



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item K, August 11, 2006
Water Resources Commission Meeting

Request to Adopt Rules Related to Rulemaking, Protests and Contested Cases, and Public Records Requests (OAR Chapter 690, Divisions 1, 2, and 3)

I. Issue Statement

The Commission is asked to amend rules relating to rulemaking (OAR Chapter 690, Division 1) to update the rules to reflect the latest version of the Attorney General's Uniform Rules. The Commission is asked to amend the rules related to protests and contested case hearings (OAR Chapter 690, Division 2) to update the rules to be consistent with the Attorney General's Model Rules of Procedure. The Commission is asked to adopt rules related to public records requests (OAR 690, Division 3) to provide procedures related to requests for public records and the Department's processing of those requests. The final proposed rules are located in Attachments 1 through 3.

II. Background

The Administrative Procedures Act (APA) requires non-exempt agencies, including the Water Resources Department, to adopt rules of procedure for use in rulemaking and in contested cases. These agencies must follow the Attorney General's Uniform and Model Rules when conducting rulemakings. The Department's amendments to Division 1 adopt the latest version of the Uniform and Model Rules and insert additional rulemaking procedures required by law.

The Attorney General has also adopted Model Rules of Procedure. All contested case hearings conducted by an administrative law judge from the Office of Administrative Hearings for the Department must be conducted pursuant to the Model Rules of Procedure. The Department may not generally have rules that are not expressly authorized by the Model Rules. Although use of the Model Rules in the Department's contested case hearings is mandatory, the Department may adopt supplemental procedural rules for contested case hearings as required by state law or as allowed by the Model Rules. The Department is allowed to have rules specifying the time for requesting a contested case hearing, the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing, and timelines for issuance of a proposed or final order. The proposed revisions to the Division 2

rules delete rules that are not authorized by the Model Rules and clarify the rules that are authorized under the Model Rules.

Finally, the Department is proposing new rules in Division 3 to guide public records requests. Under ORS 192.420, every person has a right to inspect any nonexempt public record of a public body in Oregon. This includes any nonexempt public records of the Department. The proposed rules in Division 3 establish procedures that people must follow when requesting public records from the Department and that the Department must follow when providing public records in response to a public records request.

In an effort to update its rules to reflect the requirements of the APA and to provide clear procedures for public records requests, the Department, in cooperation with a rules advisory committee, developed hearing drafts of these three rule divisions for public input. Members of the rules advisory committee are identified in Attachment 4. Notice of the public rulemaking was published in the *Oregon Bulletin* and hearing drafts of the proposed rules were made available on May 1, 2006. In addition to the opportunity to provide written comment, the Department held a public rulemaking hearing in Salem on May 25, 2006. No testimony was provided at the public rulemaking hearing.

Written public comments on the hearing drafts of the proposed rules were provided by WaterWatch of Oregon. A copy of the written comments is provided in Attachment 5.

III. Discussion

Hearing Draft Summaries

In addition to revisions for clarity, the hearing draft of the Division 1 rules proposed the following changes to the rules related to the rulemaking process:

- 1) *Updates the reference to the most recent edition of the Attorney General's Uniform and Model Rules* – The hearing draft of the proposed rules updates the rules to adopt the January 1, 2006 edition of the Attorney General's Uniform and Model Rules of Procedure, rather than the out-dated September 15, 1997 version.
- 2) *Reflects the Department's ability to provide notice and rules by electronic mail* – The current rulemaking process rules refer to mailing copies of notices and copies of rules. The proposed rules create the option for the Department to provide notice of proposed rules by electronic mail, as allowed by HB 2204 (2005).
- 3) *Includes notice requirement in ORS 183.335(15)* – The proposed rules add the requirement from ORS 183.335(15) in the APA that the Department provide notice to particular members of the legislature, depending on the basis for the rulemaking.
- 4) *Deletes reference to the Strategic Water Management Group* – The proposed rules delete the requirement that the Department provide notice to the Strategic Water Management Group. The statutory authority for that group was repealed in 1995.

In addition to revisions for clarity, the hearing draft of the Division 2 rules proposed the following changes to the rules related to the protest and contested case hearing process:

- 1) *Repeals all provisions not authorized* – As discussed above, the Model Rules of Procedure provide that an agency may have rules specifying the time for requesting a contested case hearing, the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing, and timelines for issuance of a proposed or final order. An agency may also have rules as specifically allowed by other provisions of the Model Rules and as provided by statute. In response to these restrictions, the proposed rules repeal all of the provisions in Division 2 for which the Department no longer has authority.
- 2) *Expands provisions to encompass all protests and contested case hearings* – The proposed rules include several revisions to address protests and contested case hearings for all applicable Department programs, including the hydroelectric program.
- 3) *Simplifies provisions related to exceptions to proposed orders* – Based on advice from the Department of Justice, the proposed rules provide that the Director will consider any exceptions filed and issue a final order, unless the applicable law provides otherwise. Rather than attempting to include comprehensive lists of all final orders to be issued by the Director and by the Commission, the proposed rules refer to the applicable law to determine who will issue the order. This approach also avoids the necessity of amending Division 2 if the substantive law changes.
- 4) *Includes provision for Commission to hear exceptions to some final orders* – The proposed rules provide that for contested case hearings held on protests to ground water and surface water applications, parties may file exceptions to the final order. The rules clarify that the Commission will consider these exceptions and either issue a modified final order or deny the exceptions and affirm the final order.

The hearing draft of the Division 3 rules proposed to create rules related to the process for public records requests:

- 1) *Describes the process for requesting public records* – The proposed rules establish a process for the public to follow in requesting public records. The proposed rules indicate that the Department may require that the request be submitted in writing. With some exceptions, the proposed rules require that requests be submitted to the headquarters office.
- 2) *Describes the Department's response to a public records request* – The proposed rules clarify the Department's existing process for responding to public records requests. The Department will charge fees as established in ORS 536.050 or as reasonably calculated to reimburse the Department for the actual costs of providing copies of the public records. If the charge for a public records request will exceed \$25, the Department must notify the requestor before completing its response to the request, as required by HB 2545 (2005).

Issues Identified in Written Comments:

Comment – Definition of “Protest”: WaterWatch of Oregon commented that it opposes the proposed amendment to the definition of “protest” in OAR 690-002-0010. WaterWatch objects to the sentence: “‘Protest’ means a statement expressing disagreement with an action or proposed action by the Department that, *under applicable law*, may entitle the person filing the protest to become a party to a contested case hearing. Where provided or required by applicable law, a ‘protest’ may include a request for contested case hearing.” (Emphasis added.) WaterWatch argues that the phrase “under applicable law” creates a ban on the public’s ability to file a protest unless a statute specifically authorizes protests.

Response: While WaterWatch and Department disagree whether a protest may be filed when statutes and rules are silent as to protests, both agree that this definition should not be construed to address this issue. The definition of “protest” was drafted to be neutral, adaptive, and referential to other applicable law. The definition is not intended to add or remove any legal rights. By phrasing the definition in these broad terms, the definition will also accommodate any future changes to applicable law.

Although WaterWatch suggests that the definition limits who may file a protest, the definition is silent on that issue. The definition merely provides that filing a protest may (or may not) entitle a protestant to become a party to a contested case hearing, based on applicable law. The definition includes a reference to possible participation in a contested case hearing to distinguish a protest from a comment. The phrase “under applicable law” is necessary to clarify that the processes available to the person or entity filing the protest are dependant on the applicable law and are not created by the definition of “protest.” Staff do not propose changing the rule in response to this comment.

Comment – Location for Filing Public Records Request: WaterWatch expressed concern that the proposed provisions in OAR 690-003-0140(4) would require most public records requests to be filed with the Department’s headquarters office, rather than with individual field offices. WaterWatch was concerned about a transparent process and that this provision would prevent timely access to the field office materials or thwart public access to materials.

Response: Under law, a person has a right to inspect any nonexempt public record of a public body in Oregon. Accordingly, the Department must provide public records in accordance with law, whether the records are held in a field office or in the Salem office. The Department anticipates that promulgation of these rules will speed, rather than slow, responses to public records requests by establishing a deadline. Further, the process will be more transparent for the public because the rules will describe how to request public records from the Department and how the Department will process those requests. Staff do not propose changing the rule in response to this comment.

Other Modifications to the Hearing Draft

In addition to the changes in response to written comments described above, staff also propose to add OAR 690-001-0000(6) to hearing draft to explicitly state that a person may choose whether to receive an electronic or paper copy of rulemaking notices. The final proposed rules clarify that the Department will send notices electronically unless a person requests to receive notices by mail.

The Division 2 final proposed rules also change the requirements for timely filing for all documents, except requests for hearing, to the date the document was postmarked, rather than the date received. Under the proposed rules, a request for hearing is still only timely filed if the Department receives it by the deadline. Staff made this change to the hearing draft based on advice for the Department of Justice.

Finally, staff made several minor changes in the final proposed rules for Division 3, based on advice from the Department of Justice. The changes clarify the purpose of the rules, rephrase the requirement to file requests with the headquarters office, and simplify the provisions related to requests for fee waivers.

IV. Summary

The final proposed rules in Attachments 1 through 3 (OAR Chapter 690, Divisions 1, 2, and 3) create rules guiding public records requests and update the rulemaking and contest case hearing rules to reflect the current APA and Uniform and Model Rule provisions. Based on internal review and consideration of public comments received, staff propose modifications to the hearing drafts of the rules issued May 1, 2006. These modifications are reflected in the final proposed rules.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachments 1 through 3.
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

VI. Recommendation

The Director recommends that the Commission adopt the final proposed rules in Attachments 1 through 3.

Attachments:

1. Final Proposed Rules – OAR Chapter 690, Division 1 - Rulemaking; Attorney General's Uniform and Model Rules
2. Final Proposed Rules – OAR Chapter 690, Division 2 - Protests and Contested Cases

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3. Final Proposed Rules – OAR Chapter 690, Division 3 - Public Records Access and
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4. Rules Advisory Committee
5. Written Public Comment

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