




Oregon

John A. Kitzhaber, MD, Governor

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MEMORANDUM

TO: Water Resources Commission
FROM: Phillip C. Ward, Director 
SUBJECT: Agenda Item L, March 7, 2014
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions

Since the November meeting, the Department has hired 14 new employees and promoted nine staff. The Department would like to congratulate Brenda Bateman, promoted to Technical Services Division Administrator, and Kris Byrd, promoted to Well Construction Enforcement Manager.

Water Right Application Processing Internal Guidance Review

It has been suggested that there is a need for the Department to initiate a review of its water rights application processing internal guidance memos in order to evaluate whether information contained in these documents should be included in rule or on the Department's website. The Department has started work internally to review such memos. After the initial internal review, the Department will engage stakeholders to review the Department's findings. This action is consistent with an agreement that the Department made last year after a decision made in processing a water right application relied, in part, on information contained in an internal guidance memo.

New State Scenic Waterways Being Developed

As directed by Governor Kitzhaber, Department staff is working with the Oregon Parks and Recreation Department (OPRD) to recommend three new State Scenic Waterways each biennium (see Attachment 1). Eventually, the Water Resources Commission will be asked to adopt flow recommendations for each of the new segments. Staff, in conjunction with OPRD, is planning to brief the Commission at the May meeting, with action tentatively planned for the November 2014 meeting.

II. Commission Follow Up

Columbia River Treaty Update

On December 13, 2013, the U.S. Entity submitted to the U.S. Department of State, the final *U.S. Entity Regional Recommendation for the Future of the Columbia River Treaty after 2024*. The Pacific Northwest Region supports the modernization of the Treaty to generate better and more balanced benefits. The goal is to develop a modernized Treaty that balances and ensures reliable and economic power production, acceptable flood risk management, and more resilient and healthy ecosystem-based function as the primary purposes, while also recognizing other important elements. Specifically, water supply was identified as a key element necessary to help meet regional needs for irrigation, municipal and industrial use, instream flows, navigation, and recreation.

The regional recommendation suggests that the U.S. government make a decision by mid-2014 to move forward with negotiating a modernized Treaty and that the U.S. complete the renegotiation no later than 2015.

The President is ultimately responsible for determining whether to pursue negotiations to change the Treaty and, if so, the matters that would be addressed in negotiations with Canada. Under the direction of the National Security Council on behalf of the President, the Department of State has been appointed to coordinate and oversee the formal federal process, which will consist of a Federal interagency review. During this process, the Department of State may contact the region for additional advice and may also work with stakeholders that have national or regional interests in the Treaty. Relevant Congressional committees may also request information from the Federal government as well as stakeholders. The U.S. Entity and regional partners, including the State of Oregon, are committed to supporting the Department of State, as it engages in its formal review. The U.S. Entity and the region, including the State of Oregon, in coordination with the Department of State, are ready to work with Canada to develop a modernized Treaty.

Key Performance Measures

At the November Commission meeting, staff shared the Department's progress on Key Performance Measures, and the Department was asked to provide an update at the March meeting. Below is information on select Key Performance Measures, as data is available, that were not trending towards the target at the last meeting.

KPM #690-8 Fully implement the Water Resources Commissions 2000 Water Measurement Strategy

The target for this KPM is the installation of 175 measurement devices per year. In 2013, 79 measurement devices were installed and another 32 measurement devices were confirmed installed, for a total of 111 measurement devices installed on significant diversions.

KPM #690-9 - Promote Efficiency in Water Management and Conservation Plan Reviews

The goal is for 95 percent of Water Management and Conservation Plans to receive a preliminary review within 90 days. Between July and December, the Department had received four Water

Management and Conservation Plans. One hundred percent of the plans were reviewed in 90 days, compared to 81 percent for the last KPM reporting cycle.

KPM# 690-10 - Promote Efficiency in Water Right Application Processing

The current target for KPM #10 is for 55 percent of water right applications to receive an initial review within 45 days of application filing. For the first six months of this reporting year, 13.1 percent of new water right applications received an initial review within 45 days. Eighty-six percent of the applications were groundwater applications. During the same period, 10.5 percent of groundwater applications and 40 percent of surface water applications received an initial review within 45 days. The groundwater review that must occur before groundwater application can be processed makes the statutory 45-day requirement for issuance of an Initial Review difficult to meet. The process improvement update staff report discusses efforts that are being taken to improve performance in this area.

Litigation Update

Meadows Utilities LLC v. Oregon Water Resources Department

Meadows Utilities requested an extension of time for water right permit G-13494. The permit authorizes the use of ground water for commercial use on the north side of Mt. Hood. In 2004, the Department issued a Final Order approving the extension of time. The proposed development and use of water was opposed by members of the local community.

A petition for Judicial Review of the Department's Final Order was filed with the Oregon Court of Appeals. The parties to the Court action worked over an extended period to seek a solution. Eventually, a settlement agreement was achieved. Petitioners moved the Court to dismiss the case and acknowledge the water right settlement agreement. The Court granted the motion and dismissed the case on December 3, 2013.

Deborah Noble et al v. Oregon Water Resources Department, et al (Lytle), Oregon Court of Appeals

This case was heard in Clackamas County Circuit Court and was a petition for Judicial Review of an alternate reservoir application filed on an existing, small (1 acre-foot) reservoir. The Nobles raised issues regarding impacts to fish resulting from the reservoir. The hearing was held December 2010. The Judge ruled that the Department's Final Order, authorizing the issuance on the Lytle alternate reservoir, was issued in violation of statutory provision. The ruling states that the information and data contained in the application was insufficient to meet the statutory eligibility criteria. However, the Judge concluded that a reasonable person could agree with the agency's conclusions in the Final Order and permit.

Noble has appealed the ruling of the Clackamas County Circuit Court in relation to the merits of the case. Oral arguments before the Court of Appeals have taken place. There has been no ruling from the Court at this time.

Wolfgang Nebmaier and Vajra Ma v. Water Resources Department and others

This case involves Judicial Review of a Final Order in a Contested Case wherein the Department received affidavits alleging forfeiture of water rights. The water use included domestic use and irrigation of 0.6 acres. The contested case resulted in a finding that the portions of the water rights in question had been forfeited. Nebmaier and Vajra Ma filed Exceptions with the Commission. The Commission denied the Exceptions. On June 27, 2012, the Court of Appeals affirmed the case without Opinion. The Court denied a request filed by Nebmaier for reconsideration.

The Oregon Supreme Court issued the Judgment, upholding the Department's order cancelling the water right.

WaterWatch v. Oregon Water Resources Department (City of Cottage Grove)

The City of Cottage Grove filed an application to extend a water right permit issued in its name. WaterWatch protested the order approving the extension of time. Following a Contested Case Hearing, the Department issued a Final Order granting the extension to the City.

After issuance of the extension of time, the City filed the Claim of Beneficial use for the extended water right permit and requested that the water right certificate be issued. Following review of the Claim, the Department issued the certificate. No petitions for reconsideration or Judicial Review were filed.

WaterWatch filed a petition with the Oregon Court of Appeals for Judicial Review of the water right extension order issued following the contested case. The Court of Appeals heard oral argument on September 10, 2012.

The Court of Appeals ruled in favor of WaterWatch. The Court reversed and remanded with instructions to vacate the City of Cottage Grove's water right certificate and to reconsider the permit extension request in accordance with the Court's opinion.

WaterWatch v. Oregon Water Resources Department (Lower Clackamas Water Districts)

WaterWatch protested the approval of various extensions of time involving several water districts that divert water from the lower portion of the Clackamas River. Since the issues were similar, the eight cases were consolidated into a single contested case. Following the contested case hearing, the Department issued orders approving the extensions of time. WaterWatch filed three petitions for Judicial Review with the Oregon Court of Appeals. Oral argument was held on November 15, 2013 and the decision is now pending before the court.

State of Oregon v. Gary Harrington (Jackson County Circuit Court)

On July 11, 2012, a Jackson County Circuit Court Jury convicted Harrington on nine counts, each related to the unauthorized use of water. Harrington has been storing and using water illegally by placing dams across channels on his property and preventing the flow of water out of these artificial reservoirs without a water right permit. The height of each dam varies; two dams stand about ten feet tall and the third stands about 20 feet tall. The total amount of water collected behind these dams totals about 40 acre feet. The watermaster first identified Harrington's illegal water use more than ten years ago and initiated enforcement action to discontinue his illegal use of water.

The Court sentenced Mr. Harrington to 30 days in jail, three years' probation, and imposed a \$1,500 fine. He was ordered to open the headgates and to keep them open. The Judge also ordered the dams to be breached once the water is drained. However, water continues to be stored. Mr. Harrington was sentenced to additional time in jail for the continued storage of water. The Department is awaiting a Judgment from the Court on this continuing violation.

Farm of the Family Recreation Association v. Water Resources Department and others

This case is the most recent in a series of legal actions over the past decade concerning Gary Harrington and the storing of water without a water right. The Farm of the Family Recreation Association alleges it acquired, from Gary Harrington, the property where the three reservoirs are located. The Association argues that Gary Harrington is not authorized to drain or breach the dams. The Jackson County Circuit Court dismissed the case, ruling in favor of the State. The Farm of the Family Recreation Association's attorney filed objections to the Court's Order.

On November 12, 2013, the Court granted the State's motion to dismiss the case.

Westland Irrigation District v. Water Resources Department

Westland Irrigation District filed a petition with Marion County Circuit Court for Judicial Review of water right certificate 87872, which was issued to the U.S. Bureau of Reclamation. The right is for supplemental irrigation within the West Extension Irrigation District from return flows generated by the use of McKay Reservoir storage.

The parties met to discuss possible settlement. All parties participated and agreed to minor modifications to the agreement. At the end of the day, settlement had been reached. Documents were filed with Marion County Circuit Court requesting that the case be dismissed. In January 2014, the Circuit Court issued an order dismissing the case.

WaterWatch of Oregon, Inc., v. Oregon Water Resources Department

WaterWatch filed a petition for judicial review of a final order in the Marion County Circuit Court (case no. 13C23741). The case involves the Department's approval of a limited license for the use of water from a sump in Spring Creek for placer mining. Spring Creek is within the Deschutes Basin.

The Department is working with the Attorney General's Office to respond to the petition. At this time no hearing dates have been scheduled by the Court.

James Young v. Oregon Water Resources Department

James Young filed a ground water application to construct well(s) and use ground water within the Deschutes Basin. After reviewing the application it was determined that mitigation credits would be required before the application could be approved. Insufficient credits exist in the zone of impact to mitigate the proposed new use. As a result, the Department issued a proposed order to deny the application. The applicant requested a contested case hearing. The Administrative Law Judge who heard the case issued a proposed order supporting the Department's actions. Subsequently, the Director issued a Final Order consistent with the proposed order.

Mr. Young has filed a petition for Judicial Review of the Director's final order with the Oregon Court of Appeals. To date, the Court has not scheduled a time for oral argument.

III. Commission/Board Schedules	Location	Date
Board of Forestry	Southern OR	April 14-15
Land Conservation and Development Commission	Salem	March 21
Parks and Recreation Commission	Bend	April 9
Dept. of Geology and Mineral Industries	Portland	March 10
Fish and Wildlife Commission	Salem	March 7
State Land Board	Salem	April 8
Environmental Quality Commission	Portland	March 19-20
Watershed Enhancement Board	Bandon	April 29-30
Board of Agriculture	TBA	TBA

- Attachment 1 Governor Kitzhaber's Letter Regarding Scenic Waterways
Attachment 2 Rulemaking Calendar



September 23, 2013

JOHN A. KITZHABER, MD
Governor

The Honorable Peter Courtney
President of the Senate
S-201 State Capitol
Salem, OR 97301

The Honorable Tina Kotek
Speaker of the House
H-269 State Capitol
Salem, OR 97301

Dear Senate President Courtney and Speaker Kotek:

I am writing to confirm my office's intent to comply with ORS 390.855, pursuant to which Oregon Parks and Recreation Department (OPRD) shall use operating funds for studying and analyzing waterways for inclusion in the State Scenic Waterways program, and issue recommendations by January 1, 2015 that, if implemented by the Governor or signed into law, would designate segments of Oregon rivers as State Scenic Waterways.

The process of studying and analyzing waterways will include public hearings in the counties in which proposed additional rivers or segments are located, consistent with the process and considerations specified in ORS 390.855. This analysis and study will be conducted on a minimum of three waterway segments per biennium. OPRD may study and analyze more than three waterways per biennium but will do so to the extent practicable within existing resources and without causing undue financial or operational harm to other program areas.

Please feel free to contact me if you have any questions.

Sincerely,

John A. Kitzhaber, M.D.
Governor

JAK/GG/tb

Last Revision: 2/25/14

Water Resources Department Anticipated Rulemaking

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
New Division: SB 200 Implementation	Split a Permit into Multiple Ownerships...new program	Dwight	Yes	No	Mid 2014	Underway
Division 51	Streamline hydroelectric protests with OAH	Dwight	Yes	No	Mid 2014	Underway
Division 20	Minor changes to improve clarity and specificity of dam safety rules	Brenda/Keith	Yes	No	Late 2014	Planned
Division 340 Division 382 Division 310	Limited License, Road Watering, and Certificate of Registration fees, and Water Right Application refunds	Dwight/Tim	Yes	No	Mid 2014	Underway
New Division: SB 839 Implementation	1.SVF Approach 2.Rating / Evaluating Projects 3.Making Loans	1. Brenda 2. Brenda/Tracy/ Racquel 3. Tracy	1. Yes 2. Yes 3. Yes	1.No 2.No 3.No	1. Late 2014 2. Late 2014 3. Late 2014	1. Underway 2. Underway 3. Underway
New Division: Klamath Basin Rules	Implementation of Klamath Settlement Agreement (Placeholder if needed)	Tom/Doug/Ivan	Yes	Yes	Late 2014	Planned

Last Revision: 2/25/14

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Division 8 Division 200	Reconcile Competing Definitions of Aquifer	Brenda/Ivan	Yes	Yes	Late 2014	Planned
Division 210	1. Clarify Well Construction Rules and Drawings 2. Columbia River Basin Special Area Standards	Brenda/Kris/Ivan	Yes	Yes	Late 2014	Planned