

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Water Resources Commission Work Session
October 10, 2002

Statewide Riparian Management Policy

I. Issue Statement

In June 2002, Governor Kitzhaber transmitted a Statewide Riparian Management Policy (Riparian Policy) as informal direction to natural resource agencies. As directed by the Governor, the Department has reviewed its statutory authority for adequacy to carry out the Riparian Policy and its existing rules, policies, and programs for consistency with the Riparian Policy. This staff report describes the Riparian Policy and presents the results of the Department's review. *The Commission is asked to endorse the Department's report to the Governor as provided in Attachment 3.*

II. Background

The Riparian Policy was developed by the Governor's Natural Resources Office and the Oregon Plan Core Team in response to the Governor's Executive Order related to the Oregon Plan (Executive Oregon 99-01) and to recommendations from the Independent Multidisciplinary Science Team (IMST). Prior to final drafting, the policy was subject to public review and comment. The policy was also reviewed and endorsed by the state's natural resource agency directors prior to transmittal. The Riparian Policy is Attachment 1.

The Riparian Policy states that the "policy of the State of Oregon is to promote land use policies and land management practices that sustain streamside and wetland riparian functions that support desirable water quality, native fish populations, and wildlife across the landscape."

In a letter to agency directors and commission chairs (Attachment 2), the Governor has requested that each agency, board, and commission with responsibilities relating to riparian areas review the Riparian Policy as follows:

- First, review the agency's existing statutory authorities to determine if they are adequate to allow the agency to carry out the Riparian Policy;

- Second, if the statutory authorities are not adequate, report to the Governor regarding what statutory changes are needed;
- Third, if the statutory authorities are adequate, review the agency's existing rules and policies to determine whether they are consistent with the Riparian Policy; and
- Finally, where the agency's existing programs, rules, and policies are not consistent with the Riparian Policy, report to the Governor regarding any inconsistencies, and formally consider implementing measures necessary to make the agency's programs, rules and policies consistent with the Riparian Policy.

III. Discussion

To carry out the Governor's direction, the Department formed an internal review group with representatives from each of the agency's relevant divisions. The internal work group reviewed the programs, policies, administrative rules, and statutory authorities for consistency with the Riparian Policy. Based on this review, the work group developed a report addressing the Riparian Policy which is provided as Attachment 3.

The internal work group concluded that the Department's existing statutory authorities are essentially adequate to allow the agency to carry out the Riparian Policy with one possible exception. Transfers of surface water points of diversion to ground water appropriations under ORS 540.531 are currently limited by statute by the location of the new ground water appropriation relative to the surface water source and the timing of ground water pumping impact on the surface water source. These types of transfers can provide several benefits to fish and riparian areas including minimizing disturbance of riparian areas and eliminating fish passage barriers. Opportunities for utilizing these types of transfers could be expanded through changes in the existing statutory language. The Commission's Ground Water Advisory Committee has been reviewing this issue.

Beyond statutory authorities, the internal work group found that the programs, administrative rules, and policies of the Department and Commission are largely consistent with the Riparian Policy. Much of the direction contained in the policy represents actions that have historically been carried out by the Department as part of its efforts under the Oregon Plan for Salmon and Watersheds.

The work group identified a few areas where the Department could build on previous actions to further the goals of the Riparian Policy. For instance, the Commission may consider expanding use of water right conditions to protect riparian areas. In other areas, the Department could expand its efforts, such as administering more distribution for the protection of instream water rights and conducting additional streamflow gaging, but additional staff and funding resources would be required.

IV. Recommendation

Staff recommend that the Commission endorse the report to the Governor as provided in Attachment 3.

WRC Work Session

October 10, 2002

Page 3

Attachments:

1. Statewide Riparian Management Policy
2. Governor's letter to Natural Resource Directors and Commission/Board Chairs
3. Draft Response to the Governor

Barry Norris

Technical Services Division

503-378-8455, Ext. 246

Debbie Colbert

Director's Office

503-378-8455, Ext. 316

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October 12, 2002

The Honorable John A. Kitzhaber
Governor
State Capitol
Salem, Oregon 97310

Dear Governor Kitzhaber,

The Water Resources Commission and Water Resources Department have reviewed the Statewide Riparian Management Policy (Riparian Policy). In response to your direction, the Department formed an internal review group with representatives from each division of the agency. The internal work group reviewed our programs, policies, administrative rules, and statutory authorities for consistency with the Riparian Policy. Based on that review, the work group developed a report evaluating the Department's current activities according to the implementation actions of the Riparian Policy. The Water Resources Commission reviewed and endorsed the report at its October 10, 2002 meeting. A copy of the final report is attached for your consideration.

In reviewing our statutory authorities, we conclude that the Department's existing statutory authorities are adequate to allow the agency to carry out the Riparian Policy. We believe our programs, administrative rules, and policies are largely consistent with the Riparian Policy. Much of the direction contained in the policy represents actions that have historically been carried out by the Department as part of its efforts under the Oregon Plan for Salmon and Watersheds. We have identified a few areas where the Department could build on previous actions to further the goals of the Riparian Policy as described in the attached report.

Sincerely,

Dan Thorndike
Chair
Water Resources Commission

Paul R. Cleary
Director
Water Resources Department

**Statewide Riparian Management Policy
Oregon Water Resources Department
OCTOBER 2002**

INTRODUCTION

On behalf of the Water Resources Commission (Commission), the Water Resources Department (Department) has reviewed the adequacy of its statutory authority for carrying out the Statewide Riparian Management Policy (Riparian Policy) and its existing rules, policies, and programs for consistency with the Riparian Policy. This report provides the results of that review and describes the Department's current activities that promote the protection and restoration of riparian areas.

Department activities that affect riparian areas are presented in the context of each of the five implementation actions identified in the Riparian Policy (Section 1 of the Riparian Policy).

IMPLEMENTATION ACTIONS

Implementation Action 1: Promote the protection of properly functioning riparian corridors and promote the restoration of degraded riparian areas

The Department's statutory authorities and existing rules and programs promote the protection and restoration of riparian areas. Actions for the protection and restoration of riparian areas include the Department's authorities to review and condition new appropriations of water, programs providing incentives for the protection of riparian areas, and programs promoting voluntary streamflow restoration.

A. New Appropriations of Surface and Ground Water

- Conditioning of New Water Rights for the Restoration of Riparian Areas: For the mainstem reaches and tributaries of the Columbia River, the Department consults with a number of state, federal, and tribal entities to determine if permits for new uses of water should be conditioned to require the restoration or enhancement of riparian areas that would be impacted during the development of a new point of diversion from a water source (OAR 690-033-0120 and 690-033-0220). Based on this authority, the Department can condition new water rights tributary to the Columbia to require the restoration and enhancement of riparian areas disturbed in the process of developing a new point of diversion, planting of vegetation in the riparian zone, maintenance of minimum riparian zones where disturbance is not permitted, and fencing of the stream and adjacent riparian area to exclude livestock.

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Statewide rules for areas other than the Columbia River and tributaries under OAR 690-033-0310 could be amended to include similar provisions for conditioning new uses for the restoration of riparian areas.

- Conditioning of New Water Rights for the Protection of Native Fish: Using its authority under ORS 537.170, the Commission has promulgated rules requiring compliance with fish screening and passage standards on permits for new water uses for the mainstem reaches and tributaries of the Columbia River (OAR 690-033-0120 and 690-033-0220). For areas outside of the Columbia River basin, conditions for fish passage can be recommended by an interagency review team that reviews new applications for water use in areas that affect the habitat of sensitive, threatened, or endangered fish (OAR 690-033-0330). These rules are consistent with the goal of the Riparian Policy to achieve productive riparian and aquatic habitats to support self-sustaining populations of native fish species. Implementing these rules also requires close collaboration with Oregon Department of Fish and Wildlife (ODFW) and Department of Environmental Quality (DEQ), consistent with the guiding principles of the Riparian Policy and implementation actions of the Riparian Policy for coordinating agency programs.
- Conditioning of New Water Rights for Water Quality Protection: One goal of the Riparian Policy is to achieve clean water to support self-sustaining populations of native fish species. Using its authority under ORS 537.170, the Commission has promulgated rules requiring that permits for new uses in the mainstem reaches and tributaries of the Columbia River comply with state and federal water quality standards (OAR 690-033-0120 and 690-033-0220). During the Department's initial review of an application, the water source identified in the application is checked against the location of DEQ designated water quality limited streams under the Clean Water Act (303d listed streams) and Oregon Department of Agriculture (ODA) Agricultural Water Quality Management Areas (SB 1010 plan areas). Applications for water use from these streams may be conditioned or denied by the Department based on consultation with DEQ and/or ODA.
- Protection of Scenic Waterway Flows: Under ORS 390.835, new water right applications in or above a state scenic waterway cannot impair the recreational, fish, and wildlife values in the scenic waterway. The Department has prepared estimates of the streamflow levels needed to satisfy these uses, commonly referred to as the "Diack" flows, which it uses to determine if new water rights in or above a scenic waterway should be authorized. In many areas, the protection of scenic waterway flows under these statutes benefits aquatic habitats that support native fish populations.
- Commission's Water Allocation Policy: New appropriations of surface water or hydraulically connected ground water are evaluated using the Commission's Water Allocation Policy under OAR 690-400-010. The Water Allocation Policy sets standards for evaluating whether water is available for new appropriations from Oregon streams. Direct appropriations from streams are appropriated for water rights on an 80% exceedance basis. This means that before a new water

right may be issued the Department must conclude that water is available for appropriation 80% of the time. The amount of available water is calculated by subtracting from natural flow all consumptive uses, scenic waterway flows, and instream water rights. Use of the 80% exceedance standard ensures that new appropriations will not further diminish water available to satisfy instream water rights and scenic waterway flows.

B. Incentives for Protecting and Restoring Riparian Areas

- Stock Watering: Streamside livestock watering is exempt from the requirement to obtain a water right. Off-channel stock watering would involve diversion of water and would thus require a water right. However, under ORS 537.141, a water right is not required to divert water from a surface water source for the purposes of offstream livestock watering, proving an incentive to private landowners to limit the impact of cattle on riparian areas. In order to take advantage of this exemption, livestock must have direct access to the stream prior to the diversion of water. The diversion must also be through an enclosed delivery system and equipped with a shut off valve, or return the water to the stream through an enclosed system. The exception encourages protection of riparian areas by making it possible to exclude livestock from a stream while continuing to allow livestock access to water. This exception to water right requirements is a great example of using a “carrot” instead of a “stick” approach to restore and protect riparian areas.
- Sediment Retention Ponds: Sediment retention ponds can be used to reduce channel scour and restore riparian habitat. These types of structures are exempt from the requirement for a water right as long as they do not store water on a permanent basis (ORS 537.141). If they are constructed over specified size limits, an engineered design must be approved by dam safety staff at the Department prior to construction. These retention ponds have been very effective at restoring natural riparian conditions in areas such as Pine Hollow.

C. Streamflow Restoration Programs

- Instream Transfers: The Commission has adopted policies to protect instream flows and to encourage streamflow restoration under OAR 690-410-030. Oregon law allows water right holders to sell, lease or donate water rights to be converted to instream water rights (ORS Chapters 537 and 540). Water rights may be transferred to instream uses, either permanently by an instream transfer or temporarily by a lease agreement or temporary transfer. These transferred rights become instream water rights with the priority date of the original right. Water may not be diverted by any junior user while it is an instream right. Promoting these voluntary streamflow restoration programs is a high priority measure for the Department under the Oregon Plan for Salmon and Watersheds. The benefits to native fish, water quality, and riparian areas include enhanced flow and elimination of disturbances when constructing and maintaining surface water diversions.

- Allocation of Conserved Water Program: Oregon law allows the holder of a certificated water right to create “conserved water” by reducing the amount of water diverted to satisfy an existing beneficial use through conservation measures (ORS 537.455 to 537.500). The allocation of conserved water program is a voluntary program intended to provide an incentive for water right holders to implement conservation measures. Water right holders participating in this voluntary program are able to utilize a portion of the conserved water for new uses but are also required to permanently dedicate a minimum of 25% of the conserved water to restore streamflows. The original water right is reissued to reflect the quantity of water being used with the improved technology. The priority date stays the same. Another water right certificate is issued for the instream use with either the same priority date, or a priority date of one minute after the original water right. The Department promotes this voluntary program under its Oregon Plan measures. These projects benefit both the water right holders and instream values by providing flexibility to water users and water for instream benefits.
- Instream water rights: Oregon law allows ODFW, DEQ, and the Parks and Recreation Department (OPRD) to apply for instream water rights for the purpose of fish protection, minimizing the effects of pollution, or maintaining recreational uses, respectively (ORS 537.332). The law also gives instream water rights the same status as other water rights. When the quantity of water in a stream is less than the instream water right, the Department will require junior water right holders to stop or reduce diversion of their water. Depending on the priority date of the instream water right, flows are either stabilized or may improve where instream water rights are in place.

Implementation Action 2: Utilize education, technical assistance, financial incentives and assistance, and regulation to protect and restore riparian areas

A. Education and Technical Assistance

- Watershed councils: Watershed Councils devote their efforts to restoration of watersheds. Much of their effort is aimed specifically at riparian areas and requires accurate and timely data. Under Oregon Plan measures, Department staff are committed to providing Watershed Councils technical assistance, including access to resource data collected by the agency. Streamflow data, water use data, and water resource mapping are shared with Watershed Councils and have proven among their most valuable assets.
- Data Collection: The Department gathers and provides quality assurance on a variety of surface water data including gage flow at over 200 surface water gaging stations, miscellaneous measurements of surface water flow at various locations throughout the state, water rights for both instream use and out of stream diversions and a variety of digitized data mapped in GIS format. This data is

provided to various interests including the general public and state and federal agencies for their use. The data is used for a variety of uses including riparian management and restoration projects. Considerable effort is expended by Department staff in collecting and making this data easily accessible through our web page or on request. The Department continues to improve its public information system by adding many new ways of accessing information and data about Oregon's water resources. In addition to printed materials, the Department offers online services, workshops, customized maps, presentations, and frequent mailings for specific topics. However, increasing and, in some cases, maintaining these data efforts is challenging given budget limitations and recent reductions in federal commitments.

B. Regulation

- One of the Department's primary functions is distribution and regulation of water use for the protection of senior water rights, including instream water rights. Watermasters monitor streamflows to protect instream water rights and have increased their monitoring efforts dramatically in recent years. However, the small number of field staff limits the capability of the Department's regulation and enforcement program. Given these limitations, the Department works with ODFW to identify basins where instream flow monitoring is a priority.

Implementation Action 3: Recognize, accommodate, and mitigate to the extent possible existing legal uses of private and public property that prevent restoring riparian areas

- Fish Passage: Through the Oregon Plan, the Water Resources Department, Division of State Lands, and Department of Fish and Wildlife have coordinated to assist water users in replacing over 60 push up dams with alternative diversion structures. By changing this practice, the need to bring heavy equipment through the riparian area is decreased, if not eliminated, and channel morphology is also maintained.

Beyond these interagency efforts under the Oregon Plan, the Department promotes other tools for eliminating fish passage barriers. For instance, the Department promotes the transfer of surface water points of diversion to ground water appropriations under ORS 540.531. These transfers provide several benefits to fish and riparian areas including minimizing disturbance of riparian areas and eliminating fish passage barriers. These transfers are limited by statute by the location of the new ground water appropriation relative to the surface water source and the timing of ground water pumping impact on the surface water source. Opportunities for utilizing these types of transfers could be expanded through changes in the existing statutory language. The Commission's Ground Water Advisory Committee has been considering this issue.

Other tools for eliminating fish barriers include water right substitutions. A water user may substitute use of a supplemental ground water right for use of a primary

surface water right, provided that no other water rights are injured by the change (ORS 540.524). This provides an opportunity for water users with existing surface water rights and groundwater rights to eliminate points of diversion on surface waters, thereby providing benefits to fish and water quality. However, the substitution does not create a protectable instream water right.

The Department can also condition approval of a point of diversion transfer to require a proper fish screen or by-pass device if requested by ODFW (ORS 540.525; OAR 690-015-0073).

- Water Reuse: Increasingly municipalities and industries are being required to reduce or eliminate discharges of pollutants to streams. Land application of treated effluent provides an alternative method of disposal of pollutants. The reclaimed water statute provides an opportunity for the reuse of water that has been used for municipal purposes (ORS 537 and 540). The statutes also allow ground water reuse/land application of industrial process water and water from confined feeding operations without the need of a water right issued by the Department (ORS 537.605). If practical, reuse of the effluent in lieu of diverting this same quantity of water would provide miles of enhanced streamflow. A simple registration of this reuse is all that is required in most cases. If reused ground water replaces other surface water for irrigation, the reuse registration protects the original surface irrigation water right from forfeiture. This program encourages use of wells instead of surface water points of diversion thus protecting riparian areas from annual point of diversion installation and maintenance. It also has the potential to enhance streamflows.

Implementation Action 4: Coordinate the implementation of agency programs that affect riparian areas, and establish regional riparian management priorities

- High Priority Streamflow Restoration Watersheds: The Department has focused on the protection and restoration of streamflows in high priority areas identified in cooperation with ODFW. ODFW prioritized the areas where fish habitat is most dependent on flow restoration. Working together, Department and ODFW staff identified areas in which (1) the need for flow restoration to support fish recovery is high, and (2) there are good opportunities to achieve flow restoration using the tools available to Department.
- Hydroproject Relicensing and Decommissioning: The Hydroelectric Application Review Team (HART) are established for each hydroelectric project with a water right about to expire. Core membership of each HART includes the Department as the lead agency, DEQ, and ODFW. HARTs can also include other state agencies with a specific interest in the project. The purpose of the team is to develop a unified state position regarding: 1) the requirements to be included in the issuance or renewal of a hydroelectric water right; 2) the requirements for proper removal from service of a hydroelectric project slated for decommissioning; and 3) the state's recommendation to the Federal Energy

Regulatory Commission (FERC) for operational requirements to be included in the federal hydroelectric license. The HART teams address several issues related to riparian areas, including protection of the riparian area through proper rate of release of water from storage projects to prevent undue river level fluctuations; control of stream dewatering by diversions of water for the purpose of power production; and proper management of high use areas to prevent or minimize environmental damage.

Under ORS 543A.305, hydroelectric water rights are converted to instream water rights five years after the water use ceases, upon expiration of a the water right, or upon consent of the water right holder. The water right is converted to an instream water right for up to the full amount of the water right upon a finding by the Water Resources Director that the conversion will not result in injury. The purpose of this statute is to protect instream flow, which is a necessity for maintenance of a healthy riparian area.

- Conservation Reserve Enhancement Program (CREP): An offspring of the Federal Conservation Reserve Program (CRP), Conservation Reserve Enhancement Program CREP is a voluntary program for agricultural landowners. Unique state and federal partnerships allow landowners to receive incentive payments for installing specific conservation practices targeted towards riparian areas. Through the CREP, farmers can receive annual rental payments and cost-share assistance to establish riparian vegetation on eligible land. Under certain circumstances, irrigated acres in this program are paid a higher rate than others. So, eligible participants can protect water instream through an instream lease or temporary transfer while also receiving a higher rental payment. There is a federal cap on the amount of payments per state which can be devoted to public landowners such as parks and recreation agencies, port authorities, fish and wildlife agencies and public works agencies. Changes in the federal rules would increase the opportunity for these entities to participate.
- Storage Operations: The Department is lead agency for developing state recommendations to the Corps of Engineers for summer operation of Corps owned reservoirs. These reservoirs are located in the Willamette and Rogue Basins. Operational considerations include providing habitat for fish and wildlife, pollution abatement, and recreational opportunities. After close collaboration with the Corps of Engineers, a proposed plan is presented at public meetings to interested parties, who are given the opportunity to provide comments. A final plan is developed in time for implementation for that season. Throughout the summer season the Department continues to collaborate with other state agencies in recommending modifications to the plan to reflect unforeseen needs and to take advantage of opportunities in reservoir operation. The process is designed to bring about an outcome that is best practice for management of the river systems and the riparian areas.

Implementation Action 5: Develop a landscape approach to managing streams and their associated riparian features

- Policy for Protection of Water Resources on Public Riparian Lands: In implementing its integrated statewide water policies, the Commission adopted a policy for the protection of water resources on public riparian lands (OAR 690-410-0050). This policy is consistent with the statewide riparian policy in that it incorporates a landscape approach, emphasizing management of Oregon's waters, riparian areas, and associated uplands as a unit. The policy also recognizes riparian functions for fish, wildlife, and water quality. Similar to the Riparian Policy, the Commission's policy calls on land management agencies to track riparian area conditions, monitor the effectiveness of restoration and management activities, and mitigate and minimize the impact of activities within riparian areas.
- Ground Water Investigations: The Department maintains 336 data collection sites in a statewide network of observation ground water wells. The agency's ground water hydrogeologists also gather information from more than 3,000 test wells. These staff work with the USGS in cooperative studies mapping and assessing ground water resources, including determining whether there is a hydraulic connection between surface water and ground water. If a hydraulic connection is verified, and surface water is fully appropriated, new ground water rights are not be granted in those systems. This process provides protection of instream water rights and scenic waterways. Likewise, junior water users are regulated when use is detrimental to senior instream rights.

CONCLUSION

With the possible exception of limited authority under ORS 540.531 related to changes in point of appropriation from surface water to ground water, the Department concludes that it has adequate statutory authority to carry out the Riparian Policy. Furthermore, the Department's current rules, programs and policies are consistent with the Riparian Policy. There are opportunities to improve implementation of the policy, including expanded use of water right conditions to protect riparian areas. In some areas, programs or policies are in place, but additional fiscal resources may be required for full implementation by the agency.