter-agency) review for extensions.

Division 86 (Water Management and Conservation Plans)

- Plans should include an analysis of the competing uses for water within the basin, effects of expansion, and plans and options to minimize effects.
- Projections of growth and water use need to be updated regularly.
- Permits junior to an instream water right and requesting an extension should be required to mitigate for impacts.
- The rules should include a public process with local government approval or denial of the plan.

C. Environmental Interests

General Comments

- Conservation plans have not been very successful to date. More conservation program elements (eg. billing rates) should be required of municipalities.
- The rules are a departure from the Department's statutory authority and inconsistent with other Department rules and policies.
- There needs to be better linkage between the two divisions of rules in terms of requiring plans for extension approvals.

Division 315 (Extensions)

- Demand forecasts should be more detailed, based on recognized forecasting methodology, not exceed 20 years and should be based on water use efficiency standards.
- The diligence standards are too open and are inconsistent with the standard applied to other water users. Current extension rules require permittees to show diligence by "actual construction" and in considering the present demand for water require the Department to consider things like instream water rights etc. It also lumps diligence and good faith evaluations together which isn't allowed by statute.

- The statute does not give the Department discretion to create different standards of “good cause” for different permit holders seeking an extension – the rules are invalid as a matter of law. The market and demand for water is limited by the proposed rules in a way not allowed by the statute, particularly because it “punts” to the Division 86 plans.
- There should be diligence “check-ins.” Benchmarks under Division 86 cannot substitute for check-ins.
- There needs to be clear language regarding cancellation of municipal and quasi-municipal permits.
- Oppose the rules because they feel that using water management plans creates an exception to the “good cause” review for an extension and allows water developers to hold on to old water use permits in the name of development.
- The rules provide no guidance for what is a “reasonable” amount of time for an extension.
- The rules should require applicants to provide information regarding beginning of construction, annual accomplishments, and undue hardship resulting from denial.
- The rules should provide clear steps as to what the Department will do if an extension is denied.

Division 86 (Water Management and Conservation Plans)

- The use of benchmarks under Division 86 should be changed to checkpoints that the public can participate in.
- The use of “benchmarks” provides little or no guarantee that conservation measures will yield results in a timely manner. Replace “benchmark” with deadline.
- Exemptions from certain planning requirements should be 100 instead of 2,500.
- The proposed changes to Division 86 fail to establish concrete deadlines for achieving clear standards.
- In some cases the proposed rules are less restrictive than the existing rules.