



# Oregon

Tina Kotek, Governor

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## **Groundwater Allocation Rules Advisory Committee Hybrid Meeting #6 (8:30 am – noon, September 13, 2023) Meeting Summary**

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This is a summary of the Groundwater Allocation Advisory Committee (RAC) Meeting held in person (Salem office, Oregon Water Resources Department) and virtually (Zoom platform), on September 13, 2023, from approximately 8:30 to Noon. For more information, see the Meeting Agenda, Meeting Presentation, Draft Rules, and other Meeting Materials, available online at <https://www.oregon.gov/owrd/programs/GWWL/GW/Pages/Groundwater-Rulemaking.aspx>

### **Rules Advisory Committee (RAC) members in attendance:**

Adam Sussman, Central Oregon Cities Organization, GSI Water Solutions  
April Snell, Oregon Water Resources Congress  
Bill Jaeger, Applied Economics, Oregon State University  
Casey McClellan, Seven Hills Winery  
Cheyenne Holliday, Verde  
Gen Hubert, Deschutes River Conservancy  
Greg Kupillas, Pacific Hydro-Geology, Inc., Oregon Groundwater Association  
Jeff Stone, Oregon Association of Nurseries  
Kelly Warren, Confederated Tribes of the Umatilla Indian Reservation  
Lauren Poor, Oregon Farm Bureau  
Lisa Brown, WaterWatch  
Misty Buckley, Homeowner, Klamath County  
Phil Brown, Northwest Groundwater Services  
Robyn Cook, GSI Water Solutions  
Sarah Liljefelt, Oregon Cattlemen's Association  
Susan Lea Smith, Willamette University Law School  
Tammy Wood, Oregon Lakes Association  
Zach Freed, The Nature Conservancy

### **RAC members not in attendance:**

Brad Parrish, Klamath Tribes  
Dave Wildman, Anderson Perry & Associates  
Darrick DeGroot, Klamath County Commission, Association of Oregon Cities

Karen Lewotsky, Oregon Environmental Council  
Kelly Simmelink, Jefferson County Commission  
Laura Masterson, 47<sup>th</sup> Ave Farms  
Margaret Durner, Citizen at Large  
Michael Martin, League of Oregon Cities  
Nick Siler, Atmospheric Science, Oregon State University  
Obie Strickler, Grown Rogue  
Scott White, Klamath Irrigation District  
Tyler Hufford, Rancher

**Others in attendance:**

Oregon Water Resources Department (OWRD) staff: Annette Liebe, Justin Iverson, Laura Hartt, Ben Scandella, Travis Brown, Kelly Meinz, Darrick Boschmann, Emily McKain, Ivan Gall, Jeana Eastman, Jeffrey Pierceall, Jerry Grondin, Phil Marcy, Tim Seymour.

Members of the public: Glenn Barrett (Water for Life), Roger Nicholson, Danette Faucera (Oregon Department of Fish and Wildlife), Nolan Smith (Carollo Law Group). Jessi Talbot (Central Oregon Irrigation District).

**Welcome & Agenda**

OWRD staff welcomed participants, led a round of introductions, and reviewed the agenda.

**RAC Meeting 5**

OWRD staff noted that RAC comments following the fifth RAC meeting were distributed to RAC members and posted online. OWRD staff then asked if RAC members had any comments, questions, or concerns regarding the RAC 5 Draft Meeting Summary.

No corrections or comments were made to the RAC 5 Draft meeting summary.

**Objective Reminder**

Staff reviewed the objectives of this rulemaking process, including the guiding definition of “groundwater sustainability” from Gleeson et al, 2020.

**Summary of Recent Revisions**

***Changes from RAC 5***

Staff summarized the changes to the draft rules since RAC #5, including removal of “capacity of the resource” from the definition of “Water is Available” in Division 300. As a result, the draft rules propose no changes to Division 400 from the current rules. Minor changes were proposed in the draft rules for Divisions 300, 8, 9, and 410.

A RAC member asked whether the definition of “Water is Available” relates to when a call is made or when an application is submitted. Staff clarified that “Water is Available” only applies to new applications, not to calls or regulation. A RAC member asked for confirmation that although a determination that a proposed use would be within the “capacity of the resource”

would no longer be required when determining whether “Water is Available,” “capacity of the resource” still may be considered in the decision to approve or deny an application. Staff confirmed that aspects of “capacity of the resource,” such as thermal interference, could still be considered in deciding to approve or deny an application via other statutory pathways separate from “Water is Available.” Staff further clarified that the proposed definition of “Water is Available” is intended to be a quantitative standard requiring an affirmative finding before a new use would be approved. Staff also noted that removal of “capacity of the resource” from the proposed definition of “Water is Available” was in response to RAC comments.

### ***Water is Available Flow Chart***

Staff shared and reviewed flow charts outlining the Public Interest Presumption under ORS 537.621(2) and outlining the analysis of “Water Is Available” in Division 300.

### ***Format Guide***

Staff reviewed the formatting guide for illustrating changes under the draft rules.

### **Revised Draft Rules – Division 300**

#### ***690-300-0010 Preamble***

Staff reviewed changes to OAR 690-300-0010, including the removal of division references that are no longer applicable and the addition of references to Division 380 and Limited Licenses.

#### ***690-300-0010(57) “Water is Available”***

Staff reviewed the draft definition of “Water is Available.” The draft definition now requires affirmative findings that groundwater levels are reasonably stable, that the proposed use will not cause Substantial or Undue Interference, and that the requested rate of appropriation is achievable given best available information regarding the yield of the proposed wells.

Several RAC members asked why injury is not considered as part of the definition of “Water is Available.” Staff clarified that the assessment of injury is still part of the statutory four-part test under ORS 537.621(2), but OWRD is not proposing any changes to the injury assessment under this rulemaking. Staff explained that the “Water is Available” definition is based on statutory authority, with the additional goal of having the draft rules reflect scientific understanding of the source of water to wells, namely storage and capture from surface water. The requirement that groundwater levels be reasonably stable to make a finding that “Water is Available” addresses the storage component of the source of water to wells and is focused on year-over-year stability of groundwater storage (a long-term dynamic). The assessment of injury under ORS 537.621(2) is concerned with seasonal, acute impacts to other users (a short-term dynamic), and thus is addressed separately from “Reasonably Stable Water Levels” and “Water is Available.”

A RAC member noted that once a permit is issued, the permittee can apply for a permit amendment if they need an additional point of appropriation (POA) or different location; however, if a permittee does not develop the full requested rate, a certificate is issued for less. The RAC member asked what harm there would be in leaving out the provision under (57)(f)

that the requested rate be achievable. Staff acknowledged that permit amendments are an option, but if the applicant needed to add numerous wells to achieve the requested rate, that would raise concerns about injury to other groundwater users. Therefore, OWRD does not provide a paper water right for something that is not physically plausible. The RAC member responded that the capacity of a given well is different from the capacity of the aquifer; therefore, the provision under (57)(f) did not seem relevant to the assessment of whether “water is available.” Furthermore, the RAC member was concerned that where an applicant is proposing to use an existing well with the intention of deepening the well to increase its capacity, the proposed language under (57)(f) would be too restrictive. Another RAC member acknowledged that while the language proposed in (57)(f) seems ostensibly sensible, it may present some problems in practice.

Staff reviewed the major changes to Division 300 in the draft rules versus the current rules.

A RAC member asked for confirmation that, under the current rules, “capacity of the resource” is still part of the review of a new application until and unless the proposed new rules are adopted. Staff confirmed that was the case.

### **Revised Draft Rules - Division 8**

#### ***Flow Chart***

Staff used the provided flow chart to illustrate the subject Division in relation to the Public Interest Presumption and Water Is Available

Staff reviewed proposed changes to Division 8, including

- limiting the definition of OAR 690-008-0001(8) “Overdrawn” to an assessment of the total authorized groundwater use compared to the average annual recharge,
- requiring four (4) total annual high water level measurements to calculate the average rate of decline under the definition of OAR 690-008-0001(9)(a) “Reasonably Stable Water Levels,”
- limiting the allowable rate and total water level declines which may be considered “Reasonably Stable Water Levels” under superseding basin program rules,
- removing the word “contributive” from the definition of OAR 690-008-0001(10)(a) “Substantial or Undue Interference,” and
- minor formatting changes for clarity and consistency.

Staff noted that one RAC member had requested that a provision be added allowing total water level declines of up to 15% of the saturated thickness of certain aquifers where the saturated thickness is greater than 500 feet. Staff responded they would share the request with the Water Resources Commission.

#### ***Major Changes from Current Rules***

Staff reviewed changes to Division 8 proposed in the draft rules versus the current rules.

A RAC member questioned whether the more limited definition of “Overdrawn” might affect other rules or statutes. Staff responded that was not known to be an issue.

A RAC member asked where else in rule the term “Reasonable Stable Water Levels” is used and how the proposed Division 8 definition differs. Staff responded that “reasonably stable water levels” is used in Division 507, i.e., the Umatilla Basin program rules pertaining to the Butter Creek and Stage Gulch Groundwater Critical Areas. Staff further responded they were not aware of anywhere else in the rules where the term “reasonably stable water levels” appears, and the only known appearance in statute is in ORS 537.525, which is a general policy statement concerning groundwater appropriation. The RAC member indicated that the proposed Division 8 definition may be more stringent than the current definition found in basin program rules pertaining to critical groundwater areas. Staff disagreed that the proposed Division 8 definition is more stringent, noting that the Umatilla Basin program rules define “reasonably stable water levels” as a 5-year average of zero water level change, whereas the proposed definition of “reasonably stable water levels” in Division 8 would allow for a rate of decline of less than 0.5 feet per year. Staff also noted that the proposed Division 8 definition includes a provision allowing for basin-specific definitions of “reasonably stable water levels,” within limits.

A RAC member asked how changes in annual precipitation would be considered when assessing whether groundwater levels are “reasonably stable.” Staff responded that the quantitative limits proposed in the definition of “reasonably stable water levels” were selected after review of available water level data in wells that respond significantly to cyclical climate fluctuations; therefore, such fluctuations are already incorporated into the definition. However, staff noted that longer term, sustained climate changes were not incorporated into the definition as the impact of such changes on groundwater levels remain unclear.

### **Revised Draft Rules – Division 9**

Staff reviewed proposed changes to Division 9 including:

- Removing language from the proposed definition of “Effective and timely manner” related to the process of making the determination, as such process language is already and more appropriately specified in OAR 690-009-0050,
- Simplifying references to “substantial or undue interference” to just “substantial interference” as “undue” was used only infrequently,
- Adding statutory references related to Limited Licenses (ORS 537.143) and Emergency Use Drought Permits (ORS 536.750),
- Adding language to OAR 690-009-0040(1)(a) to clarify that appropriate information provided in a new water right application or in the public comment period for an application will be used in making determinations of hydraulic connection and the potential for substantial interference, and
- Adding a clarifying reference to OAR 690-008-0001(10)(a), the surface water component of “Substantial or Undue Interference,” in the preamble for OAR 690-009-0050, with the intention that Rule 0050 would continue to function as it does currently.

### ***Major Changes from Current Rules***

Staff reviewed major changes to Division 9 proposed in the draft rules versus the current rules.

A RAC member asked for clarification regarding the reference to “all...existing appropriations” in the preamble to the proposed Division 9 rules. Staff responded that the proposed rule changes in Division 9 are intended to focus on new groundwater allocations while retaining the current function of Division 9 with respect to regulation of existing groundwater rights; therefore, the reference to “all...existing appropriations” was retained to preserve the function of Rule 0050, which relates to regulation of existing groundwater appropriations.

A RAC member asked whether the past tense language “...may have caused substantial interference...” in OAR 690-009-0040(4) is meant to apply to existing groundwater appropriations. Staff responded they would review the language, reiterating that the proposed rule changes are intended only to apply to new groundwater allocations.

A RAC member asked for confirmation that, under the proposed rules, where groundwater is hydraulically connected with surface water, groundwater availability will be dependent on surface water ability which is largely over-appropriated and would mean no more groundwater appropriations. Staff confirmed that under the proposed rules there are likely to be fewer findings that groundwater is available for additional appropriation due to hydraulic connection with over-appropriated surface water. Staff further noted that the result is consistent with the doctrine of prior appropriation because over-appropriated surface water means senior users are already being impacted; therefore, additional impacts by new groundwater users would not be justifiable. Staff acknowledged there are groundwater reservoirs that are not hydraulically connected to surface water, noting such reservoirs are not very common. The RAC member expressed concern about the effect the proposed rules would have on senior water rights. Staff responded that the proposed rules would not affect senior water rights other than protecting them. Another RAC member responded that science indicates that the current policy of groundwater allocation has been unintentionally injuring senior surface water rights. While the proposed rules may limit additional groundwater availability in the near term, in the long term they will be far more protective of existing water users.

A RAC member noted that a finding of “potential for substantial interference” (PSI) could factor into other rules besides the Division 300 definition of “Water is Available,” e.g., the public interest review under Division 33.

A RAC member commented that the dependence of the determination of water availability on the Water Availability Reporting System (WARS) is a major flaw in the proposed rules. The RAC member stated that he did not think WARS accurately depicts current water availability and, therefore, he did not think the proposed rules could be applied justly by relying on WARS. Staff noted that the assessment of groundwater availability also considers regulation history, i.e., whether senior surface water users are having their water rights met, which is a separate analysis from WARS. The RAC member responded that if WARS indicates water is not available, then groundwater would be determined not to be available, regardless of regulation history.

A RAC member asked whether WARS is being updated. Staff responded that OWRD received funding from the legislature to update WARS within a 6-year time frame. The RAC member suggested that the proposed rules apply a precautionary principle, but as WARS is improved, the proposed rules may become less overly precautionous.

A RAC member commented that they did not think the rules reflected the significant work being done by senior water users to conserve water. The RAC member expressed concern that the proposed rules would increase conflict over water. The RAC member encouraged more consideration of how to store water and share water amongst multiple uses given that climate change would lead to earlier, more rapid runoff. Staff noted that conservation measures by senior users would create opportunities to transfer the conserved water. The RAC member responded that the transfer process is problematic. Another RAC member commented that they think the proposed rules do encourage conservation because if water levels stabilize due to conservation, more groundwater could then be available for appropriation. Where surface is over-appropriated, conservation would enable more users to get their water rights met. The first RAC member responded that the transfer statutes do not allow that kind of flexibility and that they see the proposed rules as a moratorium. The other RAC member responded that they don't see the proposed rules as a moratorium if water is available.

A RAC member commented that a lot of historic water use was likely not reported. Another RAC member added that people's discomfort with WARS data speaks to the need for a comprehensive measurement and reporting requirement for all water use.

A RAC member expressed concern that overlap in timing for the rulemaking effort with the legislative session limited the ability of impacted parties to engage with the rulemaking process. The RAC member did not think the proposed rules would be more protective of senior users. The RAC member wanted more focus on data-gathering efforts as opposed to proposing new rules. The RAC member was concerned that many terms in the new rules could apply to existing water users. The RAC member agreed with another member that the proposed rules are potentially a moratorium on new water uses except for those with the resources to conduct their own studies. The RAC member did not believe the rulemaking process should proceed without further discussion of these issues.

A RAC member commented that the measurement and reporting system does not incentivize conservation and that water users should not be at risk of losing their right if they conserve water.

### **Division 400**

#### ***No changes***

Staff reviewed explained to the RAC that OWRD was no longer proposing any changes to Division 400, because the Division is no longer referenced in the Division 300 definition for "Water Is Available."

## **Division 410**

### **690-410-0070 “Water Allocation”**

Staff reviewed the proposed changes to OAR 690-410-0070(2)(b), namely that water shall only be allocated when available from the requested source.

A RAC member noted that OAR 690-410-0070(2)(b) includes a statement that restrictions on new exempt groundwater uses may be considered when water is not available from a groundwater source. The RAC member considered this wording to be a significant change and noted that a similar policy change in Washington State had become a major political issue. Staff responded that the proposed language was only for clarification and was not a change in OWRD’s authority to regulate exempt groundwater uses, but that they would review the proposed language considering the RAC member’s comments. The RAC member responded that exempt uses became an issue in Washington State after a state supreme court ruling forced the State to regulate exempt uses where water was not available. The RAC member stated that the result was the creation of basin plans that allow additional appropriation only after mitigation is provided to offset the impact. The RAC member noted that such mitigation is not always the responsibility of the applicant; counties and public utility districts were authorized to implement large scale recharge, re-use, and other projects, sometimes with state and federal funding, to allow for continued growth without harming the resource or senior rights. The RAC member suggested that something similar may occur in Oregon following the rule changes, but care would be needed in structuring such programs to offset the tendency for water to flow only toward the wealthy.

### **Review Objective, Framework, & Approach**

Staff reviewed the rule writing objectives, framework, and approach.

A RAC member noted that while he did not agree with all aspects of the proposed rules, he did appreciate the improved clarity in the current draft as compared to previous drafts.

### **Follow Up Items – Artificial Recharge (AR)/Aquifer Storage & Recovery (ASR)**

Staff provided follow up regarding the potential use of artificial recharge (AR)/aquifer storage and recovery (ASR) to stabilize groundwater levels and augment individual use, with examples. Staff discussed how the proposed rules relate to rules for permitting AR and ASR, noting that AR/ASR are intended to take surface water during the storage season when available and store it in an aquifer; that process should not be changed by proposed rules. Staff also noted recent interest in pumping groundwater from alluvial aquifers to then use for AR/ASR and suggested those interested request a pre-application conference with OWRD staff.

A RAC member asked for confirmation that the proposed rules would not change the ability to use surface water for AR/ASR when surface water is only available for a few months of the year. Staff confirmed that the proposed rules do not change that ability.

### **Follow Up Items - Limited Licenses/Drought Permits**

Staff summarized how temporary uses under Limited Licenses or Emergency Use Drought Permits would be affected by the proposed rules, noting that the short-term nature of these uses

would be considered when making a finding on the potential for substantial interference (PSI).

### **Follow Up Items – Transfers**

Staff provided follow up on the evaluation criteria for transfers and clarified that the proposed rules will not affect the transfer evaluation process.

A RAC member noted that comments equating the proposed rules to a moratorium on water availability do not acknowledge the possibility of a market for transferred water rights. The RAC member suggested that there is a moratorium on land in Oregon, in that there are borders and a fixed amount of land, but there is a vibrant economy around land sales in Oregon. The RAC member suggested that a similarly viable market for water would address many concerns, including promoting efficiency. The RAC member acknowledged difficulties with the transfer process and asked if there were ways the process could be improved. Staff acknowledged there was a longer conversation to be had regarding transfers and deferred to the Department’s leaders as to when that conversation should take place. Another RAC member agreed that a strong water market with protections for those less advantaged could incentivize conservation and efficiency.

A RAC member suggested that the Allocation of Conserved Water Program could provide opportunity given new technologies used in agriculture to conserve water.

A RAC member asked how OWRD differentiates the injury assessment for transfers from the assessment for potential for substantial interference when reviewing new applications. Staff responded that “injury” has its own definition in Division 380, but a more detailed comparison was outside the scope of the meeting.

A RAC member commented that transfers would become very important where new groundwater rights would not be available. The RAC member expressed a desire for the transfer process to be easier and more transparent. The RAC member also noted concerns about the viability of the Allocation of Conserved Water Program because of the requirement that participants forfeit 25% of the water conserved. Another RAC member concurred that the transfer process is difficult.

A RAC member expressed concerns about the direction of the rules, stating a need for additional tools for transfers, particularly temporary transfers. The RAC member also expressed concern that there was too much focus on instream flows at the expense of other users.

### **Draft Statements of Need, Racial Equity Impacts, and Fiscal and Economic Impacts**

OWRD staff asked RAC members if they had any questions or comments regarding the draft Statement of Need to be included with the Notice of Proposed Rulemaking. One RAC member asked if the proposed rules would allow applicants to submit their own data as part of application process. Staff responded affirmatively. The RAC member then asked if OWRD has included the additional burden on applicants of collecting data to support applications and any potential economic inequities that may occur as a result. Staff responded that the draft Statement of Fiscal and Economic Impacts does mention that small businesses may incur additional costs associated with data collection but that welcomed input from the RAC on any specific costs they wished to share. The RAC member noted that some businesses may have more financial resources at their

disposal to perfect their application (e.g., Amazon versus a small family farm). Staff acknowledged the comment, emphasizing however that the required equity statement is specifically focused on racial equity. The RAC member responded that she did not represent a group focused on racial issues. Another RAC member suggested trying to extrapolate equity impacts through a data analysis. OWRD staff responded that they would review the language to see how racial equity with response to economic impacts might be addressed.

A RAC member noted that the language in the Fiscal and Economic Impact Statement understates the fact that municipalities will need to find alternative water supply sources to meet future demands. He also suggested that the proposed rules amount to a moratorium on new groundwater permitting in Central Oregon and asked that the statement clearly state as much. He further noted the Governor's priority regarding supplying additional affordable housing and potential challenges in doing so. Staff responded that the Racial Equity Impact Statement does include an acknowledgment of potential challenges local governments might face in providing affordable housing if water supply options become more costly because of the rulemaking. Staff agreed to review the language and consider including it in the Fiscal and Economic Impact Statement as well.

One RAC member commented on the well construction analysis included in the Fiscal and Economic Impact Statement, noting that some of the numbers differed from those he had submitted. Staff explained that the number of well drilled differed because his estimated included all new well construction and OWRD's are limited to new wells constructed for the purposed of accessing new irrigation groundwater rights. The RAC member also stated he didn't include any estimates after 2019 in his analysis because issuance of permits had slowed down. Staff responded that they chose a range of values for that very reason—a high figure pre-pandemic and the most recent figure. The RAC member acknowledged that OWRD's final estimates were not much different from his, but he did wish to note that they were different. He also requested that OWRD try to determine economic impacts on small farms.

A RAC member commented that with respect to municipalities, OWRD should examine economic impacts from both sides of the issue, namely the cost of acquiring new water rights as well as the cost of avoiding remediation needed in response to declining groundwater levels. She pointed to the cities of Hines and Burns as examples. She noted \$45 million coming to the Harney Basin to address declining groundwater levels. She also noted that no one applies the term "moratorium" when discussing the fact that surface water is no longer available across much of the state. She urged caution with respect to use of the term.

One RAC member stated she appreciated the acknowledgement of litigation costs in the Statement of Fiscal and Economic Impacts. She suggested OWRD include current litigation costs and how much over budget those costs are. She noted that irrigation districts are considered "local governments" and may have rising litigation costs because of the proposed rulemaking. Staff responded that the statements in the Notice of Proposed Rulemaking are narrowly focused on the anticipated costs associated with the proposed rulemaking, which makes it difficult to separate out the legal costs associated specifically the rulemaking. The RAC member said she thought including how much legal costs were over the agency's budget during the last biennium would still be helpful. Another RAC member responded that reduced legal conflict associated

with over allocating water may also be a result of the rulemaking.

A RAC member stated that she thought it would be useful to identify which basins would be most affected to provide members of the public with greater understanding regarding the rulemaking impacts.

Another RAC member offered broad comments in support of the rulemaking. However, she noted that the final draft of the rules does not project into the future, which would benefit senior users. With respect to WARS, she noted its utility while acknowledging the need for updates. She also commented that the six-year timeframe for the updates seems excessive given the urgency. She further noted that while some RAC members question WARS reliance on permitted rights as opposed to water use, using permitted rights does build in a margin of safety.

### **Public Comment**

Members of the public offered the following comments:

- Glen Barrett (Water for Life) stated that he has made similar comments previously but still thinks unintended consequences may arise from the proposed rule changes, citing references to “existing uses” in Division 9. He also noted that OWRD has other ways to regulate groundwater and asked that the Statement of Need clarify why these rules are needed when other options are available. He urged caution in the use of models, noting they do not work everywhere including in the Klamath Basin. He also urged OWRD to consider the prospects of large companies like Amazon battling new farmers over water.
- John Short (Water Right Services, LLC) introduced himself as someone with 20 years of experience helping applicants acquire water rights, noting that he has been involved in a substantial number of transfers as well as buying and selling rights. He noted that pending groundwater applications really have not moved since 2019 and questioned whether the new rules would not apply to those existing applications. He noted that OWRD does not have mitigation programs other than one in the Deschutes Basin and future programs are less likely because of concerns over the capacity of the resource. In theory, the allocation of conserved water program seems like a viable option, but in practice has not accomplished much. He explained that he has had several clients who went most of the way through the conserved water process before realizing they would have to forfeit a proportion of their conserved water. Regarding transfers, Mr. Short said it is getting more difficult to identify the same source within which a groundwater right may be transferred; if it was as simple as keeping it in the same United States Geological Survey Hydrologic Unit (HUC), that would be easier. With respect to transfers, Mr. Short noted that the backlog for review is two years even if the application is expedited, which is a tough timeline for businesses. He stated that the new rules are essentially a moratorium. He then noted that even when an application does get through the process, Water Watch contests it.
- Roger Nicholson (Water for Life) commented that the allocation of conserved water statute was a bill supported by Water for Life. He noted that the 25% forfeiture requirement was necessary to move the bill forward. He noted that he is a farmer and rancher in Oregon, Nevada, and California and was bothered by the current rulemaking. He noted that he served on the RAC for Division 25 which was intended to mitigate bad effects of Division 9. He urged caution in making changes to Division 9. He has asked

legislators to contact OWRD to confirm that the proposed Division 9 would not affect existing wells. He thinks the process will impact existing wells. He urged caution and asked OWRD to get more input from well users around state. He noted that in Klamath, OWRD shut down hundreds of well users based on modeling despite individual wells showing full recovery because they were artesian. He stated that there should be a contested case on every well proposed to be shut down. He stated that one model does not work for all users, and he had concerns over how science has been integrated into the rulemaking process. He closed by commending the RAC members for the time they have spent on the process.

### **RAC Roundtable Discussion**

RAC members offered the following comments during the Roundtable discussion:

- Several RAC members expressed appreciation for the time and effort OWRD put into the rulemaking.
- Several RAC members noted the urgency of the rulemaking effort.
- Several RAC members noted the latest draft rules were much clearer than prior drafts.
- Several RAC members noted that more data and information would improve the groundwater allocation process.
- Several RAC members expressed support for the goals of the rulemaking, namely, to manage groundwater resources more sustainably and to protect existing water rights holders.
- Some RAC members suggested that WARS needed updating prior to further efforts to updating the rules.
- Some RAC members indicated that it was not clear the rules would not apply to existing water rights holders.
- Some RAC members suggested that the rulemaking amounts to a moratorium on new groundwater rights.
- One RAC member offered to provide additional comments concerning economic impacts on municipalities. He suggested there was a way to define “reasonably stable ground water levels” specific for the Deschutes Basin. He did not think further analysis was needed before acting and encouraged OWRD and the Commission to consider his proposed rule language.
- One RAC member reiterated his concern over the effects of the proposed rules on exempt well uses. He stated that the rules are moving in the right direction and that OWRD cannot keep postponing action because of imperfect regulation. He suggested that some of the imperfections may get settled out of court. He asked OWRD to consider the impacts of the rulemaking on citizens in drier parts of the state.
- One RAC member commented that he found the RAC process interesting, reinforcing how difficult groundwater management is. He stated it was important not to “shoot the messenger” because there is only so much water in Oregon. He suggested management is challenging because in many cases we are managing a complex resource we cannot see.
- One RAC member said he felt he benefitted from the rulemaking discussions and appreciated be able to audit the process.
- One RAC member identified herself as a bit of an outsider in the sense that as an academic, she does not necessarily represent a vested interest with respect to water. She

appreciated learning from everyone's expertise. She characterized the concerns of RAC members in terms of two groups. The first group consists of those worried about pending applications and existing rights. She suggested that a very simple inclusion in the rule language clarifying that the rules will not affect existing rights would make people more comfortable and would be worth OWRD's time and effort. She described the other group of concerned RAC members as those who do not currently have water rights or a pending application. She suggested that clarifying who will be affected by new rules geographically might help alleviate some of those concerns. She further offered that people who may face a denial of a new groundwater application fall into two groups: those who will be affected by OWRD reliance on inadequate information in WARS and those where WARS information is adequate to support a determination there should not be a new groundwater right issued because of over appropriation. She suggested OWRD consider exploring other information if there are serious problems with the data in WARS. She also acknowledged the rules do achieve what the Commission has asked and appreciated the improved readability and organization compared with prior draft versions.

- One RAC member noted the need for OWRD to clear the backlog of applications. She felt that a "number of things" needed to be addressed in the rules and by legislators before her members would be able to support the rules.
- One RAC member noted that he has seen some of the impacts to people and the environment from over allocation in the Harney Basin and that he views Harney is microcosm of groundwater issues. He mentioned the recent New York Times article, which cited Oregon as a place where groundwater declines are particularly severe (available here: <https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html>). He also stated that we only have two alternatives, either accept the fact that hydrologic principles indicate that new users can negatively impact nearby streams and therefore negatively impact senior water right holders or accept the negative impacts. He further stated that anyone who wants to protect senior users should be supportive of the proposed rules.
- One RAC member commented that the rulemaking is long overdue, citing negative impacts from overuse around state. With respect to data, she noted that we should always strive for more and better data but that we also need to use the data we do have in order manage groundwater more sustainably. She said she was puzzled by the position taken by some RAC members suggesting that existing data is sufficient to issue more groundwater rights under current rules but is not sufficient to support the new rulemaking. She urged rule adoption as expeditiously as possible.
- One RAC member stated that she felt compelled to defend the regional groundwater models, noting that they are state-of-the-art tools for managing the resource. She acknowledged the appeal of acquiring real-time data to manage the resource better but did not think that goal was realistic given the timescales involved and delayed detection of impacts to streams due to groundwater pumping. She acknowledged that water rights are issued essentially in perpetuity and did not think OWRD has the means to adjust water use each year based on current conditions.
- One RAC member urged caution concerning special rules for a single basin, given the number of basins and their unique nature. He stated that the new rules are needed and somewhat urgent. He also asked OWRD to pay attention to water equity concerns in the

drier and more rural parts of the state.

- One RAC member expressed appreciation for OWRD’s efforts to facilitate and respond to RAC concerns, acknowledging that it is not possible to please everyone. She noted she was generally supportive of the goals of sustainable allocation of water rights and protecting senior water rights. However, she also noted that the Deschutes Basin has an active water market, but that market is not something in which economically disadvantaged people can participate.
- One RAC member noted that the timing of the rulemaking effort could have been better but acknowledged that the timing was driven by the Commission. He also commented that rarely do rules stay in a “box” without impacting other aspects of water policy. He urged the RAC to keep the bigger goal in mind concerning equitable sharing of a resource that is in demand. He suggested that water is the “new oil.” He indicated that his association as well as the broader agricultural community would continue to engage with OWRD. He stated that the rulemaking has big implications and economic resonance beyond those to the nursery and greenhouse industry. He stated that his association would provide comments on the rulemaking.
- One RAC member commented on the reference to Gleason et al. (2020) definition of sustainability, stating that it seems as though you could still determine something was sustainable even though a hydraulic connection to over appropriated surface water would lead to groundwater allocation denial. He acknowledged overallocation issues in the Harney Basin issues but also stated that these issues are not representative of the whole state. He commented that he felt the new rules swing the “pendulum” too far in the other direction. He stated that the rules are based on the Commission’s misperceptions of what is going on over the whole state. He suggested that the way of the future was to look to aquifer storage and recovery projects. He also indicated that the need for transfers was going to become more prevalent and that the process for acquiring a new transfer needed to be more efficient. He noted that most transfer applications take over a year to process. He also urged OWRD to review rule interpretation to insure it aligns with the rulemaking intention.
- One RAC member commented that she thought the proposed rulemaking was not consistent with the Commission’s intent because it amounted to a moratorium on new groundwater rights. She also noted the limitation of the rulemaking to Oregon, which does not control what happens in California or Washington. She suggested that basin by basin management would be a viable alternative. She noted her membership would provide formal comments once the draft rules were out for public comment. She suggested that a lot of the focus was on the eastside of the state but that the Willamette Valley also may be heavily impacted by the rulemaking. She appreciated OWRD’s responsiveness to her concerns regarding the rulemaking schedule. She also urged OWRD to reconvene the RAC after the close of public comment period before presenting the final draft rules to the Commission. She asked when DOJ would be reviewing the rules and asked for another RAC meeting if the rules are changes substantially in response to DOJ input. OWRD staff responded that DOJ has reviewed the current draft of rules.

### **Schedule/Wrap- Up and Next Steps**

Staff noted that the rulemaking would be a topic of discussion at the next Water Resources Commission meeting, to be held September 28 and 29 in Burns. Staff also noted that the

presentation would highlight some of the concerns raised by the RAC. Staff then reviewed the timeline for public comment and rule adoption, noting that the comment period would extend from November 1, 2023, to February 1, 2024, and public hearings would be held in December and January. The Commission will consider the rules for adoption in Spring of 2024.

A RAC member noted that the September meeting may be the first opportunity OWRD has had to discuss the proposed rules with the Commission. He suggested pursuing another opportunity to present to the Commission prior to the rules going out for public comment. Staff responded that they would consider the suggestion and discuss with leadership.

The meeting adjourned at approximately 12:23 pm.