

Water Resources Department

Division 93 (SB 839) Draft 6.0

DRAFT RULES

010 - Purpose

The purpose of these rules is to establish a means for state government to support the development of water resource projects having economic, environmental and community benefits. The rules establish procedures and requirements for the funding of water resources projects from the Water Supply Development Account established in ORS 541.656.

020 - Definitions

The following definitions apply to this division of the rules:

- (1) "Adequate Security" means the pledge of real or personal property given to secure a loan against loss or credit enhancement guaranty or other security of value authorized by ORS 470.170, given as assurance that the loan will be paid.
- (2) "Ad valorem taxing authority" means a tax based on the value of real estate or personal property.
- (3) "Collateral" means the security pledged for the payment of a loan.
- (4) "Commission" means the Water Resources Commission.
- (5) "Conserved Water" means that amount of water that results from conservation measures, measured as the difference between:
 - (a) The smaller of the amount stated on the water right or the maximum amount of water that can be diverted using the existing facilities; and
 - (b) The amount of water needed after implementation of conservation measures to meet the beneficial use under the water right certificate.
- (6) "Director" means the director of the Oregon Water Resources Department or the director's designee.
- (7) "Expanded Storage" means the quantity of water authorized by a new water storage permit which adds to the capacity of an already-existing storage facility.
- (8) "Indian tribe" means a federally recognized Indian tribe in Oregon that has members residing on a reservation or tribal trust lands in Oregon.
- (9) "Instream use" means water that remains in or is released into the natural stream channel or lake bed or where water naturally flows or occurs that provides a benefit including but not limited to recreation, conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, other ecological values, pollution abatement or navigation.
- (10) "Newly developed water" means the new increment of water:
 - (a) Stored for a project providing new or expanded storage;
 - (b) Allocated to a use under a secondary water right for a project involving the allocation of previously uncontracted water stored by the United States Army Corps of Engineers under an existing water right; or
 - (c) Conserved for a project to allocate conserved water under the program described in ORS 537.455 to 537.500.
- (11) "Non-Profit Organizations" means an organization that uses surplus revenues to achieve its goals rather than distributing them as profit or dividends.
- (12) "Perennial Stream" means a continuous stream flow year around.
- (13) "Personal property" means movable property or possessions not permanently affixed to and a part of the real estate.
- (14) "Persons" means individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, the state and any agencies thereof, and the federal government and any agencies thereof.

- (15) "Project Materials" means documents or media materials that are published or produced to describe or market the project.
- (16) "Protected instream" means water that remains in or is released into the natural channel and is legally protected by the state.
- (17) "Seasonally varying flows" means the duration, timing, frequency and volume of flows, identified for the purpose of determining conditions for a new or expanded storage project, that must remain in-stream outside of the official irrigation season in order to protect and maintain the biological, ecological and physical functions of the watershed downstream of the point of diversion, with due regard given to the need for balancing the functions against the need to store water for multiple purposes.
- (18) "Secondary water right" as used in OAR 690-093-020 (10)(b) means a water right permit issued for the beneficial use of stored water.
- (19) Technical Review Team – Team which conducts the initial scoring and ranking for the projects which consists of representatives of the Water Resources Department, the Department of Environmental Quality, the State Department of Fish and Wildlife, the State Department of Agriculture, Oregon Business Development Department, affected Indian tribes, any collaborative body established by the Governor to address challenges, opportunities and priorities for the region affected by the project and additional experts as determined by the Water Resources Department.
- (20) "Water Supply Development Account" is the account established in the State Treasury under ORS 541.656.

030 - Authorized Use of Funds

- (1) The department may expend moneys from the account for:
 - (a) Subject to subsection (3) of this section, making loans and grants to evaluate, plan and develop in-stream and out-of-stream water development projects approved by the Water Resources Commission, including but not limited to projects that:
 - (A) Repair or replace infrastructure to increase the efficiency of water use;
 - (B) Provide new or expanded water storage;
 - (C) Improve or alter operations of existing water storage facilities in connection with newly developed water;
 - (D) Create new, expanded, improved or altered water distribution, conveyance or delivery systems in connection with newly developed water;
 - (E) Allocate federally stored water;
 - (F) Promote water reuse;
 - (G) Promote water conservation;
 - (H) Provide streamflow protection or restoration;
 - (I) Provide for water management or measurement in connection with newly developed water; and
 - (J) Determine seasonally varying flows in connection with newly developed water.
 - (b) Paying the necessary administrative and technical costs of the department in carrying out sections 1 to 15 of this 2013 Act.
- (2) (a) In addition to any other permissible uses of moneys in the account, the department may expend moneys from the account to support:
 - (A) Ongoing studies conducted by the United States Army Corps of Engineers to allocate stored water; and
 - (B) Comprehensive basin studies conducted by the United States Bureau of Reclamation.
- (b) Expenditures described in this subsection are not subject to any grant or loan procedures, public benefit scoring or ranking or other requirements or restrictions for grants or loans established under this administrative rule.

- (3) The department may expend account moneys under subsection (1) of this section for loans and grants to develop in-stream and out-of-stream water development projects only if the department determines under ORS 540.530 that any transfer of water rights for the project will not injure existing water rights.
- (4) The commission is not required to obligate all available account moneys during a funding cycle. Any available account moneys that are not obligated during a funding cycle shall be carried forward and be made available for projects in future funding cycles.

040 - Loan and Grant Applicant Eligibility

- (1) Parties eligible for a loan or grant under these rules include:
 - (a) "Persons" as defined by ORS 536.007.
 - (b) "Indian tribes" as defined by ORS 391.802.
 - (c) "Non-profit organizations".
- (2) If an applicant is required to have a water management and conservation plan as prescribed by a condition of a water use permit; a permit extension; or another order or rule of the Commission, the plan must be submitted to the Water Resources Department and receive approval prior to department acceptance of an application for a loan or grant from the account.

050 -Pre-application conferences

- (1) A pre-application conference may be requested by prospective applicants.
- (2) The Department may request, and the applicant must provide 14 days prior to the conference, adequate project information to prepare for the pre-application conference.
- (3) At the pre-application conference, the Department shall inform the prospective applicant of:
 - (a) The procedural and substantive requirements of a loan or grant application.
 - (b) The scoring system used to evaluate loan and grant requests.
 - (c) Any known issues associated with project eligibility for a loan or grant from the account.
- (4) The prospective applicant may request additional pre-application consultation with the department.

060 - Application Submission Periods

- (1) The Department shall accept an application for a loan or grant at any time, but shall establish a yearly deadline for the consideration of a pool of applications.
- (2) The Department will conduct a preliminary review of the application for completeness, eligibility and for sufficiency of information to determine benefits and outcomes as listed in OAR 690-093-090 Scoring and Ranking and OAR 690-093-100 Project Selection.
- (3) Applications not funded during one annual period may be resubmitted in a future period.

070 - Application Requirements

- (1) Applications for a loan or grant from the Water Supply Development Account must be in a form prescribed by the Water Resources Department and must include the following:
 - (a) A description of the need, purpose and nature of the project, including what the applicant intends to complete and how the applicant intends to proceed.
 - (b) Sufficient information to allow evaluation of the application based upon the public benefit scoring and ranking of the project.
 - (c) Current contact information for the principal contact, fiscal officer and involved landowners.

- (d) For applications involving physical changes or monitoring on private land, evidence that landowners are aware of and agree to the proposal and are aware that monitoring information is a public record.
 - (e) The location of the proposed project, using public land survey reference points, latitude and longitude, county, watershed, river and stream mile, if appropriate.
 - (f) An itemized budget for the project, including fiscal and administrative costs.
 - (g) A description of funds, services or materials available to the project.
 - (h) A project schedule, including beginning and completion dates.
 - (i) Any conditions that may affect the completion of the project.
 - (j) A completed feasibility analysis if appropriate.
 - (k) Suggestions for interim and long-term project performance benchmarks.
 - (l) If the application is for a grant, demonstrated in-kind and cash cost match of not less than 25 percent of the amount of the grant sought from the account.
 - (m) If the application is for a loan, evidence demonstrating ability to repay the loan and provide collateral.
 - (n) Letters of support for the proposed project.
 - (o) If required by the department, a description of consultations with affected Indian tribes regarding the project.
 - (p) Any other information required by the department.
- (2) Applications determined to be ineligible, incomplete or that provide insufficient information shall be returned to the applicant.

080 - Public Comment

- (1) The Department shall provide public notice and a 60-day period for public comment prior to initial scoring by the Technical Review Team by posting applications passing an initial review on the Department's website.
- (2) Additional public comment will be sought by the commission prior to a final decision on an application.

090 - Scoring and Ranking; funding decisions

- (1) The primary elements in the process of scoring and ranking of applications include the following:
 - (a) Initial review for completeness by the Department
 - (b) Public Comment
 - (c) A Technical Review Team conducts the initial scoring and ranking for the projects, considers comments from applicants and the public and makes loan and grant funding recommendations to the Commission.
 - (d) The Commission determines the final scoring and ranking of projects, provides for additional public comment, and makes the final decision regarding which projects are awarded loans or grants from the account.
- (2) The Technical Review team scoring methodology shall rank applications based upon the public benefits of the project and additional considerations set forth in ORS 541.677 subsection (1)(b), (1)(d) and (1)(e). The Technical Review Team shall use a score sheet provided by the Department. Each of the three public benefit categories shall be given equal importance in the evaluation and will have scoring sublevels including but not limited to the following:
 - (a) The evaluation of economic benefits for a project based on the changes in economic conditions expected to result from the project related to:
 - (A) Job creation or retention;
 - (B) Increases in economic activity;
 - (C) Increases in efficiency or innovation;
 - (D) Enhancement of infrastructure, farmland, public resource lands, industrial lands, commercial lands or lands having other key uses;

- (E) Enhanced economic value associated with tourism or recreational or commercial fishing, with fisheries involving native fish of cultural significance to Indian tribes or with other economic values resulting from restoring or protecting water in-stream; and
 - (F) Increases in irrigated land for agriculture.
- (b) The evaluation of environmental benefits for a project based on the changes in environmental conditions expected to result from the project related to:
- (A) A measurable improvement in protected streamflows that:
 - (i) Supports the natural hydrograph;
 - (ii) Improves floodplain function;
 - (iii) Supports state or federally listed sensitive, threatened or endangered fish species;
 - (iv) Supports native fish species of cultural importance to Indian tribes; or
 - (v) Supports riparian habitat important for wildlife;
 - (B) A measurable improvement in groundwater levels that enhances environmental conditions in groundwater restricted areas or other areas;
 - (C) A measurable improvement in the quality of surface water or groundwater;
 - (D) Water conservation;
 - (E) Increased ecosystem resiliency to climate change impacts; and
 - (F) Improvements that address one or more limiting ecological factors in the project watershed.
- (c) The evaluation of the social or cultural benefits for a project based on the changes in social or cultural conditions expected to result from the project related to:
- (A) The promotion of public health and safety and of local food systems;
 - (B) A measurable improvement in conditions for members of minority or low-income communities, economically distressed rural communities, tribal communities or other communities traditionally underrepresented in public processes;
 - (C) The promotion of recreation and scenic values;
 - (D) Contribution to the body of scientific data publicly available in this state;
 - (E) The promotion of state or local priorities, including but not limited to the restoration and protection of native fish species of cultural significance to Indian tribes; and
 - (F) The promotion of collaborative basin planning efforts, including but not limited to efforts under the state integrated water resources strategy.
- (3) Scoring sublevels shall have a numeric point scale that accounts for positive and negative effects of the project. Sublevel scores shall be summed to a public benefit category level. The Department shall set a minimum score for the application to proceed.
- (4) The Technical Review team will use the total score from the score sheet provided by the Department to rank all applications and make loan and grant funding recommendations to the Commission.
- (5) The Commission shall determine the final scoring and ranking of projects and make the final decision regarding which projects are awarded loans or grants from the account based on criteria in OAR 690-093-100.
- (6) The Department shall document the ranking of all applications and make the application ranking publicly available after the funding decisions by the Commission have been published.

100 - Project Selection

The Commission shall select projects for funding which have the greatest public benefit and will achieve the outcomes listed in section (2).

- (1) Project evaluation shall include:

- (a) The public benefit in three categories:
 - (i) Economic,
 - (ii) Environmental, and
 - (iii) Social or Cultural;
 - (b) Equal importance of each of the three categories of public benefit; and
 - (c) Consideration of both positive and negative effects of the projects.
- (2) The Commission will consider the following in its determination of eligible Projects that will receive funding:
- (a) The issuance of grants or loans only to projects that provide benefits in each of the three categories of public benefit described in (1)(a) of this section.
 - (b) Preference for partnerships and collaborative projects.
 - (c) The funding of projects of diverse sizes, types and geographic locations.
 - (d) If a project proposes to divert water, preference for projects that provide a measurable improvement in protected streamflows.
 - (e) If a project proposes to increase efficiency, preference for projects that provide a measurable increased efficiency of water use.

110 - Water dedicated instream for certain above-ground storage facilities

- (1) For the purposes of this section “dedicated instream” has the same meaning as “protected instream” as defined in OAR 690-093-0020(16) .
- (2) A grant for the development of a new or expanded above-ground storage facility (reservoir) that impounds surface water on a perennial stream; diverts water from a stream that supports state or federally listed sensitive, threatened or endangered fish species; or diverts more than 500 acre-feet of water annually must dedicate 25% of the newly developed water to instream use.
- (3) To meet the requirements of subsection (2) of this section, dedicated water from projects may come from any combination of newly developed water and other sources and may be released or transferred instream at other locations in the tributary if the Department determines as provided under ORS 540.530 that the alternate location would not injure existing water rights and, in consultation with the State Department of Fish and Wildlife, determines that the alternate location would provide greater or equal environmental benefit. The Water Resources Department, in consultation with the State Department of Fish and Wildlife, shall determine the timing of the flows to maximize instream benefits in a manner consistent with public health and safety.
- (a) Other sources of water as identified in this subsection include but are not limited to water released from another reservoir and protected under a secondary water right for instream use and/or a water right transferred instream.
 - (b) To establish that a project complies with subsection (2) of this section, the loan or grant recipient may include water dedicated to instream use as a result of the conditions of federal, state or local permits for the project.
 - (c) Other sources of water to meet the requirement of subsection (2) of this section shall be permanent.
 - (d) The Department shall protect water dedicated to instream use under this subsection.
- 4) A storage water right that is using stored water releases to meet the requirement of subsection (2) of this section, shall be conditioned to achieve the following:
- (a) meet the dedication requirement with stored water releases that are protected under a separate secondary water right.
 - (b) annually report, on a schedule determined by the Department, the maximum volume of newly developed water stored in the funded reservoir, including newly developed water present in the reservoir during the immediate past storage season. Twenty-five percent of this volume equals the dedication requirement.
 - (c) if the dedication requirement is not fully met from other sources, the funded reservoir shall release and the Department shall protect the balance of the water necessary to meet the dedication requirement.

- (d) demonstrate that the dedication requirement has been met.
- (5) For an existing storage permit subject to the requirements of subsection (2) of this section, the permit holder shall enter into a stipulated agreement with the Department to meet the requirements of subsections (3) and (4) of this section.

120 - Demonstration of public benefits of project

- (1) A project that receives a loan or grant from the Water Supply Development Account must:
 - (a) Demonstrate social or cultural benefits and economic benefits sufficient to qualify the project under the scoring and ranking system described in ORS 541.669; and
 - (b) Except as otherwise provided in ORS 541.681, demonstrate environmental benefits:
 - (A) By dedicating 25 percent of conserved water or newly developed water to instream use; or
 - (B) By demonstrating environmental benefits that are sufficient to qualify the project under the scoring and ranking system described in ORS 541.669.
- (2) To establish that a project complies with subsection (1)(b) of this section, the loan or grant recipient may include water dedicated to in-stream use as a result of the conditions of federal, state or local permits for the project.

130 - Seasonally Varying Flows

- (1) The Department shall make a determination as provided under subsection (2) if an application for a loan or grant is for a project that requires a new water storage or aquifer recharge permit or limited license for the storage of water outside of the official irrigation season and:
 - (a) Impounds surface water on a perennial stream;
 - (b) Diverts water from a stream that supports state or federally listed sensitive, threatened or endangered fish species; or
 - (c) Diverts more than 500 acre-feet of surface water from October 1 through September 30 of a given year.
- (2) The department shall review an application to determine whether the applicable seasonally varying flows have been established for the stream of interest. If the department determines that the applicable seasonally varying flows have not been established, the department shall establish the seasonally varying flows before issuing a loan or grant. The establishment of the seasonally varying flows by the Department shall occur after an application has been selected for funding based on the criteria of OAR 690-93-100. The department may use Water Supply Development Account moneys to pay the cost of establishing a seasonally varying flow and to pay other costs directly related to project development.
- (3) The department shall establish any seasonally varying flows under subsection (2) in consultation with the State Department of Fish and Wildlife and any affected Indian tribes. The department may rely upon existing scientific data and analysis or may fund new data and analysis. The department shall establish seasonally varying flows using a methodology provided in Appendix ___. If seasonally varying flows are established for a stream, a new water storage or aquifer recharge permit or limited license for the storage of water must be conditioned in accordance with the applicable seasonally varying flows if the license or permit:
 - (a) Is for a project receiving a loan or grant from the account;
 - (b) Is for the storage of water outside of the official irrigation season; and
 - (c) Has a diversion point that is subject to seasonally varying flows.
- (4) For an existing water storage or aquifer recharge permit or limited license for the storage of water that is subject to subsection (3) of this section, the permit holder shall enter into a stipulated agreement with the Department to protect the applicable seasonally varying flows. The Department and the permit holder shall enter into the stipulated agreement prior to the permit holder receiving funding.
- (5) The applicant for a permit or license may request that seasonally varying flows be altered based upon new information. There is, however, a rebuttable presumption that existing applicable seasonally varying flows protect and maintain the biological, ecological and physical functions of the stream to the extent required by commission rules.

- (6) The Department shall condition the new water storage permit and resulting certificate, new aquifer recharge permit and resulting certificate or new aquifer recharge limited license associated with a project that receives a grant or loan from the account to protect the seasonally varying flow in effect at the time the loan or grant is issued for the project.
- (7) For purposes of any project that receives a loan or grant and has the characteristics described in subsection (1) of this section, or any project described in subsection (3) of this section, the department shall use a seasonally varying flow methodology provided in Appendix ___ in lieu of any other methodologies for determining seasonally varying flows or any methodologies for determining peak and ecological flows outside of the official irrigation season.
- (8) Subsections (1) to (7) of this section do not eliminate or alter any applicable standard for department review of an application to determine whether water is available for purposes of reviewing an application for a new water storage or aquifer recharge permit or a limited license for the storage of water.

140 - Seasonally Varying Flow Methodology

- (1) In determining the method for development of Seasonally Varying Flow prescription the Department shall use the methodology provided in Appendix ___ to Select Methods for Development of Seasonally Varying Flow Prescriptions.
- (2) "Sufficient" information means enough scientific information collected using standard biological, hydrologic, or hydraulic methods to develop the recommended flow prescription.
- (3) The methodology provided in Appendix ___ to Select Methods for Development of Seasonally Varying Flow Prescriptions shall consider:
 - (a) The level of ecological impact of the proposed project including:
 - (A) Whether the project is diverting water from a stream supporting sensitive, threatened, or endangered species;
 - (B) Whether the impoundment is located in-channel;
 - (C) Whether the impoundment or proposed project has an impact on sensitive habitat/process;
 - (D) Whether the project is proposing to divert more than half of the remaining available water in the basin;
 - (E) Whether the majority of water is already developed in the basin.
 - (b) The type of information already available including:
 - (A) Whether there is sufficient long-term data to understand the natural hydrograph;
 - (B) Whether there is sufficient information to understand climate driven shifts to the flow regime.
 - (C) Whether there is sufficient information about water availability;
 - (D) Whether there is sufficient information about all species present at/below the point of diversion and their lifecycle needs.
 - (E) Whether there are habitat studies that provide sufficient information to understand the relationship between selected habitat features and streamflow;
 - (F) Whether there are geomorphological studies or data that provide sufficient information to understand the relationship between sediment transport and streamflow;
 - (G) Whether there is sufficient stream data available to describe stream complexity and floodplain connectivity; and
 - (H) Whether there is sufficient water quality data available, particularly related to temperature.

150 - Agreements and Conditions

- (1) Before loan or grant moneys are expended from the Water Supply Development Account for the construction of a project, the recipient must obtain all applicable local, state and federal permits.
- (2) Project materials must include a notation indicating that Water Resources Department funding was used for the project.

- (3) The loans or grants may be conditioned to require that the recipient complete and operate the funded project as described in the loan or grant application. The Department may require that before commencing the operation of a project funded with account moneys, the funding recipient demonstrate that the public benefits identified for the project, including any environmental benefits proposed at a location other than the project site, will be realized in a timely fashion.
- (3) At regular intervals, and upon completion of the project, the loan or grant recipient must submit updates to the Department that describe the completed work, the public benefits achieved and project expenditures.
- (4) The recipient must regularly measure and report the water diverted and used from the project. The Department shall make the final determination regarding the method, timing, frequency and location of measurement.
- (5) The recipient must monitor, evaluate and maintain the project for the life of the loan, or for a specified number of years for a grant, and provide annual progress reports to the Department.
- (6) The Department may impose other project specific conditions by noting the conditions during project evaluation and including the condition in the funding agreement for the project.
- (7) The Department may terminate, reduce or delay funding for a project if the loan or grant recipient fails to comply with any provision of subsections (1) to (6) of this section.

160 - Authority of the Director

- (1) The Director is authorized by the Commission to enter into agreements with applicants who have been awarded a grant or loan by the Commission.
- (2) The Director may:
 - (a) Contract with regulated lenders, state or federal agencies or others to provide services to the program.
 - (b) Take such steps as are needed to:
 - (i) Ensure repayment or recovery of loan funds
 - (ii) Prevent project funds from being diverted from the originally approved purpose
 - (c) Delegate to staff, in writing, authority to approve, deny, or amend agreements consistent with these rules.
- (3) The Director or the Director's designee may conduct periodic inspections of water projects with reasonable notice.

170 - Loan Interest Rates and Terms

- (1) Interest on loans shall be at reasonable rates as determined by the Commission
- (2) Loan repayment terms shall be for no more than 50 years and shall not exceed the estimated lifespan of the project.

180 - Loan Closing

- (1) If the Commission approves a loan, the Department and the applicant or applicants shall enter into an agreement for repayment; arrangements for repayment shall be made by the applicant and the Director.
- (2) The loan agreement shall set forth the repayment schedule. The repayment schedule shall:
 - (a) Include the amortization of the principal plus interest and provide for full repayment of the loan within 30 years or the life of the project, from the date of the first payment, whichever occurs first; and
 - (b) Provide for commencement of repayment by the applicant of moneys used for construction and interest thereon not later than two years after the date of the loan contract or at such other time as the Director may provide.
- (3) The loan agreement shall be a binding legal document between the applicant and the Director stating the terms of the loan including but not limited to:
 - (a) The purpose of the loan describing the project and location;
 - (b) The amount of the loan and payment schedule;

- (c) The description of good and sufficient collateral for the loan; and
 - (d) A statement allowing the Director to inspect the project to ensure that the developer complies with conditions for which the money was loaned. This shall remain in effect for the length of the agreement.
- (4) The loan agreement shall include provisions for early prepayment of the loan.
- (5) The ownership of a project shall not be assigned or transferred during the term of the loan without the prior written approval of the Director; such approval shall not be unreasonably withheld.

190 - Standards for security of loans

- (1) Loans shall not be approved unless:
- (a) The applicant demonstrates and the department finds that the loan will comply with all requirements of the department and any applicable federal and state requirements.
 - (b) The Director determines that the applicant meets the following standards:
 - (A) Demonstrated revenues or other resources available to:
 - (i) Repay the loan in accordance with its terms, and
 - (ii) Provide for the continued operation and maintenance of the project.
 - (B) The applicant is a qualified, credit-worthy and responsible water developer as demonstrated by a satisfactory credit history or rating from a rating agency; or
 - (C) A first lien or other good and sufficient collateral is available to secure and provide repayment of the loan, and
 - (D) The project plan assures timely completion and includes schedules with measurable performance benchmarks.
 - (c) The application requirements and qualifications are met.
 - (d) The proposed water development project is feasible and a reasonable risk from practical and economic standpoints

200 - Program Review

- (1) The Water Resources Department shall review the loan and grant program on a biennial basis to assess to what extent the outcomes described in ORS 541.677 are being achieved, and shall report the review findings to the Water Resources Commission.
- (2) The commission shall modify the project selection process as necessary to better achieve the outcomes described in ORS 541.677.