



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item O, November 21, 2014
Water Resources Commission Meeting

Request for Adoption of Rules - OAR Chapter 690, Division 33, Upper Columbia Rules

I. Introduction

During this agenda item, the Water Resources Commission will be asked to consider the adoption of modifications to Oregon Administrative Rule (OAR) 690-033-0120. This rulemaking amends Division 33, Upper Columbia Rules, to achieve consistency with current Oregon Department of Fish and Wildlife (ODFW) Habitat Mitigation Rules, as well as make minor corrections to the rule.

II. Background

OAR Chapter 690, Division 33, establishes additional procedures and standards to aid the Water Resources Department in determining whether a proposed new water use will impair or be detrimental to the public interest with regard to sensitive, threatened, or endangered fish species. Currently, OAR 690-033-0120 (4) references ODFW Fish and Wildlife Habitat Mitigation Policy rules that have since been modified and updated.

This rulemaking seeks to amend OAR 690-033-0120 (4) so that it is consistent with current ODFW rules. Specifically, the rule would be amended to reference the current ODFW Implementation of Department Habitat Mitigation Recommendations rule (OAR 635-415-0025). In addition, the rule change would remove two unnecessary hyphens [OAR 690-033-0120 (1) & (2)(a)], update the title of the Northwest Power Planning Council to its current title, and update the statutory reference for fish screen design, installation, operation specifications and passage requirements [690-033-0120 (2)(c)] to achieve consistency with current ODFW revised statute references. A copy of the proposed rule change is contained in Attachment 1.

The Department consulted a Rules Advisory Committee (RAC) at a meeting held at OWRD offices in Salem on August 13, 2014. Members of the RAC included: Rick Kepler (ODFW), Kimberley Priestley (WaterWatch), JR Cook (Northeast Oregon Water Association), and Spencer Hovekamp (National Oceanic and Atmospheric Administration). Department representatives included Mike Ladd, Dwight French and Jon Unger.

A Notice of Proposed Rulemaking Hearing was noticed on the Department's website and appeared in the *Oregon Bulletin* on September 1, 2014. The notice was also sent by electronic mail to the Department's listserv of interested constituents. The public comment period was open through September 30. Public hearings were conducted by Dwight French on September 22 in Salem and on September 25 in Hermiston. Department staff reviewed and considered all public comments that were received by the close of the public comment period. Complete copies of the public comments received are included in Attachments 2 and 3. Summaries of the comments received are provided in the discussion section below.

III. Discussion

This proposed rule change is needed to make the rules consistent with ODFW Habitat Mitigation rules, so that additional water development can occur in the Upper Columbia Basin with mitigation. Allowing the bucket-for-bucket mitigation of new water development can positively impact local and state economies.

The Department received two comments on the draft of the proposed amended rule:

- 1) WaterWatch of Oregon submitted written comments to reflect their understanding of the limited scope and intent of the rulemaking to simply make the Division 33 rules consistent with ODFW policy.
- 2) JR Cook of the Northeast Oregon Water Association testified at the public hearing in Hermiston in favor of the proposed amendments to the rule.

IV. Action Item

The Commission is asked to consider adoption of modification to OAR 690-033-0120, which achieve consistency with ODFW Habitat Mitigation rules. The final proposed rules for adoption are included in Attachment 1.

V. Alternatives

1. Adopt the final proposed amended rule OAR 690-033-0120, as contained in Attachment 1.
2. Modify and adopt the proposed amended rule OAR 690-033-0120.
3. Find that the amended rules are not needed and retain the existing rules.
4. Direct Department staff to do further work on the rules and return to a future Commission meeting.

VI. Recommendation

The Director recommends Alternative 1, to adopt the proposed amended rule OAR 690-033-0120.

Dwight French
Water Right Services Division Administrator
503-986-0819

Attachments

- Attachment 1: Final proposed amended rule OAR 690-033-0120
- Attachment 2: Copies of Written Comments Received (WaterWatch)
- Attachment 3: Transcript of Public Hearing Comments Received (JR Cook)

DRAFT DIV 33 RULE CHANGE DOCUMENT

[Deleted text in brackets] **new text bold and underlined**

690-033-0120

Determination of Consistency with the Fish and Wildlife Program

(1) To determine whether a proposed use is consistent with the Fish and Wildlife Program, the Department shall consult with the Northwest Power **and Conservation** *[Planning]* Council, ODFW, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Indian tribes and appropriate local governments. If the Department determines that a proposed use of water is inconsistent with the Fish and Wildlife Program and cannot be conditioned to achieve consistency, the application shall be presumed to impair or be detrimental to the public interest.

(2) The applicant shall provide information to show compliance with the following standards which will form the basis for permit conditions:

(a) The proposed use does not involve appropriation of direct streamflow during the time period of April 15 to September 30, except as provided in OAR 690-033-0140;

(b) The proposed use does not involve hydraulically connected groundwater with potential for substantial interference as listed in OAR 690-009 *[Division 9 of this Chapter]* during the time period of April 15 to September 30, except that which is artificially recharged or as otherwise provided in OAR 690-033-0140;

(c) The proposed use complies with screen design, installation, operation specifications and passage requirements as listed in *[ORS 498.248 through 498.268 and ORS 509.600 through 509.630;]* **ORS 498.301 through 498.346 and ORS 509.580 through 509.910;**

(d) The proposed use complies with existing state and federal water quality standards; and

(e) The proposed use complies with water use measurement, recording and reporting required by the Director.

(3) Based on the consultation in section (1) of this rule, the proposed use may be further conditioned so that, if the riparian area is disturbed in the process of developing a point of diversion, the riparian area is restored or enhanced.

(4) If a proposed use is not consistent with the Fish and Wildlife Program, the applicant may propose mitigation compatible with sections (2) and (3) of this rule. The Director shall determine if the proposed use with mitigation is consistent with the Fish and Wildlife Program. For purposes of mitigation, the *[ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415-0030 adopted November 13, 1991]* **ODFW rules regarding Implementation of Department Habitat Mitigation Recommendations, OAR 635-415-0025 adopted April 21, 2000 and effective May 1, 2000** shall be followed.



September 30, 2014

Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Comments, Division 33 Rulemaking

Dear Rules Coordinator,

WaterWatch of Oregon was on the Rules Advisory Committee that helped develop the draft rule changes to Division 33. Prior to and during the rulemaking process, WRD stated that the sole purpose of the rulemaking and of the proposed changes was to make section OAR 690-033-0120 consistent with current ODFW rules. Further WRD stated that this rulemaking would not lead to additional substantive rulemakings in the future, regardless of any public pressure that might come to bear during this rulemaking.

The primary purpose of our comments today is to ensure that the record reflect OWRD statements and commitments regarding the limited scope and intent of this particular rulemaking.

The draft rules reflect the limited scope of the rulemaking, and simply make the Division 33 rules consistent with ODFW policy. WaterWatch would not support any further changes to the rules beyond these small adjustments.

Sincerely,

Kimberley Priestley
Sr. Policy Analyst

Transcript of public hearing comments

<u>Hearing Date</u>	<u>Location</u>	<u>Comments</u>
September 22, 2014	OWRD offices Salem, Oregon.	No public comments received.
September 25, 2014	Oxford Suites, Hermiston, Oregon	JR Cook

Transcript: My name is JR Cook. I'm the Director of the Northeast Oregon Water Association whose address is 3750 SW Marshall Place, Pendleton, Oregon 97801. I would like to thank OWRD for undertaking this rulemaking to ensure the Division 33 rules are consistent with current habitat goals and policies of ODFW. I support this rulemaking and will most likely utilize this rulemaking in the future so it is important it be completed at the earliest convenience by the Commission of the Department.