

July 11, 1996

OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690
DIVISION 33

ADDITIONAL PUBLIC INTEREST STANDARDS FOR NEW APPROPRIATIONS

Purpose

690-33-000 (1) The purpose of OAR Chapter 690, Division 33 is to establish definitions, additional procedures and standards to aid the Department in determining whether a proposed use will impair or be detrimental to the public interest with regard to sensitive, threatened or endangered fish species.

(2) These rules apply to the following types of applications for permits:

(a) To appropriate surface water;

(b) To appropriate hydraulically connected groundwater with potential for substantial interference as listed in OAR Chapter 690, Division 9, Section 040;

(c) To appropriate water for the purpose of groundwater recharge; and

(d) To store water or construct a reservoir.

(3) These definitions, standards and procedures are in addition to, not in lieu of, existing rule and laws.

Statutory Authority.: ORS 536.025 and 536.027

Stats. Implemented: ORS 537.140 to 190

Hist.: WRD 10-1994, f. & cert. ef. 9-21-94; WRD -1995, f. & cert. ef. 6-16-95; WRD -1996, f. & cert. ef. 7-11-96

Definitions for the purposes of Chapter 690, Division 33

690-33-010 (1) "Commission" means the Water Resources Commission.

(2) "Department" means the Water Resources Department.

(3) "Director" means the Director of the Department.

(4) "Domestic Water Use" means the use of water for human consumption, household purposes, domestic animal consumption that is ancillary to residential use of the property or related accessory uses.

(5) "Interagency Review Team" means a team comprised of staff from the Departments of Agriculture, Environmental Quality, Fish and Wildlife, Water Resources and other state natural resource agencies as appropriate.

(6) "Fish and Wildlife Program" means the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power Planning Council in February, 1994; document number 94-2.

(7) "Human Consumption" means the use of water for purposes of drinking, cooking and sanitation.

(8) "Threatened or Endangered" means fish species listed by Oregon Department

Note: These rules were filed with the Office of the Secretary of State and took effect on July 11, 1996. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360 (2)(a) when published by the Secretary of State.

of Fish and Wildlife (ODFW) under OAR 635-100-125; or listed under the federal Endangered Species Act.

(9) "Sensitive" means fish species classified as either critical, vulnerable, or peripheral on the ODFW sensitive species list established under OAR 635-100-040.

Statutory. Authority.: ORS 536.025 and 536.027

Stats. Implemented: ORS 537.140 to 190

Hist.: WRD 10-1994, f. & cert. ef. 9-21-94; WRD -1995, f. & cert. ef. 6-16-95; WRD -1996, f. & cert. ef. 7-11-96

Upper Columbia Rules (Above Bonneville Dam)

Geographic Scope

690-33-115 (1) These rules, OAR 690-33-115 through 690-33-140, apply to applications filed after July 17, 1992, upstream from Bonneville Dam in the Columbia / Snake Basin in the areas listed below for which no permit has been granted, or on which no contested case has been ordered:

- (a) Hood Basin;
- (b) Deschutes Basin;
- (c) John Day Basin;
- (d) Umatilla Basin;
- (e) Grande Ronde Basin;
- (f) Powder Basin;
- (g) Malheur Basin;
- (h) Owyhee Basin;
- (i) Mainstem Columbia River above Bonneville Dam; and
- (j) Mainstem Snake River.

(2) These rules, OAR 690-33-115 through 690-33-140, will be reviewed and may be revised as additional information becomes available concerning the recovery of threatened or endangered fish stocks in the Columbia / Snake Basin.

Statutory. Authority.: ORS 536.025 and 536.027

Stats. Implemented: ORS 537.170

Hist.: WRD -1995, f. & cert. ef. 6-16-95; WRD -1996, f. & cert. ef. 7-11-96

Determination of Consistency with the Fish and Wildlife Program

690-33-120 (1) To determine whether a proposed use is consistent with the Fish and Wildlife Program, the Department shall consult with the Northwest Power Planning Council, ODFW, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Indian tribes and appropriate local governments. If the Department determines that a proposed use of water is inconsistent with the Fish and Wildlife Program and cannot be conditioned to achieve consistency, the application shall be presumed to impair or be detrimental to the public interest.

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

(a) The proposed use does not involve appropriation of direct streamflow during the time period of April 15 to September 30, except as provided in OAR 690-33-140;

(b) The proposed use does not involve hydraulically connected groundwater

with potential for substantial interference as listed in Division 9 during the time period of April 15 to September 30, except that which is artificially recharged or as otherwise provided in OAR 690-33-140;

(c) The proposed use complies with screen design, installation, operation specifications and passage requirements as listed in ORS 498.248 through 498.268 and 509.600 through 509.630;

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

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

(3) Based on the consultation in OAR 690-33-120(1), the proposed use may be further conditioned so that, if the riparian area is disturbed in the process of developing a point of diversion, the riparian area is restored or enhanced.

(4) If a proposed use is not consistent with the Fish and Wildlife Program, the applicant may propose mitigation compatible with OAR 690-33-120(2) and (3). The Director shall determine if the proposed use with mitigation is consistent with the Fish and Wildlife Program. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR Chapter 635, Division 415, Section 030 adopted November 13, 1991 shall be followed.

Stat. Auth.: ORS 537.170

Hist.:WRD -1995, f. & cert. ef. 6-16-95

Flow Management Objectives

690-33-130 If the flow management objectives cannot be achieved because of differing requirements between fish species in the management area, the Department shall consult with the affected fish and wildlife agencies and the appropriate Indian tribes to assist in resolving the flow management conflicts.

Stat. Auth.: ORS 537.140-190

Hist.: WRD 10-1994, f. & cert. ef. 9-21-94

Exemptions

690-33-140 Notwithstanding OAR 690-33-120(2)(a) and (b), the Department may approve a water right permit for:

(a) Domestic water use;

(b) Projects that provide net benefits for native resident and native anadromous fish recovery. For example, these projects may include, but are not limited to, livestock watering away from water courses which results in improved riparian areas;

(c) Emergency use necessary for public health and safety;

(d) Existing water uses covered under House Bill 2153 (Oregon Legislature 1993);

or

(e) Multipurpose storage projects or other projects with measurable public benefits.

Statutory. Authority.: ORS 536.025 and 536.027

Stats. Implemented: ORS 537.140 to 190

Lower Columbia Rules (Below Bonneville Dam)

Geographic Scope

690-33-210 (1) These rules, OAR 690-33-210 through 690-33-230, apply to applications filed after April 8, 1994, in the areas listed below for which no permit has been granted, or on which no contested case has been ordered as of the effective date of these rules:

- (a) Portions of the North Coast Basin which drain into the Columbia River; and
- (b) Clackamas Subbasin of the Willamette Basin.

(2) These rules, OAR 690-33-210 through 690-33-230, apply to applications filed after June 3, 1994, in the areas listed below for which no permit has been granted, or on which no contested case has been ordered, as of the effective date of these rules:

- (a) Sandy Basin;
- (b) Willamette Basin, excluding the Clackamas Subbasin; and
- (c) Mainstem Columbia River below Bonneville Dam.

(3) These rules, OAR 690-33-210 through 690-33-230, shall be reviewed and may be revised when:

(a) A final National Marine Fisheries Service Recovery Plan for Snake River salmon is promulgated, or the Northwest Power Planning Council Fish and Wildlife Program is revised after the effective date of these rules providing additional information concerning the recovery of threatened or endangered fish stocks in the Lower Columbia Basin; or

(b) 300 cfs of additional water rights have been issued from the Mainstem Columbia River below Bonneville Dam since June 3, 1994; or

(c) An additional fish species has been listed as threatened or endangered in the area listed in OAR 690-33-210(1) or (2).

Statutory. Authority.: ORS 536.025 and 536.027

Stats. Implemented: ORS 537.140 to 190

Hist.: WRD -1995, f. & cert. ef. 6-16-95; WRD -1996, f. & cert. ef. 7-11-96

Evaluation Criteria

690-33-220 (1) If the Department determines that a proposed use of water is detrimental to the protection or recovery of a threatened or endangered species and cannot be conditioned or mitigated to avoid the detriment, the application shall be presumed to impair or be detrimental to the public interest. The Department shall review recovery plans, the Fish and Wildlife Program, and regional restoration programs applicable to threatened or endangered species in evaluating whether a proposed use is detrimental to the protection or recovery of a threatened or endangered species.

(2) The proposed use shall comply with the following standards which will form the basis for permit conditions:

(a) The proposed use complies with screen design, installation, operation (including provisions for maintenance) specifications and passage requirements as listed in ORS 498.248 through 498.268 and 509.600 through 509.630;

(b) The proposed use complies with existing state and federal water quality

standards; and

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

(3) Any application for more than one cubic foot per second not subject to the requirements of OAR Chapter 690, Division 86, shall contain a description of the measures to be taken to assure reasonably efficient water use.

(4) Based on the determination under OAR 690-33-220(1) the proposed use may be further conditioned so that, if the riparian area is disturbed in the process of developing a point of diversion, the riparian areas is restored or enhanced.

(5) If a proposed use is determined to be detrimental to the protection or recovery of a threatened or endangered species, the applicant may propose mitigation compatible with OAR 690-33-220 (2), (3), and (4). The Director shall determine if the proposed use with mitigation offsets the detriment. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR Chapter 635, Division 415, Section 030 adopted November 13, 1991 shall be followed.

Stat. Auth.: ORS 537.170

Hist.: WRD -1995, f. & cert. ef. 6-16-95

Flow Management

690-33-230 The Department shall consult with the affected fish and wildlife agencies and the appropriate Indian tribes to assist in resolving the flow management conflicts, if the flow management objectives for protection of threatened and endangered fish species cannot be achieved because of differing requirements between fish species in the management areas.

Stat. Auth.: ORS 537.170

Hist.: WRD -1995, f. & cert. ef. 6-16-95

Statewide Rules

Geographic Scope

690-33-310 (1) These rules, OAR 690-33-310 through 690-33-340, apply to:

(a) Applications filed after June 3, 1994, for which no permit has been granted, or on which no contested case has been ordered as of the effective date of these rules; and

(b) Requests for limited licenses except those:

(A) for less than 120 days; or

(B) issued in conjunction with an enforcement order of the Department.

(2) These rules, OAR 690-33-310 through 690-33-340, apply to the following geographic areas:

(a) Waterways of the state where sensitive fish species are located.

(b) Waterways of the state, outside the Columbia Basin, where threatened or endangered fish species are located.

(3) For purposes of making a preliminary determination of the presence of sensitive, threatened or endangered species, the Department may rely primarily on information provided by ODFW, but may also rely on information provided by the U.S. Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate Indian tribes.

Statutory. Authority.: ORS 536.025 and 536.027
Stats. Implemented: ORS 537.140 to 190
Hist.:WRD -1996, f. & cert. ef. 7-11-96

Rule Review

690-33-320 (1) These rules, OAR 690-33-310 through 690-33-340, shall be reviewed and may be revised when:

- (a) Additional species are listed as sensitive, threatened, or endangered; or
- (b) Basin programs are revised by the Department.

Statutory. Authority.: ORS 536.025 and 536.027
Stats. Implemented: ORS 537.140 to 190
Hist.:WRD -1996, f. & cert. ef. 7-11-96

Review of Proposed Water Use

690-33-330 (1) If the Department concludes during the initial review that the proposed water use will occur in an area that may affect the habitat of sensitive, threatened or endangered fish species, the Department shall:

(a) Notify the applicant that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied.

(b) Notify the interagency review team that an application has been received in an area that may affect the habitat of sensitive, threatened or endangered fish species.

(2) The interagency review team shall be convened, as needed, to review applications which the Department determines may affect sensitive, threatened or endangered fish species. Participating agencies may also request interagency review of specific applications. When reviewing applications, the interagency review team shall apply the following standards:

(a) In areas of the state outside of the Columbia Basin where threatened and endangered fish species are located, no loss of essential habitat as identified by ODFW pursuant to OAR 635-415-030 (1).

(b) In all areas of the state where sensitive species are located, no net loss of essential habitat as identified by ODFW pursuant to OAR 635-415-030 (2).

(3) The interagency review team, whenever possible, will recommend conditions to the application necessary to achieve the standards listed in 690-33-330 (2) (a) and (b).

(4) If the interagency review team cannot identify conditions that meet the standards listed in 690-33-330 (2) (a) and (b), the interagency review team shall recommend denial of the application unless it concludes that the proposed use would not harm the species.

Statutory. Authority.: ORS 536.025 and 536.027
Stats. Implemented: ORS 537.140 to 190
Hist.:WRD -1996, f. & cert. ef. 7-11-96

Public Interest Review Presumption

690-33-340 (1) Nothing in these rules delegates the authority of the Department to make final decisions on permit applications.

(2) Consistent with 690-33-340 (1), the Department shall follow the recommendation of the interagency review team in completing the remainder of the public interest evaluation pursuant to OAR 690-310-110 (1) unless it finds:

(A) The proposed use is of statewide significance;

(B) There are no other reasonable and prudent alternatives to the proposed use;

(C) The benefits of the proposed use to the public under ORS 537.170 (8) outweigh the benefits of the alternatives that would conserve the species; and

(D) All reasonable mitigation measures necessary to minimize the effect of the proposed use on the species have been implemented; or

(3) The Department shall include its findings and conclusions in the proposed final order.

Statutory. Authority.: ORS 536.025 and 536.027

Stats. Implemented: ORS 537.140 to 190

Hist.:WRD -1996, f. & cert. ef. 7-11-96