



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Douglas Woodcock, Field Services Division Administrator
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SUBJECT: Agenda Item B, May 12, 2010
Water Resources Commission Meeting

Informational Report on 2010 Field Regulation and Enforcement Activities

I. Issue Statement

This is an informational report by staff to the Water Resources Commission on Department field activities. This report provides information on field regulation and enforcement activities for 2010. *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 2010 there were five state funded assistant watermasters and 14 locally funded part-time and full-time assistant watermasters located in field offices throughout the state. The locally funded assistants are typically compensated through county budgets, grants, or contracts.

In addition to watermasters and assistants, regional offices house staff such as well inspectors, water right and transfer specialists, hydrographers, hydrologists, and hydrogeologists. Day-to-day actions are carried out by field staff whose activities include:

- Surface and ground water regulation
- Installation of surface water measuring devices
- Customer service and public outreach
- Stream gaging and measurements
- Implementation of Oregon Plan measures
- Investigation and referral of formal enforcement activities

- Preparation of hydrographic records
- Dam safety inspections
- Well construction compliance and enforcement activities
- Final proof surveys, mapping and proposed certificate preparation
- Field assistance to other Department divisions
- Water right transfer application processing

These day-to-day field activities involve working with water users to ensure compliance with the terms and conditions of their water rights, and to ensure 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 Manager is responsible for enforcement policy development, 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. Formal enforcement is initiated by the issuance of a proposed order and may include suspension of a well constructor's license or assessment of civil penalties. Generally, most formal enforcement actions are settled before the case is referred to the Office of Administrative Hearings.

Staff in the Well Construction and Compliance Section include a Well Construction Program Coordinator who oversees the well inspection program, including maintaining continuity among the regional well inspectors, and interpretation of the administrative rules governing well construction. The program also includes one Well Licensing Program Specialist who oversees the Well Constructor Licensing Program and the Continuing Education Program for well constructors; a Well Log Review Support Position; a Well Identification Tag Program and Start Card Support Position; and an Exempt Use Well Program Coordinator.

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. 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 field staff is to engage in pro-active water management rather than relying solely on a complaint-driven process. The directive 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.

Another priority for watermasters and assistant watermasters is installation of measuring devices on surface water significant points of diversion (POD) in high priority stream basins. A significant POD diverts greater than five cubic feet per second (cfs), or greater than 10 percent of the lowest monthly 50 percent exceedance flow as defined in the water availability model and greater than 0.25 cfs, or had a condition on the water right requiring installation of a measuring device. Attachment 2 provides a summary of significant point of diversion work completed in the high priority basins through the end of calendar year 2010.

Well inspections and well construction enforcement are also a priority for watermasters, although this work is typically led by regional well inspectors that are funded through Start Card fees. The decline in Start Card fees has impaired the Department's ability to fill well inspector positions as they become vacant. The watermaster's efforts are helping to meet the Department's goal of inspecting a minimum of 25 percent of all new wells drilled.

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. The Department has developed "General Guidance to Address a Call for Surface Water" which field staff use for guidance. Watermasters regularly monitor streams within their districts with instream water rights or minimum streamflows. If streamflow is not adequate to satisfy the instream water right, or if other entities submit complaints to the watermaster, the watermaster begins an investigation and takes appropriate actions such as curtailing or shutting off the diversion of junior users. Only in unusual cases, when voluntary compliance with the watermaster's request is not achieved, do formal phases of enforcement begin.

Water is distributed according to priority date, 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 the amount of 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, priority date, and other necessary information. This may involve several hours or days of effort, depending on the number of water rights in the stream basin. 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.

Unauthorized uses of water discovered during surface water regulation 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 or excessive diversion rate. 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 senior user of the situation.

During regulation watermasters often negotiate voluntary reductions, rotations, or compliance schedules with water users. Senior right holders may 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 available surface water 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 ensuring 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. Well inspections may also be initiated by complaints or inquiries from the public, or through investigation by the well inspector or watermaster. Well inspectors work closely with drillers to informally resolve problems and protect groundwater. As noted above, field staff attempt to inspect at least 25 percent of all new wells.

III. Discussion

A. 2010 Surface Water Regulation

In 2010, watermasters and their assistants regulated 398 stream systems, up from 392 in 2009. Regulation on the 398 streams was prompted by the watermaster's own investigation in 358 cases and by complaints in 235 cases. Actions were taken to protect instream rights in 214 cases and other senior rights in 227 cases, and to stop un-permitted use in 152 cases. Attachment 3 provides a summary of field staff actions

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." Watermasters reported a total of 10,645 regulatory actions in 2010, compared to 11,527 in 2009. Of these 10,645 regulatory actions, 2,641 involved written notices, compared to 3,310 written notices in 2009. The efforts range from one action per stream to a high of 1,380 actions on the Umatilla River, tributary to the Columbia River. There is a large variation in total regulatory actions among the regions. Differences can be attributed to the number of irrigation districts compared to the number 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.

In 2010, statewide, compliance with water rights and regulations was approximately 94 percent, the same as in 2009. Attachment 4 provides a regional and watermaster district breakdown of compliance rates for 2010. The Well Construction and Compliance Section Manager continues to work with field staff to improve compliance reporting and ensure consistency and accuracy throughout the state.

In 2010, statewide, the earliest priority date regulated was 1854 on Neil Creek, tributary to Bear Creek in the Rogue Basin, Southwest Region. The category of earliest priority regulated reflects, for each river system, the earliest water right priority date that was regulated by the watermaster to a diversion rate less than the maximum legal limit.

Staff are working to expand streamflow monitoring and ensure that distribution and regulation of water needed to protect instream water rights is performed expeditiously. In 2010, staff worked with water users to have measuring devices installed on 68 significant points of diversion in high priority watersheds around the state.

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, Fresh Water Trust, and other organizations to promote voluntary streamflow restoration. In 2010, 1,663 cubic foot per second (cfs) (excluding supplemental water rights) 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. 2010 Well Program Activity

Well reports, or “logs,” are a physical description of well construction, alteration, abandonment, conversion, or deepening. In 2010 the Department received 4,097 water supply and monitoring well reports. Of these, 1,152 were monitoring wells and 2,945 were water supply wells. The Department received 6,784 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 2010, 2,776 start cards were received for wells requiring a fee. Of that number, 597 were monitoring wells and 2,179 were water supply wells. The regional well inspectors and field staff performed a total of 1,332 well inspections. Of that number, 804 inspections were conducted on new construction, representing an inspection rate of 27 percent of all new wells. Of the new wells inspected, 29 percent were water supply wells and 19 percent were monitoring wells. About 8 percent of the new wells inspected were deficient and required repairs. Attachment 5 shows the data for logs received and well inspections performed during 2010.

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, 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 Well Construction and Compliance Section Manager for a formal enforcement action. If the Department determines there is sufficient evidence to pursue the matter, a proposed order is issued which may include assessment of 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 10,648 regulatory actions taken in 2010, it is significant that only six Notices of Violation (NOV) were issued by field staff, indicating that a very high degree of compliance is achieved voluntarily. In addition to the six NOVs sent by field staff in 2010, the Well Construction and Compliance Section Manager issued three formal enforcement orders related to well constructors, resulting in civil penalties in the amount of \$3,700. Attachment 6 lists the formal enforcement for 2010. Working with the Commission, one drilling machine was impounded in Lake County in 2010.

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

Staff also 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.

Attachments:

1. List of Watermasters by District
2. Significant Point of Diversion summary table
3. 2010 Surface Water Summary Totals and by Region
4. 2010 Compliance Rate Summary by Watermaster District and Region
5. 2010 Well Construction and Inspection Summary
6. 2010 Formal Enforcements