

## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Adam Sussman, Senior Policy Coordinator  
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**SUBJECT:** April 11, 2002, Water Resources Commission Work Session  
Briefing on Community Water Supply Work Group

### I. Issue Statement

Under OAR Chapter 690, Division 315, the Commission is required to review the progress of the Community Water Supply Work Group by July 1, 2002. The purpose of this report is to update the Commission on the work group's progress, describe some of the outstanding policy issues, and seek input on the work group's current direction. Stakeholders representing municipal and conservation interests will also address the Commission regarding their views. *This is an informational report only; no Commission action is required.*

### II. Background

The Community Water Supply Work Group was formed in November 1998 in response to issues arising from a complex rulemaking on water right permit extensions. Changes to the permit extension rules were prompted by June 26, 1997, advice from the Attorney General's (AG) office. Prior to the advice, the Department granted permit extensions for one year for non-municipal uses or five years for municipal uses. The AG advice interpreted ORS 537.230 to require the Department to authorize permit extensions for the period of time needed to complete development, rather than for fixed one or five year increments. The advice also provided guidance on the criteria and standards used to review extension applications. In August 1997, staff recommended the Commission initiate rulemaking to address the single issue of the time period for which an extension could be authorized. However, based on public comment, the Commission directed staff to undertake a comprehensive review of the extension process and recommend appropriate rules.

In response to the Commission's request, staff worked with a Rules Advisory Committee (RAC) to review the extension program and develop proposed rules. In October 1998, in order to strike a compromise between polarized interests, the Commission simultaneously adopted two versions of permit extension rules. One version — OAR Chapter 690, Division 320 — was applicable through June 30, 2001. The second version — OAR Chapter 690, Division 315 — became effective on July 1, 2001. The Division 320 version made primarily procedural changes to the rules already in effect. Delaying the effective date of the more comprehensive Division 315 rules to July 1, 2001, gave permit holders nearly two and one-half years to prepare for their implementation.

During the permit extension rulemaking, both staff and municipal stakeholders agreed that municipal permit extension issues were unique, warranting a separate rule development process to

focus on their resolution. In order to move forward with the Division 315 and Division 320 rules, the Department and municipal stakeholders struck a compromise. The municipal stakeholders agreed to move forward with the Division 315 and 320 rules if they provided an express exemption for municipal use permits until July 1, 2001. For its part, the Department committed to convene a work group to review permit extension and other issues related to community water suppliers and recommend changes, where appropriate, to current laws and rules. The Community Water Supply Work Group was formed in November 1998 to accomplish this task. A list of the members of the work group is included in Attachment 1.

In December 2000, in order to provide the work group more time to develop recommendations on community water supply issues, the Commission extended the exemption for municipal use permits until July 1, 2003. The December 2000 rules require the Commission to review the progress of the work group before July 1, 2002. OAR 690-315-0010(4).

### **III. Discussion**

#### *A. Stakeholder Issues*

From the start of the work group process, municipal stakeholders have asserted that the current permit extension rules do not adequately address the unique needs of community water providers. Specifically, the rules are not well suited for considering long-term planning horizons; the rules do not recognize many aspects of (diligent) municipal permit development such as water quality monitoring or intergovernmental planning; and the rules do not recognize that many community water suppliers have relied on and planned for using municipal use permits that have been repeatedly extended by the Department. Moreover, municipal stakeholders believe they should not be subject to mitigation requirements for impacts from continued development of an existing permit, other than those required under federal law, such as the Endangered Species Act and Clean Water Act. Finally, municipal stakeholders assert that municipal water rights are not subject to cancellation by the Department, whether for failure to construct and apply water within time limits or for any other reason. While the Department has preliminary legal advice to the contrary, the Department and municipal interests have agreed to table this issue and look for mutually agreeable solutions.

Conservation interests have also articulated their concerns. Conservation interests are concerned about community water suppliers "holding" old water use permits in the name of future development, especially future development for a service area not contemplated under the original permit. Their concern is that many of the existing municipal use permits were granted with minimal environmental analysis or demonstration of water demand. In their opinion, continued development and marketing of these municipal use permits, without adequate review by the Department and without streamflow mitigation, will result in further degradation of the state's rivers and provide a disincentive to water conservation. Conservation interests want permit extension rules that ensure the protection of the state's rivers.

#### *B. Current Direction*

After three and one-half years of meeting, the fundamental positions of stakeholders have changed little, and consensus has been elusive. Numerous proposals and good faith efforts have been put forward by conservation interests, municipal interests, and the Department; however, none have been mutually acceptable. In November 2001, the Department convened a subcommittee of the Water Supply Work Group to reinvigorate the process and work towards final resolution.

In preparing for and conducting the November meeting, staff and work group members agreed that the work group was not moving forward because it was attempting to resolve too many issues at once. The most pressing need was to address the approximately 150 municipal use permits with extension applications pending and “on-hold” awaiting the outcome of the work group process. The Department developed a *Conceptual Framework for Moving Ahead with Existing Permits* (conceptual framework) to address this specific need. The conceptual framework was built on previous proposals of stakeholders and was an attempt to find middle ground on issues related to the length of an extension, the status of water not currently developed, and resource stewardship.

Following the December 2001 subcommittee and full work group meetings, there was general agreement on the direction and focus of the conceptual framework; however, conservation stakeholders made it clear that they could not support the framework unless their core issues of resource protection and conservation were adequately addressed. Since December 2001, staff and work group members have focused their efforts on revisions to the Commission’s Water Management and Conservation Plan rules (Division 86 rules), a major component of the conceptual framework and current work group direction.

The *Conceptual Framework for Moving Ahead with Existing Permits* is provided for the Commission as Attachment 2. The framework is designed to work within the Department’s current statutory authority so implementation can occur without new legislation. The concept also focuses on water management and planning on a twenty-year horizon. Within the context of the Department’s mission and co-equal goals, the framework requires conservation and resource stewardship and gives community water suppliers the flexibility to plan for long-term, reliable water supplies.

Under the conceptual framework, holders of municipal use permits issued prior to November 1998 (the date the current extension rules became effective) can get an extension for the reasonable time necessary to complete development of a water right permit or to apply all the water to beneficial use. Upon receiving an extension, the permit holder would have a “green light” to develop an amount of water identified in an approved Water Management and Conservation Plan (Division 86 plan) that includes projections of water needs over the next 20 years. Additional increments of water could get the “green light” status only upon submittal and approval of a revised Division 86 plan projecting water needs over subsequent 20-year periods. Additional increments of water after year 50 (the year 2052) would be subject to further review beyond a strict “needs analysis.”

In terms of resource stewardship, community water supplier extension rules would not prescribe specific mitigation measures. Responsible development of the resource would be articulated in the water providers’ approved Division 86 plan, which would include elements such as: an analysis of reasonable and justifiable need; an analysis of conservation efforts and accomplishments; an analysis of regional supply opportunities; an analysis of alternative supplies and environmental considerations; and an analysis of mitigation opportunities and proposals.

Debate on the conceptual framework has focused exclusively on the standard of review for the proposed Division 86 plan. In terms of potential resource impacts from the development of existing permits, conservation stakeholders have advocated for a standard that would require an analysis and development of the “least sensitive source” and/or mitigation that results in flow augmentation. Municipal stakeholders have advocated that the evaluation, findings, or conclusions in a plan submitted by a municipal water supplier should be presumed valid and given deference by the Department.

The Department has attempted to reach middle-ground in working draft iterations of revised Division 86 rules, proposing rules that provide access to “green light” water only upon a demonstration of efficient use of the resource and a rigorous analysis of water demand. This is a major shift from previous extension requirements for community water suppliers and, in the Department’s view, a gain for the resource. The working draft of revised Division 86 rules propose a set of findings that, among other things, would require the Department to find that the water provider has:

- C developed a schedule to implement all conservation measures that are feasible and appropriate;
- C developed a schedule to implement a program to reduce system leakage to no more than 15%;
- C demonstrated that estimates of future water demand are reasonable and not inconsistent with relevant land use plans;
- C demonstrated that increased use from the subject source is the most feasible and appropriate water supply alternative; and
- C included mitigation measures in the plan, if required, designed to address legally required limitations or restrictions.

Despite the Department’s efforts, conservation stakeholders are not satisfied with the conservation and resource protection elements of the proposed direction and conceptual framework, and have elected to stop participating in the work group process. In their opinion, the proposed direction of the group shows a lack of commitment towards aggressive water conservation and requires little more of water suppliers than that required under other environmental protection laws. On the other hand, municipal stakeholders are concerned about the significant changes the draft rules would require and the cost and resources necessary to develop and implement the Division 86 plans contemplated by the conceptual framework. However, while they cannot assure universal acceptance of the Department’s proposed direction, municipal interests remain committed to working with the Department to improve water management and to resolve the permit extension issue.

*C. Next Steps*

The Department is committed to continuing its efforts to address permit extension issues regarding community water suppliers. At this point, unanimous agreement among the work group members seems unlikely. In terms of the pre-1998 municipal use permits, staff believe that the conceptual framework makes sense for the resource, for the long-term water supply needs for the people of the state, and for the Department’s administration of municipal water use permits.

As an alternative, some conservation stakeholders have begun advocating that the Department and Commission take no action and let the municipal exemption under the current extension rules expire in July 2003. (*See* Agenda Item F, WRC Meeting April 12, 2002). Inaction by the Department is not a good option. First, the municipal stakeholders agreed to moving the Division 315 and Division 320 rules forward on the Department's commitment that it would resolve community water supply issues related to permit extensions through an approach other than that of the existing rules. Second, inaction will likely result in these issues being addressed by stakeholders in the 2003 Legislative Session. The Department would prefer to resolve the issue administratively with rules that ensure improvements in water conservation and management. Finally, inaction may ultimately result in litigation over a municipal permit extension. Again, resolving this matter administratively is preferable to the expense and uncertain outcome associated with litigation.

The Department supports the direction of the work group and intends to proceed with rulemaking and the associated public process. We hope that conservation stakeholders will rejoin the work group to assist in these efforts. Unless otherwise directed, staff plan to proceed and intend to have rules for the Commission's consideration and adoption at its August 2002 meeting.

#### **IV. Recommendation**

No Commission action is required. Staff welcome the Commission's input on the direction of the Community Water Supply Work Group.

Attachments:

1. Membership of Community Water Supply Work Group
2. Conceptual Framework for Moving Ahead with Existing Permits

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## Department and Subcommittee's Conceptual Framework for Moving Ahead With Existing Permits

### Time frame

, Current holders of municipal water right permits would get an extension for the reasonable time necessary to complete water development or to apply all the water to beneficial use.

### Status of water

, Upon receiving an extension the surface or ground water permit holder would have a green light to develop the amount of water identified in its approved Division 86 plan projecting water needs over the next 20 years.

, Additional increments of water would get a green light for development upon submission of a revised and approved Division 86 plan projecting water needs over subsequent 20 year periods.

, For additional increments requested after year 50, in order to gain access to the water, the permit holder would be subject to further review beyond a strict "needs analysis," the details to be addressed further by the working group. The water remains in the name of the permittee and the priority date remains the same.

, Upon expiration of the extension the permit holder could apply for another extension as outlined above, prove up on the use, or relinquish the remaining water. Any request to put water in a green light status for development after year 50 would be subject to further review beyond a strict "needs analysis," the details to be addressed further by the working group.

### Mitigation

, Extension rules would not prescribe specific mitigation. The responsible development of the resource would be articulated in an approved Division 86 plan and that would include an analysis of reasonable and justifiable need, an analysis of conservation efforts and accomplishments, an analysis of regional supply opportunities, an analysis of alternative supplies and environmental considerations and an analysis of mitigation opportunities and proposals