DUNN CARNEY LLP

Proposed Groundwater Allocation Rules & Potential Impacts to Water Users

December 5, 2023

Current Rules

- ORS 537.621-Public Interest met if: Basin Rules, Water Available, No Injury, Compliance with other Rules
- Groundwater is available if not over-appropriated
- Injury to surface water rights assessed under OAR 690 Div 9 (Potential For Substantial Interference)
  - Hydraulic connection (plus below)
  - Less than ¼ mile = presume PSI
  - Less than 1 mile:
    - Rate higher than 5 cfs
    - Rate higher than 1% minimum perennial streamflow or instream right or the discharged equaled or exceeded 80% of the time
    - Groundwater appropriation after 30 days would result in stream depletion greater than 25% the rate of appropriation

DUNN CARNEY LLP

OWRD Policy & Results

B. GROUNDWATER AVAILABILITY CONSIDERATIONS, OAR 690-310-130, 400-010, 410-0070

B1. **Based upon available data**, I have determined that groundwater* for the proposed use:

a. ☐ **is** over appropriated, ☐ **is not** over appropriated, *or* ☒ **cannot be determined to be** over appropriated during any period of the proposed use. * This finding is limited to the groundwater portion of the over-appropriation determination as prescribed in OAR 690-310-130;

b. ☐ **will not** *or* ☐ **will** likely be available in the amounts requested without injury to prior water rights. * This finding is limited to the groundwater portion of the injury determination as prescribed in OAR 690-310-130;

c. ☐ **will not** *or* ☐ **will** likely to be available within the capacity of the groundwater resource; or

d. ☒ **will, if properly conditioned**, avoid injury to existing groundwater rights or to the groundwater resource:
   i. ☒ The permit should contain condition #(s) **7N and 7J**;
   ii. ☐ The permit should be conditioned as indicated in item 2 below.
   iii. ☐ The permit should contain special condition(s) as indicated in item 3 below;

- Resulted in serious groundwater decline in certain areas
- Changed in 2023

DUNN CARNEY LLP

Proposed Rules

- Flips the groundwater allocation system on its head
- Current Rules: Groundwater is available if OWRD doesn't determine that the source is over-appropriated
- Proposed Rules:
  - OWRD must make an affirmative finding that groundwater is available *(OAR 690-410-0070(1)(b))*
  - Lessens the criteria for finding substantial interference (injury) with other water rights

DUNN CARNEY LLP

Proposed Rules (Continued)

- "Water is Available" means that the requested groundwater source must exhibit "reasonably stable water levels" *(OAR 690-300-0010(57))*
- "Reasonably Stable Groundwater Levels" means: the annual high water levels measured at "one or more representative wells in a groundwater reservoir or part thereof: *(OAR 690-008-0001(9))*
  - No decline or average decline of less than 0.5 feet per year in 5-20 years
  - AND compared to highest static water level, no decline by the smaller of 25 feet and 8% saturated thickness of aquifer
  - Not enough data = groundwater levels are not reasonably stable
  - May be superseded by Basin Plan Rules

DUNN CARNEY LLP

Proposed Rules (Continued)

- "Water is Available" also means that the proposed groundwater use will not substantially interfere with existing rights to appropriate surface water *(OAR 690-300-0010(57))*
- Substantial Interference now has 2 definitions:
  - *OAR 690-008-0001(10)* – spreading cone of depression to intersect surface water or another well, or reduction of groundwater levels:
    - Contributes to depletion of surface water source (PSI – OAR 690 Div 9)
    - Is already over-appropriated & is a source for senior surface water rights
    - Is administratively withdrawn
    - Is restrictively classified
    - Is the source for surface water rights regulated off after call
    - Minimum perennial streamflow or instream water right not met

DUNN CARNEY LLP

Proposed Rules (Continued)

- Groundwater level drawn below “economic pumping level”
  - Level below land surface at which per-acre cost of pumping equals 70% next increase in value derived by irrigating
- Groundwater appropriators being unable to access groundwater
  - Permitted or customary quantity of water from reasonably efficient well fully penetrating the aquifer

– Substantial Interference #2 *(OAR 690-009-0040)*

- Hydraulic connection
- Potential for Substantial Interference = obtain water from streamflow depletion “over the full term of the proposed or authorized groundwater use”
- Finding PSI = groundwater not available

DUNN CARNEY LLP

Proposed Rules (Continued)

- Define “declined excessively” for the purpose of designating Critical Ground Water Areas *(OAR 690-008-0001(5) & (7))*
  - Annual high water levels in a groundwater reservoir or part thereof which:
    - Precludes or could preclude the perpetual use of the reservoir;
    - Exceeds the economic pumping level;
    - Constitutes a decline determined to substantially interfere with surface water;
    - Constitutes lowering of annual high water level 50 feet below highest known
    - Results in groundwater pollution
    - Constitutes lowering of annual high water level greater than 15% greatest known saturated thickness

DUNN CARNEY LLP

Agricultural Perspective

- Senior rights should be protected & the current rules are not perfect, but…
- Most negative impacts result from OWRD policy
- Sweeping changes are the purview of the Legislature
- OWRD is ignoring HB 2018 (2021) & adopting rules without scientific basis
- The proposed rules are arbitrary
- The proposed rules will result in a de facto moratorium

DUNN CARNEY LLP

Questions?

Sarah Liljefelt
Dunn Carney LLP
SLiljefelt@dunncarney.com
503-306-5321

DUNN CARNEY LLP