

MEMORADUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Water Resources Commission Meeting
September 13, 2002

Request for Adoption of Administrative Rules, OAR Chapter 690, Division 505 – Modifications to Deschutes Basin Program (Deschutes Basin Ground Water Mitigation Rules) – and OAR Chapter 690, Division 521 - Deschutes Basin Mitigation Bank and Mitigation Credit Rules

I. Issue Statement

The Commission is asked to adopt amendments to the Deschutes Basin Program, OAR Chapter 690, Division 505 (ground water mitigation rules) and to adopt Deschutes Basin Mitigation Bank and Mitigation Credit Rules, OAR Chapter 690, Division 521. The final proposed rules are Attachment 1. The proposed amendments to the basin program implement Senate Bill 1033 (1995 Legislative Assembly, now codified as ORS 390.835) and provide for mitigation of impacts to scenic waterway flows and senior water rights while allowing additional qualifying appropriations of ground water. Without mitigation, the Department is required to deny new and pending ground water applications in the Deschutes Ground Water Study Area (Study Area).

The proposed Division 505 rules provide ground water permit applicants two options to satisfy the requirement to mitigate - completion of an individual project or acquisition of mitigation credits. The rules identify the amount of mitigation needed, how new ground water permits issued under the proposed rules will be conditioned, and how municipal and quasi-municipal water users can provide incremental mitigation. The rules also clarify the types of ground water uses allowable in the basin. Finally, the proposed rules provide that holders of certain existing conditioned permits/certificates in the Study Area that choose to mitigate will not be subject to future regulation for scenic waterway flows.

The proposed rules in OAR Chapter 690, Division 521, implement House Bill 2184 (2001 Legislative Assembly), which provides for the establishment of mitigation credits through completion of various mitigation projects and actions, and formation of mitigation banks for the Deschutes Basin.

II. Background

The following time-line and background set the stage for the Department's rulemaking activity in the Deschutes Basin.

A. Chronology

- 1970 - Oregon Scenic Waterway Act was adopted by ballot initiative. The Act declares that the "highest and best use of the waters within a scenic waterway are recreation, fish and wildlife uses." The Act requires the State to maintain the "free flowing character of these waters in quantities necessary for recreation, fish and wildlife uses." The Act designated as a Scenic Waterways various portions of the Deschutes River and Basin tributaries, including the Lower Deschutes River from Pelton Dam to its confluence with the Columbia River.
- 1987 - State instream water right law was enacted.
- 1988 - Oregon Supreme Court, in *Diack v. City of Portland*, interpreted the Scenic Waterway Act to mean that "no diversion of water that otherwise would enter a scenic waterway may be permitted unless the requirements of [the Act] are met." The Department was required to determine that scenic waterway flows will not be impaired before issuing new water rights.
- 1991 - Scenic waterway flows ranging from 3,500 cubic feet per second (cfs) in August to 4,500 cfs in winter months were established on the Lower Deschutes Scenic Waterway after public hearing by the Water Resources Commission.
- 1993 – U.S. Geological Survey (USGS) initiated a comprehensive ground water study in cooperation with the Department, local governments, tribes, Bureau of Reclamation, and Environmental Protection Agency. The objective was to provide a quantitative understanding of ground water hydrology in the Upper Deschutes Basin.
- 1995 - Legislature passed Senate Bill 1033, codified as ORS 390.835, to authorize reasonable and appropriate uses of ground water while not jeopardizing flow protection for State Scenic Waterways. The Department was required to review ground water applications and make a finding on whether proposed use will "measurably reduce" the flows necessary to maintain free flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife. A use "measurably reduces" if it individually or cumulatively reduces streamflow by 1% of average daily flow or 1 cfs, whichever is less. The statute requires conditioning of permits to allow for regulation in the future if the "measurably reduce" standard is triggered, and requires mitigation by new ground water applicants once the measurably reduce standard is triggered.

- 1996 - Department issued two instream water right certificates on the Lower Deschutes River, one with an October 2, 1989, priority date, for 3,000 to 3,500 cfs (matching the minimum flows required under the Federal Energy Regulatory Commission license for Pelton Dam); and the other with a January 16, 1991, priority date, for 3,500 to 4,500 cfs (matching the Scenic Waterway flows established by the Water Resources Commission).
- 1998 - Preliminary results from USGS/Department study show ground water originating in or flowing through Upper Deschutes Basin discharges into the lower reaches of Deschutes, Metolius and Crooked Rivers above and within Lake Billy Chinook. These conclusions are consistent with previous studies in 1931 and 1968. Based on these initial study results, Department staff determined ground water use in the study area has the potential for substantial interference with surface water and the “measurably reduce” standard in ORS 390.835 is triggered. New ground water applications were put on hold and the Department convened a diverse group of stakeholders to develop mitigation strategies to offset impacts on Lower Deschutes while accommodating new uses and restoring the Middle Deschutes. The committee, known as the Deschutes Basin Steering Committee continued to meet monthly from early 1999 to early 2001.
- June 2001 – House Bill 2184, authorizing a system of mitigation credits and banking arrangements is enacted into law.
- September 2001 and April 2002 - Department issued draft Deschutes Basin Ground Water Mitigation rules for public review and comment. Five public hearings were held on the proposed rules, four in September 2001 and one in April 2002. In addition to oral testimony, over 160 written comments have been submitted to the Department on the April 2002 hearing draft.

B. The Challenge

Much of the mainstem Deschutes River and the Metolius River are designated State Scenic Waterways. Likewise, much of the mainstem Deschutes River and many of its tributaries are protected by instream water rights. These flows are not always met. In addition, under the Commission’s water allocation rules, surface water in the study area is not available for most of the year due to prior appropriations. Finally, the USGS/Department ground water study demonstrates a direct hydraulic connection between ground water and surface water. Given these facts, without mitigation, new ground water uses in the Study Area would be prohibited. First, they would trigger the statutory “measurably reduce” standard in ORS 390.835 regarding scenic waterways. Second, they would be subject to surface water availability, and water is not available.

The bottom line for pending and new permit applicants is that mitigation must be provided to moderate impacts to the scenic waterway and senior surface water rights, including instream water rights. Without mitigation, the Department will be unable to conclude that a proposed use is in the public interest and will be required to deny new and pending ground water applications in the Study Area. Holders of existing conditioned permits/certificates in the Study Area may choose to mitigate in order to avoid future regulation for scenic waterway flows. If they choose not to mitigate, they would be subject to future regulation.

C. Rulemaking Process

In September 2001, based in part on the work of the Deschutes Basin Steering Committee, the Department developed and distributed draft rules proposing to implement a mitigation program for the Deschutes Basin. Based on testimony at four public hearings and over 75 written comments the Department developed a second hearing draft of the rules in April 2002. Public input on the second hearing draft was extensive. Approximately 30 individuals provided testimony at the April 2002 hearing in Bend and over 160 written comments were submitted representing more than 250 individuals/organizations. Attachment 2 is a summary of the major issues raised during the public comment period. Attachment 4 is copies of the public comments on the April 2002 hearing drafts.

On August 28, 2002, a working draft of the final proposed rules was presented to the Ground Water Advisory Committee (GWAC). Under ORS 536.090, GWAC is to advise the Commission on matters relating to rules for the development, securing, use and protection of ground water. Based on their review of the draft rules, GWAC made four recommendations to the Commission – one related to concerns about limiting mitigation flexibility through the designation of general zones of impact, one related to the transfer and assignment of mitigation credits, and two related to the establishment and operation of mitigation banks. Attachment 3 is a summary of GWAC’s recommendations to the Commission.

III. Discussion

Based on an analysis of the public comment and the GWAC’s recommendations, the Department has developed the final proposed rules in Attachment 1. Following are highlights of the proposed rules.

A. Rule Highlights

Deschutes Basin Program (Deschutes Ground Water Mitigation Rules) (Division 505)

- Except for a cumulative total of 200 cubic feet per second (cfs), ground water in the Study Area is closed to further appropriation. (See OAR 690-505-0500(1))
- Upon future evaluation of rule implementation, the Commission may lift or modify the 200 cfs cap. Based on public comments the final proposed rules require (1) Commission evaluation upon reaching 150 cfs of the proposed 200 cfs allocation cap or January 1, 2008, whichever comes first, (2) Commission evaluation on subsequent five year intervals, and (3) annual Department evaluation and reporting on the implementation of the rules in cooperation with the Oregon Department of Fish and Wildlife (ODFW), Oregon Parks and Recreation Department (OPRD), Oregon Department of Environmental Quality (DEQ), and Division of State Lands (DSL). (See OAR 690-505-0500(2) and (3))
- Many commenters urged the Department to articulate actions that will be taken if the mitigation rules are unsuccessful. The final proposed rules require the Commission to initiate

proceedings to declare all or part of the Deschutes Study Area a critical ground water area, close all or part of the Basin to additional ground water use, or take other administrative action(s) if evaluation of rule implementation shows that Scenic Waterway flows and instream water rights are being met less frequently than compared to long-term, representative base period flows due to new ground water appropriations. (See OAR 690-505-0500(5))

- Significant public input was provided regarding the potential effect of the proposed rules on existing conditioned permits in the Study Area. The final proposed rules clarify that they are meant to implement SB 1033 (1995 Legislative Session, now codified as ORS 390.835) and, as such, they place no additional requirements on existing conditioned permits/certificates. However, holders of existing conditioned permits/certificates that choose to provide mitigation will not be subject to any future regulation for scenic waterway flows. If holders of existing conditioned permits choose to mitigate, they would do so under the same standards as new applications. If they choose not to mitigate, their conditioned permits/certificates would continue to be subject to future regulation for scenic waterway flows. (See OAR 690-505-0600 (2) and (4))
- The options for fulfilling a mitigation obligation have been narrowed based on public comment. All mitigation obligations must be satisfied through individual mitigation projects such as the transfer of a water right to an instream use or by securing mitigation credits. The “payment-to-provide” option has been eliminated from the rules. (See OAR 690-505-0610(2) and (3))
- In response to public comment regarding “mitigation standards,” the final proposed rules specify that (1) mitigation water must be provided within the same general zone of impact as the use, (2) mitigation water must be legally protected instream prior to permit issuance, (3) mitigation must be committed and maintained for the life of the permit, and (4) the amount of mitigation water must be equivalent to the amount of consumptive use. GWAC specifically expressed concern that requiring mitigation within “general zones of impact” could limit flexibility. Regarding the location of mitigation, as proposed, the rules provide the maximum flexibility given the hydrogeology of the Study Area. (See OAR 690-505-0605 (5) and 690-505-0610(4) and (5))
- The final proposed rules set out the process for notifying permit applicants of their mitigation obligation, for permit applicants to submit proposed mitigation to the Department, and for the Department to coordinate with ODFW, DEQ, OPRD, and DSL to maximize the resource benefits of mitigation projects and mitigation water. (See OAR 690-505-0615 (1) – (7))
- The final proposed rules provide for conditioning final orders approving ground water applications and subsequent permits and certificates. In response to public input regarding long-term maintenance of mitigation, the rules specifically provide for regulation and/or cancellation if the required mitigation is not maintained. (See OAR 690-505-0620(1)(f))

- Municipal and quasi-municipal ground water permit applicants may satisfy a mitigation obligation by incrementally obtaining and providing mitigation to coincide with permit development. (See OAR 690-505-0625)
- A number of commenters questioned the adequacy of review of permit applications and mitigation projects in the Study Area. In response, the final proposed rules require the Department to work with numerous state natural resource agencies in an interagency team review process to seek input on ground water permit applications and mitigation projects in the Study Area. (See OAR 690-505-0630 (2))

Highlights of Deschutes Basin Mitigation Bank & Mitigation Credit Rules (Division 521)

The final proposed rules under Division 521, implement House Bill 2184 (2001 Legislative Assembly) and provide for the establishment of mitigation credits through completion of various mitigation projects and actions, and formation of mitigation banks for the Deschutes Basin.

- The final proposed rules provide that any person may establish mitigation credits and that valid credits may be assigned by any person or mitigation bank to any person or other mitigation bank. They also identify who can establish mitigation credits, the types of projects that may qualify for mitigation credits, the process for the Department to notify the public of a person’s intent to establish mitigation credits, and the process for the Department to coordinate with ODFW, DEQ, OPRD, and DSL to maximize the resource benefits of mitigation and mitigation water. (See OAR 690-521-0300)

GWAC expressed concern that the ability of “any person” to acquire and assign mitigation credits could lead to abuse of the system (e.g. acquiring and holding mitigation credits by individuals or organizations with no mitigation obligation). The Department carefully considered this concern but ultimately did not incorporate into the proposed rules a restriction on who can acquire mitigation credits. If individuals or entities abuse the system the Department and Commission can address those abuses on an as-needed basis, through approval of mitigation charters, or as part of the regular evaluation of rule implementation.

- The final proposed rules set out the process and requirements for establishing a mitigation bank. Based on public input and a recommendation from GWAC regarding the formation of mitigation banks, the proposed rules require that mitigation bank charters must be approved or denied by the Commission following public notice and an opportunity for comment. (See OAR 690-521-0500)

B. The final proposed rules reflect the Department's statutory requirements

As described above, much of the mainstem Deschutes River and the Metolius River are designated State Scenic Waterways and much of the mainstem Deschutes River and many of its tributaries are protected by instream water rights. The Scenic Waterway Act, as amended by SB 1033 in 1995, contains provisions that protect established scenic waterway flows from ground water use that “measurably reduce” those flows. ORS 390.835. Moreover, the state law

establishes instream water rights as a beneficial use and affords such rights protection from junior appropriators.

Under current law, upon reaching a determination of “measurably reduce,” the Department is required to deny new and pending ground water applications in the Deschutes Ground Water Study Area unless mitigation is provided. The final proposed rules under Division 505 reflect this statutory requirement and set the ground rules for those required to mitigate. The required mitigation also meets the Department’s obligation to protect senior surface water rights in the Deschutes Basin, including instream water rights from ground water uses that are hydraulically connected to surface water with the potential for substantial interference.

The final proposed rules under Division 521 (the Deschutes Basin Mitigation Bank and Mitigation Credits) implement the statutory provisions of HB 2184 (2001 Legislative Session).

C. The final proposed rules advance the Department's co-equal goals of protecting streamflow and addressing Oregon's water supply needs

Simply put, the Scenic Waterway law requires that new ground water permits in the Study Area be denied unless mitigation is provided. The final proposed rules address water supply needs by providing guidance regarding mitigation to those seeking new water rights. Such mitigation will allow the Department to address new and growing water supply needs in the Deschutes Basin.

With respect to streamflow protection, the proposed rules are specifically designed to allow new appropriations and protect scenic waterway flows and senior water rights, including instream water rights. Examples of final proposed rule elements focused on streamflow protection include: coordinated monitoring of rule implementation by the Department and ODFW, OPRD, DEQ and DSL; strict mitigation standards requiring that mitigation be provided at 100% of the consumptive use of the permit application, occur within the same generalized zone of impact as the ground water use, be protected instream for the life of the ground water use, and be in place before a new ground water permit may be issued; provision for regulation and/or cancellation if mitigation is not maintained; and a requirement that all mitigation projects, including those used to generate mitigation credits, be evaluated by the Department in consultation with ODFW, OPRD, DEQ and DSL in order to maximize resource benefits.

D. The final proposed rules fit within staff capabilities

The Department intends to utilize existing staff to implement the proposed rules. Early in the rulemaking process, Department staff proposed mitigation options and standards that would have reduced the complexity of administration of the rules (e.g. payment-to provide). The Department’s proposals were not supported by stakeholders. The approach in the final proposed rules fits within the capabilities of the field staff, technical services staff, and water right staff that will be largely responsible for their administration, but will clearly result in additional workload for staff already stretched very thin. The Department will continue to rely on other entities and partnerships to help implement the rules.

E. The final proposed rules provide for adaptive management

The final proposed rules provide an adaptive management approach to ground water use in the Deschutes Basin. This approach gives the Department and the Commission the opportunity to keep doing those things that are working well and adjust those things that are not working. The rules require the Commission to evaluate the effectiveness of mitigation activities, especially with regards to use of time-limited transfers, instream leases, and allocations of conserved water. This review will occur on or before January 1, 2008, and on subsequent five year intervals. The rules also require the Commission to initiate proceedings to declare all or part of the Study Area a critical ground water area, close all or part of the Basin to additional ground water use, or take other administrative action(s) if Scenic Waterway flows and instream water right flows are being met less frequently than historic conditions due to new ground water appropriations. The rules also accommodate any new science and new mitigation approaches that may emerge over time.

IV. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the proposed rules to amend OAR Chapter 690, Division 505, and to establish OAR Chapter 690, Division 521 (Attachment 1).
2. Adopt the proposed rules with revisions.
3. Not adopt rules and request the Department to further evaluate the issues.

V. Director's Recommendation

The Director recommends Alternative 1, that the Commission adopt the proposed rules in Attachment 1 to amend OAR Chapter 690, Division 505 and to establish OAR Chapter 690, Division 521.

Attachments:

- Attachment 1. Final Proposed Rules, OAR Chapter 690, Division 505 – Modifications to Deschutes Basin Program and OAR Chapter 690, Division 521 – Mitigation Bank and Mitigation Credit rules.
- Attachment 2. Summary of Major Issues Raised in Public Comment on April 2002 Hearing Draft.
- Attachment 3. Summary of Ground Water Advisory Committee Recommendations.
- Attachment 4. Copies of Public Comment on April 2002, Hearing Draft (provided to the Water Resources Commission and available to others upon request)