



MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item H, December 3, 2021
Water Resources Commission Meeting

Division 51 Temporary Rulemaking – Annual Fees for Hydroelectric Projects

I. Introduction

During this agenda item, Breeze Potter, Rules Coordinator, will present a request for adoption of a temporary rule to amend OAR 690-051-0400 to conform with statute.

II. Background

With the passage of House Bill 2143 during the 2021 Legislative Session, existing rule provisions relating to annual fees for hydroelectric projects conflict with statute. House Bill 2143, which is codified as 2021 Oregon Laws (OL) Chapter (Ch.) 516, became effective the 91st day after sine die. A copy of 2021 OL Ch. 516 is contained in Attachment 1. Under the new statutory annual fee structure, the licensee is required to annually pay the applicable fee under Oregon Revised Statute (ORS) 543.078 as amended by 2021 OL Ch. 516 for the hydroelectric project on or before January 1 each year.

The Department has determined that rulemaking is required to conform the current Oregon Administrative Rule (OAR) with statute and is developing a permanent rule to remove existing language in OAR 690-051-0400 that relates to annual fees. However, with annual fees due on or before January 1, 2022, it is not possible to adopt a permanent rule before annual fees are due. Given the conflict between the current rule and the new statutory annual fee structure, there is a potential for confusion regarding the assessment of annual fees due on or before January 1, 2022. In order to mitigate this confusion and provide immediate guidance for licensees, the Department is proposing adoption of a temporary rule to amend OAR 690-051-0400 to conform with statute.

III. Overview of Rule

This proposed temporary rulemaking amends OAR 690-051-0400 to remove existing language that relates to annual fees. The full text of the proposed temporary rule is contained in Attachment 2. This proposed change will conform the rule with statute and will eliminate confusion for licensees regarding the amount of the annual fee due on or before January 1, 2022.

IV. Temporary Rulemaking Requirements and Justification

Pursuant to ORS 183.335(5), an agency may temporarily adopt, amend, or suspend a rule without prior notice or hearing. In order to file a temporary rulemaking an agency must prepare a written statement that:

- Indicates the specific consequences that would result from a failure to adopt, amend, or suspend the rule and why these consequences would constitute a serious prejudice;
- Identifies who would suffer these consequences;
- Explains how failure to take immediate rulemaking action would cause these consequences; and
- Explains how the temporary rulemaking will avoid or mitigate these consequences.

Given the differences between the Department's current rule governing annual fees (OAR 690-051-0400) and the new statutory annual fee structure of 2021 OL Ch. 516, there is a substantial likelihood of confusion regarding the correct amount of the annual fee due on or before January 1, 2022. This confusion may result in licensees submitting an amount different than the amount due under the new law and potentially an amount different than other similarly situated licensees. This result is contrary to the intent of the Legislature in adopting House Bill 2143. If the differences in assessment of the annual fee due under the Department's current rule and under the new law cause confusion and ultimately payment of different annual fees, some licensees may be seriously prejudiced by paying more than other licensees who are similarly situated. It is in the public interest to implement the fee schedule authorized by the 2021 Legislature, as that fee schedule is necessary to address budgetary shortfalls to support hydroelectric programs at three state agencies, enabling these programs to carry out their statutory duties to serve the public and hydroelectric project owners.

The Department estimates there are around 120 hydroelectric project licensees who will be subject to the annual fee requirements of 2021 OL Ch. 516. These licensees include individuals, small businesses, irrigation districts, and municipalities. By amending OAR 690-051-0400 to remove existing language relating to annual fees, the proposed temporary rule will reduce the likelihood of confusion regarding the correct amount of the annual fee due on or before January 1, 2022, and ensure all licensees who are similarly situated are submitting the same amount under the new annual fee structure.

V. Conclusion

While the Department intends to bring forward permanent rules for adoption to conform OAR 690-051-0400 with statute, there is an immediate need to eliminate potential confusion about the amount of annual fees due on or before January 1, 2022. Adoption of the proposed temporary rule will mitigate the consequences identified above and allow the Department time to undertake the permanent rulemaking process to make the required changes to conform OAR 690-051-0400 with statute.

VI. Alternatives

1. Adopt the temporary rule amending OAR 690-051-0400, as contained in Attachment 2.
2. Modify and adopt the temporary rule amending OAR 690-051-0400.
3. Decline to adopt the temporary rule amending OAR 690-051-0400 and instead wait for Department staff to bring forward a permanent rule for adoption at a future meeting.

VII. Recommendation

The Director recommends Alternative 1, to adopt the temporary rule amending OAR 690-051-0400, as contained in Attachment 2.

Attachments:

1. 2021 OL Ch. 516
2. OAR 690-051-0400 Temporary Rule

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CHAPTER 516

AN ACT

HB 2143

Relating to annual fees for hydroelectric projects; creating new provisions; amending ORS 536.015, 543.078, 543.085, 543.090, 543.300, 543.710 and 543A.405; repealing ORS 543A.415; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 536.015 is amended to read:

536.015. (1) The Water Resources Department Hydroelectric Fund is established separate and distinct from the General Fund of the State Treasury. Except as provided in subsections (4) [to (6)] **and (5)** of this section, of the moneys in the Water Resources Department Hydroelectric Fund:

(a) A portion equal to 67 percent of the total moneys received each year shall be transferred to the fund created under ORS 496.835;

(b) A portion equal to 10.3 percent of the total moneys received each year shall be transferred to an account of the Department of Environmental Quality to be used to review applications for certification of hydroelectric projects under ORS 468B.040 and 468B.045; and

(c) All of the remaining moneys received each year are continuously appropriated to the Water Resources Commission and the Water Resources Department to provide for the payment of the administrative expenses of the commission and the department in carrying out their responsibilities related to the issuance of permits, licenses or water right certificates for hydroelectric projects.

(2) The following shall be deposited into the State Treasury and credited to the Water Resources Department Hydroelectric Fund:

(a) Fees received by the Water Resources Department for hydroelectric projects under ORS 536.050, 543.078 to 543.092, 543.210, 543.280, 543.300, 543.710[,] **and** 543A.405 [and 543A.415]; and

(b) All moneys received on behalf of this account by gift, grant or appropriation from whatever source.

(3) All interest, if any, from moneys credited to the Water Resources Department Hydroelectric Fund shall be credited to the fund and shall inure to the benefit of the Water Resources Department Hydroelectric Fund.

(4) Application fees received under ORS 543A.405 shall be disbursed to the various agencies in the amounts specified in the cost reimbursement agreement executed with each reauthorization applicant.

[(5) Four cents of each 28 cents paid as a reauthorization fee under ORS 543A.415 shall be paid to the Department of Environmental Quality.]

[(6)] **(5)** Annual fees paid under ORS 543.078 shall be disbursed to state agencies pursuant to a memorandum of agreement developed by the Department of Environmental Quality, the State Department of Fish and Wildlife and the Water Resources Department.

SECTION 2. ORS 543.078 is amended to read:

543.078. (1) On or before January 1 of each year, each holder shall pay to the State of Oregon an annual fee for each hydroelectric project that is subject to this section. The annual fee required by this section shall be based on the theoretical horsepower specified in the water right for each project.

(2) The amount of the annual fee required under subsection (1) of this section shall be determined in the following manner:

(a) Subject to the [schedule set forth in subsection (3) of this section,] **adjustment required under this paragraph, for a project producing more than 123.5 theoretical horsepower** each holder shall pay an amount[, in 1998 dollars,] equal to [*\$0.405*] **a base rate of \$0.687** per theoretical horsepower covered by the water right for the holder's hydroelectric project. The annual fee may be set forth in the water right or may be established by order of the Water Resources Director. [and shall be adjusted annually for inflation according to rules established by the Water Resources Commission.] **The Water Resources Commission shall annually adjust the fee established in this paragraph based on the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor, using a base date of January 1, 2021.** The annual fee also may be adjusted through the periodic review process established in ORS 543.085.

(b) Each holder of a hydroelectric project that produces **15 or more theoretical horsepower but not more than 123.5 theoretical horsepower** [or less] shall pay an annual fee of \$50 for that project.

(c) **Each holder of a hydroelectric project that produces less than 15 theoretical horsepower shall pay an annual fee of \$15 for that project.**

(d) **The amount of theoretical horsepower upon which the fees are paid must be computed by multiplying the maximum amount of water appropriated, expressed in cubic feet per second, by the average total fall utilized, expressed in feet, and dividing the number resulting from the multiplication by 8.8.**

(e) **For a project that diverts water from a point on a river that forms a border with another state, the fee computation described in paragraph (d) of this subsection may not use as the maximum amount of water appropriated more than half of the capacity of the project.**

[(3) The fee determined in subsection (2) of this section shall apply to a project on the January 1 following the occurrence of an event enumerated as follows:]

[(a) A licensee or water right certificand shall begin to pay the annual fee after the final order for the reauthorized water right is issued under ORS 543A.130.]

[(b) Notwithstanding paragraph (a) of this subsection, if a licensee holds, on October 23, 1999, an

original state hydroelectric license for which the original expiration date was or is more than five years after the expiration date of the original Federal Energy Regulatory Commission license for the project, the licensee shall begin payment of the annual fee established under this section after the expiration date of the original state hydroelectric license.]

[(c) A power claimant, or uncertificated claimant, licensed by the Federal Energy Regulatory Commission shall begin to pay the annual fee after the Federal Energy Regulatory Commission issues a new license. A power claimant or uncertificated claimant that received a new license from the Federal Energy Regulatory Commission within 10 years prior to October 23, 1999, shall begin to pay the annual fee on January 1, 2000.]

[(d) A power claimant, or uncertificated claimant, whose project is exempted from licensure by the Federal Energy Regulatory Commission or not licensed by the Federal Energy Regulatory Commission shall begin paying the annual fee under this section on January 1, 2008, for that project.]

[(4) No fee shall be assessed under ORS 543.710 for a project subject to an annual fee under this section.]

SECTION 2a. Notwithstanding ORS 543.078 (2)(a), a holder of a hydroelectric project shall pay \$0.48 per theoretical horsepower for a project producing more than 123.5 theoretical horsepower if:

(1) The project is not exempt from relicensing under ORS chapter 543A; and

(2) The holder has not received either:

(a) A final order described in ORS 543A.130 that approves an application for reauthorization of a water right or license; or

(b) A new license issued by the Federal Energy Regulatory Commission on or after the effective date of this 2021 Act to replace an original license issued by the commission.

SECTION 2b. Section 2a of this 2021 Act is repealed on December 31, 2023.

SECTION 3. ORS 543.085 is amended to read:

543.085. (1) At least once every eight years the Water Resources Director shall appoint a review panel to review the amount of the annual fee established under ORS 543.078 *[in 2003 and 2009 and every eight years thereafter]*. The review panel shall consist of at least one representative from the following and others at the director's discretion:

- (a) The Department of Environmental Quality;
- (b) The State Department of Fish and Wildlife;
- (c) The Public Utility Commission;
- (d) The Water Resources Department;
- (e) Investor owned utilities;
- (f) Publicly owned utilities;
- (g) Municipalities;
- (h) Environmental organizations;
- (i) Agricultural organizations; and
- (j) Nonutility owners of hydroelectric projects.

(2) All holders paying annual fees under ORS 543.078 **(2)(a)** shall be notified by the Water Resources Department at least 60 days in advance of the meeting of the review panel established in subsection (1) of this section, and provided the opportunity to submit comments to the panel.

(3) Any periodic review conducted under subsection (1) of this section shall evaluate each agency's hydroelectric program to determine if current staffing levels, activities and funding are appropriate to fulfill program objectives. There shall be a presumption that the fee should not change. To overcome the presumption and alter the existing fee, the panel must find compelling reasons for alteration and must reach unanimous consent on the new fee. If the presumption is overcome, upon completion of the review process the director shall either adjust the annual fee as recommended by the panel or elect not to adjust the fee. Any change in the annual fee as a result of this section shall become effective on the January 1 following the director's action. The director shall notify all holders of any change in the annual fee and the effective date of such change.

SECTION 4. ORS 543.090 is amended to read:

543.090. (1) Any project operating under a hydroelectric license issued by the Federal Energy Regulatory Commission and concurrently operating under the authority of a power claim or uncertificated claim shall pay all expenses related to the review and decision of a Hydroelectric Application Review Team established under ORS 543A.075 that:

(a) Are incurred by the team and any agency participating as part of the team in the federal relicensing process; and

(b) Are not otherwise covered by [the reauthorization fee paid under ORS 543A.415] a fee described in ORS 543.078.

(2) Not later than six years before the expiration of a hydroelectric license issued by the Federal Energy Regulatory Commission to any project operating concurrently under the authority of a power claim or uncertificated claim, the Water Resources Department shall contact the holder to schedule a consultation meeting regarding expected fees to be incurred by the Hydroelectric Application Review Team.

(3) Relicensing fees shall be calculated and assessed according to the terms and conditions set forth in ORS 543A.405 and 543A.410 for application fees.

SECTION 5. ORS 543.300 is amended to read:

543.300. Any license issued under ORS 543.010 to 543.610 shall take into consideration, and shall be on, the following conditions:

(1) That the proposed project shall be such as, in the judgment of the Water Resources Commission, is well adapted to the development and utilization of the water power involved.

(2) That the licensee shall construct and build the project according to the maps, plans and specifications filed with and approved by the commission,

and within the time fixed by the license or by any lawful extension thereof.

(3) The operations of the licensee so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules as the commission may prescribe for the protection of life, health and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes. The licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the commission may prescribe.

(4) That the licensee [*will*] **shall** maintain the project, and each part thereof, in good order and repair and in efficient operation, for the development and transmission of electricity to its reasonable capacity; shall make all necessary renewals and replacements as required; and shall maintain and operate the project, and all parts thereof, conformably to the rules of the commission not inconsistent with ORS 543.010 to 543.610.

(5) That the licensee [*will pay to the state annually not more than \$1 for each horsepower covered by the license*] **shall annually pay to the state the applicable fee under ORS 543.078 for the project.** This sum shall constitute a first lien upon the project, which lien may be enforced by suit in equity or other appropriate proceeding, or payment thereof may be enforced by the state in an action for debt. Payment of such license fees may be waived by the commission during all or any part of the period of construction. The fees need not be uniform throughout the entire period of the license, but may be for different amounts for different periods. [*The amount of the license fees, within the minimum and maximum limits herein specified, shall be determined by the commission and expressed in the license.*]

(6) Other and further conditions not inconsistent with ORS 543.010 to 543.610 as the commission may require in the public interest.

(7) In issuing a license for a minor project of not more than 100 horsepower the commission may waive all or any of the conditions and requirements of ORS 543.010 to 543.610 except the period for which a license may be issued, and the annual charge [*as determined by the commission*] under subsection (5) of this section. In issuing licenses for projects in excess of 100 horsepower for which the applicants are required to secure permits and licenses from the United States as a condition precedent to the construction of the projects, the commission may waive and modify such of the terms, conditions and requirements of ORS 543.010 to 543.610, except the period for which a license may be issued and the annual charge [*as determined by the commission*] under subsection (5) of this section, as the commission, by order, after full investigation and public hearing, shall find to make impracticable the construction of such projects. During the time

that a licensee is not a public utility and does not sell electric energy, and does not sell bonds or other evidences of debt against the licensee's plant, the commission may waive the accounting and amortization requirements of ORS 543.010 to 543.610, even [*where*] **if** the project involved exceeds 100 horsepower.

[*(8) Subsection (5) of this section does not apply to a water right reauthorized pursuant to ORS chapter 543A.*]

SECTION 6. ORS 543.710 is amended to read:

543.710. Every claimant other than a licensee under ORS 543.010 to 543.610 shall on or before January 1 of each year pay to the state in advance an annual fee based upon the theoretical water horsepower claimed under each separate claim to water **and calculated using the formula under ORS 543.078 for a project of similar theoretical horsepower.** [*, graduated as follows: Thirty cents for each theoretical water horsepower or fraction thereof up to and including 50 and 28 cents for each theoretical water horsepower or fraction thereof in excess of 50. However, upon filing the statement provided in ORS 543.720, the United States or the state, claiming the right to the use of water to any extent for the generation of power, or any other claimant to the right to use water for the generation of 10 theoretical water horsepower or less, shall be exempted from the payment of all fees provided for in this section. Four cents of each 28 cents collected as an annual fee under this section shall be deposited to the Water Resources Department Hydroelectric Fund and disbursed to the Department of Environmental Quality.*]

SECTION 7. ORS 543A.405 is amended to read:

543A.405. (1) Subject to the provisions of ORS 543A.410, any person submitting a notice of intent to seek reauthorization, a preliminary application or an application for reauthorization of a project under ORS 543A.030, 543A.035, 543A.075, 543A.080 or 543A.095 shall pay all expenses related to the review and decision of the Hydroelectric Application Review Team that are incurred by the team and any agency participating as part of the team, and that are not otherwise covered by the [*reauthorization fee paid under ORS 543A.415*] **fee paid under ORS 543.078.**

(2) Every person submitting a notice of intent to seek reauthorization of a project shall submit the fee required under ORS 536.050 (1)(r) to the Water Resources Department when the notice of intent is submitted.

(3) Before submitting an application to reauthorize a state project under ORS 543A.035, the applicant shall request from the team an estimate of the costs expected to be incurred in processing the application. The team shall inform the applicant of that amount and require the applicant to make periodic payments of such costs pursuant to a cost reimbursement agreement. The cost reimbursement agreement shall provide for payment of 25 percent

of the estimated costs when the applicant submits an application under ORS 543A.035.

(4) Before the close of public comment on study proposals developed by the applicant for a federally licensed project under ORS 543A.085, the team shall estimate the costs expected to be incurred in evaluating the project. The team shall inform the applicant of that amount and require the applicant to make periodic payments of such costs pursuant to a cost reimbursement agreement. The cost reimbursement agreement shall provide for a first payment of 25 percent of the estimated costs on a schedule established in the agreement.

(5) If costs of the team's evaluation of a project exceed the estimate in the cost reimbursement agreement, the applicant shall pay any excess costs shown in an itemized statement prepared by the team. In no event shall the team and its participating agencies incur evaluation expenses in excess of 110 percent of the fee initially estimated unless the

team provided prior notification to the applicant and a detailed projected budget the team believes is necessary to complete evaluation of the application. If costs are less than the fee paid, the team shall refund the excess to the applicant.

(6) The Water Resources Department shall reimburse participating agencies for costs incurred in their review of a project. Such costs shall not include expenses of other state agencies for which a fee is otherwise collected under state law.

SECTION 8. ORS 543A.415 is repealed.

SECTION 9. This 2021 Act takes effect on the 91st day after the date on which the 2021 regular session of the Eighty-first Legislative Assembly adjourns sine die.

Approved by the Governor July 19, 2021
Filed in the office of Secretary of State July 19, 2021
Effective date September 25, 2021

OAR 690-051-0400 Temporary Rule

**OREGON ADMINISTRATIVE RULES CHAPTER 690
DIVISION 51**

Rule Text and Individual Rule Summary:

AMEND: OAR 690-051-0400

Rule Summary: Removes language relating to hydroelectric project annual fees to conform rule with statute.

690-051-0400 Application Filing 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.

OAR 690-051-0400 Temporary Rule

~~(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.~~

Statutory Authority: ORS 536.025, ORS 536.027, ORS 537 & ORS 543, 2021 OL Ch. 516

Statutes/Other Implemented: 2021 OL Ch. 516

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