



Oregon

Tina Kotek, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

www.Oregon.gov/OWRD

TO: Harney Basin Voluntary Agreement Group

FR: Oregon Water Resources Department Division 512 Rulemaking Team

DT: September 27, 2024

RE: Response to email from Mark Owens to Kelly Meinz (August 6, 2024) regarding OWRD's Draft Voluntary Agreement Guidance Document

Introduction

This document outlines OWRD's response to questions and comments raised in Mark Owen's August 2024 email sent on behalf of a group interested in providing feedback on OWRD's Draft Document, Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir (Draft Guidance). The July 2024 Draft Guidance was provided to the group consisting of

- Mark Owens (Oregon State Legislature)
- Kristen Shelman (Harney County Commission)
- Brenda Smith (High Desert Partnership)
- Chad Karges (High Desert Partnership)
- Zach Freed (The Nature Conservancy)
- Elizabeth Howard (Schwabe, Williamson & Wyatt)

The Draft Guidance is intended to outline criteria OWRD considers consistent with ORS 537.745 to assist the Water Resources Commission in decision making concerning approval of Voluntary Agreements. The Draft Guidance also included outstanding questions. The group provided general comments, specific comments on criteria outlined in the Draft Guidance document, and responses to OWRD's outstanding questions. OWRD has included this input below and provided additional Departmental responses/feedback. This summary is intended to further the dialogue with the group.

Group's General Comments & OWRD Responses

As a quick reminder, here are some of the key elements we hope will be considered in the work OWRD is doing on voluntary agreements:

- Voluntary agreements need to be simple, transparent and understandable. Any guidance needs to be very broad with lots of flexibility.

Department Response: Agree in principle, though criteria should be specific enough to set participants up for success while also achieving groundwater recovery goals.

- We would expect voluntary agreements to provide for tracking and accountability.

Department Response: Agreed.

- We anticipate there will be a number of wells that are not specifically in their authorized locations. We need a process to allow water users to fix this without penalty and without delays (i.e., a set period for rapid permit amendments?).

Department Response: The Department does not have a mechanism to prioritize specific applications. Participants should be responsible for necessary water right modifications.

- We need to address “unused” wells. Will these be decommissioned or mothballed to be used as backup wells in emergencies, or both? Might they be used as MWs?

Department Response: The Department does not need to address unused wells in the context of a voluntary agreement. If a well is a POA on a valid right participating in a voluntary agreement, whether the well is used or not is immaterial. Unless specified on the water right, current statute and rules do not require the use of all authorized POAs.; a VA would not change that expectation. However, if the well remains a valid POA on a water right, the right holder must comply with the requirements for measurement of use and reporting. If the right holder does not want to comply with these VA requirements (e.g., the right holder does not want to install a flowmeter because the right holder does not intend to use the well), then the well would no longer be authorized to pump as part of the VA.

- We need flow meters on all wells that will be used to appropriate water under the Voluntary Agreement to track use.

Department Response: Agreed.

- The Voluntary Agreements should provide a relatively simply way to trade and move water between users (akin to a rotation agreement or district temporary transfers) at a set time so that owners can plan their water usage and crop rotations for the year. This could be coordinated timing-wise to occur after the March static water level measurements are in.

Department Response: This recommendation is feasible. However, prior to each irrigation season, VA participants would have to notify the Department which wells they intend to use and how much water they intend to use from each well, as well as the period of time over which the use is to occur. Notification is necessary to ensure Department field staff have adequate opportunity to monitor use and ensure participants comply with the terms of the VA.

- Voluntary Agreements should look to achieve a rate of decrease over a period of time, but also provide for adaptive management that requires revisiting the plan at least once every 5-10 years.

Department Response: Agreed.

- The primary goal of a VA should be to slow the rate of decline so that we are moving toward reasonably stabilized groundwater levels.

Department Response: In an area that has not passed the thresholds for a CGWA, the goal of a VA could be to slow the rate of decline and moving towards stable groundwater levels with the intent of preventing a CGWA from ever being necessary. In an area that has passed the threshold for a CGWA designation, then the goal of a VA needs to be the same as any CGWA rules that are adopted by the Commission. E.g., for the Harney Basin, the goal of the VA should be zero rate of decline. Otherwise, the VA becomes a tool by which declines are allowed to continue. There could be flexibility in how quickly the VA achieves the goal set out by the CGWA rules, but the VA goal should be the same as the CGWA.

- We would like to see a “carrot” for voluntary cancellation of water rights that are being unused and would like to see OWRD exercising its authority to cancel water rights that are forfeit such that we are working from “real” water use numbers and not being inaccurately regulated due to the reliance on paper water rights.

Department Response: The Department is working to determine ways to be more efficient in cancelling unused water rights.

- Also, water users participating in a VA need to be shielded from claims of forfeiture and cancellation proceedings for any water right that is part of the agreement.

Department Response: Any water right curtailed as a result of the CGWA implementation would not be subject to forfeiture (ORS 540.610 (2)(k)). Any right that is allocated water but does not meet any of the exemptions to forfeiture under ORS 540.610 could be subject to forfeiture. The Department does not believe it has the authority to prevent forfeiture outside the existing statute.

- The Voluntary Agreements should measure and hold parties accountable for annual volumes, and not to a particular rate.

Department Response: Agree, however the Department may not be able to allow rates above water right limits without showing overall increased efficiency.

Group's Comments on Specific Criteria within the Draft Guidance for Voluntary Agreements Among Groundwater Users & OWRD Responses

General Applicability

We agree that voluntary agreements can be entered into in areas with CGWA designations and those without. However, we do not think that the statement that a voluntary agreement in the area of a CGWA designation must comply with all rules pertaining to a critical groundwater area is quite right. ORS 537.745(1) states that the agreement, once approved by the commission, "shall control in lieu of a formal order or rule of the commission...." Thus, it would appear that the legislature intended that a voluntary agreement would be independent of the CGWA order and rules. This makes sense as voluntary agreements are substantially less likely to be utilized as a tool if the participants in the agreement are also subject to the CGWA order.

Department Response: When the Commission finds that a voluntary agreement, executed in writing and filed with the Commission, is consistent with the intent, purposes and requirements of the Ground Water Act of 1955, including in particular ORS 537.730 to 537.740 (pertaining specifically to critical groundwater area designations), the Commission shall approve the agreement. The approved agreement shall control in lieu of a formal order or rule of the Commission. Because CGWA designation and associated rules and orders are an effort to remedy the problems leading to designation, then the VA also must be consistent with those rules and orders. This means the outcome of the water use reductions undertaken by the VA must have the same overall outcome as the CGWA rules and orders. The Department agrees there can be flexibility in the time it takes to achieve the same outcome, but the final outcome must be the same. Statutory guidance language has been added to the Draft Guidance document.

Groundwater Rights

We think voluntary agreements are not the right means or mechanism to make a determination about which water rights are valid or not. Related to this, beneficial use in the past five years is not necessarily the measurement for determining if a water right is "valid" assuming the Department is using that term to mean "not subject to forfeiture." See ORS 540.610.

If a water right is subject to forfeiture, we think that the Department should be engaging in cancellation proceedings in accordance with OAR 690, Division 17, separate and apart from the voluntary agreement process. Further, we agree that, as noted in prior conversations, the CGWA rules and the voluntary agreements will work better if the WRD would initiate those proceedings now. This will allow all impacted parties to operate with more accurate information about which water rights appropriately bear the designation of "non-cancelled."

We would include in these separate, but important proceedings the need to resolve the cancellation of unperfected permits (or parts thereof).

Department Response: The Department agrees that rights subject to forfeiture need to be cancelled, and the Department is working on determining ways of being more efficient in

cancelling rights subject to forfeiture. However, the Department emphasizes that rights subject to forfeiture should not be included in a VA and that is why this language was included.

We are also concerned about the comment that a water right that has exceeded its permit decline conditions cannot participate. We agree that a water right that has exceeded its permit decline condition should be regulated off. However, this should not prohibit a water right being included in the voluntary agreement, particularly as we anticipate that involvement in an agreement could cause the water right to return to a place where the permit decline conditions are no longer being triggered.

Department Response: If a Point of Appropriation (POA) has exceeded its decline condition and is regulated off, no pumping may occur from that POA. The Department agrees that if the water level in the POA recovers to above the decline condition threshold, then that POA would be allowed to pump again. If all POAs on a right are regulated off, that right would provide no volume of water to the VA as it would be allocated no water. Only if the water level recovers in at least one of the POAs on that right, would it be evaluated for allocation of water.

We would encourage you to support and provide more flexibility regarding the place of use and point of appropriation within the voluntary agreement boundaries. Participants will want to be able to do transfers to support efficient and economic use within the voluntary agreement boundaries. Limits on place of use or point of appropriation will likely discourage the most efficient use of water. We encourage you to support a model more akin to temporary transfers within districts. ORS 540.570.

Department Response: This recommendation is feasible. However, prior to each irrigation season, VA participants would have to notify the Department which wells they intend to use and how much water they intend to use from each well, as well as the period of time over which the use is to occur. Notification is necessary to ensure Department field staff have adequate opportunity to monitor use and ensure participants comply with the terms of the VA. Changes in place of use and point of appropriation could be made within the boundaries of the voluntary agreement from season to season; however, changes mid-season would not be feasible to manage.

Groundwater Reservoir

We agree with the approach of allowing voluntary agreements within subareas and think that the subareas determined in the CGWA process can be groundwater reservoirs for purposes of agreement.

We also agree that the area for the agreement should be defined by its boundaries. Lands and wells within its boundaries should be the “area” to which the voluntary agreement applies.

Department Response: Acknowledged.

Groundwater Use

As noted elsewhere, we would not agree with the idea that the department approves (or disapproves) a voluntary agreement. Per ORS 537.745, this is solely within the authority of the Commission.

Department Response: This section specifies that the Department establishes either the “permissible total withdrawal” or the “target for voluntary reduction” which would support a Department recommendation to the Commission regarding approval. The section does not state that the Department approves the agreement. Clarifying language has been added to the Draft Guidance document.

The purpose of a voluntary agreement to achieve reasonably stable groundwater levels through voluntary actions pursuant to a carefully crafted agreement. An agreement is an alternative to (“in lieu of”) the CGWA order and rules. Thus, PTW or TVR, as set by the department should not necessarily be the guiding principle for determining annual withdrawals.

Department Response: While the agreement shall control in lieu of a CGWA order, the agreement must still be consistent with the intent, purposes and requirements of the Ground Water Act, including in particular ORS 537.525 (general policy considerations), 537.730 to 537.740 (critical groundwater area designations) and 537.780 (Commission powers). The intent of a CGWA is to remedy the problems resulting in the designation. The PTW is the maximum amount of pumpage allowed that will result in stabilizing groundwater levels within that area.

Department Question to Group for Follow Up: What other guiding principle for determining annual withdrawals should be considered that would result in stable groundwater levels?

Many of the water rights in the Div 512 rulemaking area fall below the rate required to irrigate crops in the Harney Basin. Limiting all water use to 1/80th cfs (may not exceed the rate and duty of “any water right”) will be highly detrimental to water right holders and voluntary agreement participants. If individuals are part of a voluntary agreement, it does not make sense that they would generally be subject to WRD regulation based on water right calls. ORS 537.735(3)(d) can apply whether there is a senior water right call, or not. The flexibility in rate is critical to formulate voluntary agreements that are reducing water withdrawals so as to achieve a stable groundwater level within an acceptable timeframe and at an acceptable level, while making economic sense to the participants and signatories to the agreement.

Department Response: Theoretically, flexibility in terms of allowing for higher rates is possible; however, for the Commission to consider allowing a rate higher than the rate authorized by a certificate in a VA, the VA participant(s) would need to demonstrate that the higher rate results in greater water efficiency (i.e., results in use of less volume over time or over acreage). Historically, the Department has allowed groundwater applicants in Eastern Oregon to request a higher than standard rate of 1/80th cfs up to 1/60th cfs in order to account for crop needs in a dry climate. Also, the Natural Resource Conservation Service has calculated that alfalfa crops

may require a rate of approximately 1/60th cfs using a standard pivot. Therefore, the Department acknowledges there is some precedent for allowing rates as high as 1/60th cfs, which is reflected in the Draft Guidance document.

Overuse adjustments need to account for years where there are “credits” to the groundwater levels due to less groundwater pumping than anticipated. Right now, this section is too punitive. Also, the voluntary agreements are meant to be and should be self-enforcing. We would not agree with an approach where the department is overseeing them in great detail or issuing proposed orders related to over-use. We also do not think this falls within the department’s authority under current law.

Department Response: We agree that tracking a water use balance in the form of credits or debits from year to year is unnecessary. We have reworded the section to define overuse and to state what action the Department may recommend if overuse occurs.

As noted elsewhere, there needs to be flexibility regarding which wells can be used. It should be broader than an approved POA. Meters should be a prior condition of use for any POA, however.

Department Response: The Department agrees that some flexibility concerning which POAs are used on rights participating in a VA may be permissible; however, all POAs used under the VA need to be authorized by a water right.

Duration

This section is likely too prescriptive. Voluntary agreements need to be flexible and adaptable for the area of the reservoir that falls within their boundaries. That said, we do not disagree that the length of the agreement could logically be set to the amount of time that the participants anticipate it will take to reach stable groundwater levels. At the same time, we do not think that a voluntary agreement should necessarily expire at a set time. Further, any voluntary agreement should provide for adaptive management and regular reviews to account for a growing body of data and information pertaining to the relevant CGWA(s) and management of the area.

Department Response: The Department agrees in principle, though criteria, including the duration of the agreement, should align with to goal of reaching stable groundwater levels in a reasonable amount of time. In many cases, the duration needed to achieve reasonably stable groundwater levels may be on the order of decades.

Reporting and Monitoring

We think this should operate more like a district, with the participants gathering the information listed, monitoring use, and reporting at the end of the irrigation season. We are concerned with the concept that department staff would use the voluntary agreements as a means to access property. Absolute and required access to WRD under the terms of the voluntary agreement is likely a non-starter.

Department Response: Access to POAs authorized by rights participating in a VA is a critical component of monitoring for compliance with the agreement. Access does not have to be absolute; however, scheduled access with reasonable notice would need to be a component.

Also, we would differ on the idea that failure to maintain flow meters or provide access to WRD would rise to the level of “the agreement is not being substantially complied with,” requiring termination of the agreement. The metering provision needs to be more circumspect and account for practical realities, including other ways to measure if a meter fails.

Department Response: Functional measuring devices need to be maintained so Department staff can reasonably monitor use. Equipment failure is expected and reasonable time for repair or replacement can be considered as well as using other methods to calculate use until the repair is complete.

Appeal Process

This section does not conform to ORS 537.745(1) or ORS 536.025(2). Propose to delete in its entirety.

A Voluntary Agreement is not an order of the Commission. It is an agreement between groundwater users. That agreement is approved by the Commission (“the commission shall approve the agreement.”) It is “in lieu of a formal order or rule of the commission....”

Moreover, the Commission has not delegated its authority to act on Voluntary Agreements to the Department. Thus, WRD cannot cause a termination of the agreement or review, approve, or deny a voluntary agreement. That authority is vested entirely within the Commission. ORS 536.025(2) (regarding delegation of the commission’s authority to the director).

Department Response: Agree that a VA is not an order of the Commission; however, the process for challenging the Commission’s approval/rejection of a VA is an order in other than contested case unless the Commission by rule or order decides to offer a contested case. The Department also agrees that the Commission has not delegated its authority to approve voluntary agreements to the Department; however, the Commission does have authority to do so. If the Commission does delegate its approval/rejection authority to the Department, then the process for challenging the Department’s approval/rejection of a VA is an order in other than contested case unless the Commission also delegates to the Department by rule or order the authority to offer a contested case.

Moreover, ORS 536.037(d)(d) authorizes the Department to participate in any Commission proceeding. The Commission also can explicitly delegate authority to the Department to act as the Commission’s staff in making a recommendation to the Commission. Therefore, these guidelines address the need for the Department to advise the Commission on whether or not proposed voluntary agreements are consistent with the intent, purposes, and requirements of the

Ground Water Act of 1955. These guidelines also recognize the need for the Department to assist the Commission in determining whether the agreement is not being substantially complied with by the parties thereto or whether changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and healthy, or contrary to the intent, purposes, and requirements of the Ground Water Act of 1955.

Clarifying language has been added to the Draft Guidance document.

Agreement & Modified Agreement Approval

As noted previously, we would do not think that the Department has authority to approve a voluntary agreement or amendments thereto. That authority is vested in the Commission only. Similarly, while the Department may choose to recommend an agreement to the Commission for approval, we would note that a department recommendation is not a pre-requisite for approval.

Department's Response: The Commission may choose to delegate some responsibilities to the Department, e.g., compliance with and amendments to existing voluntary agreements. See immediately prior response.

Group Responses to OWRD Outstanding Issues/Questions & OWRD Responses

Q: What is the impact of the sale of a property that is within the voluntary agreement (VA)?

A: The agreement could provide an assignment and assumption term so that it can be fully transferred and fully assigned.

Department's Response: Agreed, however, the VA should require compliance with the Department's assignment process. The VA also should include a standard "successors and assigns" clause requiring the purchaser to comply with all terms of the agreement.

Q: Can someone other than the landowner participate in a voluntary agreement? For instance, the person leasing property with groundwater rights.

A: Yes – we can include a provision in the VA addressing this, too.

Department's Response: Because a VA represents an encumbrance, the participant needs to be the holder of the water right. Typically, the water right holder is the landowner, but the Department acknowledges there may be some exceptions.

Q: How does WRD calculate actual use by groundwater users?

A: Using totalizing flow meters and annual reporting. We had also discussed allocating the amount of water to be used on an annual basis prior to irrigation season. Actual use can be compared to this allocation post-season. Also, the continuation of annual static water level measurements could be useful for evaluating annual use.

Department's Response: Agree in part, however, static water level measurements on an annual basis are not good indicators of annual use out of a specific well.

Q: How does WRD calculate the portion of the Permissible Total Withdrawal (PTW) or Target for Voluntary Reduction (TVR) that the VA gets to pump?

A: We think that this question can be informed by runs of the USGS model.

Department Response: Agree in principle, though staff resources may be limited. [consider option of third party modeling?]

Q: How should water be allocated within the areas? Should the high and low priority subareas be treated the same or differently?

A: Likely differently, but we think this should be answered after we have a few runs of the USGS model available to inform our decisions.

Department Response: The decision should be made a priori, to ensure consistency with the goals of setting participants up for success while also achieving groundwater recovery.

Q: Should we allow multiple agreements in the same geographic area (or subarea)?

A: We should maintain flexibility to the maximum extent possible. If having multiple agreements allows the basin to more quickly achieve reasonably stable groundwater levels with less economic impacts and without too much of an additional administrative and management load for the water users, then, likely "yes." That said, we are having a hard time developing a scenario where this would make sense right now.

Department Response: The Department does not foresee the possibility that different groups of users may want to work together within a geographic area/subarea. Should they all be forced to join a single voluntary agreement?

Q: Should we broaden the scope of the "target for voluntary reduction" to include other corrective controls (besides water use reduction) such as geothermal, water purity, interference between wells, or interference between wells and surface water? For instance, change it to "target for voluntary action".

Department Response: No answer provided by group.

Q: If a user exceeds their duty or rate, is that grounds for termination of the agreement?

A: We envision the VA being a holistic plan across the area of the agreement and where water users are temporarily trading water allocations, while staying within the bounds of the water agreement long term goals to reach a reasonably stable groundwater level. Thus, looking at whether an individual user complies with his/her water right is not necessarily the framework that we think could work best in this case.

Department Response: Generally, agree. Similar to a rotation, the Department could allow users to temporarily exceed the limits on a water right as long as they maintain use within the allocation limits of the rights participating in the VA.

Q: Should there be a minimum or maximum duration for an agreement?

A: Likely, yes. We propose ten years as a minimum. Any other time is likely too short on a geological time scale. We do not think they need an automatic termination date based on a maximum duration, but should be subject to regular reviews (i.e., every 5-10 years).

Department Response: If the duration is 10 years, then the agreement ends after 10 years because of “lapse of time.” ORS 537.745(1).

Q: Should there be restrictions on the length of time it takes for the voluntary agreement to reach the PTW or TVR?

A: Not necessarily, but the VA will likely impose a timeframe that the Commission finds sufficient to approve the agreement as the tool for managing groundwater levels in lieu of the formal order or rules.

Department Response: The VA should include a time frame for achieving goals within the subject area/sub area, e.g., for Harney Basin, the time to achieve zero rate of decline or time to reach PTW. During CGWA re-evaluation, VA may no longer be deemed effective in achieving goals of basin, necessitating termination.

Q: WRD is still reviewing the methodology by which agreements will be approved and/or amended and orders issued in relation to voluntary agreements. Language that states the WRC or WRD will issue an “order in other than contested case” or “proposed order in contested case” is likely to change once final determinations of process have been made.

A: We appreciate this and have noted above the areas where we saw this language and reasons why we would not agree that WRD has authority to issue proposed or final orders as it relates to Vas.

Department Response: Acknowledged.