

## DISCLAIMER – DRAFT RULES PENDING ADDITIONAL INPUT FROM DAS AND DOJ

xxx-xx-xxxx

### Purpose

These rules guide the Oregon Watershed Enhancement Board “OWEB” in administering the Drinking Water Source Protection Program under the provisions of ORS 448.370-448.380. The program includes grants to Water Suppliers to protect, restore, or enhance sources of drinking water through:

- a) the acquisition of lands from willing sellers,
- b) entering into covenants, easements or similar agreements with willing landowners, or
- c) repaying a loan used to finance a project as described in a) or b) above.

The program intent is that lands protected by this program will benefit a source of drinking water used by a Water Supplier.

This Chapter XXX, Division XX supplements the OWEB Grant Program rules under OAR Chapter 695, Division 5, which also apply to this program. This division provides specific requirements for the OWEB Drinking Water Source Protection Program. In any conflict between these requirements and requirements identified in OAR 695-005, the Drinking Water Source Protection requirements in this division will take precedence.

### Definitions

1) “Community Drinking Water Enhancement and Protection Fund” is a fund established in the State Treasury for use by OWEB to carry out the purpose of ORS 448.370.

2) “Conservation Easement” means a nonpossessory interest in real property that imposes limitations or affirmative obligations for the purposes of protecting, restoring, or enhancing lands where doing so will benefit a source of drinking water.

3) “Drinking Water Source Area” has the meaning given in OAR 333-061-0020 (52) for Drinking Water Protection Area 333-061-0020 (52). “Drinking Water Protection Area” or “DWPA” means the source area supplying drinking water to a Public Water System. For a surface water-supplied drinking water source the DWPA is all or a specifically determined part of a lake's, reservoir's or stream's watershed that has been certified by the Department of Environmental Quality. For a groundwater-supplied drinking water source the DWPA is the area on the surface that directly overlies that part of the aquifer that supplies groundwater to a well, well field or spring that has been certified by the Authority.

4) “Drinking Water Source Protection Grants” are funded with the Community Drinking Water Enhancement and Protection Fund and awarded by the Board to Grantees to protect, restore, and enhance sources of drinking water.

5) “Grantee” means an applicant that enters into an agreement with ~~the Board~~ OWEB to accomplish a project.

6) “Holder” has the meaning given to it in ORS 271.715:

(a) The state, any county, metropolitan service district, soil and water conservation district, city or park and recreation district or a county service district established under ORS 451.410 to 451.610 to

**Commented [SO1]:** We have now alphabetized the definitions and have made note of those that are new since the last RAC meeting (since track changes disappeared with reorder).

**Commented [SO2]:** Newly added definition

**Commented [SO3]:** Updated to include definition instead of simply reference to ORS.

construct, maintain and operate service facilities in Washington or Clackamas County for the purposes specified in ORS 451.010 (1)(a) and (b) and in Washington County for the purpose specified in ORS 451.010 (5) acting alone or in cooperation with any federal or state agency, public corporation or political subdivision;

(b) A charitable corporation, charitable association or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property; or

(c) An Indian tribe as defined in ORS 97.740.

7) "Long-Term Management Plan" is a description of the planned future management and stewardship of a Protective Instrument intended to carry out the purposes of ORS Chapter 448.370 that is consistent with guidance established by OWEB and includes, but is not limited to, proposed restoration activities, strategies for monitoring, maintaining, managing, and improving the property, including providing signage, controlling access, enforcing use restrictions and resolving violations.

Commented [SO4]: Newly added definition

8) "Notice of Grant Requirements" is a legal recordable document that provides protection in perpetuity to Drinking Water Source Protection Program investments in fee title acquisitions.

Commented [SO5]: Newly added definition

9) "Partnership" means a collaboration between an eligible Water Supplier and a Holder as that term is defined in ORS 271.715 that have committed to coordinating funding, expertise, materials, labor, or other assistance to a proposed project. An eligible entity may form a Partnership for the acquisition of any Protective Instrument.

10) "Project" means the aggregate of eligible activities included in OAR xxx-xxx-xxxx that comprise an application and are specific to parcels of land, all of which are essential to the protection, restoration, or enhancement of a drinking water source.

11) "Protective Instrument" means a legal document conveying fee simple ownership, a Conservation Easement, covenant, equitable servitude or a deed restriction for the purposes of protecting, restoring, or enhancing lands where doing so will benefit a source of drinking water source.

12) "Water Supplier" means any person, group of persons, municipality, district, corporation, or entity that owns or operates a Water System per ORS 448.115.

13) "Water System" means a system for the provision of water for human consumption through pipes or other constructed conveyance per ORS 448.115.

#### Protective Instrument Requirements

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(1) A Protective Instrument, other than fee title, acquired with funds awarded in a Drinking Water Source Protection Program grant shall include:

- a. A legal description of the land subject to the Protective Instrument acquired;
- b. The objectives of the grant and terms demonstrating how the Protective Instrument will meet those objectives;
- c. Specific obligations of the Grantee including, but not limited to:

- ~~i.~~ Demonstration of how protective instrument will meet intent of program;
  - ~~ii.~~ Requirement that the Grantee will monitor the property, at least annually, and enforce the terms in the Protective Instrument;
  - ~~iii.~~ Requirement that the Grantee will repay the grant funds to OWEB (or provide some other remedy) if Grantee fails to enforce the terms of the Protective Instrument;
  - ~~iv.~~ Statement that the Grantee will not assign or convey the Protective Instrument without the consent of OWEB and the Department of Administrative Services.
  - ~~v.~~ Terms that provide for~~Statement that~~ the obligations to run with the land and inure to any successor in interest;
  - ~~vi.~~ Grantee will require any assignee to enter into a similar agreement with OWEB.
- d. Requirement that OWEB and its designees will be provided sufficient legal access to the land affected by the Protective Instrument acquired with Drinking Water Source Protection Program funds, given reasonable notice, for the purpose of compliance inspections.
- e. The duration of the Protective Instrument
- i. A Conservation Easement shall last in perpetuity.
  - ii. Any other Protective Instrument, except for a fee simple deed, may last for a term unlimited in duration unless the instrument creating it otherwise provides. The covenant term shall be set at 12-month increments only and not partial years.
- (2) If the Project includes a Partnership with a Holder, and the Grantee will not hold the Protective Instrument, the Holder will be required to execute any Protective Instrument so that it meets the requirements above.
- ~~(3)~~ If a Grantee, or a Holder in Partnership with the Grantee, acquires fee simple title, the Grantee or the Holder, shall:

Record on title a Notice of Funding Grant Requirements that includes (1) a – ~~d above;~~ e above; ~~and~~

- ~~a. Develop a long term management plan for the acquired lands, that includes, but is not limited to:~~
  - ~~i. Stewardship, monitoring, and uses of the Property intended to carry out the purposes of ORS Chapter 448.370, developed in accordance with long term management plan content described in the grant agreement with OWEB.~~
- ~~(4) A Grantee is responsible for fulfilling the terms and conditions of any agreement (A) Between the Grantee and the board; and (B) Between the Grantee and a landowner, or other person, necessary for the grant recipient to carry out the project for which a grant has been awarded. The board is not liable to any landowner or person for the failure of a grant recipient to fulfill the terms or conditions of any agreement between the person and the grant recipient.~~
- ~~(5)~~ (3) Subsequent Conveyances
  - a. If a Protective Instrument is subsequently transferred, it must:
    - i. Be made subject to prior approval by the Board and, if applicable, the Department of Administrative Services; and

- ii. Strictly comply with the requirements of ORS XXX.XXX and OAR xxx-xx and OAR xxx-xx.

## Eligibility

### Eligible Applicants

- 1) Eligible applicants include Water Suppliers as defined in ORS 448.115. Applicants defined in OAR 695-005-0040(2) are not eligible for this grant type unless they are defined as Water Suppliers.
- 2) Eligible Water Suppliers must have service populations at or below 25,000 users.
- 3) Eligible Water Suppliers may form Partnerships with eligible Holders as defined in ORS 271.715.

### Eligible Properties

- 1) Eligible properties for Drinking Water Source Protection ~~Program-g~~Grants are lands where the acquisition will result in the protection, restoration or enhancement of those lands and will benefit a source of drinking water used by the Water Supplier.
- 2) Eligible properties must be within a delineated Groundwater Drinking Water Source Area or Surface Water Drinking Water Source Area.

### Eligible Systems

- 1) Eligible Water Systems include:
  - a. The following public Water Systems as defined by Oregon Health Authority OAR 333-061-0020:
    - i. Community Water Systems
    - ii. Oregon Very Small Water Systems
    - iii. Transient Non-Community Water Systems operated by non-profit Water Suppliers
    - iv. Non-Transient Non-Community Water Systems operated by non-profit Water Suppliers
  - b. Tribal Water Systems with delineated ~~D~~erinking ~~w~~Water ~~s~~Source ~~protection~~ ~~a~~Areas.
- 2) Federal Water Systems are not eligible.

### Eligible Maximum Funding Request

Define

### Matching Contributions

(1) All applicants shall demonstrate that at least ~~XX%~~ match is being sought, based on the total ~~DWSP~~ Drinking Water Source Protection Grant request for the Project.

(2) The following funds and activities qualify as match:

- (a) In-kind contributions to activities listed under OAR XXX-XX-XXXX;
- (b) Funding commitments made by others as a result of grant applicant efforts;

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(c) A donated portion of a sale; and

(d) Funds deposited in a stewardship fund before the time that OWEB funds are released for acquisition of the covenant or easement.

(3) The OWEB Director retains the discretion to determine whether specific proposed match contributions not specifically identified above can be recognized as qualifying match.

#### **Application Requirements**

(1) In accordance with ORS 448.370, OWEB will accept on a regular basis Drinking Water Source Protection grant applications for the acquisitions of Property Interests Protective Instruments that lead to the protection, restoration, or enhancement of ~~sources of~~ drinking water sources.

(2) In addition to (3) - (9) below, Drinking Water Source Protection grant applications shall be consistent with OAR 695-0050-0030;

(3) If a Water Supplier will form a Partnership with a Holder, as defined in ORS 271.715, the application must include, at a minimum, the following information about the Partnership:

(a) Description of Partnership resources to assist with the long-term protection, restoration, or enhancement of drinking water sources.

(b) Whether the Partnership's and the Holder's missions supports the protection or restoration of natural resources.

(4) The application must describe the timeline for acquiring the Property Interests Protective Agreement Instrument within the period established by ~~the board~~ OWEB.

(5) For source surface water areas, grant applications shall include:

(a) Demonstration of Water System ownership or authority to use the water.

(b) Property proximity to drinking water intake and confirmation of location with Drinking Water Source Area.

(c) Description of land uses or activities that pose significant threat to water quality.

(6) For ~~source~~ ground-water source areas, grant applications shall include:

(a) Demonstration of well ownership or authority to use the water.

(b) Property proximity to wells and confirmation of location within a Wellhead Protection Area ~~groundwater Drinking Water Source Area~~.

(c) Occurrence of land uses or activities that release contamination.

(d) Location of the release.

(e) The hydrologic or soil characteristics in the source area that allow the transport of the contaminants to the well.

(7) Applicants must provide the Source Water Assessment of the drinking water supply.

(8) Applications must include description of community characteristics of the Water System user base including information on the following:

(a) whether there are seasonal variations in users (e.g., temporary higher rates of users due to seasonal tourism or due to drought) and the impacts that has on the Water System.

(b) information that demonstrates whether the Water Supplier has a limited rate payer base due to population, economic, or other disadvantages experienced by the water users.

(9) ~~State the project duration of the type of Protective Instrument and, other than a fee simple Conservation Easement or fee simple~~ transaction is not proposed, the applications must explain the reasoning for the Protective Instrument proposed, and a justification for the ~~Explain and the reasoning for the project duration if less than perpetual, include the duration of the Protective Instrument.~~

#### Use of Grant Funds

1) Drinking Water Source Protection ~~funds-Grants~~ may be applied towards costs related to 1) acquiring lands from willing sellers for the purposes in ORS 448.370; 2) entering into covenants, Conservation Easements or similar agreements for the purposes of ORS 448.370; and 3) repaying a loan used to finance a project to protect, restore, or enhance lands consistent with 1) or 2).

a. Use of Lottery Revenue Bond funds deposited into the Community Drinking Water Enhancement and Protection Fund may only be applied to a Project ~~for that includes the acquisition of a Conservation Easement or fee simple title Protective Agreement Instruments that include: a fee simple title, a Conservation Easement, or other legal agreements drafted to run with the land and last in perpetuity.~~

2) Eligible costs for projects under subsection (1) that are funded with Lottery Revenue Bonds deposited into the Community Drinking Water Enhancement and Protection Fund must be "capital expenditures" for federal income tax purposes within the meaning of Section 1.150-1(b) of the IRS Tax Code. This includes both capitalized and capitalizable expenditures. Eligible costs include:

(1) The purchase price associated with the Protective Instrument.  
a. The purchase price shall be based on an appraisal and review appraisal completed in accordance with applicable appraisal standards, including the Uniform Standards of Professional Appraisal Practice or other method of substantiating the purchase price.

(2) The staff costs incurred as part of the acquisition process related to the Protective Instrument. Staff costs (labor hours) must be documented and tracked to the Project and capitalizable to the asset.

(3) The cost of due diligence activities associated with property acquisition after the specific property has been identified and that are capitalizable to the asset, including appraisal or other method of substantiating the purchase price, environmental site assessment, survey, title review, and other customary due diligence activities.

(4) The cost of baseline inventory preparation; for the specific property that has been chosen for acquisition and that is capitalizable to the asset.

(5) ~~Discrete legal costs. The legal fees~~ incurred by the Water Supplier ~~that are specific to the acquisition of the asset, and capitalizable to the asset. Legal costs (labor hours) must be documented and tracked related to the Project.~~ General in-house legal costs that are related to the overall management or policy of the entity are not eligible.

(6) The closing fees, including recording and title insurance costs. ~~Pre-payments, such as those that funding the escrow account ahead for insurance, taxes, or interest payments, are not eligible.~~

3) Eligible costs for Projects under subsection (1) that are funded with General Funds deposited into the Community Drinking Water Enhancement and Protection Fund includes:

- (1) The purchase price associated with the Protective Instrument.
  - a. The purchase price shall be based on an appraisal and review appraisal completed in accordance with applicable appraisal standards, including but not limited to the Uniform Standards of Professional Appraisal Practice ~~, or other method of substantiating the purchase price.~~
- (2) The interest on bridge loans needed to secure closure on the Protective Instrument prior to when funding will be available for distribution through the program.
- (3) The staff costs incurred as part of the covenant or easement acquisition process related to the property.
- (4) The cost of due diligence activities, including appraisal or other method of substantiating the purchase price, environmental site assessment, survey, title review, and other customary due diligence activities.
- (5) The cost of baseline inventory preparation.
- (6) The legal fees incurred by the ~~w~~Water ~~provider~~ Supplier related to the Project.
- (7) The closing fees, including recording and title insurance costs. General in-house legal costs that are related to the overall management or policy of the entity are not eligible.
- (8) Indirect costs of the Grantee and/or the Holder, dependent on available funding.

4) For Projects funded with General Funds deposited into the Community Drinking Water Enhancement and Protection Fund and requesting funding for repaying a loan, the land transaction must have been recorded no more than:

- a. ~~18XX~~ months ~~prior to from~~ the date of submitting a Drinking Water Source Protection grant application to ~~the agency~~ OWEB.
- ~~a.~~ b. Notwithstanding (4)(a) of this Section, the transaction may have closed no more than 48 months prior to the date of submitting a Drinking Water Source Protection grant application during the initial grant solicitation for the Program.

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#### Evaluation Criteria

- 1) ~~The application must describe the~~ Significance of the acquisition to the protection, restoration, or enhancement of sources of drinking water.

- 2) The capacity and experience of the applicant and, if a Partnership is proposed, the Holder, to achieve the ongoing management and stewardship of the Protective Instrument as the long-term owner.
- 3) The soundness of the legal and financial terms of the real estate transaction.
- 4) Project readiness, including but not limited to the applicant's capacity to complete acquisition transaction and due diligence steps within OWEB established timelines, and due diligence information provided by the applicant.
- 5) The Climate Related Evaluation Criteria ~~evaluation criteria~~ described in OAR 695-005-0045.
- 6) The consistency of the Project with the applicable technical criteria for Drinking Water Source Areas including ~~XXX~~.
- 7) For applicants that form Partnerships with eligible Holders:
  - i. Demonstrated capacity and resources for long-term protection, restoration, or enhancement of drinking water sources.
  - ii. Partnership mission is in support of protection or restoration of natural resources.
- 8) Demonstrated benefit of how the acquisition will ~~have to~~ address at least one of the following limiting factors of the Water System:
  - (1) Capacity challenges in the Water System due to seasonal variations in users.
  - (2) Capacity challenges in the Water System due to drought conditions.
  - (3) Limited rate payer base of the Water System due to population, economic, or other disadvantages experienced by the water users.

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~~PLACEHOLDER — Due to bond funding, may also need to demonstrate economic and social benefits~~

- 9) The duration and type extent of the Protective Instrument, with a preference for longer term agreements.
- 10) The existence and implementation of a Long-Term Management Plan or the intent to develop a Long-Term Management Plan that incorporates measures targeted at maintaining or enhancing drinking water quality. If the acquisition is for a Protective Instrument other than fee title or a Conservation Easement and a Long-Term Management Plan is not proposed, required justification and rationale provide an explanation of about why a Long-Term Management Plan is not necessary given the type of Protective Instrument proposed.
- 11) The degree and timing of risk to the land and the associated Drinking Water Source Area if the proposed protection is not implemented.

**Commented [MRM\*O10]:** RAC: Please consider whether this meets the intent of the discussion on preference of perpetual agreements.

**Commented [SO11]:** RAC, please consider if this is an appropriate location for Long-Term Management Plans and if it addresses what you were looking for.

#### Grant Agreement Conditions

Such other conditions as the Board deems appropriate to the particular circumstances of the Project, including but not limited to:



1) ~~The Grantee agrees to develop a Long-Term Management Plan if deemed appropriate and necessary by the Board, but in all cases for acquired lands, that includes, but is not limited to:~~  
a. Stewardship, monitoring, and uses of the Property intended to carry out the purposes of ORS Chapter 448.370, developed in accordance with Long-Term Management Plan content described in the grant agreement with OWEB.

2) Review and approval of the agreement between the Grantee and the Holder.

~~Placeholder for GA conditions required by DAS.~~

#### **Board Approval and Delegation of Authority**

(1) The Director is delegated ~~all necessary authority to the responsibility of~~ ensuring that funding conditions required by the Board are fully satisfied by the Grantee.

(2) Notwithstanding xxx-xxx-xxxx(3) (Distribution of Funds) ~~Conditionally~~ approved grant funds shall be encumbered for disbursement only after all conditions are fulfilled. The encumbered funds may be made available for other uses by OWEB if all conditions required by the Board are not satisfied within 18 months of the conditional Board approval, unless approved by the ~~OWEB~~ Board.

#### **Public Involvement**

The public shall be provided with meaningful opportunities to comment on grant applications being considered by the Board. In a manner consistent with this requirement, the governing bodies of cities and counties with jurisdiction in the area of the proposed ~~covenant or easement acquisition~~ Protective Instrument, as well as affected governmental agencies and tribes, will be provided with written notice of the Board's intent to consider:

- (1) Written comments received prior to the Board meeting at which the Board will consider the application;
- (2) Comments made at public hearings held and publicized in accordance with ORS 271.735; and
- (3) Comments made at the Board meeting at which the grant application is considered.

#### **Distribution of Funds**

(1) The Director may approve the distribution of grant funds. Funds may be distributed throughout the time between approval by the Board and transaction closing as the following conditions are met:

- (a) A grant agreement is executed by the Director and the ~~grant applicant~~ Grantee;
- (b) The funding conditions applicable to the allowable cost, if any, imposed by the Board are satisfied to the full satisfaction of the Director;
- (c) The legal and financial terms of the proposed real estate transaction are approved by the Director;
- (d) The Protective Instrument and any required title restrictions are approved by the Director;
- (e) The Director has reconciled conditionally approved funding with actual project costs;

(f) The Grantee has satisfied the match requirements under OAR xxx-xx-xxxx;

(2) For grants established under these rules, the Director is authorized to reimburse the Grantee ~~for the Holder if expended as part of a Partnership) for~~ allowable costs identified in OAR xxx-xx-xxxx and to recognize match contributions under OAR xxx-xx-xxxx that were incurred no earlier than 18 months before the applicable grant application deadline. For those projects requesting grant funds for reimbursement of already incurred expenses, eligible match must align with the timing of the Project for which grant funds are being requested.

(a) Costs incurred in a Project by a sub-grantee may be reimbursed if they have a Partnership established with the Grantee and reimbursements are requested through the Grantee.

(3) Notwithstanding OAR 6xx-xxx-xxxx(1)(a) and (b), funds may be distributed prior to transaction closing for staff costs and due diligence activities specified in OAR xxx-xxx-xxxx and included in the application budget.

#### Compliance and Enforcement

- (1) The ongoing use of the Protective Instrument acquired with ~~OWEB~~-Drinking Water Source Protection Program funds shall be consistent with the purposes specified in ORS Chapter 448.370. OWEB may initiate any and all legal remedies available to OWEB to address compliance issues, including but not limited to recovery of the OWEB grant funds used to purchase the Protective Instrument, and reasonable interest and penalties at the option of the Director.
- (2) A Grantee is responsible for fulfilling the terms and conditions of any agreement (A) Between the Grantee and the Board; and (B) Between the Grantee and a landowner, or other person, necessary for the ~~Grantee-recipient~~ to carry out the project for which a grant has been awarded.
- (3) ~~OWEB and t~~The Board is not liable to any landowner or person for the failure of a ~~Grantee~~ recipient to fulfill the terms or conditions of any agreement between the person and the ~~Grantee-recipient~~.

#### Demonstration of Public Benefits of Project

~~Placeholder if needed~~

#### Subsequent Conveyances

(1) Subsequent conveyances of fee simple acquired with OWEB grant funds must strictly comply with the requirements of ORS 541.960, including, but not limited to, the requirement that subsequent conveyances be made subject to Board approval and that subsequent conveyances shall not result in a Profit.

#### Waiver of Rules

The Director may waive the requirements of division XX for individual grant applications unless required by statute, when doing so will result in more efficient or effective implementation of the Drinking Water Source Protection Program. Any waiver must be in writing and included in the grant file to which the waiver applies.

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