



OREGON ADMINISTRATIVE RULES

OREGON DEPARTMENT OF FISH AND WILDLIFE

Instream Water Right Rules

Purpose

635-400-000

(1) These rules set the policy, procedures, criteria, standards, including flow methodologies, and definitions for instream water right applications by the Department of Fish and Wildlife to the Water Resources Department. Instream water rights provide for protection of public uses as defined in OAR 635-400-010. These rules provide for the Department of Fish and Wildlife to apply for instream water rights for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat. The rules set out: the internal procedures for application for and coordination of instream water rights, the criteria and standards for prioritizing waterways for application, the methodologies to be used in determining flow requirements and water surface elevations needed for the public uses, and the process assisting with transfers of regular water rights to instream water rights.

(2) In 1987, the Legislature created a new type of water right called an instream water right. Instream water rights are established by certificate from the Water Resources Commission, pursuant to ORS 537.332 to 537.360, to maintain and support public uses within natural water bodies. The instream water right is held in trust by the Water Resources Department but is regulated and enforced like all other water rights. The Water



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Resources Department's procedures for establishing instream water rights are OAR 690-77-000 through 690-77-100. The Department of Fish and Wildlife may apply for instream water rights on any waters of the state that meet the definition set out in ORS 537.332 (1) and that provide for one or more of the public uses for which the Department is allowed to apply. Instream water rights allow the Department of Fish and Wildlife to manage fish and wildlife to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state.

Policy

635-400-005

It is the policy of the Oregon Fish and Wildlife Commission to apply for instream water rights on waterways of the state to conserve, maintain and enhance aquatic and fish life, wildlife, and fish and wildlife habitat to provide optimum recreational and aesthetic benefits for present and future generations of the citizens of this state. The long-term goal of this policy shall be to obtain an instream water right on every waterway exhibiting fish and wildlife values.

Definitions

635-400-010

As used in these rules:

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- (1) "Application" means an official instream water right application developed by the Water Resources Department.
- (2) "Commission" means the Fish and Wildlife Commission.
- (3) "Department" means the Department of Fish and Wildlife.
- (4) "Deputy Director" means the deputy director of the Department.
- (5) "DEQ" means the Department of Environmental Quality.
- (6) "Director" means the director of the Department of Fish and Wildlife.
- (7) "Environmental Basin Investigation Reports" means reports on instream flow studies conducted by the OSGC between the mid-1960's and the mid-1970's.
- (8) "Forest Service Method" means a methodology developed by the Pacific Northwest Region, USDA Forest Service, to determine instream flow requirements of salmonids (Swank, G. W. and Phillips, R. W. 1976. Instream flow methodology for the Forest Service in the Pacific Northwest Region. pp 334-343. In Proceedings of Symposium and Special Conference on Instream Flow Needs, Orsborn, J. F. and O. H. Allman, eds. Vol. II, American Fisheries Society, Bethesda, Maryland.)
- (9) "Held in trust by the Water Resources Department", as defined in OAR 690-77-010 (8), means that the water right must be enforced and protected for the public uses listed in the water right. Actions by the Water Resources Department affecting instream water rights are limited by public trust obligations.

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(10) "IFIM" means Instream Flow Incremental Methodology, a methodology to determine instream flows for fish and other aquatic life, developed by the U. S. Fish and Wildlife Service (Bovee, K. D. 1982. A guide to stream habitat analysis using the instream flow incremental methodology. Information Paper No. 12, U.S. Fish and Wildlife Service, FWS/OBS-82-26, Fort Collins, CO).

(11) "Instream Flow Requirement" means the amount of water required for aquatic and fish life, wildlife or fish and wildlife habitat. This requirement may be quantified as an amount of flow, such as in a stream or river, or a water surface elevation in a standing waterway.

(12) "Instream water right", as defined in ORS 537.332 (2), means a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in stream for public use. An instream water right does not require a diversion or any other means of physical control over the water.

(13) "Oneflow Method" means a methodology to determine instream flow requirements for salmonid spawning areas based on the mean width, depth and velocity of water in a stream channel at one measured flow (Sams, R. E. and L. S. Pearson. 1963. A study to develop methods for determining spawning flows for anadromous salmonids. Unpublished report, Oregon Fish Commission, Portland, Oregon. 56 pp.).

(14) "Oregon Method" means a methodology to determine instream flow requirements for fish, developed by the OSGC



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(Thompson, K. E. 1972. Determining streamflows for fish life. Pp. 31-50. In Proceedings of the Instream Flow Requirement Workshop, Pacific N. W. River Basins Commission. Portland, OR.

(15) "OSGC" means Oregon State Game Commission (a predecessor to the Department).

(16) "Parks" means the Parks and Recreation Division of the Department of Transportation.

(17) "Public use", as defined in ORS 537.332 (4), includes but is not limited to:

(a) Recreation;

(b) Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values;

(c) Pollution abatement; or

(d) Navigation.

(18) "State sensitive and state or federally listed threatened or endangered species" means those species defined in ORS 496.004 and OAR 635-100-001 and determined through ORS 496.172 through 496.176 or through the federal process.

(19) "Stream order" means a widely accepted system of classifying streams. First order streams have no tributaries and are often called headwater streams. When two first order streams meet they form a second order stream. The joining of two second order streams form a third order stream and so on. When two streams of the same order meet the next higher order is formed.

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(20) "Waterway" means a stream, lake or place where water naturally occurs.

(20) "WRD" means the Water Resources Department.

Determination Of Instream Flow Measurement Methodologies

635-400-015

(1) Instream flow requirements requested in Department instream water right applications shall be based on the methodologies and standards in this section.

(2) Discussion of and guidelines for implementing the rules in this section are provided in the Oregon Department of Fish and Wildlife Guidelines for Instream Flow Methodologies (1989).

(3) Habitat requirements for conservation, maintenance or enhancement of fish and wildlife migration, spawning, nesting brooding, egg incubation, larval or juvenile development, juvenile and adult rearing and aquatic life shall all be considered when developing an instream flow requirement.

(4) Fish and wildlife species plans, basin and subbasin plans, management objectives, statutes, administrative rules and Commission policies shall be used to assist in determining the required instream flows for conserving, maintaining or enhancing fish or wildlife habitat or populations.

(5) Instream flow requirements shall be defined by either month or half-month intervals, depending on the temporal duration of particular fish and wildlife life stages.

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(6) The instream flow requirement shall be based on habitat criteria recommended by one of the following technical sources:

(a) IFIM habitat suitability curves published in a series of technical reports by the U. S. Fish and Wildlife Service.

(b) The Oregon Method.

(c) The Forest Service Method.

(7) An instream flow requirement shall be specified as a quantity of water or water surface elevation as determined by the methodologies in this section and dependent upon other habitat factors, fish or wildlife species plans, basin or subbasin plans, management objectives or other Commission policies for the waterway.

(8) The instream flow requirement for any specified period shall be no less than the highest instream flow or water surface elevation required by any of the fish or wildlife species of management interest during that period.

(a) Fish and wildlife species of management interest shall be determined by fish and wildlife species plans, basin and sub-basin plans, management objectives, statutes, administrative rules and Commission policies.

(9) Site-specific studies may be needed to determine flows necessary for flushing of sediment deposits, gravel recruitment, stimulating upstream migration of fish species, maintaining passage for fish migration or other specific requirements.

(10) If hydrological estimates or gaging data can be obtained, the instream flow requirements shall be compared



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against the range of naturally occurring stream flows or water surface elevations.

(a) Instream flow requirements greater than 70 percent or less than 30 percent of the naturally occurring stream flows or water surface elevations for any given time period shall be evaluated for appropriateness of the requirement in relation to naturally occurring stream flows or water surface elevations.

(11) An instream flow requirement shall be specific to a stream reach or a particular standing body of water.

(a) The length of stream reach shall be determined according to biological and hydrological factors.

(b) A stream reach shall extend from the upstream end to a downstream point where either:

- (A) Species use of the stream changes;
- (B) Streamflow diminishes by at least 30%; or
- (C) Stream order changes.

(12) Whenever possible, actual measurements of stream flow or water surface elevation shall be made at or near the required instream flows or water surface elevations. Preferably these measurements shall be made at times when the waterway is occupied by the fish or wildlife life stages to be protected.

(13) Instream flow requirements in the OSGC Environmental Basin Investigation Reports shall be used to apply for instream water rights for waterways listed in the reports.

(a) If the physical conditions of the waterway have changed since the instream flow requirements were established, such as



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construction of a dam, reservoir or major channel changes, one of the methods in (14) in this section shall be used to determine the instream flow requirements.

(14) The acceptable methodologies for determining new instream flow requirements for aquatic and fish life, wildlife and their habitats shall be the following:

(a) On large lower reaches of main stem rivers, instream flow requirements shall be determined through an IFIM study by an interagency interdisciplinary team drawn from specialists in hydrology, water quality, water resources planning, fish and wildlife biology, limnology, recreational planning and any other related field.

(A) Besides fish and wildlife biology, three or more of the above specialties may be represented on a team.

(b) On principal tributaries to main stem rivers, either the IFIM or the Oregon Method shall be used.

(c) On secondary tributaries to main stem rivers, either the IFIM, Oregon Method or the Oneflow Method may be used.

(A) The IFIM shall be used before the Oregon Method if Department resources are available.

(B) The Oneflow Method may be used only when there is not enough time to conduct the IFIM or Oregon Method. Optimum spawning discharge shall be estimated using this technique. Corresponding incubation, rearing and migration instream flows shall be based on OSGC or Department streamflow requirement conversion factors.

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(C) Instream flow requirements estimated through use of the Oneflow Method and conversion factors shall be verified through measurement of actual streamflows during the next spawning season and next low flow rearing conditions.

(d) Minor tributaries are second or third order streams and may include headwater streams, minor direct tributaries to the ocean, estuaries or main stem rivers.

(A) Instream flow requirements may be determined by either direct measurement of flow or surface water elevation during each critical fish or wildlife life history stage or by IFIM, Oregon Method or One-flow Method.

(B) Direct measurement may be used to determine lake, pond or wetland water surface elevations or volumes needed to maintain fish, wildlife or their habitats.

Standards For Selection Of Streams Or Stream Reaches For Instream Water Right Applications

635-400-020

(1) When applying for instream water rights the Department shall use the following resources and standards for prioritizing waterways:

(a) Fish and wildlife species plans, basin and subbasin plans, management objectives, statutes, administrative rules and Commission policies shall be used to determine the waterway priority for applying for instream water rights.

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(b) Highest priority waterways for instream water right applications shall have one or more of the following conditions existing at the time of application:

(A) State or federal sensitive, threatened or endangered fish or wildlife species, or important populations of native resident or anadromous fish, as defined by fish species plans, basin and subbasin plans, management objectives, other Commission policies, statutes, administrative rules, treaties or other legal agreements.

(B) Important populations of native wildlife species, as defined by wildlife species plans, management objectives, other Commission policies, statutes, administrative rules, treaties or other legal agreements.

(C) Court, Legislature or Commission mandated priorities, including all protected areas as defined by the Northwest Power Planning Council's protected area designations as adopted in August 1988.

(D) State Scenic Waterways or federal Wild and Scenic Rivers.

(E) One of the conditions in (1) (b) (A) through (D) in this section exists and a potential threat to the fish or wildlife resource is identified, including the threat to aquatic and fish life, wildlife and fish and wildlife habitat by cumulative impacts from out-of-stream uses of water.

(c) An instream water right application may also be requested to conserve, maintain or enhance one or more of the

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following fish or wildlife habitats or functions of a waterway by protecting instream flows or water surface elevations that provide for:

- (A) Passage of adult or juvenile fish.
- (B) Access to important spawning or rearing areas.
- (C) High quality critical rearing areas.
- (D) Protection of incubating fish eggs and alevins.
- (E) Flushing stream systems of sediment and for gravel transport and recruitment.
- (F) Populations of aquatic organisms and other aquatic life to provide sufficient food for fish and wildlife.
- (G) Breeding or wintering migratory bird habitat, fur-bearing mammal habitat, and other wildlife habitats.
- (H) Maintenance of riparian and wetland habitats.
- (I) Water quality for fish or wildlife, including, but not limited to, factors such as limiting or diluting sediment loads, maintaining correct water temperature and increasing dissolved oxygen levels.
- (J) Protection of inflow to standing water and to maintain lake, wetland and other standing water surface elevations.
- (K) Protection of habitat improvement investments and potential sites for habitat improvements.
- (L) Special habitat features within and adjacent to the waterway which may be critical to fish or wildlife species life cycles.

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(M) The fish and wildlife values for which a state Scenic Waterway or federal Wild and Scenic River was established.

(d) The Department shall conserve, maintain or enhance angling, hunting and nonconsumptive recreational uses of fish and wildlife by requesting instream water right applications through Parks (see OAR 635-400-040).

Responsibilities To WRD

635-400-025

(1) The Department shall coordinate with WRD on prioritizing instream water rights for monitoring of flows.

(a) The Department shall coordinate with WRD Watermasters to develop monitoring plans for instream water rights.

Monitoring plans may include:

(A) Locations and methods of instream flow measurement. The downstream end of each instream water right reach shall be considered the best flow measurement location, unless conditions do not allow measurement at this location.

(B) Use of volunteers and Department personnel to conduct monitoring.

(C) The frequency of monitoring.

(D) A system for reporting and enforcing violations of instream water rights.

(b) The Department shall work with WRD to revise the existing Memorandum of Understanding between the Department and

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WRD to include issues related to instream water rights, such as measuring, monitoring and enforcement of instream water rights.

Internal Process For Instream Water Right Applications

635-400-030

(1) Instream water right requests shall be initiated by Department Field Operations staff or Fish, Wildlife or Habitat Conservation Division staff. The Commission, Director or Deputy Director may also initiate instream water right requests.

(a) Department staff shall submit completed draft instream water right applications to the Department Instream Water Right Coordinator.

(A) Prior to sending the draft applications to the Department Instream Water Right Coordinator, the draft instream water right applications shall be reviewed within seven working days by the Department Regional Supervisor or Assistant Regional Supervisor for consistency with regional direction and other Commission policies. A response shall be sent within the same seven day time frame by the Department Regional Supervisor or Assistant Regional Supervisor to the Department person originating the request. The response shall either approve or deny the request for an instream water right application.

(B) Draft applications may be hand-written or typed, and shall contain all information required on the application, as set forth in OAR 690-77-020.

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(C) Information in the draft application shall follow the standards set out in OAR 635-400-020.

(D) Draft instream water right applications submitted to the Department Instream Water Right Coordinator shall be based on the priorities set out in OAR 635-400-020. However, a lower priority waterway with readily available flow or water surface elevation information may be submitted before a higher priority waterway having no available flow or water surface elevation information.

(b) Within 30 days the Department Instream Water Right Coordinator shall review the draft applications and send approved draft applications to Department Fish, Wildlife, and Habitat Conservation Division representatives for review and to DEQ and Parks as set forth in OAR 690-77-020 (2).

(A) Draft applications needing more information or corrections prior to review by Department Divisions and coordination with agencies may be sent back to the initiator of the application.

(B) Review and response by Department Divisions shall not exceed 30 days from the date the review was requested.

(C) Review by Department Divisions shall determine if the draft application conforms with Commission policy and program direction for the waterway listed in the draft instream water right application.

(D) Any suggested change or correction to the draft application by the Department Divisions shall be reviewed by the

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Department Instream Water Right Coordinator and coordinated with the initiator of the draft application.

(E) Changes or corrections to the draft application suggested by DEQ and Parks through OAR 690-77-020 shall be reviewed for consistency with Department rules, policy and available information. These suggested changes or corrections may be made if they are consistent with Department rules, policy and available information.

(F) DEQ or Parks, or both may incorporate the public uses for which they are responsible into a Department application for instream water rights in accordance with OAR 690-77-020.

(G) The final application shall have all changes and corrections consistent with Department rules, policy, and information available.

(c) The final application shall be signed by the Director or the Director's designated representative.

(A) If DEQ or Parks, or both are combining their applications for an instream water right with the Department's application, the application must be signed by representatives of DEQ or Parks, or both.

(B) All completed signed applications on which the Department is the sole signatory shall be submitted immediately to the WRD for processing.

(d) If an application is returned by the WRD because of deficiencies in fulfilling requirements of OAR 690-77-020, the Department Instream Water Rights Coordinator shall correct those

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deficiencies within the required time period or withdraw the application. A request may be made of the WRD for an extension to correct the deficiencies.

(e) The Department Habitat Conservation Division shall be responsible for monitoring the application through the application process.

(A) If a petition for review is received by the WRD, in accordance with OAR 690-77-030, and the WRD Director determines that OAR 690-77-030 is not satisfied, the Department Habitat Conservation Division shall work with the WRD and the petitioner to resolve the concerns.

(B) If an application is referred to the Water Resources Commission for review in accordance with OAR 690-77-030, the Department Habitat Conservation Division shall work with the Water Resources Commission, the WRD and the petitioner to seek approval of the application.

(C) If the Water Resources Commission requires a public hearing (as set forth in OAR 690-77-035), the Department shall become a party to the hearing and provide evidence to support approval of the application.

(D) In (1) (e) (A) - (C) of this section, the Department shall seek to have applications certified for the quantity of water needed to support the public uses applied for.

(E) Notwithstanding (1) (e) (A) - (D) of this section, the Department, at any time in the application process, may withdraw an application on which it is the sole signatory. If the

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Department is a co-applicant with Parks or DEQ or both, the Department may withdraw its portion of the application.

(2) The Department shall maintain a complete, up-to-date and accessible file of all instream water rights applications and certifications.

(a) Certified instream water rights shall be recorded on the Department computerized database for water rights and on the Department habitat database.

(b) Copies of the certificates and pending applications shall be readily accessible to Department staff, other agencies and members of the public.

(A) Copies of the certificates shall be maintained in the Department Habitat Conservation Division on microfiche, the Department Engineering Section and the appropriate Department Fish or Wildlife District.

(B) The Department Habitat Conservation Division shall provide the appropriate Department Fish or Wildlife District, Region and Divisions with information regarding certification of recent instream water rights.

Purchase, Lease Or Gift Of Water Rights For Instream Water Rights

635-400-035

(1) The Department shall buy, lease, and accept as gifts water rights for the purpose of transferring the water right to

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an instream water right for the public uses and purposes set forth in OAR 635-400-000 through 635-400-035.

(a) Donors of gifts shall be recognized through a formal Commission process.

(b) Water rights that may be transferred to instream water rights shall be reviewed for potential benefits and adverse impacts to fish and wildlife or their habitats, angling, hunting, trapping or nonconsumptive uses of fish or wildlife.

(A) Standards set out in OAR 635-400-020 shall apply to prioritize water rights that are to be bought or leased.

(B) Gifts of water rights shall be accepted regardless of priorities set out in OAR 635-400-020, if the transfer does not harm fish or wildlife or their habitats, angling, hunting, trapping or nonconsumptive uses of fish or wildlife.

Public Involvement

OAR 635-400-037

(1) Any individual, organization or public agency may request the Department apply for an instream water right on a waterway.

(a) The Department Instream Water Right Coordinator shall review the request with the appropriate Department District and Region to determine the Department priority of the waterway requested.

(b) If the request is determined to be for a high priority waterway, as defined by OAR 635-400-020, the Department Instream

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Water Right Coordinator may apply for the instream water right, after determining the instream flow requirement in accordance with OAR 635-400-015.

Review And Coordination Of Instream Water Right Applications Submitted By Other Agencies

635-400-040

(1) Within 30 days of receipt, the Department Habitat Conservation Division shall review and return comments on all draft instream water right applications from other agencies, in accordance with OAR 690-77-020, for potential adverse impacts or benefits to fish and wildlife populations or their habitats, angling, hunting, trapping and nonconsumptive uses of fish and wildlife.

(a) Every effort shall be made by the Department to resolve conflicts with draft applications, identified in (1) of this section, before the applications are submitted to WRD by other agencies.

(b) The Department Instream Water Right Coordinator shall track the WRD process for instream water right applications submitted by other agencies in which the Department has an interest.

(2) The following standards will be used to determine the level of Department participation in the application and certification process.

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(a) The Department shall support and shall provide staff assistance, if needed, to the agency making an instream water right application if the following standards apply:

(A) State sensitive or state or federally listed threatened or endangered fish or wildlife or their habitats are involved.

(B) The requested instream water right is beneficial to conserving, maintaining or enhancing significant native fish and wildlife populations or habitat.

(C) The requested instream water right is beneficial to conserving, maintaining or enhancing Department fish and wildlife management objectives for commercial harvest, angling, hunting, trapping or nonconsumptive uses of fish or wildlife.

(D) Requested instream water right is in a state Scenic Waterway or federal Wild and Scenic River.

(b) The Department shall support but may elect not to provide staff assistance to an agency making application if the following standards apply:

(A) An adequate instream water right for fish and wildlife populations or their habitats already exists.

(B) The application is for a waterway that provides no identified benefits for fish or wildlife populations or their habitats.

(C) The application is for general recreation or esthetics.

(D) The waterway does not meet priorities and standards established in OAR 635-400-020.



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(c) The Department shall oppose draft instream water right applications submitted by agencies if such applications cause one or more of the following problems:

(A) Increased instream flows provided by storage are greater than the natural or traditional instream flows occurring during any time period and cause adverse impacts to fish and wildlife populations or habitats, commercial harvest, angling, hunting, trapping or nonconsumptive uses of fish and wildlife.

(B) Decreased lake or reservoir water surface elevations occur that are lower than the natural or traditional water surface elevations during any time period and cause losses to fish or wildlife populations or their habitats, commercial harvest, angling, hunting, trapping or nonconsumptive uses of fish and wildlife.

(C) Any proposed storage releases or reservoir filling schedules that are required to meet the instream water right and adversely affect Commission policies and program direction established for that waterway or other affected waterways.

Adopted 10-13-89

Effective 10-28-89