

Division 512 Rules Advisory Committee

Meeting 1 (April 25, 2 pm – 5 pm)



This document is a summary of Division 512 Rules Advisory Committee (RAC) hybrid meeting number one held at the Harney County Community Center on April 25, 2023, from 2 pm to 5 pm. For more information, see the Meeting Agenda, Meeting Presentation, Draft Rules, and other Meeting Materials, available on our [rulemaking website](#).

Meeting attendees

RAC members in attendance were Angie Ketscher, Barbra Howard, Ben Mccanna, Brandon McMullen, Brandon Haslick, Breanna O'Connor, Brenda Smith, Fred Otley, Jeff Mackay, Jennifer Tayton, John Short, Julie Weikel, Karen Moon, Ken Bentz, Kristen Shelman, Lisa Brown, Lorissa Singhose, Louie Molt, Mark Owens, Nick Schott, Roger Sheley, Steve Grasty, Steve Rickman, Susan Maupin, Tony Hackett and Travis Singhose.

Oregon Water Resources Department (OWRD) staff in attendance were Kelly Mainz, Ivan Gall, Tim Seymour, Alexandria Scott, Jason Spriet, Dally Swindlehurst, Graham Thomas, Jon Sanfilipo, Darrick Boschmann, Gerald Grondin, Annette Liebe and Laura Hartt.

Welcome and introductions

Oregon Water Resources Department staff introduced themselves, as did the RAC members and public attendees.

RAC purpose (Kelly Mainz)

A Rule Advisory Committee (RAC) represents parties that are more likely to be affected by the rules once adopted. Throughout the process OWRD will ask for input on draft rule language and the statement of need and fiscal impacts.

Ground rules (Kelly Mainz)

RAC members were reminded that they are invited to each RAC meeting to express their viewpoints, treat others respectfully, remain muted when not speaking if online, and to use the "raise hand" feature to request to speak.

Harney Basin Groundwater Study recap (Ivan Gall)

Ivan described the Malheur Lake administrative basin boundary, GHVGAC boundary and the groundwater study area boundary to orient the audience to the boundaries we will be discussing in the coming months. The groundwater study has resulted in 6 published reports including the [U.S. Geological Survey \(USGS\) Groundwater Hydrology Report](#) and [Water Budget Report](#). All study related documents can be accessed on the Department's [Harney Basin Groundwater Study webpage](#). There are 2 items that are still in progress: the USGS numerical groundwater flow model and report are currently in peer review and will be available soon.

A key study finding from the water budget is that the lowland groundwater discharge (water leaving) exceeds recharge (water going in) by 110,000 acre-feet/year. Another key finding was that lowland groundwater levels decline at various rates depending on the: local geology, amount of recharge and amount of withdrawal. For historical context, the group looked at a hydrograph displaying groundwater level elevations from the 1960s – 1990s in the Weaver Springs area. It showed that things were relatively stable until the 90s and then after that they begin to decline, continuing to this day. Lastly, the group learned about permeability which describes the ability of any fluid to flow through rocks or sediments. What they learned is that pumping large volumes of groundwater from low-permeability rocks causes deep drawdown over smaller areas, and that pumping large volumes of groundwater from high-permeability rocks causes shallow drawdown over larger areas.

Questions & comments from the RAC on this agenda item

RAC member: During what years was the groundwater study conducted? Did you guys consider 20-year cycles?

Answer: Gerald answered that the water budget looked at from late 1980s to 2018 for the study. Bulk of the study was done in 2015 – 2019. Ivan gave some examples of wet years but said that the declines are not attributed to mother nature it is the result of development of the resource.

RAC Member: We have 4 meetings planned for the next year and you are only going to spend 6-minutes on the groundwater study review. He finds that disturbing.

Answer: Ivan responded with a brief summary of the study results was what was planned for this meeting. Justin followed with we have given a couple presentations in large community venues and smaller venues on the study results. He reminded folks that members of the Groundwater Study Advisory Committee that met with WRD staff quarterly during the Study are serving on the RAC that could probably help answer questions as well.

RAC Member: I appreciate that Justin but there is a lot of community members that need to weigh in on this. We're going to have to put some time in if you truly want a fiscal impact statement on how it's going to affect this community, this town, this tax base, the schools, the domestic well users and the farmers. It's going to take more than 12-hours of scheduled meetings in the next year to make some of the most impactful decisions made to this community since the ESA and spotted owl. I know I shouldn't be saying this in the first 20-minutes but that is what I am feeling right now. So, I will be quiet and listen more, but I don't like the trajectory we are going on right now.

RAC Member: Let me add a suggestion, involve Business Oregon in the economic analysis for the fiscal impact statement. You may be experts in water, but you are not experts in economics, and they are.

Rulemaking process (Kelly Meinz)

Kelly reviewed the typical rulemaking process and highlighted that this process will be a little different. We are having a RAC in April because the current rules state that a RAC needs to be convened within 1-year of the Study being published. The Division 10 Rules for Critical Ground Water Area (CGWA) designations will be brought to our Water Resources Commission (WRC) in June, so that is a tool that will be available to us soon to use here in the Harney Basin. Between now and August, OWRD will start developing an initial set of draft rules to talk about at RAC's 2-5. Once the RAC meetings are complete,

there will be a 90-day public comment period with 2 public hearings in the basin. We are looking for a June 2024 adoption by the WRC for these rules. If we need more RAC's we can add more.

There are 3 action options that OWRD can take to regulate groundwater use: classification (limits future use), SWMPA (requires water use measuring and reporting), CGWA (this can curtail current use). The Division 10 or CGWA rules are open for public comment now and there is a public hearing tomorrow from 5pm to 7pm at the Harney County Community Center. We have mentioned Division 10 a lot, what is it? It is the steps that the Department has to follow to designate a CGWA.

Kelly summarized the 7 conditions that can trigger a CGWA designation process; only 1 needs to be met to trigger this process. He walked through the Division 10 [process flow chart](#) that was distributed to the RAC in advance of the to walk them through the different components. Between now and the next RAC, OWRD will prepare draft rule language for: a SWMPA, groundwater classification and the CGWA boundary. The Division 10 requirements that must be met before the August RAC include: draft a report for the WRC, begin consultation with Federally Recognized Tribes and begin coordinating with Affected Local Governments.

Questions and comments from the RAC on this agenda item

RAC Member: Are classification, SWMPA and CGWA designations really the only tools that the Department has to reduce groundwater use? Are we just going to repeat what we have done in other basins or are we going to try and do something different? That is what I am trying to figure out.

Answer: Ivan said we are here to listen. What Kelly is presenting here are the tools the Department has available to us in rule. Voluntary agreements are briefly mentioned in statute in a generic way and there is also a place-based planning process that is going on down here. We are trying to get us to a point where we can deal with the significant management issues in the area. We have an ability to continue allocation in this basin, even though the groundwater was classified in 2016 within the GHVGAC area within the Study area. What the Study found was that we're dealing with one groundwater reservoir system up in Grant County down to the Donner and Blitzen system. Some of those areas are still theoretically open to groundwater development which is an issue we would like to address sooner rather than later. It is going to take us years to address these issues. Help us figure out how we should engage with the public and at what frequency.

RAC Member: What is the purpose of RAC #2?

Answer: Tim answered with we will provide you with copy of draft rules and we will be looking for your input on those rules. We will dive into this further during our rulemaking scope agenda item if that's okay.

RAC Member: These meetings have been set but do these rules have to be adopted by June 2024?

Answer: Kelly answered no they do not have to be adopted by June 2024. Groundwater levels will continue to decline so time is important, but we want to do this rulemaking right so we will take the time we need. RAC members can also provide written input on draft rules or call Alexandria and I between meetings to submit input if needed.

RAC Member: So, the main purpose of this meeting was to just meet your deadline?

Answer: Tim said to meet our deadline and kick off the rulemaking. Justin followed with in other rulemakings we show up to the first RAC meeting with draft rules and say this is what we are proposing let's talk about it. The reason we are having this early meeting is because many of you have been with us for years and we wanted to have a chance to discuss and meet with you before we make edits to the rules. We have heard that you guys want the opportunity to provide meaningful input. This is an opportunity to do that and is different from what we normally do for rulemaking.

Community conversation recap (Alexandria Scott)

March 7-9, 2023, Kelly and Alexandria came out to Burns to meet with community members and attend local meetings to hear what groundwater concerns they have, recruit for the RAC and start to build a foundational understanding with the community around this rulemaking. The community had great recommendations for what to present at the first RAC, who should be invited to serve on the RAC, how to share info with community moving forward and much more. We took what we heard from the community to help form this RAC, develop our meeting presentation for today and improve how we share information with the community about this rulemaking moving forward. A 1-page document summarizing what we learned from these community conversations can be viewed by [clicking here](#).

Scope of rulemaking (Tim Seymour)

What we know is that we have met the criteria of excessive groundwater declines in areas of the Harney basin (excessive decline 3ft/year for 10 years or have declined 50 ft/year) and we have also met the criteria of the groundwater supply is or is about to be overdrawn. To address these issues OWRD has 3 regulatory tools: classification (limits future use), CGWA (curtains current use) and SWMPA (measuring and reporting current use) designations. Tim highlighted for the group that the Harney Basin Study area is what we consider the groundwater reservoir and is the max area we could pursue based on the excessively declined criteria for a CGWA. OWRD will bring a proposal of the boundaries and criteria to the next RAC for discussion so we will not be discussing that today. Tim walked through the corrective control provisions within a CGWA rule that ORS 536.735 authorizes (see slide 27 of the PowerPoint for the full list).

ORS 540.435 authorizes the Commission to establish a SWMPA which may: require any water right owner to install a measuring device on any surface water or groundwater source, require submission of an annual water use report and allow a watermaster to prohibit water use by anyone who does not comply. We must do the SWMPA designation to know how much water is being used to understand the effectiveness of the curtailment; that is why we need to do a CGWA and SWMPA. The Walla Walla is the only place in the state that we have a SWMPA designated. ORS 536.340 authorizes the Commission to classify the water within a basin as to the highest and best use and quantity of use. This affects future uses only, it does not affect current uses. The classification process was used to create the GHVGAC in 2016.

Questions and comments about this agenda item

RAC Member: What about subareas it isn't just one area we are seeing declines and we are seeing them at different rates?

Answer: Tim answered yes, we can do that in these rules.

RAC Member: Why aren't you sharing the boundary now? Are you going to come with an actual proposal for RAC 2 and going forward nothing will be slipped into the rules without us knowing right?
Answer: Tim answered we are not making a proposal today we will come to RAC 2 with that information. There will be an opportunity for input across all RAC meetings and during the public comment period on that information. We will be as transparent as possible.

RAC Member: When you come back with your mark outs or whatever you want to call them, are we going to be given different alternatives or is it going to be a singular option? How much will this group be involved?

Answer: Ivan replied that a CGWA is a geographical area where we throw a boundary around based on the best available science. We can establish subareas in there we lay out supporting data for you to look at and provide input and ideas so it will serve as a starting place for us. We want to protect the existing users and not worsen the issues we are seeing. Tim added that for classification there may be more flexibility in the alternatives we bring, but we need a starting place for the CGWA boundary and subarea boundaries.

RAC Member: If a RAC member emails Kelly Mainz will everyone on the RAC be notified of the answer to the question?

Answer: Kelly said that any answers to a RAC members question will be shared with the entire RAC.

RAC Member: This is more of a process comment, but I think it might be helpful for people in the room. I got to sit on the RAC for Division 10 and it came as a shock to me when I learned the process goes straight into the contested case process. I thought, why are we making rules assuming they are going to be challenged? There's a lot of protection built into this whole process by the fact that creating a CGWA automatically takes it clear into the contested case process. Because this issue potentially impacts water right users, it is important to know that exempt wells are pretty much untouched with respect to curtailment. The more we all understand the rules the better; people are often upset because they don't understand the rules. This has been built into the notification process for Division 10.

RAC Member: Curious I had heard a lot about establishing water use amounts, does that assume that the input is static based on it being the same each year? That can't be the case.

Answer: Ivan responded that recharge the groundwater aquifer system is not static it varies on the nature of the water year (i.e., precipitation). This brings up questions of how more rain may impact recharge and there are things we don't know yet and we will learn as time goes on. The estimates that groundwater staff are going to calculate is going to be based on the best information we have which is estimates of what has been pumped. Are we going to be spot on? We are going to get as close as we can to calculate target flows.

RAC Member: Concerned that a SWMPA will bring surface water and groundwater into the data, but these rules are for groundwater and the study did not look at surface water.

Answer: Ivan said Tim is just sharing what the statute allows not necessarily what we are going to do. We have no intentions of requiring basin wide surface water measurement that won't be part of this.

RAC Member: With the SWMPA designation it doesn't preclude Department from coming in later and

doing this on surface water. Is a SWMPA designation ever removed from a basin?

Answer: Ivan answered that is correct we could come back and say now all surface water needs to be measured. We could do it as surgically or as broadly as needed. We have had only 1 SWMPA designation for 3 years so we have not removed one, but we could. We would have to use the same process we used to create a designation as we would to remove it.

RAC Member: Will the conversion on irrigation systems to LESA (Low Elevation Sprinkler Application) affect the data you use?

Answer: Tim replied we will use the best available science.

RAC Member: Does classification restrict you from transferring an existing use to a new use?

Answer: Ivan said he would need to follow up. We can't provide more flexibility for transfers in this rule process.

RAC Member: How will classification apply to a new business coming in?

Answer: Ivan said we don't want more development taking place so classification can help us stop the bleeding. A new business could plug into existing municipal water rights, but classification restricts new groundwater uses. There is a possibility of rolling back a classification if there is strong evidence to do so if there is national interest in say a Lithium mine or something.

RAC Member: Highlighted for the group as something to consider when thinking about classification that Crane community wells don't have a water right.

What the RAC wants to see in the rules

OWRD staff sent a copy of the existing Division 512 rules to the RAC in advance of the meeting and asked them to come to this meeting with ideas for what they would like to see. The RAC had the following recommendations: guidance for voluntary agreements, change in season for use (i.e. irrigation season to full year), community monitoring program, clarification on the triggers for the contested case process, clarification on definitions for substantial interference and reasonably stable, ability to do limited licenses for CREP, clarification on implementation of prior appropriation doctrine, deal with development within areas of recharge, how will areas of significant drawdown be considered, dealing with potential artificial recharge options, ways to move water legally from one well to another and language on well reconstruction or illegal construction.

Public comment period

Jim Campbell: Is the contested area the entire designated area or is it or by water rights?

Answer: Ivan said I will try to answer your question. I am not an expert on this, but any rule that an agency adopts can be contested in 2 ways. Either we didn't follow the statewide rule process appropriately, so the process is incorrect, so you go back to step 1 and start over. Or 2, you created rules that aren't supported by the underlying statutes, so they get kicked out at the Court of Appeals and we start over.

Ben Kern: I am the farm manager in Weaver Springs which I expect will fall within the CGWA, how much will I be able to have my voice heard? Or be able to talk with others in the area for these voluntary

agreements?

Answer: Ivan responded that we want folks talking to each other about this and we could at later date provide a list of water right holders by priority date for each subarea.

Leslie Richman: Will actual use be taken into consideration versus an estimate of our permitted water right? Some people aren't using the entirety of their water rights.

Answer: Gerald answered that in the water use calculations for the Study reports we did take that into consideration.

Ken Bierly: When will the water budget model be publicly available?

Answer: Justin answered that USGS model/report are in the peer review process. As the GWSAC members know the peer review process is a long one and it very well may take longer than this RAC process does.

Ken Bierly: Does the Department have access to the model, and can it run scenarios?

Answer: Justin said my understanding is not.

John Short: So, Justin we may very well need to make huge decisions without having the model available to use?

Answer: Ivan said the model will be a very useful tool, but again there are some standards of practice in hydrogeology that are going to be helpful to us in developing rough estimates of how water level decline rates will respond to reductions in groundwater pumping.

Ken Bierly: When will the estimates of sustainable use for different areas be available?

Answer: Tim said we intend to put those in a report to present to the WRC at RAC 2.

Ken Bierly: Recommends providing the RAC with options for subareas rather than one singular option.

Chad Karges: It would be helpful if you came to the next meeting with strawman alternatives. Is the objective of classification to reduce water use?

Answer: OWRD staff said they would take that into consideration. Tim said no, a classification helps stop future development of the resource.

Leslie Richman: Is it a possibility that in a rulemaking there could be some definition for periodic re-evaluation in the rules?

Answer: Ivan that is a good question, Mark touched on it earlier about the concept of sentinel wells. We are trying to figure out internally how to build this in a way that is easy to manage, easy to understand and that is legally defensible. We could layout target groundwater level elevations for a subarea or a specific well in a subarea it's just the management tools would be tough. If everything could be done voluntarily and we don't have to go to step 2 of the CGWA process that works better for everyone. If we have to go to step 2, we will be focused on priority dates and will curtail off a group of junior water users. If we go below the target level during that time, then we would have to engage a new group of junior water users and begin a whole new contested case process, which would take several years meanwhile the issues we are seeing are still compounding.

Jerry Miller: Is the list of RAC members available online?

Answer: Kelly said yes, the RAC roster is available of the Division 512 webpage on the Water Resources Department website.