



Oregon

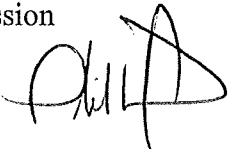
John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director 

SUBJECT: Agenda Item A, January 27, 2011
Water Resources Commission Meeting

Request for rulemaking that would establish rules requiring public notice of the issuance of certificates of water rights

I. Issue Statement

The Commission received a Petition for Rulemaking to adopt an Oregon Administrative Rule ("OAR"), Chapter 690 Division 330 to require public notice of water right certificate issuance within seven days of issuing. The petition was received on November 10, 2010. The State of Oregon Administrative Procedures Act and the rules of the Water Resources Commission direct that petitions of this nature must be either denied or rulemaking initiated within 90 days of receiving the petition. (ORS 183.390; OAR 690-001-0005; OAR 137-001-0070 (2006)). This is an action item. The Commission must act by February 7, 2011 to either deny the petition or direct the Department to initiate rulemaking.

II. Background

To acquire a water right, a user must first file a water right application. The Water Resources Department reviews the application to consider whether water is available for the proposed use and to consider other criteria that allow the department to determine whether the proposed use of water is in the public interest. If these conditions are met, the Department may issue a water right permit. The water right permit contains the date by which beneficial use must be performed. Upon completion of beneficial use, the owner of the permit is to submit notice of completion and a final proof survey to the Water Resources Department. The Department issues a certificate to the permit holder following proof of completion and beneficial use of the water.

III. Discussion

A water right certificate is created based on information contained in the notice of completion, final proof survey, and final proof report describing how and where water was used. The water right certificate issued in accordance with the provisions of the

water right act is conclusive evidence of the right. Oregon Revised Statute (ORS) 537.260 provides that any person owning a water right application, permit or certificate subsequent in priority to a newly issued water right certificate may contest the issuance of the new certificate within three months of issuance.

A water right certificate is a final decision of the Department, making it an action which may be reviewed by the court.

The rulemaking petition filed on November 10, 2010 proposes a rule that would require the Department to provide notice of water right certificate issuance in the Department's weekly notice. The Department has requested advice from the Department of Justice regarding the interpretation of relevant statutes pertinent to certificate issuance, as those statutes relate to questions of judicial review.

The Department is continuing to work with its legal counsel to resolve some outstanding questions. This issue will be presented to the Commission at a future meeting, once the Department has received advice on the questions it has posed to the Department of Justice.

IV. Summary

The petition received by the Commission requesting rulemaking to provide notice of water right certificate issuance meets the requirements of the Administrative Procedures Act. Based on the Act, Commission action is necessary to either deny the petition or initiate rule making by February 7, 2011. Because issuing notice raises questions relating to interpretation of the relevant statutes, the Department would like to receive advice on outstanding legal questions before it makes policy recommendations to the Water Resources Commission. The Department is thus recommending the Commission to deny the Petition and to direct the Department to return at a future Commission meeting with a proposed process to provide notice consistent with the terms of the relevant statutes governing certificate issuance.

V. Alternatives

1. Deny the petition and direct the Department to return to the Commission with a process to provide notice of certificate issuance.
2. Accept the petition and direct the Department to initiate rulemaking to adopt the proposed rule included in the petition.

VI. Recommendation

The Director recommends Alternative 1, to deny the petition and direct the Department to return to the Commission with a process to provide notice of certificate issuance.

Attachments:

1. Rulemaking Petition
2. Letter from the League of Oregon Cities, Special Districts Association of Oregon, and Oregon Water Utilities Council
3. Draft Order Denying Petition For Rulemaking

Tom Paul
Deputy Director
503-986-0882

BEFORE THE
OREGON WATER RESOURCES COMMISSION

WaterWatch of Oregon, Inc.,)	
Petitioner)	PETITION FOR
)	RULEMAKING
)	
)	

WaterWatch of Oregon (“WaterWatch”) files this Petition for Rulemaking to establish rules requiring public notice of the issuance of certificates of water rights. WaterWatch files this petition pursuant to ORS 183.390, OAR 690-01 and OAR 137-001-0070.

I. Statement of the Problem

When certificating a water right, the Department is required to issue a certificate of water right. OAR 690-330-0010; ORS 537.250(1); ORS 537.630(4). In practice, the Department also issues a separate order making findings and ordering a certificate to be issued. Both of these are orders in other than a contested case and are thus subject to review and appeal under ORS 183.484 or OAR 137-004. However, while issuing certificates is a critical step in the water permitting process and petition for reconsideration and appeal of these orders is allowed under Oregon law, the Department currently does not provide notice of its issuance of the certificate or accompanying final order.

Failing to provide public notice of certification decisions makes it very difficult for the public to know when the Department has issued a certificate and accompanying final order. Failure to provide this notice also undermines the on-going commitment of the Department and of the State to transparency in decision-making. Lack of notice directly affects the public right to meaningfully assess certificate decisions. It also deprives the public from gaining timely knowledge of the Department’s actions and thus risks the public’s statutory rights to request review.

Additionally, in many cases certification decisions may involve the interests of other state agencies. Without public notice, those agencies typically will not know about decisions that are being made. Providing notice to interested agencies would be consistent with the commitment of the Department and the Commission to working towards integrated state water resources management.

In a nutshell, lack of public notice serves as a significant barrier to public and agency review and input on certification decisions made by the Department.

II. WaterWatch's Request to the Water Resources Commission

WaterWatch requests that the Commission adopt rules requiring public notice of the issuance of certificates of water rights, pursuant to ORS 183.390, and OAR 690-01 and 137-001-0070, to require public notice of the issuance of certificates of water rights. Specifically, WaterWatch requests that OAR 690-330 be amended to add a new section (005) that includes the following language:

OAR 690-330-0050(1): Within seven days of issuing a certificate of water right pursuant to OAR 690-330-0010, ORS 537.250(1), or ORS 537.630(4), the Department shall give public notice of the certificate issuance in the weekly notice published by the Department. The notice shall include:

- (a) The application file number;
- (b) The permit number;
- (c) The certificate number and date of certificate issuance;
- (d) The certificate holder name and address;
- (e) County of water use;
- (f) Amount of certificated water use;
- (g) Common name of surface water source(s) or basin;
- (h) Nature of use.

(Note: this language closely follows the existing public notice rule for new permit applications, OAR 690-310-0090.)

III. Facts Supporting the Request

All waters within the state from all sources of water supply belong to the public. ORS 537.110. The Water Resources Commission has a duty to make available information concerning water resources. ORS 536.480.

The lack of public notice of the Department action of certification is inconsistent with agency practice in all other areas of water right processing. The Department provides public notice for all stages of the processing of a water right except for certification. For example, the Department's public notice includes notice of the initial review of a new application, proposed final orders for new applications and for extensions of time requests, final orders for new permits and extensions, and notice of extension applications and limited license applications. Moreover, there is also public notice of transfer applications, preliminary determination on transfer requests and cancellation of certificates. Issuance of a certificate is

the only significant step in the water right process for which the Department does not provide public notice.

Issues that arise during certification include, but are not limited to, adequacy of claims of beneficial use, compliance with permit conditions and compliance with settlement agreements. Given that certification is the final step in the vesting of a water right for use of the public's water, the public should be given notice of Department decisions.

In sum, there is a clear need for notice of the issuance of certificates in the Department's weekly notice. Providing notice is consistent with the Department's commitment to transparency in decision making. Moreover providing notice is consistent with the opportunity to petition the Department for reconsideration or to seek judicial review. Providing public notice is also consistent with the Department's practice of providing notice of all other significant steps in the water right process.

IV. Comments required by OAR 137-001-0070 for petitions to amend an existing rule

WaterWatch is proposing to amend an existing rule through addition of a section at the end of the rule. The proposal does not amend or delete any of the existing language of the rule (OAR 690-330).

(a) Options for achieving the existing rule's substantive goals while reducing the negative economic impact on businesses: WaterWatch does not anticipate any negative economic impact on businesses from the proposed rule amendment.

(b) The continued need for the existing rule: The existing rule continues to be needed and WaterWatch's proposed amendment (through addition) would not alter the existing language of the rule.

(c) The complexity of the existing rule: The existing rule is not complex. Addition of a provision regarding public notice would not add to the complexity of the rules.

(d) The extent to which the existing rule overlaps, duplicates, or conflicts with other state or federal rules and with local government regulations: WaterWatch is not aware of any way in which the existing rule overlaps, duplicates, or conflicts with any state, federal or local rules or regulations.

(e) The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule: Technology, economic conditions and other factors may have affected proof of appropriations and issuance of water right certificates since the rule was adopted; however, this should not have an impact on the proposed rule amendment

(through addition). Since original rule adoption, the Department has made great advances in its technological distribution of information to the public.

V. Information provided pursuant to OAR 137-001-0070(1).

Name and address of Petitioner:

Kimberley Priestley
WaterWatch of Oregon
213 SW Ash St., STE 208
Portland, OR 97204

Name and address of any other person known to the petitioner to be interested in the rule:


Petitioner does not have knowledge of any other person interested in the rule.

VI. Conclusion

Amending the certification rules to provide for public notice of certificate orders will help ensure that the public's rights to petition the Department for reconsideration and to seek judicial review are preserved. It will also help inform interested agencies of Departmental decisions. Without notice, it is very difficult for the public to know which decisions the Department is taking with regards to specific water uses and permits. Providing public notice of certification issues is consistent with the Department's on-going commitment to transparency in decision-making.

Dated: November 10, 2010.

Respectfully submitted,



Kimberley Priestley
Senior Policy Analyst
WaterWatch of Oregon
213 SW Ash St., STE 208
Portland, OR 97204
Phone: 503.295.4039 x3
Fax: 503.295.2791
kjp@waterwatch.org



January 14, 2011

John Jackson, Chair
Oregon Water Resources Commission
North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Dear Chairman Jackson,

We would like to take this opportunity to comment on the petition for rulemaking that WaterWatch of Oregon, Inc. (WaterWatch) recently submitted to the Water Resources Commission (the Commission). WaterWatch's objective is to amend Water Resource Department (WRD) administrative rules to add a public notice requirement when water right certificates are issued.¹

WaterWatch's proposed amendment of the current extensive public notice requirements would confuse the public, increase costs for WRD and potentially create public frustration.

WRD already provides notice in multiple stages of the water right application process. In fact, notice is required by statute at every stage of the water right determination process.²

¹ In its Petition for Rulemaking, WaterWatch proposes adding the following requirements as OAR 690-330-0050(1):

Within seven days of issuing a certificate of water right pursuant to OAR 690-330-0010, ORS 537.250(1), or ORS 537.630(4), the Department shall give public notice of the certificate issuance in the weekly notice published by the Department. The notice shall include:

- (a) The application file number;
- (b) The permit number;
- (c) The certificate number and date of certificate issuance;
- (d) The certificate holder name and address;
- (e) County of water use;
- (f) Amount of certificated water use;
- (g) Common name of surface water resource(s) or basin;
- (h) Nature of use.

² For example: ORS 537.150(6) proceeding with an application; 537.153(4) issuing a proposed final order; 537.170(9) issuing a final order; 537.252(2) water right certificate altered to contain land not described in permit

Following WRD's initial review and application review, applicable statutes entitle the general public to notice and an opportunity to submit comment or protest to any proposed water right application. If such a water right application is not withdrawn or put on hold by the applicant, WRD provides public notice and allows for a 30 day public comment period. It is during this public comment period that individuals and interest groups are allowed to voice concerns or object to the proposed new use.

Since the water right certificate mirrors the conditions and terms of a water right permit granted by final order, we believe that the notice requirement at the final order stage is adequate as to the issuance of a water right certificate. Only in very limited situations does WRD have the authority to amend the terms and conditions of a water right permit when issuing a water right certificate.

In addition to the many requirements for public notice throughout the water right application process, water right certificates are public records subject to disclosure and WRD is required by statute to maintain paper copies of all certificates.³

Public notice of the issuance of a water right certificate by weekly notice published by WRD may need to outline the limitations on rights to appeal to WRD or to petition for judicial review. Plainly restating these rights to appeal may be necessary to reduce confusion, unwarranted challenges and expensive and futile legal wrangling and delays. Further, WaterWatch's proposed amendment, if adopted, must be carefully prefaced so as not to create a right to appeal where that right is precluded by law because, by statute, the opportunity to contest the issuance of a certificate is limited to only an identified group of persons. ORS 537.260 (3) states:

"Any person owning an application, permit or water right certificate subsequent in priority may jointly or severally contest before the department the issuance of the water right certificate at any time before it has issued, and after the time has expired for the completion of the appropriation under the permit, or within three months after issuance of the certificate." (emphasis added.)

Our organizations certainly understand the benefits of public notice in water right decision making, especially for junior water right holders. Many of our respective members hold junior water rights. That said, should the Commission decide to adopt the proposed amendment to WRD administrative rules, we strongly urge the Commission to adopt rules that reflect existing statutes by reaffirming and emphasizing in any notification of proposed certificate the limitations on standing to appeal. In addition, should the Commission move forward with rulemaking on this issue, our organizations would appreciate the opportunity to comment on proposed rules and participate on any advisory committees.

³ORS 536.040(1) and 536.040(3)

We thank you for this opportunity to comment and look forward to continuing to work with you on important water issues in the future.

Warm regards,

Chris Fick
League of Oregon Cities

Mark Landauer
Special Districts Association of Oregon

Jason Pulley
Oregon Water Utilities Council

cc: Charles Barlow, Oregon Water Resource Commission
Jeanne LeJeune, Oregon Water Resource Commission
Mary Meloy, Oregon Water Resource Commission
John Roberts, Oregon Water Resource Commission
Carol Whipple, Oregon Water Resource Commission
Ray Williams, Oregon Water Resource Commission
Phil Ward, Director, WRD
Brenda Bateman, WRD
Tom Paul, WRD
Ruben Ochoa, WRD

BEFORE THE OREGON WATER RESOURCES COMMISSION

IN THE MATTER OF:

WaterWatch of Oregon, Inc.,
Petitioner.

FINAL ORDER DENYING PETITION
FOR RULEMAKING

This matter came before the Oregon Water Resources Commission at a special meeting held via conference call on January 27, 2011. The Commission considered WaterWatch of Oregon Inc.'s Petition for Rulemaking dated November 10, 2010. The Commission also considered a report and comments submitted by staff and comments submitted by the public during opportunities for public comment provided prior to and during the Commission's meeting.

After due consideration, the Petition submitted by WaterWatch of Oregon, Inc. is hereby denied and the Department of Water Resources is directed to return to the Commission with a process to provide notice of certificate issuance.

Dated this ___ day of January, 2011.

John Jackson, Chair
Oregon Water Resources Commission

NOTICE: This is a final order other than contested case. Pursuant to ORS 536.075(1) this order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the time specified by ORS 183.484(2).