



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission
FROM: Thomas M. Byler, Director
SUBJECT: Agenda Item N, November 21, 2014
Water Resources Commission Meeting

**Request for Adoption of Rules – OAR 690-340-0030, 690-340-0040,
690-310-0080, 690-382-0400, Revisions to Transaction Fees**

I. Introduction and Background

This report seeks Water Resources Commission approval of amendments to administrative rules to increase certain fees.

II. Background and Discussion

Most fees for Water Resources Department (Department) services are set by statute in ORS 536.050. In 2013, HB 2259 authorized transaction fee increases that average 13 percent to cover annual inflationary costs over a four-year period (3.25 percent annually). Thereafter, the Department undertook the rulemaking process to ensure that the fees that were increased in statute were also adjusted in the corresponding rules. In addition, the rulemaking sought to adjust the fees that are set only in rule; the Department decided to increase these fees on average by 13 percent in order to account for annual inflationary costs and align with similar percent increases authorized by the Legislature for other fees.

The Department drafted proposed rule revisions and consulted a Rules Advisory Committee (RAC) to receive feedback from representative stakeholders. Members of the RAC included Lisa Brown, WaterWatch of Oregon; Jeanne Boatwright, Boatwright Engineering; and Norm Daft, water-rights consultant.

While RAC members acknowledged the need for cost recovery related to transactional services, much of the discussion pertained to the desirability of limiting the growth of upfront transaction fees via legislative passage of an annual water-right maintenance fee.

Aside from general concerns about higher fees, there were few issues brought forward by the RAC. One change recommended by the RAC was to refer to points of appropriation (for groundwater) as well as points of diversion (for surface water) in the proposed rules. After careful consideration, the Department decided not to refer to “points of appropriation” to preserve the readability of the rules, as has been common Department practice. For example, in statute, all appropriations come from “diversions” whether the proximate source is surface water or groundwater.

WaterWatch also expressed concern about not increasing the application fee specifically for mining (which was subsequently removed from the proposed rules after the public comment period).

Notice of the rulemaking appeared in the *Oregon Bulletin* on September 1, 2014. A public hearing was held on October 1, and the public-comment period was open through October 6. No one attended the hearing; however, timely written comments on the public-hearing draft were received from WaterWatch of Oregon on October 5.

In written comments, WaterWatch objected to two proposed revisions intended to facilitate compliance by the placer-mining community with the requirement to obtain water-use authorizations for out-of-stream diversions. These comments are contained in Attachment 1. Both were removed from the final rules as explained in Attachment 2.

III. Action Item

The Commission is asked to consider adoption of amendments to OAR 690-340-0030, 690-340-0040, 690-310-0080, 690-382-0400 rules. The amended rules being proposed for adoption are included in Attachment 3.

IV. Alternatives

The Commission may consider the following alternatives:

1. Adopt the proposed amendments to OAR 690-340-0030, 690-340-0040, 690-310-0080, and 690-382-0400 as proposed in Attachment 3.
2. Modify and adopt the proposed rules.
3. Request staff to return with further amendments for consideration later.

V. Recommendation

The Director recommends Alternative 1, to adopt the proposed amendments to OAR 690-340-0030, 690-340-0040, 690-310-0080, 690-382-0400, as proposed in Attachment 3.

Dwight French
503-986-0819

Attachments

- Attachment 1: Copies of Written Comments Received
Attachment 2: Summary of Public Comments and Department Responses
Attachment 3: Proposed final OAR 690-340-0030, 690-340-0040, 690-310-0080, and 690-382-0400 rules



October 2, 2014

Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Comments, Fee Adjustment Rulemaking

Dear Rules Coordinator,

WaterWatch is a river conservation group dedicated to restoring and protecting streamflows statewide. We appreciate the opportunity to provide comments on regarding proposed fee adjustments found in rule.

As a general matter, WaterWatch supports the proposed increase in fees noted in the hearings draft.

That said, we adamantly oppose the proposed “exception” for limited license applications for mining which would keep their application fee at a lower level (\$250 flat fee) than all other people seeking limited licenses (\$280 flat fee plus \$30 per additional point of appropriation). See OAR 690-340-0030(1)(E).

Limited license applications for mining generally raise significant public interest issues and take significant WRD time to process. The recent application submitted by Red Flat Nickle Corporation provides a good example. This application, for 10 gpm of surface water from a small tributary in the Smith River Watershed in Southern Oregon resulted in over 3,000 comments in opposition. Processing this limited license request, including a site visit to determine water availability, took an inordinate amount of WRD staff time and resources-- certainly more than is covered by the \$250 flat fee proposed by the rule change. If anything, the WRD should be charging more for limited license applications for mining, not less. At the very least mining applications should be subject to the same fee as other limited license applications, which would be the \$280 plus \$30 for each point of appropriation, as proposed in OAR 690-340-0030(F).

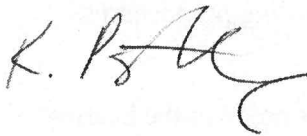
Additionally, we oppose the change in mapping requirements for limited licenses from points of diversion to river reaches of up to ½ mile proposed in OAR 690-340-0030(1)(c)(A). This change goes beyond the scope of the Hearing Notice and is thus outside the scope of this rulemaking. Changing mapping requirements is a substantive change that goes far beyond “fee adjustments” noticed to the public. Moreover, it undercuts WRD funding. The WRD should be

looking for ways to better cover their costs, not avenues to make it cheaper for mining interests to access publically owned water.

The public noticed for this rulemaking was also inadequate in that it did not note that the WRD was proposing special carve outs for mining interests. There are thousands of Oregonians who are concerned about the negative effects mining is having on beloved rivers around the state, most notably in Southern Oregon. Because the notice made no mention of this, there is no way anyone who gets the WRD notices or otherwise monitors water issues would know what is actually being proposed. The WRD should be more transparent in its public notices.

With that, we urge the Department, and the Water Resources Commission, to (1) reject any special carve outs for mining purposes that would grant them lower fees than other limited license applicants must pay, and (2) reject the proposed mapping requirement changes as they relate to maps for placer mining as they are outside the scope of this “fee adjustment” rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Priestley", with a stylized flourish at the end.

Kimberley Priestley

Senior Policy Analyst

WaterWatch of Oregon

- We adamantly oppose the proposed “exception” for limited license applications for mining which would keep their application fee at a lower level (\$250 flat fee) than all other people seeking limited licenses (\$280 flat fee plus \$30 per additional point of appropriation). If anything the WRD should be charging more for limited license applications for mining, not less. A good example for this notion is the recent application submitted by the Red Flat Nickel Corporation. This application, for 10 gpm of surface water from a small tributary in the Smith River Watershed in Southern Oregon resulted in over 3,000 comments in opposition. Processing this request, including a site visit to determine water availability, took an inordinate amount of WRD staff time and resources (certainly more than is covered by the \$250 flat fee proposed by the rule change). At the very least mining applications should be subject to the same fee as other limited license applications, which would be \$280 plus \$30 for each point of appropriation.

Department’s Response: The Department has removed mining-specific fee language (that originated in failed legislation) and will continue to charge the same fee for all applications for limited licenses.

WaterWatch of Oregon

- We oppose the change in mapping requirements for limited licenses from points of diversions to river reaches of up to ½ mile proposed in OAR 690-340-0030(1)(c)(A). This change goes beyond the scope of the Hearing Notice and is thus outside the scope of this rulemaking. Changing the mapping requirements is a substantive change that goes far beyond “fee adjustments” noticed to the public. Moreover, it undercuts WRD funding. The WRD should be looking for ways to better cover their costs, not avenues to make it cheaper for mining interests to access publically owned water. The public noticed for this rulemaking was also inadequate in that it did not note that the WRD was proposing special carve outs for mining interests. There are thousands of Oregonians who are concerned about the negative effects mining is having on beloved rivers around the state, most notably in Southern Oregon. Because the notice made no mention of this, there is no way anyone who gets the WRD notices or otherwise monitors water issues would know what is actually being proposed. The WRD should be more transparent in its public notices.

Department’s Response: The intent of the proposed revision to the mapping requirement was to facilitate applications by the placer-mining community by recognizing that those activities are typically not confined to one precise location. Given that placer mining activity may move up or downstream, the Department sought to simplify the application process by recognizing that fact and allowing applicants to specify short reaches as points of diversion, which would meet the operational needs of both miners and the Department. However, the Department concedes that the title and rule summary should have included reference to the proposed mapping change, and thus has removed the proposed placer-specific mapping allowance for points of diversion.

Fee Adjustment Rule Making

Rules affected: 690-340-0030, 690-340-0040, 690-310-0080, 690-382-0400

690-340-0030

Limited License

(1) A request for a limited license shall be submitted on a form provided by the Water Resources Department, and shall be accompanied by the following:

(a) The fee for examination and recording:

(A) [~~\$1,000~~]**\$1150** for a limited license filing requesting the use of water for Aquifer Storage and Recovery testing purposes.

(B) [~~\$500~~]**\$575** for renewal of a limited license for Aquifer Storage and Recovery testing purposes.

(C) [~~\$500~~]**\$575** for modification of a limited license for Aquifer Storage and Recovery testing purposes.

(D) [~~\$1,000~~]**\$1150** for a limited license filing requesting the use of water for Artificial Groundwater Recharge purposes.

(E) For limited license applications, [~~\$250~~]**\$280** for the first point of diversion plus [~~\$25~~]**\$30** for each additional point of diversion; and

(a) A completed water availability statement from the local watermaster on forms provided by the department; and

(b) A site map of reproducible quality, drawn to a standard, even scale of not less than 2 inches = 1 mile, showing:

(A) The locations of all proposed points of diversion referenced by coordinates or by bearing and distance to the nearest established or projected public land survey corner;

(B) The general course of the source for the proposed use, if applicable;

Text in bold and underlined (**example**) indicates proposed new text to existing rule.

Italicized text in brackets [*example*] indicates existing rule text proposed to be removed.

(C) Other topographical features such as roads, streams, railroads, etc., which may be helpful in locating the diversion points in the field.

(2) The Director shall provide notice of the request to the public in the same manner as other water use applications, but may approve the license after 14 days from the date of mailing of the weekly public notice, upon a finding that the proposed water use will not impair or be detrimental to the public interest.

(3) Each limited license shall be limited to an area within a single drainage basin.

(4) Except for a licensee using water under a limited license issued in conjunction with an enforcement order, the licensee shall give notice to the watermaster in the district where use is to occur not less than 15 days or more than 60 days in advance of using the water under the limited license. The notice shall include the location of the diversion, the quantity of water to be diverted and the intended use and place of use.

(5) The licensee shall maintain a record of use, including the total number of hours of pumping, an estimate of the total quantity pumped, and the categories of beneficial use to which the water is applied. The record of use shall be submitted to the watermaster upon request.

(6) The Director may revoke the right to use water for any reason described in ORS 537.143(2). Such revocation may be prompted by field regulatory activities or by any other reason.

(7) A limited license does not receive a priority date and is not protected under ORS 540.045.

Stat. Auth.: ORS 536.027, 595 & 654

Stats. Implemented: ORS 537.143 & 537.144

Hist.: WRD 6-1989(Temp), f. 9-29-89, cert. ef. 10-3-89; WRD 9-1989, f. & cert. ef. 11-20-89; WRD 16-1990, f. & cert. ef. 8-23-90; WRD 9-1992, f. & cert. ef. 7-1-92, Renumbered from 690-011-0082; WRD 5-1994, f. & cert. ef. 4-13-94; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0046; WRD 5-2004, f. & cert. ef. 6-15-04; WRD 9-2009, f. 12-8-09, cert. ef. 12-15-09

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690-340-0040

Registration of Water Use for Road Maintenance and Construction

Text in bold and underlined (**example**) indicates proposed new text to existing rule.

Italicized text in brackets [*example*] indicates existing rule text proposed to be removed.

(1) A request by a public agency to register water use for road and highway maintenance, construction and reconstruction shall be submitted on a form provided by the Water Resources Department and shall include at least the following:

- (a) The name and authorized agent of the public agency;
- (b) The address and telephone number of the agency's authorized agent;
- (c) If the source of water to be used for the agency's road maintenance or construction program:
 - (A) Is groundwater, attach copy of well log or description of the well;
 - (B) Is surface water, identify the name of the source and the stream, or river the source is tributary to.
- (d) The maximum amount of water to be used during the calendar year in gallons or acre-feet;
- (e) The maximum amount of water to be used during any 24-hour period in gallons or acre-feet;
- (f) A map indicating the location(s) of the point(s) of diversion of water to be used for road maintenance or construction (the map shall be of sufficient scale to establish the location(s) of the point(s) of diversion to the nearest quarter section, township and range);
- (g) A fee in the amount of [~~\$300~~] **\$340** (more than one point of diversion may be identified per registration); and
- (h) If water is obtained from a well, conveyance or storage facility that has a perfected or certificated water right:
 - (A) Provide the permit or certificate number or the court decree identification of the right; and
 - (B) Written authorization from the owner of the right that allows use of water from the well, conveyance or storage facility.

(2) The registrant may use either a county road map or a Water Resources Department basin map to indicate the location(s) of point(s) of diversion. Counties may submit one registration for all uses within the county. State-wide public agencies shall submit one registration for each of the agencies administrative units. (The Oregon Department of Transportation shall submit one

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registration for each of its Regions within which road construction or maintenance water is to be used). Federal agencies with jurisdiction over roads/highways shall submit one registration for each of their administrative units.

(3) An Oregon Department of Fish and Wildlife "Requirements for Small Pump Screen", Self-Certification form shall accompany the registration form.

(4) As used in this rule, public agency means:

(a) The State of Oregon or any agency of the State of Oregon;

(b) A county or a special road district of a county;

(c) A city, town or incorporated municipality; and

(d) Any federal agency that has jurisdiction over a roadway in this state.

(5) The registration is subject to the following terms:

(a) Water use authorized by the registration shall not have priority over any existing water right;

(b) Water use authorized by the registration shall be subordinate to all future permitted or certificated water rights;

(c) Water use authorized under the registration shall not exceed 50,000 gallons from a single source during any 24-hour period;

(d) The registration shall be valid until the public agency voluntarily withdraws the registration or the public agency fails to file the annual renewal statement as required under section (8) of this rule;

(e) No person may construct any dam, reservoir or other impoundment facility to divert water from within a designated scenic waterway;

(f) Under no circumstances may the registrant cause the water course to be dewatered to a degree that the live, continuous flow is obstructed;

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(g) The department may require the public agency to cease diversion of water at any time the director has reason to believe use of water under the registration is causing a significant adverse impact upon:

(A) The affected watershed; or

(B) Any existing water right; and

(h) The registrant shall notify the watermaster for the district in which the water is to be diverted not fewer than 30 days nor more than 60 days prior to the date diversion under the registration is to be initiated. If the proposed diversion is within or above a designated scenic waterway, the registrant shall not withdraw water under the registration until the watermaster provides written findings that the proposed withdrawal will not interfere with the free-flowing character of the scenic waterway in quantities necessary for recreation, fish and wildlife uses.

(6) The registrant may authorize any person(s) to divert, transport or apply water under the registration; however, the registrant is responsible for the acts of such person(s) as authorized by the registration and these rules.

(7) The registrant shall provide copies of its registration form and map to the local office of the Oregon Department of Fish and Wildlife (ODFW) at least 30 days before water use under the registration is initiated. If sensitive, threatened or endangered aquatic species are present in the stream(s) proposed as a source(s) of water under the registration and such species may be adversely affected by withdrawal of water by the registrant, ODFW shall advise the watermaster to direct the registrant to withdraw water from an alternative location(s) or stream(s) wherein the proposed withdrawal will not cause significant adverse impact to the affected watershed.

(8) The public agency must submit an annual renewal statement on or before February 1 of each calendar year. The annual renewal statement shall be accompanied with a [~~\$50~~] **\$60** renewal fee and shall specify any change in:

(a) The registrant's map;

(b) The sources of water to be used;

(c) The maximum amount of water to be used during the calendar year or during any 24-hour period; and

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(d) A map delineating any changes in the location(s) of point(s) of diversion.

Stat. Auth.: ORS 536.027

Statutes Implemented: [ORS 537.040](#)

Hist.: WRD 6-1995, f. & cert. ef. 6-10-94; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-011-0047

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690-310-0080

Initial Review

(1) If the proposed use is not prohibited by statute, the Department shall undertake an initial review of the application and make a preliminary determination of:

- (a) Whether the proposed use is restricted or limited by statute or rule;
- (b) The extent to which water is available from the proposed source during the times and in the amounts requested; and
- (c) Any other issue the Department identifies as a result of the initial review that may preclude approval of or restrict the proposed use.

(2) Upon completion of the initial review and no later than 30 days after determining an application to be complete and not defective as described in 690-310-0070, the Department shall send by regular mail, or with the consent of the recipient, by electronic means to the applicant an initial review report setting forth the Department's preliminary determinations. The applicant shall have 14 days from the date the Department sends the initial review report within which to notify the Department to stop processing the application or to proceed with the application. If the applicant notifies the Department to stop processing the application, the Department shall return the application and all except [\$50] (**\$225**) of any fees paid by the applicant. If the Department does not receive a timely response from the applicant, the Department shall proceed with the review of the application.

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Stat. Auth.: ORS 536.027

Stats. Implemented: ORS 537.150 & 537.620

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 1-2012, f 1-31-12, cert. ef. 2-1-12

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690-382-0400

Application for Modification of Certificate of Registration

Each application for modification of a certificate of registration shall be prepared in ink or printed on a form provided by the Department. Applications shall contain the following minimum information concerning the certificate of registration and any appurtenant water right or permit, if applicable:

- (1) Applicant's name, mailing address, and telephone number.
- (2) Type of change proposed.
- (3) Name appearing on the certificate of registration.
- (4) Certificate of registration number for the registration to be modified.
- (5) Water right certificate, permit, or certificate of registration numbers, as applicable, for any layered water uses subject to transfer, permits, or certificates of registration.
- (6) Source of water as described on the certificate of registration.
- (7) Date of priority.
- (8) The authorized and proposed point(s) of appropriation located accurately in reference to a public land survey corner, if applicable.
- (9) The authorized and proposed use of water, if applicable.
- (10) The authorized and proposed place of use identified by its location within the public land survey and tax lot number, if applicable.

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(11) A map prepared pursuant to OAR 690-380-3100, except it need not be prepared by a water rights examiner.

(12) Land use information as outlined in the Department's Land Use Planning Procedures Guide, except for those modifications that meet the following four requirements:

(a) Where existing and proposed water uses would be located entirely within lands zoned for exclusive farm use as provided in ORS 215.203 or within irrigation districts;

(b) That involve changes in place of use only;

(c) That do not involve the placement or modification of structures including but not limited to water diversion, impoundment, or distribution facilities, water wells, and well houses; and

(d) That involve irrigation water uses only.

(13) For a change in point of appropriation, copies of water well reports for the authorized and proposed point of appropriation. If water well reports are not available, a description of the construction of each well, including but not limited to, well depth, static water level, casing size, and any other necessary information to establish the ground water body developed or proposed to be developed.

(14) A listing of the names and mailing addresses of:

(a) All affected local governments, including but not limited to, county, city, municipal corporations, and tribal governments; and

(b) Any district in which the affected registration is located or that serves the registration and any district in which the affected registration would be located or that would serve the registration after the proposed modification.

(15) An oath that the information contained in the application is true and accurate.

(16) The following information related to the authority of the applicant to pursue the proposed modification:

(a) A signed statement that the applicant understands that, upon receipt of the draft preliminary determination described in OAR 690-382-0700(4) and prior to Department recognition of the

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modification, the applicant will be required to provide the landownership information and evidence identified in OAR 690-382-0700(5) to demonstrate that the applicant is authorized to pursue the modification;

(b) A statement affirming that the applicant is a municipality as defined in ORS 540.510(3)(b) and that the right is in the name of the municipality or a predecessor; or

(c) Documentation that the applicant is an entity with the authority to condemn property and is acquiring by condemnation the property to which the certificate of registration proposed for modification is appurtenant. Such an entity may only apply for recognition of a modification under this subsection if it has filed a condemnation action to acquire the property and deposited the funds with the court as required by ORS 35.265. Such an entity need not obtain the consent or authorization for the change from any other person or entity.

(17) The signature of the applicant, and if an entity, the title of the person signing the form.

(18) The appropriate fee required under ORS 537.610 as follows:

(a) For examination of an application to only change the place of use under a certificate of registration, [~~\$775~~] (**\$875**).

(b) For examination of all other applications to modify a certificate of registration, [~~\$1,125~~] (**\$1,250**).

Stat. Auth.: ORS 536.025; 536.027, 537.610, 540.531, HB 2123 (ch. 614, 2005 Oregon Water Laws)

Stats. Implemented: ORS 537.610, 540.505-540.532, HB 2123 (ch. 614, 2005 Oregon Water Laws)

Hist.: WRD 5-2006, f. & cert. ef. 10-6-06; WRD 8-2009, f. 12-8-09, cert. ef. 12-15-09

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