

September 23, 2005

Mary Graine
Water Resources Department
725 Sumner Street NE, Suite A
Salem, OR 97301-1271

Dear Ms. Graine,

Thank you for the opportunity to comment on the Oregon Water Resources Department's (Department) proposal to repeal all rules under OAR Chapter 690 Division 50 and Division 74.

The Hydropower Reform Coalition is a national coalition of river recreation and conservation organizations that advocate for environmental and public benefits through the Federal Energy Regulatory Commission's hydropower dam licensing process. Our Coalition has an office in Portland, Oregon, for the purpose of assisting its Northwest member organizations in policy and dam issues such as the Department's rulemaking. The Coalition believes that balanced management of hydropower dams is crucial to the health of our Northwest rivers. More about our Coalition is available online at www.hydroreform.org.

WaterWatch of Oregon works to protect and restore streamflows in Oregon's world-class rivers and streams for the benefit of fish, wildlife and the people who depend on healthy rivers. Because hydropower operations greatly alter the natural hydrograph of streams and rivers across Oregon, WaterWatch also advocates for balanced laws and policies that account for the significant environmental effects of hydropower operations in Oregon on streamflows, fisheries and river health.

As we understand it, the Department's proposal will completely eliminate all rules under Division 50 and 74 of Chapter 690. The Department regulates all hydropower projects under Division 51 rules with one exception; this exception directs the Department to regulate specific projects under Division 50 and Division 74 rules. The Department has concluded that no hydropower projects exist that meet the terms of the exception. Therefore, the Department concludes that the Division 51 rules are adequate to regulate all hydropower projects, and the Division 50 and Division 74 rules are no longer necessary. To the Department, the proposal to eliminate Division 50 and Division 74 rules is a housekeeping matter, eliminating rules that no longer serve any purpose.

These comments concern the exception in Division 51. OAR 690-51-0020(3) directs the Department to regulate all hydropower projects under Division 51 rules "except as provided by Section 27, Chapter 569, Oregon Laws (OL) 1985."¹ The cited exception

¹ The full text reads: "(3) Except as provided by Section 27, Chapter 569, Oregon Laws (OL) 1985, these rules shall apply to any application for which the hearing record was not closed prior to the effective date of

curiously only exists in legislative history, and was, apparently, never placed into statute or consequent regulation or codified in the Oregon Revised Statutes. This is an irregularity that should be corrected. Without resurrecting the obscure language, the commenters are at a serious disadvantage in these comments. We must rely on the Department's paraphrase: the exception is for projects with a power capacity greater than 25 megawatts that were authorized by a city before 1985.

In the rulemaking, the Department says plainly that there are no such excepted projects (no "pending" or "new" projects) before the Department and so, there is no need for the rules that govern them. The Department does not offer any analysis demonstrating that there are no *potential* or currently moribund projects that may come before the Department in the future.

The Coalition believes that while the possibility is remote, excepted projects certainly may come before the Department at any time. For example, if the City of Klamath Falls' Salt Caves project were to be proposed again, the proper course would be to regulate it under Division 50 and 74 rules – which will no longer exist should this rulemaking be carried out. There may well be other projects that we are unaware of that would fall within the Division 51 exception.

What will the Department do if faced with an excepted project? This is answered in the materials providing background on the rulemaking: the Department says that once the rules are repealed, all hydropower projects will be reviewed under Division 51. But, if presented with the type of project expressly exempted from Division 51, the law and the Department's own regulations say that it must do otherwise. Against that obligation, the assertions made in text supporting the proposed rulemaking cause us real concern and carry little weight.

The Department should not eliminate Division 50 and Division 74 rules without accounting for their purpose and confirming that there are no projects in existence (whether alive or currently moribund) that could move forward under the exception contained within the Division 51 rules. That can be done either by maintaining the rules proposed for repeal or establishing another avenue for the excepted projects within the rules. However, the Department has not acknowledged the possibility that projects falling within the Division 51 exception could move forward in the future, much less offered a proposal to deal with the possibility. The commenters are deeply concerned that should the Department find itself faced with an excepted project, there will be no clear regulatory path for the Department to respond.

The Coalition does not support the elimination of Division 50 and 74 rules without altering the exception under OAR 690-51-0020(3) and providing an accounting of all projects that could potentially move forward in the future under the Division 51 exception. If the alteration is impossible without legislative approval, the Department should retain the Division 50 and 74 rules.

these rules. Projects to which Chapter 569, Oregon Laws 1985 do not apply, shall be subject to the provisions of OAR Chapter 690, Divisions 50 and 74.”

To be clear, altering the exception under OAR 690-51-0020(3) would require another notice and opportunity for comment. Any future rulemaking addressing this issue must provide an inventory and analysis on the existence of excepted hydropower projects; the specific text of the exception along with an explanation of its force upon the Department; and a proposal for regulating excepted hydropower projects should any of these projects move forward. Before the Coalition can support the elimination of Division 50 and 74, we need more information, more explanation, and an answer to the problem of possible excepted projects moving into a regulatory vacuum.

There is no harm in keeping Division 50 and 74 rules, while eliminating them may cause substantial harm. We appreciate the Department's interest in housekeeping. However, the Coalition recommends retaining the rules until the proper provision for the excepted class of projects has been made and an inventory of such projects has been provided. We oppose elimination of the rules without explicit acknowledgement of and provision for possible projects arising in the future under the exception in Division 51.

Thank you for the opportunity to comment.

Respectfully submitted,

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Hydropower Reform Coalition

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