



Food & Wildlife for the Future

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Attn: Laura Hartt
Oregon Water Resources Department
Laura.a.hartt@water.oregon.gov

Re: OWRD Groundwater Rule Comments

The Proposed rules have many issues that make them problematic at best.

First, I don't believe the Department has fully described why the changes are necessary and has not fully discussed why the tools the Department currently has to regulate groundwater don't work. For example: Critical Groundwater designation, designations of groundwater limited areas or the Commission's authority to withdraw areas from further appropriation. There needs to be some specific examples of concern to warrant such a change to groundwater rules.

I think it would be advantageous for the Department to start over and establish a new division within existing administrative rules addressing the regulation of groundwater on a prospective basis. This would eliminate confusion over the application affecting or impacting existing uses. When the Department changes definitions, it is nearly impossible to distinguish between old rules and existing rules when written in the same division.

I appreciate the Department has tried to put up a fire wall in the latest draft rules, but it doesn't go in depth enough.

OWRD's amendments to Divisions 8 and 9 create an unnecessarily convoluted regulatory scheme. In Division 8, the definition of "substantial interference," "substantially interfere," and "unduly interfere" are materially changed. This alone has a substantial effect on Division 9, which would still purport to pertain to the regulation of new *or existing* rights which will "substantially interfere" with a surface water source. In the definitions section of Division 9, the definition of "potential for substantial interference" itself turns to the Division 8 definition of "substantial interference." Next, proposed OAR 690-009-0040 creates a process for determining hydraulic connection and the potential for substantial interference between a groundwater right and surface water source.

The proposed groundwater allocation rules attempt to bifurcate the analysis of hydraulic connection and potential for substantial interference for new groundwater rights versus existing

groundwater rights. Proposed ORS 690-009-0050 declares that, for controlling or regulating groundwater rights, OWRD shall apply the 1988 version of ORS 690-009-0040, which is readopted as ORS 690-009-0060. However, that 1988 version still references certain terms which have been redefined in the proposed groundwater allocation rules. In other words, by changing certain definitions, including that for substantial interference and potential for substantial interference, it appears that OWRD is changing how it analyzes substantial interference between *existing* groundwater rights and surface water rights. Thus, the incredibly confusing bifurcated regulatory analysis proposed in the groundwater allocation rules fails to insulate existing groundwater rights from the new proposed rule changes

The proposed Division 9 rules do little-to-nothing to identify the analytical process OWRD must follow to determine substantial interference and, ultimately, issue groundwater controls. Instead, the rules rely on generalized statements that any determination must be based on the application of “generally accepted hydrogeologic principles” or the “best available information.” What constitutes these principles or the best available information is largely left to the agency’s discretion. No limiting factors are placed on OWRD’s ability to make its substantial interference determination. Most glaringly, the proposed Division 9 rules leave the door open for OWRD to determine substantial interference without any consideration of site-specific factors, or the *actual* effect of a given well on a given surface water source. Ultimately, what the proposed Division 9 rules appear to authorize is for OWRD to regulate groundwater uses based on assumptions of substantial interference, without regard for actual site-specific hydrogeological conditions. Under the proposed rules, there is no guarantee that OWRD will go beyond simple assumptions and simple conceptual models to analyze whether substantial interference will occur. This can allow OWRD to adopt a simplified analysis in a complex, multi-layer aquifer system for the purpose of justifying groundwater controls. Ultimately, this results in a burden-shifting analysis, where the proposed rules put the burden on the groundwater user to demonstrate why controls are not justified, rather than keeping the burden on OWRD for demonstrating why controls are justified. This presents a due process issue, allowing OWRD to regulate groundwater uses without having to first demonstrate with reasonable scientific certainty that such regulation is necessary to alleviate substantial interference.

In 2023, OWRD adopted new rules governing the designation of critical groundwater areas. Under those rules, the Commission may adopt rules designating critical groundwater areas where groundwater levels have declined excessively, where there is a pattern of substantial interference, or where groundwater supplies are overdrawn, among other circumstances. The proposed groundwater allocation rules amend these various terms. The definition of “declined excessively” would be changed substantially, as would the definitions of “substantial interference” and “overdrawn.” This will modify the meaning of the critical groundwater area rules in unintended ways.

The modification of the definition of “substantial interference” may have the biggest effect on Division 10. By redefining “substantial interference” in Division 8 as currently proposed, OWRD would be authorized to designate critical groundwater areas where two wells simply interfere with

one another, even if the aquifer in general is being utilized sustainably. This seems incompatible with the legislative intent of the critical groundwater area tool.

As indicated above, you can see that including the proposed changes in the current Division rules causes confusion between existing groundwater appropriations and future groundwater appropriations. While the Department has indicated during public meetings that the proposed rules will not interfere with existing groundwater use, there is a possibility that courts could adopt the new definitions in future challenges.

Therefore, it is imperative that the Department create a new division that establishes rules for new appropriations separate from existing appropriations.

Future regulation must be on a specific site basis, as opposed to the “one size fits all” approach that the proposed rules seem to promote. The proposed rules seem to be contradictory to all the work the Department has accomplished with Basin Planning. Groundwater reacts so differently to soil and geologic conditions that trying to define interference with such a broad approach is problematic.

It was brought to the attention of the Department during the RAC meetings that the proposed rules put a regulatory moratorium on any new groundwater rights within the State boundaries. This is especially concerning in the Klamath Basin area without first coming to an agreement with the California Water Resources Control Board. It is commonly acknowledged that the wells along the California border are drawing water out from under Oregon. Regulating Oregon landowners’ ability to compete with landowners in California is unjust.

Water for Life respectfully requests OWRD amend the proposed groundwater allocation rules consistent with the above concerns.

Glenn Barrett

On behalf of Water for Life, Inc.