

**DIVISION 95 – COLUMBIA RIVER BASIN WATER DEVELOPMENT LOAN PROGRAM  
HEARING DRAFT (Department’s Response to Comments Received)**

**Format:**

Entity/Person/Association submitting the public comment.

- Summary of or “duplication” of public comment presented by entity/person/association.

*Italic:* Department response to public comment.

690-095-0005 Purpose, Statutory Authority

Oregon Water Resources Congress:

- 690-095-0005 The preference given to “entities with as valorem taxing authority” runs counter to the inclusion of irrigation district sponsored projects being successful in this program as the district sponsored projects would not qualify as preference projects under the proposed rules as irrigation districts are not generally “ad valorem taxing” districts.

East Valley Water District:

- 690-095-0005 (2) EVWD strongly urges the commission to revisit and remove this policy statement, altogether. ....Under this method, a district would not be considered an “entity with ad valorem taxing authority.” Maintaining the pre-BM5 policy preference in these rules would particularly disadvantage the EVWD, and likely most other water supply districts in Oregon, which generally utilize the Alternative Method of Collecting Incurred Charges.

*Department Response:*

HB 33690 provides discretion to the commission to make ad valorem taxing authority a preference. In deference to these comments, the department removed this provision from this section, but does recommend that ad valorem taxing authority is one of a number of ways to provide loan security in 690-095-0060.

WaterWatch

- 690-095-0005 should include: “...enhancing watershed health or fish habitat”.

*Department Response:*

The Department recognizes the definition of “Water Development Project” as defined in ORS 541.700 which includes “...enhancing watershed health or improving fish habitat...”. The hearing draft 690-095-0005(1) is an excerpt from Article XI-I(1) of the Oregon Constitution. No changes made to the hearing draft as a result of this comment.

WaterWatch:

- The remaining two rulemaking exercises will 1) create fiscal and administrative rules to administer the new Water Investment Grant Fund and 2) create rules for the assessment of net environmental public benefits which includes protection of peak and ecological flows... [W]hile we understand that the WRD is going to conduct another rulemaking to address “how” the WRD will conduct the assessment of net environmental public benefits, as a procedural matter the rules governing the administration of the fund need to clearly lay out the requirement that there be an assessment and that the applicant is required to provide a number of documents/studies up front to help in that assessment.

*Department Response:*

In accordance with HB 3369, on and after January 2, 2012, the Water Resources Department must require a Division 95 project, “to protect peak and ecological flows to the extent determined by the State Department of Fish and Wildlife to be necessary.” Efforts are underway to provide technical information about peak and ecological flows that is intended to assist policy makers in crafting rules that guide the Department’s assessment of net environmental public benefits (which include peak and ecological flows) under the Columbia River Basin Loan Program. The goal is for this information to sufficiently inform the commission to adopt rules by January 2, 2012. Until those rules are adopted, the Department will evaluate these elements in consultation with the Oregon Departments of Fish and Wildlife, State Parks and Recreation, Environmental Quality, and Agriculture in order to weigh a project’s various environmental impacts on, and enhancements to, the forms of environmental benefit described in HB 3369 as part of its review of applications. The rules have been revised and it is now clearer that the assessment is required under 690-095-0030 and 690-095-0045, and the application must provide the required documentation under 690-095-0040.

WaterWatch:

- 690-095-0005 (2) Policy: We suggest that this “policy” statement be struck.

*Department Response:*

The Department agrees with this comment. Section 2 of 690-095-0005 is has been removed. Item (a) relating to the high probability of repayment is moved into a general statement in section (1); item (b) regarding ad valorem taxing authority is addressed above and is removed from this section; item (c) relating to funding water development projects is removed as it is redundant.

WaterWatch:

- 690-095-005 (3). The statutory cite for loan applications should be revised to include “and pursuant to ORS 541.600-700.”

*Department Response:*

The Department agrees with this comment. This requirement was moved to the Application section at 690-095-0040.

**690-095-0010 Definitions**

WaterWatch

- OAR 690-095-0010 (3): The definition of “Application” should be redrafted to make clear that an application must conform to the content and form set by statute, rule and WRD.

*Department Response:*

The Department agrees with the suggestion that the definition needs to be clarified so that the application contains all required information. The definition of “Application” is changed to “includes all documents and forms required by the department pursuant to ORS 541.600 to 541.855.”

WaterWatch

- OAR 690-095-0010 (18): Amend definition of “Person” to reflect ORS 183.310(8). “Person” means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency.

*Department Response:*

The Department appreciates this public comment. Additional input from legal counsel clarified that the definition of this term is no longer necessary and will therefore be deleted from the final rules.

WaterWatch:

- OAR 690-095-0010: (New Definition) Construction: Suggestion that a broad definition of the word construction would make clear that the statutory allowed projects under ORS 541.700(6) include the “methods” to restore streamflows under subsection (e).

*Department Response:*

The Department believes that “construction” is included in the definition of a “Water development project” under ORS 541.700 and that it clearly allows for loan proceeds to be used for the “methods” to restore streamflows. Comments on this matter are noted. No changes were made to the hearing draft as a result of this public comment. An excerpt from the definitions of a “Water development project” is noted here for reference:

An undertaking, in whole or in part, in this state for the purpose of enhancing watershed health or improving fish habitat, including methods and materials to restore...

WaterWatch:

- OAR 690-095-0010: (New Definition) Complete application: This rule should clearly lay out that the definition ‘complete application’, including a clear statement that all requirements of HB 3369 § 20 must be met for an application to be complete.

*Department Response:*

The department agrees with the intent of this comment. Section 690-095-0040 Application has been modified to clearly state that the application must be filed pursuant to ORS 541.600 to 541.855 and contain all components required by and any additional information prescribed by the commission and required by the department.

#### **690-095-0015 Eligibility: Applicant and Project**

WaterWatch:

- OAR 690-095-0015: This section should add an eligibility provision that requires submission of a complete application, that contains, at a minimum, all the requirements of HB 3369 §20 must be met for an application to be complete.

*Department Response:*

This section speaks to the eligibility requirements that must be met prior to an application being submitted for consideration. 690-095-004 relates to the application and clearly states that the application must have full and complete information or the department will reject it or require additional information. Comments on this matter are noted. No changes were made to the hearing draft as a result of this public comment.

#### **690-095-0020 Eligible Costs**

Umatilla Basin Water Commission:

- OAR 690-095-0020(7): Revise this rule to include: “Cost incurred up to and including water right certificate.”

*Department Response:*

The Department accepts this recommendation given the potentially complex nature of the water development projects under the Columbia River Basin Water Development Loan Program. Changes were made to OAR 690-095-0020 to read as follows:

The Department shall determine the eligible costs during the pre-application conference or the loan review process. Subject to these rules, a loan may be approved to pay the “startup costs” relating to a water development project. “Startup costs” must be allowable as capital costs or reimbursable costs that may be financed with federally tax-exempt bonds under the Internal Revenue Code and may include, but are not limited to:

(7) Costs for preparation of claim of beneficial use, and costs incurred up to and including obtaining applicable water right certificates and limited licenses.

### **690-095-0030 Authority of Director**

WaterWatch:

- 690-095-0030 (1): ...the rules should be reworked to clearly tie WRC approval of projects over three million dollars to the provisions required HB 3369, ORS 541.700 and these rules.

*Department Response:*

The Department's intent was to recommend the authority of the Director to approve, deny or amend loans under three million dollars and to make recommendations to the commission on loans over three million dollars under these rules. The draft was not clear on this point. As a result of this comment, changes were made to OAR 690-095-0030 to read as follows:

(1) Loans over three million dollars that meet statutory requirements of ORS 541.600 – 855 and these rules must be approved by the commission.

WaterWatch:

- 690-095-0030 (2): The rules need to be tied to the standards set forth by HB 3369, ORS 541.700, and these rules. A reference to this should be noted here.

*Department Response:*

The Department appreciates the public comment received on this hearing draft and intends to tie the approval of all loans under the Columbia River Basin Loan Program to the standards set forth in ORS 541.600 – 855 and these rules. As a result of this comment, changes were made to OAR 690-095-0030 to read as follows:

(2) The director is authorized by the commission to approve loans under three million dollars that meet the statutory requirements of ORS 541.600 – 855; approve, deny, amend, or set conditions of loans; interest rates; execute bond and loan documents; and sign all loan documents.

WaterWatch:

- 690-095-0030 (3)(b): [This section] demands of the WRD tasks that should be discretionary, not mandatory as proposed.

*Department Response:*

The Department agrees with the public comment received on this hearing draft and has deleted it.

WaterWatch:

- 690-095-0030 (3)(c): This section says that the WRD shall notify and/or consult with any other state agencies, Indian tribes, or other parties as deemed appropriate, as part of the department's evaluation and processing of the application. This falls far short of the statutory requirements for loan approval. The construction of [HB 3369 §21(5)] requires consultation with ODFW, Parks, DEQ and affected tribal governments. Consultation with "other interested parties", on the other hand, is optional and applies "when appropriate". The WRD has erred in asserting that consultation with agencies and tribes is optional. Moreover, this requirement applies to all loans, not just those under three million dollars. This requirement needs to be called out in the notice and review section – OAR 690-095-0045.

*Department Response:*

The Department agrees in part with the public comment received on this rule and intends to exercise the Director's authority, delegated by the commission in accordance to the provisions of HB 3369, ORS 541.600 – 855, as related to the Columbia River Basin Loan Program. Rather than calling out the consultation with other agencies under 690-095-0045 Notice and Review Period, the Department has chosen to place it here so that it is clear that the Director is authorized to determine who "other interested parties" may be and "when a project may

affect agricultural use”. The 690-095-0030 (3) now states that the director shall assess each project in consultation with named entities.

### **690-095-0035 Loan Advisory Board**

Oregon Water Resources Congress:

- 690-095-0035 The loan advisory board section of the rules lists no qualifications or requirements for the individuals appointed to the board. In order for Water Development Loan Fund to be successful, we feel that qualified, experienced advisers who have knowledge of finance, loan funding, water development projects and other key experiences should be prioritize as advisory board members. Further, the appointees should have no involvement in the projects for which applications have been submitted or be under contract with the Water Resources Department for services related to this loan program. Particularly in the light of past experiences with Water Development loan Fund a couple of decades ago, this is a critical piece we would like to see emphasized.

#### *Department Response:*

The Department appreciates this public comment and has made changes to state qualifications of members and limit the scope of loan review. As a result of this comment and those below, changes were made to OAR 690-095-0035 to read as follows:

(1) The director may appoint a loan advisory board to review applications made under the loan program and pursuant to these rules make recommendations thereon to the director. The scope of application review shall be limited to the adequacy of security, the potential for repayment, and economic feasibility of the project. Members shall be knowledgeable and experienced in the field of banking, finance, economics, or related field. The members appointed to the board shall be subject to the approval of the commission.

(2) After its review, the loan advisory board shall advise the director in writing and recommend the amount in which any loan should be made. The director may accept, modify or reject the recommendation of the loan advisory board.

Davis Wright Tremaine LLP – John DiLorenzo, Jr:

- 690-095-0035 Proposed Rule 690-095-0035 provides for a Loan Advisory Board which the Director may appoint. The hose Bill 3369 does not require such an advisory board, but it our understanding that the Department would like the flexibility to do so in other to conform this program to others which it administers. The language suggests that the Loan Advisory Board might advise the Director in writing whether the loan application project complies with the rules in general. We suggest the task assigned to the Loan Advisory Board, if one is appointed, should be limited to advice concerning the adequacy of security, the potential for repayment, and economic feasibility of the project without regard to considerations which to do not bear on the State’s financial security.

#### *Department Response:*

The Department appreciates this public comment and is committed to operating the Columbia River Basin Water Development Loan Program not only consistent statutes and rules that guide the program, but in a manner that is in line with the terms and conditions set forth in the funding Bond Indentures. If a Loan Advisory Board is appointed, the Department will include the loan advisory board in its application review process specifically relating to the financial aspects of the applications received under the program. Changes were made to the hearing draft as a result of this comment as noted above.

WaterWatch:

- 690-095-0035 (1) A loan advisory board is not contemplated for HB 3369 amendments. That said, there does not exist a provision for a loan advisory board under the Division 90 rules. However, the provisions of Division 90 differ significantly from those proposed here. Importantly, the Division 90 rules set forth

the make up of the board and require “[t]he board shall be composed of individual with expertise in and representing interests of one or more of the following: instream flow and watershed enhancement, finance or banking, project development, agriculture, and local government operations.” OAR 690-90-0192. Moreover, importantly, the Division 90 rules set forth a number of procedures for public notice of these meetings. OAR 690-90-019(8)-(11). And finally, the Division 90 rules that provide the board will hear all comments on any matter before them, OAR 690-90-019(11). If there is going to be a loan advisory board, it should, at a minimum conform with the standards in the Division 90 rules.

*Department Response:*

The Department anticipates using the loan advisory board in obtaining qualified financial or fiscal recommendations on loan applications received under the Columbia River Basin Water Development Loan Program. The Department will appoint individuals with qualified experience in a financial field as the main function of the board is to assist the Director and the Commission in evaluating the financial soundness of loan applicants and financial viability of the associated loan. The Department has made changes to this rule, as noted above, which address these concerns.

WaterWatch:

- 690-095-0035 (2) This section, which gives the loan advisory board the power to “recommend guidelines for receipt of comments”, should be struck as a whole. The committee, especially since it is of undermined make-up, should not be allowed to dictate who and how the public comment can be prepared.

*Department Response:*

The Department agrees with this comment and Section 2 of 690-095-0035 has been deleted.

East Valley Water District

- 690-095-0035 Qualifications for members of the loan advisory board should be specified. The board should include members with experience in the public finance sector. Some considerations might include expertise in public finance and best management practices, government accounting, auditing and financial reporting, debt issuance, management and post issuance compliance. The loan advisory board should include members with specific expertise in water development projects, including storage, conservation and reuse projects. The loan advisory board should consist of members who geographically represent the whole state.

*Department Response:*

The comment on this matter is noted. See also other responses to comments on 690-095-0035 of the hearing draft rules above. Additional clarification has been provided for qualifications of board members that match with the scope of the application review.

**690-095-0040 Application**

WaterWatch:

- 690-095-0040(2) This section needs to set forth all the application requirements set forth by the statute, namely §20 of HB 3369 and any other applicable sections of ORS 541.600/700. Section 20 requires (underlined language straight from the statute);

*Department Response:*

The Department intends to fully use the statute as the foundation of operations for the Columbia River Basin Water Development Loan Program. Rather than restating the statute in these rules, the Department will develop application forms for the Columbia River Basin Water Development Loan Program which will direct applicants to provide information that meets all of the requirements stated in HB 3369 §20 and any other applicable sections of ORS 641.600 – 541.855. Changes made to 690-095-0040 due to this and other comments address this concern.

WaterWatch:

- 690-095-0040(3) This section needs to include a statutory cite to ORS.600/700.

*Department Response:*

The comment on this matter is noted. See response to 690-095-0040(2) above. 690-095-0040 was reordered and modified to address this concern.

**690-095-0045 Notice and Review Period**

WaterWatch:

- 690-095-0045(1) Currently this section opens with the following words “Upon receipt of an application that the director determines is complete.....” As noted above, there is currently no guidance as to how this determination is made in the draft rules. ... The statute is very clear what is required in an application. The rules need to be clear. In addition to the completeness review suggested above, we propose that this opening language be amended to state: “Upon receipt of a completed application which meet all the requirements of §20 of this 2009 Act and any additional information required by these rules and the WRD....”

*Department Proposal:*

Based on this comment the hearing draft was revised to note that “completeness” occurs when the application is filed in accordance with these rules. Furthermore, 690-095-0040 was modified to specifically address the requirements of the application as noted above.

WaterWatch:

- 690-095-0045(1) [W]e suggest that this section follow the Division 90 rules detail on the notice [and require that the summary include specific items].

*Department Proposal:*

The hearing draft rules have been revised to include: The notice shall contain a summary of the application including the names of the applicant, the location, purpose of the loan, and other relevant information. This is not an exact duplication of the Division 90 rules, but provides guidance as to the content of the summary.

WaterWatch:

- 690-095-0045 There are a number of statutory requirements that are missing from the proposed rule language: First, importantly, the agency review section of the rule needs to clearly state the consultation requirements of the governing statute [that require consultation with named state agencies and tribes, and other parties as appropriate.]

*Department Proposal:*

The statutory requirements relating to the consultation requirements are now included in 690-095-0030 and satisfy this comment that the rule needs to clearly state the consultation requirements.

WaterWatch:

- 690-095-0045 Currently the rules do not include this consultation as part of the process. The rules need not only to lay forth these consultation requirements, but also should clarify where in the timeline this will take place.

*Department Proposal:*

The hearing draft rules have been revised to state that the review shall begin no later than 60 days after receipt of a completed application, and that the review shall comply with ORS 541.616 which lays out the consultation requirements. Please note that the wording of the statute allows for an overlap of the public comment period and the application review; the handling of that overlap in the draft rules was awkward and has been modified for clarity.

WaterWatch:

- 690-095-0045 The rules need to state that the WRD will review/assess all the information submitted per §20 of HB 3369, these rules and any other request by the agency.

*Department Proposal:*

The hearing draft rules have been revised to state that the review shall comply with ORS 541.616, which evaluates applications that include §20 of HB 3369, these rules and any other requirements of the department.

WaterWatch:

- 690-095-0045: [W]hile we understand that there is going to be an entire rulemaking to address the requirement of §21 of HB 3369 [regarding] assessing the net environmental benefit of the project...; the rules should be clear that the WRD must do this review (it is only the “how” that is the subject of the upcoming rulemaking).

*Department Proposal:*

The hearing draft rules have been revised to state that the review shall comply with ORS 541.720, which includes §25 of HB 3369, these rules and any other requirements of the department.

### **690-095-0050 Criteria for Granting a Loan**

Davis Wright Tremaine LLP – John DiLorenzo, Jr:

- 690-095-0050: Provides for criteria for granting of a loan. Subsection (1)(b) of the rule provides for the Director determining whether the applicant meets certain standards which may include a number of specified standards... We therefore recommend that specific standards relating to the probability of repayment be actually included within the proposed rule.

*Department Proposal:*

The Department has revised the language to enumerate specific standards which must be met by the applicant prior to loan approval.

WaterWatch:

- 690-095-0050 (1) The statute requires the WRD make a finding of sufficiency. See § 25(1) HB 3369. The rule language, on the other hand, shifts the burden to the applicant to “prove” it will comply. The draft rules are not consistent with statutory direction. Moreover, the draft language noted above fails to include the statutory mandate that the loans must comply with section 26 of HB 3369, Water Resources Commission Rules and bondholder agreements. Id. At (1)(a).

*Department Proposal:*

The Department has revised the language to “the applicant demonstrates and the department finds” and further modified the citations and references to encompass the statute “and any applicable federal and state requirement.”

WaterWatch:

- 690-095-0050 (1) [N]o where in this section are the statutory directives regarding fish screens, measurements, certainty the project will result in a net environmental benefit, a finding that the project is designed to deliver instream benefits, etc. See §25 (1) (b)-(g).

*Department Proposal:*

The Department will fully use the statutes as foundation of operations for the Columbia River Basin Water Development Loan Program and generally will not be restating long portions of statute in these rules. The rule will now clearly state that the Director must establish compliance with all portions of applicable law prior to a loan being approved as a result of changes noted above.



WaterWatch:

- 690-095-0050 (1) In addition to the above omissions, this section fails to lay forth the provisions of §26(3) of HB 3369...

*Department Proposal:*

It is unnecessary to restate in the rules those portions of the statute that will, as a matter of course, be included in the loan document as requirements of the loan. No changes were made to the hearing draft as a result of this public comment.

WaterWatch:

- 690-095-0050 (1) HB 3699 §6... requires the WRC to make the following findings prior to approval of financing... The requirements should be set forth in the rules.

*Department Proposal:*

Based on this comment the hearing draft was revised to include a requirement of loan approval that “the Commission finds that all conditions of ORS 541.720 are met.”

WaterWatch:

- 690-095-0050 (3) This section grants the director the ability to issue an initial non-binding letter of intent to grant a loan. This is not contemplated by the governing statutes, but if the WRC wants to retain it this section needs to be strengthened to ensure that this letter cannot be granted until after the close of the comment period, after the multi-agency assessment, and only if all the application/rule requirements are met. In other words, the full review (except the review of the additional information the WRD requests) has been made. As i[s], the rules would allow this letter at any point of the process.

*Department Proposal:*

No changes were made to the hearing draft as a result of this public comment.

WaterWatch:

- 690-095-0050 (4) states that “[f]or any water development project requiring the filing of a water right application, the director shall make any loan approval conditioned upon receipt of the water right application in accordance with ORS chapter 536, 537, and 540.” This provision is inconsistent with the statutory directive that the applicant provide in their application: “proof that the applicant has acquired at least a final order or a limited license for necessary water permits from the WRD” up front, in the application. §20(2)(h) HB 3369.

*Department Proposal:*

690-095-0050 (4) has been deleted.

WaterWatch:

- 690-095-0050 (5): The statute requires that WRD “ensure that any necessary federal and state environmental impact approval processes have been completed, and that agencies have issued any relevant approvals and permits” before advancement of any loan. HB 3369 §26(1). These requirements need to be added to this subsection, which currently only focuses on federal funding and construction, not environmental approvals.

*Department Proposal:*

This section of the rule addresses requirements of ORS 541.765 Authorization for loans for certain federal projects. The compliance with necessary federal and state environmental impact approval process, etc. is accomplished with 690-095-0050 (1), as revised above. No changes were made to 690-095-0050 (5) because changes made to 690-095-0050 (1) addresses the concern.

## 690-095-0055 Appeal Process

Davis Wright Tremaine LLP – John DiLorenzo, Jr:

- 690-095-0055: Proposed Rule 690-095-0055 concerns the appeal process. Subsection 1 of the Proposed Rule concerns an appeal from the decision of the Director directly to the Commission. However, Proposed Rule 690-095-0030(2) only gives the Director authority to approve loans under \$3,000,000.00. Subsection (1) of that proposed rule requires that it shall be the Commission that shall approval loans over \$3,000,000.00. The appellate process should specify what happens if an applicant wishes to appeal the decision of the Commission in the first instance or the decision of the Commission on an appeal directly from application rejected by the Director.

WaterWatch:

- 690-095-0055 If an appeal section is going to be retained, it needs to allow for appeals by any party for the granting/modifying/denial of an application, and, importantly, WRC review of the appeal must be clearly tied to all the requirements of HB 3369 and ORS 541.600/700.

This section also leaves open the question of what body appeals of loans of three million or more, which per these rules are granted by the WRC not the WRD, go to.

### *Department Proposal:*

As a result of this public comment, the Department has reviewed and made changes to the hearing draft that when an applicant wants to appeal a decision on a loan that is greater than \$3 million made by the Commission that the appeal will be done by the process governed by ORS Chapter 183 relating to final orders.

## 690-095-0060 Loan Security

WaterWatch:

- 690-095-0060: This section should note that all the requirements of ORS 541.600/700 apply as well as the provisions of this rule. The statute gets into details of foreclosure. It also grants WRC the authority “to take any action, make any disbursement, hold any funds or institute any action or proceeding necessary to protect the state’s interest.” ORS 541.740(7). See HB 3369 (attached) for details.

### *Department Response:*

Comments on this rule are noted. In drafting this rule, the Department acknowledges the existence of the statute, the provisions of HB 3369 and that this rule is not intended to subjugate either the statute or the provisions of HB 3369 rather to aid in carrying out the provisions of HB 3369 and the statute. See response to 690-95-0040 for the Department’s response to this comment. No changes made to this rule as a result of this comment.

East Valley Water District

- 690-095-0060 See previous comment regarding ad valorem taxing authority. Alternative approach might be to include reference to both the pre-BM5 “charges and assessments” statutory authority and the post-BM5 “alternative method of collecting incurred charges” statutory authority, both contained in Oregon Revised Statutes Chapter 545.

### *Department Response:*

This comment is noted. See also responses to comments under 690-95-0005 above. In addition, this rule has provision suited for irrigation districts with “**An agreement entered into by the water developer wherein assessments, user charges or other revenue is pledged for security of loan repayment and that such revenue shall be maintained at no less than 125 percent of the debt service on the loan.**” No changes were made to the hearing draft as a result of this public comment.

## 690-095-0070 Loan Contract

WaterWatch

- OAR 690-095-0070: The statutes require that the applicant provide periodic review of the project, including [but] not limited to: a) review of interim and long-term performance benchmarks set by the WRD and b) program and fiscal audits to ensure that performance benchmarks are achieved on project development, project benefits and return on investment. HB 3369 §26(3). Applicants are also required to report to the WRD within two years regarding the progress of the project and the economic public benefit, social and cultural public benefit and net environmental benefit realized from the project. Id. at §26(4). While referenced, these statutory requirements should be laid forth in the rules.

### *Department Response:*

The Department believes that the wording in the administrative rule “The loan contract shall contain the provisions required by Section 26(3) and (4) of chapter 907, Oregon Laws 2009”, which is the source of the items listed by WaterWatch, is sufficient to ensure that the contract holds those requirements.

WaterWatch

- OAR 690-095-0070: ORS 541.730(§ 7 HB 3369) sets forth a number of loan contract requirements that apply to Columbia River under the Water Development Loan Development Funds(underlined below), that should be set forth here namely...

### *Department Response:*

Comments on this rule are noted. In drafting this rule, the Department acknowledges the existence of the statute, the provisions of HB 3369 and that this rule is not intended to subjugate either the statute or the provisions of HB 3369 rather to aid in carrying out the provisions of HB 3369 and the statute. See response to 690-95-0040 above for the Department’s response to this comment. No changes made to the hearing draft as a result of this comment.

WaterWatch

- OAR 690-095-0070: [T]he Division 90 rules set forth a number of provisions to be in a loan contract that are not found in these draft rules that should apply here (i.e. A statement allowing the director to inspect the property to ensure that the developer complies with conditions for which the money was loaned, 690-90-040(3)(d)). We suggest that the rules be amended to include all relevant provisions regarding loan contracts, and/or incorporate by reference the standards of OAR 690-90-40.

### *Department Response:*

The provisions of 690-095-0070 (1) provide authority to the director to include provisions necessary to “ensure expenditure of the loan proceeds for the purposes set forth in the approved application...”. The Department believes it is unnecessary to list all possible variants of that authority within these rules.

## 690-095-0075 Conditions to Disbursement of Loan Funds

WaterWatch

- OAR 690-095-0075 (1): the “may” in the rules needs to change to “shall” to be in compliance with HB 3369 §26(1).

### *Department Response:*

The word “may” has been changed to “shall” to be in compliance with HB 3369 §26(1).

WaterWatch

- OAR 690-095-0075 (2): There is no statutory authority for the broad discretion the WRD grants itself in this section to negotiate solutions regarding loan default. ORS 541.730(7)(5)(b) allows the Commission to “provide for reasonable extension of the time for making any repayment in emergency or hardship circumstances, if approved by the commission.” The statutes do not, on the other hand, grant carte blanche authority to the WRD/WRD to agree to “any other solution jointly agreed to by the water

developer and the director” as is put forth in subsection (2).

This section needs to be reworked to follow the sideboards set forth in statute. Additionally, as the statute only allows for delay of payment because of “hardship” or emergency circumstances”, the rules should add a definition of these terms, which clearly outline what qualifies as well as appropriate sideboards (i.e. the proposed language that includes any “economic stress due to factors beyond individual control” is too broad). The WRD should be required to make a finding of “hardship” or “emergency circumstances” as part of any discussions on extensions.

*Department Response:*

The Department agrees with this comment and subsections (2) and (3) were deleted.

**690-095-0080 Fees and Charges**

Davis Wright Tremaine LLP – John DiLorenzo, Jr:

- 690-095-0080: Provides that the “Director shall charge the following fees to borrowers.....: However, no fees are specified thereafter.

WaterWatch:

- 690-095-0080(4) has a typo “the following” should be struck.

*Department Response:*

Due to the innovative nature of the projects and the possible characteristics of potential borrowers under the Columbia River Basin Loan Program, the Department recognizes the difficulty in projecting all other incidental fees not covered as application fee. The Director’s authority to charge fees that exceed the application fee is expressed in sections 1, 2 & 5 of this rule. HB 3369 §(5) allows the Commission to establish reasonable fees for management, oversight or review services that the department provides for a water development project. No such fees are proposed at this time; therefore, section (4) is deleted.

**690-095-0095 Collection of Delinquencies**

Davis Wright Tremaine LLP – John DiLorenzo, Jr:

- 690-095-0095: The reference should be OAR 690-090-0055

WaterWatch:

- 690-095-0095: The provisions of OAR 690-90-055 apply to loans and loan contracts entered into under the loan program and these rules. Or in the alternative, list out the provisions of OAR 690-90-055.

*Department Response:*

The Department agrees with the suggested change and corrects this rule to read “The provisions of OAR 690-090-0055 apply to loans and loan contracts entered into under the loan program and these rules.”

**690-095-0100 Property Management**

Davis Wright Tremaine LLP – John DiLorenzo, Jr:

- 690-095-0100: The reference should be OAR 690-090-0060

WaterWatch:

- 690-095-0100: The provisions of OAR 690-90-060 apply to loans and loan contracts entered into under the loan program. Or in the alternative, list out the provisions of OAR 690-90-060.

*Department Response:*

The Department agrees with the suggested change and corrects this rule to “The provisions of OAR 690-090-0060 apply to loans and loan contracts entered into under the loan program and these rules.”

## General

### Waterwatch:

- Notice of Open Comment Period and Rulemaking Hearing: The notice of the rulemaking should have indicated that this was one of three rulemakings to implement HB 3369, and that, specifically there would be an additional rulemaking to create rules for the assessment of net environmental public benefits under this loan program (in addition to the grant program). As is, the notice indicates that “[t]he proposed rules provide procedures and establish standards for administration of a Columbia River Basin Water Development Program.....” This notice is inadequate as it leads to the interpretation that these are the rules, in their entirety, that will govern the Columbia River Basin Loan program under HB 3369.

### *Department Response:*

The Department has noted this comment and recognizes that the Public Notice was specific and announced that these rules would be “related to standards for borrowers seeking loans”. The requirement of HB 3369 §22(4) for the Commission to adopt rules for use “in assessing the net environmental public benefits of a project” was not addressed in the public announcement because it was not related to standards for borrowers seeking loans and it was thought that the public might be confused if it was announced what was not being done. There will be a future rulemaking for use “in assessing the net environmental public benefits of a project” and the Department will keep this comment in mind when crafting that Public Notice.

### Waterwatch:

- Conclusion: The rules, as currently drafted, do not include the many requirements of HB 3369, and in some cases propose standards that are inconsistent with statutory directive. We recommend that the rules be reworked to better reflect the statutory mandates, many of which are referenced in these comments. We would further recommend that the amended rules be re-noticed, so that the public will have an opportunity to comment on the full spectrum of the reworked rules.

### *Department Response:*

The Department is committed to operating the Columbia River Basin Water Development Loan Program in accordance to the provisions of HB 3369, the statutes and these rules. HB 3369 and the statutes together are the basis on which the proposed rules have been developed. The public comments received have raised issues and recommended changes that are reflected in the proposed final rules. The Department believes that the proposed final rules are appropriate to implement the aspects of HB 3369 related to loans and standards for borrowers.