



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas J. Paul, Acting Director

SUBJECT: Agenda Item H, August 22, 2014
Water Resources Commission Meeting

Director's Report

I. Current Events:

Current Water Conditions

NOAA's Climate Prediction Center estimates that there is about a 70 percent chance that El Niño conditions will develop during summer 2014, and an 80 percent chance it will develop during the fall and winter. In the Pacific Northwest, El Niño winters tend to be warmer and drier than usual. This means that less precipitation occurs, and the freezing level is higher, so the type of precipitation is more likely to be rain. Consequently, the snow accumulation season tends to be shorter.

Southern Oregon's snowpack set new historic lows in 2014 and was almost nonexistent in the mountains that border California. Only Oregon's northernmost mountain ranges (Wallowa, Blues and Mt. Hood) reached normal to above-normal snowpack levels.

The highest streamflow forecasts are for Oregon's northernmost rivers and the Willamette Basin, where streams are expected to experience 80-110 percent of average flows through September. Forecasts for streamflows in the Klamath, Malheur, Harney, Applegate, Crooked and Lake County basins are expected to range from 6 percent to 55 percent of average.

Owyhee Reservoir is virtually empty, having run out of water much earlier than last year. Powder Basin reservoirs are between 40-60 percent of normal. Malheur Basin reservoirs are between 1-17 percent of normal for this time of year. Rogue Basin reservoirs range from 15-85 percent of normal. Basins where all major reservoirs are storing near average amounts include the Willamette, Deschutes and Crooked Basins.

Monthly mean temperatures for August 2014 are expected to be above-normal across the Pacific Northwest and most of Nevada, California, and Alaska. Precipitation for August 2014 is anticipated to be above-median over much of the interior west. The August to October forecast for Oregon is for above-normal temperature and for equal chances of above, normal, or below normal precipitation.

New Staff & Staff Promotions

Since the May meeting, the Department has hired three new employees, transferred three staff and promoted four staff.

Positions filled include: Watermaster in Pendleton and Salem, Receptionist, and Well Inspector in Medford.

In June, Director Phil Ward resigned and accepted a new position as State Executive Director for the United States Department of Agriculture Farm Service Agency in Tualatin. Deputy Director Tom Paul has been named as Acting Director.

II. Commission Follow Up

Willamette Basin Reservoir Study Update

The President's 2015 Budget released earlier this year did not include funding to begin the Willamette Basin Reservoir Study. However, the current federal budget includes funding to complete the Surplus Water Letter Report (Report) in the Coast Fork Willamette River Basin and to develop the Project Management Plan (PMP) for the Reservoir Study.

On July 21, Brigadier General John S. Kem, Commander of the Corps' Northwestern Division approved the Report. The Report is currently available on the Department's website, and the Corps' Portland District is in the process of finalizing an agreement package. The agreement package will be sent to the Office of the Assistant Secretary of the Army of Civil Works OASA(CW) for review and approval. This is a necessary component of the approval process because it is the first municipal and industrial storage agreement in Willamette Basin. The approved Report will be forwarded with the agreement package as a reference.

Development of the Project Management Plan has recently begun. The Department and the Corps have scheduled a meeting in mid-September to share the draft PMP with stakeholders and other agencies to solicit feedback and input.

SB 839 Update

On July 1, 2014, the Water Resources Department submitted its 2014 SB 839 Report to the Oregon Legislature, describing work completed thus far under the 2013 bill. The report is available [on-line](#), along with two other documents, an [Economic Subgroup Report](#) and a [Science Subgroup Report](#), which were completed February 1, 2014.

Seasonally Varying Flows (SVF) Task Force

Section 19 of Senate Bill 839 calls for the Governor to appoint a task force to advise the Oregon Water Resources Commission on the implementation of the legislation, which relates to state financing of multi-purpose water resource projects and programs. The two sub-groups called for by this legislation, one on the functional needs of watersheds, and the other on the financial

feasibility of new water storage projects, have met and have completed their work as described above. The next step is to convene a full task force and make policy and implementation recommendations to the commission on the appropriate balance between functional needs and financial feasibility. The legislation provides that task force members (other than the subgroup members) "... must be persons representing the interests of irrigated agriculture, municipal water suppliers, counties, the conservation community, Indian tribes, irrigation districts and industrial water users." The list below contains the membership for the full task force, along with the subgroup members who were asked to join the full task force.

JR Cook, Northeast Oregon Water Association
Katie Fast, Oregon Farm Bureau
Teresa Huntsinger, Oregon Environmental Council
Richard Kosesan, Water for Life
Mark Landauer, Special Districts Association of Oregon
Curtis Martin, Oregon Cattlemen Association
Kimberley Priestley, WaterWatch of Oregon
Eric Quaempts, Confederated Tribes of the Umatilla Indian Reservation
Gil Riddell, Association of Oregon Counties
Tracy Rutten, League of Oregon Cities
April Snell, Oregon Water Resources Congress
Jeff Stone, Oregon Association of Nurseries
Joe Whitworth, The Fresh Water Trust

Economic Subgroup Members (3 from subgroup):

Dr. Bill Jaeger, Professor of Economics, Oregon State University
Paul Matthews, Chief Financial Officer, Tualatin Valley Water District
Dawn Wiedmeier, Deputy Area Manager, Bureau of Reclamation,

Science Subgroup Members (3 from subgroup):

Dr. Leslie Bach, Director of Freshwater Programs, The Nature Conservancy
Dr. Tim Hardin, Instream Flow Specialist, Oregon Department of Fish and Wildlife
Dr. Valerie Kelly, Hydrologist, Oregon Water Science Center, U.S. Geological Survey

Governance Task Force

In addition, Section 18 of Senate Bill 839 calls for the Governor to appoint a task force to advise the Governor and Oregon Legislature regarding the role of the state in financing multipurpose water projects and programs, and the decision-making process for determining the allocation of any newly-developed water. The list below contains the membership for this task force.

Katie Fast, Oregon Farm Bureau
Dave Filippi, Stoel Rives
Patrick Griffiths, City of Bend
Teresa Huntsinger, Oregon Environmental Council
Mark Landauer, Special Districts Association of Oregon

Janet Neuman, Tonkon Torp
Kimberley Priestley, WaterWatch of Oregon
Eric Quaempts, Confederated Tribes of the Umatilla Indian Reservation
Amanda Rich, The Nature Conservancy
Gil Riddell, Association of Oregon Counties
Tracy Rutten, League of Oregon Cities
April Snell, Oregon Water Resources Congress
Jeff Stone, Oregon Association of Nurseries
Brad Taylor, Eugene Water and Electric Board
Chris Taylor, West Coast Infrastructure Exchange

These task forces are scheduled to hold their kick-off meeting on August 15, 2014, with Richard Whitman of the Governor's Office convening. Department staff for this effort are Brenda Bateman and Racquel Rancier. The Governor's Office has directed the task forces to complete their work by year's end and submit final reports before the Legislature convenes in 2015.

Klamath Regulation Update

At the Commission's March 2014 meeting, temporary rules were adopted declaring that water for human consumption and stock hold a preference over other water uses during the Governor's drought declaration in Klamath County, or upon expiration of the rules. The adoption of these temporary rules, which expire at the end of September 2014, allow for the continued use of water for stock and human consumption, while other uses of water are regulated off.

A call for regulation was made on May 27, 2014 by the irrigation districts within the Klamath Project (1905 priority). Over several days the Watermaster measured inflows and calculated water demand in order to validate that water was insufficient to meet the demand. The call was validated and notices were sent on June 6, 2014 to water rights holders above Klamath Lake informing them to shut down diversions junior to 1905.

On June 10, 2014, the Department received a call notice from the Klamath Tribes to regulate on behalf of specified instream flows (SIFs), which were defined in the Upper Klamath Basin Settlement Agreement and generally reflect a flow target less than the full tribal instream water right. On July 13, 2014, water diversions from Jackson, Irving, and Deep Creeks were regulated off. On July 19, 2014, the Watermaster sent out notices to water users on the Sprague River and tributaries to shut down diversions with priority dates 1864 and junior, essentially all out of stream diversions (stock and human consumption water excepted). The Watermaster and staff continue to monitor the SIF measurement sites.

For the first time in the Klamath Basin, groundwater wells that were determined to be hydraulically connected and provide an effective and timely benefit to senior users were sent regulation notices upon validating the Klamath Project (1905) call for water. Water well owners within the boundary of the former Klamath Tribal Reservation were not sent regulation notices, pending a legal review on Federal reserved groundwater. Outside of the former Tribal reservation boundary, about a dozen wells received shutoff notices, including two wells for the City of Klamath Falls.

Malheur Update

Groundwater Section staff visited 35 drought permit wells and 14 domestic wells around Vale and Ontario in early July. Well location, ownership, construction, and groundwater level data were collected during the visit. Six domestic wells were selected for continued measurement every 2-3 weeks during the remainder of the irrigation season to help track the effects of reduced canal leakage and groundwater pumping. Watermaster and hydrogeologist contact information were provided to the landowners to facilitate communication with the Department.

III. Litigation Update

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

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

Noble appealed the ruling of the Clackamas County Circuit Court in relation to the merits of the case. Oral argument was conducted before the Court of Appeals.

The Court of Appeals ruled that the applicable standard for assessing detrimental impact to existing fishery resources under ORS 537.409 is whether a reservoir poses a "significant detrimental impact" to such resources. The Court also held that the circuit court correctly concluded that substantial evidence supported the Department's findings regarding injury to water rights and detrimental impact to fishery resources. The Court concluded by Affirming the ruling of the Clackamas County Circuit Court.

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

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

After the 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 and 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.

The State joined the city in petitioning for review by the Oregon Supreme Court. The Court accepted the petition and has scheduled oral arguments for September 18, 2014.

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

Several water districts that divert water from the lower portion of the Clackamas River filed applications for extensions of time. WaterWatch protested the approval of various extensions of time. 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 a 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, related to the unauthorized use of water. Harrington stored and used water illegally, placing dams across channels on his property and preventing the flow of water out of these artificial reservoirs without a water right permit. Two dams stand about ten-feet tall and the third is approximately 20 feet tall. The total amount of water collected behind the dams totals about 40 acre-feet. The Watermaster first identified Harrington's illegal water use and initiated enforcement action more than ten years ago.

The Court sentenced Mr. Harrington to 30 days in jail and 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 after the water was drained. However, water continued to be stored and Mr. Harrington was sentenced to additional time in jail. Eventually, the Court directed the Department to remove the outlet works to ensure that they could no longer store water.

As directed by the Court, the Water Resources Department arranged for and supervised work to notch the three dams. Work began at approximately 6:00 am on June 17, 2014. Work was completed with all equipment off of the property by 4:00 pm on the same day.

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 (Association) alleged it acquired, from Gary Harrington, the property where the three reservoirs were located. The Association argued 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 Association's attorney filed objections to the Court's Order.

The Court granted the State's motion to dismiss the case. The general judgment to dismiss with prejudice was issued on November 8, 2013.

This case has been appealed to the Oregon Court of Appeals. Briefs are being submitted, no date for argument has been set.

On June 17, 2014, the day work was under way to enforce the Court's order, the Association filed a motion for stay of the Circuit Court order to drain and breach the three dams. The Court of Appeals denied the motion on June 18, 2014.

James Young v. Oregon Water Resources Department

James Young filed an 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 to mitigate the proposed new use in the zone of impact. As a result, the Department issued a proposed order to deny the application. The applicant requested a contested case hearing and the Administrative Law Judge 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.

Blue Mountain Angus, LLC. v. Oregon Water Resources Department

This case is a petition to the Oregon Court of Appeals for review of a final order denying T-10898. Blue Mountain Angus filed a water right transfer application to change the point of diversion and place of use under Water Right Certificate 25844. The Department denied the transfer because the Department was unable to make findings of no injury or enlargement. Motions and responses are being filed with the Court.

Before the Oregon Court of Appeals Case Number: CA A157433

Oregon Desert Farms v. Oregon Water Resources Department and Water Resources Commission

This case is a petition for judicial review related to water right application G-17165 filed by the city of Lakeview for industrial use and power development. The water right was protested by Oregon Desert Farms. A contested case hearing was held June 11, 2013. The final order was issued followed by a request for reconsideration. Oregon Desert Farms filed exceptions to the order. Exceptions were considered by the Commission on May 29, 2014. The Commission affirmed the Department's final order. The Court has not scheduled a time for oral argument at this time.

Before the Oregon Court of Appeals Case Number: CA A157428

Willamette Water Co., an Oregon corporation, v. Oregon Water Resources Commission and WaterWatch of Oregon Inc.

This case is a petition for Judicial Review related to water right application S-87330 filed by Willamette Water Co. for municipal water use. On November 5, 2008, Willamette Water Co. submitted application No. S-87330 to the Oregon Water Resources Department for a permit to use 34 cubic feet per second (cfs) of water from the McKenzie River for a quasi-municipal use. The Department issued a Proposed Final Order (PFO) on January 26, 2010, that proposed to issue a permit with conditions. The Company and WaterWatch of Oregon filed protests on March 12, 2010.

A contested case hearing was held on April 27, 2012. Administrative Law Judge Han issued a Proposed Order recommending denial of the application on several grounds. The Company and WaterWatch both filed exceptions with the Department. On March 7, 2014, after consideration of the exceptions and the record, the Director issued a Final Order in Contested Case recommending denial of application S-87330. The Company and WaterWatch both filed exceptions on March 31, 2014. The Commission considered the exceptions and on May 29, 2014 affirmed the Department's final order.

The Court of Appeals has not scheduled a time for oral argument.

IV. Commission/Board Schedules	Location	Date
Board of Forestry	Salem	September 3
Land Conservation and Development Commission	Eugene	September 25, 26
Parks and Recreation Commission	Silver Falls	September 17
Dept. of Geology and Mineral Industries Board	Portland	September 5
Fish and Wildlife Commission	Joseph	September 5
State Land Board	Salem	October 14
Environmental Quality Commission	TBD	October 16, 17
Watershed Enhancement Board	Grants Pass	October 28, 29
Board of Agriculture	Enterprise	September 24, 25

Attachment 1: Rulemaking Calendar

Water Resources Department Anticipated Rulemaking

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Division 23:	Klamath Basin Groundwater	Brenda/Doug/Ivan	Yes	Yes	Late 2014 to 2015	Underway
Division 22	Klamath Drought Rules for Domestic and Stock	Racquel	Yes	No	Sept 2014	Underway
Division 325	Split a Permit into Multiple Ownerships, new program	Dwight/Kelly	Yes	No	Nov 2014	Underway
Division 20	Minor changes to improve clarity and specificity of dam safety rules	Brenda/Keith	Yes	No	Nov 2014	Underway
Division 340 Division 382 Division 310	Limited License, Road Watering, and Certificate of Registration fees, and Water Right Application refunds	Dwight/Tim	Yes	No	Nov 2014	Underway

Last Revision: 8/13/14

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Division 93	1. SVF Methodology 2. Scoring/Ranking Projects 3. Terms of Loans	1. Brenda 2. Brenda/Tracy/ Racquel 3. Tracy	1. Yes 2. Yes 3. Yes	1. No 2. No 3. No	1. 2015 2. 2015 3. 2015	1. Underway 2. Underway 3. Underway
Division 8 Division 200	Reconcile Competing Definitions of Aquifer	Brenda/Ivan/Kris	Yes	Yes	Early 2015	Planned
Division 210	1. Clarify Well Construction Rules and Drawings 2. Columbia River Basin Special Area Standards	Brenda/Kris/Ivan	Yes	Yes	Nov 2014	Underway
Division 217	Requirement of Pump Testing	Brenda/Ivan	Yes	Yes	Mid 2015	Planned
Division 51	Streamline hydroelectric projects with OAH	Dwight/Mary	Yes	No	2015	Underway

Last Revision: 8/13/14

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated?	GWAC Input Anticipated?	Target WRC Date	Status
Division 33	Updating a rule cross reference in Division 33	Dwight/Jon	Yes	No	Nov 2014	Underway