MEMORANDUM

To: Water Resources Department Staff October 15, 2002

Dwight French, Water Rights Section Manager
Dick Bailey, Water Rights and Adjudication Division Administrator

INTERNAL GUIDANCE
Non-Compliance of Time Sensitive Permit Conditions when reviewing Claims of Beneficial Use and Extensions of Time[1]

This memo supercedes the memo of February 14, 2002, on the same subject. Changes were made regarding reference levels and annual static water level measurements. In addition, the examples that begin on page three were re-ordered.

Purpose: The purpose of this memo is to give guidance to Department staff on how to process claims of beneficial use when performance condition compliance is lacking.[2]

Problem: At present, the Department has a backlog of several thousand permits awaiting certificate issuance. The majority of this workload is in the form of final proof surveys that need to be reviewed by the Department. Many of the permits issued since 1990 contain several specific performance related permit conditions. As the Department steps up its efforts to review final proof claims and contemplates certificate issuance, we must determine what constitutes compliance and actions to take when certain performance related permit conditions have not been satisfied.

Discussion: The Attorney General's Advice on this subject[3], concluded the following:

1 The Department may not issue a certificate for a water use absent compliance with the conditions of the permit authorizing that water use.

This memo is not intended to address claims of beneficial use submitted by permit holders themselves pursuant to ORS 537.409 (10).

2 All situations need to be handled on a case-by-case basis. There are many fact situations that have not yet been encountered. Therefore, rigid instructions are not possible nor appropriate. This memorandum will be modified and updated as the Department's position on various permit conditions is determined.

3 Dated February 7, 2002. DOJ File No. 690-303-GN0023-98. Prepared by Sharyl L. Kammerzell.

2. The final proof survey must provide information about compliance with every permit condition that affects perfection of the appropriation.
3. The Department may allow a permit holder to cure a failure to comply with time-sensitive permit conditions if measures are available to serve the public interest purposes that the condition was intended to address and achieve an equivalent result.
4. If at the certificate stage the Department discovers that a condition has not been met, the permit holder may seek an extension to cure the un-met condition, prior to certification of the permit.
5. Permit conditions may be monitored and enforced through regulation and through the extension process.

Reviewing Final Proof Surveys and Claims of Beneficial Use (CBU):

A. Dealing with an inadequate report.

When, during the review of a CBU, it is determined that information relating to a performance[4] condition is missing the Department shall RETURN THE CBU with a letter that requests the CWRE to report on the subject condition[5]. The letter must inform the recipient that:

a certificate cannot be issued unless every performance related condition is satisfied;
2. if an extension is approved it will allow an opportunity for the permit holder to properly perfect the use if the extension is approved; and,
3. use without compliance with permit conditions is an illegal use.

If the claim was submitted:	**Return the CBU to:**
Within the past year	the CWRE with a copy to the permit holder.
Between one and two years ago	applicant and a copy to the CWRE. Keep the original in the file until or unless the applicant or CWRE requests it be returned.

---

[4] A performance condition is a condition which requires some type of action on the part of the permit holder. Examples include: installation of a meter; water use reporting; submittal of a Water Management and Conservation Plan; installation of a fish screen and/or bypass devices. Non-performance conditions are often called "notice" or "standard" conditions. Examples of notice conditions include: "Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit" and "The use of water shall be limited when it interferes with any prior surface or ground water rights."

[5] As required by OAR 690-014-0100 (h).

More than two years ago	confirm the ownership of the permitted lands first and then follow directions for "between one and two years" above.

B. Deciding that a condition has not been satisfied.

For conditions that are to be satisfied before water use begins, the development is deemed satisfactory if all of the following tests are satisfied:

The condition was satisfied prior to the development deadline date.
2. Beneficial use was made after the condition was satisfied.
3. Beneficial use was made prior to the C date.

In cases where the condition was satisfied after water use begins but before the applicable development deadline date, the water use before the condition was satisfied was illegal use. If legal-beneficial use can be made before the development deadline, it is determined that proof is made to the satisfaction of the Department.

Each permit and final proof must be read individually. Before deciding that a permittee has failed to make proof, the permit condition(s) must be read with both a critical eye and the mind set of a permittee. For example, was a "totalizing flow meter" required, or just a "meter"?[6]

C. After a failure has been discovered.

If the CBU indicates that one or more conditions have not been satisfied, the following scenarios provide examples of what the result will be based on the AG's advice. One basic idea applies to all situations:

> If compliance with the condition was not obtained before the development deadline, the permit holder did not make proof and cannot get a certificate without first obtaining an extension of time.

EXAMPLES

The following examples assume that the development period has passed and are generally ordered from the most fatal to the easiest to correct.

1. **METER**: If the CBU indicates that no meter has been installed, the permit

---

[6] When the use is limited to supplemental irrigation only, it is possible that proof can be made without diversion of any water. If no use of water has been made, then conditions such as installing a meter or fish screen before water use begins cannot cause a problem for the permit holder.

holder's only option to maintain the permit is to apply for an extension.[7]

If a meter was installed prior to beneficial use but is not functioning, proof has been made. A memo should be forwarded to the Field Services Division alerting them of potential illegal water use due to the broken meter. Field Services will consider whether enforcement is appropriate.

If the condition is not specific about what type of meter needs to be installed, any meter that can be used, in whole or in part, to measure water use will suffice. However, the situation should be referred to the Field Services Division who may require that a "totalizing flow meter" be installed.

If an extension can be granted, the meter can be installed and water use resumed in an effort to make proof. In this manner, the public interest purposes that the condition was intended to address can be achieved with an equivalent result.

2. **WATER USE REPORTING**: If the CBU and Department files indicate that the Department has not received at least the use reporting (showing water used each month) for the final year before the completion date, the permit holder's only option to maintain the permit is to apply for an extension.

If an extension can be granted, water use can resume and the information for at least future years can be submitted in an effort to make proof. The extension must at least cover the year in which measurements will be take. In this manner, the public interest purposes that the condition was intended to address has been achieved with an equivalent result.

3. **FISH SCREEN**: Failure to install a fish screen or fish by-pass device can not be cured unless a letter from ODFW has been received that indicates that the fish screen condition was included on the permit by mistake and that no fish screen is needed on the subject diversion point(s).

Fish may have been killed or harmed because of the failure to install a fish screen in a timely manner. The Department determined, prior to permit issuance, that there was a need for a fish screen.

If ODFW was to inspect and approve the fish screen "before water use begins," and the permittee chose not to install a fish screen or contact ODFW because they felt a fish screen was not necessary, ODFW can determine the fish screen was not necessary and thus satisfy the condition at any time. A letter or email from an

---

[7] If the permit holder waters his entire acreage in year one then installs the meter prior to using water on the entire acreage in year two, the permit holder has satisfied the requirement to install the meter before use begins. The water use in year one was illegal.

ODFW staff person will be required. This will keep us from cancelling permits for failure to install a fish screen when, in ODFW's satisfaction, no fish screen was necessary.

If "self certification" of the fish screen was an option that was not exercised by the permit holder, the self certification form may be submitted at any time along with a statement by the permit holder that the fish screen was installed on before the required development deadline date (whichever is appropriate) and that beneficial use[8] occurred before the C date (and after the installation of the screen).

4. **REFERENCE SWL MEASUREMENT**[9]: If the permittee has not taken a static water level measurement in the correct month and year to establish the reference level an extension of time will need to be filed if the permit holder wishes to continue use under the permit.

If an extension is filed, the ground water section will attempt to establish a reference level for the permittee. Using whatever data are available, the ground water section will attempt to determine what the static water level would have been in the correct month and year. If this can be accomplished, the ground water section staff will staple a memo identifying the appropriate reference level to the extension review materials and recommend a condition specifying the reference level to insert the into the permit via the extension proposed and final order.

If the ground water section is not able to re-create the reference level, a memo will be stapled to the extension review materials indicating that no reference level was measured by the permittee and that no reference level can be determined by staff. The Department will propose denial of the extension for failure to comply with permit conditions.

Some permit holders who have submitted timely measurements have been regulated off because of dropping water levels. The Department may not issue a certificate for a water use absent compliance with the conditions of the permit authorizing that water use.

5. **ANNUAL SWL'S:** Failure to submit any annual static water level measurements

---

[8] "Beneficial Use" as used in this paragraph would need to equal the amount of use claimed in the CBU. A standard self certification form and statement should be developed to aid the permittee in collecting this information.

Special care must be take before deciding that permit holder has failed to timely submit an initial SWL measurement. There are many variations of the conditions that require an initial SWL measurement. Some conditions provide some flexibility in when the measurement can be take and/or submitted while others are very specific.

can be cured with an extension.

One static water level measurement under the terms of the permit or extension will be acceptable evidence of compliance.

When an extension is filed, the Department will review, among other things, the groundwater level changes in the area to determine if there is good cause to grant an extension. If regulation of the well would have been likely had measurements been submitted in a timely manner, the chances for obtaining an extension are poor. An extension long enough to gather one measurement will be necessary.

It is possible that the information, had it been submitted, would have resulted in regulation by the Department. The information, even when it shows that regulation is not necessary, is valuable information for the Department and the public to use when doing any groundwater supply planning.

6. **WATER CONSERVATION AND MANAGEMENT PLANS (OAR 690-86):** If the CBU and Department files indicate that a required Water Conservation and Management Plan was not submitted within the time specified in the permit, the permit holder's only option to maintain the permit is to apply for an extension. The plan does not need to be approved before the deadline identified in the condition. The Division 86 includes a process for revisions and adjustments. This allows for modifications to the plan after the deadline specified in the permit.

   Exception: The Department will honor commitments that were made by Salem Department staff, prior to January 2001, that allow additional time to submit a plan.

   This condition is routinely added to certain permits to attempt to increase the efficiency of the water use of the permit holder and to cause the water provider to do long range water supply planning.

Applications for an Extension when permit conditions have not been complied with:

If, after reviewing an applicant for an extension and the related application file it is determined that the applicant has not complied with one or more time sensitive permit conditions the Department will proceed with one of the following options:

1. Propose to deny the application for extension.

   Failure to meet a time sensitive condition contributes to a denial of extension through a negative implication regarding the "good faith of the appropriator" OAR 690-315-0040 (2)(c) and "whether the applicant has demonstrated reasonable diligence in previous performance under the permit" (2)(a).

2. Propose to issue an extension with conditions.

Condition the extension to require the condition to be satisfied before water use resumes but no later than an appropriate date certain. Condition the extension further to require evidence that the condition has been satisfied before water use resumes.

Indicate that the Department will proceed with permit cancellation in under ORS 537.410 if the condition is not satisfied before water use restarts or by a date certain. This option can be used only when measures are available to serve the public interest purposes that the condition was intended to address and achieve an equivalent result.

The Department will not issue an extension if it is known that the Department will not be able to issue the certificate after the C date has passed. Future extensions should be conditioned so the permit holder knows that the certificate will not be issued if the Department determines at a later date that all permit conditions have not been satisfied.