WATER LEAGUE

Water League engages the public in water stewardship.

P.O. Box 1033
Cave Junction, OR
97523

chris@waterleague.org
(541) 415-8010

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To: Senate Committee On Rules
Senator Kayse Jama, Chair
Senator Daniel Bonham, Vice-Chair
Senators Jeff Golden, James Manning Jr., and Kim Thatcher

RE: Water League is neutral on HB 3569. While we oppose empaneling legislators on Rules Advisory Committees (RAC), we support ways to ensure administrative rulemaking does not depart from or overturn the legislative intent of the authorizing statutes that legislators pass. We also call for securing the integrity of the administrative rulemaking framework against unreasonable and unfounded attacks by those seeking to extend the demise of Chevron Deference to the states.

Dear Chair Jama, Vice-Chair Bonham, and Committee Members,

Our testimony below describes two Rules Advisory Committee (RAC) meetings pertinent to the legislative intent of HB 3569: 1) the Chapter 690 Division 601 rules, which exemplifies the specific problem the bill seeks to correct, and 2) the Chapter 690 Division 512 rules, which exemplifies some aspects of the opposition to the bill related to the presence of a legislator on that RAC. Following these two discussions, we propose alternatives to HB 3569, which might be useful for consideration in the 2026 short legislative session if time runs out before the end of this 2025 session to make HB 3569 workable.

Water League strongly supports agency rulemaking because agencies possess staff with the professional qualifications required to write administrative rules that streamline and expound on the statutes. Neither legislators nor judges are expected to specialize in the vast array of details, knowledge, and experience that scores of agencies' staff possess. Oregon must take all actions necessary to protect

the system by which state agencies write rules. That said, we acknowledge that all systems are not perfect, despite how desirable they may be. Oregon's administrative rules must be protected and secured against unreasonable and unfounded attacks. One way to do so is to fix problems related to state agencies' adherence to the legislative intent of the authorizing statutes for which they write administrative rules. One of the most serious complaints about administrative rules relates to the disjunction between rules and their authorizing statutes.

The Case for Helicoptering Over Agency Rulemaking – OAR 690-601:

The Oregon Water Resources Department's (OWRD) Division 601 rulemaking process exemplifies the concerns of HB 3569 regarding the preservation of legislative intent during administrative rulemaking.

OWRD engaged in Division 601 rulemaking to implement ORS 541.551, stemming from the passage of House Bill (HB) 3293. This statute explicitly seeks to provide funding support for community engagement plans, specifically enabling disproportionately impacted communities to actively participate in water project planning and decision-making processes through which they can exercise agency. The legislative intent, which is documented through statutory language, testimony, and legislative hearings, is unambiguous: community engagement resources were intended for local governments and organizations to authentically represent disproportionately impacted communities. The statute did not limit funding eligibility to water project developers; rather, it intended to create an independent avenue for genuine community engagement.

However, the Division 601 draft rules proposed by OWRD directly contravened this clear legislative intent. These new rules restrict community engagement plan funding eligibility strictly to entities already eligible for grants and loans under OAR 690-600 (Water Conservation, Reuse, and Storage Grant Program) and OAR 690-093 (Water Supply Development Account). Both sets of administrative rules inherently pertain to project feasibility and implementation, frameworks not initially structured nor legally capable of independently funding community engagement unrelated to specific feasibility or infrastructure projects. We incorporate by reference, our extensive written RAC comments and public comments at these hyperlinks.

This rulemaking effort counters the original legislative intent of HB 3293 (2021) and the authorizing statute ORS 541.551. Rather than fostering independent community

participation, the Division 601 rules revision implies that local organizations representing disproportionately impacted communities must partner with water project developers in what can only be a subordinate position. This arrangement to access funding shifts the power balance away from the communities that the Legislature explicitly intended to empower toward entities that naturally possess vested interests in project outcomes. The administrative rules, as drafted, set the stage for inherent conflicts of interest, undermining authentic engagement by forcing communities into dependent relationships with developers whose interests will inherently diverge from theirs. The rules all but set out how water projects can get extra funding for marketing and public relations needed to manufacture the consent of the disproportionately impacted communities. As a result, and surely unintended, the "10 Best Practices in Community Engagement" now appear to serve as political cover for this dynamic.

Late in the rulemaking process (two weeks after the Notice of Proposed Rulemaking deadline for public comment), OWRD discovered that the primary funding source, Lottery Revenue Bonds (used for Water Project Grants under ORS 541.656 and OAR 690-093), cannot fund community engagement activities because Measure 76 Lottery Funds are constitutionally-restricted from supporting community engagement activities. This acknowledgment demonstrates that OWRD's initial administrative rulemaking strategy is flawed because it attempted to insert community engagement components into funding streams legally unable to support them. Not only would grant funds be restricted to the water project developers themselves but now OWRD has to hope for other state funding to materialize to offer community engagement activities for Water Project Grants. These grants are 10 times larger than the Feasibility Grants we discuss below. The decision to restrict funding of community engagement activities to water project developers has effectively shut down the program and obstructed at least 90% of the legislative intent of ORS 541.551.

Regarding Feasibility Grants in ORS 541.566 and OAR 690-600, OWRD had to find a way to fund community engagement from the Feasibility Grant account, which, unlike water project grants, is not supported by Measure 76 Lottery dollars. To the rescue, legislators addressed the need for a legislative fix by adding a provision this spring to HB 3364 in Section 2(1)(q), which states: "Analyses of impacts of a project on environmental justice or disproportionately impacted communities and ways to minimize impacts on environmental justice or disproportionately impacted communities." This legislative fix retroactively legitimizes OWRD's initial administrative failure. OWRD wrote rules beyond statutory authorization, then sought legislative amendments after the fact to align statutes

(ORS 541.566) with their rules rather than aligning rules with the clear original legislative intent of ORS 541.551, the actual authorizing statute. This inversion of the statutory and rulemaking relationship represents a concerning departure from administrative norms and statutory fidelity. We incorporate by reference our testimony on HB 3364, wherein we discuss this issue at length.

In response to public comments leading up to the submission of the proposed rules to the Water Resource Commission for adoption, OWRD offered procedural adjustments and slight clarifications that failed to resolve the central problem of grant recipients' dominance over community engagement funding. OWRD's modifications reasserted the eligibility of existing water project grant applicants to request community engagement funding but did little to independently enable community-led organizations to seek resources directly. As a result, the core issue, genuine, independent community empowerment, remains unresolved, which the authorizing statute, ORS 541.551, did not envision.

This departure from the legislative intent described above illustrates precisely why rulemaking reform is necessary. Indeed, given the broadside attack against federal rules resulting from the demise of the Chevron Deference, all rulemaking across the nation is in the crosshairs of those who wish to strip state agencies of their legitimate and vital administrative rulemaking authorities. The Division 601 rules, and perhaps others, could be used as examples by critics to rein in agency rulemaking. Water League agrees oversight is needed; however, we're not sure the remedy HB 3569 proposes is the best solution, which brings us to our next section.

The Case for Why Legislators Should Not Oversee Agency Rulemaking – OAR 690-512:

Water League agrees with the numerous valid critiques of HB 3569. We incorporate by reference the well-articulated opposition to HB 3569 instead of repeating the excellent testimony here. Below is a cautionary tale about the presence of a legislator on a RAC.

To the argument against HB 3569, we refer to the lengthy and contentious Chapter 690 Division 512 rulemaking process, during which a powerful and prominent legislator and irrigator dominated the Rules Advisory Committee meetings, and unambiguously represented the interests of the other irrigator-RAC members, who formed a majority of the membership. To be clear, the legislator was representing their constituents, which led to strident debates, obstruction, and a contentious posture directed at OWRD staff. Water League attended all but one of the 15 Division 512 RAC meetings over two years and has

received thousands of pages of documents and reports. We have compiled transcripts of every meeting (~80 hours), taken notes during each meeting, and provided extensive oral and written testimony throughout. We are producing a comprehensive case study of the process in historical format to document this first application of the Administrative Procedures Act (ORS 183) to the implementation of the Critical Groundwater Area statutes and administrative rules under OAR 690-0010 (Water League was on that RAC).

The record will show how the Division 512 RAC meeting process was not well-served by the presence of a legislator who frequently dominated the proceedings. However, in this particular case, the legislator had an irremediable conflict of interest in the outcome as an irrigator in the CGWA, where some of the steepest cones of depression are located. While HB 3569 does not envision that legislators will have such intense special and personal income-based interests in the outcomes of the rulemaking proceedings, the effect of the political power, the dominance, and the bully-pulpit authority will be present by varying degrees based on the temperament of the empaneled elected official.

Water League incorporates our extensive comments on the effort to promote Voluntary Agreements under ORS 537.745 by reference here. Our comments explain many serious problems pushed by the legislator RAC member. Now, HB 3800 has been proposed for two reasons: 1) to supersede the OAR 690 Division 512 rulemaking process, and 2) to incorporate HB 3801, which was envisioned to address the extensive critiques lodged against the Voluntary Agreements proposal, all of which can be found in our 28-page set of comments linked above. While we agree that the Division 512 circumstance is an outlier for how extreme of an example it is, we believe that it stands as a cautionary tale for incorporating legislators into the agency's administrative rulemaking process.

Suggestions to revise HB 3569 or to propose a similar bill for the 2026 short session:

We believe that the Legislature must take action to ensure that administrative rulemaking is secure; however, we do not think HB 3569 is the way to go about it. Below are a few suggestions:

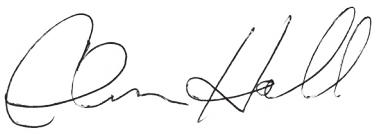
1) In the past, we have suggested in testimony and letters to state officials that going forward, all statutory references to rules should use the term "shall" instead of "may" to ensure that all rules going forward are unambiguous acts of the Legislature carried out by state agencies.

2) We suggest an alternative to empaneling a legislator, such as asking the DOJ General Counsel's office to appoint a staff attorney who has authority interpreting statutes to oversee RAC meetings. While we expect DOJ staff to be busy and find difficulty fitting RAC meetings into their schedules, we think the importance of the administrative rulemaking process requires such prioritization. Water League has asked OWRD to request the attorney assigned by the DOJ General Counsel Division to attend the Division 512 RAC meetings to oversee the propriety of the meetings and push back against the attorneys who were occasionally "substituted in" by certain RAC members who were absent and requested that such an alternate of their choosing be permitted to attend. We acknowledge that officials could view recordings of the RAC meetings; however, that does not have the same effect as being present.

3) We wonder what should be done when rulemaking has been stalled for years due to politics, and the sponsoring legislators have since retired or died, as was the case with the Chapter 690 Division 10 rules, which were stalled for 32 years. Perhaps HB 3569, or a similar bill in the 2026 Short Session, could include a time limit to the political stalling since OWRD was frozen out of implementing CGWAs so long as the Division 10 rules went unrevised. During that time, groundwater levels declined excessively, possibly causing substantial permanent harm. We suggest a two-year limit to the start of all rulemaking when the authorizing statutes state that agencies "shall" write administrative rules.

4) We suggest that the WRC take a more active role in the rulemaking process, especially since this process is the only activity the WRC cannot delegate to OWRD. We acknowledge and support the very comprehensive and excellent rulemaking reports OWRD staff provide to the WRC at quarterly WRC meetings. In addition to those staff updates, perhaps Water Resource Commissioners can attend RAC meetings and oversee the rulemaking process more closely.

Sincerely,



Christopher Hall
Executive Director