



February 27, 2026

Oregon Watershed Enhancement Board
775 Summer St NE #360
Salem OR 97301

RE: Water Acquisition Administrative Rule RAC

Honorable RAC Members:

I am writing to provide some additional background on the potential for considering groundwater rights under the same conditions that OWEB considers surface water rights. I strongly support the approach that the staff have proposed by having a single set of rules for water right acquisition that apply to all water rights that have the opportunity to benefit native fish, wildlife, habitats and water quality as required by the Constitutional dedication of Oregon lottery funds. The guidance on what kinds of groundwater permits that may be considered for acquisition is very clear in that the guidance ties groundwater pumping to impacts to groundwater dependent ecosystems and species (GDEs).

Once it is understood that the same criteria for evaluation apply to all water right applications, there is the question of the difference in considering the observable Impacts to surface flows and less observable impacts from groundwater changes. There is significant literature on the effects of groundwater pumping on GDEs (see <https://www.nature.com/articles/s41586-024-07702-8> <https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1890/090108> <http://dx.doi.org/10.1016/j.rse.2016.07.004>) The Nature Conservancy has developed a GDE Atlas for Oregon (see [https://www.groundwaterresourcehub.org/content/dam/tnc/nature/en/documents/groundwater-resource-hub/Oregon Atlas of Groundwater Dependent Ecosystems 2022.pdf](https://www.groundwaterresourcehub.org/content/dam/tnc/nature/en/documents/groundwater-resource-hub/Oregon%20Atlas%20of%20Groundwater%20Dependent%20Ecosystems%202022.pdf)). The atlas identifies the link between pumping and GDEs as: “Groundwater extraction by pumping directly impacts the hydrogeologic regime and can disrupt connectivity between groundwater and GDEs.” The report goes further to state: “Small amounts of capture will reduce groundwater discharge to a GDE—for example, a perennially-gaining river reach may become a seasonally-gaining reach. Capture of sufficient magnitude or duration can reverse the flow of groundwater, causing a GDE to contribute water to an extraction well—for example, changing a gaining river reach to a losing reach, and therefore disrupting the groundwater regime that would otherwise support a GDE (Barlow and Leake 2012¹).” They further state: “On a state

¹ Barlow PM, Leake SA. 2012. Streamflow depletion by wells – Understanding and managing the effects of groundwater pumping on streamflow. U.S. Geological Survey Circular 1376, 84p.

scale, groundwater extraction is likely the most widespread and impactful cause of hydrologic alteration.”

The atlas identifies three aspects of groundwater withdrawal as stressors to GDEs. Groundwater level declines, concentrations of permitted groundwater use, and presence of Groundwater Administrative Areas are all seen as stressors to GDEs. While these stressors are general to areas of impact they are necessary conditions but not sufficient to identify the impact of an individual well.

The closest to connecting specific wells to GDE impacts has been done in the Upper Klamath basin where OWRD² has identified well distance from select streams and the resulting stream depletion in cfs. They categorize wells by distance from the stream and have calculated the effect on gaining reaches of the affected streams for each distance increment.

While the clear demonstration of connection between individual wells and GDEs may be difficult, that difficulty should not be used as a reason not to consider the potential for such a connection to be documented. The approach of providing guidance (with specific requirements for documentation) will allow groundwater rights to be considered and require a clear demonstration of benefit to GDEs. This could be argued as a higher standard than for surface water conservation.

The requirements for all water right acquisitions are specified in OAR 695-046-0196 according to the evaluation process identified in OAR 695-046-0200. These requirements apply to all water right acquisitions. The additional showings for groundwater as identified by the proposed guidance are above and beyond those required for surface water rights.

I encourage the RAC to consider supporting the proposal as developed by the OWEB staff. The review process and criteria are not changed for groundwater, however groundwater permit proposals have additional requirements to assure the connection between the well(s) involved and groundwater dependent ecosystems and species. As OWRD increases enforcement of groundwater well conditions there may be opportunities to provide both benefit to the state’s GDEs and to owners of groundwater rights.

Thank you for your consideration.

Sincerely,

Kenneth F. Bierly

Kenneth F. Bierly

² Thoma, Michael and Justin Iverson. 2018. Oregon Water Resources Department Technical Memorandum. Groundwater Regulation in the Upper Klamath Basin Area under OAR 690-009. April 26, 2018. 16 p.



WaterWatch of Oregon Protecting Natural Flows In Oregon Rivers

March 13, 2026

Eric Hartstein, eric.hartstein@oweb.oregon.gov
Oregon Watershed Enhancement Board
725 Summer St. NE, Suite 360
Salem, OR 97301

Re: Public Comments, Water Acquisition Grant Rulemaking, RAC meeting #5

Dear Mr. Hartstein,

Thank you for the opportunity to provide public comments. WaterWatch is a river conservation group that works to restore and protect river flows statewide. WaterWatch drafted and championed the 1987 Instream Water Rights Act that provides the legal framework for much of the work funded by the OWEB Acquisition Grant Program to take place. We also helped negotiate the Conserved Water Act. As such, we have a great interest in ensuring that state dollars are only spent on projects that result in legally protected instream flows.

We previously provided comments prior to the December 2025 meeting. Two of our concerns raised are still outstanding, so we will reiterate them here in addition to other comments.

Expanding funding eligibility to groundwater projects/acquisitions: At the last RAC meeting, OWEB staff noted that they would address the issue of expanding funding eligibility to groundwater projects in a guidance document rather than the rules. OWEB staff previewed the draft document at the meeting. WaterWatch followed up with a public records request.

After reviewing the documents and listening to the RAC discussions, we continue to have significant concerns with any expansion of the acquisition program to include groundwater rights. Our concerns include but are not limited to:

- **The state cannot legally protect the saved and/or retired groundwater from other groundwater or surface water appropriators.** While groundwater and surface water are hydraulically connected in most areas of the state, and groundwater is critically important to many groundwater dependent ecosystems, Oregon's water laws do not allow protection of retired groundwater as either groundwater or surface flow. No mechanism exists to achieve this. In other words, the state lacks the ability to protect "purchased" groundwater either in the ground or in the stream. As such, there would be no protectable public benefit for expenditures to purchase groundwater rights.
- **Without legal protection of saved water, expansion to groundwater would not align with the purposes of the acquisition fund:** We do not believe the acquisition of groundwater rights, absent the ability to protect that water against other water right users, aligns with the purposes set forth in ORS 541.956, which focuses on funding projects that will protect or restore native fish

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or wildlife habitats and/or projects that will protect or restore natural watershed or ecosystem functions in order to improve water quality or stream flows. As noted, without new legislation to allow the state to protect saved/retired groundwater as against other ground/surface water appropriators, the GDE benefits hoped for could likely not be realized.

- **State funds should not be used to purchase rights that are subject to regulation:** The draft guidance anticipates that funds could be used for groundwater projects (including purchasing water rights) in restricted groundwater areas. The language is very broad and presumably includes water rights that will be regulated off (which is different from forfeiture). It is bad public policy to pay people to not use water that they could not use regardless. Water belongs to the public and while water users can obtain rights to use that water, those rights come with conditions of use, including the risk of regulation based on interference, lack of water, etc
- **State funding of groundwater conservation projects could increase consumptive use.** To the extent OWEB is considering allowing state funding of groundwater efficiency projects that attempt to use the state's Conserved Water Act (ACW), there are a number of concerns. First the legal efficacy of this is questionable. Our reading of the ACW is that it is directed at surface water projects. And while true that OWRD has allowed a handful of groundwater ACW projects to move forward, that does not mean the legal question is settled. Second, as noted previously, the state does not have the ability to protect any saved water from other groundwater or surface water appropriators. And third, efficiency projects that allow an increase in consumptive use (which is what the ACW allows) could make already bad situations worse for GDEs.

Funding of Conserved Water (ACW) Projects: As noted in our December comments, if OWEB is going to allow funds to be used for ACW projects, we would urge directives to ensure that they are meaningful projects. OWEB's Water Acquisition Funds are statutorily directed to be used for projects to restore and protect instream flows. They cannot, in our read, pay for benefits that accrue to a landowner. In other words, if the project is 100% funded by OWEB water acquisition funds, then 100% of the water should go instream (as opposed to the statutorily directed 75% which tops the mandatory percentage scale but is allowed if the water right holder directs it). Similarly, for partial funding, the public benefit portion of the "saved water" should be additive to the 25% that the user would have to return instream if no public funds were used. Absent that, the public benefit technically derived from public funds could be zero (e.g. a project that is 25% publicly funded would only put 25% of the water instream, which is exactly what the users would have to do anyway in order to capture any "saved water" under the Conserved Water Act). In other words, a user could get public funds to pay only for the portion that s/he would be legally required to provide anyway. While we understand this deviates from other funding sources, given the water acquisition fund is limited to "acquiring" instream benefit this seems appropriate for this particular fund. If applicants are not interested in this, they could utilize other funds that start the public benefit calculation at zero (e.g. OWRD's Water Supply Loan and Grant Fund).

We appreciate that the draft rules will look at the percentage put instream for scoring, but we would urge greater direction in the actual rules (e.g. 100% of the saved water should go instream, 1 minute priority to instream right, etc).

Also, as noted previously, we would also recommend OWEB develop process/standards to evaluate the instream benefits of a conservation project against the negative impacts. While conservation is generally viewed as a positive undertaking, projects under the Conserved Water Act, which allows an increase of

consumptive use of water that would otherwise return to the system, can result in a net negative (especially if only 25% of the water is returned instream). This should be part of the evaluation criteria.

Evaluation Criteria: We are a bit concerned that any language related to efficacy of the protected water in dry years and/or drought years has been recommended for removal. It is precisely during those times that the need for water instream is most critical. State funds should be prioritized for projects that will provide senior enough water to remain viable in dry and/or drought years. It is unclear why this language is proposed for removal (see e.g. OAR 695-046-0196(1)(a) and suggested (g), and 4(d)).

We have similar concerns related to the removal of language related to climate change (see OAR 695-046-0196(1)(f)). Given Governor Kotek's EO 25-26 related to building climate resilience for Oregon's natural and working lands and waters, maintaining a tie seems relevant.

Contractually protected instream flow: We agree with the RAC's decision to retain the phrase contractually protected flows. That said, we would encourage further discussion related to remedies for failure to abide by a contract. The state has no ability to enforce or regulate private contracts. Given public monies are being spent on these types of "alternate" instream agreements, it would seem prudent to include directives on enforcement/remedy, including refunding the state if the agreement goes awry.

Thank you for your consideration of our comments.

Sincerely,



Kimberley Priestley
Sr Policy Analyst