

DISCLAIMER – DRAFT RULES PENDING ADDITIONAL INPUT FROM DAS AND DOJ

xxx-xx-xxxx

Purpose

These rules guide the Oregon Watershed Enhancement Board in administering the Drinking Water Source Protection Program under the provisions of ORS 448.370-448.380. The program includes grants to water suppliers to protect, restore, or enhance sources of drinking water through:

- a) the acquisition of lands from willing sellers,
- b) entering into covenants, easements or similar agreements with willing landowners, or
- c) repaying a loan used to finance a project as described in a) or b) above.

The program intent is that lands protected by this program will benefit a source of drinking water used by a water supplier.

This Chapter XXX, Division XX supplements the OWEB Grant Program rules under OAR Chapter 695, Division 5, which also apply to this program. This division provides specific requirements for the OWEB Drinking Water Source Protection Program. In any conflict between these requirements and requirements identified in OAR 695-005, the Drinking Water Source Protection requirements in this division will take precedence.

Definitions

- 1) “Protective Instrument” means fee simple ownership, a Conservation Easement, covenant, equitable servitude or a deed restriction.
- 2) “Conservation Easement” means a nonpossessory interest in real property that imposes limitations or affirmative obligations for the purposes protecting, restoring, or enhancing lands where doing so will benefit a source of drinking water.
- 3) “Holder” has the meaning given to it in ORS 271.715:
- 4) “Water system” means a system for the provision of water for human consumption through pipes or other constructed conveyance per ORS 448.115.
- 5) “Water supplier” means any person, group of persons, municipality, district, corporation, or entity that owns or operates a water system per ORS 448.115.
- 6) “Grantee” means an applicant that enters into an agreement with the Board to accomplish a project.
- 7) “Project” means the aggregate of eligible activities included in OAR xxx-xxx-xxxx that comprise an application and are specific to parcels of land, all of which are essential to the protection, restoration, or enhancement of a drinking water source.
- 8) “Partnership” means a collaboration between an eligible water supplier and a Holder as that term is defined in ORS 271.715 that have committed to coordinating funding, expertise, materials, labor, or other assistance to a proposed project. An eligible entity may form a Partnership for the acquisition of any Protective Instrument.

9) "Community Drinking Water Enhancement and Protection Fund" is a fund established in the State Treasury for use by OWEB to carry out the purpose of ORS 448.370.

Protective Instrument Requirements

(1) A Protective Instrument, other than fee title, acquired with funds awarded in a Drinking Water Source Protection Program grant shall include:

- a. A legal description of the land subject to the Protective Instrument acquired,
 - b. The objectives of the Grant;
 - c. Specific obligations of the Grantee including, but not limited to:
 - i. Requirement that the Grantee will monitor the property, at least annually, and enforce the terms in the Protective Instrument;
 - ii. Requirement that the Grantee will repay the grant funds to OWEB (or provide some other remedy) if Grantee fails to enforce the terms of the Protective Instrument;
 - iii. Statement that the Grantee will not assign or convey the Protective Instrument without the consent of OWEB and the Department of Administrative Services.
 - iv. Statement that the obligations run with the land and inure to any successor in interest;
 - v. Grantee will require any assignee to enter into a similar agreement with OWEB.
 - d. Requirement that OWEB and its designees will be provided sufficient legal access to the land affected by the Protective Instrument acquired with Drinking Water Source Protection Program funds, given reasonable notice, for the purpose of compliance inspections.
 - e. The duration of the Protective Instrument
 - i. A conservation easement shall last in perpetuity.
 - ii. Any other Protective Instrument, except for a fee simple deed, may last for a term unlimited in duration unless the instrument creating it otherwise provides. The covenant term shall be set at 12-month increments only and not partial years.
 - f. If the Project includes a Partnership with a Holder, and the Grantee will not hold the Protective Instrument, the Holder will be required to execute any Protective Instrument so that it meets the requirements above.
- (2) If a Grantee, or a Holder in partnership with the Grantee, acquires fee simple title, the Grantee or the Holder, shall:
- a. Record on title a Notice of Funding that includes (1)a – d above; and
 - b. Develop a long-term management plan for the acquired lands, that includes, but is not limited to:
 - i. Stewardship, monitoring, and uses of the Property intended to carry out the purposes of ORS Chapter 448.370, developed in accordance with long-term management plan content described in the grant agreement with OWEB.
- (3) A Grantee is responsible for fulfilling the terms and conditions of any agreement (A) Between the Grantee and the board; and (B) Between the Grantee and a landowner, or other person, necessary for the grant recipient to carry out the project for which a grant has been awarded.

- a. The board is not liable to any landowner or person for the failure of a grant recipient to fulfill the terms or conditions of any agreement between the person and the grant recipient.
- (4) Subsequent Conveyances
- a. If a Protective Instrument is subsequently transferred, it must:
 - i. Be made subject to prior approval by the Board and the Department of Administrative Services; and
 - ii. Strictly comply with the requirements of ORS XXX.XXX and OAR xxx-xx and OAR xxx-xx.

Eligibility

Eligible Applicants

- 1) Eligible applicants include water suppliers as defined in ORS 448.115. Applicants defined in OAR 695-005-0040(2) are not eligible for this grant type unless they are defined as water suppliers.
- 2) Eligible water suppliers must have service populations at or below 25,000 users.
- 3) Eligible water suppliers may form partnerships with eligible Holders as defined in ORS 271.715.

Eligible Properties

- 1) Eligible properties for Drinking Water Source Protection Program grants are lands where the acquisition will result in the protection, restoration or enhancement of those lands and will benefit a source of drinking water used by the water supplier.
- 2) Eligible properties must be within a delineated Groundwater Drinking Water Source Area or Surface Water Drinking Water Source Area.

Eligible Systems

- 1) Eligible water systems include:
 - a. The following public water systems as defined by Oregon Health Authority OAR 333-061-0020:
 - i. Community Water Systems
 - ii. Oregon Very Small Water Systems
 - iii. Transient Non-Community Water Systems operated by non-profit water suppliers
 - iv. Non-Transient Non-Community Water Systems operated by non-profit water suppliers
 - b. Tribal water systems with delineated drinking water source protection areas.
- 2) Federal water systems are not eligible.

Eligible Maximum Funding Request

Define

Matching Contributions

(1) All applicants shall demonstrate that at least XX% match is being sought, based on the total DWSP grant request for the Project.

(2) The following funds and activities qualify as match:

(a) In-kind contributions to activities listed under OAR XXX-XX-XXXX;

(b) Funding commitments made by others as a result of grant applicant efforts;

(c) A donated portion of a sale; and

(d) Funds deposited in a stewardship fund before the time that OWEB funds are released for acquisition of the covenant or easement.

(3) The OWEB Director retains the discretion to determine whether specific proposed match contributions not specifically identified above can be recognized as qualifying match.

Application Requirements

(1) In accordance with ORS 448.370, OWEB will accept on a regular basis Drinking Water Source Protection grant applications for the acquisitions of Property Interests that lead to the protection, restoration, or enhancement of sources of drinking water.

(2) In addition to (3) - (9) below, Drinking Water Source Protection grant applications shall be consistent with OAR 695-0050-0030;

(3) If a water supplier will form a partnership with a Holder, as defined in ORS 271.715, the application must include, at a minimum, the following information about the partnership:

(a) Description of partnership resources to assist with the long-term protection, restoration, or enhancement of drinking water sources.

(b) Whether the partnership's and the Holder's mission supports the protection or restoration of natural resources.

(4) The application must describe the timeline for acquiring the Property Interest within the period established by the board.

(5) For source surface water areas, grant applications shall include:

(a) Demonstration of water system ownership or authority to use the water.

(b) Property proximity to drinking water intake.

(c) Description of land uses or activities that pose significant threat to water quality.

(6) For source ground water areas, grant applications shall include:

(a) Demonstration of well ownership or authority to use the water.

(b) Property proximity to wells and confirmation of location within a Wellhead Protection Area

(c) Occurrence of land uses or activities that release contamination.

(d) Location of the release.

(e) The hydrologic or soil characteristics in the source area that allow the transport of the contaminants to the well.

(7) Applicants must provide the Source Water Assessment of the drinking water supply.

(8) Applications must include description of community characteristics of the water system user base including information on the following:

(a) whether there are seasonal variations in users (e.g., temporary higher rates of users due to seasonal tourism or due to drought) and the impacts that has on the water system.

(b) information that demonstrates whether the water supplier has a limited rate payer base due to population, economic, or other disadvantages experienced by the water users.

(9) State the duration of the type of Protective Instrument and, other than a conservation easement or fee simple, include the duration of the Protective Instrument.

Use of Grant Funds

- 1) Drinking Water Source Protection funds may be applied towards costs related to 1) acquiring lands from willing sellers for the purposes in ORS 448.370; 2) entering into covenants, conservation easements or similar agreements for the purposes of ORS 448.370; and 3) repaying a loan used to finance a project to protect, restore, or enhance lands consistent with 1) or 2).
 - a. Use of Lottery Revenue Bond funds may only be applied to a Project that includes the acquisition of a Conservation Easement or fee simple title.
- 2) Eligible costs for projects under subsection (1) that are funded with Lottery Revenue Bonds include:
 - (1) The purchase price associated with the Protective Instrument.
 - a. The purchase price shall be based on an appraisal and review appraisal completed in accordance with applicable appraisal standards, including the Uniform Standards of Professional Appraisal Practice.
 - (2) The staff costs incurred as part of the acquisition process related to the Protective Instrument.
 - (3) The cost of due diligence activities, including appraisal, environmental site assessment, survey, title review, and other customary due diligence activities;
 - (4) The cost of baseline inventory preparation;
 - (5) The legal fees incurred by the water supplier related to the Project;
 - (6) The closing fees, including recording and title insurance costs;
- 3) Eligible costs for projects under subsection (1) that are funded with General Funds includes:
 - (1) The purchase price associated with the Protective Instrument.
 - a. The purchase price shall be based on an appraisal and review appraisal completed in accordance with applicable appraisal standards, including

but not limited to the Uniform Standards of Professional Appraisal Practice.

- (2) The interest on bridge loans needed to secure closure on the Protective Instrument prior to when funding will be available for distribution through the program.
 - (3) The staff costs incurred as part of the covenant or easement acquisition process related to the property;
 - (4) The cost of due diligence activities, including appraisal, environmental site assessment, survey, title review, and other customary due diligence activities;
 - (5) The cost of baseline inventory preparation;
 - (6) The legal fees incurred by the water provider related to the Project;
 - (7) The closing fees, including recording and title insurance costs;
- 4) For Projects requesting funding for repaying a loan, the land transaction must have been recorded no more than XX months from the date of submitting a Drinking Water Source Protection grant application to the agency.

Evaluation Criteria

- 1) The application must describe the significance of the acquisition to the protection, restoration, or enhancement of sources of drinking water.
- 2) The capacity and experience of the applicant and, if a partnership is proposed, the Holder to achieve the ongoing management and stewardship of the Protective Instrument as the long-term owner.
- 3) The soundness of the legal and financial terms of the real estate transaction.
- 4) Project readiness, including but not limited to the applicant's capacity to complete acquisition transaction and due diligence steps within OWEB established timelines, and due diligence information provided by the applicant.
- 5) The Climate Related Criteria evaluation criteria described in OAR 695-005-0045.
- 6) The consistency of the Project with the applicable technical criteria for drinking water source areas including XXX.
- 7) For applicants that form partnerships with eligible Holders:
 - i. Demonstrated capacity and resources for long-term protection, restoration, or enhancement of drinking water sources.
 - ii. Partnership mission is in support of protection or restoration of natural resources.
- 8) Demonstrated benefit acquisition will have to address at least one of the following limiting factors of the water system:
 - (1) Capacity challenges in the water system due to seasonal variations in users.

- (2) Capacity challenges in the water system due to drought conditions.
- (3) Limited rate payer base of the water system due to population, economic, or other disadvantages experienced by the water users.

9) PLACEHOLDER – Due to bond funding, may also need to demonstrate economic and social benefits

Grant Agreement Conditions

Placeholder for GA conditions required by DAS.

Board Approval and Delegation of Authority

(1) The Director is delegated the responsibility of ensuring that funding conditions required by the Board are fully satisfied by the grantee.

(2) Notwithstanding xxx-xxx-xxxx(3) (Distribution of Funds) Conditionally approved grant funds shall be encumbered for disbursement only after all conditions are fulfilled. The encumbered funds may be made available for other uses by OWEB if all conditions required by the Board are not satisfied within 18 months of the conditional Board approval, unless approved by the OWEB Board.

Public Involvement

The public shall be provided with meaningful opportunities to comment on grant applications being considered by the Board. In a manner consistent with this requirement, the governing bodies of cities and counties with jurisdiction in the area of the proposed covenant or easement acquisition, as well as affected governmental agencies and tribes, will be provided with written notice of the Board's intent to consider:

- (1) Written comments received prior to the Board meeting at which the Board will consider the application;
- (2) Comments made at public hearings held and publicized in accordance with ORS 271.735; and
- (3) Comments made at the Board meeting at which the grant application is considered.

Distribution of Funds

(1) The Director may approve the distribution of grant funds. Funds may be distributed throughout the time between approval by the Board and transaction closing as the following conditions are met:

- (a) A grant agreement is executed by the Director and the grant applicant;
- (b) The funding conditions applicable to the allowable cost, if any, imposed by the Board are satisfied to the full satisfaction of the Director;
- (c) The legal and financial terms of the proposed real estate transaction are approved by the Director;
- (d) The title restrictions are approved by the Director;
- (e) The Director has reconciled conditionally approved funding with actual project costs;

(f) The grantee has satisfied the match requirements under OAR xxx-xx-xxxx;

(2) For grants established under these rules, the Director is authorized to reimburse the grantee for allowable costs identified in OAR xxx-xx-xxxx and to recognize match contributions under OAR xxx-xx-xxxx that were incurred no earlier than 18 months before the applicable grant application deadline.

(3) Notwithstanding OAR 6xx-xxx-xxxx(1)(a) and (b), funds may be distributed prior to transaction closing for staff costs and due diligence activities specified in OAR xxx-xxx-xxxx and included in the application budget.

Compliance and Enforcement

(1) The ongoing use of the Protective Instrument acquired with OWEB Drinking Water Source Protection Program funds shall be consistent with the purposes specified in ORS Chapter 448.370. OWEB may initiate any and all legal remedies available to OWEB to address compliance issues, including but not limited to recovery of the OWEB grant funds used to purchase the Protective Instrument, and reasonable interest and penalties at the option of the Director.

Demonstration of Public Benefits of Project

Placeholder if needed

Subsequent Conveyances

(1) Subsequent conveyances of fee simple acquired with OWEB grant funds must strictly comply with the requirements of ORS 541.960, including, but not limited to, the requirement that subsequent conveyances be made subject to Board approval and that subsequent conveyances shall not result in a Profit.