



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

725 Summer Street NE, Suite A

Salem, OR 97301-1271

503-986-0900

FAX 503-986-0904

## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Acting Director

**SUBJECT:** Agenda Item H, October 22, 2004  
Water Resources Commission Meeting

### **Request for Adoption of Administrative Rules Regarding Cancellation of Perfected Water Rights (OAR Chapter 690, Division 17) and Allocation of Conserved Water (OAR Chapter 690, Division 18)**

#### **I. Issue Statement**

As part of the Department's Notice and Concurrence Work Group efforts, the Commission is asked to adopt and amend rules regarding cancellation of perfected water rights (OAR Chapter 690, Division 17) and allocation of conserved water (OAR Chapter 690, Division 18). The final proposed rules in Attachment 1 and 2 make significant progress toward the Department's commitment to address issues underlying water right "ownership" bills introduced during the 2003 Legislative Session.

#### **II. Background**

##### *A. Notice and Concurrence Work Group*

During the 2003 Legislative Session, there were various bills introduced aimed at addressing water right "ownership." At the close of the legislative session, the Department committed to address the issues underlying the water right ownership bills, namely who should receive notice and who needs to concur in initiating a water right transaction with the Department that involves a shared delivery system such as within an irrigation district.

To this end, the Department assembled a work group with diverse representation whose overall purpose is to identify and address water use relationships that involve a shared delivery system such as within an irrigation district. The Department's objectives in establishing the work group are to work to ensure the protection of existing water rights; to develop policies, legislative concepts or rules that unify the water user community; and to establish clear, understandable, efficient, and equitable processes and procedures. In particular, the work group has been looking

at issues of "notice" and "concurrence" as they relate to water right cancellations, allocations of conserved water, and water right transfers. Attachment 3 is a list of work group members.

The final proposed rules in Attachments 1 and 2 reflect the administrative rule deliberations of the work group regarding "notice" and "concurrence" for water right cancellations and allocations of conserved water. The Department also used the work group to develop rules to implement 2003 statutory changes to the allocation of the conserved water program. The work group has also developed a legislative concept regarding voluntary water right cancellations within irrigation districts and continues deliberations regarding "notice" and "concurrence" associated with water right transfers.

*B. Rule Highlights*

**Cancellation of Perfected Water Rights (OAR Chapter 690, Division 17)** - The proposed changes to the water right cancellation rules modify requirements associated with voluntary cancellation requests and affidavits asserting non-use in order to enhance the notification of interested parties of proposed water right cancellation actions. The final proposed rules also establish timelines for the Department to initiate a water right cancellation proceeding under the provision of ORS 540.631. These proposed rule modifications are in Attachment 1.

**Allocation of Conserved Water (OAR Chapter 690, Division 18)** - The proposed changes to the allocation of conserved water rules are to implement changes to the allocation of conserved water statutes (ORS 537.455 to 537.500) as a result of HB 2456 (2003 Oregon Laws); implement fees established by HB 2268 (2003 Oregon Laws); clarify the applicant pays the publication costs of the newspaper notice; establish a requirement for districts seeking allocations of conserved water to adopt a policy articulating how the district will handle such allocations (*See* proposed OAR 690-018-0025); and make minor housekeeping changes to improve the readability of the rules.

The statutory provisions from HB 2456 being implemented include the applicant's ability to choose the priority date of the conserved water – same as or one minute junior to the originating right; allowing for consideration of conservation projects implemented up to 5 years prior to application submittal; and providing for applications to be submitted for a "water use subject to transfer." These proposed rule modifications are in Attachment 2.

**III. Rulemaking Process/Discussion**

Notice of this rulemaking was published in the *Oregon Bulletin* on August 1, 2004. In addition to the opportunity to provide written comment, the Department held two public rulemaking hearings – one in Salem on August 24, 2004, and another in Bend on August 25, 2004. No testimony was provided at the public rulemaking hearings.

Written public comments on the proposed rules were provided by WaterWatch of Oregon, Oregon Water Resources Congress, Oregon Farm Bureau, and Water for Life. Copies of the written comments are provided in Attachment 4.

The written comments by Water for Life, Oregon Farm Bureau, and Oregon Water Resources Congress address both divisions of proposed rules and are generally supportive of the proposed changes. Oregon Water Resources Congress suggested specific language changes to the cancellation rules in Division 17 to ensure communication among parties that may be affected by a water right cancellation. Specifically, they commented that the rules should consistently require that water rights within reclamation projects (proposed for cancellation) be identified as such and that notice of a cancellation be provided to the U.S. Bureau of Reclamation if the water right is within a reclamation project. Staff have modified 690-017-0100(2)(f), 690-017-0400(2)(k), and 690-017-0400(6) to address this comment. In addition to these changes, staff have made minor modifications to the final proposed rules in Division 17 to improve readability. (Attachment 1)

Oregon Water Resources Congress and WaterWatch both suggested modifications to the allocation of conserved water rules in Division 18. Oregon Water Resources Congress commented that 690-018-0025(3), regarding applications for allocations of conserved water by districts, should be modified to clarify the application can be submitted by “a district” instead of “by districts.” They also suggested a modification to 690-018-0040(5) to provide the applicant the opportunity to submit information as to the maximum amount of water diverted at the applicant’s diversion facilities. Both rule modifications suggested by Oregon Water Resources Congress have been incorporated into the final proposed rules as have a few minor changes to improve readability (Attachment 2).

WaterWatch commented that 690-018-0040(25) regarding fee waivers for certain allocations of conserved water should be modified. This rule provision implements HB 2268 (2003 Oregon Laws) which requires a fee of \$700 be submitted with an application to allocate conserved water but also provides the Director discretion to waive the application fee when specific criteria are met. The final proposed rule, in cases where the specific statutory criteria are met, requires the Director to waive the fee based on the percent of conserved water allocated to the state for instream use, not to exceed 50 percent of the application fee.

In their comments, WaterWatch suggests that given the Department’s mission to protect streamflow, the Department should be doing everything in its power to provide incentives to put water instream. This includes not putting a “cap” on the fee waiver and providing the Director discretion to waive up to 100 percent of the fee for allocations of conserved water that place 100 percent of the water instream.

Numerous streamflow restoration transactions occur each year through the Department’s voluntary streamflow restoration tools such as instream transfers, leases, and allocations of

conserved water. However, adequate staff resources are needed to handle this growing workload – staff resources that are supported in part or entirely by application fees. Given the state’s current budget climate and the Department’s workload, it is not feasible to waive more of the allocation of conserved water fee as WaterWatch requests.

#### **IV. Summary**

The final proposed rules in Attachment 1 (Cancellation of Perfected Water Rights, OAR Chapter 690, Division 17) and Attachment 2 (Allocation of Conserved Water, OAR Chapter 690, Division 18) are based on the “notice” and “concurrence” deliberations of the Department’s Notice and Concurrence Work Group. The work group also assisted the Department in developing modifications to the allocation of conserved water rules to implement House Bills 2456 and 2268 (2003 Oregon Laws). Based on review of written public comments described in Section III, staff propose minor modifications to the hearing draft rules issued July 23, 2004.

#### **V. Alternatives**

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachment 1 and Attachment 2.
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

#### **VI. Recommendation**

The Director recommends that the Commission adopt the final proposed rules in Attachment 1 and Attachment 2.

Attachments:

1. Final Proposed Rules – Cancellation of Perfected Water Rights (OAR Chapter 690, Division 17).
2. Final Proposed Rules – Allocation of Conserved Water (OAR Chapter 690, Division 18).
3. Notice and Concurrence Work Group Members.
4. Written Public Comment.

Adam Sussman  
(503) 986-0877