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ARCHIVES DIVISION
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 690
WATER RESOURCES DEPARTMENT

FILED
12/24/2019 12:06 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Changing Mitigation Water to Mitigation Credits and Revising Criteria for Reassignment of Permanent Mitigation Credits

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/31/2020 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Racquel Rancier
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 01/22/2020

TIME: 10:30 AM - 12:30 PM

OFFICER: Dwight French

ADDRESS: Oregon Water Resources
Department

231 SW Scalehouse Loop

Suite 103

Bend, OR 97702

SPECIAL INSTRUCTIONS:

Members of the public must arrive and sign up by 11:00 am to testify. The hearing will close no later than 12:30 pm.

NEED FOR THE RULE(S):

OAR Chapter 690, Division 522, is used in conjunction with the Deschutes Basin Groundwater Mitigation Rules in Division 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Division 521. Division 522 clarifies how the Department counts new, reduced, cancelled and partially cancelled groundwater permits under the allocation cap; allows unused permanent mitigation credits to be reassigned; and clarifies how municipal and quasi-municipal permit holders can provide mitigation under incremental development plans. The rules also allow a mitigation project to provide direct mitigation for a specific groundwater application, which is called mitigation water. Mitigation water, as defined in OAR 690-521-0200(9) means water that is legally protected for instream use from implementation of a mitigation project, calculated in acre-feet.

The first purpose of the proposed rulemaking is to include provisions that would allow the Department to change mitigation water developed under a mitigation project prior to the adoption of these rules into mitigation credits. Currently if a permit holder that has mitigation water does not prove up on the entirety of their permit, the mitigation water is lost and not able to be used for any other mitigation obligation.

With these proposed rules, if the permit holder is allowed to change the approved mitigation water to mitigation credit and does not prove up on the entirety of their permit, the credits would then be able to be used to satisfy another mitigation obligation through the existing rule OAR 690-522-0050.

The second purpose of the proposed rulemaking was at the request of the Rules Advisory Committee. Currently OAR 690-522-0050 (1) (g) allows a permit holder that holds more than one municipal or quasi-municipal permit issued under OAR 690-505-0620 to re-assign mitigation credits from one such existing permit to another existing permit of their own, provided the reassignment is consistent with the requirements of OAR 690-505-0610(4).

With the proposed rulemaking revising OAR 690-522-0050 (1) (g), the permit holder that holds a municipal or quasi-municipal permit issued under OAR 690-505-0620 would have the ability to re-assign mitigation credits to another such existing permit not only their own.

There are currently seven approved mitigation water projects that are located within five different zones within the Deschutes Basin Ground Water Study Area that may be able to take advantage of the results of the first purpose of this rulemaking. This proposed change could be the first step in making more mitigation credits available in zones that are currently lacking in availability.

The second purpose of this rulemaking has the potential to allow municipal and quasi-municipal permit holders to work together and re-assign mitigation credits where credits were not currently available.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

OAR Chapter 690, Divisions 505, 521 and 522; available for review at:

<https://www.oregon.gov/OWRD/programs/policylawandrules/OARS/Pages/Completed-Rulemaking.aspx>

FISCAL AND ECONOMIC IMPACT:

The Department anticipates that the proposed modification, if implemented, will have a positive fiscal and economic impact by providing the potential to assign mitigation in areas that have little or no mitigation credits presently available. The free market structure may impact the value of mitigation credits: the more credits that are available could make the price go down and the less credits available can make the price go up. If project water is converted to mitigation credits as allowed in the proposed rules, there may be more credits available in areas that have little or no mitigation credits presently. In areas where there are credits available, additional credits may cause the prices to decline, and thus those providing credits may see a decline in the amount they can charge for credits. However, in areas where there has not been credits available, this rulemaking could be the first step in being able to sell credits through

the existing rules of the Department, thus benefiting those that have experienced limitations on development due to a lack of credits available. Economically, additional credits will allow those seeking to develop groundwater, such as for domestic, irrigation, drinking water, or other purposes, to be able to proceed with using that water.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

The Water Resources Department has incurred some staff time to develop these rules, and will incur additional staff time to develop related materials and any necessary outreach to permit holders. The Department estimates this will be minimal and can be done with existing resources.

Up to nine permit holders may be economically affected by the rules to the extent that they sell mitigation credits that are changed from mitigation water as a result of these rules. However, they would not be able to immediately sell the credits. If they choose to go through this first step, then they would have to utilize the existing rules to sell credits. There is no fee for the change. If permit holders pursue conversion of mitigation water to mitigation credits, they then have the ability to re-assign the mitigation credits pursuant to the criteria outlined in OAR 690-522-0050, thereby giving cities and others within the Deschutes Basin the opportunity to purchase the mitigation credits.

In some areas of the basin, there is currently insufficient mitigation credits for municipal purposes. Those cities that need credits and wish to purchase them, will then be able to pursue development of their water rights necessary for economic growth.

A member of the public that needs to develop groundwater and needs to obtain mitigation credits may also benefit from being able to purchase these credits.

If sufficient credits are available, the price of credits may decline. Since the proposed modifications to Division 522 provide for greater flexibility, the Department does not anticipate additional costs of compliance by state and local government and the public; those that do not see a benefit can choose not to participate.

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

There are seven permits that may be allowed to change their mitigation water over to credits; the holders of some of these permits may be small businesses. Based on what the Department knows about those permits, three are likely small businesses. While these are the small businesses that would be subject to the rules; the Department does anticipate that small businesses may benefit from those permit holders changing mitigation water into credits. However, the Department cannot predict the number of small businesses that may decide to purchase mitigation credits that result from these rules.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

Under the rules, the permit holder may, in writing, request that the Department change their mitigation water to mitigation credits. The written request will require them to provide the application, permit, or certificate number for which the mitigation water was established and the mitigation project number, which the Department does not believe will take more than a few minutes to prepare. The associated cost will depend on the specific salaries paid by the small business to pay the person to prepare the written request. The Department does not anticipate additional costs associated with reporting and other administrative activities associated with this rule amendment. The Department is currently tracking and accounting mitigation pursuant to Division 505, 522 and 521.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The Department does not anticipate additional costs of compliance for equipment, supplies, labor or increased administration due to implementation of the rules. These proposed changes will provide greater flexibility. The small businesses may be subject to fluctuating free market value of credits, which already exists without these rules today.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Department notified many small businesses, as well as local governments. One of the Rules Advisory Committee (RAC) members participated on behalf of two of the permits affected by these rules that are held by a small business. During the meeting, the RAC members discussed the impact to small business.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

690-522-0010, 690-522-0020, 690-522-0025, 690-522-0030, 690-522-0040, 690-522-0050, 690-522-0060

AMEND: 690-522-0010

RULE SUMMARY: States the purpose of the rules and their relationship to other rules for the Deschutes Groundwater Mitigation Program. The Division 522 rules operate in conjunction with the Deschutes Basin Groundwater Mitigation Rules in Division 505 and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Division 521. The existing Division 522 rules clarify how the Department counts new, reduced, cancelled and partially cancelled groundwater permits under the allocation cap; allows unused permanent mitigation credits to be reassigned; and clarifies how municipal and quasi-municipal permit holders can provide mitigation under incremental development plans. The rules also allow a mitigation project to provide direct mitigation for a specific ground water application. This rule section is modified to remove references to a prior work group in recognition of emerging needs in the Deschutes Basin Groundwater Study Area.

CHANGES TO RULE:

690-522-0010

Introduction Purpose

The following rules are based on recommendations of a Work Group convened by the Water Resources Department pursuant to House Bill 3494 (2005 Oregon Laws Ch. 669) and are intended to operate in conjunction with the Deschutes Basin Ground Water Mitigation Rules in OAR 690-522-0010 through 690-522-0060, Chapter 690, Divisions 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in OAR 690-522-0010 through 690-522-0060, Chapter 690, Division 521.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~ORS 669, OL 2005~~ 537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694

AMEND: 690-522-0020

RULE SUMMARY: This rule states the applicability of the OAR 690, Division 522 rules. The rules apply to mitigation credits and mitigation water established pursuant to the Deschutes Basin Ground Water Mitigation Program.

CHANGES TO RULE:

690-522-0020

Applicability ¶

The following rules apply to final orders, permits, and certificates issued pursuant to OAR 690-4, Division 505 after September 27, 2002, including but not limited to the change of mitigation water into mitigation credits.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~ORS 669, OL 2005~~ Laws 2011, ch 694, 537.746, Or Laws 2005, ch 669

ADOPT: 690-522-0025

RULE SUMMARY: Defines terms used in OAR chapter 690, division 522.

CHANGES TO RULE:

690-522-0025

Definitions

The following definitions apply to OAR chapter 690, division 522.

(1) "Department" means the Oregon Water Resources Department.

(2) "Mitigation credit" is a means of accounting for mitigation water, calculated in acre-feet, made available by a mitigation project. One mitigation credit is equal to one acre-foot of mitigation water. Mitigation credits are determined and awarded by the Department upon completion of the project and verification by the Department.

(3) "Mitigation obligation" means the amount of mitigation water needed for the appropriation of groundwater as determined by the Department under OAR chapter 690, division 505, calculated in acre-feet.

(4) "Mitigation project" means a project approved by the Department that results in mitigation water.

(5) "Mitigation water" means water that is legally protected for instream use from implementation of a mitigation project, calculated in acre-feet.

Statutory/Other Authority: ORS 536.027, ORS 537.746

Statutes/Other Implemented: Or Laws 2011, ch 694, ORS 537.746, Or Laws 2005, ch 669

AMEND: 690-522-0030

RULE SUMMARY: This rule defines what is not counted in the Deschutes Basin Ground Water Mitigation allocation cap. This change is a minor correction to update statutory authority and statutes implemented.

CHANGES TO RULE:

690-522-0030

Ground Water Appropriations within the Deschutes Ground Water Study Area ¶

The cumulative rate specified under 690-505-0500(1) shall not include:¶

- (1) Rates associated with offsets pursuant to 690-505-0610(8);¶
- (2) Rates associated with applications withdrawn after final order issuance pursuant to 690-505-0620;¶
- (3) Portion of rates approved by a final order issued under 690-505-0620 but not included in a water right permit issued following satisfaction of the mitigation requirement;¶
- (4) Rates associated with expired final orders pursuant to 690-505-0620(2);¶
- (5) Portions of rates associated with permits issued pursuant to 690-505-0620 and subsequently cancelled;¶
- (6) Rates associated with certificates issued pursuant to 690-505-0620 and subsequently canceled; and¶
- (7) Rates associated with the portion of use originally authorized under a permit issued pursuant to 690-505-0620 and not included in a subsequent certificate.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~Ch. 669, OL 2005; Ch. 537.746, Or Laws 2005, ch 6694, OL 2011~~ Laws 2011, ch 694

AMEND: 690-522-0040

RULE SUMMARY: This rule defines the incremental development plan reporting requirement for certain municipal or quasi-municipal groundwater permits. This rule change is a minor correction to update statutory authority and statutes implemented.

CHANGES TO RULE:

690-522-0040

Incremental Development in the Deschutes Ground Water Study Area ¶

(1) An incremental development plan under 690-505-0625 for municipal and quasi-municipal ground water permit applicants and permit holders may include offset pursuant to 690-505-0610(8).¶

(2) When providing incremental mitigation pursuant to OAR 690-505-0625, a municipal or quasi-municipal ground water permit holder may provide mitigation, offset, or a combination of both during each approved increment to coincide with each stage of development of the permit on the condition that the permit holder does not increase the rate or amount of water diverted under the permit before submitting the corresponding required mitigation or offset and documentary evidence.¶

(3) The report required under OAR 690-505-0625(1)(b) shall describe the annual volume of water used and the source of offset and mitigation used for that period.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~ORS 669, OL 2005~~537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694

AMEND: 690-522-0050

RULE SUMMARY: This rule identifies the circumstances in which mitigation credits can be reassigned. Changes as part of this rulemaking include in: (1) to clarify instances in which the Department may reassign permanent mitigation credits, in (1)(d) to specify that permanent mitigation credits may be reassigned if a groundwater permit is partially cancelled, and in (1)(g) to allow an existing municipal or quasi-municipal permit holder with an incremental development plan the ability to re-assign credits to another such existing permit including those not their own.

CHANGES TO RULE:

690-522-0050

Reassignment of Permanent Mitigation Credits ¶

- (1) Notwithstanding OAR 690-521-0400(2), the Department may reassign part or all of permanent mitigation credits that were used to satisfy a mitigation obligation ~~may be reassigned if:~~¶
- (a) The ground water permit application to which the credits were assigned is denied or withdrawn;¶
 - (b) The ground water permit application to which the credits were assigned is amended and the mitigation obligation is reduced;¶
 - (c) The final order issued approving the ground water permit application to which the credits were assigned expires pursuant to OAR 690-505-0620;¶
 - (d) The ground water permit to which the credits were assigned is subsequently cancelled or partially cancelled resulting in a reduced mitigation obligation;¶
 - (e) The subsequent ground water certificate is issued for less ground water use than originally allowed under the permit and there is a corresponding reduction in mitigation obligation;¶
 - (f) The subsequent ground water certificate to which the credits were assigned is cancelled, or partially cancelled resulting in a reduced mitigation obligation; or¶
 - (g) The ~~permit holder holds more than one municipal or quasi-municipal ground water permit issued~~mitigation credits are assigned to a permit for municipal or quasi-municipal use issued under OAR 690-505-0620 with an incremental development plan under OAR 690-505-0620~~5~~ and the permit holder requests to re-assign credits from one to another such existing permit to another existing permit of their own or to another municipal or quasi-municipal entity that holds a groundwater permit issued under OAR 690-505-0620 with an incremental development plan under OAR 690-505-0625, provided the reassignment is consistent with the requirements of OAR 690-505-0610.(4) and OAR 690-505-0625. The permit holder requesting the re-assignment of credits under this provision shall submit to the Department an updated incremental development plan.¶
- (2) Mitigation credits available pursuant to this rule may be assigned by applicant or permit or certificate holder to any person or mitigation bank or assigned to satisfy a mitigation obligation.

Statutory/Other Authority: ~~ORS 536.025, 536.027, 537.746~~

Statutes/Other Implemented: ~~Ch. 669, OL 2005; Ch. 537.746, Or Laws 2005, ch 6694, OL 2011~~ Laws 2011, ch 694

ADOPT: 690-522-0060

RULE SUMMARY: This section outlines a new process, which allows mitigation project owners to work through the Department to change mitigation water developed under a specific mitigation project into mitigation credits. Mitigation credits awarded under this process are assigned to the original mitigation obligation under an existing permit or certificate, after which the project owner may utilize other existing rules to re-assign and satisfy other mitigation obligations within the Deschutes Basin.

CHANGES TO RULE:

690-522-0060

Change of Mitigation Water into Mitigation Credits

(1) For mitigation project applications submitted after the adoption of these rules, pursuant to 690-521-0300 (4), any person requesting mitigation credits through completion of a mitigation project, identified in 690-521-0300 (1), shall, in any application associated with the mitigation project, notify the Department that they intend to use the project to establish mitigation credits. For those that do not request to establish mitigation credits under the proposed project, the Department will consult before moving forward. ¶

(2) To apply to change mitigation water into mitigation credits a written request must be submitted to the Department no later than December 31, 2021.¶

(3) The written request to change mitigation water generated by a mitigation project into mitigation credits may be submitted to the Department by the permit holder(s) of record or certificate holder(s). The request will include:

- ¶
- (a) The application, permit, or certificate number for which the mitigation water was established; ¶
- (b) The mitigation project number; and ¶
- (c) Any other information requested by the Department. ¶

(4) Provided the written request is consistent with (2) and (3) of this section, the Department may issue an order to approve the change of mitigation water generated by the mitigation project into mitigation credits, consistent with the order approving the mitigation project. The order will: ¶

- (a) Award mitigation credits in any zone(s) where the mitigation project water is legally protected instream;¶
- (b) Assign the awarded mitigation credits to the existing permit or certificate to which the mitigation water was originally assigned and used to satisfy the originating mitigation obligation.¶

(5) After the award and assignment of the mitigation credits, the mitigation water will no longer be valid to meet a mitigation obligation.¶

(6) Approved mitigation credits become subject to the provisions of OAR Chapter 690, Division 521, and OAR Chapter 690, Division 522. Mitigation credits can only be reassigned in accordance with OAR 690-522-0050.

Statutory/Other Authority: ORS 537.027, ORS 537.746

Statutes/Other Implemented: ORS 537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694