



# Oregon

Kate Brown, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Breeze Potter, Water Policy Analyst & Rules Coordinator

**SUBJECT:** Agenda Item I, June 3, 2021  
Water Resources Commission Meeting

#### Preview of Upcoming Rulemakings

#### I. Introduction

During this informational report, Department staff will provide the Commission an overview of the status of work on four upcoming administrative rulemakings.

#### II. Overview of Rulemaking Process

Administrative rulemaking must follow the procedures of ORS 183.310 to 183.355, the Attorney General's Model Rules, and the Department's Division 001 rules. The rulemaking process begins with internal development of draft rules. The Department then appoints a Rulemaking Advisory Committee (RAC) comprised of persons likely to be affected by the proposed rule change. The RAC provides the Department with feedback on the substantive language of the draft rules and any fiscal impact that may result from the proposed rule change.

Thereafter, the Department will file a Notice of Proposed Rulemaking with the Secretary of State's Office (SOS), which includes information about public hearing(s) and public comment opportunities, the proposed rule language, and a fiscal impact statement. The SOS publishes the notice in the *Oregon Bulletin*, signaling the commencement of formal rulemaking. The Department also provides notice to legislators, interested parties, the media, and the public in an effort to ensure those impacted by a proposed rule change are notified of their opportunity to comment.

Once a public hearing(s) is held and the public comment period closes, Department staff prepare a Staff Report and present a rulemaking recommendation to the Water Resources Commission for consideration. The Commission makes a decision on whether to adopt, amend, or repeal a rule. The final official rules can be found in the [Oregon Administrative Rules Database](#).

### III. Rulemakings

As shown in the table below, the Department currently has four rulemakings that are a priority for 2021.

| DIVISION | RELATING TO                                                        | STATUS                            |
|----------|--------------------------------------------------------------------|-----------------------------------|
| 10       | Critical Groundwater Areas (CGWAs)                                 | Preparation for RAC               |
| 54       | Conversions of Hydroelectric Water Rights to Instream Water Rights | RAC Complete;<br>Preparing Notice |
| 77       | Instream Water Right Leases and Transfers                          | RAC Meetings                      |
| 215      | Measuring Tube Requirements for Water Supply Wells                 | On Hold                           |

#### **Division 10**

Division 10 outlines the process for designation of critical groundwater areas (CGWAs) and is currently out-of-date and inconsistent with statute (ORS 537.730 to 537.742). The proposed amendments to Division 10 will provide a framework for implementing future CGWA designations according to statute and will cover:

- Required conditions and findings for CGWA designations as specified by statute; Notice and hearing requirements;
- Consultation process with local government;
- CGWA rule requirements as specified by statute;
- Corrective control provisions as specified by statute;
- Filing and review requirements; and
- Contested case process.

The proposed amendments will not create basin- or subbasin-specific CGWAs; limit groundwater appropriation; or implement corrective control provisions. Once the rules are in place, future designations of basin- or subbasin-specific CGWAs will require a separate rulemaking process conducted in accordance with the provisions of the amended Division 10. The Department is currently working to identify RAC members and preparing draft documents for the RAC to review.

#### **Division 54**

Division 54 is a new rule division that will establish standards and procedures for conversions of hydroelectric water rights to instream water rights in accordance with the provisions of ORS 543A.305. The proposed rules will guide the review and decision-making process for conversions and establish procedures for providing notice of a proposed conversion. The rules also propose standards for determining:

- Actual use under the hydroelectric water right and resulting impacts on actual use by other existing water rights as of October 23, 1999;
- Whether the conversion would result in injury to other existing water rights as of October 23, 1999; and
- Mitigation measures to avoid injury and to ensure the continuation of authorized water uses by other existing water rights as of October 23, 1999.

This rulemaking effort began in 2017 and was resumed in 2020 after further amendment of the proposed rules. The Department held two Rules Advisory Committee (RAC) meetings in November 2020 to seek feedback on the amended proposed rules. The RAC meetings were attended by 18 RAC members and interested parties (representing: Confederated Tribes of the Warm Springs Reservation; Oregon Department of Environmental Quality; Northwest Hydroelectric Association; Trout Unlimited; WaterWatch of Oregon; League of Oregon Cities; Middle Fork Irrigation District; East Fork Irrigation District; Oregon Water Resources Congress; Oregon Farm Bureau; Oregon Department of Fish and Wildlife; and Confederated Tribes of the Umatilla Reservation). The Department provided an opportunity for RAC attendees to submit written comments on the proposed rules. The Department is currently refining the proposed rules in response to RAC feedback.

### **Division 77**

Division 77 sets forth standards for reviewing and approving instream water right transfers, instream leases, conversion of minimum perennial streamflows, and agency requested instream water rights. The proposed amendments to Division 77 address the following primary issues related to instream leases and instream transfers:

- Streamline the process for instream leases involving irrigation districts. Proposed changes include making the district the applicant (lessor) and removing the requirement for the district to provide water right “ownership” information with the submitted application for individual properties involved in a lease application. Currently, the rules define the landowner as the water right holder (lessor) and water right ownership and consent information is required if the lessor is not the landowner. The Department proposes to change the rules to allow districts to obtain consent from individual landowners or other parties holding interest in the water right and keep that documentation on file in the district office. That information would be available to the Department if necessary. These changes are consistent with existing water right transfer requirements for irrigation districts (both temporary and permanent) under OAR Chapter 690, Division 385.
- Incorporate changes to instream leasing resulting from Senate Bill 199 (2013 Oregon Law). SB 199 modified the sunset date for split-season instream leasing and added a 10-year limitation on a water right included in a split-season lease.
- Incorporate the process for transferring all or a portion of a water right to store water (i.e., a reservoir right) to an instream right.
- Incorporate additional changes to clarify certain application requirements. Changes may include adding basic mapping requirements for instream leases; restructuring the split-season lease section of the rules to clarify the application requirements, process, and actions that must be completed prior to submittal of a lease application and the use of water instream; and grammatical and punctuation corrections.

The Department has appointed RAC members and is currently working to schedule upcoming RAC meetings and preparing draft documents for the RAC to review.

### **Division 215**

The Division 215 rules apply to the maintenance, repair, and deepening of water supply wells. During a prior rulemaking action, OAR 690-215-0200, relating to installation of dedicated measuring tubes in water supply wells, was erroneously repealed. This section is cross-referenced in the requirements of OAR 690-200-0028 (designated special area standards). The proposed amendment to Division 215 would reproduce the exact language of OAR 690-215-0200 in a new section. This change would clarify existing references in OAR 690-200-0028 and provide guidance to well owners on when installation of a dedicated measuring tube is required in order to protect groundwater resources in three specific geographic locations (Petes Mountain Area of Clackamas County, Eola Hills Ground Water Limited Area of Polk and Yamhill Counties, and “Mosier Area” Special Area Standards area of Wasco County). This rulemaking is currently on hold as the Department awaits the outcome of pending legislation (HB 2145). Should this legislation pass, the Department plans on combining rulemaking efforts in order to increase efficiency.

### **IV. Conclusion**

The Department anticipates bringing forward several rulemakings for consideration by the Commission during the November Water Resources Commission meeting.

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