

HARTT Laura A * WRD

From: Adam Sussman <asussman@gsiws.com>
Sent: Friday, July 7, 2023 8:06 AM
To: LIEBE Annette I * WRD; IVERSON Justin T * WRD; HARTT Laura A * WRD
Cc: MCKAIN Emelie L * WRD; Michael Buettner; Michael Preedin
Subject: FW: REMINDER: Please provide input on GW Allocation Draft Rules by COB July 7 (Friday))

Annette, Justin and Laura:

During the RAC meetings (and the Commission's Groundwater Advisory Committee Meeting on 6/13/2023) Central Oregon Cities Organization (COCO) has expressed a number of concerns about the draft rules. The comments that follow are not a comprehensive summary of COCO's concerns, instead they focus on two specific areas of concerns (1) impacts to the Deschutes Basin Groundwater Mitigation Program, and (2) the definition of "Reasonably Stable Groundwater Levels."

Impacts to Deschutes Basin Groundwater Mitigation Program

The foremost concern is that the draft rules dated 6/21/2023 continue to put the entire Deschutes Basin Mitigation Program at risk. As I have discussed at the RAC meetings and over Teams with OWRD staff, OAR 690-505-0630 states that:

"(1) If a ground water permit applicant satisfies the mitigation obligation, notwithstanding OAR 690, division 9, for the purposes of OAR 690, divisions 33, 310, 400, and 410, the proposed ground water appropriation is deemed to be a ground water appropriation that does not have the potential for substantial interference with surface water."

This provision was specifically developed to document that if mitigation is provided (as required by the mitigation program rules) then additional analysis of impacts to surface water from groundwater pumping would not be conducted. This regulatory certainty has allowed the program to function since its inception in 2002. The 6/21/2023 draft rules would put this program at risk.

The draft rules add the following new provisions for the definition of "water (specifically groundwater) is available" in 690-300-0010(57):

In subsection (d): Groundwater levels must be reasonably stable (per Division 8);

In subsection (e): The proposed use cannot impair or substantially interfere with surface water rights (per Division 9). (Please note that having PSI does not necessarily mean water is not available because the affected surface water source may be available, such as the Willamette or Columbia Rivers. This definition should be revised to correct this oversight.)

In subsection (f): The proposed use must be "available within the capacity of the resource" (per Division 400). (We assume this is intended to mean the groundwater supply needed to meet the proposed use must be available within the capacity of the resource.)

The definition of "capacity of the resource" in the draft rules for Division 400 now includes "overdrawing of the groundwater resource" (per Division 8). However, the definition of "overdrawing" references not only impacts to groundwater, but also impacts to surface water. This creates a new pathway to considering impacts to surface water outside of the context of Division 9 and associated Division 33, 310, 400 and 410. This, in turn, puts the Deschutes Basin Mitigation Program at risk because, as shown in the Division 505 rule quoted above, the mitigation program includes an

exception to the provisions of Division 9 and associated Division 33, 310, 400 and 410, but does not include an exception to provisions of Division 8. Accordingly, a new application to use groundwater within the Deschutes Basin Study Area could be found to not comply with other rules of the Commission and be denied due to impacts to surface water, even though the applicant would be providing mitigation consistent with the mitigation program rules. (For the same reason, references in other rule divisions to the definition of “overdraw/overdrawing” in Division 8 should be eliminated.) To address this concern, COCO recommends that OWRD eliminate subsection (f) from the definition of the “water is available” in OAR 690-300-0010(57). This change would remove the definitions of the “capacity of the resource” in Division 400, and “overdraw/overdrawing” in Division 8 from the definition of “water is available.” OWRD should eliminate OAR 690-300-0010(57)(f) for multiple reasons:

- 1) The term “overdraw” is a statutory term that is related to management of groundwater resources, particularly through the designation of a critical groundwater area. It is not a term related to the permit application review process, as it would become if subsection (f) is retained.
- 2) The above-described series of internal references to other definitions incorporates over-appropriation of surface water (in the definition of the “capacity of the resource” in Division 400) and impacts to surface water from groundwater pumping (in the definition of “overdraw/overdrawing” in Division 8). However, there is no need to retain provisions to address impacts to surface water in the definition, because it is clearly addressed in the review conducted under Division 9.
- 3) Retaining 690-300-0010(57)(f) will just recreate in a more convoluted form the very problem the Department says it is trying to fix. The draft rules propose to delete OAR 690-400-0010(11)(a)(B), which provides a definition of “Over-Appropriated” specific to groundwater because the Department has stated that it often does not have sufficient information to make that determination, leaving OWRD staff no option but to check the box on the groundwater review form that says that groundwater “cannot be determined to be over appropriated.”. However, the definition being deleted is largely the same as part of the definition of “overdraw/overdrawing” in Division 8. Thus, retaining OAR 690-300-0010(57)(f) will continue to include this definition and associated finding in the permit review process, despite the Department saying it typically has insufficient information to make that determination.

Definition of Reasonably Stable Groundwater Levels

COCO continues to be concerned about the overall direction of the rules and the reliance on water levels as a proxy for evaluating groundwater sustainability. Putting an arbitrary time limit on how long a decline is “reasonable” ignores the many reasons the hydraulic head in a groundwater system may be changing. As COCO has reiterated multiple times, the current rule definition does not make sense in the context of the Deschutes Basin and as outlined in COCO’s White Paper, *Understanding Upper Deschutes Basin Groundwater Levels* <https://gsiwatersolutions.com/news/white-paper-upper-deschutes-groundwater-levels.html>

I previously sent along the concept below that can be incorporated into a definition of “Reasonably Stable Groundwater Levels.” This concept defines the term as a percent of thickness of certain groundwater reservoirs that can be removed, regardless of rate of observed declines. (See below – **highlighted text is new.**)

“Reasonably Stable Groundwater Levels” means that, for a well:

- (a) The annual high water levels as measured at one or more representative wells in a groundwater reservoir or part thereof: **meets (A) and (B) OR it meets (C):**
 - (A) indicate no decline or an average rate of decline of less than 0.5 feet per year over any immediately preceding averaging period with duration between 5 and 20 years. If data are insufficient to perform this test. Then the Department will presume that water levels are not reasonably stable; and
 - (B) compared with the highest known water level, have not declined or have declined by less than the smaller of 25 feet and 8% of the greatest known saturated thickness of the ground water reservoir; **OR**

- (C) for aquifers that can be ascertained or reasonably inferred to have a saturated thickness of 500 feet or greater, the representative high water level is 15 percent or less than the saturated thickness of the subject groundwater reservoir.
- (b) Water level data must be available in the year under evaluation to perform the tests in (a). However, in the absence of current data, a finding of reasonable stability may be presumed to persist for a maximum of 5 years beyond the most recent groundwater level measurement in the record.

We look forward to continued discussion and resolution of the issues identified above.

Sincerely,

Adam

Adam Sussman

Principal Water Resources Consultant

direct: 541.257.9001 | mobile: 541.602.5188

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GSI Water Solutions, Inc. | www.gsiws.com

From: HARTT Laura A * WRD <Laura.A.HARTT@water.oregon.gov>

Sent: Monday, July 3, 2023 11:48 AM

Subject: REMINDER: Please provide input on GW Allocation Draft Rules by COB July 7 (Friday))

Good morning, RAC members,

I just wanted to check in briefly with you all to remind you that we would like to receive any input you might have on the draft groundwater allocation rules reviewed to date (Divisions 8, 9, 300, 400, and 410) by COB Friday, July 7. Although we will discuss further during our next meeting, if you have any input to share at this time regarding the need, racial equity impacts, and/or economic impacts of the rulemaking, please provide that as well. This will give us time for internal reviews and to incorporate your feedback prior to our next RAC meeting on August 2, 8:30 am – noon (hybrid, Salem/Zoom). We will be sending out pre-meeting materials closer to the meeting date.

Thank you! Laura

[Laura Hartt \(she/her/hers\)](mailto:Laura.A.Hartt@water.oregon.gov)

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HARTT Laura A * WRD

From: LIEBE Annette I * WRD
Sent: Tuesday, July 25, 2023 8:51 AM
To: HARTT Laura A * WRD
Subject: FW: COCO/OWRD meeting 7/17 Follow-up
Attachments: Well_Construction_Slides.pdf; Reasonably Stable Water Levels_7_2023.pdf

Annette Liebe, JD
Technical Services Division Administrator
Oregon Water Resources Department
annette.i.liebe@water.oregon.gov
(971) 375-7322

From: Adam Sussman <asussman@gsiws.com>
Sent: Friday, July 21, 2023 3:03 PM
To: MCKAIN Emelie L * WRD <Emelie.L.MCKAIN@water.oregon.gov>; Mike Buettner <mbuettner@bendoregon.gov>; Owen McMurtrey <OMcMurtrey@gsiws.com>; Lori Faha (Lfaha@bendoregon.gov) <lfaha@bendoregon.gov>; Ken Lite <klite@gsiws.com>; LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>; GALL Ivan K * WRD <Ivan.K.GALL@water.oregon.gov>; KEMPER Joseph B * WRD <Joseph.B.KEMPER@water.oregon.gov>; SUFIT Carolyn W * WRD <carolyn.w.sufit@water.oregon.gov>; LAMARCHE Jon L * WRD <jon.l.lamarche@water.oregon.gov>; IVERSON Justin T * WRD <Justin.T.IVERSON@water.oregon.gov>; Joshua Wedding <Joshua.Wedding@redmondoregon.gov>; WOODCOCK Douglas E * WRD <Douglas.E.WOODCOCK@water.oregon.gov>
Cc: Doug Riggs <doug@nwpolicy.com>; Michael Preedin <mpreedin@ci.sisters.or.us>
Subject: RE: COCO/OWRD meeting 7/17 Follow-up

OWRD Team:

We wanted to reach out to say thank you for taking the time to meet with us on Monday and for keeping the lines of communication open. We appreciate the effort to meet in person to discuss these issues of great importance to Central Oregon cities. We are disappointed with what we heard and, upon reflection, it is clear we have not come to a common understanding of the science as it relates to influences on water levels in the Upper Deschutes Basin groundwater flow system.

After much discussion we heard that the OWRD's policy goal for this rulemaking is to protect existing groundwater users and water right holders. OWRD's current proposal would disallow issuance of new permits when water levels have declined 25 feet from their highest known levels. We understand that the Department's goal in enacting this rule would be to prevent a decline of 50 feet from the highest known water level because this is one criterion for "declined excessively." We also heard that apparently "the Commission has spoken" on this topic when they adopted the 50 foot criterion in 1988, against the backdrop of water level declines and critical groundwater area designations in the Umatilla Basin.

We understand that there are groundwater settings in Oregon where groundwater pumping is high in comparison to recharge and that having the ability to control new appropriations may make a meaningful difference in the magnitude and timeline for groundwater level changes in those settings. But based on the data and reports we shared, that is not the case in the Deschutes Basin. Groundwater pumping is less than 2 percent of average annual recharge. If climatic conditions remain significantly drier than average for long periods of time (which is *not* predicted by climate change models), even the total cessation of all existing groundwater pumping would not prevent continued water level declines.

Based on the peer-reviewed science, the Department's application of the proposed rule in the Deschutes Basin is arbitrary. If the Department's policy goal is to prevent impacts to existing groundwater users in the Deschutes Basin, a policy mechanism that intervenes directly in assisting groundwater users to replace shallow or inefficiently constructed legacy wells (which COCO has been supporting through the legislative process) would be much more effective.

We look forward to seeing edits to future iterations of the rules that reflect our concerns (and attached suggestions) about whether OWRD's proposed approach to addressing declining groundwater levels is appropriate for the hydrogeologic context of the Upper Deschutes Basin.

Sincerely,

Adam

Adam Sussman

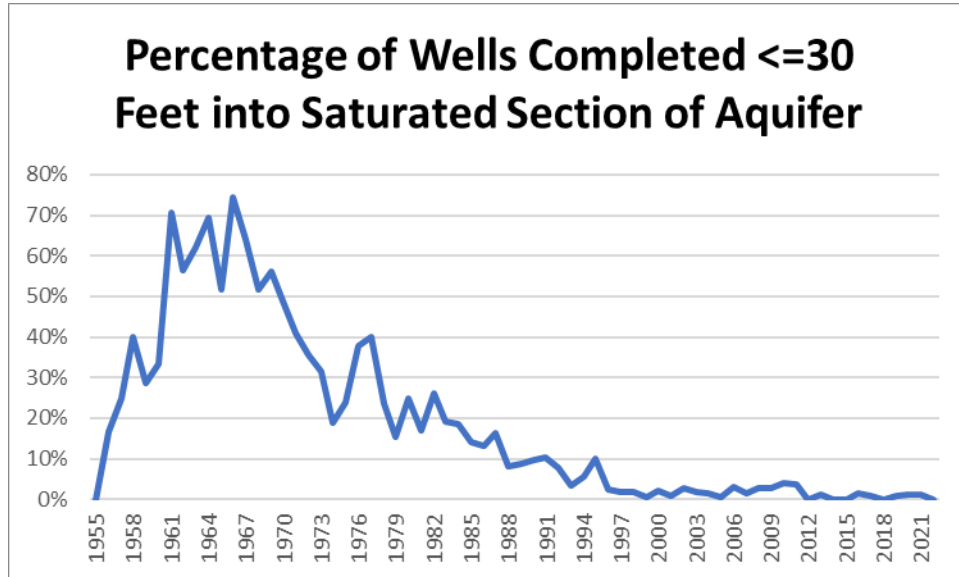
Principal Water Resources Consultant

direct: 541.257.9001 | mobile: 541.602.5188

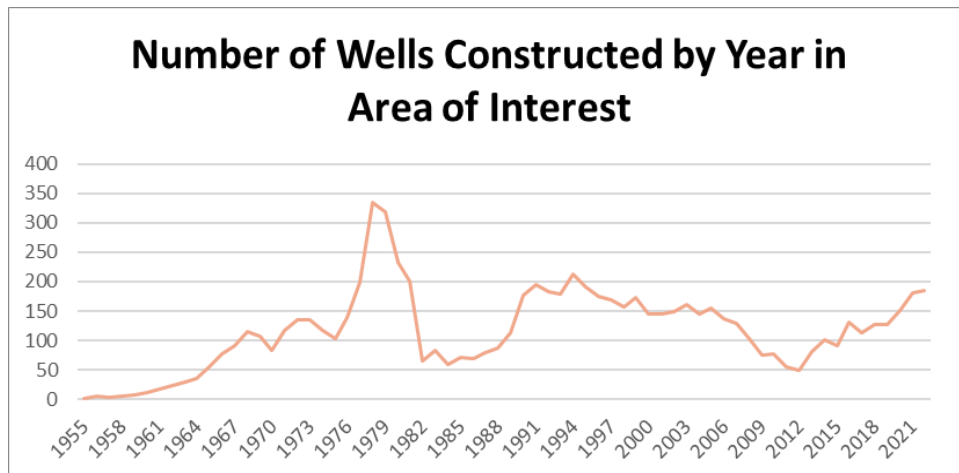
1600 SW Western Boulevard, Suite 240, Corvallis, OR 97333

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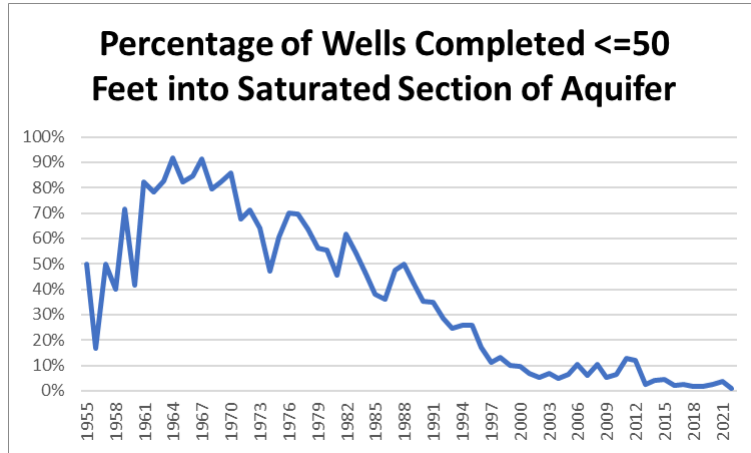
Well Construction Considerations



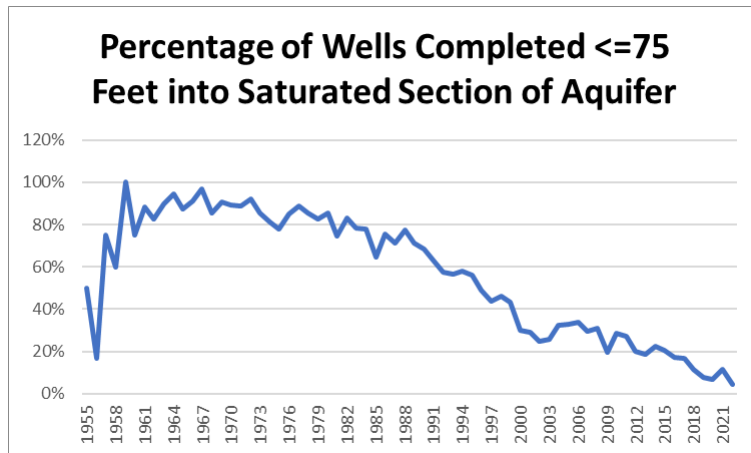
	Year Begin	Year End	Number of Wells Completed Less than 30 feet into Saturated Section of Aquifer	Total Number of Water Supply Wells Completed	Percent
Construction Boom 1	1967	1981	758	2432	31%
Construction Boom 2 (Pre-drought)	1988	1995	105	1338	8%
Construction Boom 2 (Post-drought)	1996	2005	25	1576	2%
Construction Boom 3	2014	2022	8	1211	1%



Well Construction Considerations

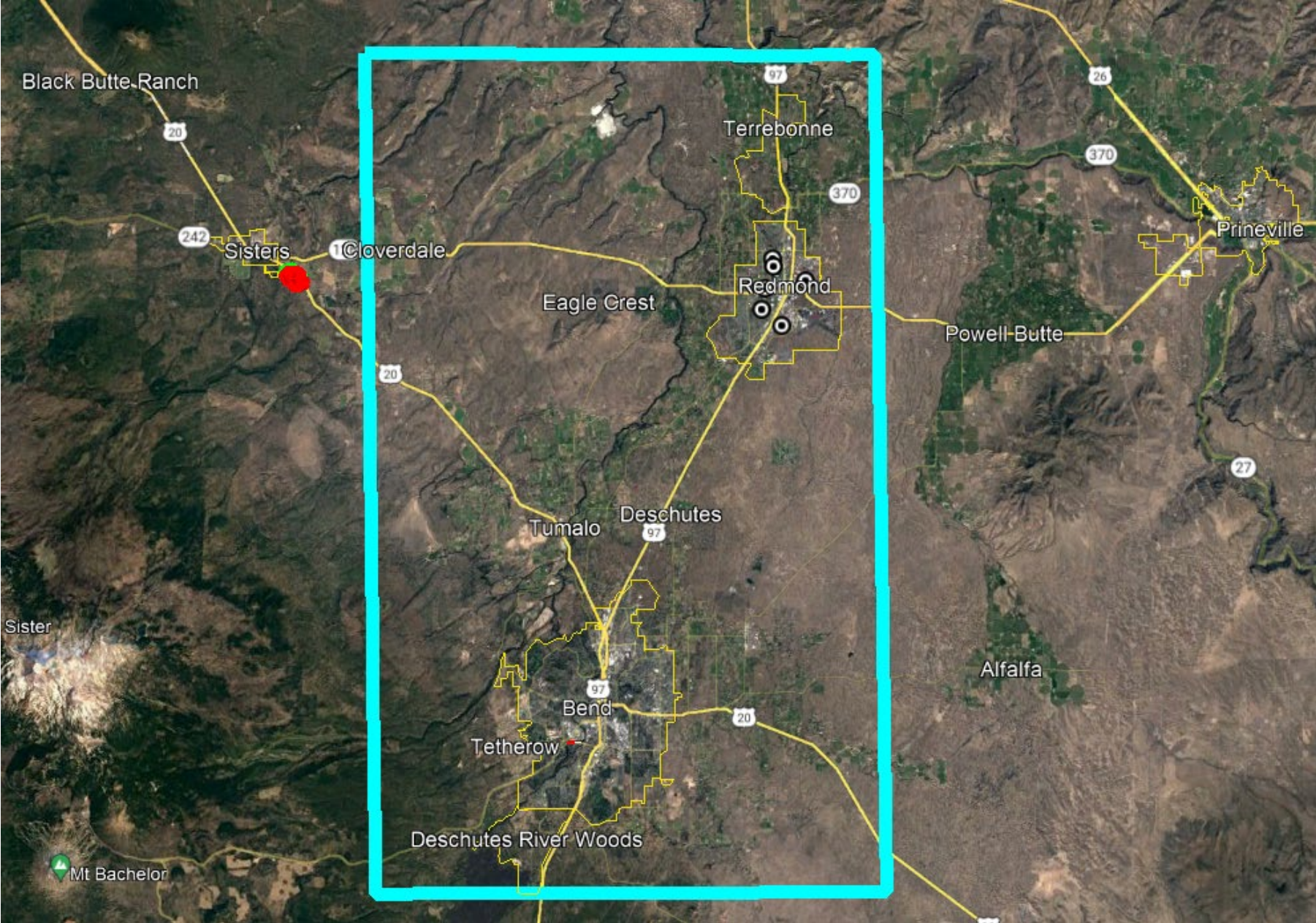


	Year Begin	Year End	Number of Wells Completed Less than 50 feet into Saturated Section of Aquifer	Total Number of Water Supply Wells Completed	Percent
Construction Boom 1	1967	1981	1565	2432	64%
Construction Boom 2 (Pre-drought)	1988	1995	422	1338	32%
Construction Boom 2 (Post-drought)	1996	2005	147	1576	9%
Construction Boom 3	2014	2022	31	1211	3%



	Year Begin	Year End	Number of Wells Completed Less than 75 feet into Saturated Section of Aquifer	Total Number of Water Supply Wells Completed	Percent
Construction Boom 1	1967	1981	2073	2432	85%
Construction Boom 2 (Pre-drought)	1988	1995	828	1338	62%
Construction Boom 2 (Post-drought)	1996	2005	570	1576	36%
Construction Boom 3	2014	2022	148	1211	12%

Area from which well log data were pulled.



highlighted text is new

“Reasonably Stable Groundwater Levels” means that, for a well:

(a) The annual high-water levels as measured at one or more representative wells in a groundwater reservoir or part thereof: **meets (A) and (B) OR it meets (C):**

(A) indicate no decline or an average rate of decline of less than 0.5 feet per year over any immediately preceding averaging period with duration between 5 and 20 years. If data are insufficient to perform this test. Then the Department will presume that water levels are not reasonably stable; and

(B) compared with the highest known water level, have not declined or have declined by less than the smaller of 25 feet and 8% of the greatest known saturated thickness of the ground water reservoir; **OR**

(C) **for aquifers that can be ascertained or reasonably inferred to have a saturated thickness of 500 feet or greater, the representative high-water level is 15 percent or less than the saturated thickness of the subject groundwater reservoir.**

(b) Water level data must be available in the year under evaluation to perform the tests in (a). However, in the absence of current data, a finding of reasonable stability may be presumed to persist for a maximum of 5 years beyond the most recent groundwater level measurement in the record.

HARTT Laura A * WRD

From: Jaeger, William K <wjaeger@oregonstate.edu>
Sent: Wednesday, July 5, 2023 4:02 PM
To: HARTT Laura A * WRD
Subject: RE: REMINDER: Please provide input on GW Allocation Draft Rules by COB July 7 (Friday))

Laura,

I have a few thoughts following our last RAC meeting that I'll share here.

The suggestion under "Rulemaking Need" that the preservation of the public welfare, safety, and health depends on a positive finding that "water is available" strikes me as a misleading and somewhat perilous claim. Water is available – but (like most everything else in Oregon) you just might have to buy it. One can buy water rights from somebody else who currently holds them. This is the way people needing land are able to acquire land. Oregon doesn't have any newly created rights to land, but that does not get in the way of having robust land markets that facilitate all kinds of transactions leading to changes in how the state's lands are put to new and varied productive uses, ones that benefit the public welfare, safety, and health. But we don't expect it to be free.

Thinking about the stakeholder dynamics in all of this, I find it useful to contrast two groups. One group includes interests who see gains for themselves or their constituents from a determination that allows for new groundwater rights. A second group includes those who currently hold water rights and in many cases have held them for decades and generations. Some of these second-group interests are less aware and less attentive to the way these rule changes may affect them. In many cases they have already seen their water rights encroached upon and diminished due to the hidden, common-pool problems to which groundwater resources are subject. In many basins across the state we observe reduced availability of water for fulfilling those prior appropriated water rights, the rights that according to the OWRC are the top priority. Given this OWRC mandate, and juxtaposing it with the differences between these two groups in terms of their awareness and incentives, there is a divergence between short-term and long-term aspects to this rule making process that, from my vantage point, needs buttressing on the side of the long-term.

This provides a segue to return to the importance of taking account of climate change. I very much appreciate the updated and nuanced explanations provided in an email to me (and Annette Liebe and Justin Iverson) by RAC member Professor Nick Siler. The takeaways would appear to be two: i) there is a lot of uncertainty about the multiple ways that climate change will affect water supply and demand, but likely will result in water being more scarce in summer when it is most needed; and ii) evaporative demand by plants will increase, but the rate of increase in ET for many crops may not be as high as the 15% by 2050 that I mentioned drawing on a 2015 OWRD report.

I think there are two important follow-ups. First, climate change will not stop at 2050, and the continued increase in average mean temperatures certainly through 2100 and beyond means that significant increases in the crop water demands should be anticipated. As I understand it, declines in soil moisture will add to the need for additional applied water to achieve today's levels of agricultural productivity. Protecting existing water rights would seem to require taking full account of these realities.

(On a related topic, Professor Siler mentioned drought-tolerant crops. Let me point out that while the possibility of a shift to drought-tolerant or low-water-using crops is, in principle, deserving of investigation, the reality is that farmers decide what to grow on their fields and they understandably choose the crop that maximizes their profits. This is consistent with the requirement under Oregon water law that they put the water to "beneficial use without waste." Farmers are very good at figuring out what will maximize their profits. Alternative crops that would use less water are

frequently ones with lower yields, lower prices, no market, or little demand from consumers. The evidence suggests that the best assumption we can make in most cases is that farmers will continue with current practices – absent interventions or incentives to do otherwise.)

On the racial equity impacts question, I'm not sure much can be said as part of this rule making process. I have two observations. First, this is a large question that would need some resources to assemble data and assess the situation. There is a need for empirical information on how water rights are affecting different racial groups, both groundwater and surface water. One would want to know how the adverse effects of water scarcity affect people in different racial groups, and if those effects are disproportionately felt by some racial groups more than others. But these questions are descriptive, about observed allocations and access. Racial equity frequently involves fairness and entitlements, and how these ideas involve disproportionate harms resulting from current or past actions; how these past actions have affected the capabilities and opportunities of different racial groups. These issues would of course come into play when considering the impacts on indigenous peoples.

Second, it is important to recognize that our system of water rights, which protects the interests of existing water right holders, is also open in most cases to market exchange. As noted above, the way in which many resources are allocated is through the market place, and outcomes depend on people incomes, wealth, information, and opportunities. To the extent that water rights are bought and sold, or are tied to land ownership, obstacle to a more equitable distribution of those water rights may be due more to differences in income, wealth, opportunities, or other circumstances rather than the result of existing rules. Whether laws, property rights, and the rules that govern their allocation are well-designed and well-implemented may be best seen as a separate question from questions about whether the outcomes of the allocation of those property rights are racially equitable. The case is often made that questions of equity and fairness should be addressed with different tools and actions than with the design of the property rights system itself (indeed, this separation is a fundamental finding in economics highlighted in "The First and Second Welfare Theorems in Economics").

I hope these comments are helpful despite being excessively long.

Bill Jaeger

From: HARTT Laura A * WRD <Laura.A.HARTT@water.oregon.gov>

Sent: Monday, July 3, 2023 11:48 AM

Subject: REMINDER: Please provide input on GW Allocation Draft Rules by COB July 7 (Friday))

[This email originated from outside of OSU. Use caution with links and attachments.]

Good morning, RAC members,

I just wanted to check in briefly with you all to remind you that we would like to receive any input you might have on the draft groundwater allocation rules reviewed to date (Divisions 8, 9, 300, 400, and 410) by COB Friday, July 7. Although we will discuss further during our next meeting, if you have any input to share at this time regarding the need, racial equity impacts, and/or economic impacts of the rulemaking, please provide that as well. This will give us time for internal reviews and to incorporate your feedback prior to our next RAC meeting on August 2, 8:30 am – noon (hybrid, Salem/Zoom). We will be sending out pre-meeting materials closer to the meeting date.

Thank you! Laura

[Laura Hartt](#) (she/her/hers)

Water Policy Analyst | Rules Coordinator | Tribal Liaison

725 Summer St NE Suite A | Salem OR 97301 | Phone 971-720-0963 | Laura.A.Hartt@water.oregon.gov



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HARTT Laura A * WRD

From: LIEBE Annette I * WRD
Sent: Friday, June 23, 2023 4:56 PM
To: Siler, Nicholas; Jaeger, William K
Cc: IVERSON Justin T * WRD; HARTT Laura A * WRD; LIEBE Annette I * WRD
Subject: Re: Question about Oregon's climate change projections and evapotranspiration,

Thank you. Justin and I are both on vacation next week. We'll look at this more closely after the 4th and maybe schedule some time to discuss. Appreciate your contributions.

Best,
Annette

From: Siler, Nicholas <nick.siler@oregonstate.edu>
Sent: Friday, June 23, 2023 4:30:08 PM
To: Jaeger, William K <wjaeger@oregonstate.edu>
Cc: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>; IVERSON Justin T * WRD <justin.t.iverson@water.oregon.gov>
Subject: Re: Question about Oregon's climate change projections and evapotranspiration,

Hi Bill (also CCing Annette and Justin),

Sorry to miss the meeting Wednesday--I was on a flight at the time. I think your assessment is basically right, but there are a couple other factors to consider. First, GCMs generally predict that precipitation in Oregon will increase faster than evaporation, implying an increase in runoff + ground storage. On the other hand, precipitation is expected to become "flashier" (i.e., more extreme), and to fall even more disproportionately in winter than in summer compared with today. Combined with a reduction in winter snowpack, these changes are likely to make water scarcer in the summer when it is most needed.

Second, although the vapor pressure deficit is expected to increase roughly exponentially with warming, ET and potential ET will likely increase more slowly due to the effects of CO2 fertilization on stomatal resistance, among other things (e.g., <https://doi.org/10.1029/2022EF002814>). So although it's likely that the same crops will require more water in the future, recent research suggests that a 15% increase is probably too high (I didn't read the OWRD study from 2015, but my guess is that the 15% estimate is based on the increase in vapor pressure deficit alone). And of course, a shift to drought-resistant crop varieties would further offset any increase in water demand.

In short, there's still a lot we don't know about how climate change will impact both the demand for and availability of water in Oregon, and indeed this remains a very active area of research globally. I'd be happy to chat more with you (and/or Annette/Justin) if you think it might be helpful.

-Nick

On Jun 23, 2023, at 12:24 PM, Jaeger, William K <wjaeger@oregonstate.edu> wrote:

Hi Nick,

We are both on the OWRD RAC.

At the most recent OWRD Rules Advisory Committee meeting, I made the case that given the need to start by recognizing the priority of protecting existing water rights (e.g., senior irrigation water rights), an assessment of available water should be taking into account a) the expected change in

temperature with climate change, and b) the effect of those changes on crop (and all vegetation) evapotranspiration. I raised this in my written comments, but more strongly in the meeting this past week (for which I believe you were not available). I pointed to a study done (commissioned by OWRD) in 2015 that estimated how these changes in temperature are likely to affect ET and water demand across the state (by county, by crop). It suggests increases in ET up to 15 % by 2050.

I'm wondering if there are other sources, other estimates, that the RAC should be aware of to add additional evidence to the argument I am making (if you agree that it is a strong one). Even to protect existing groundwater rights for the future, one should look to, say, 2100 and include increases in pumping to respond to rising ET for crops. It seems like that could be a significant increase.

Any thoughts or references would be greatly appreciated.

Cheers,
Bill

William K Jaeger

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July 7, 2023

Oregon Water Resources Department
Attn: Laura Hartt, Water Policy Analyst/Rules Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301
Email: Laura.A.Hartt@water.oregon.gov

RE: Oregon Groundwater Allocation Rule Advisory Committee Comments

Dear Ms. Hartt,

The undersigned organizations—Oregon Association of Nurseries, Oregon Cattlemen's Association, Oregon Farm Bureau Federation, Oregon Water Resources Congress, and Oregon Dairy Farmers Association—write to express great concerns with current rulemaking. Together, these organizations have members in all sectors of agriculture across the State of Oregon. According to the Oregon State Board of Agriculture 2021 Report, Oregon agriculture has a \$50 billion annual economic impact, and “plays a huge role in the state’s economy and the lives of everyday Oregonians’ by providing food, beverages, agricultural products, and services.” Water is of vital importance to Oregon agriculture.

The rules proposed by the Oregon Water Resources Department (“OWRD”) in the Groundwater Allocation Rulemaking (“Proposed Rules”) are the largest, most far-reaching change to Oregon water law and groundwater rights administration in decades. We are extremely concerned by the Proposed Rules. The rulemaking process must be paused to address serious deficiencies discussed below.

First, we believe that OWRD has exceeded the intent and scope of its enabling legislation by proposing rules that will effectively end new groundwater appropriations across the State. ORS 537.525 calls for a balanced approach to groundwater appropriation, including 537.525(2),

which calls for the “rights to appropriate ground water and priority thereof be acknowledged and protected, except when, under certain conditions, the public welfare, safety and health require otherwise.” The Proposed Rules would ignore the “under certain conditions” component of the law by throwing a blanket moratorium over the entire state without sufficient background knowledge of hydrologic realities of individual basins or sub-basins.

To that point, OWRD is putting the cart before the horse by attempting to overhaul groundwater allocation and management before understanding the groundwater resources of the State. OWRD must halt the rulemaking process and complete its legislative mandate under HB 2018 (2021) - to study the State’s groundwater aquifers and create water budgets. Further, a rulemaking pause is needed to develop sound policy to balance the various uses of groundwater and determine the level of permissible economic use and sustainability under ORS 537.525. These are policy issues of the highest order that, frankly, should be enacted by the Oregon Legislature, rather than a rulemaking process convened in the middle of a legislative session.

Water users in Oregon have continued to suffer due to OWRD’s lack of knowledge regarding sustainable use of groundwater resources. Groundwater resources in several areas of the State have become over-allocated as a direct result of OWRD’s lack of understanding of Oregon’s groundwater. For example, groundwater levels in portions of the Harney Valley have declined for decades. Only recently has OWRD studied groundwater resources in that region. Despite growing awareness that groundwater is over-appropriated in certain locations, OWRD has not increased its scientific study of groundwater basins. In fact, in late 2020/early 2021, OWRD proposed major budget cuts to technical services, including groundwater studies and observation wells.

Under current regulations, groundwater is available for new appropriation if it is not over-appropriated, which requires OWRD to make an affirmative finding of over-appropriation. Rather than making this affirmative finding, however, OWRD decides in many instances it does not have enough information, and until very recently, it would issue new groundwater permits despite its lack of knowledge. This practice led to significant groundwater declines in certain areas, including the Harney Valley. Senior groundwater users have been injured, and junior water users may never receive the anticipated benefits from their water permits.

In response to this failure, the Oregon Legislature enacted HB 2018 (2021), directing and providing funding to OWRD to enter into contracts with the United States Geological Survey to develop and publish groundwater budgets for all major hydrologic basins in the State. At the June 21, 2023 Rulemaking Advisory Committee (“RAC”) meeting, OWRD staff summarized HB 2018 as a bill that provided funding for some monitoring wells. While one component of the bill includes funding for monitoring wells, OWRD’s mischaracterization of the scope of the law is aligned with the minimal amount of work completed by OWRD to date. To our knowledge, OWRD has not complied with HB 2018 in any meaningful way over the past two years.

The State is still falling short of its duty to responsibly manage and allocate Oregon’s water resources. The Oregon Water Resources Commission instructed OWRD to “[u]pdate groundwater allocation rules to be more sustainable and protective of existing water right holders, both instream and out-of-stream.” We fully support this goal, but it misstates the

overarching problem: lack of scientific study of groundwater resources. The true problem would be greatly, if not fully, resolved if OWRD would do its job and gather the scientific data necessary to make responsible water allocation decisions.

This is not to say that the current regulations would not benefit from updated language. There are portions of the rules that are somewhat arbitrary and not based in science. We recognize that portions of the existing rules at issue in the rulemaking are not based in science and should be revised to reflect both the best available science and the duty of OWRD to actively manage groundwater by studying groundwater resources. However, the Proposed Rules will suffer from the same errors if they are adopted in the current scientific vacuum. When questioned in the June 21, 2023 meeting about what the State is doing to collect more data to implement the Proposed Rules, OWRD's response was that it will deny applications where not enough information exists. Additionally, OWRD offered that applicants can collect five years of groundwater data to submit to OWRD in support of their applications. OWRD recognized, however, that the Proposed Rules do not provide for applicants to submit their own data, nor describe what data OWRD will accept.

Based on its response, it is our understanding that OWRD will not make efforts to collect necessary groundwater data in support of its Proposed Rules. Instead, it will simply enact an effective moratorium on new groundwater permits, regardless of whether groundwater resources are over-appropriated in certain locations. This response is totally unacceptable. OWRD was directed by the State Legislature to develop and publish water budgets for every major hydrologic basin in the State. OWRD cannot sit on its hands with a 1950s understanding of groundwater and say it is making decisions based on the best available information – it is not. Moreover, OWRD cannot shift an undefined and unattainable burden to applicants and water users while abdicating its responsibilities under the law.

Finally, throughout the RAC process, it has become abundantly clear that OWRD does not have any fully formed policy objectives. OWRD has no stated position on how to balance economic use with sustainability. OWRD has no stated position on the level of decline that is appropriate to support sustainable use of the resource. OWRD has no stated position on the appropriate timeline for considering hydraulic interference between uses, leaving open the question about the number of years—10 years, 100 years, or an infinite number of years—that OWRD will use as the timescale with which to assess potential interference. These are critical policy deficiencies that must be resolved prior to moving forward with rulemaking efforts. And again, with no legislative direction to make these policy decisions, we question the Commission's authority to effectively change water law in Oregon with its proposed broad-sweeping changes to the groundwater allocation system.

While we appreciate the great deal of time OWRD's staff must have invested in the Proposed Rules, as well as the professionalism OWRD staff has shown in facilitating the RAC, this rulemaking effort needs to be paused. OWRD must complete its statutory mandate under HB 2018 to create water budgets for all major hydrologic basins in Oregon. Once OWRD has a greater understanding of the State's groundwater basins and existing water uses, only then can the Legislature and OWRD work together to develop solid policy around further economic development and sustainability. Moving forward with the Proposed Rules at the current time

would be a colossal mistake – one that will have vast negative impacts on the future of our precious water resources and agricultural production. We urge that the rulemaking be paused and revisited when the time is appropriate. We are willing to meet and discuss this matter further, and are committed to staying engaged on this issue and improving groundwater allocation in the State.

Sincerely,

Oregon Association of Nurseries



Jeff Stone, Executive Director

Oregon Water Resources Congress



April Snell, Executive Director

Oregon Cattlemen's Association



Tammy Dennee, Executive Director

Oregon Dairy Farmers Association



Tami Kerr, Executive Director

Oregon Farm Bureau Federation



Greg Addington, Executive Director

cc: Doug Woodcock, OWRD Interim Director (WRD_DL_Director@water.oregon.gov); Oregon Representative Ken Helm (Rep.KenHelm@oregonlegislature.gov); Oregon Representative Mark Owens (Rep.MarkOwens@oregonlegislature.gov); Geoffrey Huntington, Senior Natural Resources Advisor to Governor Kotek (geoff.huntington@oregon.gov)



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July 20, 2023

VIA EMAIL ONLY

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RE: Oregon Groundwater Allocation Rule Advisory Committee Comments

Dear Executive Directors:

Thank you for your interest and your participation in the Rules Advisory Committee (RAC) process working to advise the Department on revisions to Oregon's rules governing new allocation of groundwater. The Department understands the role your members play in the state's economy and the lives of Oregonians by providing agricultural products and services. The goals of this rulemaking effort are to ensure that any new uses of groundwater do not adversely affect existing water rights holders and to manage Oregon's water resources more sustainably. The draft rules will continue to benefit from input from the RAC and other public commentors.

The Department is actively implementing the work required under HB 2018. Here's a quick recap of progress; the Department:

- Entered into a cooperative agreement with the U.S. Geological Services (USGS) to develop groundwater budgets for major hydrologic basins in Oregon. Under the cooperative agreement, the first phase of this effort is expected to be completed in 2026, with local validation/calibration to be completed in 2032. The USGS is an



important scientific partner to this work in Oregon; due to their limited capacity, the USGS Oregon Science Center has partnered with USGS Science Centers outside of Oregon to complete this work.

- Contracted with Desert Research Institute (DRI) and OpenET Inc. to develop historical statewide consumptive use estimates for all irrigated fields and open water evaporation from major reservoirs and lakes (years 1984-2021). The data for 1984-2021 has been developed and delivered, and the Department has just begun to review these estimates. Watershed summaries of consumptive use and irrigated acreage for years 2016-2021 developed by DRI were added to the OSU Institute for Natural Resources Oregon Water Map Viewer in June 2023. (https://tools.oregonexplorer.info/OE_HtmlViewer/Index.html?viewer=water). A report from DRI summarizing the 1984-2021 consumptive use and open water evaporation estimates is expected December 2023.
- Hired project management and hydrogeologic expertise to support observation well installation and modification projects, and to conduct instrumentation and expanded water level data collection in the field. One or more observation wells have been completed or are in progress in the following basins: Umatilla, Rogue, Malheur Lake, Walla Walla, Hood, Klamath, and Willamette. These wells are being added to an existing network of over 1200 wells that supply groundwater level data.

These studies and expanded data collection efforts, along with our previously completed groundwater investigation activities and ongoing study in the Walla Walla basin, are an important means to continue to improve our detailed understanding of groundwater conditions in specific areas across the state.

While we continue to refine our understanding, historical groundwater data collection and investigation in Oregon provides enough information to support the Commission's request that the Department prioritize updates to the groundwater allocation rules. The draft rules are based on fundamental hydrogeologic principals and are broadly applicable statewide as assessed with existing data. The rules define the statutory policy of determining and maintaining "reasonably stable groundwater levels." The defined metrics are intended to be compared to publicly available hydrologic data (e.g., groundwater levels, surface water availability metrics, etc.) to make a positive finding of whether, or not, "water is available." The draft rules also provide parameters for how much new data must be collected by water right



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applicants when available data is found to be insufficient to assess a particular future application for a new groundwater right.

The draft rule language is designed to meet the Commission's goal of ensuring that new permits do not jeopardize either existing ground and surface water right holders or the long-term sustainability of the resource. We understand that Oregon agriculture provides significant economic benefits to the state. These rules are intended to protect the water-dependent investments made by agricultural and other existing water users by limiting over-allocation of the state's water resources. Overallocation may result in adverse impacts to the agricultural community when it results in either curtailment of existing water rights, or depletion of the supply to such an extent that it jeopardizes the ability of existing users to rely on that source of water. Under the proposed rules, new applications will be evaluated to determine if water levels in the vicinity of the proposed use are "reasonably stable." The proposed definition of "reasonably stable water levels" establishes quantitative limits on water level declines that are intended to accommodate temporary water level declines due to climate variability and identify existing unsustainable pumping from groundwater storage. Finally, the draft Division 9 rules, in order to be protective of existing water right holders, evaluate the full impact of a proposed use when determining to issue a new permit.

The Department is committed to ensuring that the proposed rules meet the statutory policies laid out in the Groundwater Management Act of 1955 and the goals of the Commission. We thank you for your continued interest and participation and are available to meet to discuss your concerns.

Sincerely,

Annette Liebe, Administrator

Technical Services Division

Cc: Geoffrey Huntington, Senior Natural Resource Advisor to Governor Kotek
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July 7, 2023

Ms. Laura Hartt
Water Policy Analyst/Rules Coordinator, Policy Section
Oregon Water Resources Department
725 Summer St. N.E. Ste. A
Salem, Oregon 97301

RE: Comments on Proposed Groundwater Allocation Rules

Dear Ms. Hartt:

As the Chair of the Government Affairs Committee for the Oregon Ground Water Association (OGWA), I am presenting these comments officially on behalf of the OGWA in support of all groundwater users in Oregon and the groundwater professionals who provide the services and supplies that support them.

As a representative of the OGWA, I cannot support the proposed rule changes being developed through this RAC. These rule changes will not create an environment where groundwater is protected and sustainably utilized for the benefit of all Oregon residents. Rather, these rule changes will unnecessarily inhibit the ability of the agricultural producers in the State to provide more food for an ever-growing population, will likely have a significant negative economic impact on the rural and agricultural areas of Oregon, and will effectively impose a moratorium on any further groundwater development needed by Oregon's agricultural industry. The proposed rule changes seem to go far beyond the directives set forth by the Commission, and were created from the application of scientific theory to justify an arbitrary, policy-driven decision process. I would suggest instead of implementing these proposed rules changes that the current Division 9 rules be retained with minor changes to the Groundwater Review process. The Commission should then look to collect more definitive, basin-specific groundwater data in order to provide models that would help shape future rules changes that would allow for a more holistic and sustainable approach to the management of the groundwater resources in Oregon.

The rule changes I propose, which are discussed in further detail below, would likely result in achieving the objective reiterated in RAC meeting number 4 to "update groundwater allocation rules to be more sustainable and protective of existing water right holders, both instream and out-of-stream." Further, I propose that these changes could serve as a *temporary, interim* measure to allow time to assemble a work group of highly qualified professionals (e.g., highly experienced hydrogeologists, water resources policy experts, attorneys specializing in water law, members of the agricultural community who are active in water resources issues, etc.) to complete a more in-depth analysis of the technical and policy issues surrounding groundwater availability in Oregon in order to come up with recommendations for future rulemaking.

The members of this Groundwater Allocation RAC offer a diverse range of perspectives and opinions. One thing I think we can all agree on is that we can, and should, do a better job of managing the groundwater resources of this State in a more sustainable manner. The proposed rules offer a one-size-fits-all solution that may be relevant for application in some areas, but are inappropriate for application in many other parts of the State. Given more time, more in-depth study, and careful consideration, I think the OWRD could come up with rules that would be more applicable to all areas in Oregon.

In the sections below, I discuss some of the reasons why I believe the current rulemaking process is the wrong approach, followed by more in-depth discussion of my proposed rule changes.

Proposed Rules Go Beyond Original Directive of the Commission

My understanding from observations of the evolution of the current Groundwater Allocation rulemaking process from the inception is that the core issue of concern to members of the Commission was the fact that the Department was issuing groundwater permits when Groundwater Section staff were checking a box on the application Groundwater Review form that indicated it “cannot be determined” if groundwater is over-appropriated. The Commission found this to be unacceptable, and directed the Department to stop issuing new permits when it “cannot be determined” if groundwater is over-appropriated.

The written guidance used by the Department for completing the Groundwater Reviews refers only to evaluating water level data to determine if groundwater is, or is not, over-appropriated, or if it “cannot be determined” (OWRD, 2004). Based on the discussions in the Commission meetings and the public meetings held on Groundwater Allocation, it seemed reasonable and logical to expect that this new rulemaking process would involve development of a more detailed and prescriptive methodology by which the Groundwater Section would evaluate the available groundwater level data to determine whether groundwater is, or is not, over-appropriated.

However, what we have with the proposed rules is basically a system that identifies if pumping from a new proposed well will have *any* impact on a nearby surface water source, and denies the application if there is *any* impact, whether large or insubstantial. This system will result in summarily denying potential future groundwater development without any evaluation of whether the impacts will result in actual injury. This approach seems to go far beyond the basic directive given by the Commission.

Though Based on Sound Scientific Theory, the Proposed Rules are Arbitrary

The theory of groundwater-to-surface water interactions as discussed in the Barlow and Leake paper (USGS, 2012) is valid and indisputable. Nevertheless, it is important to recognize that the theoretical effects of pumping groundwater on a nearby surface water source can only be accurately applied if the natural environment closely resembles the idealized conditions embodied in the theory. The Barlow and Leake report (USGS, 2012) states on page 2 that “In many areas of the United States, groundwater systems are composed of a vertical sequence of aquifers in which an upper, unconfined aquifer is underlain by a series of one or more confining beds and confined aquifers.... In many other areas, however, the ground-water system consists of a single, often unconfined, aquifer underlain by geologic formations, such as crystalline rock, whose permeabilities are so low that the formation can be assumed to be impermeable to groundwater flow. Aquifers of this type are used throughout the report to illustrate many of the factors that affect streamflow depletion by wells.” In other words, the factors affecting streamflow depletion by wells are best illustrated if the hydrogeologic system consists of a single, unconfined aquifer which discharges to a single stream. In many places throughout Oregon, and especially within the alluvial deposits in the Willamette Basin, the aquifers often consist of many

different layers of clay, silt, sand, and gravel with varying thickness and aerial extents. Furthermore, as illustrated during one of our RAC meetings, pumping from a single well in these complex systems will likely impact multiple streams to varying degrees. As a result, while the general theories discussed in Barlow and Leake still hold broadly, they cannot be applied directly to such complex groundwater systems.

In order to accurately model even simple groundwater flow systems, you must know the value of several aquifer properties, and these properties must be the same throughout the aquifer within the study area. This rarely occurs in nature, so we have to make estimates of average aquifer properties within the study area. When you add multiple layers of varying thicknesses with different aquifer properties, and try to parse out the impacts to all of the various effected streams, the complexity increases dramatically, making it very difficult to model the system. And so, when using simple analytical models such as are used by the Department to estimate pumping impacts on nearby streams, the results are only as good as the estimates of the parameters. Furthermore, these models cannot easily apportion the impacts to the various effected streams. As a result, the models will give us numbers that cannot be relied upon with a high degree of confidence. In other words, these models work fine for determining *if* there will be some impact, and, may also be valuable for determining if those impacts will be relatively small or large, or will occur within a short or long timeframe, but they are not very good for accurately determining the actual impact.

Therefore, while the theory and the models do well to inform us about how the pumping of groundwater may impact nearby surface water sources, they are limited in their usefulness for determining the extent of those impacts. To deny a new proposed use of groundwater because the application of scientific theory says it will cause an impact (without determining the actual impact or whether that impact causes injury) may sound scientific to some, but in actuality, this determination relies more on a policy decision (i.e., any impact = denial), which is arbitrary and unscientific.

The Proposed Rules Rely on Flawed Water Availability Data

As mentioned during our RAC meetings, the existing Water Availability Reporting System (WARS) was established based on the record of stream flows from 1958 to 1987. Department staff have indicated that the system is overdue for an update. When and if that happens, the updated estimates for natural flows in many of our streams may change in ways that are not favorable to issuing new ground water permits. However, I believe it is likely that the groundwater uses and out-of-stream uses, which are factored into the surface water availability calculation, are grossly overestimated. Grossly overestimating these uses would result in significant underestimates of surface water availability. Practical experience tells us that farmers use far less than the authorized annual duty. For example, in the Willamette Valley, we understand anecdotally that most farmers use 1.5 acre-feet (AF) per acre or less of their annual maximum allowed 2.5 AF per acre. Also, farmers rarely irrigate throughout the entire irrigation season. It is unclear to me to what extent the estimates of uses in WARS accounts for these factors. In any case, given the large amount of actual water use data the Department has been collecting over many years, it seems that better estimates of both groundwater and surface water uses could be made. My guess is that if better estimates of actual water use were applied to WARS, the data would show more water available in the streams than is currently reported.

Under the proposed rules, a determination of groundwater availability depends on the water availability data reported in WARS. Notwithstanding the other issues I have discussed above, how can we make fair and reasonable determinations about the impacts from pumping groundwater on the nearby surface water sources if we are relying on an outdated and flawed WARS?

The Proposed Rules Do Not Achieve the Proper Balance

ORS 537.525 obligates the Department to, among other things, manage the State's groundwater resources in a balanced manner for multiple uses. Specifically, ORS 537.525(5) states it is necessary that "Adequate and safe supplies of ground water for human consumption be assured, while conserving maximum supplies of ground water for agricultural, commercial, industrial, thermal, recreational and other beneficial uses." In an apparent attempt to correct what is perceived to be a current imbalance which is weighted in favor of groundwater use at the expense of surface water use, I think the proposed rules will shift the balance too far the other way.

If we could calculate everything in terms of economic costs, I think we would find that the proposed approach would result in disproportionate economic costs to agricultural producers and to the groundwater professionals who support those producers. The best solution should be one that minimizes the overall costs to all water users.

I believe we can manage the water resources of this State so that there are no losers, but if we are ever able to succeed in that goal, it will take many years, and is a subject that is outside the scope of this rulemaking process. So, under the current systems in place, use of water in one place may mean the reduction in water availability in another place. Reductions in water availability can be avoided and minimized with better knowledge and proper management, but this requires first establishing a policy that recognizes that certain, minimal impacts are acceptable in order to maintain the proper balance. The proposed rules completely disregard the concept of acceptable impacts, which is not compatible with the obligations stated in ORS 537.525(5).

Recommendations

Given the foregoing discussion, I think that the rules need to be fundamentally re-written in a way that will meet the Commission's directive, but allow more future development of groundwater resources than would be allowed under the currently proposed rules. As I mentioned above, this could be done as a temporary, interim measure while the State assembles a work group or committee of highly qualified professionals to carefully evaluate all of the relevant issues and develop recommendations for future rulemaking. I believe the Department needs to take more time to develop a better understanding of our water resources, basin by basin, including robust estimates of groundwater recharge and discharge, and a comprehensive update of the surface water availability data. This cannot happen quickly, and is outside the scope and capabilities of this RAC.

The interim objectives could be achieved by retaining the current Division 9 rules for now, with some minor changes to tighten up on the groundwater availability portion of the Groundwater Review process. During this interim period, the best proxy we have for evaluating the stability of aquifers is water level data. If groundwater levels are returning to the same elevations every year (accounting for annual variations in precipitation and influences from improper well construction) and there is no clear evidence of depletion of flows in nearby streams, then we should be able to say that groundwater is available.

Accordingly, the rule changes I propose should include adoption of the methodology developed by the Groundwater Section for evaluating available groundwater level data (as currently defined in proposed OAR 690-008-0001(10)) as part of the groundwater availability portion of the Groundwater Review. As part of the water level data review process, it will also be important to recognize that water levels can be declining for reasons other than groundwater over-appropriation. For example, wells improperly constructed to commingle multiple aquifers often exhibit declining water levels for years until the new composite water level finds its equilibrium. Therefore, the groundwater level evaluation should include

a careful review of the construction details of the wells being evaluated to check for possible influences from improper well construction.

The groundwater availability review could also include an evaluation of the regulation history of nearby streams. If there is no clear evidence of increasing regulation of the nearby streams (also while accounting for annual variations in precipitation) and water levels are determined to be stable, then Groundwater Section staff can make the determination that “groundwater is not over-appropriated.” If, on the other hand, groundwater levels are found not to be stable, and/or the regulatory history of a nearby stream (within 1 mile of the well) shows a historical increase in regulation, a finding that “groundwater is over-appropriated” can be made. If there is not enough available groundwater level data to make a determination, but all other criteria are met to issue a permit, then the Department could offer to put the permit application on administrative hold and issue a 5-year limited license that would start when water use begins. During the 5-year limited license period, the license holder would be required to measure and report water levels annually. If water levels are not reported, the limited license and the permit application would be canceled. If all 5 years of water levels are reported, and found not to be stable, then the limited license would be allowed to lapse and the permit application would be cancelled. On the other hand, if water levels were determined to be stable after 5-years of monitoring, then the permit could be taken off administrative hold and issued.

These interim measures would serve to identify those areas where there is clear evidence of groundwater over-appropriation based on analysis of hard data and actual observations, and would likely result in significant reductions in the numbers of groundwater permits being issued. In cases where there is not enough water level data to make a determination, offering the limited license option could provide additional water level data where it is needed, with no obligation to issue a permanent water right if the water level data are unfavorable. By preventing issuance of new, permanent groundwater right permits in areas which demonstrate clear evidence of groundwater over-appropriation, these interim measures will also meet the directive of the Commission to “update groundwater allocation rules to be more sustainable and protective of existing water right holders, both instream and out-of-stream” and allow more time for the development of a long-term approach that will better achieve the overall objectives and better serve the people of Oregon.

Respectfully,

Gregory E. Kupillas, R.G., C.W.R.E.
Pacific Hydro-Geology Inc.
Chair, Government Affairs Committee
Oregon Ground Water Association

References

OWRD, 2004, Draft Oregon Water Resources Department Ground Water Review Guidance Document, Sections B1 and B1a, page 3. (Provided as an attachment to an email message from Justin Iverson, September 4, 2019.)

USGS, 2012, Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow, by P. M. Barlow and S. A. Leake, USGS Circular 1376.

July 6, 2023

Laura Hartt – Water Policy Analyst and Rules Coordinator

Submitted by: Zach Freed, Sustainable Water Program Director

Laura,

Thank you for the opportunity to comment on proposed rule changes to Divisions 8, 9, 300, 400, and 410. The Nature Conservancy **supports the proposed changes to rules** and agrees with the need to responsibly allocate groundwater rights to avoid injuring senior water right holders and to prevent further unsustainable groundwater use. Over-extraction of groundwater is a substantial threat to Oregon’s rivers, secure access to drinking water, and economy. Based on future climate projections, Oregon is facing drier summers (exacerbating water demand for irrigation)^[1], increased frequency of drought, and decreased snowpack (diminishing aquifer recharge).^[2]

The Nature Conservancy especially appreciates the science-based approach to establishing standards of “reasonably stable” (690-008-0010), which is intended to detect acute declines in groundwater level trends through a rate of decline threshold (>0.5 feet per year of annual high water levels [690-008-010 (a)(A)]) and chronic, shallow declines in groundwater level trends through a magnitude threshold cutoff (the lowest of 25 feet or 8% of known saturated thickness between highest and lowest annual high water level [690-008-010 (a)(B)]). However, environmental impacts can occur with less than 25 feet of decline. Aldous and Bach (2014) found obligate wetland indicator plants in Oregon fens experience 100% mortality when groundwater levels decline more than 2.3 feet.^[3] de Graaf and others (2019) modeled the amount of groundwater level declines that would cause streams to reach environmental flow thresholds, and found that Oregon streams and rivers only needed 0.8 feet of groundwater declines to fall below these ecological thresholds.^[4] Finally, Jasechko and others (2021) provide a nationwide analysis of rivers that switch from gaining to losing reaches, and find that 6.6 feet of drawdown due to groundwater pumping will correspond to a 10% net increase in losing streams due to capture and induced recharge.^[5] These studies indicate a need to have a more sensitive magnitude-of-decline threshold. However, The Nature Conservancy understands that normal climatic variation in groundwater levels can occur (e.g., through ENSO or the Pacific Decadal Oscillation), especially in more permeable or shallower aquifers. Therefore, we suggest a middle ground: we recommend changing the “reasonably stable” criterion from the proposed 25-foot total difference between highest and lowest annual high water levels to a more protective 10-foot total difference between highest and lowest annual high water levels. Although ecological impacts can occur before 10 feet of declines, this approach will limit the harm done while still creating a buffer for normal climatic variation in otherwise-stable groundwater levels.

Other RAC members have made comments that the Oregon Water Resources Department should attempt to differentiate between groundwater level declines due to efficiency upgrades versus declines due to over-pumping in order to determine “reasonably stable” groundwater levels. Not only would that be difficult and time-intensive to ascertain, but it should be irrelevant. The Nature Conservancy believes that regardless of the cause of groundwater level declines, new groundwater rights should not be allocated unless there is sufficient data and evidence to suggest that groundwater levels are stable or increasing. Based on existing rules, temporary declines due to efficiency upgrades or other causes will eventually stabilize and meet “reasonably stable” criteria, at which point a decision to allocate more groundwater rights could be made. Given the negative impacts of over-allocation of the resource to nature and people that have already occurred in Oregon, it is appropriate to err on the side of caution.

Finally, The Nature Conservancy supports the proposed rules in 690-009-0040 (1) through (6) relating to interference between groundwater use and surface water rights. The proposed rules are consistent with decades of research which suggests that groundwater use in stable conditions comes at the expense of surface water, either through capture or through induced recharge.

During the fiscal impact analysis, we suggest incorporating the value of avoided economic impacts to communities in Oregon. The cost of overallocation is extreme: consider the need for millions of dollars for domestic well relief and incentives to reduce groundwater use in the Harney Basin alone. The proposed rules will benefit Oregon’s economy by reducing or avoiding the costs incurred when groundwater rights are over-allocated.

The Nature Conservancy appreciates that the proposed rules represent a paradigm shift for groundwater allocations compared to the status quo and will attract scrutiny. We assert that the proposed rule changes are based on rigorous science, are applicable throughout the state, and will be much more effective at preventing injury to senior surface- and groundwater right holders than the status quo. We further believe that the proposed rule changes will limit environmental and ecological harm, although they may be improved by incorporating more stringent decline thresholds as suggested in this letter.

[1]: Oregon Water Resources Department. (2015). Oregon Statewide Long-Term Water Demand Forecast. 76 p. Salem, OR.

[2]: Ahmadalipour, A., Moradkhani, H., and Svoboda, M. (2016). Centennial drought outlook over the CONUS using NASA-NEX downscaled climate ensemble. *Int. J. Climatol.* 37, 2477-2491. doi:10.1002/joc.4859.

[3]: Aldous, A. and Bach, L. (2014). Hydro-ecology of groundwater-dependent ecosystems: applying basic science to groundwater management. *Hydrol. Sci. J.* 59, 530-544. doi:10.1080/02626667.2014.889296.

[4]: de Graaf, I.E.M., Gleeson, T., van Beek, L.P.H., Sutanudjaja, E.H., and Bierkens, M.F.P. (2019). Environmental flow limits to global groundwater pumping. *Nature* 574, 90-94. doi:10.1038/s41586-019-1594-4.

[5]: Jasechko, S., Seybold, H., Perrone, D., Fan, Y., and Kirchner, J.W. (2021). Widespread potential loss of streamflow into underlying aquifers across USA. *Nature* 591, 391-395. doi:10.1038/s41586-021-03311-x.

HARTT Laura A * WRD

From: Lisa Brown <lisa@waterwatch.org>
Sent: Friday, July 7, 2023 4:22 PM
To: HARTT Laura A * WRD; LIEBE Annette I * WRD; IVERSON Justin T * WRD
Subject: Groundwater Allocation RAC - WaterWatch 7-07-2023 comments

WaterWatch provides the following comments regarding the draft rules and initial comments regarding the economic and racial equity impact analyses.

Comments regarding draft rules

WaterWatch is very supportive of the department's effort to revise the rules related to groundwater allocation. We very much appreciate all of the work that the department has put into the draft rules and think that the sections work well together. We also emphasize the urgency of adopting revised rules. These revisions are long overdue. While addressing the significant damage that has been caused by groundwater over-allocation will be difficult to impossible (and extremely expensive), adopting the more sustainable and responsible system embodied in this rulemaking is extremely important and time sensitive.

For specific comments on the various rule sections, we refer the department to the comments WaterWatch has previously submitted over the course of the RAC process. We also highlight the following points:

1. The following edit should be made to DRAFT OAR 690-300-0010(57)(e) (addition shown in bold, deletion shown in strikethrough):

"The proposed use will not impair or substantially interfere with existing **surface water** rights ~~to appropriate surface water~~, as per the rules governing groundwater interference with surface water in OAR 690-009-0010 through 0040; and"

This change is necessary because instream water rights do not appropriate surface water, but clearly must be considered under this rule. The rule should encompass all surface water rights.

2. The following edit should be made to DRAFT OAR 690-008-0001(8)(c), which is part of the definition of "'Impairment", "impair", "substantial interference", "substantially interfere", "undue interference", or "unduly interfere"' (addition shown in bold, deletion shown in strikethrough):

"One or more of the senior ground water appropriators being unable to obtain either the permitted or the customary quantity of ground water, whichever is less, from a reasonably efficient well that ~~fully penetrates~~ **adequately accesses** the aquifer. ~~where the aquifer is relatively uniformly permeable. However, in aquifers where flow is predominantly through fractures, full penetration may not be required as a condition of substantial or undue interference.~~"

This rule, commonly referred to as the "Race to the Bottom Rule," is inconsistent with Oregon's 1955 Ground Water Act. Requiring "full penetration" of the aquifer, which has been asserted to mean drilling to the bottom of the aquifer, is contrary to the requirement to maintain reasonably stable groundwater levels and to allocate groundwater only within the capacity of the resource. It has no statutory support and no place in these rules and should be amended in this rulemaking.

Initial comments regarding economic impacts of the rulemaking

These are initial thoughts on the economic impacts analysis. That analysis should include (among any others) the following categories:

1. Economic benefits from better maintaining the surface water flows and water quality needed to support healthy rivers and native fish. Inputs of cold, clean groundwater are critical to maintaining many of Oregon's rivers and streams and native fish, including salmon, steelhead and trout. The current groundwater allocation rules, including but not limited to the Division 9 PSI calculation, result in issuance of groundwater permits that result in groundwater use that reduces groundwater inputs to streams and rivers. This both reduces surface water flows and the input of cold groundwater that creates cold water refugia and helps maintain cooler water temperatures needed by salmonids. The analysis should include the economic value of supporting the sport and commercial fishing industries and the river related recreation and travel economy.
2. Economic savings that will accrue from avoiding the need to spend money (state, federal and private) to address the impacts of declining groundwater levels, for example, impacts on domestic well owners and irrigation well owners. Recent examples of state expenditures related to domestic wells affected by groundwater level declines include HB 2145 (2021) (Statewide fund for domestic well owners) and HB 3092 (2021) (Harney Basin specific fund for domestic well owners). More broadly, the Harney Basin CREP program, created to help address over-allocation of groundwater, has a price tag of more than \$60 million (\$19,670,000 from Oregon and \$40,651,320 from the federal government). Additionally, a feasibility study by Anderson Perry included evaluation of costs for community wells in the Harney Basin as a way to provide drinking water where domestic wells are declining – that study could provide helpful numbers. The draft groundwater allocation rules will help reduce the need for these types of expenses in the future.
3. Economic benefits of maintaining water quality. Helping maintain water quality by maintaining groundwater discharges to streams and rivers helps avoid compliance and restoration costs.
4. Economic benefits from better maintaining surface water availability for consumptive surface water users. The current groundwater allocation rules, including but not limited to the Division 9 PSI calculation, result in issuance of groundwater permits that result in groundwater use that reduces surface water flows. This in turn reduces the surface water available to meet senior surface water rights. The analysis should look at the economic impact of diminishing the surface water available to meet these rights, and on the flip side of being able to better fulfill those rights into the future.

Initial comments regarding racial equity impacts

If state-wide information is not available to evaluate the racial equity impacts of the draft rules (or of not making these changes), perhaps the analysis could focus on case study areas, such as the Klamath Basin and Lower Umatilla Basin, where more information is available.

Thank you for opportunity to provide these comments.

Best,
Lisa Brown
Staff Attorney
WaterWatch of Oregon
O: 503.295.4039 x102



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July 10, 2023

Via Email

Oregon Water Resources Department
Attn: Laura Hartt, Water Policy Analyst/Rules Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301
Email: Laura.A.Hartt@water.oregon.gov

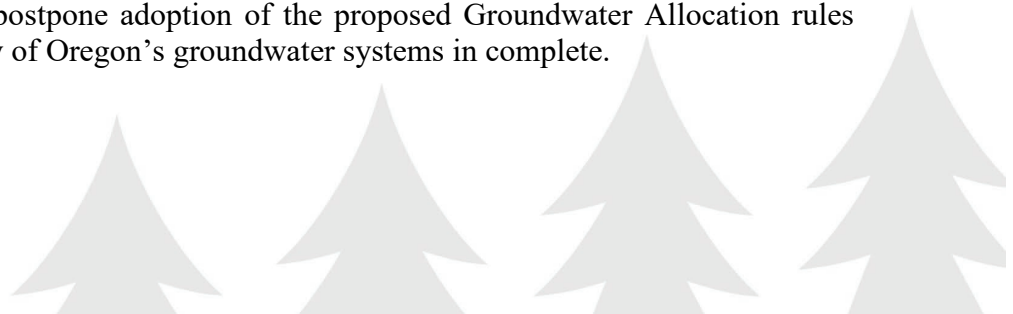
Re: Proposed Groundwater Allocation Rules

Ms. Hartt:

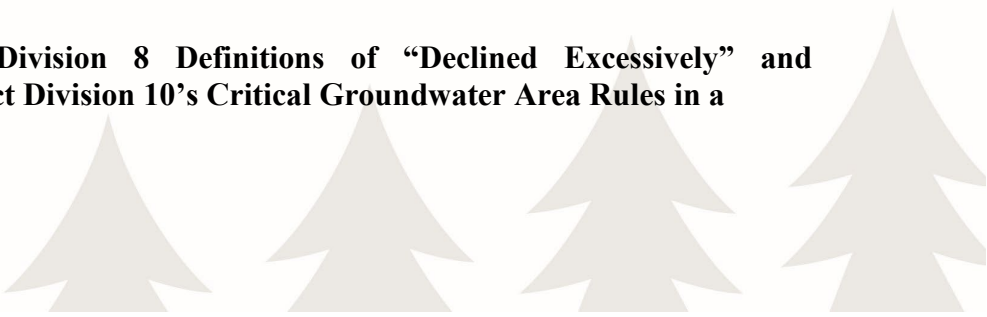
My firm represents the Sprague River Resource Foundation, Inc., Fort Klamath Critical Habitat Landowners, Inc., Productive Timberland LLC, the Mosby Family Trust, and Sprague River Cattle Company. These individuals and organizations consist of, and represent, a number of water right holders in the Upper Klamath Basin that rely on groundwater for irrigation. On our clients' behalf, we have been monitoring the Department's recent efforts to promulgate new "Groundwater Allocation" rules affecting divisions 8, 9, 300, 400, and 410. I understand you are the point of contact for the Groundwater Allocation rulemaking and, thus, this letter is directed at you. I request that you share this letter with the Rules Advisory Committee prior to their upcoming August meeting.

My clients are deeply concerned about the proposed Groundwater Allocation rules, their arbitrariness, affect on existing water right holders, disregard for due process, and inconsistency with Oregon's prior appropriation system. Significant amendments to the proposed rules are necessary to ensure that the rules will be both legally and scientifically defensible. The following bullet points describe the various considerations and modifications OWRD should evaluate in this rulemaking. OWRD therefore should amend the proposed Groundwater Allocation rules, or postpone their adoption, in the manners described below.

- **The Proposed Rules Create Arbitrary Limitations on Future Appropriations:** My clients support the comments of the Oregon Agriculture Water Alliance, submitted July 7. As a matter of policy, I encourage OWRD not to limit future appropriations of water based on arbitrary drawdown limitations for all groundwater basins in the state. As the comment letter of Oregon Agriculture Water Alliance explains, enhanced knowledge of Oregon's groundwater systems is necessary before sweeping policy changes are made. Therefore, I encourage OWRD to postpone adoption of the proposed Groundwater Allocation rules until a systematic study of Oregon's groundwater systems is complete.



- **The Proposed Rules’ Effect on Future Modifications of Existing Rights is Unclear:** The proposed Groundwater Allocation rules create arbitrary limitations on future appropriations across all Oregon groundwater basins. Unfortunately, it is unclear whether these arbitrary limitations will also serve as barriers to future modifications (i.e., transfers in the place of use, point of diversion, or manner of use) for existing rights. Any rules which have the effect of restricting the use of existing rights implicate due process. See *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491, opinion modified on other grounds on denial of reh’g, 137 Or. 480 (1931). Therefore, I strongly encourage OWRD to include language in the proposed Groundwater Allocation rules explaining that the rules do not apply to applications for the modification of *existing* rights.
- **Division 9 Must Provide Procedures Protecting Due Process Rights:** Division 9 describes OWRD’s process for regulating groundwater rights on account of senior surface water appropriations. OWRD’s prior attempts to do this in the Klamath Basin resulted in numerous due process violations. In 2018, OWRD attempted to regulate 140 wells in the Upper Klamath Basin in favor of instream water rights based on a technical memo dated April 26, 2018, purporting to determine an impact of groundwater pumping on stream flows. The regulation orders sent to affected water right holders were dated and issued a day later, on April 27, 2018, but did not even include the technical memo. My office filed ten lawsuits against OWRD challenging this groundwater regulation on the basis that OWRD’s regulation orders denied the water right holders due process of law. See, e.g., *Sprague River Cattle Company v. Byler*, Marion County Circuit Court, No. 18CV201167. OWRD settled those cases by paying the petitioners’ attorney fees and costs and agreeing to consider adopting new groundwater regulation rules. OWRD then adopted the Division 25 rules, attempting to regulate groundwater use by existing water right holders in the Off-Project Area of the Klamath Basin if the wells met certain pre-determined criteria established in the rule. OWRD sent shut-off notices to six (6) well owners in the Upper Klamath Basin based on the Division 25 rules. Our office filed suit on behalf of one of the affected water right holders. See *Brooks v. OWRD*, Marion County Circuit Court, No. 19CV27798. The Marion County Circuit Court ruled: (1) that OWRD acted without statutory authority because the Division 25 rules effectively declared a critical groundwater area without following the statutory requirements of ORS 537.730-742; (2) the Division 25 rules did not provide adequate due process to existing water right holders prior to regulating off groundwater use; and (3) OWRD’s regulation order violated the plaintiffs’ due process rights under the Fourteenth Amendment of the U.S. Constitution. Here, the proposed Division 9 rules continue this legacy of ignoring the due process rights of groundwater users. In accordance with the *Brooks* case, OWRD must ensure that any regulation of groundwater users on account of senior surface water appropriators comply with due process. This requires a contested case proceeding before any regulation under Division 9. I strongly encourage OWRD to modify the proposed Division 9 rules by stating that any groundwater controls pursuant to OAR 690-009-0050 trigger a contested case process.
- **Modifications to the Division 8 Definitions of “Declined Excessively” and “Impairment” Will Affect Division 10’s Critical Groundwater Area Rules in a**



Manner Violating Due Process and the Prior Appropriation Doctrine: The proposed Groundwater Allocation Rules modify the definitions of “declined excessively” and “impairment.” Under existing rules, when a groundwater use impairs a **senior** surface water right, the definition of “declined excessively” is met. In the proposed Division 8 definitions of “declined excessively” and “impairment,” all references to seniority are stricken. If promulgated, this means that when a groundwater use impairs **any** surface water right, the definition of “declined excessively” is met. This will have significant consequences within OWRD’s proposed Division 10 rules. Under proposed OAR 690-010-0120(1)(a), a critical groundwater area can be designated when groundwater levels have “declined excessively.” Proposed OAR 690-010-0230 then allows OWRD to regulate existing groundwater users based on a finding that groundwater levels have “declined excessively.” This allows OWRD to circumvent the prior appropriation doctrine by regulating **senior** groundwater users on account of impairment of **junior** surface water rights within a critical groundwater area. This would further violate due process in the same manner described in the preceding bullet. In addition, a nonsensical inconsistency within OAR 690-010-0120 results from the proposed definition of “declined excessively.” Proposed OAR 690-010-0120 already states that interference between groundwater users and **senior** surface water users is grounds for a critical groundwater area designation. This express language becomes meaningless if the reference to “declined excessively” in OAR 690-010-0120(1)(a) includes interference between a senior groundwater user and *any* (even junior) surface water users. To avoid this very significant mistake, OWRD must either clarify that the definition of “declined excessively” does not apply to Division 10, or reinstate the references to seniority in the definitions of “declined excessively” and “impairment.” Otherwise, OWRD’s OAR 690-010-0120(1)(a) reference to “declined excessively” serves as a work-around to the prior appropriation system, allowing senior groundwater users to be regulated on account of junior surface water rights within a critical groundwater area.

These comments to the Groundwater Allocation rules are intended to protect the due process rights that existing water right holders are entitled to under the Oregon Constitution and U.S. Constitution, as well as the integrity of the prior appropriation system. My clients urge OWRD, and members of the RAC, to give serious consideration to adopting modifications to the proposed rules consistent with these comments. If these comments are not addressed, and due process and the prior appropriation system are violated, OWRD should expect more litigation on behalf of Oregon water rights holders.

I hope the Department and Commission finds these comments constructive and helpful and that the agency will see the wisdom in modifying its Groundwater Allocation rulemaking. Please feel free call me to discuss this matter further.

Sincerely,



Dominic M. Carollo
Cc: clients

HARTT Laura A * WRD

From: LIEBE Annette I * WRD
Sent: Tuesday, July 25, 2023 8:30 AM
To: HARTT Laura A * WRD
Cc: IVERSON Justin T * WRD
Subject: FW: Groundwater Allocation Follow-up

Annette Liebe, JD
Technical Services Division Administrator
Oregon Water Resources Department
annette.i.liebe@water.oregon.gov
(971) 375-7322

From: Rep McIntire <Rep.EmilyMcIntire@oregonlegislature.gov>
Sent: Wednesday, July 12, 2023 8:24 AM
To: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>
Cc: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Subject: Re: Groundwater Allocation Follow-up

Sure! I am on vacation but when I get back let's find time in August:) blessings! Emily

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From: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>
Sent: Tuesday, July 11, 2023 4:30:55 PM
To: Rep McIntire <Rep.EmilyMcIntire@oregonlegislature.gov>
Cc: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Subject: RE: Groundwater Allocation Follow-up

Thank you Rep. McIntire.

I think it would make the most sense for us to set up a time to chat as I understand this is somewhat complicated. Can you please identify some times that work for you for a short meeting?

Best,

Annette Liebe, JD
Technical Services Division Administrator
Oregon Water Resources Department
annette.i.liebe@water.oregon.gov
(971) 375-7322

From: Rep McIntire <Rep.EmilyMcIntire@oregonlegislature.gov>
Sent: Tuesday, July 11, 2023 9:10 AM
To: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>
Cc: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>; LIEBE Annette I * WRD

<Annette.I.LIEBE@water.oregon.gov>

Subject: RE: Groundwater Allocation Follow-up

Thank you, Annette, I am sure this is an extremely thorough process. I am however, still wondering how you are looking at the state water regionally- specifically for Klamath. As Klamath has no official water rights as it is still in the adjudication process, what rights do they have and how is this addressing that?

I am just looking for someone, anyone, that is willing to tackle this with me. We do have a meeting in Klamath coming up, but I just want to have this question and these thoughts be front and center...

Blessings to you! Emily

Ps- I'm currently locked out of my computer- so using my COS 😊

Ryan McIntire - Chief of Staff

Representative Emily McIntire

District 56 (Jackson and Klamath Counties)

900 Court St. Salem, OR (503) 986-1456

www.oregonlegislature.gov/mcintire

[Facebook-Emily McIntire State Representative](#)

From: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>

Sent: Wednesday, July 5, 2023 12:31 PM

To: Rep McIntire <Rep.EmilyMcIntire@oregonlegislature.gov>

Cc: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>; LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>

Subject: RE: Groundwater Allocation Follow-up

Rep. McIntire,

I hope you enjoyed a restful and festive Independence Day. Thank you for joining the Groundwater Allocation Rules Advisory Committee meeting on June 21st; we appreciate your patience in responding to your questions.

The Water Resources Commission asked Department staff to begin the rulemaking process to revise the rules governing new applications for groundwater rights to ensure that the resource is managed sustainably and to protect the interests of existing water right holders. The Commission directed staff to begin rulemaking because data shows that groundwater levels are declining and surface waters are over appropriated throughout much of the state. Existing rules ignore the cumulative impacts of over-allocation of groundwater on both groundwater and surface water over both time and space. Additionally, climate change has led to more frequent and more intense droughts, further depleting water resources. Once adopted, these rules will apply to application received after the effective date of the rules.

The draft approach relies on local scientific data for determining whether conditions are met for reaching a finding that water is available to issue new groundwater rights. This is one of several criteria that the Department evaluates when reviewing water right applications. Basin-specific criteria are addressed through basin program rules and are evaluated during the water right review process.

During any rulemaking process, at a minimum, we seek input from community leaders in two ways—through a Rules Advisory Committee (RAC) and during the public comment period associated with the Notice of

Proposed Rulemaking. The RAC for this rulemaking includes a broad array of community leaders representing agriculture, livestock, exempt well users, conservation, environmental justice, Tribes, local governments, and consultants. These members have background and expertise in areas that include hydrology, ecology, climate, water rights, water management, policy, and economics. These members also represent regions throughout the state. The RAC meetings are hybrid and open to the public. These meetings are noticed through GovDelivery, the Oregon Transparency website, and the Oregon Water Resources Department website. Community members are encouraged to attend and provide public comment at any of these meetings. During RAC meetings, staff provide the scientific background underlying the proposed rule changes as well as the draft rule language, which RAC members review and discuss openly. The rule drafting is an iterative process, where staff collect, review, and incorporate RAC feedback and public input. The RAC also reviews, discusses, and provides feedback on the draft Statements of Need, Racial Equity Impacts, and Economic and Fiscal Impacts. Again, this is an iterative process, where staff collect, review, and incorporate RAC feedback and public input. Community leaders not on the RAC may contact the Department to request an informational session with staff.

Once the RAC has reviewed the proposed rules, staff will hold several information sessions and public hearings in different parts of the state. During the information sessions, staff will provide background information concerning the environmental and hydrogeological criteria underlying groundwater allocation determinations under the proposed rules and why changes are needed. Staff will be available to answer any questions from the public. During the public hearings and comment period, staff will collect oral and written comments for consideration during the rulemaking process. The public comment period and all public hearings will be noticed as required by statute. In recognition of the statewide nature of this rulemaking, the Department will enhance its notifications to ensure all interested parties receive ample notice to participate during the public comment period. Methods and recipients of notification include the following: Oregon Bulletin, Oregon Transparency website, Associated Press, Oregon Water Resources Department press releases, Oregon Water Resources Department website, GovDelivery listservs (Rulemaking, Legislation/Budget), Rules Advisory Committee (RAC) members, Groundwater Advisory Committee members, Oregon Groundwater Association members, Tribal leadership, League of Oregon Cities, Association of Oregon Counties, Irrigation Districts, and all State Legislators.

Please let me know if you have additional questions or would like additional information.

Best,
Annette Liebe, JD
Technical Services Division Administrator
Oregon Water Resources Department
annette.i.liebe@water.oregon.gov
(971) 375-7322

From: Rep McIntire <Rep.EmilyMcIntire@oregonlegislature.gov>
Sent: Friday, June 23, 2023 2:48 PM
To: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>
Subject: RE: Groundwater Allocation Follow-up

Thanks Annette!! No worries!! Blessings!

From: LIEBE Annette I * WRD <Annette.I.LIEBE@water.oregon.gov>
Sent: Friday, June 23, 2023 2:06 PM
To: Rep McIntire <Rep.EmilyMcIntire@oregonlegislature.gov>

Cc: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>

Subject: Groundwater Allocation Follow-up

CAUTION: This email originated from outside the Legislature. Use caution clicking any links or attachments.

Rep. McIntire,

Thank you for joining the groundwater allocation rules advisory committee meeting earlier this week.

We are working on responses to the questions that you put in the chat. Both myself and the groundwater section manager will be on vacation until after the July 4th holiday. Therefore, we will send the responses later that week.

Thanks for your patience and understanding.

Best,

Annette Liebe, JD
Technical Services Division Administrator
Oregon Water Resources Department
annette.i.liebe@water.oregon.gov
(971) 375-7322