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CHAPTER 690

WATER RESOURCES DEPARTMENT

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FILING CAPTION: Conversion of a Hydroelectric Water Right to an Instream Water Right

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RULES:

690-054-0000, 690-054-0010, 690-054-0020, 690-054-0030, 690-054-0040, 690-054-0050, 690-054-0060, 690-054-0070, 690-054-0080

ADOPT: 690-054-0000

RULE TITLE: Purpose and Applicability

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the purpose and applicability of OAR Chapter 690 Division 54.

RULE TEXT:

These rules establish definitions and procedures for the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with ORS 543A.305. The conversion process is for Hydroelectric Water Rights beneficially used and which ceased beneficial use within 5 years of October 23, 1999, or later. Conversion of a Hydroelectric Water Right to an Instream Water Right is not a new allocation of water within a stream basin. A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610. These rules do not apply to Projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon the written request of the water right holder.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0010

RULE TITLE: Definitions

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule defines terms used in OAR Chapter 690, Division 54.

RULE TEXT:

Unless the context requires otherwise, the following definitions apply in OAR Chapter 690, Division 54:

(1) "Actual Use" means:

(a) For a Project, the maximum amount of water, expressed in cubic feet per second (cfs), legally diverted through the hydroelectric turbine to produce electricity for each month of the year, including those months in which no water was used, pursuant to a Hydroelectric Water Right, based on documents available to the Department; or

(b) For Other Existing Water Right(s) as of October 23, 1999, the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department;

(2) "Continuation of Authorized Water Uses" means that Other Existing Water Right(s) as of October 23, 1999, shall not be required to curtail Actual Use under their existing water rights as a result of the conversion of a Hydroelectric Water Right to an Instream Water Right;

(3) "Department" means the Oregon Water Resources Department;

(4) "Director" means the Department Director or staff authorized by the Director to administer these rules;

(5) "Holder" has the meaning given that term in ORS 543.075;

(6) "Hydroelectric Water Right" is a water right issued and used for hydroelectric purposes including: hydroelectric licenses containing time-limited water rights issued under ORS 543; water right certificates issued under ORS 543A; water right permits or certificates issued under ORS 537; and power claimants under ORS 543.705 to 543.730 whether certificated or uncertificated;

(7) "Injury" means the proposed conversion of up to the full amount of a Hydroelectric Water Right associated with a Project to an Instream Water Right would result in Other Existing Water Rights as of October 23, 1999 not receiving previously available water, based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999, to which the Other Existing Water Right(s) as of October 23, 1999 are legally entitled, pursuant to the considerations of OAR 690-054-0040(6);

(8) "Instream Water Right" means a water right held in trust by the Department for the benefit of the people of the State of Oregon to maintain water in stream for public use. An instream water right does not require a diversion or any other means of physical control over the water;

(9) "Mitigation Measures" means conditions to the Instream Water Right that avoid, abate, minimize, rectify, reduce, or compensate for impacts of the conversion in order to avoid Injury and to ensure the Continuation of Authorized Water Uses;

(10) "Other Existing Water Right(s) as of October 23, 1999" means a decreed, certificated, or permitted water right(s) issued on or before October 23, 1999, or a determined claim established on or before October 23, 1999, using water from the same water source or tributary as the Hydroelectric Water Right proposed for conversion;

(11) "Project" means any hydroelectric power project;

(12) "Reauthorized" has the meaning given the term "reauthorize" in ORS 543.075; and

(13) "Subordinated" means a condition of a water right that expressly makes it inferior in right and subsequent in time to any appropriation of water upstream for beneficial use.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0020

RULE TITLE: Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the process of preparing a notice of consideration for conversion to an instream water right, including making eligibility determinations and preliminary findings of fact.

RULE TEXT:

For the purposes of a notice of consideration for conversion to an Instream Water Right, the Director shall make the following eligibility determinations and preliminary findings of fact:

(1) The Director shall determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right. A Hydroelectric Water Right is eligible for conversion if one of the following criteria is met:

- (a) Use of water under the Hydroelectric Water Right has ceased for a period of five years;
- (b) A time-limited Hydroelectric Water Right has expired and has not been extended or Reauthorized;
- (c) The Hydroelectric Water Right was transferred under ORS 540.520 and 540.530 and has expired; or
- (d) The Director has received written consent of the Holder;

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right associated with the Project that is eligible for conversion to an Instream Water Right. The amount of a Hydroelectric Water Right eligible for conversion is subject to the following limitations:

- (a) Any portion of a Hydroelectric Water Right transferred under ORS 540.520 and 540.530 is not eligible for conversion to an Instream Water Right, except upon expiration of that time-limited water right;
- (b) Any portion of a Hydroelectric Water Right for which hydroelectric production is not the sole beneficial use authorized by the right is not eligible for conversion to an Instream Water Right;
- (c) Any portion of a Hydroelectric Water Right authorized in conjunction with another water right pursuant to ORS 543.765, or that is part of a larger distribution system for municipal, irrigation, or other beneficial purposes is not eligible for conversion to an Instream Water Right; and
- (d) Any portion of a Hydroelectric Water Right authorized in conjunction with multi-purpose dam releases including flood control, irrigation, municipal, or other beneficial uses, is not eligible for conversion to an Instream Water Right. Conversion to an Instream Water Right may not require release of water stored for other beneficial purposes. An Instream Water Right resulting from conversion under these rules shall not have priority over waters legally stored or legally released from storage;

(3) The Director shall make a preliminary finding on Injury. In making such finding, the Director shall consider:

- (a) The Actual Use of the Project. To make a preliminary finding on the Actual Use of the Project, the Director shall consider available documentation including, but not limited to: meter records of flow through a turbine, stream gage records, records of electricity production, seasonal restrictions on use, records of water historically supplied from storage, evidence that storage capacity has or has not been decommissioned, and other evidence of use by the Project.
- (b) The resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999. To make a preliminary finding on the resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999, the Director may consider:
 - (A) Whether Other Existing Water Rights as of October 23, 1999 are junior to and upstream of the Hydroelectric Water Right;
 - (B) Whether new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right, based upon historic streamflow records, regulation actions historically taken by the watermaster, or other data;
 - (C) Whether the Hydroelectric Water Right is Subordinated to Other Existing Water Rights as of October 23, 1999; or
 - (D) Any other available evidence that may assist the Director to make a preliminary finding on Injury.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0030

RULE TITLE: Notice of Consideration for Conversion: Requirements and Comment Period

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the required content and notice process for a notice of consideration for conversion to an instream water right.

RULE TEXT:

(1) The Director shall prepare a notice of consideration for conversion with a 30 calendar day comment period. The notice shall include the following information:

(a) The eligibility determinations and preliminary findings of fact identified in OAR 690-054-0020;

(b) The county or counties in which the Project is located;

(c) The Project file number, permit, certificate, or decree volume and page;

(d) The name of the surface water source(s);

(e) The location of the point of diversion used for the Project; and

(f) A request for comments on the proposed conversion, including the date by which comments must be received.

(2) The Department shall provide a copy of the notice to the Holder and publish the notice in the Department's weekly notice publication with information about how interested persons may comment, obtain future notices about the proposed conversion, or obtain a copy of the final proposed order.

(3) If the Hydroelectric Water Right is not Subordinated to Other Existing Water Rights as of October 23, 1999, then the notice shall provide a 30 calendar day opportunity for any interested person to propose Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses.

(4) At the discretion of the Director, if the Hydroelectric Water Right was Subordinated to Other Existing Water Rights as of October 23, 1999, then the first public notice may be given at the time of the proposed final order describing the conversion to an Instream Water Right under OAR 690-054-0040 to 690-054-0050.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0040

RULE TITLE: Proposed Final Order: Final Determinations and Findings of Fact

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the proposed final order, including the process for making final determinations and findings of fact.

RULE TEXT:

Following the close of the comment period under OAR 690-054-0030, the Director shall prepare a proposed final order. The proposed final order shall recommend either to approve or to deny the conversion of the Hydroelectric Water Right to an Instream Water Right. The Director shall make the following determinations and findings of fact for inclusion in the proposed final order:

- (1) The Director shall determine whether the Hydroelectric Water Right is eligible for conversion to an Instream Water Right pursuant to the preliminary eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305;
- (2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right that is eligible for conversion to an Instream Water Right pursuant to the eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305;
- (3) If the full amount of the Hydroelectric Water Right is not proposed for conversion to an Instream Water Right, the Director shall include an explanation of how the amount proposed for conversion was determined;
- (4) The Director shall determine the priority date of the Instream Water Right, in accordance with the requirements of ORS 543A.305;
- (5) The Director shall determine the point of diversion of the Instream Water Right, in accordance with the requirements of ORS 543A.305;
- (6) The Director shall determine whether conversion of a Hydroelectric Water Right to an Instream Water Right will result in Injury. In making this determination, the Director shall consider:
 - (a) The Actual Use of the Project. To determine the Actual Use of the Project, the Director shall consider available documentation including, but not limited to: meter records of flow through a turbine, stream gage records, records of electricity production, seasonal restrictions on use, records of water historically supplied from storage, evidence that storage capacity has or has not been decommissioned, and other evidence of use by the Project;
 - (b) The resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999. To determine the resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999, the Director may consider:
 - (A) Whether Other Existing Water Rights as of October 23, 1999 are junior to and upstream of the Hydroelectric Water Right;
 - (B) Whether new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right, based upon historic streamflow records, regulation actions historically taken by the watermaster, or other data;
 - (C) Whether the Hydroelectric Water Right is Subordinated to Other Existing Water Rights as of October 23, 1999. If Subordinated, there is a rebuttable presumption that no Injury will occur and that no Mitigation Measures are required to ensure the Continuation of Authorized Water Uses; or
 - (D) Any other available evidence that may assist the Director to make a finding on Injury;
- (7) In order to avoid Injury and to ensure the Continuation of Authorized Water Uses the Director may include Mitigation Measures as a condition to the Instream Water Right. In determining whether to include Mitigation Measures the Director may consider:
 - (a) Whether Mitigation Measures were proposed during the comment period pursuant to OAR 690-054-0030, and if so, may:
 - (A) Share Mitigation Measures proposed by interested persons during the comment period of OAR 690-054-0030 with other interested persons who responded during the comment period;

- (B) Meet and confer with those interested persons who proposed Mitigation Measures during the comment period;
 - (C) Extend the comment period of OAR 690-054-0030, via notice in the Department's weekly notice publication, to allow discussion of Mitigation Measures, if interested persons demonstrate reasonable progress towards agreement on Mitigation Measures; or
 - (D) Obtain affidavits consenting to the relevant Mitigation Measure from each holder of an Other Existing Water Right as of October 23, 1999 that is potentially subject to new regulation under Chapter 690, Division 250; and
- (b) Whether the conversion of a Hydroelectric Water Right to an Instream Water Right would result in Injury pursuant to the findings in section (6);
- (8) If the Director determines Mitigation Measures are necessary to avoid Injury and to ensure the Continuation of Authorized Water Uses, the Director shall condition the Instream Water Right to state: "Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." If the Director chooses to include other Mitigation Measures as a condition to an Instream Water Right, the Director shall condition the Instream Water Right according to the Mitigation Measures agreed-upon pursuant to section (7);
- (9) No Mitigation Measures other than in section (8) above shall be included as conditions of the Instream Water Right without an affidavit consenting to the relevant Mitigation Measure from each holder of a water right that is potentially subject to new regulation under Chapter 690, Division 250; and
- (10) The Director shall determine whether the conversion, together with any recommended Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses, is consistent with ORS 543A.305 and shall either approve or deny the conversion. If the Director approves the conversion to an Instream Water Right, then the proposed final order shall include a draft certificate, including any proposed Mitigation Measures.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0050

RULE TITLE: Notice of Proposed Final Order

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the required content and notice process for notice of a proposed final order on a conversion.

RULE TEXT:

(1) The proposed final order shall be:

(a) Distributed to the Holder and to all individuals, including all governmental entities, who have filed timely comments with the Department; and

(b) Published in the Department's weekly notice publication.

(2) The proposed final order shall specify that all protestants have 60 calendar days from the date of the notice to file a protest.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0060

RULE TITLE: Filing of Protests

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the filing process and requirements for protests of the proposed final order and requests for standing and describes the actions required upon receipt of a protest.

RULE TEXT:

(1) All protests and comments must be received by the Director within the time specified in the notice of proposed final order. To become a party to a contested case hearing the fees required under ORS 536.050 must also be submitted by the date specified in the notice.

(2) Any person may submit a protest against a proposed final order. A protest shall be in writing and shall include:

(a) The name, address, and telephone number of the protestant;

(b) A description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented;

(c) A description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest;

(d) A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;

(e) Any citation of legal authority supporting the protest, if known; and

(f) Statements of facts which support the allegation that the proposed conversion instream should not be acted upon as proposed by the proposed final order.

(3) Any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order. The request for standing must be in writing, signed by the requester, and include the following:

(a) The requester's name, mailing address, and telephone number;

(b) If the requester is representing a group, association or other organization, the name, address, and telephone number of the represented group;

(c) A statement that the requester supports the proposed final order as issued;

(d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and

(e) The fee established under ORS 536.050.

(4) Any person who has filed a timely request for standing may later file a petition for party status in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 137-003-0535.

(5) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period.

(6) Upon receiving a protest, the Director shall:

(a) Send a copy of all protests and requests for standing timely filed to the protestant(s), if any, and to each person who requested standing;

(b) Evaluate the protest to determine whether significant issues are raised and if so, shall refer the proposed final order, with accompanying protest, to the Office of Administrative Hearings (OAH) established under ORS 183.605 to 183.685 for a contested case hearing consistent with OAR 690-054-0070. If the Director determines the protests do not raise significant issues, the Director shall issue a final order. A final order issued pursuant to this section is a final order in other than a contested case subject to judicial review under ORS 183.484. A final order shall be transmitted to all parties who have filed a protest.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0070

RULE TITLE: Time and Place of Hearings, Exceptions, Final Order

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the contested case process for protests of the proposed final order on a conversion and describes available actions after the contested case hearing or in the event a hearing is not held.

RULE TEXT:

- (1) The conduct of contested hearings shall be as provided in OAR 137-003-0501 to 137-003-0700.
- (2) If the proposed conversion is referred for a contested case hearing, a proposed order shall be issued by the Administrative Law Judge (ALJ) after the hearing. Any party to the contested case hearing may file exceptions to the ALJ's proposed order. Exceptions must be filed with the Department within 30 calendar days of the order. If no exceptions are filed to the ALJ's proposed order within 30 calendar days, the Director shall issue a final order consistent with section (4).
- (3) If exceptions are filed to the ALJ's proposed order, the Director may review or hear argument, either written or oral, and make the final determination for the final order.
- (4) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would not comply with ORS 543A.305 and OAR Chapter 690 Division 54, the Director shall:
 - (a) Issue a final order denying the conversion to an Instream Water Right; or
 - (b) Modify the proposed order to comply with ORS 543A.305 and OAR Chapter 690 Division 54, and issue a final order approving the conversion to an Instream Water Right.
- (5) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would comply with ORS 543A.305 and OAR Chapter 690, Division 54, the Director shall issue a final order approving the conversion to an Instream Water Right.
- (6) A final order may set forth any of the provisions or restrictions to be included in the Instream Water Right.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305

ADOPT: 690-054-0080

RULE TITLE: Issuance of Instream Water Right Certificate

NOTICE FILED DATE: 07/27/2021

RULE SUMMARY: This new rule describes the process and requirements related to issuance of an instream water right certificate after a conversion is approved.

RULE TEXT:

After the Director issues a final order approving the conversion of a Hydroelectric Water Right to an Instream Water Right, the Department shall issue a certificate for an Instream Water Right. Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights. The certificate shall be in the name of the Department as trustee for the people of the State of Oregon. A certificate for an Instream Water Right supplied by stored water shall describe the reservoir.

STATUTORY/OTHER AUTHORITY: ORS 536.027

STATUTES/OTHER IMPLEMENTED: ORS 543A.305