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Kate Brown, Governor

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**House Committee on Water  
Representative Helm, Chair**

**Informational Testimony on HB 2244**

**Submitted by:**

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The purpose of this testimony is to provide information to the committee regarding the current law on stays of enforcement of final orders under Oregon's water laws. The Department is not taking a position on the bill at this time.

### **ORS 536.075 – Oregon Water Law Automatic Stay Provision**

The Department distributes water rights based on a priority system—regulating (shutting off) junior water rights to meet the needs of senior water rights when there is insufficient supply to meet all needs. This regulation of junior water rights to meet the needs of senior users is enforced through final orders in other than contested cases, as are regulatory orders to address using water without a water right in violation of Oregon's water laws.

ORS 536.075(5) stays the enforcement of a regulatory order if a petition for judicial review is filed within 60 days of the order's issuance. This means that while judicial review is pending, the junior user that was regulated to provide water to a senior user, or the individual with no water right that was regulated for using water without authorization, can continue to use water even if this takes water from one or more senior water right holders. The Department's Director or Commission may take action to deny the stay based on a finding of substantial public harm. The denial of the stay can take several weeks to prepare and issue, which can be a challenging period of time for the senior user(s) to not receive water.

In 2015, in response to regulation final orders, the Department began to see petitions for judicial review assert the automatic stay provision. Since early 2015, 40 petitions for judicial review have been filed against Department final orders. Of those, 31 of the 40 petitions for judicial review were from the Klamath Basin. Since 2015, the Department has taken action to deny the stays in seven instances.

### **ORS 536.075 Compared to the Oregon Administrative Procedures Act in Regards to Stays**

ORS 536.075 governs stays of final orders of the Department, instead of the Oregon Administrative Procedures Act in ORS Chapter 183, which provides the authority for final orders

and stays for many state agencies. The following outlines some distinctions between the laws, in particular relating to stays of enforcement of final orders.

### ***Stays under the Oregon Administrative Procedures Act (APA)***

The Oregon APA typically governs petitions for review of agency orders. For final orders in other than a contested case, ORS 183.484 provides that a petitioner must file within 60 days following the date the order is served, or 60 days after a request for reconsideration is denied. In their filing, the petitioner must state the nature of the petitioner's interest, the facts showing how the petitioner is adversely affected or aggrieved by the agency order, and the grounds upon which the petitioner contends the order should be reversed or remanded.

The APA and associated rules for stays require that, before getting a stay relating to a petition for judicial review, the petitioner must show that they are being (1) irreparably harmed, and (2) that there is a colorable claim of error. In addition, if a stay is granted the person has to post a bond to cover the cost of whoever they are harming by the stay being in effect. OAR 137-004-0090 (model rules pertaining to stays in other than contested cases) requires the petitioner for the stay to identify potential injury to other parties that would be incurred by the stay, propose actions to minimize that injury, and if the injury cannot be mitigated – the amount of a bond or letter of credit that is reasonable. OAR 137-004-0090 gives interested parties 10 days after notice to respond with their interest in participating in a stay proceeding. The agency has 30 days to issue an order in response to the stay request.

### ***Stays Under ORS 536.075***

ORS 536.075 is different from the APA and associated rules. For example, it does not require a petitioner to assert either irreparable harm or a colorable claim of error in order to receive a stay. Instead, under ORS 536.075(5), the act of filing a petition for judicial review automatically stays enforcement of the order, so even if a petition is ultimately dismissed, the automatic stay remains in effect until a final determination is made by the court, unless the Department or Commission takes action to deny the stay. In addition, under ORS 536.075 the petitioner is not liable for the costs of the stay that are borne by senior water users.