



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: Racquel Rancier, Senior Policy Coordinator *RR*

SUBJECT: Agenda Item E, May 11, 2017
Water Resources Commission Meeting

**Preview of Upcoming Rulemaking: Division 517 - South Coast Basin Program
Rulemaking to Reclassify the Waters of the Smith River Watershed in Curry
County**

I. Introduction

In response to a petition to withdraw the waters of the Smith River, the Water Resources Commission (Commission), at its November 2015 meeting, instead directed the agency to begin a rulemaking to classify the waters of the area of interest for instream purposes. During this agenda item, staff will provide an overview of progress on the rulemaking to amend the South Coast Basin Program, Oregon Administrative Rules 690, Division 517.

II. Background

The Commission received a petition dated August 31, 2015, for withdrawal of the watershed of the Smith River in Southern Oregon, including its tributaries and groundwater, from appropriations under ORS 536.410. The petition requested withdrawal of all uses including exempt uses, except for the establishment of instream water rights.

After reviewing the Department's concerns about use of ORS 536.410 at its November 2015 meeting, the Commission instead directed the agency to begin a basin program rulemaking to consider classifying the waters of the area of interest for instream purposes under ORS 536.340.

The Commission is charged with developing basin program rules with consideration for the multiple aspects of the beneficial use and control of such water resources to best protect and promote the public welfare of Oregon's citizens generally. Classification of sources of water has the effect of restricting the new uses allowed for new water rights to those that are specified by the classification; no other uses are allowed, except water uses that do not require a water right (for example, see ORS 537.141), alternative reservoirs (i.e., ORS 537.409), and other uses as allowed by law or approved by the Commission (for example, see ORS 536.295).

Current classified uses in the South Coast Basin Program for the Smith River watershed include domestic, livestock, municipal, industrial, fire control, irrigation, agricultural use, mining, power development, recreation, wildlife, and fish life uses.

III. The Smith River Watershed

The Smith River watershed in Oregon was designated as a key watershed under the Northwest Forest Plan to maintain and recover anadromous fisheries, and a portion of the watershed is designated as critical habitat for ESA-listed threatened coho salmon. Thirteen miles of the North Fork Smith River is a federally designated Wild and Scenic River for its fisheries, water quality, and scenery. Most of the watershed is within the Kalmiopsis Wilderness and the South Kalmiopsis and Packsaddle Inventoried Roadless Areas. Fisheries in the watershed include chinook salmon, coho salmon, steelhead, anadromous cutthroat trout, resident rainbow and resident cutthroat trout; the area is critical habitat for coho. The area is also known for Darlingtonia wetlands, which support rare plant species. Although use in the area is low due to limited access, recreational uses include fishing, swimming, hiking, hunting, camping, kayaking, and rafting.

IV. Rulemaking Process

A Rules Advisory Committee (RAC) meeting was held on June 30, 2016 in Brookings to discuss modifications to the draft rules and the statement of need and cost of compliance. Proponents of the rulemaking provided information on why they believed the rulemaking was necessary, and discussed the economic benefits of recreation and fisheries to the area. Other members of the committee expressed concerns about the rulemaking, stating that it was not necessary and that mining could be done in a responsible manner. The information provided by the RAC was essential in developing rulemaking notices. The Department also briefed the Groundwater Advisory Committee and provided an opportunity for feedback on the notices.

The Public Comment Draft of the proposed rules would classify the surface waters in the Smith River Watershed for human consumption, livestock, and instream public uses including pollution abatement, fish life, wildlife, and recreation, and classify the groundwater within the watershed for exempt uses that are outlined in ORS 537.545.

The Public Comment Draft of the proposed rules did not propose to limit new exempt groundwater uses. As outlined in the August 2016 Director's Report, ORS 536.340(3)(a) requires the Commission to review the proposed action to determine whether the proposal is consistent with ORS 537.780 before taking any action to begin rulemaking that would limit new groundwater uses that are exempt under ORS 537.545. ORS 537.780(2)(a) requires that the Commission have substantial evidence to restrict exempt groundwater uses. Staff do not believe there is substantial evidence at this time to justify moving forward with limiting the allowed classified exempt groundwater uses, particularly since there are no existing water rights or exempt wells in the area. This means that pursuant to the Department's existing interpretation of its rules, mining activities associated with an industrial water use could occur under the 5,000 gallons per day exemption.

The notice of rulemaking was published in the September 2016 Oregon Bulletin. Notices were also sent out to the County, interested parties, and the rulemaking listserve. Newspaper notices were published in the Curry Coastal Pilot and the Grants Pass Courier. During the public comment period, the Department also met with the Groundwater Advisory Committee. They declined to provide comment on the rules. A public hearing was held in Brookings on September 29, 2016. Commission Chair John Roberts served as the hearings officer.

On September 28, 2016, the Department received a request from a Curry County Commissioner to extend the public comment deadline by 30 days, to allow the County to review the proposal in more detail and hear from the local community. The County held a public hearing on October 12, 2016, which was followed by a letter to the Department. The public comment period closed on October 28, 2016.

The Department received over 2,000 written comments, mostly form letters in support of the proposed rules. Several comments in support requested that livestock be removed as a classified use, while several comments were in opposition to the rules. Department staff are currently in the process of reviewing and considering the comments.

V. Review of Proposed Rules and Rulemaking Considerations

According to Oregon's Water Laws, the Commission, may, "by a water resources statement" in ORS 536.300(2), "classify and reclassify waters" for the "highest and best use" of these waters in aid of "an integrated and balanced program for the benefit of the state as a whole." Classification "has the effect of restricting the use and quantities of uses...and no other uses...except as approved by the Commission under ORS 536.370 to 536.390, or as accepted by the Commission under ORS 536.295." ORS 536.340 (1)(a).

ORS 536.310 further outlines the purposes and policies to be considered in formulating a water resources statement under 536.300(2), stating that the Commission "shall take into consideration the purposes and declarations enumerated in ORS 536.220," as well as the policies in ORS 536.310.

ORS 536.220 provides for an "integrated state water resources policy" through actions that "encourage, promote and secure the maximum beneficial use and control of such water resources" and directing the agency, in carrying out these actions, to "give proper and adequate consideration to the multiple aspects of the beneficial use and control of such water resources with an impartiality of interest except that designed to best protect and promote the public welfare generally." ORS 536.220(2)(a).

ORS 536.310 (1) protects existing rights, (2) encourages the "integration and coordination of uses," (3) promotes the protection of "adequate and safe supplies" for human consumption, while conserving water for other uses, (4) prefers multipurpose storage, (5) discourages exploitation of the resources for single-purposes when other uses are in the general public interest, (6) requires consideration of harmful effects in evaluating benefits of drainage, (7) promotes the maintenance of streamflows to support aquatic life, minimize pollution, and maintain recreation, (8) favors watershed development policies that preserve balanced multiple uses, (9) provides for consideration of pollution in developing recreation facilities, (10) declares that it is of paramount

importance that the principles of sovereignty of this state be protected and preserved over water resources, (11) encourages local development of watershed conservation when consistent with sound economic and engineering, and (12) gives preference to human consumption and livestock when there is a mutually exclusive conflict of proposed uses.

VI. Other Agencies' Actions

On January 12, 2017, the Assistant Secretary for Land and Minerals Management issued a public land order withdrawing lands of certain Bureau of Land Management and United States Forest Service lands from “settlement, sale, location, and entry under the public land laws, location and entry under the U.S. mining laws, and operation of the mineral and geothermal leasing laws, for a period of 20 years.” The area included the North Fork Smith River watershed. The withdrawal does not prevent development of existing valid mining claims, but prohibits new mining claims.

The Oregon Department of Environmental Quality has been undertaking a rulemaking effort to consider designating the Smith River Watershed as an Outstanding Resource Water (ORW). ORWs are waters that are considered to be an outstanding state resource due to their extraordinary water quality or ecological values, or to maintain critical habitat areas. It is anticipated that the Environmental Quality Commission will consider the proposed rule amendments at the June 2017 meeting. More information about their rulemaking is available online at:

<http://www.oregon.gov/deq/Regulations/rulemaking/Pages/nfsmithriver2017.aspx>.

VII. Conclusion

The public hearing draft of the rules proposes to classify the surface waters of the Smith River Basin for instream uses, livestock, and human consumption, while the groundwater uses are proposed to be classified for exempt uses only. Department staff are reviewing the public comments and intend to bring this rulemaking for consideration by the Commission later this year.