



HB 4044—OPPOSE

Testimony of WaterWatch of Oregon Submitted to the House Agriculture and Environment Committee February 6, 2014

Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and restoration of natural flows in Oregon's rivers. We work to ensure that enough water is protected in Oregon's rivers to sustain fish, wildlife, recreation and other public uses of Oregon's rivers, lakes and streams. We also work for balanced water laws and policies. WaterWatch has members across Oregon who care deeply about our rivers, their inhabitants and the effects of water laws and policies on these resources.

WaterWatch urges the Committee to opposes HB 4044

HB 4044 undercuts the state's longstanding effort to manage surface water and groundwater conjunctively. The Oregon Legislature recognized that surface waters and groundwaters are integrally connected as early as 1955, when it passed the Groundwater Act. This law began the state's effort to sustainably manage groundwater and, for the first time, recognized the close connection between the groundwaters of the state and the surface water that we see and use in streams and rivers.

Where Oregon has failed to sustainably manage groundwater by recognizing the close connection between groundwater and surface water, trouble has followed. In the Umatilla Basin, aquifers dropped as much as 500 feet, causing harm to streams and farmers. In the Klamath Basin, in areas of the Willamette Valley and elsewhere, similar problems have arisen from the unsustainable use of groundwater. In recent years the state has partnered with the USGS to produce extensive studies to help them better manage Oregon's groundwater resource so as to avoid future water crises. HB 4044 will undercut that important work.

HB 4044 turns back the clock of conjunctive water management, ignores the realities of peer reviewed science and hydrology, and could end Oregon's attempt to manage groundwater sustainably. This bill, if enacted, will seriously harm surface water users, including farmers, cities and fish and wildlife and will cause even more conflict over water in this state.

Following are some, but not all, of WaterWatch's concerns with this bill.

1. HB 4044 would make it difficult, if not impossible, for the state to protect farmers, cities, industries and instream uses that hold senior surface water rights. The bill imposes a new standard of review for the state's review of new groundwater right applications and/or regulation of existing groundwater rights. The new "clear and convincing evidence" standard and its associated definition imposes standards and processes that will make it very hard (even when hydrologic connection is extensively documented by USGS groundwater studies), for the state to deny (or even condition) new groundwater applications or regulate junior groundwater wells that could harm existing surface water right holders including farmers, cities, industries and instream uses.

2. HB 4044 creates an inequitable standard that prefers one class of water user over all others: HB 4044 prohibits the state from denying a new water right application unless it can provide “clear and convincing evidence” that there is interference with surface water. On the flip side, the bill does not require the state to provide “clear and convincing evidence” that the use will NOT harm senior surface water users or public values when they approve a new groundwater right. This is not equitable. Frankly, if the legislature really wanted to enact a law that would help Oregon more sustainably manage its groundwater resources it is the latter standard that should be adopted.

3. HB 4044 defines “clear and convincing evidence” so narrowly that the OWRD would essentially be banned from relying on existing peer reviewed science in their decision-making. As noted, HB 4044 prohibits the state from conditioning, limiting and/or denying new groundwater resources to protect senior water right holders unless the state can provide “clear and convincing evidence” that interference will occur. HB 4044 then goes a step further by defining what clear and convincing evidence must include, including mandating that the state collect extensive and costly field data and measurements specific to exact well locations. As noted, the state has recently entered into partnerships with USGS to develop comprehensive basin studies. The resulting studies in the Klamath and Deschutes basins are the result of years of peer reviewed research and robust study, and are an invaluable tool for water management in this state. However, these studies do not evaluate each and every well site in their respective basins. Thus, under the bill’s definition of clear and convincing evidence, the state would essentially be banned from using these important tools in their decision-making.

4. HB 4044 undermines impartial scientific review by the OWRD: HB 4044 forces the OWRD, in groundwater permitting decisions, to use a hydrologist mutually chosen by OWRD and by a hydrologist chosen by the party seeking the permit. This imports improper and costly influence by the permit seeker into OWRD’s analysis, as the bill also forces OWRD to pay for the selection process and to pay the selected hydrologists’ fees. OWRD has a top-notch and well-respected groundwater staff and this is a step backwards for good, and impartial, science. This also shifts substantial and unnecessary costs onto Oregon taxpayers. If the parties seeking to secure water permits want to hire a hydrologist to refute an agency finding or otherwise influence agency decisions, they need to do so with their own money.

5. HB 4044 negates longstanding agreements between the state and existing groundwater right holders. The WRD has issued thousands of water rights across the state with limitations and/or conditions. These permit holders agreed to conditions making clear they would be regulated under certain circumstances. Users had full notice of this. HB 4044 attempts to negate agreed to permit conditions to the detriment of other water right holders.

6. HB 4044’s requirement to pay extensive damages and legal costs could result in a chilling effect on agency decision-making. Under HB 4044, if an applicant appeals a WRD decision to deny, limit and/or even simply condition a groundwater right and the applicant is the “prevailing party” (as defined by the bill), HB 4044 directs the state to pay attorney fees and damages (the greater of \$5,000 or double the actual damages). No such mandates currently exist for either contested cases or legal proceedings regarding water permits (under current law reasonable attorney fees and costs may be approved by a judge, but they are not automatically granted, and damages are not provided for). Notably, the bill does not require the applicant to pay the State if the State is the prevailing party, nor does this provision apply to other types of permit holders or to public interest groups. As such, it creates a substantial new fee shifting provision that would only apply to one type of party. These provisions are inequitable and

unbalanced, and in the end would be very costly to Oregon taxpayers. Moreover, the potential cost to the OWRD associated with this costly fee provision could result in a chilling effect on agency decisions.

7. HB 4044 would undermine the Deschutes Groundwater Mitigation Program. The Deschutes Basin Groundwater Mitigation program serves as one of the state's best examples of successful conjunctive management of ground and surface waters. For over a decade the state has been requiring mitigation for new groundwater uses to protect scenic waterway flows and senior water right holders from diminishment caused by groundwater pumping. The science relied upon for this program is a joint USGS/WRD basin investigation. While the program was somewhat controversial at first, the entire spectrum of water users in the basin now laude this as a success story, including irrigation districts, cities and conservation groups alike. As a result of the program, Central Oregon cities (Bend, Prineville, Redmond, Madras, Sisters) have obtained groundwater permits to meet their needs for decades to come and the Deschutes River flows have increased nearly five-fold (the mitigation program has spawned a successful market based restoration effort basinwide). This bill puts that program at risk. While the USGS study provides clear and convincing evidence by any ordinary application of this standard, the study did not analyze every single well, or potential well site, in the basin. If this bill were to pass, unless the OWRD ran expensive modeling for each and every well and/or application, the OWRD could not "limit" Deschutes Basin groundwater rights.

8. HB 4044 enacts new standards that apply to both surface and groundwater, which would render Oregon's permitting and regulation authorities unclear: It is our understanding that drafters of this bill intended this to apply to the permitting and regulation of groundwater wells. However, the body of the bill contains provisions that would impact the issuance/regulation of surface water rights as well (i.e. Sections 3(2), 3(3), 5(3)). This mixing and matching of surface and groundwater provisions makes this bill very unclear. Regardless, if the provisions that apply to surface water allocation/regulation are enacted, such provisions would make it nearly impossible for the state to apply important surface water controls that were instituted to protect the public interest and other surface water right holders.

9. HB 4044 undermines the public ownership of Oregon's waters: Under Oregon law, all water within the state from all sources of water supply belongs to the public. ORS 537.110. Individuals can apply to the state for a water right to "use" this water, but this use is subject to longstanding statutory protections of the public interest and senior water right holders. HB 4044 attempts to grant a nearly unfettered right to use groundwater, regardless of the effect on the public or other water right holders. In essence, it elevates the status of groundwater right holders above all other water users in Oregon, regardless of public ownership of this precious resource.

Conclusion: The Legislature recognized the importance of sustainable management of Oregon's groundwater resources as far back as 1955. HB 4044 is inconsistent with nearly 60 years of progress to better manage our state's water resources. WaterWatch urges the Committee reject HB 4044.

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