



OREGON
ASSOCIATION OF
NURSERIES

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Laura Hartt, Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
E-mail: laura.a.hartt@water.oregon.gov

RE: Oregon Association of Nurseries Comments: 2025-26 Water Rights Rulemaking

Laura:

The purpose of this letter is to identify comments on various rule changes that the Oregon Water Resources Department (“OWRD”) has proposed as part of its 2025-26 rulemaking. These comments are in addition to the comments that the Oregon Association of Nurseries (“OAN”) has made verbally throughout the course of the rulemaking process.

OAN appreciates the opportunity to participate in this important rulemaking. We also appreciate OWRD’s focus on increasing the efficiency of its internal processes, and we always welcome the opportunity to work with OWRD staff and leadership to advance this goal. OAN also recognizes the incredible complexity of Oregon water laws, including those that inform the various water right transaction processes that OWRD administers. While this letter contains specific comments on various proposed rule changes, as a foundational comment, OAN urges OWRD to modify the scope of the current rules process to focus only on rules that are necessary for implementation of the 2025 legislation (HB 3342 and HB 3544) and postpone any rule revisions that do not implement this legislation. This request is set forth in greater detail in the November 25, 2025 letter sent to Director Gall by OAN and other municipal and agricultural representatives.

We recognize that OWRD, along with the many rulemaking advisory committee (“RAC”) members, including OAN, have dedicated countless hours to this rulemaking process. OAN is not asking OWRD to scrap its effort; it is simply asking that the scope of this rulemaking process be narrowed to focus only on implementing the necessary 2025 legislation components to allow further discussion and rulemaking process on the remaining proposed rule changes, many of which are substantive and could impact agricultural operations across the state, including OAN’s members.

Like many RAC members, OAN participated in the RAC meeting 9 discussion regarding OWRD’s various suggested updates to the land use compatibility language across the divisions at issue in this rulemaking, including Division 310. Oregon land use law, like Oregon water law, is incredibly complex. During this meeting, Director Gall discussed the upcoming plan for a joint

meeting of the Oregon Water Resources Commission and the Department of Land Conservation and Development that will allow interested parties to share their thoughts and concerns about issues at the intersection of water and land use. Director Gall also stated that the conversation about this intersection is “just getting started” and that there is “much more work to do.” In light of these comments, OAN does not believe that now is the appropriate time for OWRD to introduce updates to OWRD’s land use compatibility requirements, particularly given the massive scope of the rulemaking. OAN is eager to work with OWRD and other stakeholders to address land and water issues in a thoughtful and comprehensive manner. This rulemaking process has simply not allowed enough time for RAC members to adequately discuss OWRD’s proposed changes to various land use-related provisions, and we urge OWRD to refrain from making any of these changes until it can hold a more focused rulemaking process to properly address such changes.

Generally speaking, OAN is concerned that due to the incredible breadth and scope of this rulemaking process, OWRD’s proposed changes will have unintended consequences. The pace of the rulemaking process has made it very difficult to conduct a wholistic review of the proposed changes, increasing the risk that some of the changes may be “missing the forest for the trees.” OWRD’s rule divisions tie together in various and important ways, and drafting comments for one division often requires a review and understanding of potential related changes in another division. However, given the limited review times for each division and the constantly changing language in the rule divisions, it has been difficult to engage in this bigger picture evaluation. OAN is also concerned that various specific changes that OWRD has proposed will increase the burden on water right transaction applicants and introduce new standards beyond those authorized or contemplated in the 2025 legislation. We have identified a set of specific rules of concern in the following paragraphs to supplement comments made during the various RAC meeting.

Division 2

OAN recognizes that HB 3544 introduced changes to the contested case process, and therefore it is appropriate to revise Division 2 to reflect the changes set forth in this legislation. OAN has identified additional changes that should be made, set forth below.

- OAR 690-002-0025(3). OAN appreciates the addition of language clarifying the jurisdictional deadline for submitting a payment accompanying a protest, but we encourage OWRD to work as quickly as possible to implement a system that can accept electronic payments for protests and other water right transactions. We also request that OWRD add language that clarifies that once an electronic payment system is implemented, payments will be considered received on the day they are made in the electronic system.
- OAR 690-002-0095(2). We appreciate that OWRD has increased the number of interrogatories that are available to a party. We request that OWRD develop a clear standard that it will apply to determine whether it will consent to additional interrogatories so parties can better assess whether additional interrogatories may be available to them based on the particular nature or scope of the contested case at issue.
- OAR 690-002-0095(3). OWRD’s proposed language identifies circumstances in which an applicant may be required to file a public records request instead of a request for production based on anticipated OWRD staff time. This proposal is incongruous with the goals of due process and fundamental fairness, and OAN requests that OWRD remove

the requirement for parties to shift to a public records request after threshold set forth in the proposed rule.

- OAR 690-002-0205. OAN understands that HB 3544 mandates that OWRD identify a specific contested case schedule to fit within 180 days, and we appreciate that OWRD has added additional language allowing parties to alter the timeline by agreement.
- OAR 690-002-0220. This rule should include language similar to the language that OWRD added to OAR 690-002-0005(3) regarding electronic payments. As written, the rule provides for filing via email but also retains the language that a filing should “include any required fees” without addressing the electronic payment issue.

Division 17

Generally speaking, a majority of OWRD’s proposed changes to this division are not required by the 2025 legislation, and we encourage OWRD to move forward only with the changes that are specifically required by the legislation to enable further discussion of additional changes in a future rulemaking. The rules in Division 17 dictate the process by which vested property rights can be cancelled, and it is crucial that OWRD and stakeholders have adequate time to discuss any substantive changes to these rules. OAN has identified various specific changes that should be made, set forth below.

- OAR 690-017-0400(2)(g). This current rule requires that an affidavit of forfeiture include a statement that the affiant knows with certainty that no water from the allowed source has been used for the authorized use on the lands. OWRD is proposing to strike “with certainty,” which is a substantive change.

A party who files an affidavit is making a serious claim against a water right holder, and such a party should be certain of past water use before filing an affidavit. We understand that OWRD originally struck this language in an attempt to align with the “preponderance of evidence” standard that it has clarified across Division 17. However, OWRD’s recent language tracker document contains a “correction” which states that affidavits of the public are not subject to the preponderance of evidence standard. We request that OWRD retain the original language requiring an affiant to know with certainty that no water use has occurred when it files an affidavit.

- OAR 690-017-0400(3). This rule addresses the timeline for providing notice to a district or to the Bureau of Reclamation when an affidavit addresses water rights within the boundaries of district or federal project. The current language provides for notice of at least 90 days before OWRD initiates a cancellation proceeding, but OWRD proposes to reduce the notice timeline to 60 days. This is a substantive change not required by the 2025 legislation.

Federal agencies, including the Bureau of Reclamation, often take some time to review and respond to materials that have been submitted to the agency. Additionally, the recent government shutdown is an example of a circumstance that could affect the ability of the Bureau of Reclamation to address the affidavit and identify its position and next steps within a more limited timeframe. OWRD should retain the existing language that provides for at least 90 days’ notice.

- OAR 690-017-0400(4). OWRD’s proposed language for this rule provides that OWRD may “rely on stream or canal gaging records, water or electric meter readings, static

level measurements, system capacity calculations, a summary of field investigations, photos, aerial imagery, maps, evapo-transpiration data, or other relevant evidence covering each year of the period of alleged non-use.” We request that OWRD revise its proposed language to replace the term “rely on” with “refer to” or “examine.”

We understand that each of these information types can be useful to assess whether a water right has been used, but we are concerned that if OWRD can simply “rely” upon any single one of the data sources listed in OAR 690-017-0400(4) to initiate cancellation proceedings, OWRD risks coming to an erroneous conclusion about use.

- OAR 690-017-0700(2). OAN appreciates that OWRD has increased the notice of cancellation hearing timeline from the original proposed 10 days to 30 days.

Division 18

The Allocation of Conserved Water (“ACW”) process is a critical tool to encourage conservation and increase flexibility for water users. As we move into a future where new water rights are not available, this program will become increasingly valuable. OWRD should ensure that any new proposed language does not disincentivize willing ACW applicants by creating new burdensome processes or requirements. OAN has identified various specific comments and changes that should be made, set forth below.

- OAR 690-018-0040(15). OWRD’s proposed rule language provides that applicants would be required to provide a description of the intended use and boundaries of the expected area within which the diversion structures and places of use of the applicants’ portion of conserved water right would be located and used for beneficial out-of-stream uses. The underlined language is an unnecessary addition. An applicant who is undergoing the ACW process is modifying an existing water right certificate that was authorized for beneficial use. Once the ACW process is complete and finalized, the applicant will continue to be subject to the existing and well-established Oregon requirement of beneficial use of water. By adding the proposed language underlined here, the rule appears to be establishing a special standard for the ACW process beyond what is already required by Oregon water law.
- OAR 690-018-0040(22)(a)(B). OWRD’s proposed rule language adds a new requirement for applicants to provide “[d]ocumentation demonstrating that, for the portion of the conserved water being dedicated to an instream water right for instream purposes, the applicant provided notice of the intent to create an instream water right under an allocation of conserved water to each affected local government along the proposed instream reach.”

This obligation is onerous and potentially impracticable for irrigation and nursery use water right holders who would like to undertake the ACW process. It is not realistic to assume that the applicant can identify the “affected local governments” that will be impacted by a new instream water right for the portion of the applicant’s conserved water. The ACW program is a critical conservation tool, and water users should not be disincentivized from participating as a result of additional application requirements not required by the authorizing statute.

- OAR 690-018-0050(7)(c)(C). We appreciate that OWRD has added language that formally addresses the protection of groundwater for groundwater rights that are subject to the ACW process. As you know, OWRD has previously processed groundwater rights

under the ACW program. The ACW program is a crucial tool to encourage conservation and on-farm efficiency, and we encourage OWRD to retain this language to ensure groundwater rights are clearly included in Division 18.

Division 77

There are multiple sections still listed as “under review” for this particular division, and RAC members have not had the chance to review OWRD’s newest set of changes in response to multiple comments already made. RAC members should have an additional opportunity to comment once OWRD makes changes before the public comment process begins. A majority of the changes proposed in Division 77 are not related to the 2025 legislation, and we encourage OWRD not to move forward with any changes that are not directly required by the legislation to allow additional future dialogue between OWRD and stakeholders on this important section.

If OWRD moves forward with the proposed changes to the Division 77 rules, OAN encourages it to retain language in the proposed OAR 690-077-0020(3). This language provides a commonsense approach to ensure that relevant special districts will have advance notice of ODFW’s intent to file instream water rights that could impact the districts’ operations. This language provides a solution to a known problem, and we encourage OWRD to retain it.

Division 315

HB 3342 requires implementation of new extension standards by April 1, 2026, so OWRD’s changes to Division 315 are appropriate for this rulemaking.

HB 3342 provides limited opportunities for some non-domestic and municipal water right permits to obtain one two-year extension if OWRD determines that “[f]ish-related conditions have been satisfied” and that “[g]ood cause for the extension has been shown.” This language provides a critical path forward for a small subset of permits to obtain an extension.

OWRD’s rules already provide a framework to assess whether or not good cause has been shown, and OWRD’s addition of OAR 690-315-0040(5) confuses this clear framework to assess “good cause.” As written, OAR 690-315-0040(5) provides in relevant part that “the Department shall find good cause has not been shown and deny the extension if:...(c) The Department’s evaluation under (2) otherwise finds that good cause has not been shown.” This is circular. OWRD should remove OAR 690-315-0040(5)(a), as the existing framework to assess “good cause” is already set forth in OAR 690-315-0040(2).

With regard to OAR 690-315-0040(5)(b), OWRD should modify the language to better align with the language in HB 3342. OWRD’s proposed language provides: “The permit holder has used water and has failed to demonstrate compliance with fish-related permit conditions that are required to be met before water use began.” To better reflect the language from HB 3342, we request that OWRD revise this language to provide: “The permit holder has not satisfied fish-related permit conditions that are required to be met before water use began.”

Division 380 and Division 382

The changes that OWRD is proposing to Division 380 and 382 go beyond the scope of the 2025 legislation mandates, and OAN encourages OWRD to limit the changes it implements to those required by the 2025 legislation. Transfers are a crucial water management tool that enable agricultural water right holders to efficiently and sustainably manage water. OAN is concerned that based on the breadth of proposed changes to the transfer process, the permit amendment process, and the groundwater registration modification process, stakeholders have not had adequate time to fully review and assess the potential impacts of the proposed changes.

Below are examples of some, but not all, of the substantive changes that OWRD is proposing that is outside the scope of the 2025 legislation.

- OAR 690-380-2110(3). The proposed language provides that OWRD may condition a transfer to protect against the potential for likely injury or enlargement that may occur as a result of the change. The term “likely injury” is not defined in statute or rule, and it is not clear how the addition of this phrase will increase the processing efficiency, as it appears to add additional ambiguity.
- OAR 690-380-2120. OWRD indicated that it removed references to “point of division or appropriation” to reflect a new belief that the rule only applies to historic surface water point of diversion changes. It is not clear whether OWRD conducted a legislative history analysis to determine the legislative intent of the implementing statute. This language should not be changed until OWRD has clarity on such history.
- OAR 690-380-3000(12)(b)(A). OWRD’s rule proposes to update requirements for dated receipts for use of water or sales of irrigated crops. The new language provides that such receipts must be marked by the issuer of the receipt with information that ties the receipt to the authorized place of use of the water right. It is unlikely that crop sales receipts or receipts for use of water (i.e. power bills) will mark the specific location of the place where crops were grown or water was used, and OAN requests that OWRD remove this proposed language.
- OAR 690-380-7300. OAN appreciates that OWRD is formalizing some longstanding components of the permit amendment process in rule. However, permit amendments are authorized under a single statute, ORS 537.211, that is different from the statutes that apply to the transfer process. Notably, ORS 537.211 does not mention the enlargement standard. OWRD should revise this section, including removing the reference to enlargement, to ensure that the applicable standards align with the provisions of ORS 537.211.

We appreciate your time and consideration of our comments. Please do not hesitate to reach out with any questions.

Sincerely,

Jeff Stone
Executive Director
Oregon Association of Nurseries