



Oregon

Kate Brown, Governor

Water Resources Department
725 Summer St NE, Suite A
Salem, OR 97301
(503) 986-0900
Fax (503) 986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item B, November 19, 2015
Water Resources Commission Meeting

Amendment of Hydroelectric Rules OAR Chapter 690 Division 51

I. Introduction

At the Water Resources Commission meeting in March 2015, staff presented an overview of the Hydroelectric Program and the efforts to update rules governing new hydroelectric projects, OAR Chapter 690 Division 51. The hydroelectric statutes that govern these rule amendments are summarized in Attachment 1. During this agenda item, staff will present the proposed rule amendments for the Commission to consider adoption.

II. Purpose of Rule Updates

The Division 51 rules were last updated in 1993 and many of the provisions are outdated because the statutes that authorized the rules have been modified or repealed. The Water Resources 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 2. The Department held three meetings with the RAC.

The proposed amendments to the rules are in Attachment 3. The modifications to the rules are intended to:

1. Eliminate burdensome and unnecessary financial reporting requirements (OAR 690-051-0310, 0330, 0340, 0360, and 0370) related to statutes that have been repealed, and to update references to other statutes and rules that have been changed in the past 22 years;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)) to implement ORS 543.078(2) and 543.088(1) and (3);
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 (OARs 690-051-0090, 0095, 0130, 0140, and 0150). The final order may be appealed to the Court of Appeals.

III. Discussion

A. Financial Reporting Requirements and Other Changes to Statute and Rules

In 1995, ORS 543.510 and 543.520 relating to the amortization of hydroelectric projects were repealed by the Legislature. However, the rules addressing the financial reporting requirements associated with these statutes have not been repealed (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 are also proposed to be updated.

B. 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. <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>

C. Standards to Protect Fish Populations and Habitats

Department staff conferred with staff of the Oregon Department of Fish and Wildlife (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 Oregon Department of Environmental Quality 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 OWRD does not intend to overrule DEQ's water quality standards set out in OAR Chapter 340, Division 41.

D. Final Orders and Contested Case Hearings

The Department is required under ORS 543.255 to prepare a proposed order on whether the impacts of a 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, 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 another order on the public interest issues of the project to approve or deny the project.

These two proposed orders making a cumulative impact determination and a public interest determination 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 is proposing to streamline the review process so that only one proposed order is issued. If protests are filed, the Department will determine whether to consolidate or to split up the issues and refer them to the Office of Administrative Hearings. 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 4.

E. Exceptions to Proposed Final Order and Issuance of Final Order

The amendments propose 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 comprehensive review over a time span of several years. Major hydroelectric projects are also reviewed by 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.

IV. Public Comment and Department Response

A public hearing was held on July 22, 2015, in Salem. A representative from the Oregon Department of Fish and Wildlife (ODFW) attended the hearing. No other members of the public attended. The Northwest Hydroelectric Association and ODFW submitted written comments by the comment deadline as discussed below (Attachment 5).

Comments from Northwest Hydroelectric Association

- New definition of “Available Water” provides clarity for non-consumptive uses. (See page 2 of proposed rule).

Staff response: The commenter did not recommend changes to the draft proposed rules; the Department agrees that the new definition provides greater clarity about how hydroelectric projects and instream water rights are factored into water availability calculations.

- “Request for Standing” should not be allowed for “non-aggrieved” persons as this is unique to the ORS 537 hearings process. (See page 18 of proposed rule.)
Staff response: The comment implies that decisions on projects licensed under ORS 537 should have a different opportunity for standing than projects licensed under ORS 543. The Department does not agree. Requests for Standing are specifically allowed during the permitting and re-licensing processes for hydroelectric projects under 537 and 543A.130 and it is logical to have the same type of process for all hydroelectric projects. The Department prefers not to have one hearings process for hydroelectric permits and a different hearings process for hydroelectric licenses. Both types of projects must meet the same resource and hearing standards. (ORS 537.170, 537.283, and 543.230)

ORS 543.230(1) states “The Water Resources Commission shall, by order or rule, provide for the time and manner of hearings upon applications. . . ” ORS 543.230 (2) states “every application . . . shall be subject to protest or remonstrance on behalf of the public. . . ”

In providing for the time and manner of hearings for application, the Department recommends that the rule allow that:

“-0150(3) Any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order, or for judicial review of a final order.”

The Department’s intention in this rulemaking is to eliminate the automatic referral of all hydroelectric projects to a contested case hearing and only refer those cases for which outstanding issues have been identified. The Department’s intent is not to limit participation in a hearing. The Department prefers to know as soon as possible the parties who have an interest in a case. The request for standing is an opportunity for persons not objecting to the proposed order, but intending to protect their opportunity to participate in a hearing to be allowed a way into the proceedings.

Consider for example, if the Department denied a project on the basis of injury to another water user, and a protest was filed. If the rule did not allow for a person who supported the proposed final order to request standing, the non-aggrieved water user who could potentially be injured by a modified order would have to make a special petition for party status in order to protect his/her interests. This is an extra step that would delay the process. The Department does not recommend changes to the rule language as proposed.

- Considerations for anadromous fish standards should not apply to other wild fish. (See page 23 of proposed rule.)

Staff response: The Commenter objects to the need to consider mitigation measures including item 690-051-0200(1) (f) "Managing wood and gravel through the project to maintain or enhance habitat conditions."

The "No Net Loss" Standard in statute (ORS 543.017(1)(c)) requires mitigation for possible adverse impacts to either wild fish or anadromous fish resources. Loss of habitat would necessarily lead to loss of fish, so the Department prefers that this mitigation measure be given full consideration at the time of Project review. Staff recommends no changes to the rule language as proposed.

Comments from Oregon Department of Fish and Wildlife

- Supports proposed language for 690-051-0200(1) . . . "including but not limited to (a)-(f)" and 690-051-0200(2) . . . "as applicable"

Staff response: Department agrees and recommends no changes to rule language as proposed.

V. Attorney General Suggestions and Modification of Hearing Draft

After the hearing was held, the Attorney General's (AG) office advised staff that the proposed rules should more closely follow the requirements of ORS 543.017(1)(e) regarding the need for power. Therefore, additional language has been drafted to reflect that the Director will consider any recommendation of the Energy Facility Siting Council for projects greater than 25 MW.

(Proposed language from hearings draft to be replaced is shown in ~~stikethrough~~, hearing language to be retained is in **bold**, and new language is underlined)

690-051-0280 Need for Power

In order to approve an application, the Director, ~~shall consider whether the Project is economically reasonable and consistent with the policies of ORS 543.017(1)(e) and ORS 469.310.~~ The Director [, or in cases where the Commission approves the final order, the Commission] shall [~~find~~] **make a finding on the need for power. In making**

this finding the Director shall consider the present and future power needs, taking into consideration ~~apply the following standards:~~

(1) **Whether t**[T]here is a need for project power based upon:

(a) [*The forecasts of the Regional Conservation and Electric Power Plan of the NPPC or state energy demands*] **Consultation with the Oregon Department of Energy on the most current regional power plan for an analysis ~~on whether there is a~~ of need for development of hydropower or renewable energy resources within the Columbia River region; or**

(b) Evidence of a contract for the sale of power, **and**

(c) For projects greater than 25 MW, any recommendation by the Energy Facility Siting Council based on information contained in the hearing record for the application.

VI. Action Item

The proposed final OAR Chapter 690, Division 51 rules were developed with a rules advisory committee comprised of representatives from electrical utilities, tribes, hydroelectric developers, irrigators, environmentalists, consultants, and state and local agencies. The final rules accomplish five major objectives to update rules to match current statutory standards. The only changes from the public hearing draft to the proposed final rules being presented to the Commission for consideration are recommendations from the AG's office regarding the need for power standard.

VII. Alternatives

The Commission may consider the following alternatives

1. Adopt the proposed amendments to OAR 690-051 in Attachment 3.
2. Modify and adopt the proposed amendments to the rules.
3. Request staff to return with further amendments for consideration at a future meeting.

VIII. Recommendation

The Director recommends Alternative 1, to adopt the proposed amendments to OAR 690-051 in Attachment 3.

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

Attachments

- 1 Statutes of Hydroelectric Program
- 2 Participants in Rules Advisory Committee
- 3 Proposed Final Rules
- 4 Flow Chart of Current and Proposed Hearing Processes for Major Projects
- 5 Public Comments

Mary Grainey
(503) 986-0833

ATTACHMENT 1

HYDROELECTRIC PROGRAM BACKGROUND

A. Permit and Licensing Requirements

There are two types of hydroelectric authorizations: (1) licenses with time-limited water rights, and (2) standard water right permits.

A private entity or person is authorized to operate a hydroelectric project through a license containing a time-limited water right.¹ To obtain a license,² an applicant must comply with the provisions of ORS 543. The term of a license may be up to 50 years and reauthorization of a license is possible pursuant to ORS 543A.

A municipal corporation or public utility district is authorized to operate a hydroelectric project under a permit issued pursuant to the provisions of ORS 537.140(2), which outlines the process for obtaining a surface water right, and ORS 543.017, setting minimum standards for development of hydroelectric power.³ These rights are standard water right permits that do not expire and are not required to undergo relicensing.

In addition to the state hydroelectric license or permit, 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). In processing the state hydroelectric license or permit, the Department closely follows FERC's review and timelines. Many of the FERC documents are used to satisfy the state's application requirements under ORS 543. For example, a formal environmental assessment (EA) or environmental impact statement (EIS) is prepared during the FERC review of a project. The Department often relies on the information from the EA or EIS to assess the potential effects of the project on natural resources.

The Department consults and coordinates with the Department of Fish and Wildlife, Department of Environmental Quality 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. In addition, the project is reviewed to determine that its impacts will not be cumulative with other hydroelectric projects in the same river basin.

¹ ORS 543.075(3).

² ORS 543.260(1).

³ ORS 543.150

B. Review required pursuant to ORS Chapter 543

1. Minimum Standards

ORS 543.017 sets standards to evaluate whether to approve a hydroelectric application. The minimum standards provide that:

- The anadromous salmon and steelhead resources of Oregon shall be preserved. The Commission must not approve activity that may result in mortality or injury to, or loss of natural habitat of, anadromous salmon and steelhead resources except when an applicant proposes to modify an existing facility or project in such a manner that will restore, enhance or improve anadromous fish populations within that river system.
- Any activity related to hydroelectric development must be consistent with the provisions of the Columbia River Basin Fish and Wildlife Program providing for the protection, mitigation and enhancement of fish and wildlife resources of the region as adopted by the Pacific Northwest Electric Power and Conservation Power Planning Council pursuant to Public Law 96-501.
- An activity may not be approved that results in net loss of wild game fish or recreational opportunities unless acceptable mitigation is provided in the project vicinity.
- No activity may be approved that in the judgment of the Commission, after balancing gains and losses to all affected natural resources, may result in a net loss of natural resources (including water quality, wildlife, scenic and aesthetic values, and historic, cultural and archaeological sites).⁴
- In determining whether it is in the public interest to allocate water for a proposed hydroelectric development, the Commission must consider present and future power needs and must make a finding on the need for power. For a project with a nominal electric generating capacity of 25 megawatts or more, the Commission shall consider recommendations by the Energy Facility Siting Council.

2. General and Resources Specific Standards

The Commission's rules implement the provisions of ORS 543.017. Before a project may be approved it must meet the general and resource specific standards in OAR 690-051-0170 to 690-051-0290 as follows:

- | | |
|--------------------|--|
| • OAR 690-051-0170 | Protection of Designated Resource Areas and Special Management Areas |
| • OAR 690-051-0180 | Standards on Mitigation and No Net Loss |
| • OAR 690-051-0190 | Water Resources Standards |

⁴ OWRD refers to these as the "resources standards." The various resources standards that the Commission must consider are in OAR Chapter 690, Division 51.

- OAR 690-051-0200 Fish Resources
- OAR 690-051-0210 Wildlife
- OAR 690-051-0220 Plant Life
- OAR 690-051-0230 Recreation
- OAR 690-051-0240 Historic, Cultural and Archaeological Resources
- OAR 690-051-0250 Land Resources
- OAR 690-051-0260 Land Use
- OAR 690-051-0270 Economics
- OAR 690-051-0280 Need for Power

3. *Cumulative Impacts Determination and Consolidated Review*

Whenever the OWRD receives an application to appropriate water for a new hydroelectric project (ORS 537.140 to 537.230), or for a hydroelectric permit or license (ORS 543.010 to 543.610), it shall determine whether the impacts of the project will be cumulative with:

- a. Impacts of other proposed hydroelectric projects for which an application is pending before the department; or
- b. Existing hydroelectric projects in the same river basin.

If the OWRD determines that pending applications or existing projects may have unacceptable cumulative effects, the Commission shall conduct a “consolidated review before approving any application in the affected river basin.”⁵ Cumulative impacts on any given natural resource shall be considered unacceptable if the level of impact would exceed any of the natural resources standards set out in Commission rule.⁶

4. *Public Interest Determination*

In addition to determining whether a project meets the minimum, resource, cumulative impact, or consolidated-review standards, the Commission must address whether the proposed project “would impair or be detrimental to the public interest.” Pursuant to ORS 543.225(3), in making this determination, the Commission shall have due regard for:

- a. Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- b. The maximum economic development of the waters involved.
- c. The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

⁵ ORS 543.255(3)

⁶ OAR 690-051-0290(5).

- d. The amount of waters available for appropriation for beneficial use.
- e. The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- f. All vested and inchoate rights to the waters of this state or to the use thereof, and the means necessary to protect such rights.
- g. The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

5. *Public Hearing and Contested Case Hearing*

OWRD conducts a public hearing in a community near the project usually at the time of a preliminary permit application, or, in the case of a municipal applicant, at the time of the permit application. By rule, if an application is for a major project that will generate more than 100 theoretical horsepower (THP) the OWRD must conduct a “contested case hearing.”⁷

C. Annual Fees

Licensees and other persons who have water right permits, certificates or claims for hydroelectric developments must pay an annual fee.⁸ On or before January 1 of each year, each holder must pay the State an annual fee for each hydroelectric project. The annual fee is calculated according to the theoretical horse power (THP) generated by each project.⁹ The annual fee must be adjusted annually for inflation according to rules established by the Commission.¹⁰

The annual 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. The annual fee required under ORS 543.078 is to be reviewed every eight years by a panel of public and private entities.¹¹ The most recent review panel was convened in 2009.

⁷ ORS 543.225(1); OAR 690-051-0130
⁸ ORS 543.075 – 078; ORS 543.710.
⁹ ORS 543.078(1).
¹⁰ ORS 543.078(2)(a)
¹¹ ORS 543.085.

Attachment 2 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 – Water Law Attorney
Rebecca O’Neil – Oregon Department of Energy
Martha Pagel – Water Law Attorney
Kimberley Priestley - WaterWatch of Oregon
Tracy Rutten – League of Oregon Cities
John Sample - PacifiCorp
Erik Steimle – ERM, Environmental Consultant

Staff: Dwight French, Mary Grainey, Ann Reece

Proposed Rule Changes are for several purposes:
To eliminate references to statutes or rules that have been repealed,
To define the process for adjusting fees for annual inflation,
To provide specific examples of how to meet the natural resources standards,
To simplify the process for proposed final orders and contested case hearings,
To allow the Director to handle exceptions and to issue a final order.

**OREGON ADMINISTRATIVE RULES
DIVISION 51**

**APPROPRIATION AND USE OF WATER FOR HYDROELECTRIC POWER AND
STANDARDS FOR HYDROELECTRIC APPLICATIONS**

690-051-0000 Purpose

These rules establish definitions, information requirements, filing procedures, hearing requirements, fees, and standards for hydroelectric development. The Water Resources Commission and the Director shall use these rules to process applications for permits to appropriate water for hydroelectric projects, Preliminary Permits and hydroelectric licenses under ORS Chapters 537 and 543.

Stat. Auth.: ORS 537 & ORS 543
Stats. Implemented:
Hist.: WRD 14-1986, f. & ef. 10-13-86

690-051-0010 Definitions

Terms used in ORS 537.170, 543.015, 543.017, 543.220, 543.225, 543.255, [543.257] and in these rules are given the following meanings:

- (1) "Affected Local Government" means any local government, as defined in OAR 690-005-0015, within whose jurisdiction the use of water for hydroelectric purposes, or the construction of all or part of proposed or existing project facilities would be located.
- (2) "Anadromous Salmon and Steelhead" means an individual fish, or a run, stock, or population of any species of salmon or any steelhead trout that:
 - (a) Is naturally or hatchery spawned in freshwater;
 - (b) Spends a portion of its life in the ocean; and
 - (c) Returns to fresh water to spawn.
- (3) "Approved Project" means a Permit application filed under ORS Chapter 537 for hydroelectric power use or a Preliminary Permit or License application filed under ORS Chapter 543 which has been approved by the Water Resources Commission or Director.

(4) "Available Water" means water not subject to statutory limits on use and which would not interfere with amounts needed for existing water right permits, [rights] certificates, or decrees including [and] minimum perennial streamflows, and instream water rights as established under ORS 537.332 through 537.360 and OAR 690-077. Available water shall be based on stream gage records or, if stream gage records are not available, flow estimates using generally accepted methods of hydrologic analysis. At the location where water from a hydroelectric project would be returned to the stream and is available for other instream or consumptive uses downstream, it is not considered to be contributing to over-appropriation of any downstream water availability sub-basin.

(5) "Commission" means Water Resources Commission.

(6) "Compensate" means to recover, replace, or substitute for loss from unavoidable or unforeseen adverse impacts of an action.

(7) "Cumulative Impact" means the collective effect resulting from incremental actions of past, present, or pending projects, developments or facilities.

(8) "Director" means the Water Resources Director or staff authorized by the Director to administer these rules.

(9) "Enhance" means to improve natural resource conditions over pre-project levels.

(10) "Existing Facility" means any permanent physical structure for the diver[s]ion, conveyance, control, or use of water, whether or not in current use.

(11) "Governmental Entity" means any federal or state agency and local government as defined in ORS 294.004, irrigation district formed under ORS Chapter 545 and a water control district formed under ORS Chapter 553.

(12) [*"Hydro Task Force" (HTF) representatives of the following state agencies, and other agencies as necessary, appointed by the Strategic Water Management Group pursuant to ORS 536.145 and chaired by the Water Resources Department*] "Agency Representatives" means any representatives of the following state agencies and other agencies as necessary that may be consulted by the Water Resources Department on the particular natural resources for which each is responsible:

- (a) Department of Agriculture;
- (b) Water Resources Department;
- (c) Department of Environmental Quality;
- (d) Department of Energy;
- (e) Department of Fish and Wildlife;
- (f) Department of Forestry;
- (g) [*Division*] Department of State Lands;

- (h) Parks and Recreation Department;
- (i) Department of Land Conservation and Development.

(13) "Improve" means to enhance.

(14) "License" means a hydroelectric license containing a time-limited water right issued to non-municipal applicants as provided in ORS 543.210 - 543.320.

(15) "Major Hydroelectric Project" means any hydroelectric project greater than 100 theoretical horsepower.

(16) "Minor Hydroelectric Project" means any hydroelectric project less than or equal to 100 theoretical horsepower.

(17) "Maximum Economic Development" means achievement of the greatest net practical economic gain to the people of the state.

(18) "Minimum Perennial Streamflow", also minimum streamflow, means the minimum flow in a stream designated by an administrative rule adopted in a basin program by the Water Resources Commission or its predecessors to implement ORS 536.235, 536.300(2), and 536.310(7) [established] to support aquatic life, *[or] to minimize pollution and to maintain recreation values.* *[The rule includes a priority date and specifies streamflow levels for all or any period of the year. It establishes priority for instream use over future appropriations and identifies flow objectives for future management in streams where shortages occur.]*

(19) "Mitigation" means taking action or measures that avoid, minimize, rectify, reduce or compensate for impact.

(20) "Modify" means to alter the appearance, character, structure, function or operation of an existing facility.

(21) "Net Loss" means that the magnitude, quality or type of natural resource lost, exceeds the magnitude, quality or type of natural resource provided by mitigation, restoration or enhancement.

(22) "Permit" means a Permit to appropriate water for hydroelectric development issued to municipal corporations as provided in ORS Chapter 537.

(23) "Preliminary Permit" means a Preliminary Permit issued to nonmunicipal hydroelectric applicants as provided in ORS 543.210 - 543.320.

(24) "Project" means any hydroelectric power project as defined in ORS 543.010.

(25) "Project Facilities" means all parts of the project necessary for or related to power

generation. Project facilities shall include dams, diversion structures, reservoirs, forebays, conveyance structures, penstocks, turbines, tailraces, navigation locks, fish ladders, fish screens, recreation facilities, tunnels, transmission lines, substations, buildings, structures and other such works necessary or related to the project.

(26) "Project Vicinity" means:

- (a) All lands and waters required for project facilities; and
- (b) All lands and waters which project construction or operation could reasonably be expected to affect.

(27) "Proposed Project" means a project for which an application has been received but not acted on by the Commission or Director.

(28) "Protected Area" means an area where the Northwest Power [*Planning*] **and Conservation** Council believes hydroelectric development would have unaccept[-]able risks of loss to fish and wildlife species of concern, their productive capacity or their habitat as designated in the Columbia **River** Basin Fish and Wildlife Program ([1987] **2014**); [*Northwest Conservation and Electric Power Plan (1991); Strategy for Salmon (1992);*] including [*amendments identifying*] Protected Areas **adopted on August 10, 1988, and subsequently amended** (September 14, 1988 and August 8, 1990, August 13, 1992) **pursuant to P.L. 96-501.**

(29) "Public Facilities" means private and public lands and structures that provide for transportation, power, communication, water supply, waste treatment, drainage, flood control, recreation and community services to meet public needs for health, safety and welfare.

(30) "Public Utility" means a utility regulated by the Public Utility Commissioner, under ORS Chapter 757, that provides electric power to consumers.

(31) "Restoration" means to return the condition of a natural resource to its pre-project state.

(32) "River Basin" means:

- (a) A subbasin designated by the Commission; or
- (b) A major river drainage not otherwise divided by the Commission.

(33) "Significant" means having importance in terms of the context and intensity of an action and its result.

(34) "Study Plan" means a document prepared by or on the behalf of the applicant which provides detailed descriptions of proposed methods for evaluating project impacts and effectiveness of potential mitigation measures.

(35) "THP" means theoretical horsepower, computed by multiplying the flow in cubic feet per second by the amount of fall in feet and dividing the product by 8.8.

(36) "Wasteful, Uneconomic, Impracticable or Unreasonable" as used in ORS 537.170 and 543.225 shall have the following meanings:

- (a) A use of water in greater quantities or at greater rates than necessary to achieve proposed project purposes;
- (b) A use of water for which quantifiable public and private economic costs exceed quantifiable public and private economic benefits over the life of the project as demonstrated in the record;
- (c) A use of water which could not reasonably be developed with the available means or methods;
- (d) A use of water which would preclude present beneficial uses or other uses with a reasonable expectation of being developed during the proposed life of the project, which have a greater value to the public.

(37) "Water-Dependent Recreational Opportunity" means a recreational opportunity that can occur only on or in water, such as swimming, boating, water skiing, and fishing.

(38) "Water-Dependent Recreational Opportunity of Statewide Significance" means a recreation opportunity that, combined with natural qualities of the water resource involved, has exceptional value. Factors that may contribute to statewide significance include special designation, high demand, uniqueness, outstanding or unusual natural surroundings, irreplaceable qualities or relatively limited availability. Recreation opportunities readily available on other waters shall not be considered of statewide significance.

(39) "Wild Game Fish" means any fish, run, stock or population of fish belonging to a family of fish listed in ORS 496.009 and which is sustained through natural reproduction.

Stat. Auth.: ORS 197, ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0020 Projects to be Considered by the Commission and/or Director

(1) The Commission or Director where designated by these rules or separate order, shall consider projects for which applications for Permits to appropriate water for hydroelectric purposes under ORS 537.140 and applications for Preliminary Permits or Licenses under ORS 543.010 to 543.620 have been filed.

(2) Projects shall be further classified as minor and major projects. For the purpose of these rules, a minor project shall be any project proposing to develop 100 THP or less. All other shall be major projects.

[(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 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.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0030 [Restriction] Notice on Filing

(1) *[No application shall be accepted by the Commission or Water Resources Department for a project in any of] **Whenever a proposed project is located within one of the following designated resource areas, the Department shall provide notice of the application to the managing agency:***

- (a) National parks;
- (b) National monuments;
- (c) Wilderness areas established by federal law;
- (d) Bureau of Land Management areas of critical environmental concern established under federal law;
- (e) Wild and scenic rivers established by federal law;
- (f) Estuarine sanctuaries established under Public Law 92-583;
- (g) Federal research natural areas established under federal regulation;
- (h) State parks and waysides;
- (i) Scenic waterways designated under ORS Chapter 390;
- (j) State wildlife refuges; or
- (k) State dedicated natural heritage areas established under ORS Chapter 273.

(2) *An application is exempt from the restrictions of section (1) of this rule, provided:*

- (a) *The application was filed prior to April 9, 1980;*
- (b) *The application was filed under ORS Chapter 537; and*
- (c) *The applicant has a valid lease from the agency managing the designated resource area.]*

Stat. Auth.: ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86

690-051-0050 Applications: Filing Procedure

(1) All applications to use water for hydroelectric purposes shall be filed with the Director at Salem, Oregon. Applications shall be typed so that the paragraphs and headings correspond with the information required. All applications shall be accompanied by the documents specified in OAR 690-051-0070, or 690-051-0100, and shall be dated and designated as "Exhibit A", "Exhibit B", etc.

(2) If the information required by these rules does not apply to the proposed project, it shall be noted on the application with a brief statement why the information does not apply.

(3) Information required to file an application is listed in the rules reference in section (1) of this rule. At any time, the Director may require additional information from the applicant.

(4) Applications [*filed before October 1, 1985, and*] on which no hearing has been held, shall meet all the [*filing*] requirements in these rules. [*Applicants shall be required to comply with these rules and will have 120 days from the date of notice to provide additional information. Failure to supply the required information may result in rejection of the application as incomplete. If more time is needed, a request must be made before the 120 days expires. Requests filed timely and showing good cause will be granted.*]

(5) Any municipal corporation of this state or utility district organized under section 12, Article XI, Oregon Constitution who has applied to the Federal Energy Regulatory Commission (FERC) for a preliminary permit, an exemption from licensing, or a notice of intent to construct a qualifying conduit hydropower facility shall, at the same time, apply to the Water Resources Department for:

(a) a permit under ORS 537.140 to appropriate water for a hydroelectric project,
or

(b) for a certificate to use water for hydroelectric purposes within an artificial delivery system under the applicant's existing water right under ORS 543.765.

(6) Any person other than in (5) above who has applied to the FERC for a preliminary permit, a license, an exemption from licensing, or a notice of intent to construct a qualifying conduit hydropower facility shall, at the same time apply to the Water Resources Department for:

(a) a state preliminary permit under ORS 543.210,

(b) a license under ORS 543.260, or

(c) a certificate to use water for hydroelectric purposes within an artificial delivery system under the applicant's existing water right under ORS 543.765.

(7) An applicant for a new hydroelectric project shall submit to the Department a complete copy of any application filed with FERC or similar application to another federal agency responsible for authorizing the project.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0060 Consultation

All applicants shall consult with appropriate [*public and private agencies*] **government entities**. Consultation shall occur before an application for a License or Permit is filed. The first consultation may occur with the [*Hydro Task Force*] **agency representatives** after the Preliminary Permit application has been accepted. Evidence of the consultation shall be filed with the License or Permit application. At a minimum, applicants shall consult with the **Water Resources Department and** affected local governments and the agencies under each heading listed below:

(1) Fish and Wildlife Resources:

(a) Oregon Department of Fish and Wildlife (ODFW);

(b) U.S. Fish and Wildlife Service (USF&WS);

(c) National Marine Fisheries Service (NMFS);

(d) Appropriate Indian tribe(s) identified by the Legislative Commission on Indian services; and

(e) Northwest Power [*Planning*] **and Conservation** Council (NP[P]CC), if the proposed project

is within a Protected Area designated by the Columbia River Basin Fish and Wildlife Program

([1987]**2014**); [*Northwest Conservation and Electric Power Plan (1991); Strategy for Salmon*

(1992);] including [*amendments identifying*] Protected Areas **adopted August 10, 1988, as**

subsequently amended (September 14, 1988 and August 8, 1990, August 13, 1992).

(2) Water Quality: **Oregon** Department of Environ[*-*]mental Quality (DEQ).

(3) Historic, Cultural and Archaeological Resources:

(a) State Historic Preservation Officer (SHPO); and

(b) Appropriate Indian tribe(s) identified by the Legislative Commission on Indian Services.

(4) Forestlands:

(a) U.S. Forest Service;

(b) **U.S.** Bureau of Land Management; and

(c) [*State Forestry*] **Oregon** Department **of Forestry**.

(5) Wetlands:

- (a) [*Division*] **Oregon Department** of State Lands (DSL);
- (b) [*The Natural Heritage Advisory Council*] **Oregon Parks and Recreation Department (OPRD)**; and
- (c) **U.S. Army** Corps of Engineers.

- (6) Scenic -- Aesthetic Resources,
 - (a) Planning department of each affected local government;
 - (b) DEQ (re noise standards);
 - (c) Federal managing agency, if public land **or a national Wild and Scenic River**; and
 - (d) Oregon Parks and Recreation Department.

- (7) Recreation Resources:
 - (a) Oregon Parks and Recreation Department;
 - (b) Federal managing agency, if public land **or a national Wild and Scenic River**; and
 - (c) Planning department of each affected local government.

- (8) Land Use and Access:
 - (a) Planning department of each affected local government;
 - (b) Appropriate state land management agencies;
 - (c) Federal managing agency, if public land; and
 - (d) Landowner(s), if private land.

- (9) Threatened and Endangered Species:
 - (a) ODFW;
 - (b) USF&WS; and
 - (c) NMFS[; *and*
 - (d) *Oregon Natural Heritage Data Base (The Natural Heritage Advisory Council).*]

- (10) **Natural Areas**: [*Natural Communities and Geological Features: Oregon Natural Heritage Data Base (The Natural Heritage Advisory Council).*] **OPRD**.

Stat. Auth.: ORS 197, ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0090 Applications for Minor Projects: Contents, Scope of Evaluation and Application of Standards

[(1) Under ORS 543.300(7), the Commission may waive any or all procedural but not substantive standards for a minor License or Permit. The term of a License and annual fees cannot be waived. The Commission's waiver authority is delegated to the Director.]

([2]1) An application shall be filed for each minor License or Permit. **An application must contain the information in OAR 690-051-0070.** [*Contents of the application shall be prescribed by the Director.*] No application shall be filed for a project in a designated resource area described in OAR 690-051-0030 **without the consent of the managing agency.**

(2) The Department shall receive the application together with the filing fee and date stamp the application which will thereafter serve as the priority date of the application. If the application is for an area withdrawn from hydroelectric development by the Commission the application and filing fee may be returned.

(3) The Department may schedule a site visit to the proposed project with other agency representatives. A public hearing shall be held only if the Director, [*or Commission in the case where a protest has been referred to the Commission pursuant to paragraph (f)(E) of this section*] deems it in the public interest to do so. The hearing may be limited to specific issues. **Notice of the hearing shall meet the requirements specified in OAR 690-051-0130(3).** Upon acceptance of a minor hydroelectric application, the following [*public notice, technical review, filing of objection and public hearing*] **review** process shall apply:

(a) Upon filing of a minor hydroelectric application, the Director shall notify the following groups and individuals of the information described in subsection (b) of this section:

- (A) Affected local, state and federal agencies, including the planning departments of affected local governments with a request that a copy of said notice be posted in a conspicuous location in the county courthouse;
- (B) Property owners within 300 feet of the proposed powerhouse;
- (C) Affected Indian tribes; and
- (D) All persons on the Department's weekly [*mailing*] **notice** list.

(b) The notice shall include but is not limited to the following information:

- (A) Application file number;
- (B) Applicant name and address;
- (C) Amount of proposed water use;
- (D) Common name of water source;
- (E) Location of the proposed point of diversion and point of power generation;
- (F) Purpose for which the power would be used;
- (G) Total amount of power to be developed;
- (H) If a pond or reservoir is part of the project, how much water will be impounded.**

(c) A 30-day comment period shall commence on the day the Department [*mails*] **sends** the notice. The notice shall state the date comments must be received by the Department;

(d) Following the comment period, the Department shall [*develop a technical report on the acceptability of the project considering the basin plan, scenic waterway flow requirements, potential conflict with existing water rights, and the resource protection standards*] **prepare a**

proposed final order with findings to address whether the proposed project together with any recommended measures to protect, mitigate, or enhance the natural resources of the State is consistent with the minimum standards in ORS 543.017 and the requirements in OAR 690-051-0160 through 690-051-0270 and whether the project would impair or be detrimental to the public interest as provided in ORS 543.225. The [technical review] **proposed final order** shall include the action proposed to be taken on the minor hydroelectric application;

(e) The [technical report] **proposed final order** shall be distributed to the applicant and all individuals, including all governmental agencies, who have filed timely comments with the Department. The report shall state the date by which [objections] **protests** must be received by the Director (60 days from the date [of mailing] **it was distributed**);

(f) Comments, [or objections], **or protests** must state facts which support the allegation that the proposed minor hydroelectric use should not be acted upon as proposed by the [technical report] **proposed final order**. Upon receiving a [n objection] **protest**, the Director shall:

(A) Transmit [the objection] **copies of any protest timely filed** to the applicant and all [objectors, and] commentors;

(B) [Base upon the objection, determine if the technical report was in error and, if so, issue a revised technical report or portion thereof. Any new technical report revisions shall be disseminated and reviewed as described above;

(C) If the objection is not considered valid by the Director, the objector shall be notified within 30 days;

(D) The objector shall be allowed 30 days from the date of mailing of their denial to submit a protest. The form and content of the protest along with the filing and service procedure shall be in accordance with the standards set forth in OAR 690-002-0030 through 690-002-0080.

(E) If a protest is timely filed, the Director] **Evaluate the protest to determine whether significant issues are raised and if so** shall refer the application, with accompanying [objection and] protest, to the [Commission] **Office of Administrative Hearings (OAH) established under ORS 183.605 to 183.685** for [review] **a contested case hearing**. **If the Director determines the protests do not raise significant issues, the Director shall issue a final order.** **A final order issued pursuant to this section is a final order in other than a contested case subject to judicial review under ORS 183.484.**

(4) [Any minor project that would violate the standards in OAR 690-051-0190 through 690-051-0260 shall be proposed for rejection. The applicant shall be given the opportunity to request a contested case hearing. Notice of filing a request for a contested case hearing shall be distributed to interested parties, commentors and objectors.] **If the application is referred for a contested case hearing, a proposed order shall be issued by the Administrative Law Judge (ALJ) after the hearing. Any party to the contested case hearing may file exceptions to the ALJ's proposed order. Exceptions must be filed with the Department within 30 days of the order. If no exceptions are filed to the ALJ's proposed order within 30 days, the Director shall issue a final order consistent with subsection (6) below.**

(5) If exceptions are filed to the ALJ's proposed order, the Director shall review/hear argument (written or oral, at his/her discretion) and make the final determination for the final order.

(6) 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 use would not comply with the standards of ORS 543.017 and the requirements of OAR 690-051-0160 through 690-051-0290 or would otherwise impair or be detrimental to the public interest as provided in ORS 543.225, the Director shall issue a final order rejecting the application or modifying the proposed order to comply with ORS 543.017 and the public interest. If, after the contested case hearing the Director determines that the proposed use would comply with the standards of ORS 543.017 and would not impair or be detrimental to the public interest as provided in ORS 543.225, the Director shall issue a final order approving the application or otherwise modifying the proposed order.

(7) A final order may set forth any of the provisions or restrictions to be included in the permit or minor License concerning the use, control and management of the water to be appropriated for the project, including, but not limited to, a specification of reservoir operation and minimum releases to protect the public interest.

(8) If the project is approved a Permit or minor License shall then be issued after any balance due on the application filing fee has been paid.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0095 Applications for Major Projects: Scope of Evaluation and Application of Standards

This rule establishes the process the applicant, the Department and those participating in the process must follow and defines the stages of application review and processing as required by ORS 543.280(4). The fee for each stage must be paid at the beginning of each stage of project review. If an applicant submits an application in any stage other than stage one, the total fees due up to an including that stage will be due upon submittal. Municipal corporations and utility districts follow the consultation requirements described however, no Preliminary Permit is required.

(1) Stage One -- 20 Percent of Fee: Preliminary Permit and Consultation:

(a) The Department shall receive the application together with the filing fee and date stamp the application which will thereafter serve as the priority date of the application (if the application is

for an area withdrawn from hydroelectric development by the Commission the application and filing fee will be returned):

(A) The application shall be returned for correction or completion if defective. Additional information may be requested;

(B) Upon receipt of an application that is complete and not defective, [N] notice of the application shall be printed in the Department weekly notice.

(b) The Department shall distribute copies of the application to the other agency representatives [*Hydro Task Force (HTF)*]. The Department shall set a meeting date with the applicant to appear before the other agency representatives [*HTF*] to give a presentation of the project;

(c) The applicant shall prepare a draft study plan for the project and distribute it to the appropriate agencies listed in OAR 690-051-0060 as applicable. For each of the resources that may be impacted, the written study plan should include the following major study elements and phases:

- (A) Objectives;
- (B) Resource background;
- (C) Rationale or justification for proposed approach;
- (D) Study area;
- (E) Methodology;
- (F) Sampling location and number, frequency and timing of sampling;
- (G) Data treatment and analysis;
- (H) Report preparation;
- (I) Schedule; and
- (J) Review of draft and final technical reports by resource agencies.

(d) The Department shall schedule a site visit and a public hearing for the purpose of providing information and receiving public questions and comment on the proposed project. Notice of the public hearing shall conform to OAR 690-051-0130;

(e) The Department shall establish a comment period during which the [*HTF*,] other affected agencies or the public shall review and comment on the draft study plan supplied by the applicant;

(f) The Director [*or Commission*] shall issue an order to modify, approve or reject the Preliminary Permit application based upon the standard set out at OAR 690-051-0080;

(g) The Preliminary Permit is denied or issued by the Director.

(2) Stage Two -- 30 Percent of Fee: Study and Draft Application:

(a) The applicant shall modify the study plan based upon the requirements imposed by the Preliminary Permit and submit it to the agencies and the Director for [approval] review. Notice of submittal shall appear in the Department weekly notice;

(b) An agency, tribe or the public may file a request with the Director for additional specific studies within 30 days of receipt of the final study plan;

(c) The applicant must file a response to a study request within 30 days of receiving notice from the Director of the request;

(d) The **Director shall** [Commission shall resolve any dispute and] inform all participants of requests and responses to study requests that are received [to the dispute accordingly];

(e) The applicant shall conduct the studies in coordination with state and federal agencies;

(f) The applicant shall prepare a draft License or Permit application which it submits to the state and federal agencies and Indian tribes and makes available for public review. Notice of the opportunity to review the draft application shall be posted in the Department's weekly [newsletter] public notice;

(g) Comments on the studies and draft License or Permit application shall be submitted within a time [certain to] specified by the Director who shall forward [collated] all responses to the [HTF] other agency representatives and the applicant.

(3) Stage Three -- 30 Percent of Fee: **Final Applica[-]tion, [and] Cumulative Impact and Public Interest Reviews, [and] Determinations and Hearings Process:**

(a) The applicant shall file the **Final** License or Permit application with the Water Resources Department. **Permit applications filed by municipal corporations or utility districts under ORS 537.140 for hydroelectric purposes and final license applications that are not following a preliminary permit application are also subject to the requirements of a public site visit and public hearing as in OAR 690-051-0095(1)(d).** The Department shall distribute the application to the appropriate consultation agencies. The Department shall [mail] send notice of [its availability] the application and of the filing to the local planning authority, affected property owners and public interest groups on record at the Water Resources Department as requesting such notices. The application shall be made available to the public by the [developer] project applicant and the Department;

(b) An agency, Indian tribe or member of the public who requests additional information shall notify the Director within 60 days after the application is so filed;

(c) The applicant shall file a response to additional information request(s) within 30 days of receiving notice from the Director of the request;

(d) The [Commission] **Director** shall either accept or reject the applicant's position on additional studies and notify the affected parties accordingly;

(e) Once the application issues are resolved, a "ready for final review" notice shall be sent to agencies and interested parties by the Director (comments must be submitted within 60 days of the final review notice);

(f) The Director shall prepare a[n] **proposed final order [on] that determines whether the proposed Project together with the recommended measures to protect, mitigate or enhance the natural resources of the State is consistent with the minimum standards of ORS 543.017, and the requirements of OAR 690-051-0160 through 690-051-0290 and whether the Project would impair or be detrimental to the public interest as provided in ORS 543.225. The proposed final order shall also provide findings on whether [the potential] the proposed project may contribute to cumulative impacts with other existing, proposed or approved hydroelectric projects in the same river basin and whether consolidated review is required under ORS 543.255 and OAR 690-051-0290.**

(g) The proposed final order shall be distributed [it] to state and federal agencies, Indian tribes, [and] owners of other proposed, approved or existing hydroelectric projects in the same river basin and other participants. Notice of the proposed final order shall be published in the Department's weekly public notice.

[(g) If a determination is made that there is no potential for cumulative impacts the Director shall conduct a contested case hearing on the public interest issues of the application, i.e., on the merits of the application. A proposed order is issued by the Referee. If no exceptions are filed to the proposed order within 30 days, the proposed order becomes final and is signed by the Director;]

*(h) [If the Director determines that there is potential for cumulative impacts with other existing or pending projects in the same river basin, the Director shall conduct a consolidated review. The review shall be in the form of a contested case hearing. A proposed order shall be issued by the Referee. If no exceptions are filed to the proposed order within 30 days, the order becomes final and is signed by the Director;] **If the Director determines that consolidated review is required, the Department shall refer the matter to the OAH to conduct a contested case hearing only after the period to file protests has passed in order to allow for all issues regarding the proposed project to be addressed in one contested case hearing. Such hearing may be consolidated or bifurcated as the Department directs.***

*(i) [If exceptions are filed to the final order, the Commission shall review/hear argument (written or oral, at its discretion) and make the final determination for the final order.] **If one or more protests are filed within 30 days after issuance of a proposed final order the Department shall refer the matter to the OAH for a contested case hearing as provided in ORS 543.230(2) and/or 543.255(3). All issues regarding the proposed project may be addressed***

in one hearing. The hearing may be consolidated or bifurcated as the Department directs. If no protest is filed the Director shall issue a final order consistent with subsection (l) below.

(j) A proposed order shall be issued by the ALJ after a contested case hearing. Any party to the contested case hearing may file exceptions to the ALJ's proposed order. Exceptions must be filed with the Department within 30 days of the order. If no exceptions are filed to the ALJ's proposed order within 30 days, the Director shall issue a final order consistent with subsection (l) below.

(k) If exceptions are filed to the ALJ's proposed order, the Director shall review/hear argument (written or oral, at his/her discretion) and make the final determination for the final order.

(l) 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 use does not comply with the minimum standards of ORS 543.017 and the requirements of OAR 690-051-0160 through 690-051-0290 or would otherwise impair or be detrimental to the public interest as provided in ORS 543.225, the Director shall issue a final order rejecting the application or modifying the proposed final order to comply with ORS 543.017 and the public interest. 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 use would comply with the standards of ORS 543.017 and would not impair or be detrimental to the public interest of ORS 543.225, the Director shall issue a final order approving the application or otherwise modifying the proposed final order. A final order may set forth any of the provisions or restrictions to be included in the permit or final License concerning the use, control and management of the water to be appropriated for the project, including, but not limited to, a specification of reservoir operation and minimum releases to protect the public interest.

(m) If the project is approved a Permit or final License shall then be issued per OAR 690-051-0095(4).

(4) Stage Four -- 20 Percent of Fee: Final Plan Review and Inspection:

(a) The License or Permit shall be issued or denied with conditions that the Director [*or Commission, in cases where the final order is issued by the Commission,*] deems necessary;

(b) The applicant shall submit construction specifications to the Director:

(A) The Director shall distribute the plans and specification to appropriate agencies and collate issues to be addressed by the applicant;

(B) The plans shall be approved by the Director or modified by the applicant and approved or

denied.

(c) The applicant shall submit a construction schedule to the Director and construction bond documentation;

(d) The Director shall issue a Notice to Proceed;

(e) The applicant shall notify the Director of the beginning of construction;

(f) The Director shall conduct a final inspection [*or final proof survey*] **of the constructed Project. For permits issued for applications filed under ORS 537.140 a water right certificate may be acquired according to ORS 537.250.**

Stat. Auth.: ORS 536.025 & ORS 536.027

Stats. Implemented:

Hist.: WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0130 Public Hearings Requirements for Preliminary Permits, Licenses and Permits; Notice of Hearings

(1) [*A contested case hearing shall be held on any License or Permit application in excess of 100 THP, and on any application for 100 THP or less, as determined necessary pursuant to OAR 690-051-0090 for which the Commission determines it is in the public interest.*]

(2)] A public hearing shall be held on each application for a Preliminary Permit **or as required under 690-051-0095(3)(a)**. The public hearing shall be held in a community near the proposed project with notice provided pursuant to section ([3] 2) of this rule

([3] 2) Notice of hearing shall be given to:

(a) The applicant;

(b) Interested parties;

(c) Property owners within the project vicinity;

(d) The affected tribe(s) as identified by the Legislative Commission on Indian Services;

(e) The governing body(ies) of any affected county(ies) or city(ies); and

(f) The planning department(s) of the affected county(ies) or city(ies) as provided by ORS Chapters 183, 537 and 543.

(4) The Director, through press releases or additional notices, also shall endeavor to provide general notice to individuals or organizations who have expressed an interest in the outcome of the proceedings.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0140 Time and Place of Hearings

The *[time and place for holding]* **conduct of contested** hearings shall be **as provided in OAR 137-003-0501 through -0700.** *[fixed by the Director. In case no protest or objection against an application is filed by the time announced in the hearing notice, the]* **The** contested case hearing may be heard at the Director's office in Salem.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0150 Filing of Protests and [Remonstrances] Requests for Standing

(1) All protest and requests for standing [objections] must be filed with the Director within the time specified in the notice. To become a party to a contested case hearing the fees required under ORS 536.050(1) (j), (n), and/or (o) as appropriate must also be submitted by the notice date.

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

(a) The name, address and telephone number of the protestant;

(b) A description of the protestant's interest in the proposed final order 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 proposed final order would impair or be detrimental to the protestant's interest;

(d) A detailed description of how the proposed final order 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; and

(f) For persons other than the applicant, the protest fee required under ORS 536.050.

(3) Any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order. The request for standing must be in writing, signed by the requester, and include the following:

(a) The requester's name, mailing address and telephone number;

(b) If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;

(c) A statement that the requester supports the proposed final order as issued;

(d) A detailed statement of how the requester would be harmed if the proposed final order

is modified; and

(e) The fee established under ORS 536.050.

(4) Any person who has filed a timely request for standing may later file a petition for party status in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 137-003-0535.

(5) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period.

(6) The Department shall send a copy of all protests and requests for standing received to the applicant, the protestant(s), if any, and to each person who requested standing.

[NOTE: Rules Pertaining to Preparation, filing and service of protests are found at OAR 690-002-0030 to 690-002-0050.]

Stat. Auth.: ORS 536.027, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0160 Standards for Evaluation

The standards in OAR 690-051-0170 to 690-051-0290 implement the provisions of ORS 537.160, 537.170, 543.017, 543.225 and 543.255 for the review of all hydroelectric applications. To be approved, a project must *[meet]* comply with the *[general and resource specific]* minimum standards in ORS 543.017 and the requirements of OAR 690-051-0170 to OAR 690-051-[0260. Economic and need for power standards in OAR 690-051-0270 and 690-051-0280 must be met as well. When required, a project must also be reviewed with other projects pursuant to OAR 690-051-] 0290, and must not impair or be detrimental to the public interest as provided in ORS 543.225.

Stat. Auth.: ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86

690-051-0170 [Protection of] Designated Resource Areas and Special Management Areas

(1) The Director shall consult with the managing agency for any [P] proposed projects having effects on a designated resource area listed in OAR 690-051-0030(1) or a special management area listed in section (2) of this rule, shall be] to determine conditions that may be required to ensure the proposed use is consistent with the authorized use of the area. [The

Director, or Commission in actions where exceptions have been filed to the Director's proposed order requiring Commission action, shall decide if a project is consistent only after review of input from the managing agency. If the Director or Commission approves a project that is not consistent, findings that support the action shall be made.]

- (2) Section (1) of this rule applies to the following special management areas:
- (a) National wildlife refuges;
 - (b) National recreation areas;
 - (c) State wildlife management areas;
 - (d) State forests;
 - (e) County parks;
 - (f) City parks;
 - (g) Special district parks;
 - (h) Sites listed in or determined eligible for inclusion on the National Register of Historic Places;
 - (i) Areas managed by federal agencies for study, inclusion or designation as a [*Protected Area*] **special management area** under federal law or regulation; and
 - (j) Areas under study by state agencies for inclusion in or designation as a [*Protected Area*] **special management area** under state statute or regulation.
 - (k) Protected areas designated by the Columbia River Basin Fish and Wildlife Program ([1987] **2014**); [*Northwest Conservation and Electric Power Plan (1991); Strategy for Salmon (1992);*] including [*amendments identifying*] Protected Areas **adopted on August 10, 1988, and subsequently amended** (September 14, 1988 and August 8, 1990, August 13, 1992).

(3) All applications for projects in or affecting the Columbia Gorge [*as designated in ORS 390.460*] shall be consistent with the policy in [*ORS 390.415 as determined by the Commission after considering the recommendation of the Oregon Columbia River Gorge Commission*] **the Columbia River Gorge National Scenic Area. P.L. 99-663.**

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0180 Mitigation, No Net Loss

(1) The following standards on mitigation and no net loss are minimums. They apply to all natural resources in [*general*] **the project vicinity**. Resource specific rules may impose stricter standards. In order to approve an application, the Director, [*or Commission when exceptions have been filed to the Director's proposed order on the License or Permit, shall have due regard for*] **must determine the natural resources of the state will be maintained or enhanced**. [*and enter appropriate findings on*] **In making such a determination, the following standards must be applied:**

(a) No activity may be approved that may result in the net loss of natural resources. In determining whether a proposed activity may result in a net loss of natural resources, the

department may consider mitigation. [*Proposed mitigation must be in the project vicinity;*]

(b) Proposed mitigation must be **in the project vicinity and determined as** acceptable to the Director or Commission;

(c) All mitigation measures which reasonably can, shall be fully functional when the project begins operation; and

(d) The Collective benefits of all mitigation measures must equal or exceed the collective adverse impacts on natural resources so there is no net loss of natural resources.

(2) In applying the standards in section (1) of this rule, the Commission or Director shall:

(a) Consult with federal, state, and local resource agencies, and the appropriate affected tribe(s); and

(b) Prefer mitigation that benefits the natural resource(s) affected, over mitigation that benefits some other natural resource(s). If mitigation that benefits the affected natural resource(s) is unacceptable or not possible, mitigation that benefits some other natural resource(s) may be considered.

(3) The standards in section (1) of this rule shall apply to the following natural resources: Water quality; wildlife; scenic and aesthetic resources; historic, cultural, and archaeological; agricultural lands; forest resources; wetlands; plant life; fish life; recreation; soils; and natural communities and geologic features.

(4) At the Director's discretion, [*or the Commission's discretion in the case where an exception has been filed to the Director's proposed order,*] the standards in section (1) of this rule may apply to natural resource(s) not identified in section (3) of this rule that an applicant or interested party can demonstrate to be **a natural resource** of value to the public. Anyone making a showing of value for a natural resource not listed in section (3) of this rule shall also propose, for consideration, a standard for the protection of the natural resource. If agreed by the Director[, *or Commission in cases where an exception has been filed to the Director's proposed order,*] and upon acceptable showing of public value, an applicant may propose enhancement or other mitigation of an unlisted natural resource to offset impacts on natural resources listed in section (3) of this rule.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0190 Water Resources

The Director and Commission shall **determine whether the proposed project would impair or be detrimental to the public interest so far as the coordinated, integrated state water resources policy is concerned.** [*have due regard for water resources.*]

application, the Director[, or in cases where the final order is issued by the Commission, the Commission, shall enter appropriate findings on the following standards] **shall have due regard for:**

(1) The[re is available water to provide for reasonable operation of the proposed project] **amount of waters available for appropriation for beneficial use;**

(2) **Whether [T]** the proposed use will [not] preclude or interfere with any existing rights or permits for the use of water.

(3) **Whether [T]** the proposed use is consistent with the applicable State Water Resources Policies in OAR Chapter 690, Divisions 400, 410 and the Basin Program in OAR Chapter 690, Divisions 500 through 520 or, in the absence of a policy, the proposed use is consistent with the policies set forth in ORS 536.300 through 536.350.

(4) **Whether [T]** the project is consistent with achieving maximum economic development of the waters involved.

(5) **Whether [T]** the project is consistent with making the fullest practical use of the stream's hydroelectric potential in the project vicinity.

(6) **Whether [T]** the project will [not] constitute wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

(7) **Whether [T]** the project, including mitigation and enhancement measures, is consistent with conserving the highest use of the waters of the state for all beneficial purposes.

(8) **Whether [T]** the project is consistent with controlling the waters of the state for all beneficial purposes, including, drainage, sanitation and flood control.

(9) **Whether [C]** construction and operation of the proposed project [shall] compl[y]ies with water quality standards established in OAR Chapter 340, Division 41. Exceptions to this standard may be allowed if permitted by Division 41 rules, and granted by the DEQ [*and approved by the Director, or in cases where an exception has been filed to the Director's proposed order, the Commission*].

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0200 Fish Resources

(1) [*The Director and Commission shall have due regard for fish resources in general. In order to approve an application, the Director, or in cases where exceptions have been filed to the*

Director's proposed order, the Commission, shall enter appropriate findings on the following standards:

(a) *Project facilities and operations will not have significant adverse impacts on fish populations;*

(b) *Project facilities and operations will not unreasonably interfere with upstream and downstream passage of fish through the project vicinity. The Director, or in cases where the final order is approved by the Commission, the Commission may make exceptions to this standard in special cases where fish populations have been significantly damaged by past activities and the proposed single- or multiple-purpose project development will improve existing fish populations;*

(c) *Project facilities and operation have been designed to mitigate, to the greatest extent practicable, adverse impacts upon spawning, rearing or other habitat areas necessary to maintain the levels and existing diversity of fish species;]*

Per ORS 543.017, anadromous salmon and steelhead resources and habitats shall be preserved. It is the policy of the State to protect the natural resources of the state from possible adverse impacts of a project (ORS 543.015). In order to approve an application, the Director or Commission may require that applicants implement, operate and maintain measures to mitigate for possible adverse impacts specific to a Project. The Department shall consider the need for the following mitigation measures to protect fish habitats and/or fish resources including but not limited to:

(a) Providing for fish passage around diversion structures, dams or reservoirs with appropriate bypass flows, ladders and/or other measures as may be required by ODFW under ORS 509.580 to 509.585;

(b) Screening of intakes to prevent juvenile entrainment through turbines as may be required by ODFW under ORS 498.301 to 498.321;

(c) Preventing false attraction water from guiding fish into turbines at the tailrace;

(d) Controlling ramping rates to prevent stranding of fish;

(e) Avoiding delay of upstream or downstream migration;

(f) Managing wood and gravel through the project to maintain or enhance habitat conditions; and/or other impacts.

(2) Evidence of a fish screening agreement or waiver with ODFW; a fish passage waiver, exemption or agreement with the ODFW or the Oregon Fish and Wildlife Commission; and/or an agreement to implement final terms and conditions recommended by ODFW to the FERC under Section 10(i) or 30(c) of the Federal Power Act shall satisfy these standards, as applicable.

(3) All projects which divert water away from a portion of a stream, excepting those processed under ORS 543.765, may be conditioned to provide bypass flows for aquatic

habitat protection before water may be diverted for power production.

([d] **4**) Unavoidable adverse impacts on fish or to fish management programs will be mitigated;

([e] **a**) Project construction, timing and procedures are designed to minimize fishery impacts from instream construction work and premature or unnecessary land clearing and disturbances;

([f] **b**) All fishery protective measures [*and*] **are** scheduled to be fully functional when the project commences operations; and

([g] **c**) The proposed project is consistent with ODFW management programs in force on the effective date of these rules.

([2] **5**) [*The Director and Commission shall have due regard for wild game fish.*] No project shall be approved that would result in a net loss of wild game fish. In order to approve an application, the Director [, *or in cases where exceptions have been filed to the Director's proposed order, the Commission, shall enter appropriate findings on*] **shall apply** the following standards:

(a) A project, any part of which is located on a river or stream reach used by wild game fish, or that would adversely affect wild game fish, shall include **acceptable** mitigation measures which:

(A) Are located in the project vicinity;

(B) Are in effect at the time of adverse impact or start of project operation, whichever comes first;

(C) Will prevent a net loss to individual species of wild game fish;

(D) Will prevent conversion of a wild game fish population and fishery to a hatchery dependent resource;

(E) Are consistent with ODFW management plans and programs in force on the effective date of these rules; and

(F) Employ workable and generally accepted methods and techniques of mitigation best suited to the affected fish resource(s).

([3] **6**) [*The Director and Commission shall have due regard for salmon and steelhead fish and habitat.*] No project shall be approved that may result in mortality or injury to an individual anadromous salmon or steelhead or loss of any salmon or steelhead habitat. In order to approve an application, the Director[, *or in cases where the Commission approves the final order, the Commission, shall enter appropriate findings on*] **shall apply** the following standards:

(a) If proposed at an undeveloped site, it is not reasonably foreseeable that the location, design, construction or operation of the project may result in mortality or injury to an individual anadromous salmon or steelhead or loss of any salmon or steelhead habitat; and

(b) Modification of an existing facility or project on a stream reach used by anadromous salmon

or steelhead or providing anadromous salmon or steelhead habitat shall include acceptable measures that:

- (A) Are reasonably certain to restore, enhance or improve existing salmon and steelhead populations in the affected river;
- (B) Comply with wild game fish standards in paragraphs ([2] 5)(a)(C) and (D) of this rule if the affected salmon or steelhead populations contain wild fish;
- (C) Are consistent with ODFW Fishery management plans and programs in force on the effective date of these rules;
- (D) Employ workable and generally accepted methods and techniques best suited to the fish resources affected by the proposed project; and
- (E) Are in effect at the time of adverse impact or start of project operation, whichever comes first.

([4] 7) In order to approve an application for a project within the Columbia River Basin, the Director[, *or in cases where exceptions have been filed on the proposed order, the Commission*] shall find that the proposed project complies with the fish protection, mitigation and enhancement requirements of the Northwest Power and Conservation Council (NPCC) [NPCC's] Columbia River Basin Fish and Wildlife Program. [*Certification of compliance by the NPCC shall satisfy this standard.*]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. 3f. 5-19-93

690-051-0210 Wildlife

[*The Director and Commission shall have due regard for wildlife.*] Wildlife and wildlife habitats in the project vicinity shall be maintained or enhanced. In order to approve an application, the Director[, *or in cases where an exception has been filed on the proposed order, the Commission, shall enter appropriate findings on*] shall apply the following standards:

(1) The location, design, construction or operation of the proposed project shall not jeopardize the continued existence of animal species which have been:

(a) Designated, or officially proposed by the USF&WS, or the NMFS as threatened or endangered pursuant to the Endangered Species Act of 1973; or

(b) [*Identified by the Oregon Natural Heritage Data Base as endangered, threatened or limited in Oregon; or*]

(c) Identified by the Oregon Fish and Wildlife Commission or ODFW as threatened, [*or*] endangered, limited or sensitive in Oregon.

(2) The location, design, construction and operation of project facilities will minimize adverse impacts on wildlife habitat, nesting and wintering grounds, and wildlife migratory routes.

(3) Project construction methods and scheduling will minimize disruption of wildlife and avoid premature or unnecessary land clearing in the project vicinity.

(4) Unavoidable adverse impacts on wildlife or wildlife habitat will be mitigated in the project vicinity by acceptable methods such as replacement of vegetation, regulation of reservoir levels, creation of aquatic habitat, improvements in wildlife carrying capacity in the project vicinity or acquisition of land or management rights.

(5) The project is consistent with applicable ODFW management programs in force on the effective date of these rules;

(6) If, within the Columbia River Basin, the project is consistent with the provisions of the [NPPC's] NPCC's Columbia River Basin Fish and Wildlife Program and the Northwest Conservation and Electric Power Plan. [*Certification of compliance by the NPPC shall satisfy this standard.*]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0220 Plant Life

[*The Director and Commission shall have due regard for plant life .*] In order to approve an application, the Director[, *or the Commission in cases where an exception has been filed to the Director's proposed order, shall find*] **shall apply the following standard:** that the location, design, construction or operation of the proposed project shall not jeopardize the continued existence of plant species which are:

(1) Designated or officially proposed by the USF&WS as threatened or endangered pursuant to the Endangered Species Act of 1973.

(2) Identified by the Oregon Department of Agriculture [*Oregon Natural Heritage Data Base*] as endangered, threatened or candidate species [*limited*] in Oregon.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0230 Recreation

[*The Director and Commission shall have due regard for recreation .*] No project may be approved that would result in a net loss of recreation opportunities. **Scenic and aesthetic values shall be maintained or enhanced.** In order to approve an application, the Director[, *or in cases where an exception has been filed to the Director's proposed order, the Commission shall enter appropriate findings on*] **shall apply** the following standards:

(1) Project facilities will be designed, located and operated to substantially avoid visible or audible intrusion on the natural setting integral to existing recreational facilities, activities or opportunities.

(2) The proposed project will not reduce the abundance or variety of recreational facilities or opportunities available in the project vicinity.

(3) Unavoidable adverse impacts on nonwater-dependent recreation facilities, activities or opportunities will be mitigated in the project vicinity by providing **acceptable** replacement facilities or opportunities of the same or similar nature and abundance.

(4) The project will not have significant adverse impacts on any unique, unusual or distinct natural feature which provides the focus or attraction for non water-dependent recreational facilities or activities.

(5) Unavoidable adverse impacts on any water-dependent recreational opportunity will be mitigated with **acceptable** replacement by or enhancement or another water-dependent recreational opportunity available in the project vicinity.

(6) The proposed project will not cause the loss of or significant adverse impact to any water-dependent recreational opportunities of statewide significance.

(7) Adverse impacts on any specific elements, such as flow regime, length of reach, access, season of use, degree of difficulty, of a water-dependent recreational opportunity of statewide significance, will be offset by **acceptable** enhancement to other element(s) of the same water-dependent recreational opportunity in the project vicinity.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0240 Historic, Cultural and Archaeological Resources

(1) [*The Director and Commission shall have due regard for_h*] **H**istoric, cultural and archaeological resources **shall be maintained or enhanced.** In order to approve an application, the Director[, *or in cases where an exception has been filed to the Director's proposed order, the*

Commission shall enter appropriate findings on] shall apply the following standards:

- (a) The project will not result in significant adverse impact(s) on any historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places;
 - (b) The project will comply with state laws to protect Indian graves (ORS 97.740 - 97.760), historical materials (ORS 273 .705 - 273.711) and archaeological objects and sites (ORS 358.905 - 358.955);
 - (c) Unavoidable adverse impacts on historic, cultural and archaeological resources will be mitigated in accordance with generally accepted professional standards; and
 - (d) Archaeological data of significance associated with a site not eligible for inclusion in the National Register of Historic Places will be recovered in accordance with generally accepted professional standards.
- (2) Before filing an application for a License or Permit, developers shall consult with the State Historic Preservation Office, the State Legislative Commission on Indian Services and appropriate tribes about Indian historic and cultural resources in the project vicinity.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0250 Land Resources

[The Director and Commission shall have due regard for land resources.] In order to approve an application, the Director[, or in cases where an exception has been filed to the Director's proposed order, the Commission shall enter appropriate findings on] **shall apply** the following standards:

- (1) Adverse impacts on high value or important farmlands or agricultural land as identified in OAR Chapter 660, Division 33, shall be avoided, minimized or offset by acceptable mitigation.
- (2) Adverse impacts on prime forestlands as defined by the city or county and by the Oregon Forestry Department shall be avoided, minimized, or offset by acceptable mitigation.
- (3) Adverse impacts on wetlands as defined by OAR 141-085 [-0010(20)] or identified by the [Oregon Natural Heritage Data Base] **Department of State Lands** will be avoided, minimized, or offset by acceptable mitigation.
- (4) Project facilities shall be designed and located to avoid or minimize adverse impacts on:

(a) Outstanding scenic and aesthetic views and sights inventoried in city and county comprehensive plans as required by Statewide Planning Goal 5; and

(b) Scenic and aesthetic resources identified by state or federal agencies as outstanding, significant or deserving special protection **including natural areas designated under ORS 273.563 to 273.591.**

(5) Project facilities will be designed and located to blend with adjacent features.

(6) Mechanical noise caused by the project complies with applicable noise standards in OAR Chapter 340, Division 35.

(7) The location, design, construction or operation of the project will not:

(a) Disturb fragile or unstable soils; or

(b) Cause soil erosion which would impair other water uses.

[(8) Design, location, construction and operation of the proposed project will avoid or minimize adverse impacts on natural communities or geological features identified by the Oregon Natural Heritage Data Base as threatened or endangered in Oregon.]

[(9) 8] Project facilities located in geologically unstable areas are designed with appropriate safeguards.

[(10) 9] Project facilities located in areas subject to naturally occurring conditions or hazards, such as flooding or ice formation are designed to withstand damage to project facilities and allow reasonable access for project maintenance or operation under such conditions.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

[690-051-0270 Economics

The Director and Commission shall have due regard for project economics. In order to approve an application, the Director, or in cases where the Commission approves the final order, the Commission shall find that the applicant, along with all co-owners, possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction, maintenance, operating, mitigation and compensation costs.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0280 Need for Power

In order to approve an application, the Director[, *or in cases where the Commission approves the final order, the Commission*] shall **make a finding on the need for power. In making this finding the Director shall consider the present and future power needs, taking into consideration: [find]**

(1) [T] **Whether** there is a need for project power based upon:

(a) [*The forecasts of the Regional Conservation and Electric Power Plan of the NPPC or state energy demands*] **Consultation with the Oregon Department of Energy on the most current regional power plan for an analysis of need for development of hydropower or renewable energy resources within the Columbia River region; or**

(b) Evidence of a contract for the sale of power, **and**

(c) For projects greater than 25 MW, any recommendation by the Energy Facility Siting Council based on information contained in the hearing record for the application.

(2) Section (1) of this rule shall not apply to applications for the following types of projects:

(a) Small facilities intended to supply power for on-site uses;

(b) Projects which primarily use existing storage, diversion or water conveyance facilities where the operation of the power project will foster reductions in water losses or increases in the efficiency of water use;

(c) Multiple purpose projects where the project is based primarily on other uses and in which power is a compatible project purpose; or

(d) Projects by public or municipal utilities which will serve only the applicant utility's customers.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0290 Consolidated Review

(1) The Director shall enter an order on the potential that the proposed project may contribute to cumulative impacts with other existing, approved or proposed hydroelectric projects in the same river basin. It is presumed that if there are other existing, approved or proposed projects, in the same river basin, there is a potential for cumulative impacts. This presumption may be rebutted by showing the impacts of the proposed project are so small in extent, short-termed or localized

that there is no reasonable likelihood of cumulative impacts. The Director shall consult with the agencies listed in OAR 690-051-0060 on cumulative impacts. Natural resources on which the potential for cumulative impacts will be considered are listed in OAR 690-051-0190 through 690-051-0250.

(2) If the Director determines the proposed project may have unacceptable cumulative impacts, a consolidated review shall be conducted. The review will cover all existing, approved and proposed projects in the same river basin. Existing and approved projects shall not be subject to any action by the Director or the Commission resulting from the consolidated review. If an applicant for a proposed project does not wish to be included in the consolidated review, the application may be withdrawn and refiled at a later date. The application may be subject to a later consolidated review if refiled.

(3) If two or more of the applications are competing for the same site, only one will be chosen to proceed in the consolidated review. Preference will be given to the project best suited to the site. Suitability shall be based on the criteria in OAR 690-051-0320.

(4) The consolidated review shall be conducted as a contested case hearing. Applicants and owners of all existing, approved and proposed projects in the affected basin will be advised of the need for a consolidated review contested case hearing. Applicants and owners shall be advised not less than 90 days before the hearing so they may prepare. Notice advising of the need for a consolidated review shall be sent by registered or certified mail. Separate notice will be given when the hearing actually is to take place. This notice will be as [*provided in OAR 690-051-0130 and*] required by ORS 183.415.

(5) The consolidated review shall include a study of the individual and cumulative impacts each project would cause on the natural resources discussed in [*ORS*] OAR 690-051-0190 through 690-051-0250. Cumulative impacts on any given natural resource shall be considered unacceptable if the level of impact would exceed any of the natural resource standards set forth in OAR 690-051-0190 through 690-051-0250.

(6) The purpose of the consolidated review will be to determine if the individual and cumulative impacts of proposed projects meet the natural resource standards in OAR 690-051-0190 through 690-051-0250. If the individual impacts of the applicant's project would exceed any of the resource standards, the application shall be rejected. When cumulative impacts on a natural resource would violate the natural resource standards, proposed projects in the consolidated review will be chosen for further consideration on the basis of the following criteria:

(a) Contribution to cumulative impact(s) -- Projects exhibiting lesser potential contribution to cumulative impact(s) will be preferred over projects exhibiting greater potential contribution to cumulative impact(s);

(b) Individual impacts on natural resources -- Projects potentially causing impact on a lesser number of natural resources and/or having a lesser degree of impact on a given resource shall be

preferred over projects potentially affecting a greater number of natural resources or having a greater degree of impact on a given resource;

(c) Project suitability -- Projects making more efficient use of water, developing more capacity, having greater annual output or producing more revenue will be preferred over projects that are less efficient, develop less capacity, have less annual output or produce less revenue;

(d) Mitigation -- Projects proposing more desirable mitigation in terms of restoration, improvement or enhancement will be preferred over projects proposing less desirable mitigation; and

(e) If no distinction can be made on the criteria in subsections (a) through (d) of this section, the final basis of decision will be priority of filing.

(7) Following the conclusion of the consolidated review contested case hearing, the Director will enter an order stating the findings on each proposed project included in the review. Applications for projects not selected for further consideration on the basis of criteria in section (5) of this rule, shall be rejected.

(8) Any application not filed in time to be included in the notice of contested case hearing for a consolidated review shall not be reviewed until after the Director[, *or in cases where an exception has been filed to the proposed order, the Commission,*] has entered the final order on the proceeding.

(9) If there is only one proposed project in the river basin, the Director may initiate consolidated review proceedings at the applicant's request.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

[690-051-0310 Record of Expenditures Under Preliminary Permits

Each permittee shall keep an accurate and dependable record of all expenditures made under the Permit. If a License is issued for a project covered in whole or in part by a Permit, any and all items properly includible in the actual legitimate cost of the project representing expenditures made under the Permit and before the date of the License shall be supported by proper vouchers or other records, in the same manner required of a Licensee when no Permit has been issued; and any vouchers or records, or certified copies in support of an item properly includible in the cost of the project shall become a part of the records of the project and shall be kept and retained by the Licensee in the manner required by the Commission or Director. Records kept by standard accounting methods are acceptable.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0320 Competing Applications

(1) When filed with the Director, a notice of competing application shall also be served on other applicants for the same site.

(2) A competing application shall be filed with the Director within 180 days of the time the original application is filed. If a hearing notice for the original application has been published before 180 days have passed, a notice of intent to file a competing application shall be filed. The notice of intent shall be filed prior to the closing date for comments as stated in the hearing notice. The competing application itself shall be filed within 60 days of the comment closing date.

(3) When determining which competing application should be given preference, the Director[, *or in cases where the Commission approves the final order in the contested case hearing, the Commission*] shall consider:

(a) Conservation of the waterpower involved including:

(A) Efficiency within the system;

(B) Effect on instream fisheries;

(C) Water quality; and

(D) Other factors as the Director[, *or the Commission in cases where the Commission approves the final order, the Commission*] may deem appropriate.

(b) Use of the waterpower involved including:

(A) Availability of water;

(B) Existing rights;

(C) Development of the available hydroelectric potential; and

(D) Other factors as the Director[, *or the Commission in cases where the Commission approves the final order, the Commission*] may deem appropriate.

(4) If the Director[, *or the Commission in cases where the Commission approves the final order, the Commission*] finds that both applications are equally well adapted to conserve and utilize the waterpower involved and are equal in every other way, preference shall be given to the application with the earliest filing date.

(5) If the Director[, *or the Commission in cases where the Commission approves the final order, the Commission*] finds that both applications are equally well adapted to conserve and utilize the waterpower involved and one applicant is a municipal corporation and the other is a private

developer, preference shall be given to the municipal corporation.

(6) If the Director[, *or the Commission in cases where the Commission approves the final order, the Commission*] finds that both applications are equally well adapted to conserve and utilize the waterpower involved and one applicant is the holder of a valid Preliminary Permit and has priority under ORS 543.250, preference shall be given to the holder of the Preliminary Permit.

(7) Where one application is determined to be best adapted to conserve and utilize the water-power involved and the other applicant is either a municipal corporation or has priority as the holder of a Preliminary Permit, the municipal corporation or holder of the Preliminary Permit shall be informed of specific reasons why its application is not as well adapted and shall be afforded a reasonable period of time to amend its application to be at least as well adapted as the competing application. If its application is amended to be at least as well adapted within the time allowed, preference will be given to the municipal corporation or holder of the Preliminary Permit.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

[690-051-0330 System of Accounts for Public Utilities

Each License issued by the Director, or in cases where an exception is filed to the proposed order, the Commission, where the applicant is a public utility, shall be conditioned upon the establishment by the Licensee of a system of accounts in conformity with the Uniform Classification of Accounts for Electrical Utilities as prescribed and required by the Public Utility Commissioner of the State of Oregon. The Licensee shall be required to file with the Director one copy of all of its accounts as filed with the Public Utility Commissioner, duly certified, and such other statements, accounts, or records as the Director, or in cases where the Commission approves the final order, the Commission may require in order to furnish a full and complete knowledge of the facts necessary to carry out the provisions of ORS 543.010 to 543.620.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

[690-051-0340 Accounts When the Licensee is Not a Public Utility

When the applicant for a License is not a public utility, the Director, or the Commission in cases where the Commission approves the final order, will not require the establishment and maintenance of a system of accounts as prescribed for public utilities. The Licensee shall be required to keep and maintain books, records, accounts, and/or memoranda which will show the

actual legitimate cost of construction of the project or any improvement. The Licensee shall file with the Director, under oath, when called for by the Director, or the Commission in cases where the Commission approves the final order, a statement of costs, except that a cooperative electric association shall establish a system of accounts as may be required by the Director, or the Commission in cases where the Commission approves the final order. A cooperative electric association shall file with the Director each year, one or more copies of the accounts duly certified and other statement, accounts, or records as required for a full and complete knowledge of facts necessary to carry out the provisions of ORS 543.010 to 543.620.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0350 Minor Projects, Waiver of Provisions of Act [*Where the Licensee is Not a Public Utility*]

For minor projects of not more than 100 THP, [*where the applicant for License is not a public utility,*] the Director[, *or in cases where a protest has been referred to the Commission, the Commission,*] in issuing Licenses, [*will*] waives the following conditions, provisions, and requirements of ORS Chapter 543:

[(1) ORS 543.510 which requires the Licensee to establish and maintain amortization reserves to be applied in reduction of the net investment]

[(2) 1) ORS 543.530 which relates to the issuance of bonds or other evidence of indebtedness and the control thereof by the Commission.

[(3) ORS 543.520 which provides that on amortization of the net investment the project shall become the property of the State of Oregon.]

[(4) 2) ORS 543.550 relating to liens against the project and providing that any sale shall be of the whole property embraced in the project unless a partial sale is approved by the Director.

[(5) 3) ORS 543.560 which requires the Licensee to execute to the State of Oregon a bond to the effect that the Licensee shall promptly make payment to all persons supplying labor, material, machinery, etc.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

[690-051-0360 Minor Project by Public Utility

Where the applicant for License for a minor project of not more than 100 THP is a public utility, the Director will treat the application the same as an application for a major project and may waive the requirements of the Act identified in OAR 690-051-0350.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

[690-051-0370 Transfer of Project to Public Utility

Whenever a project, or any part thereof, covered by a License issued to a Licensee who is not a public utility, is transferred or conveyed to a public utility and becomes the property of the utility, or whenever a Licensee who is not a public utility changes status to that of a public utility

by the sale of electricity to the public, the License issued shall terminate. In such a case, the Commission may issue a new License with provisions necessary to carry out the intents and purposes of ORS 543.010 to 543.620.]

Stat. Auth.: ORS 536, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86

690-051-0380 Water Rights

The right to the use of the waters of the State of Oregon in connection with the development of any water power project for the generation of electricity under a License issued by the Director[, *or in cases where the Commission approved the final order, the Commission,*] shall be vested in the Licensee while the License or any lawful extension is in force. Each License [will] **shall** be conditioned so the right to use water is expressly made inferior in right and subsequent in time to any future appropriation of water upstream for beneficial consumptive use. On termination of the License, the right to use water [shall revert to the public] **may be converted as provided in ORS 543A.305.** In case a project is taken over by the state or a municipality under the provisions of ORS 543.610, the right to use the waters previously used by the project shall continue in the state or the municipality until lawfully terminated, [or] transferred, **or converted as provided in ORS 543A.305.** [*In case of a project falling to the state by amortization under ORS 543.520, the right to use the waters previously used by the project shall continue in the state until lawfully terminated or transferred.*]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

690-051-0400 Fees: Filing and Annual

(1) An applicant for a Preliminary Permit or License for a project or for a Permit to appropriate water for power purposes shall pay to the state a project fee based on the capacity of the project to cover costs of recording, publishing notices, conducting the hearing required by ORS 543.225 and making investigations necessary to determine whether a Permit should be granted.

(2) The amount of the total project fee required under section (1) of this rule shall be:

(a) For a project of less than 100 theoretical horsepower, \$1,000;

(b) For any project of 100 theoretical horsepower or more, an amount equal to \$5,000 plus \$1,000 per megawatt for each megawatt of capacity in excess of five megawatts, up to a maximum of \$100,000;

(3) The project fee shall be payable in advance of each of four stages of project review as described in OAR 690-051-0095 as follows:

(a) For minor projects less than 100 theoretical horsepower, fifty percent of the fee at the time the application is filed and the fifty percent remaining fee charge when the License is issued;

(b) For major projects, the fee shall be collected as follows:

(A) Stage One -- 20 percent; not to exceed \$2,500;

(B) Stage Two -- 30 percent;

(C) Stage Three -- 30 percent;

(D) Stage Four -- 20 percent.

(c) If any stage is skipped, the fee at the time of submittal shall be the total application fee due up to and including the stage of current application review.

(4) In addition to the project fee required under this section, any applicant for a project to be sited at a location where anadromous fish or threatened or endangered species are present shall pay a surcharge of 30 percent of the total project fee. The surcharge shall be collected in conjunction with the project fee at each stage of the project review.

(5) An annual fee as described in ORS 543.710 shall be required for each Permit issued under ORS Chapter 537.

(6) Each License issued shall be conditioned to require the payment of an annual fee as follows:

(a) For the first 25 THP or fraction thereof, \$1 per THP; and

(b) For each THP in excess of 25, 20 cents.

(7) (a) For fees assessed under ORS 543.078(2) each holder of a hydroelectric right shall pay an amount, in 1998 dollars, equal to \$0.405 per theoretical horsepower covered by the water right for the project. The annual fee shall be adjusted annually for inflation according to (c) below.

(b) For fees assessed under ORS 543.088 each holder of a hydroelectric right shall pay an amount, in 1998 dollars, equal to \$0.125 per theoretical horsepower covered by the water right for the project. The annual fee shall be adjusted annually for inflation according to (c) below.

(c) Fees shall be adjusted using the "GDP-IPD", Gross Domestic Product - Implicit Price Deflator published by the U.S. Department of Commerce, Bureau of Economic Analysis in the publication *Survey of Current Business* (See Table 1.1.9 line 1.) for September of each year prior to the January due date for the fees. If this index ceases to be published, any reasonably equivalent index published by the Bureau of Economic Analysis may be substituted. If the base year for GDP-IPD is changed or if publication of the index is

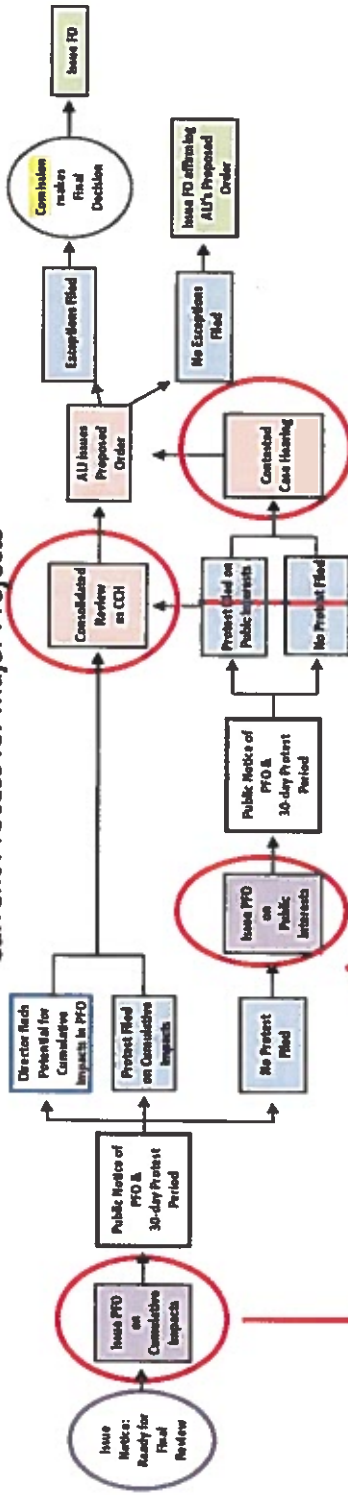
discontinued, the Department shall make adjustments or, if necessary, select an appropriate alternative index to achieve the same economic effect.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

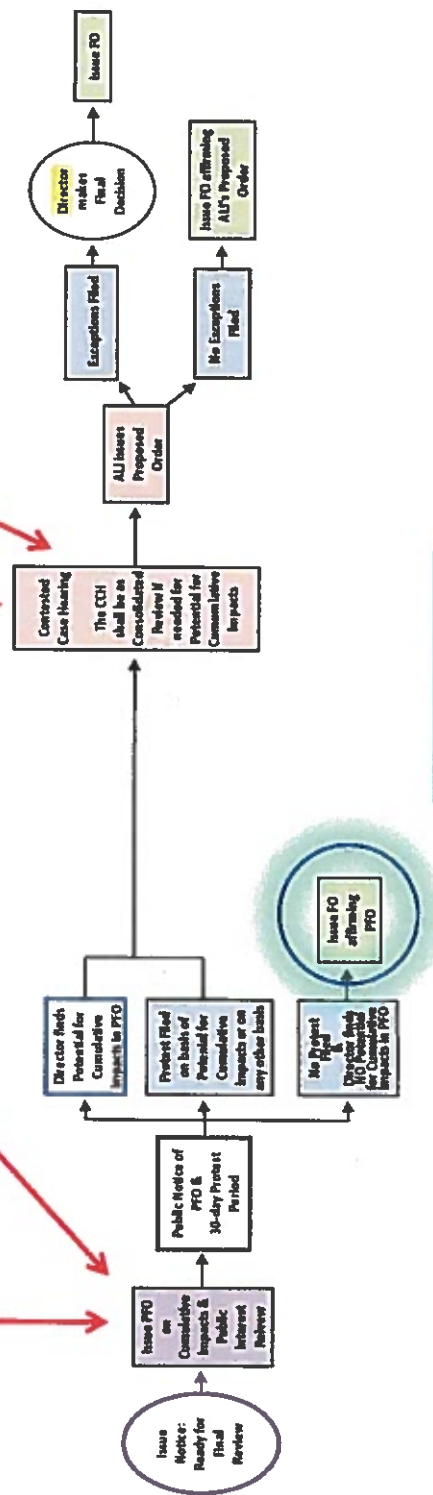
Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93

Current Process for Major Projects



Proposed Process for Major Projects



Attachment 4

August 5, 2015

Sent via email to rule-coordinator@wrд.state.or.us

Mary S. Grainey
Hydroelectric Program Coordinator

Members of the Water Resources Commission

RE: Division 51 Hydroelectric Rulemaking

Mary and Commissioners:

We appreciate the department's taking on the needed housekeeping of Division 51 to bring it current. We would like to share the following comments. The changes proposed result from the draft circulated after our last Rules Advisory Committee (RAC).

Available Water: 690-051-0010 Definitions

The newly proposed language to define available water appropriately differentiates a non-consumptive water right for hydropower from rules that affect consumptive water rights for "water availability" (as used in OAR 310). "Available Water" is a much different concept from those rules as it applies to non-consumptive rights. This definition provides clarity in protecting current water right holders from injury while not changing the standard for non-consumptive water rights.

Alternatively, one could consider a very direct statement: " 'Available Water' means the requested source has not been withdrawn from appropriation and the proposed new hydroelectric use can be developed without injury to existing water rights, including water right permits, certificates, court decrees or minimum perennial streamflows."

Request for Standing: 690-051-0150

The intent was to bring the administrative procedures in this division into compliance with more current procedures. Our only significant procedural matter is that this draft of the rules leaves in the option for filing "a request for standing", a process unique to new water right applications under ORS Chapter 537, as enacted by the Legislature in 1996 to streamline the consumptive water right process. That legislation did not contemplate the addition of the concept to Chapter 543 and other non-consumptive water rights, and indeed the legislative record supports that assumption.

Under the new provisions to Division 51, a "request for standing" would create a special status to file a document with the department rather than using the "protest"

procedure that is applicable to Division 51. This would allow anyone who files as a requestor to be a full party in a contested case hearing or a judicial review as an automatic “party” in either process. In other department permitting actions, someone who wants to participate but who has not filed the required “protest” with a fee has to show they are adversely affected or aggrieved by the department’s order.

We would urge the Commission to instead return to the typical contested case hearing process that allows interested parties to petition for party status based on whether they are adversely affected or aggrieved as supported by documentation acceptable to the department supporting the requestor’s claim.

Not including the standard protest process for standing and replacing it with a broader and unsubstantiated “request for standing” has the following impacts:

- 1) There is no statutory provision for this concept.
- 2) There is no basis in ORS Chapter 536 to establish a fee for the concept.
- 3) Adding this language changes the department’s conclusion that there is no fiscal impact as a result of these new rules. This section of the rules will require additional costs to respond to parties who would not normally have standing without findings to support their role in a contested case hearing.

This section could be fixed by amending section 1 of the rules by

Simply removing after protests the term “a request for standing”, returning to the original language: “All protests must be filed with the Director within the time specified in the notice.”

And by amending Section 3 to add in line 1:

“For applications filed under ORS 537.140 and Section 690-051-0050(4) of these rules, a”...

And at Section 3, new subsection 4:

“(4) A request for standing may be not filed for applications filed under ORS 543.210, ORS 543.260 or ORS 543.765 and section 690-051(5) of these rules.”

This would result in renumbering of the remaining sections. A copy of the language is attached as identified in the rule format with new language underlined and language struck out.

Fish Resources: OAR 690-051-0200 Fish Resources

Our strong preference throughout the rulemaking was to make no substantial changes to the current rules. This stems from our understanding that the scope of this rulemaking would be limited to procedural updates and clarifications and would not address significant policy changes. While the department’s intent in this section appears to be

provision of clarification of the rules as to the specific types of mitigation measures or potential impacts that should be considered when evaluating hydropower projects, the actual language takes us beyond that point. For example, the use of “maintain and enhance” in section 1 creates a new standard beyond the statute.

Our attached proposed changes to this section includes the list of “considerations” but otherwise restores much of the wording of the current rules.

The other comment we have is that the conditions to be considered should be placed elsewhere in that section. Right now they follow the statement about salmon and steelhead resources. That section is a higher standard related to anadromous fish resources, a higher standard than other resource areas. The lay person or the new applicant looking at these rules might interpret that the conditions listed under the opening of the anadromous fish heading might imply that the anadromous conditions apply to all other fishery resource areas and their habitat, which is not the case. The proposed new standard mixes and conflates the separate statutory standards applicable to anadromous salmon and steelhead and to wild game.

Basically the legal requirements specified in the ODFW statutes relate to fish passage and fish screening. We propose a construction that would first list conditions that are required by ODFW statutes (screening and passage), then list additional conditions that may be considered and condition that section according to the various resource areas (anadromous, wild game fish, etc.) later listed in this section of the rules as they may apply differently in varying resource areas. The most preferable fix would be to keep the original language of the rules in this area and instead have ODFW provide a set of guidelines they will address for those areas not specifically required by law and meet with applicants to review what those might mean for the project.

Thank you for the opportunity to respond.

Sincerely,

Jan Lee
Executive Director

REQUEST FOR STANDING

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690-051-0150 Filing of Protests and *Remonstrances* Requests for Standing

(1) All protests and ~~requests for standing~~ [objections] must be filed with the Director within the time specified in the notice. ~~To become a party to a contested case hearing the fees required under ORS 536.050(1) (i), (n), and/or (o) as appropriate must also be submitted by the notice date.~~

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

(a) The name, address and telephone number of the protestant;

(b) A description of the protestant's interest in the proposed final order 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 proposed final order would impair or be detrimental to the protestant's interest;

(d) A detailed description of how the proposed final order 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; and

(f) For persons other than the applicant, the protest fee required under ORS 536.050.

(3) For applications filed under ORS 537.140 and section 690-051-0050(4) of these rules, ~~any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order.~~

(a) The request for standing must be in writing, signed by the requester, and include the following:

The requester's name, mailing address and telephone number;

(b) If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;

(c) A statement that the requester supports the proposed final order as issued;

(d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and

(e) The fee established under ORS 536.050.

(4) A request for standing may not be filed for applications filed under ORS 543.210, ORS 543.260 or ORS 543.765 and section 690-051-0050(5) of these rules.

(54) Any person who has filed a timely request for standing under subsection (3) may later file a petition for party status in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 137-003-0535.

(65) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period.

(67) The Department shall send a copy of all protests and requests for standing received to the applicant, the protestant(s), if any, and to each person who requested standing.

The intent of the revisions is to first list those items specifically required by law to meet ODFW standards in all resource areas. The second section relates to additional conditions which may be considered in specific resource areas of concern (anadromous fish, wild game fish, etc.). The next section describes the particular resource areas. This implies that depending upon the fishery resource in the area, the conditions could differ and need to be considered according to the designation and that not all conditions fit in all cases but could be considered.)

690-051-0200 Fish Resources

(1) *[The Director and Commission shall have due regard for fish resources in general. In order to approve an application, the Director, or in cases where exceptions have been filed to the*

Director's proposed order, the Commission, shall enter appropriate findings on the following standards:

(a) Project facilities and operations will not have significant adverse impacts on fish populations;

(b) Project facilities and operations will not unreasonably interfere with upstream and downstream passage of fish through the project vicinity. The Director, or in cases where the final order is approved by the Commission, the Commission may make exceptions to this standard in special cases where fish populations have been significantly damaged by past activities and the proposed single- or multiple-purpose project development will improve existing fish populations;

(c) Project facilities and operation have been designed to mitigate, to the greatest extent practicable, adverse impacts upon spawning, rearing or other habitat areas necessary to maintain the levels and existing diversity of fish species;]

(moved up from new section that started with 543.017; first lists the required ODFW statutes then lists as considered the other conditions not in statute)

(1) In order to approve an application, the Director or Commission may require that applicants implement, operate and maintain measures to mitigate for possible adverse impacts specific to a Project relative to requirements of the Oregon Department of Fish and Wildlife:

(a) Providing for fish passage around diversion structures, dams or reservoirs with appropriate bypass flows, ladders and/or other measures as may be required by ODFW under ORS 509.580 to 509.585;

(b) Screening of intakes to prevent juvenile entrainment through turbines as may be required by ODFW under ORS 498.301 to 498.321;

(c) As evidenced by

a fish screening agreement or waiver with ODFW; a fish passage waiver, exemption or agreement with the ODFW or the Oregon Fish and Wildlife Commission; and/or an agreement to implement final terms and conditions recommended by ODFW to the FERC under Section 10(j) or 30(c) of the Federal Power Act shall satisfy these standards, as applicable.

(2) In addition, the Department shall consider the need for the following mitigation measures to protect fish habitats and/or fish resources, based on the resource as described in Section 3:

(a) All projects which divert water away from a portion of a stream, excepting those processed under ORS 543.765, may be conditions to provide flows for aquatic habitat protection before water may be diverted for power production;

(b) Prevention of false attraction water from guiding fish into turbines at the trailrace;

(c) Controlling ramping rates to prevent stranding of fish;

(d) Avoiding delay of upstream or downstream migration;

(e) Managing wood and gravel through the project to maintain or enhance habitat conditions; and/or other impacts;

(3) Resource areas for consideration include:

(include all of the remainder of the section below which includes description of resource areas)

([d] 4) Unavoidable adverse impacts on fish or to fish management programs will be mitigated;

([e] a) Project construction, timing and procedures are designed to minimize fishery impacts from instream construction work and premature or unnecessary land clearing and disturbances;

([f] b) All fishery protective measures [and] are scheduled to be fully functional when the project commences operations; and

([g] c) The proposed project is consistent with ODFW management programs in force on the effective date of these rules.

([2] 5) [*The Director and Commission shall have due regard for wild game fish.*] No project shall be approved that would result in a net loss of wild game fish. In order to approve an application, the Director [, or in cases where exceptions have been filed to the Director's proposed order, the Commission, shall enter appropriate findings on] shall apply the following standards:

(a) A project, any part of which is located on a river or stream reach used by wild game fish, or that would adversely affect wild game fish, shall include acceptable mitigation measures which:

(A) Are located in the project vicinity;

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- (B) Are in effect at the time of adverse impact or start of project operation, whichever comes first;
- (C) Will prevent a net loss to individual species of wild game fish;
- (D) Will prevent conversion of a wild game fish population and fishery to a hatchery dependent resource;
- (E) Are consistent with ODFW management plans and programs in force on the effective date of these rules; and
- (F) Employ workable and generally accepted methods and techniques of mitigation best suited to the affected fish resource(s).

([3] 6) [The Director and Commission shall have due regard for salmon and steelhead fish and habitat.] No project shall be approved that may result in mortality or injury to an individual anadromous salmon or steelhead or loss of any salmon or steelhead habitat. In order to approve an application, the Director[, or in cases where the Commission approves the final order, the Commission, shall enter appropriate findings on] shall apply the following standards:

- (a) If proposed at an undeveloped site, it is not reasonably foreseeable that the location, design, construction or operation of the project may result in mortality or injury to an individual anadromous salmon or steelhead or loss of any salmon or steelhead habitat; and
- (b) Modification of an existing facility or project on a stream reach used by anadromous salmon

or steelhead or providing anadromous salmon or steelhead habitat shall include **acceptable** measures that:

- (A) Are reasonably certain to restore, enhance or improve existing salmon and steelhead populations in the affected river;
- (B) Comply with wild game fish standards in paragraphs ([2] ~~5~~)(a)(C) and (D) of this rule if the affected salmon or steelhead populations contain wild fish;
- (C) Are consistent with ODFW Fishery management plans and programs in force on the effective date of these rules;
- (D) Employ workable and generally accepted methods and techniques best suited to the fish resources affected by the proposed project; and
- (E) Are in effect at the time of adverse impact or start of project operation, whichever comes first.

([4] ~~2~~) In order to approve an application for a project within the Columbia River Basin, the Director, *or in cases where exceptions have been filed on the proposed order, the Commission* shall find that the proposed project complies with the fish protection, mitigation and enhancement requirements of the **Northwest Power and Conservation Council (NPCC)** [NPCC's] Columbia River Basin Fish and Wildlife Program. *[Certification of compliance by the NPCC shall satisfy this standard.]*

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. 3f. 5-19-93



Oregon

Kate Brown, Governor

Department of Fish and Wildlife
Fish Division
Hydropower Program
4034 Fairview Industrial Drive SE
Salem, OR 97302
(503) 947-6201
FAX (503) 947-6202

August 5, 2015

Rule Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

via Electronic Mail
rule-coordinator@wrд.state.or.us



Subject: Hydroelectric Rules

Staff from the Oregon Department of Fish and Wildlife (ODFW) participated in the Administrative Rule Advisory Committee by attending the three meetings held by the Oregon Water Resources Department and reviewing and commenting on the draft rule amendments. One of the five purposes to amend the rules included "To provide specific examples of how to meet the natural resources standards". The purpose of these comments is to provide context and support for the language proposed in OAR 690-051-0200 Fish Resources.

The proposed amended rule OAR 690-051-0200 includes examples (1 a-f) of mitigation measures to protect fish habitats and/or fish resources. The proposed amended rule also specifies, by including "...but not limited to:", that other mitigation measures not specifically listed will be considered. ODFW believes it is important that the listed examples are not considered as a comprehensive list and each project proposal should be evaluated on a case-by-case basis to determine the range of mitigation measures necessary. ODFW believes the proposed amended rule as written will allow for the implementation of mitigation measures that are not specifically listed in the rule.

Similarly, OAR 690-051-0200 (2) lists several types of agreements with ODFW or the Oregon Fish and Wildlife Commission that will serve to satisfy the standards. ODFW believes it is important to acknowledge that any one of these agreements may or may not include all the mitigation measures to meet the standards, and more than one agreement may be necessary. Using "as applicable", as included in the proposed amended rule is important to indicate, for example, that a fish screening agreement is not likely to include some of the example mitigation measures listed in OAR 690-051-0200 (1 a-f). ODFW believes that the proposed amended rule as written will allow for each agreement to be evaluated pursuant to the specific mitigation measures it is intended to address in light of the range of total mitigation required to meet the standards.

Thank you for the opportunity to provide comments. If you have any questions I can be reached at 503-947-6090, or Ken.Homolka@state.or.us.

Sincerely,

Ken Homolka
Hydropower Program Leader

Recommendation from AG's office on Need for Power

(Proposed language from hearings draft to be replaced is shown in ~~stike through~~, hearing language to be retained is in **bold**, and new language is underlined)

690-051-0280 Need for Power

In order to approve an application, the Director, ~~shall consider whether the Project is economically reasonable and consistent with the policies of ORS 543.017(1)(c) and ORS 469.310. The Director~~ [, or in cases where the Commission approves the final order, the Commission] shall [find] make a finding on the need for power. In making this finding the Director shall consider the present and future power needs, taking into consideration apply the following standards:

(1) Whether there is a need for project power based upon:

(a) [The forecasts of the Regional Conservation and Electric Power Plan of the NPPC or stateenergy demands] **Consultation with the Oregon Department of Energy on the most current regional power plan for an analysis on whether there is a of need for development of hydropower or renewable energy resources within the Columbia River region; or**

(b) Evidence of a contract for the sale of power, and

(c) For projects greater than 25 MW, any recommendation by the Energy Facility Siting Council based on information contained in the hearing record for the application.

(2) Section (1) of this rule shall not apply to applications for the following types of projects:

(a) Small facilities intended to supply power for on-site uses;

(b) Projects which primarily use existing storage, diversion or water conveyance facilities where the operation of the power project will foster reductions in water losses or increases in the efficiency of water use;

(c) Multiple purpose projects where the project is based primarily on other uses and in which power is a compatible project purpose; or

(d) Projects by public or municipal utilities which will serve only the applicant utility's customers.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537 & ORS 543

Stats. Implemented:

Hist.: WRD 14-1986, f. & ef. 10-13-86; WRD 2-1993, f. & cert. ef. 5-19-93