

A report
by the

Water Quality.
Task Force
Quantity



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Submitted to
Governor John A. Kitzhaber, M.D.

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I. EXECUTIVE SUMMARY

In the fall of 1996, Governor Kitzhaber convened the Water Quality and Water Quantity Task Force to evaluate the effectiveness and coordination of state agencies involved with water management in the state. The goal of the task force is to make recommendations to improve the management of water resources by more effectively integrating water quality and water quantity concerns. The task force divided its charge into long and short-term objectives. This report discusses the short-term objectives of the task force and provides interim recommendations. The task force examined how to better integrate the Department of Environmental Quality's list of water quality limited streams [303(d) list] and the Department of Agriculture's Water Quality Management Area Plans required under Senate Bill 1010 (1993), into the Water Resources Department's existing water right application and water right transfer processes. In addition, the task force looked at the coordination of instream water rights between agencies. The task force will continue to meet to discuss long-term objectives and will submit a separate report to the Governor.

Agency roles and responsibilities pertaining to water quality and quantity have been outlined. The four state agencies involved are the Water Resources Department (WRD), Department of Environmental Quality (DEQ), Department of Fish and Wildlife (ODFW) and the Oregon Department of Agriculture (ODA). The task force offers the following recommendations to improve the coordination between these agencies and the public.

- **Water Right Applications**

The task force recommends a process which utilizes the existing water right application and public review process. WRD staff will conduct a review of the 303(d) list and any Water Quality Management Area Plans during the initial review stage of a water right application. If an application is within a reach of a stream on the 303(d) list or within a water quality management area, the applicant, DEQ and/or ODA will be informed by letter. The applicant will be encouraged to contact DEQ or ODA to develop mitigation measures to alleviate any water quality concerns. Otherwise, standard mitigation measures will be imposed.

- **Water right transfers**

The task force recommends that public notice efforts concerning water right transfers be more targeted. WRD is to work with stakeholders to improve education about potential water quality problems resulting from transfer applications.

- **Instream water rights**

Agencies able to apply for instream water rights are encouraged to coordinate with each other and prioritize those streams needing protection of flows, especially with respect to maintaining water quality.

II. INTRODUCTION

Water quality and water quantity are unequivocally related. As Oregon's population continues to grow, more demands are placed on our water resources from industry, irrigation, municipal use, recreation and instream uses. A fundamental state priority, implicit in state natural resource agency missions, is to achieve a balance between healthy, clean watersheds and waterways, viable fish and wildlife habitat and adequate and safe water supplies to support growth and maintain existing needs. In Oregon, multiple state agencies have regulatory authority over different aspects of water management, making agency coordination imperative and management of the resource a challenge.

The Water Resources Department (WRD) is responsible for addressing Oregon's water supply needs, while the Department of Environmental Quality (DEQ) is responsible for water quality. Other agencies have missions that directly involve the use and management of water resources such as the Oregon Department of Fish and Wildlife (ODFW) to protect fish and wildlife and their habitats, Oregon Department of Agriculture (ODA) to protect and develop agricultural resources. The Division of State Lands (DSL) manages waterways and wetlands and the Department of Forestry manages forest practices to protect riparian areas and other water resources. The Parks and Recreation Department is responsible for state scenic waterways, maintaining water instream for recreation and aesthetic values and is the lead agency on federal wild and scenic rivers.

Within these varied regulatory structures, different aspects of the water resource are managed to meet the specific mission and goals for that particular agency. Most often, the agencies manage the resource in concert with each other. However, there is a possibility of conflicting objectives if agencies do not clearly coordinate their responsibilities and programs. For example, "beneficial uses" are defined differently by WRD and DEQ. This may cause confusion when the agencies work together to determine priorities. In another example, ODFW, Department of Parks and Recreation and DEQ can all apply for instream water rights, but it is unclear if management objectives are coordinated.

In the fall of 1996, Governor Kitzhaber convened a task force to examine the management of water quality and quantity in the state of Oregon. The need to examine the relationship between water quantity and water quality became increasingly apparent during WRD's rulemaking to implement Senate Bill 674, a new water right application process, from the 1995 legislative session. Interest groups raised questions about whether water quality concerns should be addressed when issuing water rights. Of specific concern was how to integrate the new list of water quality limited streams under Section 303(d) of the federal Clean Water Act, in the new water rights application process. Deciding how WRD should consider water quality concerns in the water right application process was deferred until this task force could convene and make recommendations.

The Governor asked the task force to examine and evaluate the administrative and regulatory responsibilities of the state agencies involved in water management and to make recommendations on changes that would lead to more effective management of water quality and quantity. The four primary state agencies involved in the task force are the Water Resources Department, Department of Environmental Quality, Department of Fish and Wildlife and Department of Agriculture. Other state, federal and local government agencies, along with environmental and water user groups participate on the task force. A complete task force membership can be found in Appendix A. Serving as the steering committee for the task force are agency commissioners and directors from each of the four lead state agencies.

It should be noted that this is an evolving document. This report highlights the agencies and organizations involved, task force objectives and recommendations. Changes imposed by the 1997 legislature may influence how the task force's recommendations are implemented. The task force will continue to meet after the legislative session to address long term issues, integrate changes and new information as needed, as well as evaluate the effectiveness of its recommendations.

III. TASK FORCE OBJECTIVES

The task force decided that because of the breadth and complexity of issues relating to water quality and quantity management, the objectives of the task force should be broken down into short-term and long term objectives. This report focuses on the short-term objectives. The short-term objectives are driven by an immediate need to develop a process that addresses water quality concerns in the water right application process. The task force has agreed to continue to meet into 1997 to focus on more complex, long-term issues, to continue discussing the issues and recommendations identified in this report, and to prepare a second report for the Governor.

A. Short-term Objectives

The task force developed the following short-term objectives:

- develop a process to integrate DEQ's 303(d) list of water quality limited streams within the existing WRD water right application public interest review process existing in current laws and rules;
- analyze the impact of ODA's SB 1010 Water Quality Management Area Plans on the WRD water right decision making process;

- evaluate the water right transfer process, examining injury to existing water rights and National Pollution Discharge Elimination System (NPDES) permit holders based on water quality; and
- examine how the agencies authorized to request instream water rights (ISWRs) can better coordinate their efforts to more effectively protect water quality, recreation, and fish and wildlife.

B. Long-term Objectives

Long-term issues identified by the task force will focus primarily on broader policy issues. These will be discussed when the task force and steering committee reconvene after the 1997 legislative session. At that time, the task force will revisit and evaluate the effectiveness of the recommendations made in this report and incorporate any changes imposed by the legislature. Long-term issues to be discussed by the task force include:

- gaps and overlaps in agency roles and responsibilities;
- potential misunderstanding by the public of agency roles and responsibilities;
- growth and long-term water management;
- beneficial uses;
- reservations;
- transfers (during rule revisions);
- potential conflict of agency actions;
- protection of water quality of streams not included or removed from 303(d) list when issuing water rights and transfers;
- legislative and rule changes, if needed.

IV. AGENCY ROLES AND RESPONSIBILITIES

To better understand the objectives of the task force and its recommendations, it is important to understand the primary agency roles and responsibilities and their respective missions. The following outline describes each of the four agencies' roles and responsibilities as they relate to water quality and quantity.

A. Oregon Water Resources Department

Mission: "To serve the public by practicing and promoting wise long-term water management."

The goals of this mission are to restore and protect streamflows and watersheds in order to ensure the long-term sustainability of Oregon's ecosystems and quality of life as well as to directly address Oregon's water supply needs. WRD is the state agency charged with administration of the laws governing surface and groundwater resources. One of WRD's primary responsibilities, among

others, is to review water right applications and where appropriate, issue permits. Another is to protect existing water right holders from injury. In 1995, WRD implemented SB 674, a new process to review and process water right applications. WRD also processes and holds in trust instream water rights on behalf of the state. Instream water rights can be requested by DEQ for pollution abatement and other public uses, by ODFW to protect and enhance fish and fish habitat and by the Department of Parks, for recreation and to protect scenic attraction.

In addition to processing water right applications for new water uses, WRD also processes transfer applications and reservations. Transfers allow a water right holder to change the use, place of use, point of diversion or point of appropriation of water. Reservations allow state agencies to "reserve" water for future economic development.

B. Oregon Department of Environmental Quality

Mission: "To be an active force to restore, enhance and maintain the quality of Oregon's air, water and land."

DEQ is responsible for establishing and enforcing water quality standards for waters of the state pursuant to the federal Clean Water Act. Water quality standards consist of three elements:

- the designation of beneficial uses to which waters are put;
- criteria to protect beneficial uses;
- anti-degradation policy to ensure that water quality is not degraded.

Water quality standards are enforced through National Pollution Discharge Elimination System (NPDES) permits for point sources such as industrial dischargers or municipalities. Permits contain effluent limits to ensure that in-stream water quality standards are met. The federal Clean Water Act requires that water quality standards be reviewed every three years.

The Clean Water Act also requires DEQ to produce a list of water bodies in Oregon that do not meet water quality standards. This is known as the 303(d) list. There are nearly 1000 water quality limited stream segments in Oregon. This is a dramatic increase in number over previous years, and reflects the new amount of information obtained by DEQ while compiling the list. The increase doesn't necessarily indicate that water quality is getting worse. However, Oregon's surface and groundwater quality is under constant threat of pollution from increased population, recreation, development, agriculture, urban run-off and destruction of streamside habitat. Therefore, increased coordination with WRD's issuance of water rights becomes imperative.

To address water quality concerns, DEQ is required to set total maximum daily loads (TMDLs) of pollutants that can be discharged into these water quality limited stream segments. TMDLs are set at levels that will ensure that water quality standards are met. To establish TMDLs, DEQ determines how much pollutant a stream can withstand and still meet water quality standards. This is called waste load allocation. Waste load allocations for point sources, such as industry, are implemented through NPDES permits. Non-point source concerns are addressed through the development of management plans by designated management agencies, coordinated by DEQ. As a result of SB 1010 in 1993, ODA is the lead agency for the development of management plans to control pollution from agricultural lands. The plan's recommendations will be implemented by agricultural operators to ensure that non-point source pollution is managed to maintain water quality standards.

Water quantity plays a critical role in setting TMDLs, since calculations are based on stream flows. If stream flows are reduced, DEQ may require additional effluent treatment by point sources or more stringent requirements on non-point sources.

DEQ may apply for instream water rights from WRD for pollution abatement.

C. Oregon Department of Fish and Wildlife

Mission: "To protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations."

To accomplish this goal ODFW has responsibility to prevent serious depletion of any indigenous species and to provide optimum recreational and aesthetic benefits. ODFW is interested in the management of the land and water of the state in order to enhance production and public enjoyment of fish and wildlife in a manner that is compatible with the primary use of the land and waters of the state. ODFW functions as a scientific advisor to WRD and DEQ. This ensures ODFW's involvement in actions that affect fish and wildlife.

ODFW statutes affecting water rights involve fish screening and passage. ODFW requires screening of all new water diversions on fish bearing streams to prevent fish from entering diversion structures. Diverters of less than 30 cubic feet per second have the opportunity to participate in a voluntary program of cost sharing with ODFW to construct fish screens. ODFW first seeks diverters who become part of the program voluntarily, however, ODFW still has the authority to require diverters to install fish screens at existing diversions regardless of size. Fishways, to allow fish passage, are required at all artificial obstructions in fish bearing streams. Additionally, ODFW can apply for instream water rights to protect instream flows for fish, wildlife and aquatic life or their habitats. Instream flow levels are determined to maintain fish passage, spawning and rearing, but could also consider water quality needs of fish and wildlife.

D. Oregon Department of Agriculture

Mission: "To ensure food safety and provide consumer protection, protect agricultural natural resources and promote economic development in the agricultural industry."

While ODA does not have regulatory authority over water allocation, the agency does have authority to develop programs and projects for the prevention and control of surface and ground water pollution arising from agricultural activities and soil erosion. SB 502 (1995) gave ODA the authority (ORS 561.191) to regulate agricultural practices to protect surface and groundwater quality. Planning emphasis is given to water quality limited basins and other areas where an agricultural water quality management plan is required by state or federal law. ODA has regulatory oversight of confined animal feeding operations which can pose water quality concerns.

Watersheds on the 303(d) list are candidates for involvement with ODA through SB 1010 (ORS 568.900-933). SB 1010 directs ODA to work with farmers and ranchers to develop overall water quality management plans for listed watersheds. Management plans are aimed at reducing non-point source pollution caused by agricultural and ranching practices.

In regards to water allocation, ODA works with the agricultural community to make applications for water needs within the water reservations process to set aside water for future economic use.

V. RECOMMENDATIONS

The task force developed a series of interim recommendations to address the short-term issues identified in Section III. The recommendations are based on increased agency coordination as well as public education and involvement. The task force looked at current agency processes and ways to utilize existing frameworks to address the issues identified by the short-term objectives. The following describes the task force's recommendations as they relate to integrating DEQ's 303(d) list and SB 1010 planning process into the water right application process, transfers and instream water rights. It should be noted that outcomes from the 1997 legislative session and discussion of long-term objectives could affect recommendations and how they are implemented.

A. Water Right Applications

Oregon water law directs WRD to consider water quality impacts when considering water right applications and developing integrated state water resource policies. However, how water quality impacts are integrated is not

clearly defined. The task force determined that the combination of strict timelines and lack of guidance pertaining to water quality inherent in the new water right application process, mandated by SB 674, makes it difficult to adequately consider the complexity of water quality concerns brought about by the new 303(d) listing. The task force concurred that the existing public review process should remain unchanged for now, but that improved coordination between agencies was necessary.

Currently, a water right application is filed by an applicant and WRD completes an initial review of the application. Staff reviews the request to determine if:

- the use of water is compatible with basin plans;
- the use of water is compatible with other rules of the Water Resources Commission;
- water is available; and
- there are no other statutory restrictions or known impediments.

Initial reviews appear in WRD's weekly public notice and the public has 30 days to review the initial review and make comments citing specific public interest issues that will be impaired or detrimentally affected by development of the water right. At this time, DEQ and other parties may make comments relating to water quality impacts. Lastly, comments are reviewed and considered when WRD evaluates the public interest in preparation for the proposed final order (PFO). The public has 45 days to comment, file protests or request standing on the PFO. WRD reviews any comments submitted before issuing a final order. If a protest is filed, the Water Resources Department decides whether or not to issue a final order or schedule a contested case hearing.

1. *DEQ's 303(d) list*

The task force recognized that because of SB 674's strict timelines and the increasing complexity of the issuance of water rights, the public and the state agencies would benefit from additional efforts to provide a coordinated agency process for consideration of 303(d) listed streams during WRD's water right application review. The task force's recommendation utilizes the existing water right application process, including the agency review opportunity during the initial review of the application. (See Figure 1) All of the 303(d) listed streams will be integrated into WRD's resource information database. If a water right application is filed within a reach of a 303(d) listed stream, then DEQ is automatically sent a copy of the initial review, application map and other application information. ODA will also be notified in case the application is in an agricultural area that could be affected by an existing or proposed water quality management plan required under SB 1010. This would be done in addition to the initial review listing in the public notice and as part of the initial review process.

DEQ will coordinate the notification of other agencies that may have water quality concerns and will recommend specific permit conditions to WRD accordingly.

Along with the initial review, the applicant will be notified that the water right application is in a waterbody listed on the 303(d) list. DEQ will send the applicant a letter that will provide information on what the 303(d) list means and how it could affect their application. Applicants will be encouraged by both WRD in the initial review and by DEQ to contact their regional DEQ office to discuss possible mitigation options to facilitate the processing of their application. If the applicant does not contact DEQ, then DEQ, in consultation with other agencies, will recommend specific conditions be placed on the application that are appropriate for the application and stream conditions, if necessary. If there is no inter-agency consultation, WRD may condition a water right with a pre-determined set of generic conditions provided by DEQ to ensure some level of mitigation and protection of water quality.

DEQ, the applicant and any other interested party will have 30 days to comment on the initial review. These comments may contain any mitigation agreements made between WRD, DEQ, other agencies and the applicant. All comments received by WRD will be considered when it prepares its PFO. Any additional information that is provided by the applicant will be forwarded to DEQ. All parties have 45 days to support or oppose the PFO if it is issued and posted in WRD's weekly public notice.

Early mitigation consultation opportunities between the applicant and the agencies will improve the consideration of water quality issues if both agencies participate fully throughout the process. This procedural step will require WRD's water right staff to become familiar with the 303(d) list and will incorporate another step in the notification process. DEQ staff will need to interact more with the public and other agencies on individual applications to develop mitigation plans and permit conditions. Neither agency felt that this would unduly affect their staff and that they would be able to fully participate in this process. There is a recognition among the task force that these recommendations will improve coordination of a workload that already exists. Approval of the Governor's budget will also provide funding for additional staff.

2. Agricultural Water Quality Management Area Plans

When considering the issue of Agricultural Water Quality Management Area Plans, the task force suggested a process similar to and integrated with the process outlined above for 303(d) listed streams.

All areas which have an approved Agricultural Water Quality Management Area Plan in place will be integrated into WRD's database and included in the initial review of the application. If a water right application is filed within a stream reach of an area having an approved plan, DEQ and ODA will automatically be sent a copy of the initial review, application map and application information. This would be done in addition to posting in the public notice.

Along with the initial review, notification and whether a 303(d) listed stream is involved, the applicant will also be notified if an approved management plan is in place for their area. Applicants would be asked to contact ODA to discuss compliance with the plan and possible mitigation. Unlike mitigation measures for the 303(d) list, applications affected by a Water Quality Management Area Plan will be conditioned to ensure compliance with the plan.

In areas where no Water Quality Management Plan has yet been adopted, ODA will consult with DEQ, as staff time permits, to propose mitigation that would be similar to the conditions of a proposed plan. Flexibility will be built into the water right permit conditions so that when a new Water Quality Management Area Plan is adopted, requirements of the new plan can be included.

B. Water Right Transfers

Water right transfers allow a water right holder to change the use, place of use, point of diversion or point of appropriation of water. Current law prohibits any water right transfers that would result in the enlargement of a water right or injury to other water right holders. Unlike new water right applications, proposed transfers are not required to comply with basin program classifications and are not subject to public interest review. Therefore, any water quality concerns must be identified as injury to an existing water right. To date, there has never been a protest to a transfer based on injury to the water quality of a water right. However, it is anticipated that transfers will be utilized more in the future as unappropriated water sources dwindle and the likelihood of injury to a water right, based on water quality, will increase. The question remains, how should water quality concerns be incorporated into the transfer application process and how do you evaluate water quality concerns as they relate to a determination of injury?

Transfers could affect water quality in several ways. If a water right holder moves a point of diversion upstream of a discharger, base flows in the stream at the point of discharge could be affected, concentrating pollutants and causing injury to downstream water right holders. The transfer could cause costly impacts to NPDES permit holders who, as a result of the transfer, now may be violating their permits. A point of diversion change could also injure water quality if the instream water right is based on temperature. The transfer could reduce the flow in the waterway for a particular reach of stream, and in effect, raise the water temperature.

DEQ regulates dischargers through the issuance of National Pollution Discharge Elimination System (NPDES) permits, as required by the federal Clean Water Act. NPDES permits contain effluent limits to ensure that instream water quality standards are met by the discharger. With this in mind, the task force explored solutions to prevent transfers from affecting NPDES permits and downstream water right holders. One problem with transfers is notifying those potentially affected by the transfer. Most dischargers and downstream water right holders are not likely to read WRD's weekly public notice to see if a potential transfer could affect them. The other problem is that often NPDES permit holders do not have water rights to protect base flows and would not have standing to protest a transfer.

Ideally, dischargers would have water rights to ensure that base flows will maintain water quality standards. More realistically NPDES permit holders would fund DEQ to apply for ISWRs on their behalf to protect base flows.

Long-term goals for the transfer process are to promote a watershed based approach to evaluate transfers and to improve notice to potential injury claimants. To achieve this, DEQ will examine the need for ISWRs to protect NPDES permit holders as they conduct base flow analysis to establish TMDLs through basin-wide planning. In the short-term, the task force recommends that transfer application information be made available on WRD's Web Page. Notices of transfer applications will be sent to DEQ and local watershed councils in an effort to alert water right holders potentially subject to injury. WRD will also work with the League of Oregon Cities and Associated Oregon Industries to assist with educating dischargers about the potential affects of transfers. DEQ will provide WRD Region Offices with a list of dischargers on each reach of stream so they can consider impacts to water right holders as they review transfer applications.

C. Instream Water Rights (ISWR)

Three state agencies, DEQ, ODFW and the Oregon Parks and Recreation Department (OPRD) can apply for instream water rights. DEQ can apply for instream water rights to protect water quality. ODFW can apply to protect instream flows for fish, wildlife and aquatic life or their habitats. OPRD can apply for instream water rights to enhance recreation and scenic resources. To date, a total of 957 instream water rights have been filed with the WRD: 883 filed by ODFW, 38 filed by ODFW and OPRD, 2 filed by OPRD and 34 filed by DEQ.

The task force is concerned that applications for ISWRs are not being closely coordinated between DEQ and ODFW or that staff is inadequate to apply for ISWRs. Another concern is that state agencies use different methodologies to determine instream flow requirements to protect water quality and fish habitat. There may be opportunities in the future to develop a methodology that addresses both issues at once.

To ensure better coordination, ODFW and DEQ will work more closely together on applications for ISWRs. ODFW has committed to review the 303(d) listed streams and prioritize those water quality limited streams needing protection. Streams that do not have minimum instream flows or are not protected under the State Scenic Waterway Act (ORS 390.835) will receive priority consideration. ODFW's ultimate goal is to have instream water rights on all streams in the state that support fish and wildlife populations and their habitats.

ODFW is currently developing a resource matrix which is a consolidation of information from ODFW, DEQ, WRD, OPRD and federal agencies. The matrix contains information on stream reaches and will be used as a tool for prioritization and coordination prior to the instream water right application process. DEQ, OPRD and ODFW will also look to the U.S. Environmental Protection Agency or other sources for funding to help identify and prioritize streams needing instream water rights for water quality, recreation and habitat protection.

VII. CONCLUSION

The proposals outlined here were a result of a collaborative process. There are still a number of outstanding issues to address. The task force and steering committee are committed to meet after the 1997 legislative session to address long-term objectives. Work is still ahead to implement the recommendations and the task force will serve to follow-up on the process of implementation. In the short-term, the task force is satisfied that the above recommendations will better integrate water quality concerns into the water right application and public interest review process, taking an important first step toward integrating water quality and water quantity management in Oregon.