



WaterWatch of Oregon Protecting Natural Flows In Oregon Rivers

August 20, 2021

Oregon Water Resources Commission
725 Summer St, NE Suite A
Salem, OR 97301

RE: Public Testimony, Agenda Item H, Division 77 Rulemaking Timeline

Dear Oregon Water Resources Commissioners,

WaterWatch is a nonprofit river conservation group that works to protect and restore streamflows statewide. WaterWatch is serving on the current Division 77 Rules Advisory Committee (RAC), and also served on the 2005 and 2015 RACs.

We are very disappointed with both the process and the policy decisions/recommendations regarding this RAC, and the OWRD's approach to Division 77 in general.

Background: The Instream Water Rights Act was adopted in 1987. The statute is clear in its directives, and does not specify that implementing rules are required. That said, the OWRD adopted implementing rules in 1988. These rules are inconsistent with statute in many areas, and unlawfully serve to limit the instream benefits allowed by the Act.

In 2005 the OWRD convened a RAC to address split season leasing under Division 77; in that RAC WaterWatch and others flagged rule provisions that were inconsistent with the governing statute. At that time, the OWRD moved forward with limited rules but failed to address the areas that are inconsistent with statute, and instead said they would take that up at a later rulemaking (see OWRD Staff Report to the Commission, August 2006). The OWRD failed to reconvene the RAC or otherwise address these issues. In 2015, a decade later, a Division 77 RAC was convened to address additional statutory changes to split season leasing. WaterWatch and others again urged OWRD to amend rule directives that were inconsistent with statute. The OWRD told the RAC that the issues would be sent to DOJ and that the RAC would reconvene after DOJ review (OWRD email to the RAC, 10/18/2016). However, the RAC was never reconvened to address these critical problems with the rules.

In the meantime, there was growing interest in the Deschutes Basin to utilize the provision of the Instream Water Rights Act to transfer stored water instream as part of a pathway to provide NUID with water from canal piping projects in exchange for permanently transferring stored water instream. After the OWRD determined that it did not believe it had the authority it earlier thought it had regarding changes to character of use of stored water, basin discussions turned to utilizing the authority that the OWRD stated it clearly had, which was to transfer stored water rights to instream water rights. That said, stakeholders were told by OWRD that until rules were drafted, the OWRD would not allow applications to be processed.

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The 2021 RAC was convened to develop rules for transferring stored water instream¹; an area that OWRD clearly determined it had authority.

Also relevant is the fact that since 2018 there have been numerous discussions in the legislature regarding OWRD authority to allow changes to character of use and changes to location of storage (and related environmental sideboards). In 2021, the Legislature passed HB 3103. This bill does two things. First, it allows for changes to character of use of stored water (including to instream). Second, it directs facilitated conversations to try to find a path forward on subject of movement of stored water. To restate, the Legislature chose to allow changes in character of use, but rejected calls to allow for changes in location of storage at this time. The latter will be a subject of facilitated conversations. These discussions will be complex and must necessarily include environmental sideboards and will take time. Most users groups opposed HB 3103, urging that the legislature not allow changes in character of use absent allowing changes in location of storage. The Legislature chose not to hold hostage changes in character of use (a concept that in and of itself is broadly supported) to any outcome on changes in location of storage. In other words, the Legislature clearly directed the state to move forward on changes in character of use of stored water as of January 1, 2022. This is in addition to existing law allowing transfers of stored water rights to instream water rights found in the Instream Water Rights Act.

With HB 3103 in place, both paths to transferring stored water instream are clearly enconced in law. Legislative changes to these existing laws will not be the subject of future discussions as part of the facilitated workgroup².

The draft rules and the decision before the Commission³: The draft rules at issue would address the scenario where a stored water right is transferred to an instream right, an authority OWRD has had since 1987. As WaterWatch has stated from the outset of the RAC, the governing statutes do not require rules. That said, we do not disagree that rules could add clarity to the process. Given that, we would urge the Commission to direct that the rulemaking

¹ WaterWatch did request of the agency that this RAC address areas where the rules were not supported by and/or inconsistent with statute but were told that this rulemaking was going to remain narrow and that those issues would be addressed in a future rulemaking. No commitments as to when that rulemaking might occur were given.

² Note, we disagree with comments from stakeholders in the Commission package that either directly state and/or imply that all storage related transfers will be the subject of facilitated discussions. That is inaccurate portrayal of the bill. HB 3013 allows changes in character of use of stored water; including instream. Additionally, the Instream Water Rights Act also allows direct transfer of storage rights to instream rights. The facilitated discussions directed in HB 3103 is not a forum for changing these existing laws, rather that discussion will focus on changes to location of storage and appropriate environmental sideboards.

³ As to the package before the Commission, please note that the OWRD allowed written comments at the request of some of the user groups who noted at the June RAC meeting that they had not had adequate time to review the draft rules in advance of the meeting because of the legislative session. NGOs at the meeting brought their issues to the table and also all voiced support for continuation of the rulemaking. We were told that verbal comments would be captured in the record, and written comments were not necessary to duplicate verbal comments. At no time did the OWRD state that written comments would be carried forward to the Commission, nor did they state that they would be providing comments of those not on the RAC to the Commission. Had the group been told that comments would go to the Commission and that the comments were open to the public, WaterWatch (and likely others) would have provided written comments in support of the rulemaking. As such, the Commission package is somewhat unbalanced. Discussions in the RAC were not.

continue. We would also request that to the extent any rules would be helpful to the process involved in changing character of use that is directed by HB 3103, that that be subsumed in the rulemaking.⁴

That said, our bigger concern with the staff report is that following its recommendation that the rulemaking on transfers of stored water rights to instream rights be delayed, the OWRD declares that the OWRD will not process these transfers until rules are in place (pg. 5, VI.

Recommendation). So, in other words, the OWRD is not only recommending that it stall the rulemaking, but that is also stall any processing of transfer applications allowed under existing statute⁵. Again, the law is in place and it is not dependent on rules being adopted.⁶ There is no requirement and no reason for OWRD to refuse to process applications as provided in the law until someday when it finally promulgates rules. The history of OWRD's failure to address needed revisions in the Division 77 rules further illustrates problems with OWRD's approach. We believe OWRD's failure to process applications consistent with the statute raises issues of the agency unlawfully delaying and refusing to make a decision. ORS 183.490.

It should also be noted that there are many examples where OWRD allows for allocations, reallocations and other transactions that directly benefit users to occur consistent with statute but in the absence of implementing rules (e.g. alternate reservoirs, district "pilot process" transfers, etc.). And in some cases the OWRD allows even allows practices that are not supported by either rule or statute (e.g. bulge in the system storage). Given that, we find it incongruous that OWRD is taking the position that despite clear statutory authority, it will not be accepting applications absent rule under statutes meant to protect and restore water instream. It does not appear consistent with the manner in which OWRD implements other statutes where the benefit of implementation without rule promulgation is for the water user.

We are also concerned with the narrative that seems to imply that applications for changes to character of use approved by the 2021 legislature in HB 3103 might also be on hold (pg. 5, last paragraph). The legislature was clear: it did not want changes in character of use to be held hostage to the very contentious issue of changes to location of storage. HB 3103 becomes effective Jan 1, 2022. If anything, the OWRD should be subsuming any rulemaking on that issue into the current rulemaking to ensure that on the day that the law becomes effective any rules will be in place (though no rules are required). Again, the legislature was very clear that it wanted the state to move forward on character of use changes. OWRD should not be acting contrary to legislative intent, in addition to failing to follow a statutory directive.

Conclusion: We urge the Commission to direct the rulemaking continue. That said, regardless of the decision there, we strongly oppose the OWRD's declaration that it will not implement existing law that allows for the transfer of stored water rights to instream rights and/or changes to character of use of stored water. There is no rational reason for OWRD to refuse to delay

⁴ That said, this is not required by statute and apparently was not needed these past many decades when OWRD was processing these applications under its general transfer laws. Testimony in the HB 3103 record documents that upwards of 200 changes in character of use of stored water have been accepted/processed.

⁵ See Attachment 2 of the Commission packet on this agenda item; OWRD states that it has the authority to allow both leases and permanent transfers.

compliance with existing statutes, a delay that will serve only to harm instream interests. This refusal is inconsistent with how the agency has implemented other statutes and there is no basis for doing it here. To that end, we urge OWRC to direct the OWRD to reverse this position and to make clear that, regardless of existence of rule, the agency will accept and process transfer applications to move water instream as allowed by existing statutes.

We also request that the Commission set a near term schedule for a rulemaking to delete/amend provisions of the existing rules that are inconsistent with the underlying statute, as has been promised to stakeholders since 2005. Instream values are being unlawfully limited by existing rule, we urge the Commission to direct the Department to address this longstanding issue, if not in this rulemaking then in the very near future.

Thank you for consideration of our written public testimony.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Priestley", is written over a light blue rectangular background.

Kimberley Priestley
Sr. Policy Analyst