



Oregon
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House Rural Communities, Land Use, and Water
Representative Brian Clem, Chair

Testimony on House Bill 4137

Thank you for the opportunity to provide testimony on House Bill 4137, which modifies laws relating to groundwater rights. As the state agency responsible for allocating and managing water rights, the Oregon Water Resources Department offers this testimony for informational purposes and is neutral on the bill.

Background on Oregon's Water Laws

Oregon's water laws are based on the principle of prior appropriation. This means that in times of low streamflows, the water right holder with the oldest date of priority can demand the water specified in his or her water right without regard for the needs of junior water right holders. It also means that the Department has an obligation to ensure that there is no injury to existing water right holders, before issuing a new water right.

Groundwater discharge can support surface water flows, as evidenced by streams that continue to flow all summer without upstream storage, rainfall, or melting snowpack. When groundwater is pumped from a well in locations where groundwater supports surface water flows, there is an effect of reducing stream flows. This is referred to as stream depletion, and is considered in both the issuance of new water rights and the management of existing water rights.

The degree and timing of stream depletion is a function of many factors, among them being how easily water flows between the aquifer and the stream, the distance of the pumping well to the stream, well construction, pumping rate, and pumping duration. These factors are taken into account in the Department's water right permitting and regulation of wells.

Issuance of New Water Rights

The Department, under existing law, reviews a groundwater right application to determine if: the proposed use is allowed in a basin program or given preference; water is available; the proposed use will not injure other water rights; the use complies with Water Resources Commission rules; and the proposed water use will not impair the public interest or welfare. If one of these criteria is not met by "a preponderance of evidence," the Department must deny the application, unless it can modify or condition the permit to meet these standards.

In evaluating the application, the Department's groundwater staff uses available information regarding the geology and hydrology of the aquifer, reports from local water wells, and the surface water hydrology in the vicinity of the proposed well. Staff's review includes a determination as to whether the proposed use would have the potential to substantially interfere with surface water and whether the use is within the capacity of the resource.

Regulation of Existing Groundwater Rights to Meet the Call of Senior Water Rights

Oregon water law requires groundwater to be regulated along with surface water when it is determined that regulation of a well will benefit a senior surface water right holder that has made a valid call for water. The regulation must provide a benefit to the senior users in a timely and effective manner.

For example, when the pumping well is close to the stream and the water flows easily between the stream and the aquifer, the effect on the surface water is immediate. In this scenario, regulation of the well can provide a timely benefit to a senior surface water user. Conversely, when the well is a great distance from the stream and there is not a good connection between the stream and the aquifer, it may take months to years of pumping to cause stream depletion. Regulation in this case would not likely provide timely relief to the senior surface water user.

House Bill 4137

The Department's testimony focuses on sections 2 and 3 of the bill. The Department believes that these sections, as written, have a limited effect on existing groundwater rights, and the bill would modify the Department's procedures related to new groundwater right permits.

Section 2

Where there is a potential for interference with existing surface water rights, the Department currently uses recent satellite imagery and USGS topographic maps to identify the edge of the surface water source to calculate the distance from stream. The bill would require the Department to use GPS coordinates instead for both the well and the ordinary high water mark of a perennial body of water.

The Department is unaware of an existing statewide map with GPS coordinates of the high-water mark; therefore, the Department would need to send staff to collect this data. In some instances the Department might not be able to obtain coordinates if staff are unable to access the stream and survey the high-water mark.

In addition, the Department considers both perennial and intermittent streams in its analysis. Since the bill specifies "perennial body of water," it is unclear if this is intended to prohibit the Department from considering "intermittent" streams, or if this means that a different method could be used for determining interference with intermittent streams.

Section 3

Section 3 of the bill provides that if the Department's proposed final order: (1) rejects or terminates a groundwater right; (2) conditions, restricts or limits a new water right in a manner that results "in a materially lesser water right" than sought; or (3) conditions, limits, restricts, or otherwise impairs, the value of an existing groundwater right, the proposed final order (PFO) must include "all facts, grounds and legal theories" and include "detailed findings and holdings" based on a standard of "clear and convincing evidence." Regardless of the reason for limiting the new or existing well, the findings and holdings must include a report from a "qualified geologist or hydrologist" that contains specific information from the actual well site. The qualified hydrologist or geologist, who performs these additional studies and reports, must be mutually selected by a hydrologist or geologist chosen by the Department and a hydrologist or geologist chosen by the applicant, unless waived by the applicant. The bill also requires that if the proposed use is restricted or conditioned for the "purpose of preventing impairment of or interference with, or to otherwise benefit a superior water right" the PFO would have to include certain information to show that the restriction or condition "will have a substantial and quantifiable effect on the superior right" by clear and convincing evidence.

The bill's applicability to existing water rights is unclear, as the Department does not issue "proposed final orders" (PFOs) in the regulation of existing water rights to meet the call of a senior water right. It is unclear if the bill would apply to orders that are similar to PFOs that are issued for extensions and cancellations of existing water rights.

PFOs are issued as part of the permitting for new water rights; however, it is unclear how the bill is intended to be implemented, because most of the data being requested in section 3 of the bill can only be determined once a well has been drilled. Since the Department cannot guarantee approval of the permit and drilling a new well often requires a significant investment by the landowner, in most instances the well is not drilled until after an approved water right permit has been obtained.

It is also important to note that the bill is unclear on which activities the Department's staff may conduct in regards to the data collection, analysis, and report writing. This greatly affects the cost, as the hourly rate for private consulting hydrogeologists is much greater than the State's hydrogeologists.

Assuming the well is drilled and the data could be obtained, additional data collection, analysis, and documentation requirements, and the higher standard of proof, would increase the cost and time to issue new groundwater right permits. In addition, because the standard of proof is higher only if the Department limits, denies, or conditions the new water right permit, the bill contains an inherent preference for issuing a new water right. This will make it more difficult to protect existing water right holders from injury.

Thank you for the opportunity to provide information on House Bill 4137.

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