

Oregon Watershed Enhancement Board

Chapter 695

Division 46

WATER ACQUISITION GRANTS

695-046-0010

Purpose

In accordance with Section 4b of Article XV of the Oregon Constitution and ORS 541.956, OWEB may consider grant applications that propose to acquire ~~from willing sellers~~ interests in water ~~from willing sellers~~ that result in Legally ~~or Contractually~~ Protected Instream Flow to maintain or restore streamflows for the benefit of watersheds and habitats for native fish or wildlife. This division supplements the OWEB Grant Program rules under OAR 695-005 and provides specific requirements for the OWEB water acquisition grant program. ~~If there is in the event of~~ any conflict between these requirements and requirements identified in OAR 695-005, the water acquisition grant requirements in this division will take precedence. ~~OWEB does not itself hold an interest in water rights in grants authorized under these rules, but rather allocates funding for Water Acquisition Projects to other entities, which may result in the State of Oregon or other entities holding the interest in water rights.~~

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020

OWEB 2-2013, f. & cert. ef. 6-19-13

OWEB 2-2005, f. & cert. ef. 2-1-05

695-046-0020

Definitions

(1) "Conserved Water" means that amount of water that results from conservation measures, measured as the difference between:

(a) The smaller of the amount stated on the water right or the maximum amount of water that can be diverted using the existing facilities; and

(b) The amount of water needed after implementation of conservation measures to meet the beneficial use under the water right certificate.

~~(2) "Conserved Water Project" means a project that conserves water pursuant to Oregon's Conserved Water Act, ORS 537.455 to 537.500.~~

~~(2) "Conserved Water" project means a project that conserves water pursuant to Oregon's Conserved Water Act, ORS 537.455 to 537.500 and OAR 690-018.~~

(3) "Contractually Protected Instream Flow" means the amount of water secured through a Water Use Agreement.

(4) "Delegated to the Director" means the grant funds that the Board has authorized to the Director to award and enter into appropriate agreements.

(5) "Instream Lease" means the conversion of all or a portion of an existing water use subject to transfer to an instream water right for a specified time-period as authorized by ~~Oregon Water Resources Department under~~ ORS 537.348(2).

(6) "Legally Protected Instream Flow" means the amount of water secured through Instream Leases, Split-Season Use Instream Leases, Time-limited Instream Transfers, Conserved Water Projects, Permanent Instream Transfers, or other mechanisms administered by Oregon Water Resources Department.

(7) "Permanent Instream Transfer" means the permanent conversion of all or a portion of an existing water use subject to transfer to an instream water right as authorized by ~~Oregon Water Resources Department under~~ ORS 537.348(1).

(8) "Split-Season Use Instream Lease" means an Instream Lease in which the water right can be exercised in the same season defined by the water right in the same calendar year for both the existing purpose of the water right and for an instream purpose, provided that the water is not used for the existing purpose during the period in which water is to be protected instream as authorized under ORS 537.348(3).

~~(9) "Technical Review Teams" means a team of designated personnel with regional knowledge and interdisciplinary expertise drawn from agencies represented on the Board and other entities organized to evaluate water acquisition grant applications.~~

~~(10)~~ "Time-limited Instream Transfer" means an instream transfer authorized ~~by Oregon Water Resources Department~~ under ORS 537.348(1) that is not permanent and under which the water right will revert back to its original use:

(a) Without further action by the Oregon Water Resources Department at the end of the period of time specified in the final order approving the instream transfer; or

(b) On a determination by ~~Oregon Water Resources Department~~ ~~the Department~~ that other conditions, specified in the final order approving the instream transfer, for termination have been met.

~~(11)~~ "Water Acquisition Project" means a voluntary transaction that results in a Legally ~~or Contractually~~ Protected Instream Flow.

~~(12)~~ "Water Use Agreement" means a contractual agreement between a water right holder and an eligible grant applicant to ~~conserve water or curtail the beneficial use of~~ ~~manage~~ water under a water ~~user right~~, subject to transfer during specified periods or under specified conditions to achieve Contractually Protected Instream Flow, such as forbearance agreements, minimum flow agreements, and other private agreements between a water right holder and an eligible grant applicant.

~~(13)~~ "Water use subject to transfer" means a water use established by:

~~(a) An adjudication under ORS chapter 539 as evidenced by a court decree;~~

~~(b) A water right certificate;~~

~~(c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250; or~~

~~(d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission. [1991 c.957 §2; 1995 c.274 §1; 1997 c.42 §2]~~

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13

OWEB 2-2005, f. & cert. ef. 2-1-05

695-046-0035

Eligibility

Commented [D01]: OWEB staff will share thoughts on a potential path for groundwater via Water Acquisition Program Guidance.

(1) The Board will only consider Water Acquisition Projects involving legal water rights not subject to forfeiture that will result in Legally ~~or Contractually~~ Protected Instream Flows to ~~address~~:

(a) ~~Address the~~ identified conservation needs of habitats and species as determined by the Oregon Department of Fish and Wildlife and in consideration of needs identified by other federal or ~~tribal~~ fish and wildlife agencies; or

(b) Improving water quality in a water-quality-limited area, as defined in OAR 340-041-0002(70) and determined by the Oregon Department of Environmental Quality.

(2) The Board will ~~also~~ only consider projects that include written notice to irrigation districts where the proposed Water Acquisition Project is within the boundary of an irrigation district.

(3) Within grant applications for Water Acquisition Projects as described in this section(4), the Board will consider funding requests for activities such as project planning and development, project design, and outreach with water right holders that directly relate to the proposed Water Acquisition Project or will lead to future eligible Water Acquisition Projects in the same basin or other defined area as the proposed Water Acquisition Project.

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

OWEB 2-2020, adopt filed 04/27/2020, effective 05/01/2020

695-046-0185

Use of Grant Funds

Water acquisition grant funds may be applied toward reasonable costs, as determined by OWEB, related to the implementation of Water Acquisition Projects, including:

(1) The purchase price and the purchase option fees associated with acquisition of an interest in water.

(2) The cost of a Water Acquisition Project for water conveyance or water use efficiency project elements, such as equipment, parts, and installation labor, that results in legally protected instream water rights using Oregon Water Resources Department's Allocation of Conserved Water program, or other OWRD Department-administered instream flow water conservation program.

(2) The monetary interest on bridge loans needed to secure the interest in water prior to when funding will be available for distribution through the program.

(3) The staff and contracting costs incurred as part of designing the project and acquiring the interest in water.

(4) The cost of outreach activities necessary for the funded Water Acquisition Project.

(5) The cost of due diligence activities, including appraisal or valuation of the interest to be acquired, water right review, title report, assessment of the timing and extent of water use and regulation associated with the interest in water, and other customary due diligence activities.

(6) The closing fees related to the acquisition of an interest in water.

(7) The cost of monitoring the Water Acquisition Project to certify that the water interest is being used and managed ~~consistent with Section 4b, Article XV of the Oregon Constitution, consistent with intent of grant application, allowing for any conditions listed in the Grant Agreement.~~

(8) Other reasonable costs for project planning and outreach with water right holders, as determined by OWEB, related to development of the proposed Water Acquisition Project or future eligible Water Acquisition Projects in the same basin or other defined area. These costs must be necessary for carrying out eligible programs that lead to development of

eligible water acquisition projects. A maximum amount that may be requested for these costs will be included in the announcement for the grant offering.

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020

OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0190

Matching Contributions

(1) ~~Consistent with OAR 695-005-0030, a~~ All applicants shall demonstrate ~~at least 25% that some portion~~ of the Water Acquisition Project cost is being sought as match, with the grant applicant required to provide matching funds and efforts necessary to complete the purchase. Match requirements will be included in the announcement for the grant offering. The following costs and activities will qualify as match:

(a) All costs listed under OAR 695-046-0185, including in-kind contributions of those costs.

(b) Funding commitments made by others as a result of grant applicant efforts ~~(including funding to be secured from other funders as part of a Board-prescribed process conducted in cooperation with other funders).~~

(c) Any donated portion of the interest in water.

(2) OWEB funds shall not qualify as matching contributions.

(3) The Director retains the discretion to determine whether matching costs are reasonable and will be recognized as qualifying matching costs.

Statutory/Other Authority: ORS 541.906, ORS 541.958

Statutes/Other Implemented: ORS 541.932(9)

History:

OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020

OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0195

Coordinating and Partnering with Other Funders

~~In accordance with Section 4b of Article XV of the Oregon Constitution, OWEB may consider grant applications in partnership with other funders for the purposes of creating operational efficiencies and coordinating investments in projects designed to result in Legally or Contractually Protected Instream Flow and to do one or both of the following:~~

~~(1) Address the conservation needs of habitats and species as determined by the Oregon Department of Fish and Wildlife and in consideration of needs identified by other federal, or tribal fish and wildlife agencies; or~~

~~(2) Improve water quality in a water quality limited area as defined in OAR 340-041-0002(70) and determined by the Oregon Department of Environmental Quality.~~

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020

OWEB 2-2013, f. & cert. ef. 6-19-13

Commented [RD2]: Discuss with RAC the topic of premiums for water values, and subsequent use of these as match; then determine if rule content is needed (e.g., use of grants funds and/or matching contributions sections).

695-046-0196

Evaluation Criteria

Water acquisition grant applications will be evaluated on the extent to which the application describes:

(1) The significance of the projected ecological outcomes, including how the proposed Water Acquisition Project:

(a) Achieves or helps to achieve any ~~professionally, state, federally, or Tribal~~ accepted supported flow target ~~during the period of use, including dry year or drought conditions;~~

(b) Addresses limiting factors identified in professionally accepted conservation plans for habitat conservation needs or water quality;

(c) Provides benefits to impacted species and life stages;

(d) Monitors and tracks project impacts over time, as appropriate for the transaction type and duration; and

(e) Monitors project compliance and project outcomes, as appropriate for the transaction type and duration; ~~and~~

~~(f) Contributes to climate change adaptation.~~

Targets water rights of adequate seniority to ensure reliability of "wet water" instream in all water year conditions (wet, average, dry).

(2) How the water right's ownership, demonstration of use, validity, reliability, ~~protectability~~ and seniority will result in instream flow improvements.

(a) If the project is utilizing the Oregon Water Resources Department's Allocation of Conserved Water program, or other ~~OWRD~~ Department-administered instream flow water conservation program, the priority date of the conserved instream water right shall be the same as the original ~~right~~.

~~(23)~~ The alignment of proposed costs with the work necessary to accomplish the objectives described in the application, including:

~~(a) The ownership, use, validity, and reliability of the water right;~~

~~(b)~~ How the proposed cost of the Legally ~~or Contractually~~ Protected Instream Flow is consistent with local or regional market conditions; ~~and~~

~~(c)~~ How the term of the proposed Water Acquisition Project is appropriate to meet the habitat, species, or water quality needs; and.

(c) If the project is utilizing the Oregon Water Resources Department's Allocation of Conserved Water program, or other ~~Department~~ ~~OWRD~~ -administered instream flow water conservation ~~program~~, the project cost relative to the amount of water, ~~and the amount of conserved water over the required percentage~~, that will be protected instream.

~~(34)~~ How the proposed activities are part of a strategic effort or long-term vision for restoring instream flows in the watershed, including how the proposed Water Acquisition Project:

(a) Complements other habitat conservation actions and needs; and

(b) Will lead to future expansion of instream flow restoration; ~~and~~

~~(c) Addresses Oregon Department of Fish and Wildlife, or other federal or Tribal fish and wildlife agency priorities for aquatic habitat, and/or Oregon Department of ~~federal, or Tribal~~ Agriculture or Oregon Department of Forestry priorities for water quality, or Oregon Department of Environmental Quality water quality management or implementation plans, if established. ~~(d) Ensures water in drought and/or dry water years, and/or~~~~

Commented [BW3]: Protectability added to this list of water right characteristics to consider.

Commented [BW4]: ACW instream water's priority date shall be the same.

Commented [BW5]: To address the Deschutes Alternative Pathway.

Commented [RD6]: ACW project's amount of savings, and the amount above the required 25% instream. (Additional information will be provide in grant program guidance.)

Commented [RD7]: Deleted reference to collaborative planning efforts and existing plans, due to redundancy with (a) and (b).

(45) The capacity and qualifications of the applicant, including staff or consultants to be retained, to accomplish the proposed Water Acquisition Project activities described in the application and to sustain the projected ecological outcomes over the project term.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, adopt filed 04/27/2020, effective 05/01/2020](#)

695-046-0200

Application Evaluation Process

(1) For water acquisition applications seeking grant funds that require the Board to make a funding decision:

(a) A Technical Review Team will be convened to review water acquisition grant applications.

(b) Prior to the Technical Review Team meeting, the Technical Review Team shall evaluate each application based on the information provided and the evaluation criteria as described in OAR 695-046-0196.

(c) At the Technical Review Team meeting, the Technical Review Team shall:

(A) Review and evaluate each project individually based on how well the proposed project meets the criteria as described in OAR 695-046-0196.

(B) Recommend the project as:

(i) Do fund;

(ii) Do fund with conditions;~~or~~

(iii) Do not fund;~~or~~

~~(iv) Defer to staff or the Board with an explanation, if there is a policy issue or budget issue that needs to be addressed by the Board prior to a funding decision; and~~

(C) Rank order all projects recommended for funding based on how well the project meets the criteria established in OAR 695-046-0196.

(d) The project description, summary evaluation, and funding recommendation for all projects, and the rank order of projects recommended for funding shall be forwarded from the Technical Review Team to Board staff for their consideration. This information will be provided to all applicants and to the Board.

(2) For water acquisition grant applications seeking grant funds that have been Delegated to the Director;

(a) A Technical Review Team will be convened to review grant applications.

(b) The Technical Review Team shall review and evaluate each project based on how well the proposed project meets the criteria in OAR 695-046-0196 and provide feedback and recommendations to OWEB staff.

[\(3\) To the extent practicable, OWEB's application evaluation process will create operational efficiencies and complementary investments by coordinating with other agencies and funders that sponsor water acquisition grant programs, may consider grant applications in partnership with other funders for the purposes of creating operational efficiencies and coordinating investments](#)

[OWEB may consider grant applications in partnership with other funders for the purposes of creating operational efficiencies and coordinating investments](#)

C

Commented [D09]: Propose to move key content from coordinated funding section here, given that the review process is the primary nexus with other funding programs. This enables efficiency and complementarity without presenting challenges to OWEB's requirement to administer state funds.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.932(9)
History:
[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)
OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0201

Staff Funding Recommendation Process

(1) For water acquisition grant applications seeking grant funds that require the Board to make a funding decision:

(a) Staff shall review the recommendations from each Technical Review Team and make a statewide funding recommendation to the Board based on available resources for the grant offering and type. The recommendation shall include any conditions placed on individual projects as suggested by the Technical Review Team and may include proposed budget adjustments. The staff recommendation, as represented in the staff report to the Board, shall be made available to applicants and members of the Technical Review Teams at least two weeks before the Board meeting where funding decisions are to be made.

(b) Applicants may provide written or oral comment to the Board on the staff recommendation prior to the Board decision.

(2) For grant applications seeking grant funds that have been Delegated to the Director, staff shall review the recommendations from each Technical Review Team and make a funding recommendation to the Director based on available resources for the grant offering and type. The recommendation shall include any conditions placed on individual projects as suggested by the Technical Review Team and may include proposed budget adjustments. The staff recommendation shall be made available to the applicants.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.890-541.969
History:
[OWEB 2-2020, adopt filed 04/27/2020, effective 05/01/2020](#)

695-046-0202

Funding Decision

(1) For water acquisition grant applications seeking grant funds that require the Board to make a funding decision:

(a) After considering recommendations from staff, ~~and any community impacts from the proposed Water Acquisition Project and any public comments received~~, the Board may fund a project in whole or in part.

(b) Projects not funded may be resubmitted during future application submission periods.

(2) For water acquisition grant applications seeking grant funds that have been Delegated to the Director:

(a) After considering recommendations from staff, ~~and any community impacts from the proposed Water Acquisition Project and any public comments received~~, the Director may fund a project in whole or in part.

(b) Projects not funded may be resubmitted during future application submission periods.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.890-541.969
History:
[OWEB 2-2020, adopt filed 04/27/2020, effective 05/01/2020](#)

Commented [BW10]: The ACW same date, and increased % instream in the Criteria section could also be mentioned here.

695-046-0205

Public Involvement

The public shall be provided with opportunities to comment on grant applications for Water Acquisition Projects being considered by the Board. OWEB will provide written notice through its website of the Board's intent to consider water acquisition grant applications. The Board will accept:

~~(1) Comments made at public hearings, as described in ORS 271.735, held on grant applications seeking funding for Permanent Instream Transfers;~~

~~(2) Written comments received at least 14 days before the Board meeting at which the application is to be considered by the Board; and~~

~~(1) Written comments received by OWEB prior to the Board meeting at which the Board will consider the application; and~~

~~(2) Oral comments made at the Board meeting at which the grant application is considered.~~

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13

Commented [RD11]: OWEB has an extensive public notification process that is described in water acquisition grant program materials.

Commented [DO12]: Deleted due to incorrect and irrelevant statutory reference/authority.

695-046-0210

Board Approval and Delegation of Authority

The Board shall conditionally approve grants with funding conditions made available to the public. The Director is delegated the responsibility of ensuring that funding conditions required by the Board are fully satisfied by the grant applicant.

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0215

Director's Funding Approval and Distribution of Funds

(1) The Director may approve the distribution of grant funds when:

~~(a) A grant agreement is executed by the Director and the grant applicant;~~

~~(a)~~ The funding conditions, if any, imposed by the Board and Director are met to the full satisfaction of the Director;

~~(b)~~ The legal and financial terms of the proposed Water Acquisition Project transaction are approved by the Director;

~~(c) A grant agreement is executed by the Director and the grant applicant;~~

(d) The Director has reconciled conditionally approved funding with actual Water Acquisition Project costs; and

~~(e)~~ The grant applicant has satisfied the match requirements under 695-046-0190.

(2) For grants established under these rules, the Director is authorized to reimburse the grant applicant for allowable costs identified in OAR 695-046-0185 and to recognize matching contributions under OAR 695-046-0190 that were incurred no earlier than 18 months before the applicable grant application deadline.

(3) Notwithstanding OAR 659-046-0215(1)(~~a~~), funds may be distributed prior to Water Acquisition Project transaction closing for ~~eligible due diligence~~ activities specified in OAR 659-046-0185(~~5~~) and included in the application budget.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0220

Compliance and Enforcement

(1) The ongoing use of the water interests acquired with OWEB water acquisition grant funds shall be consistent with the purposes specified in section 4b Article XV of the Oregon Constitution. If significant compliance issues cannot be resolved to the full satisfaction of the Director, the Director, after informing the Board and providing reasonable written notice to the recipient of the grant, may in ~~his or her~~**their** discretion initiate any and all legal remedies available to OWEB, including recovery of the OWEB grant funds that were used to purchase the water interest, and reasonable interest and penalties at the option of the Director.

(2) OWEB, its grantees, contractors and cooperating agencies must be provided sufficient legal access to property to which the water interest acquired with OWEB funds is appurtenant, for the purpose of monitoring to certify that the water interest is being used and managed consistent with Section 4b, Article XV of the Oregon Constitution.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0225

Subsequent Conveyances

A water interest acquired with OWEB grant funds shall not be conveyed to another party unless the conveyance is approved by the Board and may not be conveyed for the purpose of consumptive uses.

Statutory/Other Authority: ORS 541.906
Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13

695-046-0230

Waiver and Periodic Review of Rules

The Director may waive the requirements of Division 46 for individual grant applications, not including mandatory constitutional or statutory requirements, when doing so is reasonably calculated to result in more efficient or effective implementation of the Board's water acquisition grant program. Any waiver must be in writing and included in the grant

file to which the waiver applies. The administrative rules for water acquisition grants shall be periodically reviewed by the Board and revised as necessary and appropriate.

Statutory/Other Authority: ORS 541.906

Statutes/Other Implemented: ORS 541.932(9)

History:

[OWEB 2-2020, amend filed 04/27/2020, effective 05/01/2020](#)

OWEB 2-2013, f. & cert. ef. 6-19-13