



Oregon

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Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Dwight French, Water Rights Services Administrator
Mary Grainey, Hydroelectric Program Coordinator

SUBJECT: Agenda Item F, March 12, 2015
Water Resources Commission Meeting

Hydroelectric Program Overview and Rulemaking

I. Introduction

A Rules Advisory Committee has been meeting with the Water Resources Department (Department) to update Oregon Administrative Rule Chapter 690, Division 051, relating to the appropriation and use of water for hydroelectric power and standards for hydroelectric applications. During this informational agenda item, staff will provide an overview of the Hydroelectric Program and the rulemaking.

II. Background

Hydroelectric Licenses and Permits

Beginning in February of 1931, the State of Oregon set out specific standards for the licensing of new hydroelectric projects. Standards for projects to be built by private developers are outlined in ORS Chapter 543. Licenses may be issued for up to 50 years. Procedures for relicensing are described in ORS Chapter 543A.

New hydroelectric projects built by a municipal corporation or public utility district do not require a license under ORS Chapter 543. These projects are only required to obtain a water right permit under ORS Chapter 537, but must meet the natural resource standards under ORS Chapter 543. The water right does not expire, and such projects are not required to undergo relicensing.

The Department consults and coordinates with the Oregon Department of Fish and Wildlife (ODFW), Department of Environmental Quality (DEQ) and other governmental and non-governmental entities and tribes during the permitting and licensing process. It is not uncommon to solicit input from up to 15-20 federal, state and local agencies when assessing the potential effects of a project. Natural resources that must be protected from

potential adverse impacts include water quality; anadromous and other wild fish; wildlife; recreation; scenic and aesthetic values; historic, cultural and archeological sites; and endangered species. In addition, the project is reviewed to determine that its impacts will not be cumulative with other hydroelectric projects in the same river basin.

Hydroelectric projects that are on federal land, a navigable waterway, or are associated with interstate commerce are also required to obtain a license or exemption from the Federal Energy Regulatory Commission (FERC).

The Department closely follows the FERC review and timelines when processing the state hydroelectric license or permit. Many of the FERC application or review documents are used to satisfy state application requirements.

During the FERC review of a project a formal environmental assessment (EA) or environmental impact statement (EIS) is prepared. The Department often relies on the information from the EA or EIS to assess the potential effects of the project on natural resources.

All hydroelectric projects are required to pay annual fees. The fee schedules change at the time a project is relicensed either by the State or by FERC, if the state water right does not expire.

III. Purpose of Rule Updates

The Division 51 rules were last updated in 1993. The Department has worked with a Rules Advisory Committee (RAC) to review proposed modifications to the rules. A list of the 22 RAC participants is included in Attachment 1. The Department held three meetings with the RAC. The modifications to the rules are intended to:

1. Eliminate burdensome and unnecessary financial reporting requirements related to statutes that have been repealed (OARs 690-051-0310, 0330, 0340, 0360, and 0370), and to update references to other statutes and rules that have been changed in the past 22 years;
2. Define the process for adjusting fees for annual inflation (OAR 690-051-0400 (7)). ORS 543.078(2) sets a baseline of \$0.405 per theoretical horsepower in 1998 dollars as the annual fee for relicensed projects and 543.088(1) and (3) set a baseline of \$0.125 per theoretical horsepower in 1998 dollars for annual fees between the time a proposed order for relicensing has been issued and the time a final order is issued.
3. Provide specific examples of how to meet the natural resources standards to protect fish populations and habitats (OAR 690-051-0200);
4. Streamline the process for proposed final orders and contested case hearings that are referred to the Office of Administrative Hearings (OARs 690-051-0090, 0095, 0130, 0140, and 0150); and
5. Allow the Director to handle exceptions after a contested case hearing and to issue a final order.

IV. Discussion

Financial Reporting Requirements and Other Changes to Statute and Rules

In 1995, ORS 543.510 and 543.520 were repealed, but the rules addressing the financial reporting requirements associated with these statutes have not been updated (OARs 690-051-0310, 0330, 0340, 0360, and 0370). Repeal of these rules will further the Department's regulatory streamlining efforts.

Other outdated references to government entities, state programs, statutes, and rules also need to be updated.

Inflation Factor for Annual Fees

As required by ORS 543.085, the Department appointed a panel in 2009 to review annual fees authorized under ORS 543.078. The panel recommended that the Department establish in rule the specific procedures for determining the annual inflation factor for the fees. The proposed changes to the rules would incorporate the panel's recommendation to set the inflation factor based on U. S. Department of Commerce Bureau of Economic Analysis publication *Survey of Current Business, Table 1.1.9* for September of each year. This publication can be found at: <http://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1%20-%20reqid=9&step=3&isuri=1&903=13#reqid=9&step=3&isuri=1&903=13>

Standards to Protect Fish Populations and Habitats

Department staff conferred with staff of the ODFW on updates to fish protection standards. The rules will reference specific ODFW standards for screening and fish passage to clarify what mitigation strategies are necessary for hydroelectric projects.

Staff also conferred with DEQ and Oregon Department of Energy to ensure that the hydroelectric projects are consistent with the water quality and need for power standards for which those agencies provide expert advice or regulation. The rules will clarify that DEQ has responsibility for the water quality certification as the Department does not intend to overrule the standards set out in OAR Chapter 340, Division 41 Water Quality Standards, Beneficial Uses, Policies and Criteria. Also, since the Energy Facility Siting Council no longer has authority to determine the need for power (ORS 469.310), this Department will confer with the Oregon Department of Energy on whether there is a need for development of hydropower or renewable energy resources in the region.

Final Orders and Contested Case Hearings

The Department is required under ORS 543.255 to determine whether the impacts of a proposed project have the potential to be cumulative with impacts of other proposed or existing hydroelectric projects in the same river basin. If there is a potential for cumulative impacts then a consolidated review is held in the form of a contested case hearing. Individual and cumulative impacts must be reviewed for each proposed and/or existing project.

If the Department determines that there is no potential for cumulative impacts and a consolidated hearing is not required, then the Department prepares an order on the public interest issues of the project to approve or deny the project.

These two proposed orders cover almost the exact same findings for the two purposes stated above. The first order determines if consolidated review is necessary with other projects. The second order is required to go to contested case hearing even if no protests are filed. The Office of Administrative Hearings has asked us to refrain from requiring a hearing if no protest is filed.

The Department proposes to streamline the review process so that only one proposed order is issued. If a protest is filed concerning cumulative impacts then a consolidated contested case hearing would be held. If a protest is filed on any other issue, then a simple hearing would be held with the appropriate parties. If no protest is filed, then the Director may issue a final order. A flow chart of the current and proposed processes is provided in Attachment 2.

Exceptions to Proposed Final Order and Issuance of Final Order

The Department is considering whether it is appropriate to streamline the final decision on a hydroelectric project by having the Director respond to exceptions filed after a contested case hearing and moving the project along to final decision and/or court review. The licensing process entails a proposed comprehensive review over a time span of several years. Major hydroelectric projects are also reviewed by the FERC which has authority over most of the major decisions regarding project construction and operation. It is unlikely that the Department could recommend a project for approval if FERC was not also prepared to approve the project. The State of Oregon retains authority over the water rights and protection of other existing water rights for hydroelectric projects. By allowing the Director to finalize the decision after a contested case, errors could be corrected in response to exceptions, however any expectation that the Department or the Commission would overturn a decision that has already been decided by another state agency or FERC would be reduced.

V. Conclusion

This is an information report only. The Commission is invited to ask questions and enter discussion to understand the basis and the scope of the hydroelectric rule amendments. Proposed rule amendments will be brought for Commission action later this year.

Attachments

1. Participants in Rules Advisory Committee
2. Flow Chart of Current and Proposed Hearing Processes for Major Projects

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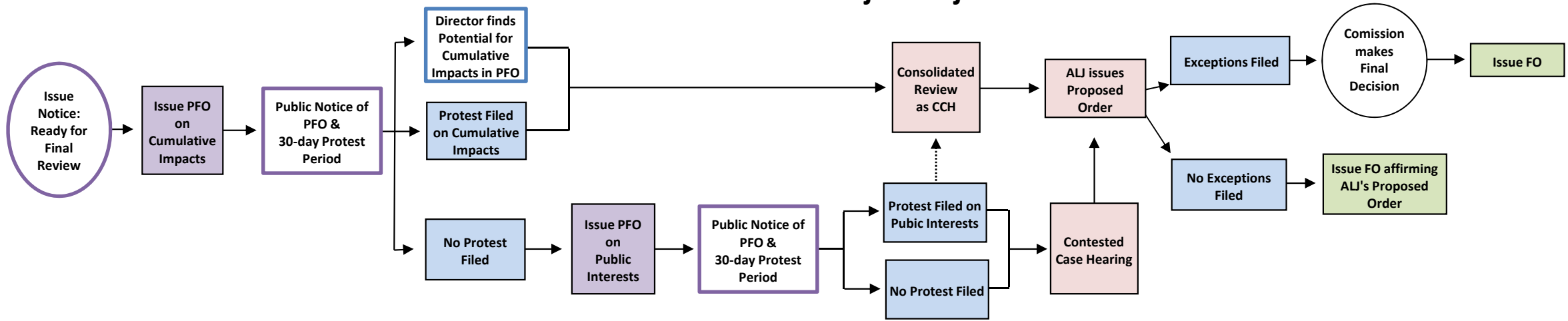
Mary Graine
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Participants in Hydroelectric Rules Advisory Committee

Suzanne Adkins – Eugene Water & Electric Board
Rich Bowers – Hydropower Reform Coalition
Chris Brun – Confederated Tribes of the Warm Springs Reservation
Jer Camarata – Farmer’s Irrigation District
Julie Carter – Columbia River Inter-Tribal Fish Commission
John Esler – Portland General Electric Co.
Marilyn Fonseca – Oregon Department of Environmental Quality
Nathan Gardiner – Idaho Power Co.
Ken Homolka – Oregon Department of Fish and Wildlife
Audie Huber – Confederated Tribes of the Umatilla Indian Reservation
Jed Jorgensen – Energy Trust of Oregon
Rick Kepler – Oregon Department of Fish and Wildlife
Jan Lee – Northwest Hydroelectric Association
Gary Marcus – Falls Creek Hydroelectric Project Owner and Operator
Kate Miller – Trout Unlimited
Peter Mohr – Tonkon Torp
Rebecca O’Neil – Oregon Department of Energy
Martha Pagel – Schwabe, Williamson & Wyatt
Kimberley Priestley – WaterWatch of Oregon
Tracy Rutten – League of Oregon Cities
John Sample – PacifiCorp
Erik Steimle – Environmental Resources Management, Environmental Consultant

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Current Process for Major Projects



Proposed Process for Major Projects

