



# Oregon

Kate Brown, Governor

**Water Resources Department**

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Thomas M. Byler, Director

**SUBJECT:** Agenda Item D, November 19, 2020  
Water Resources Commission Meeting

### **Director's Report**

#### **I. Current Events and Updates**

##### **A. Staffing Updates**

Since the May meeting, the Department has filled five positions. These positions include two promotions, two new to state service employees and one lateral transfer. Positions filled include a Well Construction Program Coordinator, an Assistant Watermaster, an NRS 4 Hydrogeologist, a Well Inspector, and a Watermaster.

##### **B. Walla Walla Basin Groundwater Update**

The Department continues to engage regularly with the Washington Department of Ecology (Ecology) and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) to coordinate individual and joint efforts as co-managers of the Walla Walla Subbasin.

The Department, Ecology, and the US Geological Survey (USGS) are continuing to develop a multi-year scope of work for the Walla Walla River Basin Groundwater Study. CTUIR has been a part of these early conversations and will be a key partner as the study progresses. A draft scope has been written and the USGS is currently developing a study timeline and budget to implement the identified scope tasks.

OWRD organized an interactive online meeting in mid-October to inform the public about the Walla Walla Basin Groundwater Study and receive public input on the scope of the study and desired public participation activities during the study. Staff from Ecology and the USGS participated in the meeting. Roughly 70 members of the public from both sides of the state line attended, as well as 30 people from cooperating agencies who presented information, assisted with break out group sessions, and/or listened and engaged with the public.

A public participation plan is under development that will communicate the Department's public outreach strategy given the constraints of current budget shortfalls and the need to keep positions vacant that were intended to support the study and the Department's public outreach efforts. More information is available on the Department's webpage at [www.oregon.gov/OWRD/programs/GWWL/GW/WallaWallaSubbasin/Pages/default.aspx](http://www.oregon.gov/OWRD/programs/GWWL/GW/WallaWallaSubbasin/Pages/default.aspx).

OWRD staff from the Pendleton field office, along with staff from CTUIR and the Walla Walla Basin Watershed Council (WWBWC) collected streamflow measurements at 23 locations along the Walla Walla River system from just above the North/South Fork confluence to Pepper's Bridge over the course of two days in August. The goal was to identify and quantify stream reaches that were gaining or losing flow due to water exchange with the alluvial groundwater system. Washington Department of Ecology and USGS staff conducted a coordinated and concurrent effort on stream reaches north of the state line.

### **C. Harney Basin Groundwater Update**

The Department-supported place-based planning group, which is co-convened by the Harney Basin Watershed Council and the Harney County Court, continue to meet monthly. Approximately 40-45 people regularly attend meetings representing diverse interests across the basin. The current priority of the place-based planning group is to develop strategies and solutions to reduce groundwater use. The Department continues to support the group through development of presentations on topics requested by the group and issue papers in response to technical assistance requests. USGS scientists will provide study summary presentations to the group in October and November to further support their strategy development.

### **D. 2020 Climate Change Adaptation Framework and EO 20-04 Interagency Workgroup on Climate Impacts to Impacted Communities**

The Department of Land Conservation and Development is partnering with 24 other state agencies, including the Water Resources Department, to update the 2010 Climate Change Adaptation Framework (Framework). The 2020 Framework will describe climate change drivers, resulting risks, potential responses, and agency needs under six main themes: (1) Economy; (2) Natural World; (3) Built Environment; (4) Public Health; (5) Cultural Resources; and (6) Social Systems. The Framework will help state agencies work in partnership with Tribal nations, local governments, and other community partners. In addition, the Framework will include a Climate Equity Blueprint (Blueprint) which will provide guidance and best practices for centering equity in climate action and planning.

The Governor's Executive Order 20-04 established an Interagency Workgroup on Climate Impacts to Impacted Communities (Workgroup) whose primary purpose is to enhance and elevate climate justice in the state's climate change initiatives through agency cross-collaboration. Breeze Potter, Water Policy Analyst, is currently serving on the Workgroup as the Department's representative. Over the next few months, the Workgroup will be addressing seven identified goals and objectives in order to center equity in the state's response to climate change and prioritize frontline communities in policy development. This work will be done in coordination with other agency initiatives, including the Climate Change Adaptation Framework and the Climate Equity Blueprint. The Workgroup is advisory to the Governor and will provide the Governor a series of climate justice strategies and recommendations at the end of the Workgroup's tenure in January 2021.

### **E. Diversity, Equity, and Inclusion**

In addition to the Department's participation on the Governor's Executive Order 20-04 Interagency Workgroup and in the state's efforts to develop the Climate Equity Blueprint, the Department is currently in the process of launching a Diversity, Equity and Inclusion Team.

The team, comprised of staff from different sections and programs, will be charged with advising the agency and management on how the Department can improve and implement agency actions, processes, policies, programs, and decision-making that are supportive of the Department's objectives to advance diversity, equity, inclusion, environmental justice, and services for vulnerable, underserved, and underrepresented communities. The team will also serve as a focal point for discussions and assistance with existing related efforts.

#### **F. Key Performance Measures**

Key Performance Measures are set by the legislature and reviewed during the Department's budget presentation. The Department's annual Key Performance Report has been completed and is available on the Department's website at [https://www.oregon.gov/owrd/wrdreports/OWRD\\_Annual\\_Performance\\_Measure\\_Report\\_Fiscal\\_Year\\_2020.pdf](https://www.oregon.gov/owrd/wrdreports/OWRD_Annual_Performance_Measure_Report_Fiscal_Year_2020.pdf).

#### **G. Water Conditions, Drought and Wildfire**

The 2020 Water Year ended September 30 with a statewide average of 25.45" of rain, ranking as the 15th driest for the last 125 years. Oregon started with an exceptionally dry fall, had a mildly dry winter and a wet spring, and ended the Water Year moderately dry. Counties in Southern and Central Oregon fared significantly worse than other parts of the state with precipitation totals in the driest 10 percent of record.

Snowpack peaked on April 8, 2020 at 109 percent. While all basins were near normal in early April, many melted out 1–3 weeks early due to a warm spell in late April and early May.

Surface water runoff for the water year was 69 percent of average, largely following the pattern of precipitation in Oregon. Surface water runoff was approximately 70 percent in western Oregon, the Cascades and some central Oregon locations. Areas in northeast Oregon were the highest at over 100 percent of normal. Areas of southern Oregon were the lowest ranging from 45 to 60 percent of normal.

Temperatures were much warmer than normal, ranking 10<sup>th</sup> warmest (125 years) on record. July to August was the fifth warmest on record with areas in southwestern and central Oregon the warmest.

The National Weather Service Storm Prediction Center issued an extremely critical fire weather warning on Sept 7 for northwestern Oregon. It was only the second time since 1999 that one was issued within Oregon. Another warning was issued the following day for southwestern Oregon.

The combination of high wind speed (over 23 mph) and extremely low relative humidity (< 18%) observed in Salem on September 8 was unprecedented. With at least 18 large fires already burning and fanned by the high winds, well over one million acres were burned. Impacts were tragic with 9 lives lost (1 still missing). Over 4,000 homes were lost with an additional 1,400 structures burned. Numbers of people evacuated were well over 20,000 during the events. Close to 1,000 people are still in shelters.

Public water supplies were also affected, with more than 60 systems jeopardized. At least 10 systems were severely damaged, incurring major loss. In addition, a significant number of private systems were potentially compromised. The Department has been engaged in the wildfire recovery efforts to the extent we are able to provide assistance. The Department is in the process of evaluating risks to the few State regulated dams within or near the burned areas. The Department has also prepared two handouts related to [wells and wildfire](#), and [water right considerations following wildfire](#). Both are available on the front page of the Department's website ([www.oregon.gov/owrd](http://www.oregon.gov/owrd)) under "Agency Spotlight." As applicable and needed, the Department is also working with other agencies on wildfire recovery as part of the Cultural and Natural Resources Recovery Task Force.

## **H. Klamath Basin Update**

Non-compliance with water distribution and regulation was more problematic in 2020. The watermaster sent out 19 notice of violations to water users who did not comply with regulation shut-off orders, and also issued three headgate and measuring device orders to help gain and monitor compliance. The Department issued a notice of civil penalties to Modoc Point Irrigation District for violation of the watermasters regulation order to stop diverting water.

Litigation with the Klamath Irrigation District (KID) is ongoing. The Department is continuing to investigate the dispute and staff are working on assessing points of diversions around Upper Klamath Lake and below Link River Dam to get measuring devices and headgates installed prior to the upcoming irrigation season. As part of this work, the Department has asked KID to pay in advance for the Department to hire of an assistant watermaster, and the Department has asked the Bureau of Reclamation to pay in advance for assistance on measuring un-gaged inflows to Upper Klamath Lake.

Letters were sent out to water right holders about the need to install measuring devices, and the Department's interest in meeting with and working with the affected water right holders. The Department also shared information regarding our measuring device cost-share program. In addition, the Department has reached out to other entities (NRCS, BOR) to see if they could provide additional cost-share dollars. No additional funding has been found to date to assist with measuring devices. The irrigation season is winding down and KID closed the headgate at the A Canal point of diversion on October 16, 2020.

## **I. Petition for Rulemaking**

On October 5, Stand Up to Factory Farms coalition submitted a petition for the Oregon Water Resources Commission to conduct rulemaking. The petitioners request the Commission "prohibit new or expanded exempt uses for stockwatering in the Ordnance CGWAs" through amendment, by rule, of the Commission's Order dated April 2, 1976. The petitioners seek an amendment of the order by rule as follows:

Effective [date of Petition], the Ordnance Gravel Critical Ground Water Area and the Ordnance Basalt Critical Ground Water Area are closed to further appropriation of ground water in excess of 5,000 gallons per day under the "stockwatering" exemption in ORS 537.545(1)(a).

The Department is inviting public comment through November 12, 2020 on the petition and the rule as proposed by the petitioners. The Commission is required by law to make a decision on the petition within 90 days. The Commission will take action on the petition at a special meeting anticipated to be scheduled for December 15, 2020. At that time, the Commission will vote to either deny the petition in writing or initiate rulemaking proceedings.

More information and a copy of the petition is on the Department's website at [www.oregon.gov/owrd/programs/policylawandrules/OARS/Pages/petition.aspx](http://www.oregon.gov/owrd/programs/policylawandrules/OARS/Pages/petition.aspx)

## II. Litigation Update

### Circuit Court Filings

#### **Taylor A. Hyde and John L. Hyde v. Oregon Water Resources Department and Dani Watson, Watermaster, Marion Circuit Court, Case No. 20CV16967**

On May 4, 2020, Taylor and John Hyde filed a Petition for Judicial Review in Marion Circuit Court of watermaster regulatory orders directing the Hydes to cease diverting surface water in the Sprague River and Williamson River drainages following a valid call by senior surface water determined claims. On May 20, 2020, the Department issued an Order Denying Stay, reinstating the enforcement of the regulatory orders pending hearing. In mid-July petitioners filed a notice of dismissal, and on July 23, 2020, the Court dismissed the case.

#### **Klamath Irrigation District v. Oregon Water Resources Department, Marion County Circuit Court (2020) 20CV17922**

On May 14, 2020, Klamath Irrigation District (KID) filed a Complaint for Declaratory and Injunctive Relief in Marion County Circuit Court. The complaint was filed under ORS 183.490 and ORS 540.740. KID is seeking an injunction compelling the Department to carry into effect the Amended and Corrected Order of Determination (ACFFOD) in the Klamath Adjudication by ordering the Bureau of Reclamation (BOR) not to divert stored water through the Link River Dam for instream purposes unless or until it: obtains a water right or instream lease authorizing the use of water for such purpose, obtains a stay of the ACFFOD pursuant to ORS 539.180, or obtains a final judgment providing that federal law authorizes the BOR to use stored water in UKL reservoir for instream purposes without securing a water right in accordance with state law and the Reclamation Act.

A hearing was held in Marion County Circuit Court on June 18, 2020. On July 30, 2020, Judge Bennett issued an opinion letter approving the KID's motion for partial summary judgment on the injunction claim under ORS 540.740 and denying the Department's motions on the same claim. A limited judgement was issued October 13, 2020, by the Court. A motion for stay was filed with the Circuit Court by the Department on October 13, 2020. A motion for contempt was filed against the Department by KID on October 23, 2020.

**Fern Valley Estates Improvement District v. Water Resources Department, Water Resources Commission, and Oregon Health Authority; Jackson County Circuit Court Case No. 20CV19061**

This case involves well construction deficiencies for two wells that supply a public water system in Jackson County. Enforcement commenced with a Notice of Violation being issued to Fern Valley Estates Improvement District on May 2, 2020. On May 27, 2020, the District filed a Petition for Judicial Review in Jackson County Circuit Court. The Court issued an order to hold action in abeyance until February 8, 2021 to give the parties an opportunity to resolve the issues.

**Court of Appeals Filings**

**Brayman, et al. v. Oregon Water Resources Department and Oregon Water Resources Commission, Harney County Circuit Court, Consolidated Case No. 02-06-134-CV and 02-10-298-CV**

This longstanding issue, dating back to 2002 in Harney County, concerns management and enforcement of water rights consistent with the Silvies River Decree and the Department's alleged violation of a settlement agreement. On November 4, 2019, the Court of Appeals granted the State a motion for stay of the Harney County Circuit Court decision for the duration of the appeal.

**Blue Mountain Angus, LLC. v. Oregon Water Resources Department, Oregon Court of Appeals Case No. A156669**

This case is a petition to the Oregon Court of Appeals for review of a final order denying a transfer (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. On May 11, 2018, the Court ordered that this case be reactivated. On June 22, 2018, the Court of Appeals granted a motion to hold the appeal in abeyance through July 23, 2018.

Staff have worked with Blue Mountain Angus' Counsel to receive materials necessary to continue processing the Blue Mountain Angus transfer application. The Court issued a new filing deadline for the Department of September 8, 2020. On September 4, 2020 the Department filed a final order with the Court. An order dismissing the case is pending.

**TPC, LLC., and Hyde v. Oregon Water Resources Department, Oregon Court of Appeals Case No. A167380**

On March 21, 2018, the State of Oregon filed a motion for stay of judgment pending appeal on TPC and Hyde Case No. 16CV27427 and 17CV26962. The petitioners requested attorney fees and a request for findings and conclusions. The State opposed the request. The petitioners opposed the State's response on May 7, 2018. TPC and Hyde filed an appeal on June 5, 2018. On August 17, 2018, the Appellate Commissioner issued an order granting a motion to stay the Trial Court's judgment for the duration of the appeal. Oral arguments were heard on November 6, 2019. On May 19, 2020 the Court dismissed TPC from the case, as requested by TPC. The Case is proceeding with Hyde at the lone petitioner.

**WaterWatch v. Oregon Water Resources Department, Oregon Court of Appeals Case No. A165160**

This case involves an order in an other-than contested case issued by the Department, specifically the renewal of an instream lease of a water right held by Warm Springs Hydro, LLC. WaterWatch asked the Circuit Court to require that the right be converted to an instream water right. A hearing on motions was held on April 11, 2017. The Court issued an order dismissing the case on May 18, 2017.

WaterWatch filed a notice of appeal with the Oregon Court of Appeals on June 14, 2017. Oral arguments were held August 30, 2018. A decision affirming the lower court's ruling in favor of the Department was issued June 10, 2020.

WaterWatch filed an appeal with the Oregon Supreme Court. On October 22, 2020 the Department was informed the Court will review the case. A case number has not been received for this review.

**III. Upcoming Commission/Board Schedules**

<b><u>Commission/Board</u></b>	<b><u>Date</u></b>
Land Conservation and Development Commission	November 12-13
Parks and Recreation Commission	November 17-18
Fish and Wildlife Commission	December 11
State Land Board	December 8
Environmental Quality Commission	November 19-20
Watershed Enhancement Board	December 16
Board of Agriculture	December 1-3

**Attachments:**

1. Rulemaking Calendar

## Oregon Water Resources Department Current/Anticipated Rulemaking

Rule Division	Topic	Lead Staff	GWAC Input Expected?	Target WRC Date	Status
<b>Division 54 (New Rule Division)</b>	Hydro conversion to instream	Mary Grainey	No	TBD	RAC
<b>Division 77 Instream Water Rights</b>	Updates to Rules / Consistency with SB 199 (2013) / Instream Leases and Transfers of Stored Water	Dwight French, Lisa Jaramillo, Sarah Henderson	No	TBD	Preparing Rule Drafts for RAC
<b>TBD – Klamath Groundwater</b>	Regulation of wells in the Klamath Basin	Ivan Gall	Yes	TBD	Not started
<b>Division 340 (formerly new 87)</b>	Municipal Reclaimed Water Registrations	Dwight French, Kerri Cope	No	2021	On Hold
<b>Division 205 &amp; 240 - Well Construction Licensing</b>	HB 3030 and SB 688 Implementation	Kris Byrd	Yes	2021	Rules Advisory Committee / Redrafting rules