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*Editors' Note: Any opinions expressed herein are those of the author alone.*

## **Oregon Water Resources Commission Unanimously Adopts Significant Updates to Rules Governing Issuance of New Groundwater Pumping Permits**

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*WaterWatch of Oregon*

On September 12, 2024, the Oregon Water Resources Commission voted unanimously to adopt significant updates to Oregon's groundwater allocation rules. The changes mark a historic step in how the state will allocate new groundwater rights going forward.<sup>1</sup> The updated rules were filed with the Secretary State and became effective on September 17, 2024.<sup>2</sup>

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<sup>1</sup> The OWRD Staff Report to the Commission, Agenda Item B, September 12, 2024, "Groundwater Allocation Rulemaking (Chapter 690, Divisions, 8, 9, 300, 410)" (Staff Report) containing and detailing the rule changes, scientific support for the rule changes, description of the process, public comments and responses to public comments, and Tribal comments and responses, is available here under September, 2024:

[https://apps.wrd.state.or.us/apps/misc/wrd\\_notice\\_view/Default.aspx?notice\\_id=41](https://apps.wrd.state.or.us/apps/misc/wrd_notice_view/Default.aspx?notice_id=41).

<sup>2</sup> <https://records.sos.state.or.us/ORSOSWebDrawer/Recordhtml/10434014>.

## BACKGROUND

As explained in the Oregon Water Resources Department (OWRD) press release announcing the Commission's vote<sup>3</sup>:

“The new rules are designed to promote sustainable groundwater use. This means that when evaluating a new use application, OWRD is looking to determine whether water is available for further appropriation, including:

- Determining if groundwater levels are reasonably stable.
- Prioritizing existing water rights over new groundwater rights that will interfere with surface water rights.
- Confirming the target aquifer is physically capable of producing the requested new rate of use.

This is largely achieved through defining reasonably stable groundwater levels and expanding the evaluation of impacts to surface water, altering the criteria OWRD uses for evaluating new groundwater use applications.”

The rule changes are not intended to affect applications pending before the effective date, and do not affect exempt uses (such as exempt domestic wells), existing water rights, or transfers.

The need to update the rules came into increasing focus due to groundwater declines in many parts of the state. In the Harney Basin, the groundwater has been over-allocated by 110,000 acre-feet with maximum groundwater declines now exceeding 100 feet.<sup>4</sup> The problem is not limited to the Harney Basin, however, with analyses in recent years documenting statewide problems. Saito et al. 2022, documented that 27% of all analyzed wells in Oregon (1,032 out of 3,796) had significantly declining water levels.<sup>5</sup> A 2021 OWRD Staff Report to the Commission documented groundwater resource concerns across significant portions of Oregon.<sup>6</sup> Efforts are underway in the Harney Basin and elsewhere to address the issue. For instance, the legislature established state-wide and

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<sup>3</sup> Available here: [https://www.oregon.gov/owrd/newsroom/WRDNewsRoom/24-11\\_WRCadoptsGWARules.pdf](https://www.oregon.gov/owrd/newsroom/WRDNewsRoom/24-11_WRCadoptsGWARules.pdf).

<sup>4</sup> Information regarding Harney Basin groundwater is available on OWRD's webpage for the Division 512 rulemaking: <https://www.oregon.gov/owrd/programs/policylawandrules/OARS/Pages/Division-512-Rulemaking.aspx>. The full USGS-OWRD Harney Basin Groundwater Study is available under the Rule Information and Background link.

<sup>5</sup> Saito L, Freed Z, Byer S and Schindel M. (2022), The vulnerability of springs and phreatophyte communities to groundwater level declines in Oregon and Nevada, 2002–2021. *Front. Environ. Sci.* 10:1007114. doi: 10.3389/fenvs.2022.1007114.

<sup>6</sup> June 3, 2021, Water Resources Commission, Agenda Item H, Groundwater Resources Concerns – 2021. Available here: [https://apps.wrd.state.or.us/apps/misc/wrd\\_notice\\_view/Default.aspx?notice\\_id=41](https://apps.wrd.state.or.us/apps/misc/wrd_notice_view/Default.aspx?notice_id=41).

Harney Basin specific funds, administered by OWRD, to help address recognized impacts of declining groundwater levels on domestic well users.<sup>7</sup>

Updating the rules has entailed a multi-year, in-depth effort. The rulemaking process utilized a 30 member Rules Advisory Committee (RAC) representing diverse interests across the state.<sup>8</sup> The RAC held eight in-depth, lively meetings, with two additional technical sessions, from April 2023 to January 2024. The RAC process was preceded in the fall of 2022 by OWRD holding four informational sessions around the state, and an additional virtual session, regarding the need to update the rules.<sup>9</sup> Many additional outreach meetings were held with various groups and committees, and the effort went before the Commission multiple times.<sup>10</sup>

Publication of the Notice of Proposed Rulemaking in March 2024 kicked off four public information sessions and rule hearings held in Bend, La Grande, Central Point and Salem, with an additional comment period provided at the June 2024 Commission meeting.<sup>11</sup> During the comment period, OWRD received 1,431 written (excluding duplicates) and 60 oral comments.<sup>12</sup> Changes were made between the proposed rules and the rules that went before the Commission, notably clarifying that the updated rules apply only to new groundwater allocations and not to existing rights, regulations or transfers.<sup>13</sup>

## **WHAT THE UPDATED RULES DO**

OWRD states that the updated rules were developed according to the following principles:

- “1. Promote sustainable groundwater use, recognizing the prior appropriation doctrine, meaning that:
  - a. Reasonably stable groundwater levels are determined and maintained, and
  - b. Groundwater contributions to streamflow are maintained where streamflow is already fully allocated to existing water right holders.
2. Base rule changes in law and science, using Oregon’s groundwater data.

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<sup>7</sup> Statewide fund information available at: [www.oregon.gov/owrd/programs/GWWL/WARRF/Pages/default.aspx](http://www.oregon.gov/owrd/programs/GWWL/WARRF/Pages/default.aspx); Harney Basin fund information available at: [www.oregon.gov/owrd/programs/fundingopportunities/hdwf/pages/default.aspx](http://www.oregon.gov/owrd/programs/fundingopportunities/hdwf/pages/default.aspx).

<sup>8</sup> See Staff Report, p. 9 for a list of RAC members. OWRD Groundwater Allocation Rulemaking webpage: [www.oregon.gov/owrd/programs/GWWL/GW/Pages/Groundwater-Rulemaking.aspx](http://www.oregon.gov/owrd/programs/GWWL/GW/Pages/Groundwater-Rulemaking.aspx).

<sup>9</sup> Staff Report, p. 9.

<sup>10</sup> *Id.*

<sup>11</sup> See Staff Report, pp. 10-40, for the Notice of Proposed Rulemaking.

<sup>12</sup> See Staff Report, pp. 41-558 for public comments, Tribal comments, and responses.

<sup>13</sup> See Staff Report, p. 6 for a summary of the modifications made in response to public and Tribal comments.

3. Only issue additional groundwater rights where information exists to confirm that water is available for further appropriation.”<sup>14</sup>

The updated rules address several statutory terms from Oregon’s “Ground Water Act of 1955,” which is part of the Oregon water code. ORS 537.505 *et seq.* The Act contains several forward-looking provisions positioning Oregon for sustainable groundwater management. It sets forth a policy that, in order to insure the preservation of the public welfare, safety and health (which is the term used instead of the “public interest” seen in other parts of the water code), a number of things are necessary, including that:

- “Reasonably stable ground water levels be determined and maintained.”;
- “Beneficial use without waste, within the capacity of available sources, be the basis, measure and extent of the right to appropriate ground water.”; and
- “Adequate and safe supplies of ground water for human consumption be assured, while conserving maximum supplies of ground water for agricultural, commercial, industrial, thermal, recreational and other beneficial uses.”

ORS 537.525(7), (3), and (5), respectively. The statute further establishes that OWRD may presume that a proposed groundwater use will ensure the preservation of the public welfare, safety and health based on a four-part test:

“the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12)”;

“water is available”;

“the proposed use will not injure other water rights”;

“the proposed use complies with rules of the Water Resources Commission.”

ORS 537.621(1). This is a rebuttable presumption. ORS 537.621(2).

The updated rules amend the following four divisions of OAR 690: 8, 9, 300 and 410. Key changes are summarized below. A tracked changes version of the rules showing the changes made as compared to the previous rules is available in the OWRD Staff Report to the Commission.<sup>15</sup>

### ***OAR 690-300 – Definitions***

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<sup>14</sup> Staff report, p. 1.

<sup>15</sup> “Final Proposed Rules – Tracked Changes from Current, Chapter 690, Division 8, 9, 300, 410”, Staff Report at pp. 559-618.

A key change is an updated definition of when “water is available” to include a new definition specific to new groundwater rights, which requires that the groundwater source exhibits “Reasonably Stable Groundwater Levels”; that the pumping rate requested is obtainable from the proposed well(s); and that the proposed groundwater use does not have the “Potential for Substantial Interference” with a surface water source that is already over-appropriated during any period of the year, or is subject to other withdrawals or shortages described in rule. OAR 690-300-0010(57)(d)-(f).

### ***OAR 690-008 – Statutory Ground Water Terms***

The updated rules define the statutory term “Reasonably Stable Groundwater Levels,” which was not previously defined by rule. OAR 690-008-0001(9). The first part of the definition states: “Annual High Water Levels, based on observed trends over time, remain within a range consistent with sustaining the function and character of a groundwater reservoir indefinitely.” *Id.* “Annual High Water Levels” is separately defined by OAR 690-008-0001(1). The definition also sets forth specific parameters that include an average rate of decline of less than 0.6 feet per year essentially over the past 5 to 20 years, and a total decline of not more than 25 feet. OAR 690-008-0001(9)(a). To arrive at this rate of decline, OWRD conducted a statistical evaluation of the dynamically stable water level range observed in existing wells in Oregon. OWRD’s Staff Report explains that “[t]he term dynamically stable refers to water levels that rise and fall over years to decades but have a long-term average level that is constant. Thus, water levels are considered reasonably stable if they remain within the dynamically stable range.”<sup>16</sup> The rule definition of Reasonably Stable Groundwater Levels is supported by two statewide analyses, whose references are provided in the Staff Report: (1) statistically characterizing the dynamically stable range of water levels that exhibit stability over their period of record, and (2) estimating the susceptibility of wells to going dry in response to different amounts of water level decline.<sup>17</sup>

The definition also describes the number and timing of measurements needed to calculate whether groundwater is reasonably stable and establishes that, subject to certain exceptions, if that data is not available for a given year then OWRD will presume that the groundwater levels are not reasonably stable. This reverses OWRD’s previous practice of defaulting to issuance of a new groundwater right if it lacked the data to determine whether or not the groundwater was over-appropriated, commonly referred to as “Default to Yes.”

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<sup>16</sup> Staff Report, p. 544.

<sup>17</sup> *Id.*

Notably, the rules allow that “[t]he quantitative tests” in part (a), being the decline rate and the total decline amount, “may be superseded by a basin program rule adopted by the Water Resources Commission pursuant to ORS 536.300 and 536.310.” OAR 690-008-0001(9)(d). The rules require that “[a]ny proposed superseding basin program rules definition must comply with ORS 537.505 to ORS 537.795, 537.992, OAR 690-410-0010 and 690-410-0070.” *Id.*

For a discussion of the scientific basis for the definition of Reasonably Stable Groundwater Levels, see the Staff Report at pages 543 to 548.

### ***OAR 690-009 – Ground Water Interference with Surface Water***

The updated rules amend the definition for “Potential for Substantial Interference” as it relates to evaluation of proposed new groundwater rights. OAR 690-009-0040(1)-(5). The definition provides information regarding how OWRD will make the determination and states that the “Potential for Substantial Interference with a surface water source exists if the well(s) under consideration will, over the full term of the proposed or authorized groundwater use, obtain water from Streamflow Depletion.” OAR 690-009-0040(5). “Streamflow Depletion” is defined to mean “a reduction in the flow of a surface water source due to pumping a hydraulically connected groundwater source[.]” with description the mechanisms this encompasses. OAR 690-009-0020(7). These definitions are a significant shift and address the previous rules’ failure to fully account for the impact of proposed pumping on surface water that resulted in issuance of groundwater permits that are diminishing surface water, even where there are senior surface water rights.

For a discussion of the scientific basis for the definition of the Potential for Substantial Interference, see the Staff Report at pages 549 to 551.

### ***OAR 690-410 – Statewide Water Resource Management***

The updated rules amend the water allocation principle relating to groundwater to state that groundwater shall be allocated to a new beneficial use only when OWRD makes a finding that Water is Available for a proposed use as defined OAR 690-410-0070. OAR 690-410-0070(2)(b).

## **CONCLUSION**

Promoting sustainable groundwater use through adoption of the updated groundwater allocation rules will likely bring more attention to other tools for accessing water. Some examples include conservation, efficiency measures, water reuse and reclamation, market based approaches, and transfers. This will more closely mirror the situation with surface

water, which has long been fully or over-allocated during the irrigation season in many parts of Oregon.

In announcing its unanimous vote to adopt the updated rules, Commission Chair Eric Quaempts explained, “Our unanimous decision to adopt these rules underscores the importance of proactive water management in Oregon. By taking this step, we are prioritizing the long-term health of our groundwater resources and ensuring that our water management practices reflect the realities of today’s challenges. This is about making responsible choices now to support Oregonians and the state’s water future.”<sup>18</sup> The implementation of the updated rules will be watched closely by many interests – stay tuned as this historic change is put into effect.

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<sup>18</sup> OWRD News Release “Oregon Water Resources Commission Adopts Historic Update to Groundwater Allocation Rules”. Available at: [https://www.oregon.gov/owrd/newsroom/WRDNewsRoom/24-11\\_WRCadoptsGWARules.pdf](https://www.oregon.gov/owrd/newsroom/WRDNewsRoom/24-11_WRCadoptsGWARules.pdf).

# Klamath Basin Adjudication Moves Forward in Oregon Circuit Court

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Nearly a half-century after its formal start, Oregon's Klamath Basin Adjudication (KBA) is lurching toward a significant milestone: a judgment in the trial court.

Oregon's water rights adjudication law establishes a two-stage process to determine water rights claims. First, in the administrative stage, the Oregon Water Resources Department evaluates claims and issues an administrative order approving or denying the claims, in whole or in part. In the KBA, that process concluded in 2013. Second, in the judicial stage, a circuit court adjudicates exceptions to the determined claims. In the KBA, that process is ongoing. Once completed, the Klamath County Circuit Court will issue its judgment/decreed, affirming or modifying the administrative order.

In the first ten years of the judicial stage, the court resolved numerous legal issues that are common to many of the parties' exceptions or that are necessary to adjudicate multiple exceptions. These include the standard of review of the administrative order and whether, and under what circumstances, parties are allowed to present new evidence in the judicial stage that is not part of the administrative record.

Functionally, the great majority of claims are now resolved, but there will be a single judgment that covers them all, some years in the future.

The most important pending issue is the judicial quantification of instream tribal claims for the Klamath Tribes in Upper Klamath Lake and its tributaries, which are the most senior rights in the basin. There will also be judicial review (without the taking of new evidence) of agency determinations for non-tribal federal reserved rights, rights of water users served by the Klamath Irrigation Project, and others.

When will there finally be a court decree? This is a decades-old question, and after a lengthy explanation (that should take less than a decade to read), we provide our prediction below.

## **PURPOSE AND AUTHORITY**

The KBA is a proceeding to determine water right claims in the Klamath Basin within the State of Oregon that are either federal reserved claims (based on *Winters v. United States*, 207 U.S. 564 (1908)) or pre-1909 appropriative claims (initiated before the enactment of



Oregon's Water Rights Code, akin to pre-1914 water right claims in California) whose scope and extent have yet to be adjudicated by a tribunal. Until such claims are determined, it is not possible for the Oregon Water Resources Department (OWRD), pursuant to its statutory duties under Oregon Revised Statutes (ORS) title 45, to administer these water rights.

ORS chapter 539 governs water rights adjudications and their procedures, directing OWRD to initially preside over the proceedings and enter a determination before a circuit court reviews the agency's determination.

## **ADMINISTRATIVE STAGE**

On December 23, 1975, OWRD issued a "Notice to Water Users, Klamath River and Its Tributaries," thereby officially commencing the KBA and requesting that water users file notices of intent to file claims. OWRD then spent years conducting a series of examinations on streams and the works diverting water therefrom. Although OWRD performed some work during this time, the KBA was largely paused due to separate litigation in federal court regarding tribal federal reserved rights. This litigation culminated in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), a seminal case for the holding that tribal water rights can carry a priority date of "time immemorial" when the tribe's treaty with the United States reserves aboriginal uses of water to support a hunting and fishing lifestyle.

The KBA is Oregon's first water rights adjudication to include federal reserved claims, which implicates the federal government. In September 1990, when OWRD issued a "Notice to File Claim" to all persons within the basin, the United States filed suit in federal court to test whether Oregon's two-stage adjudication process satisfies the requirements of the McCarran Amendment, 43 U.S.C. section 666, to waive the United States' sovereign immunity and join it as a party to a water rights adjudication. The Ninth Circuit Court of Appeals ruled in the affirmative. *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994).

Over 730 water right claims were filed with OWRD by April 1997. In October 1999, OWRD issued a "Preliminary Evaluation" on each claim, rendering initial conclusions on whether each claim should be approved or denied. Parties then had the opportunity to contest a Preliminary Evaluation and/or the underlying claim—a total of 5,656 contests were filed by May 2000. OWRD's Preliminary Evaluations triggered yet another round of federal court litigation, with the United States and Klamath Tribes (Tribes) objecting to the State of Oregon's quantification standard for tribal claims. The Ninth Circuit essentially ruled that it would abstain from deciding the matter until the KBA is completed. *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003).

In another first, the KBA is the first to involve adjudicatory procedures conducted by administrative law judges (ALJs). OWRD referred contested claims to Oregon’s Office of Administrative Hearings (OAH), whose ALJs conducted evidentiary hearings and issued Proposed Orders on the claims until April 2012. OWRD then reviewed the Proposed Orders, as well as any exceptions thereto filed by the parties, and entered a Partial Order of Determination (POD) for each claim. Each POD, determining 734 different claims, is contained within the Amended and Corrected Findings of Fact and Order of Determination ([ACFFOD](#)) that OWRD entered on February 28, 2014.

OWRD is authorized to administer the water rights determined in the ACFFOD (i.e., regulate water rights based on priority) pending the court’s review thereof unless stayed. ORS §§ 539.170, 539.180.

## JUDICIAL STAGE

The Klamath County Circuit Court ([Court](#)) has presided over the KBA since March 2013. In October 2014, parties had the opportunity to file exceptions to the ACFFOD and/or any POD within. The Court has since conducted the judicial proceedings in phases, beginning by deciding jurisdictional, procedural, and other threshold or cross-cutting issues. For example, in August 2017, the Court held that it would review findings of fact and questions of law in the ACFFOD *de novo*; it also held that it would only take non-record evidence for good cause shown, on a case-by-case basis.

Thus, through the end of 2023, the Court did not review individual PODs and resolve all exceptions thereto (although it did affirm those PODs that were not subject to exceptions). Rather, it ruled on broader issues, such as whether OWRD applied the correct legal standards when determining groups of claims. In May 2019 and July 2020, the Court modified the legal standards for certain federal reserved claims; in August 2022, the Court held that these modifications were *not* good cause for the parties to submit new, non-record evidence.

## CURRENT EVENTS

In July 2023, the Court concluded Phase 3, Part 2 of the KBA judicial proceedings when it entered an order remanding the Tribes’ Claim 622—for a federal reserved right that requires that certain water levels in Upper Klamath Lake be maintained throughout the year, with a time immemorial priority date—to OWRD. A principal reason for the remand was the fact that, in 2009, when the claim was before the OAH, the [Klamath Project Water Users](#) (“KPWU,” a group of irrigation entities that use water from Upper Klamath Lake in connection with the Bureau of Reclamation’s Klamath Project, initiated in 1905) entered

into a stipulation to *conditionally* withdraw their contest to the claim in hopes that a global settlement over the basin would be approved by Congress by December 1, 2017.

The stipulation provided that the Tribes would *not* place a “call” against claims senior to August 9, 1908 (thereby providing KPWU with safe harbor from such curtailment) during the pendency of the KBA, and that KPWU would have their “day in court” if the conditions subsequent (congressional acts) were not met. Further, to the extent that the conditions were not met, KPWU agreed to not challenge the time immemorial priority date aspect of the claim, but reserved the right to challenge the claim on all other grounds (e.g., present evidence that the water levels necessary to maintain a “healthy and productive habitat” for certain fish species – the legal standard for the claim – are much lower than those levels claimed by the Tribes).

The contested case proceedings before the OAH continued sans KPWU’s participation through 2012, when the presiding ALJ issued a [Proposed Order](#) recommending approval of Claim 622 in its entirety; OWRD then entered a [POD](#) for Claim 622 approving it as-claimed. The requisite congressional acts did not occur by December 2017, however, so the stipulation fell through and KPWU will now have their opportunity to present evidence and testimony in support of their contest in the first instance. The parties are presently awaiting a notice from the OAH, to whom OWRD again referred the remanded claim, regarding a hearing schedule. Once the remanded claim proceedings conclude, OWRD will presumably submit a new POD, with or without modifications, to the Court for its review.

Meanwhile, the Court commenced Phase 3, Part 3 of the KBA judicial proceedings in May 2024 to resolve exceptions to, and finally dispose of, individual PODs. In other words, the Court is now set to review each POD that is subject to exceptions to decide whether to affirm, modify, or reverse OWRD’s determinations on those claims. The Court is tackling groups of claims at a time, beginning with *Walton* and/or Klamath Termination Act (KTA) claims, a subset of the federal reserved claims, and ones for which the Court modified OWRD’s legal standards.

For a *Walton*/KTA claim to be approved under the Court’s legal standards, a non-Indian claimant must prove by a preponderance of the evidence that: its lands were formerly part of the former Klamath Indian Reservation; the lands were being irrigated (to the extent claimed) via diversion by an Indian owner or the first non-Indian successor; and all non-Indian successors have continued to use the claimed amount. If a claimant meets its burden of proof, it holds a water right with a priority date of 1864 (the year the Klamath Indian Reservation was created via treaty), which is superior to a state-issued license it may otherwise hold (i.e., the water user gets to increase the seniority of its right).

On August 7, 2024, the parties filed briefs with the Court in support of their exceptions to PODs approving *Walton/KTA* claims. They now await an order from the Court setting a briefing and hearing schedule, which will likely conclude in early 2025.

Once the parties conclude their *Walton/KTA* arguments, they will move to briefing their exceptions to other claims or groups of claims, such as non-tribal federal reserved claims or pre-1909 claims (exceptions to tribal federal reserved claims will likely be the last group to be briefed, given the remand of Claim 622 to OWRD).

## CONCLUSION

While several more years will pass before the Court enters a judgment in the KBA, that milestone is within sight. The judgment will then be subject to appeal to the Oregon Supreme Court. Much work remains, but (relatively) soon there will be finality to the claims filed decades ago.

When? Rumor has it that Las Vegas has set the over/under at March 19, 2029, but it is best to hold onto your money.

*This [article originally published](#) on August 20, 2024.*

# Navigating Regulatory Changes: The Ninth Circuit's CAFO Ruling and Oregon's New Rules for CAFOs

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Producers face an evolving regulatory landscape, given the recent changes to federal and state rules that govern the operation of Concentrated Animal Feeding Operations (CAFOs). The Ninth Circuit's decision in *Food & Water Watch et al. v. U.S. Environmental Protection Agency*, No. 23-2146 (9th Cir. 2024), and Oregon's updated regulation OAR 603-074 in response to Senate Bill 85 (SB 85) and its amendments, both aim to address CAFO waste management and the potential for water pollution. The Ninth Circuit's ruling provides temporary relief from new federal water regulations, but Oregon has introduced more stringent state rules with regard to CAFOs. Understanding these changes is vital to stay abreast of the continually shifting regulatory landscape.

## **The Ninth Circuit Ruling: Deferring New Federal Regulations for CAFOs**

In *Food & Water Watch et al. v. EPA*, environmental groups sought stricter Clean Water Act regulations for CAFOs. The plaintiffs argued the EPA had failed to address water pollution attributable to large animal feeding operations, and called for new and more stringent rules to limit waste discharge into surface waters.

The Ninth Circuit rejected the request, and upheld the EPA's decision not to initiate rulemaking. Crucially, the Court noted the agency had not declined to act, but chose instead not to conduct further studies on the effectiveness of its current effluent limitation guidelines. The EPA acknowledged that CAFOs "may be responsible for unlawful water pollution," but decided a rulemaking might not be the most effective or timely solution. *Id.* at 1. Instead, the agency intends to commission a stakeholders' subcommittee and study the issue further before choosing whether to pursue new regulations.

The Court's opinion stressed the EPA's broad discretion to prioritize its regulatory efforts: "EPA has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," and the agency is afforded "significant latitude as to the manner, timing, content, and coordination of its regulations." *Id.* at 2. This ruling gives producers temporary relief from the possibility of immediate new federal water regulations, and allows the EPA time to gather more data and consult with stakeholders—including producers—before making any decisions.

## **Oregon's New CAFO Rules: Stricter Standards and New Requirements for Dairy Producers**

Though the Ninth Circuit ruling delayed new federal regulations, Oregon adopted rules to implement SB 85. These changes impose stricter requirements focused on water management, construction approvals, water supply plans, and operational transparency. Below is an overview of the key adjustments and how they compare to the previous regulatory framework.

### **1. Construction Requirements**

Prior rules provided general guidance on facility construction but lacked detailed inspection requirements and clarity regarding engineering specifics. SB 85 introduces specific inspection requirements for facilities after construction as a prerequisite for moving animals into a new facility (see OAR 603-074-0018). These inspections are intended to confirm the new structure meets environmental standards before it becomes operational. The construction approval process is now codified as well, and clarifies what types of CAFO construction projects require engineering review and approval. This change puts into rule the steps required for construction compliance and may reduce uncertainty; it also creates delays that producers should factor in when they plan a new facility.

### **2. Clarified Definitions**

The updated rules in OAR 603-074-0010 clarify key terms. Notably, the definition of "CAFO" more clearly specifies which operations qualify for a permit based on confinement numbers and liquid wastewater generation. Also, for the first time "discharge" is defined as the release of pollutants into state or U.S. waters, which includes placing wastes on land or into the environment in a way that affects water quality. This clarification aligns state rules with federal definitions under 40 CFR § 122.2.

### **3. Permit Designations**

Under the previous regulations, permit designations were based primarily on the size and type of operation. Oregon's updated permit designation table in OAR 603-074-0011 introduces more specific thresholds for CAFOs, including multi-species operations and lower limits for the number of confined animals. [See the table here](#). Additional operations fall under regulatory oversight, and the table provides a more precise framework to determine which require permits.

### **4. Permit Application Procedures**

The previous application process lacked specific requirements for CAFO permit applications. In OAR 603-074-0012, the updated rules introduce pre-application

consultations, in which producers must engage with regulators before submitting a full permit application. This can provide an opportunity to identify and address potential issues early in the process, though this additional step may also create further delay in application review and approval. Additionally, large CAFOs in Groundwater Management Areas (GWMAs) must now apply for individual permits if they plan to land-apply manure. This addresses agency concerns about protecting water quality in sensitive areas. The application process also currently requires neighbor notice, to increase public and community involvement in the CAFO permitting process.

### **5. Water Supply Plan Requirements**

A significant addition to the CAFO permitting process is the requirement for a Water Supply Plan (see ORS 603-074-0019) to be submitted with new or renewing applications. Producers must now document all sources of fresh water, which will be subject to review by the Oregon Water Resource Department (OWRD). The purpose of this new requirement is to ensure the CAFO includes a plan for water use based on authorized uses, and that it will have access to sufficient fresh water for proposed operations.

### **6. Monitoring and Reporting**

The new framework requires more frequent water-quality monitoring and detailed reports. Producers must regularly test nutrient levels in nearby water sources and submit findings to state regulators who seek to address concerns that pollution risks are identified and mitigated early. This will impose more regulatory burdens on producers, especially smaller producers who may lack economies of scale to support administrative staffing.

### **7. Public Participation and Transparency**

The updated rules mandate greater transparency, including public meetings and the disclosure of nutrient management plans during the permit application process (see OAR 603-074-0012(6)).

### **8. Nutrient Management Plans for Receiving Properties**

The new framework now requires any property located with a GWMA that receives manure from a CAFO, even if it is not part of the property covered by the CAFO, must have a Nutrient Management Plan (NMP). This means producers must ensure that properties beyond their own premises follow specific guidelines for manure application. This adds additional steps to the process of managing manure, because it requires more oversight and coordination with recipient properties.

## **The Intersection of Federal and State Developments**

Although the Ninth Circuit's ruling grants dairy producers a temporary reprieve from new federal water regulations, Oregon's updated CAFO rules place additional demands on producers within the state. Producers will want to focus on complying with enhanced water-quality protections, more detailed permitting processes, new water supply plan requirements, and increased community and public participation in the permitting process.