



June 14, 2022

Oregon Water Resources Commission
c/o Director's Office
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
Sent via email to: Nirvana.COOK@water.oregon.gov

**RE: Agenda Item H, Groundwater Allocation Project Update
June 16, 2022 Water Resources Commission Meeting**

Dear Chair Reeves and Members of the Oregon Water Resources Commission:

Thank you for the opportunity to comment on Agenda Item H regarding the agency's Groundwater Allocation Project Update.

WaterWatch, Oregon Environmental Council, Trout Unlimited, Wild Salmon Center and The Nature Conservancy all have a deep interest in responsible water management, including supporting the development of a sustainable groundwater allocation policy and practice for Oregon. Unsustainable groundwater allocation harms groundwater dependent ecosystems—including springs, wetlands, and cold water refugia in rivers and streams—as well as those who rely on groundwater for drinking water, farming and other consumptive uses. The damage that the state's current groundwater allocation practice has wreaked on ecosystems, domestic well users and senior water rights holders cannot be overstated.

We appreciate the Commission's leadership in moving the state towards a more sustainable groundwater allocation and management program. We also appreciate the staff's commitment to develop a program that will address both short-term and long-term effects of groundwater allocation.

However, as noted in WaterWatch's testimony at the March 2022 Commission meeting, the Department is still issuing groundwater rights where it does not have the information to determine whether the groundwater is over-appropriated or to ensure that proposed new pumping would be within the capacity of the resource. In other words, the state is still approaching groundwater permit issuance with a "Default to Yes" approach.

At the last Commission meeting, a number of Commissioners expressed a preference for implementing a "Default to No" approach. WaterWatch's testimony urged that the state move to a "Default to No" approach immediately, while the longer-term policy and management programs are being developed

and implemented. While several Commissioners expressed support for taking a “Default to No” approach, there appeared to be some concern that directing that in the near-term would require an additional process that could slow down the larger effort.

Adhering to “Default to No” does not require any new process. It is the law. The Department should be, now, applying the “Default to No” approach while staff implements the steps outlined in the staff report.

As outlined in the attached analysis, Oregon statutes and rules require that when the agency lacks the data to determine whether it has already over-appropriated the groundwater, it cannot make the finding that water is available to allocate. This means that if a Groundwater Review for an application for a new groundwater permit has a checked box by “Cannot be determined to be over-appropriated,” the agency must issue a PFO to deny the permit.

“Default to No” is required because to establish the presumption that a proposed use will “ensure the preservation of the public welfare, safety and health,” WRD must find that “water is available” for the use. ORS 537.621(2); ORS 537.525. In turn, “water is available” means that “[t]he requested source is *not over-appropriated* ***.” OAR 690-300-057 (emphasis added). Therefore, when WRD cannot determine whether or not the source is over-appropriated, it cannot make the finding that “water is available.” “Not over-appropriated” and “water is available” are synonymous in WRD’s rules. The pertinent citations are provided at Attachment A.

Further, as explained in Attachment A, if the presumption is not met or is overcome due to lack of data regarding the state of over-appropriation, the application must be denied because it would then also be impossible to meet the specific “preservation of the public welfare, safety and health” standards that then come into play. ORS 537.525.

Correcting the agency’s approach immediately is needed to address the current on-the-ground emergency, as exemplified by the following:

- “Default to Yes” resulted in over-allocating Harney Basin groundwater by more than 100,000 acre-feet, causing significant harm to rural residents who rely on domestic wells, agricultural users and groundwater dependent ecosystems alike. Significant public funding expenditures are being secured to alleviate the problem.
- In 2017, 121 (79%) of the new groundwater permits issued by WRD had a Groundwater Review that stated it “cannot be determined to be over-appropriated.” (We are not aware of comprehensive data for subsequent years).
- OWRD continues to issue new groundwater permits at a high rate in areas of concern for groundwater declines as detailed WRD’s “2021 Oregon Groundwater Resource Concerns Assessment” (presented to the Commission on June 3, 2021).
- WRD continues to regularly issue new groundwater permits where it cannot determine whether it has over-appropriated the groundwater, including in places where nearby wells are showing groundwater level declines. Based on a review of WRD Public Notices from the 12 weeks since the last Commission meeting on March 17-18 (through June 7): nine new groundwater permits were issued with a “Cannot be determined to be over-appropriated” determination (eight of these left blank the question of whether the use would be in the capacity of the resource, while one indicated it would *not* be in the capacity of the resource); and one was issued with an “Is over-appropriated” determination. While this time period shows a reduced rate of issuance of

“Default to Yes” permits compared to past data, it calculates to a rate of 43 “Default to Yes” permits per year.

- The legislature has allocated significant funds in recent years to assist domestic well owners who are losing access to adequate domestic well supplies due to declining groundwater levels.

In closing, while we very much support the Department’s proposed path forward to modernize the groundwater allocation policy, we urge that while that is being pursued the Commission also direct staff to immediately implement the legally required “Default to No” approach to new groundwater permit applications. Alternatively, the Department could commit today to doing this. While applying the lawfully required “Default to No” approach could be accompanied by any number of available public outreach and communication methods, no “process” is needed to apply this approach because it is what is required by existing statute and rule.

Thank you for considering these comments.

Karen Lewotsky
Rural Partnerships Lead
Water Policy Director
Oregon Environmental Council

Zach Freed
Oregon Water Strategy Director
The Nature Conservancy

James Fraser
Oregon Policy Advisor
Trout Unlimited

Lisa Brown
Staff Attorney
WaterWatch of Oregon

Caylin Barter
Oregon Water Policy Director
Wild Salmon Center

Why “Default to No” is legally required for groundwater permit applications where WRD lacks the data to determine if it has already over-appropriated the groundwater

Summary: WRD’s practice of issuing new groundwater permits where it cannot determine whether or not it has already over-allocated the groundwater—commonly referred to as “Default to Yes”—is unlawful under Oregon statutes and rules. It has caused enormous harm across Oregon and WRD should instead immediately adopt the legally required “Default to No” approach.

Oregon’s Statutes and Rules Require “Default to No” for Issuance of Groundwater Permits

Oregon adopted a forward-looking Ground Water Act in 1955. ORS 537.505 *et seq.* The Ground Water Act’s standard for issuance of a new groundwater permit is that the use will “ensure the preservation of the public welfare, safety and health.” ORS 537.621(2); ORS 537.525. This standard is the groundwater equivalent of the “public interest” standard applied to applications for surface water permits. ORS 537.153(2); ORS 537.170(8).

In reviewing an application for a new groundwater permit, WRD “shall presume that a proposed use will ensure the preservation of the public welfare, safety and health” if four criteria are met:¹

1. “the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12),”
2. “***if water is available,***”
3. “if the proposed use will not injure other water rights,” and
4. “if the proposed use complies with rules of the Water Resources Commission.”

ORS 537.621(2) (emphasis added).

Consistent with the statute, by rule WRD shall only determine that the presumption has been met if, among other requirements, “water is available.” OAR 690-310-0130(1)(b).

In pertinent part, WRD’s rules state: ““Water is Available,” when used in OAR 690-310-0080, 690-310-0110 and 690-310-0130, means:

- (a) The requested source is ***not over-appropriated*** under OAR 690-400-0010 and 690-410-0070 during any period of the proposed use. ***.”

OAR 690-300-057 (emphasis added).

In addition to the definition related to surface water, “[o]ver-Appropriated” means a condition of water allocation in which: *** (B) The appropriation of groundwater resources by all water rights exceeds the average annual recharge to a groundwater source over the period of record or results in the further depletion of already over-appropriated surface waters.” OAR 690-400-0010(11)(a)(B).

¹ The presumption is rebuttable and may be overcome by a preponderance of evidence that either one or more of the criteria were not met or that a specific aspect of the “public welfare, safety and health” under ORS 537.525 would be impaired or detrimentally affected. ORS 537.621(2)(a) and (b).

Therefore, “Default to No” is legally required where WRD lacks the data to determine whether it has over-appropriated the groundwater because:

- A determination that the groundwater source is “not over-appropriated” is synonymous with “water is available” under WRD’s rules.
- If WRD “cannot determine” whether it has over-appropriated the groundwater, WRD cannot lawfully make the finding that “water is available” that is required to establish the presumption.

Further, once the presumption is not met or is overcome, WRD may not issue the permit because then the specific public welfare, safety and health standards listed at ORS 537.525 come into play, including but not limited to:

- (3) “Beneficial use without waste, within the capacity of available sources, be the basis, measure and extent of the right to appropriate ground water.”
- (5) “Adequate and safe supplies of ground water for human consumption be assured ***.”
- (7) “Reasonably stable ground water levels be determined and maintained.”

Where the presumption is not met or is overcome because WRD lacks the data to determine whether the groundwater is over-appropriated, the agency also cannot support determinations that these public welfare, safety and health standards have been met and thus must deny the permit.

Additionally, Oregon rule also demands that water be allocated within the capacity of the resource. OAR 690-410-0070(1). “Capacity of the Resource” means “the ability of a surface water or groundwater resource to sustain a balance of public and private uses without causing over-appropriation or otherwise significantly impairing the function or character of the resource.” OAR 690-400-0010(4). One of the criteria for establishing the presumption is that WRD must find that “the proposed use complies with rules of the Water Resources Commission.” ORS 537.621(2). Where WRD lacks data regarding the state of over-appropriation, or regarding impairment of the function or character of the groundwater resources, issuing a permit would be inconsistent with this rule and thus with this criteria, resulting in the presumption not being met.

Conclusion: WRD’s “Default to Yes” approach is unlawful and the statutes and implementing rules require WRD to instead apply a “Default to No” approach.