



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

DATE: Agenda Item L, June 19, 2015
Water Resources Commission Meeting

Request for Adoption of Rules - OAR Chapter 690, Division 522, Deschutes Basin Water Management Rules

I. Introduction

The Commission is asked to adopt amendments to OAR Chapter 690, Division 522, relating to the Deschutes Groundwater Mitigation Program. These rules operate in conjunction with the Deschutes Groundwater Mitigation Rules in OAR Chapter 690, Division 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Chapter 690, Division 521.

II. Background

On June 4, 2010, the Commission adopted the Division 522 Deschutes Basin Water Management Rules. The rules were developed in response to feedback received from the Deschutes Work Group as part of an evaluation of the Mitigation Program required by HB 3494 (Chapter 669, 2005 Oregon Laws). The amount of new groundwater use that can be approved under the program is limited to a total of 200 cubic feet per second (cfs). Among other things, the rules changed how the Department counted new groundwater permits under the allocation cap and allowed unused permanent mitigation credits to be reassigned.

Following adoption of the rules by the Commission, the Department realized that the rules unintentionally limited when water may be incorporated back into the allocation cap and when permit mitigation credits could be reassigned upon cancellation of a permit or certificate. Specifically, the rules limit the type of cancellation to specific processes under specific statutes; however, cancellation of a permit or certificate may occur under a variety of statutes.

Currently, Division 522 specifically cites ORS 537.410 (cancellation of a permit for failure to meet construction conditions), ORS 540.621 (voluntary cancellation of a certificate), and ORS 540.610 (forfeiture of a certificated water right). This prevents reassignment of permanent mitigation credits and inclusion of water back into the allocation cap if cancellation occurs under another statute or process.

This issue was highlighted as part of the 2012 annual evaluation and 5 year evaluation of the Mitigation Program presented to the Commission in March 2014, and again in the 2013 annual report presented to the Commission in March 2015. During the 2014 meeting, the Commission directed staff to initiate rulemaking to clarify how the Department incorporates water back into the allocation cap and reassigns permanent mitigation credits based on cancellation of a permit.

III. Rulemaking Process

Prior to convening a Rules Advisory Committee (RAC), Department staff developed a draft set of rules. On January 5, 2015, the Department convened a RAC to assist the Department in reviewing the proposed changes to Division 522. A list of RAC members is provided in Attachment 2.

RAC members were supportive of the proposed rule changes. During RAC discussions an additional provision was suggested by one RAC member, but was ultimately not incorporated into the rules. The recommendation was to allow those with municipal or quasi-municipal permits to reassign permanent mitigation credits to other municipal or quasi-municipal permit holders with incremental development plans.

The Department held a public hearing in Bend on March 30, 2015. Testimony was provided by two individuals (Peter Goodmonson and John Short) in support of the proposed changes. The public comment period closed on March 31, 2015. One written comment in favor of the proposed rules was received from Peter and Sari Goodmonson and is provided in Attachment 3.

IV. Discussion

The proposed amendments to the rules are intended to provide additional flexibility and clarity to the Deschutes Basin Water Management Rules when adding water back into the 200 cfs allocation cap and/or reassigning permanent mitigation credits when a groundwater permit or certificate is cancelled. Under the existing rules, water may only be added back to the allocation cap or credits may only be reassigned if cancellation occurs under specific statutes referenced in the rules. The proposed rules would eliminate the reference to specific cancellation statutes, thereby allowing all types of cancellation processes to qualify under the program. The final proposed rules are provided in Attachment 1.

Seven permits totaling 0.549 cfs have been cancelled by the Department. Three of these permits were cancelled voluntarily and four were cancelled under ORS 537.260. The 0.549 cfs associated with these rights cannot be incorporated back into the allocation cap as the permits were not cancelled under ORS 537.410. In addition, the current rules unintentionally prevent 9.0 permanent credits associated with one of the cancelled permits to be reassigned to another credit holder or groundwater user.

The proposed amendments to the rules will allow the Department to incorporate the 0.549 cfs back into the allocation cap and allow the former permittee (Peter Goodmonson) with 9.0 permanent mitigation credits to reassign those to another mitigation credit holder or groundwater user.

V. Summary

The final amended rules in Attachment 1 (Deschutes Basin Water Management, OAR Chapter 690, Division 522) provide greater flexibility by allowing the Department to incorporate water back into the allocation cap when a permit or certificate is cancelled regardless of the cancellation process. In addition, when a permit or certificate is cancelled, the former water right holder will be able to reassign any permanent credits to another credit holder or groundwater user.

VI. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachment 1.
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

VII. Recommendation

The Director recommends that the Commission adopt the final proposed rules in Attachment 1.

Attachments:

1. Final Proposed Rules
2. Rules Advisory Committee Members
3. Written Comments Received

Dwight French
503-986-0819

Laura Wilke
503-986-0884

- 28 (3) Portion of rates approved by a final order issued under 690-505-0620 but not included in a
 29 water right permit issued following satisfaction of the mitigation requirement;
- 30 (4) Rates associated with expired final orders pursuant to 690-505-0620(2);
- 31 (5) Portions of rates associated with permits issued pursuant to 690-505-0620 and subsequently
 32 cancelled [*pursuant to ORS 537.410*];
- 33 (6) Rates associated with certificates issued pursuant to 690-505-0620 and subsequently canceled
 34 [*pursuant to ORS 540.621 or 540.610*]; and
- 35 (7) Rates associated with the portion of use originally authorized under a permit issued pursuant
 36 to 690-505-0620 and not included in a subsequent certificate.

37 Stat. Auth.: ORS 536.025, 536.027 & 537.746
 38 Stats. Implemented: ORS 669 & OL 2005
 39 Hist.: WRD 1-2010, f. & cert. ef. 6-9-10

40 **690-522-0040**

41 **Incremental Development in the Deschutes Ground Water Study Area**

- 42 (1) An incremental development plan under 690-505-0625 for municipal and quasi-municipal
 43 ground water permit applicants and permit holders may include offset pursuant to 690-505-
 44 0610(8).
- 45 (2) When providing incremental mitigation pursuant to OAR 690-505-0625, a municipal or
 46 quasi-municipal ground water permit holder may provide mitigation, offset, or a combination of
 47 both during each approved increment to coincide with each stage of development of the permit
 48 on the condition that the permit holder does not increase the rate or amount of water diverted
 49 under the permit before submitting the corresponding required mitigation or offset and
 50 documentary evidence.
- 51 (3) The report required under OAR 690-505-0625(1)(b) shall describe the annual volume of
 52 water used and the source of offset and mitigation used for that period.

53 Stat. Auth.: ORS 536.025, 536.027 & 537.746
 54 Stats. Implemented: ORS 669 & OL 2005
 55 Hist.: WRD 1-2010, f. & cert. ef. 6-9-10

56 **690-522-0050**

57 **Reassignment of Permanent Mitigation Credits**

- 58 (1) Notwithstanding OAR 690-521-0400(2), part or all of permanent mitigation credits that were
 59 used to satisfy a mitigation obligation may be reassigned if:

[Text to be deleted is italicized and bracketed]
Text to be added is bolded and underlined

- 60 (a) The ground water permit application to which the credits were assigned is denied or
61 withdrawn;
- 62 (b) The ground water permit application to which the credits were assigned is amended and the
63 mitigation obligation is reduced;
- 64 (c) The final order issued approving the ground water permit application to which the credits
65 were assigned expires pursuant to OAR 690-505-0620;
- 66 (d) The ground water permit to which the credits were assigned is subsequently cancelled
67 [*pursuant to ORS 537.410*];
- 68 (e) The subsequent ground water certificate is issued for less ground water use than originally
69 allowed under the permit and there is a corresponding reduction in mitigation obligation;
- 70 (f) The subsequent ground water certificate to which the credits were assigned is cancelled, or
71 partially cancelled resulting in a reduced mitigation obligation; or
- 72 (g) The permit holder holds more than one municipal or quasi-municipal ground water permit
73 issued under OAR 690-505-0620 and requests to re-assign credits from one such existing permit
74 to another existing permit, provided the reassignment is consistent with the requirements of OAR
75 690-505-0610(4).
- 76 (2) Mitigation credits available pursuant to this rule may be assigned by applicant or permit or
77 certificate holder to any person or mitigation bank or assigned to satisfy a mitigation obligation.
- 78 Stat. Auth.: ORS 536.025, 536.027 & 537.746
79 Stats. Implemented: ORS 669 & OL 2005
80 Hist.: WRD 1-2010, f. & cert. ef. 6-9-10

Amendments to OAR Chapter 690, Division 522
Deschutes Basin Water Management

Rules Advisory Committee (RAC)

Martha Pagel, attorney, Schwabe, Williamson & Wyatt

Kimberley Priestley, WaterWatch

John Short, Deschutes Irrigation, LLC

Gen Hubert, Deschutes River Conservancy

Adam Sussman, GSI Water Solutions (representing City of Bend)

Leslie Clark, Central Oregon Irrigation District (representing Deschutes Basin Board of Control)

Written Comments

WILKE Laura K

From: SPANSAIL Joshua A
Sent: Tuesday, March 31, 2015 8:38 AM
To: WILKE Laura K; FRENCH Dwight W
Subject: FW: Rule making Change for OAR 690, Division 522

FYI

From: Pete Goodmonson [mailto:pgoodmonson@gmail.com]
Sent: Tuesday, March 31, 2015 8:13 AM
To: SPANSAIL Joshua A
Subject: Rule making Change for OAR 690, Division 522

March 31, 2015

In Regards to
Rulemaking for OAR 690, Division 522
Amends Division 522 to Clarify Adjustment of Allocation Cap and Mitigation Credit Reassignment Upon Cancellation

We are Peter and Sari Goodmonson, property owners at 24850 Alpine Lane, Bend OR.

The way this rule is currently written has negatively affected us because our water rights were unintentionally cancelled.

We would like to have the rule changed in order to reinstate our cancelled 9 Mitigation Credits.

This would greatly benefit us by allowing us to irrigate several of the 83 acres we own, which is heavily forested with Juniper, in order to create a green zone in an effort to inhibit the spread of wildfire around our building site.

Thank you
Peter and Sari Goodmonson
Bend, Oregon
541-728-8276