



Oregon

Tina Kotek, Governor

Water Resources Department

725 Summer Street NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

March 29, 2023

MEMORANDUM

TO: Representative Marsh
FROM: Bryn Hudson, Legislative Coordinator
SUBJECT: Response to House Bill 2929

After the March 23, 2023, House Committee on Agriculture, Land Use, Natural Resources and Water public hearing the Water Resources Department committed to following up on requests for further information on House Bill 2929.

Process for Injunctive Relief

Under HB 2929, the Department would be able to seek an injunction to obtain immediate relief from the effects of illegal water use if the standards of evidence are met. This bill would not guarantee that the Department would be successful in obtaining an injunction; rather, it would give the Department the ability to petition for injunctive relief in a circuit court.

Seeking injunctive relief in the court provides all necessary due process protections to the water user because there will be a court hearing before injunctive relief is granted (or denied). Injunctive authority does not authorize takings of a water right; rather it provides authority to the OWRD to enjoin unlawful activity. A court would not order injunctive relief unless someone was violating the law. A person would have the opportunity to present their arguments that they are not conducting an unlawful activity in court.

There are three types of injunctions:

- 1) **Temporary injunction:** is a short-term injunction that is typically valid for up to 10 days
- 2) **Preliminary injunction:** may make the temporary injunction perpetual for up to one year.
- 3) **Permanent injunction:** allows for an injunction to remain in force for an indefinite amount of time.

To obtain an injunction, the Department would need to first seek a temporary injunction; court rules require that the Department of Justice give as much notice as the circumstances allow, usually at least 24 hours, notice of intent to apply for a temporary order to the party that the injunction is being sought against. If court finds that irreparable harm is or will take place absent the injunction, it will issue a temporary injunction, which is typically in place for up to 10 days and then the court will set a date for a trial to allow the agency to make the case for a preliminary or permanent injunction and for the affected party to plead their case. Once a hearing is held, the Court will then decide whether to issue a preliminary or permanent injunction.

Per the typical injunctive process, it is up to the courts to weigh the merits of the case and make a subsequent decision and finding (whether to issue any injunction); these proceedings provide opportunity for due process.

Injunctive relief is a separate and distinct remedy that may allow more timely remediation of situations of unlawful water use.

This process is different from the Department's traditional enforcement process in that it: 1) allows for involvement of the courts early in the process to immediately halt illegal activity, if the burden of proof is met, and 2) allows for there to be required remediation if the courts find a preliminary or permanent injunction is appropriate.

Additional background on civil and criminal penalties associated with illegal water use

Civil Process

Local watermaster staff address complaints, distribute water, and respond to illegal water use. Depending on the issue, the Department may issue an order to take control of the diversion prior to issuing a notice of violation and beginning the formal enforcement process. See OAR 540.045(1)(d). A person may request reconsideration by the Director or petition for judicial review of the order.

If a person does not petition for judicial review or reconsideration, the agency may start formal enforcement action. The agency is not required to issue an order before issuing a notice of violation; however, an order must occur prior to issuing a notice of violation if the Department is requiring an existing water right holder to shutoff in order to meet the needs of a senior water right holder.

Once it has been determined that formal enforcement is necessary, the first step is to issue a Notice of Violation, which directs the responsible party to take an action within a specific period of time in order to comply with Oregon Water Law. A person can petition for judicial review or for the Director to reconsider the Notice of Violation.

When a party petitions for judicial review of an order or notice of violation, the law provides that a "stay" automatically goes into effect if the party meets the requirements of the law for the stay. While the stay is in place, the person can continue to use water even if it is in violation of the law. If the Department finds that substantial public harm will result from staying the final order, the Department may issue an order denying the stay. If the party requests a court hearing on denial of the stay, the court must hold a hearing within 21 days and the order denying the stay remains in effect until the court makes a determination.

If the person does not seek reconsideration, or petition for judicial review, and the person fails to comply with the Notice of Violation,

A Notice of Assessment is issued to begin the process of assessing civil penalties. Before issuing a Notice of Assessment of Civil Penalties, staff must first collect and review the record that was developed to issue the Notice of Violation. This assembly and review of the record often includes significant time spent by field staff putting the documentation together so that the Department's Enforcement Section staff can organize a legal case that supports the violations addressed in the Notice of Violation.

Once notice of assessment of civil penalties is issued, the party has the option of requesting a contested case hearing in order to challenge the Departments assertions and civil penalty assessment, before a final order is issued. If the responsible party does request a contested case hearing, then the assessment would become final after completion of the contested case hearing and exhaustion of any appeals.

The civil penalty schedule for violations of ORS 537.130, 537.535, 540.710 or 540.720 are outlined in the Departments [Division 260 rules](#); violations of these provisions are denoted as Class I violations. In short, these violations are further divided into major, moderate, and minor categories, each of which are delineated based on the amount of harm to other water rights, minimum flows, instream water rights, the public health or safety, or other water-based resources (Major= \$1,000; Moderate= \$500; Minor=\$250). The Department also applies a penalty formula that is used to compound civil penalties to account for repeat violations.

None of the Department's enforcement processes allow for requirements for remediation of the violation, except if the party enters into settlement negotiations and agrees to remediation as part of the settlement agreement.

The Department has historically issued only a few civil penalties annually; however, with increased focus on enforcement of unauthorized water use at cannabis operations, the Department is working to improve its administrative enforcement process. The Department anticipates that the notice of violation and civil penalty process will continue to be the primary enforcement tool, even if HB 2929 passes.

Criminal Process

Although not required, the Department generally pursues voluntary compliance first and then the civil enforcement approach. The Department does not have much experience with pursuing enforcement through the criminal process. The Department does not make the final decision on whether charges are brought. The criminal process involves criminal courts and requires a District Attorney to decide to bring charges. District Attorney's must decide how to spend their time and which actions to prosecute. In addition, while the Department can provide information to the District Attorney, often further evidence to prosecute must be collected in a specific manner to meet the requirements for criminal proceedings. Water law violations are generally not as high of a priority as other illegal activity that may pose a larger risk to public safety. However, in recent years, there has been a greater interest in pursuing water law violations, when they are coupled with other illegal activity such as illicit cannabis.

There are two categories for criminal penalties for water law violations.

- 1) Regular water law violations
 - a. 537.130, 537.535, 540.710 or 540.720: Class B misdemeanor (up to 6 months in jail and up to \$2,500 fine)
- 2) Water law violations related to unregistered cannabis
 - a. 537.130, 537.535: Class A misdemeanor (up to a year in jail and up to \$25,000 fine)