

DIVISION 53

**HYDROELECTRIC LICENSE, POWER CLAIM AND CERTIFICATE
AMENDMENTS**

OAR 690-053-0001 provides: Purpose (1) The purpose of this division is to establish procedures to be used by the Water Resources Department in evaluating applications for amendments to hydroelectric licenses, power claims or certificates. These rules do not apply to new project proposals. These rules describe the type of amendments that may be considered; the process that must be followed to approve amendments; and what steps must be taken to avoid injury to other water users, prevent undesirable impacts to natural resources, and to appeal Department decisions.

(2) These rules do not apply to:

- (a) A change in point of diversion.
- (b) A change in point of appropriation.
- (c) New uses unrelated to the hydroelectric generation use.
- (d) The construction of a new dam in a location where there is no existing dam or diversion.
- (e) Any repair, modification, or reconstruction of an existing dam that would result in a significant change in the surface area or elevation of an existing impoundment.
- (f) Any modification to an existing hydroelectric project (including the replacement of existing turbines) which would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more or would result in an increase in the project's nameplate capacity of 2 megawatts or more as defined in regulations of the Federal Energy Regulatory Commission (FERC), 18 CFR 11.1(i).

(3) Meeting the terms and conditions of a hydroelectric license, water right permit or certificate is considered a beneficial use of water.

690-053-0005 Definitions

The following definitions apply to the rules in this division:

- (1) "Commission" means the Water Resources Commission.
- (2) "Department" means the Water Resources Department.
- (3) "Director" means the director of the Water Resources Department.
- (4) "Augmentation of a hydroelectric water right" means diverting more water beyond the volume provided in the applicable hydroelectric water right over a calendar year.

Augmentation does not include rescheduling or redistributing water use within a calendar year or installing more efficient generation equipment that allows the use of the same amount of water to produce more power.

(5) "Final Unified State Position" means the formal state comments described in ORS Chapter 543A.115 that are forwarded to the Federal Energy Regulatory Commission (FERC) by the Hydroelectric Application Review Team (HART) in response to an applicant's final license application with FERC.

(6) "Applicable hydroelectric water right" means a license issued under ORS Chapter 543, a power claim or certificate issued under Chapters 537 or 543A for the generation of hydroelectric power, a decreed right issued according to Chapter 539 or pre-1909 uncertificated claim.

(7) "Injury to an existing water right" means a situation where the holder of a valid water right is prevented from receiving the water to which he/she is legally entitled.

(8) "Redistribution" means varying the amount of water over the seasons of a calendar year but not exceeding the total amount allowed for the year. The total yearly amount is computed by multiplying the daily rate by 365 days.

690-053-0015 Notice Requirements

(1) The Department shall give notice of amendment applications received by publication in the Department's weekly notice "Public Notice of Water Use Requests." Any person interested in an amendment application shall submit written comments to the Department within 30 days of the weekly notice or the last day of the newspaper notice in 690-053-0015(2), whichever is later.

(2) After notice is published by the Department, the applicant shall arrange for publication of a notice provided by the Department in an appropriate newspaper having general circulation in the area in which the hydroelectric facility is located for a period of at least three weeks and not less than one publication each week. The applicant shall provide the Department with a certificate of publication.

(3) The notice must include the following information about the application:

- (a) The application and project file number.
- (b) The county of use.
- (c) The type of amendment proposed.
- (d) The applicants name and address.
- (e) The date by which comments on the amendment application must be received by the Department.
- (f) A statement that upon issuance of a draft proposed final order any person may file with the Department a protest against the approval of the application on the grounds of injury to an existing water right and impacts to fish and wildlife values or water quality.

(4) The Department shall mail notice of all amendment applications to the planning departments of affected local governments, Indian tribes with lands inside the project

boundary or with hunting and fishing rights within the project boundary, state natural resource agencies and the Hydroelectric Application Review Team if one was formed, and any federal agencies with jurisdiction over the project. Agency comments must be received within 30 days after the last date of publication shown on the notice to file comments.

690-053-0020 Amendment Criteria

Under ORS 543.092, upon the request of the hydroelectric water right, and the approval of the Department, a hydroelectric water right or certificate may be amended, provided that the amendment:

- (1) Is consistent with the final unified state position for the project, if one exists;
- (2) Is consistent with the requirements of ORS Chapter 543A;
- (3) Causes no injury to other water rights that cannot be adequately mitigated as determined by the Water Resources Department; and
- (4) Allows for public participation in the amendment process.

690-053-0025 Types of amendments that will be considered under these rules

All amendments allowed in this section must be consistent with the standards in 690-053-0020.

- (1) Hydroelectric water right holders as defined in ORS 543.075(2) may submit amendment applications that allow augmentations or redistribution of the volume of water allowed for diversion in the applicable hydroelectric water right only if the proposed amendments meet management goals of state wildlife or environmental quality agencies and are shown to restore, enhance or improve fish populations and/or water quality within the river systems. This includes:
 - (a) The rescheduling or redistributing of the total amount of water used over the year so that more water may be diverted during certain times of the year in exchange for reductions of water use during other times.
 - (b) Augmenting or increasing the total yearly amount of water provided that:
 - (A) The proposed augmentation does not require the construction of new facilities or change in the point of diversion or use.
 - (B) The proposed augmentation meets the resource protection standards in ORS Chapter 543A.025; and
 - (C) The proposed augmentation has water available from the proposed source during the times and in the amounts requested.
 - (D) Pursuant to ORS 543A.145(3), any augmentation will receive as a priority date the date of filing the amendment application.
- (2) Hydroelectric water right holders may submit application amendments for the following:

- (a) Adding fish protection and/or water quality as a beneficial use.
- (b) Changing one or more items in the "water right conditions" section of the applicable hydroelectric water right provided that, after the application has been submitted, the affected state agencies have been consulted by the project owner and agree in writing that the amendment is needed.
- (c) Hydroelectric water right holders may submit application amendments altering the date of expiration in the applicable hydroelectric water right to match the period granted by FERC.
- (d) Clarifying language or correcting administrative errors.

(3) Other proposed amendments not identified in these rules may be considered by the Department provided that the proposed amendment meets the criteria in 690-053-0020.

690-053-0030 Public Hearing

(1) Based on review of the application, public comments received, the size of the project and other pertinent information, the Director will determine whether a public meeting and a request for additional studies or consultation will be required.

(2) The public meeting may be omitted under one or more of the following circumstances:

- (a) The project generates less than 100 theoretical horsepower of electricity;
- (b) The proposed amendment does not involve a change in the annual amount of water used; or
- (c) The proposed amendment is one agreed upon by the Department and the affected resource agencies; or
- (d) No public comments were received raising substantial issues.

(3) If the Director determines a public meeting is required, notice will be mailed two weeks prior to the meeting to the applicant and to any person or agency submitting comments within the prescribed comment period or who participated in any earlier proceedings in the amendment process.

690-053-0035 Issuance of Amendment Order

After the close of the public comment periods, or the public hearing if one is held, and upon a finding that the proposed amendment meets standards in OAR 690-053-0020, the Department shall issue a proposed order within 120 days.

(1) In developing the proposed order, the Department shall consider all comments received under OAR-690-053-0015 and 0030, but the proposed order need not separately address each comment received.

(2) The proposed order shall include findings of fact and conclusions of law that show the standards in OAR 690-053-0020 and 0025 are met.

(3) The Department shall mail copies of the proposed order to the applicant and to persons who have requested copies. Within 15 days after issuing the proposed order, the

Department shall publish notice of the order in the weekly notice published by the Department.

690-053-0040 Protests

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

- (a) The name, address and telephone number of the protestant.
- (b) A description of the protestant's interest in the amendment and, if the protestant claims to represent the public interest, a precise statement of the public interest represented.
- (c) A detailed description of how the action proposed in the amendment will be detrimental to the protestant's interest.
- (d) A detailed description of how the amendment 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.
- (f) For persons other than the applicant, the protest fee required under ORS 536.050.

(2) Each person submitting a protest shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period. Failure to raise a reasonably ascertainable issue in a protest or in a hearing or failure to provide sufficient specificity to afford the Department an opportunity to respond to the issue precludes judicial review based on that issue.

(3) Protests shall be submitted within 45 days after publication of the notice of the amendment in the weekly notice published by the Department.

(4) Within 10 days after the close of the filing period established under Section 3 of this rule, the Department shall send a copy of all protests to the applicant, and the

690-053-0045 Contested Case Hearings

(1) Within 30 days after the close of the period for receiving protests, the Director shall determine whether to issue a final order or schedule a contested case hearing.

(2) The determination of whether to conduct a contested case hearing will be made according to the provisions of OAR 690-310-0170.

(3) The contested case hearing will be conducted according to OAR Chapter 137, Division 3.

690-053-0050 Final Order

(1) If after the contested case hearing or, if a hearing is not held, after the close of the period allowed to file a protest, the Director determines that the proposed amendment is consistent with the amendment criteria set forth in OAR 690-053-0020, the Director shall issue a final order approving the amendment. The approval shall be on such terms and

conditions as are necessary to ensure compliance with the amendment criteria in OAR 690-053-0020.

(2) If the Director finds the proposed amendment does not comply with the amendment criteria set forth in OAR 690-053-0020, the Director shall issue a final order rejecting the application.