



HYDROELECTRIC TASK FORCE

Report to the 70th Legislative Assembly

House Bill 2162, April 1999

Prepared by the Oregon Water Resources Department



EXECUTIVE SUMMARY

Background

House Bill 2162 is a sequel to HB 2119, which established a coordinated state process, standards, and agency funding mechanism for the relicensing or reauthorization of hydroelectric projects. HB 2119 required the Hydroelectric Task Force to make recommendations to the Legislature on three issues; 1) the level of fees to be paid by applicants to cover agency costs of administering the hydroelectric program following relicensing; 2) the process and requirements that apply when a hydroelectric project is no longer operated for power generation; and 3) the process that applies for state approval of new hydroelectric projects.

After more than 18 months of work, the task force was able to reach consensus on a comprehensive long-term fee structure for the hydroelectric program. The task force made substantial progress but did not reach consensus on the standards, funding, or process for decommissioning, and did not have time to address the process for issuing water rights to new projects. Therefore, the bill recommends formation of a new task force to continue work on the unresolved issues.

What the Bill Does

House Bill 2162 represents a carefully balanced consensus among stakeholders regarding relicensing of hydroelectric projects. The bill does the following:

- Adjusts the amount of an existing water right fee, and creates a new, cost-recovery mechanism for state-agency oversight of hydroelectric projects that have been relicensed or reauthorized.
- Directs the Water Resources Department (WRD) to propose rules for the decommissioning of small hydroelectric projects which no longer produce power.
- Clarifies that participation in state reauthorization processes and payment of associated fees does not preclude legal challenges regarding state jurisdiction over projects that have federal licenses.
- Provides for disposition of the water right in cases when the right ceases to be used for hydroelectric or other purposes.
- Fixes technical errors from HB 2119, adopted in 1997.
- Creates a new task force to continue work on unresolved issues.

Need for the Bill

HB 2119 provided for agencies to cover their costs of participating in the reauthorization process through a system of fees. Industry representatives agreed to these fees, but saw a need for greater certainty concerning the level of fees that would apply after reauthorization. Under current law, the Director of the Water Resources Department can raise the annual fee from the current level of \$.24/theoretical horsepower (THP) to as much as \$1.00/THP. Utilities wanted statutory limits to potential fee increases.

Although HB 2119 established a coordinated state process for reviewing expiring licenses and water rights to assure that the projects continue to serve the public interest, no such process was established for projects that are decommissioned rather than reauthorized. Given that some projects will likely be retired, a process for decommissioning is needed to protect the public from orphaned facilities and project owners from unnecessarily burdensome or overlapping regulatory requirements.

The third issue referred by HB 2119—to develop a coordinated process for authorizing new projects, arose from a desire to create the same efficiencies for new projects that HB 2119 created for existing projects.

Development of the Bill

HB 2162 was developed by a WRD-staffed task force comprised of a wide range of stakeholders, including utilities, non-utility owners, agricultural representatives, state agencies, and conservation groups. After approximately 18 months of discussion, the group reached consensus on the four topics included in the bill, but ran out of time trying to develop a comprehensive decommissioning package.

Key Issues

Issues addressed by the task force presented the challenge of finding an acceptable balance among commonly held, but conflicting goals. Conflicting goals were particularly evident with respect to fees—there was a common desire to be fair to all project owners, but to be absolutely fair would require a complex

fee system and possible hardship to small-project owners. There was also a common desire to facilitate agency coordination and flexible implementation of laws—both of which result in increased agency costs and difficulty in predicting those costs.

Balance was key to discussions regarding the standards, process, and funding mechanism that would apply to projects that are no longer operated for power generation. An agreement was reached on standards, contingent on the outcome of discussions regarding who would pay to meet those standards. Who should pay depends on the balance of costs and benefits to be accrued to present or future generations, and to ratepayers, shareholders, and society at large.

The task force addressed two additional issues relating to protection of an operator's legal rights and the conversion of hydroelectric water rights to instream rights. Several utility representatives expressed concern that participation in the state's hydroelectric program and in the task force process may legally preclude a federally licensed operator from challenging the state's jurisdiction over their projects. Participation on the task force was contingent on preserving this right. Other task force members raised concern regarding the disposition of hydroelectric water rights upon their expiration. Concern centered on the potential disruptive effects on other users and to instream benefits if a hydroelectric water right was no longer exercised. A task force goal was to protect the status quo and attempt to enhance affected resources.

Issue Resolution

The desire to have fair, flexible, and adequate-but-minimal fees resulted in a somewhat complex fee system that provides an acceptable—but not absolute, level of certainty to both the hydroelectric project and the State. The water right annual fee was set at \$.405/THP in 1998 dollars and is adjusted for inflation; this base amount cannot be changed except by unanimous consent of all stakeholders. Agencies are also allowed a project-specific fee, which may be levied at the time that a water right or Federal Energy Regulatory Commission (FERC) license is issued. The project specific fee is of limited duration and

provides cost-recovery for agency oversight of adaptive management conditions in the water right, FERC license, or 401 certificate.

No resolution was reached concerning the funding of projects that are decommissioned. However, significant progress was made in clarifying and understanding the immense complexity of the issues, and most task force members believed that resolution could have been reached, given enough time and information. To provide that time and information, the task force recommended that WRD adopt rules concerning the decommissioning of small hydroelectric projects, then create a new legislative task force that would build on the lessons of the rulemaking to deal with federally licensed projects.

To allay concerns that payment of fees and participation in the State's hydroelectric program might prejudice a court decision regarding state jurisdiction over federally licensed projects, a provision was created that explicitly maintains a utility's right to challenge Oregon's jurisdiction, even though fees have been paid and benefits gained under the existing law.

The need to protect existing and instream uses of water from the harm that could arise if a senior hydroelectric right ceased to exist was resolved through a mechanism that allows conversion of up to the full amount of the water right by the hydroelectric project to an instream right that applies only at the point of the hydroelectric diversion. This assures that all those downstream of the project who currently receive water because of the hydroelectric right continue to do so. Existing uses as of the date of the bill are specifically protected, and the WRD Director may save a margin of water for allocation to new, de minimis uses in basins. The holder of a hydroelectric water right may transfer the right at any time prior to conversion. If transferred, the right is not subject to conversion until the end of its original term.

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INTRODUCTION

In 1997, the Oregon Legislature adopted House Bill 2119 creating a process by which the state could reauthorize hydroelectric projects with time-limited water rights. The bill established a state policy and created standards and procedures for reauthorizing hydroelectric projects. The Hydroelectric Reauthorization Task Force (hereafter referred to as the “Reauthorization Task Force”) which drafted HB 2119, and the Legislature, recognized that several unresolved issues would need to be addressed in order to create a comprehensive state-wide hydroelectric program. HB 2119 identified three issues in particular and established a task force to address them. The task force was directed to develop recommendations for: 1) the decommissioning of hydroelectric projects not reauthorized; 2) the amount of annual fees to be paid by projects that are reauthorized; and 3) possible changes to the procedures for obtaining a water right for a new hydroelectric project that would be consistent with the process established in HB 2119 for existing projects.

The Hydroelectric Task Force (hereafter referred to as the “task force”), created by HB 2119, met from September 1997 to March 1999 to develop recommendations on these issues. The complexity of the issues posed a significant challenge to the task force. The decommissioning of a hydroelectric project potentially involves numerous state and federal agencies, extensive studies, permits, approvals, and significant costs. Calculating new annual fees presents its own unique challenges. State agencies needed to estimate agency workload and staffing requirements for ten years into the future, based in part on license terms and conditions that are not yet established. The task force collectively struggled to find a balance between the fiscal needs and concerns of the parties at the table. This report summarizes the task force’s activities and the recommendations being made to the 1999 Oregon Legislature in the form of House Bill 2162.

Task Force Issues

- 1) Decommissioning of projects not reauthorized.
- 2) Annual fees for projects that are reauthorized.
- 3) Changes to procedures for obtaining a water right for a new hydroelectric project that are consistent with the process for existing projects.

BACKGROUND

Oregon has approximately 160 state-authorized hydroelectric projects. Most of these projects operate under time-limited licenses which will expire within the next 15 years. Prior to 1995, the state had no mechanism to reauthorize time-limited hydroelectric licenses. The hydroelectric laws did not include provisions for reauthorizing existing projects with time-limited licenses because the expectation was the state would take over ownership of the facilities once the project's investors recovered their initial investment. The 1995 Legislature repealed the statutory take over provisions, created the Reauthorization Task Force and gave it the duty of developing legislative recommendations for a hydroelectric reauthorization program. The Reauthorization Task Force reported back to the 1997 Legislature with recommendations for a state process containing standards and procedures to reauthorize expiring licenses by means of a time-limited water right.

In developing this process, the Reauthorization Task Force realized that some projects may not meet the new reauthorization standards or that some hydroelectric operators may not wish to reauthorize their project once the license expires. These situations would create the need for a decommissioning process. By enacting HB 2119, the 1997 Legislature adopted the recommendations of the Reauthorization Task Force and created the state's first hydroelectric reauthorization program. The Legislature also adopted the task force's recommendation to create a new task force to address decommissioning issues, the process for new hydroelectric projects to obtain a new water right, and the amount to be paid by reauthorized projects in annual fees.

In December 1998, on behalf of the new task force, the Water Resources Department pre-session filed HB 2162 which contained significant language on decommissioning. As of the deadline for pre-session filing legislation, the task force was still discussing decommissioning issues and hoped to reach consen-

sus. Therefore, to preserve issues for consideration by the Legislature, the bill as filed contained provisions on which the task force had not reached consensus. The bill, as amended, is significantly different from the original filing and addresses issues on which there was consensus.

HYDROELECTRIC TASK FORCE

The Hydroelectric Task Force created by the 1997 Legislature was comprised of a broad-based representation of interests including several state agencies; municipal, public and investor owned utilities; environmental and agricultural organizations; and non-utility owners of hydroelectric projects. (See Attachment C, Section 39.)

The task force, chaired by Dick Bailey, Administrator, Resource Management Division of the Water Resources Department, held its first meeting in September 1997. The task force agreed to operate on a consensus basis, with differing views being noted in the legislative report. The order of the issues the task force would address was fees, decommissioning, and new hydroelectric application procedures.

Early in the process, the task force created subcommittees to work on specific issues and report back to the full task force with recommendations for proposed legislation. The two major subcommittees were the Fee Subcommittee and the Decommissioning Subcommittee. Several smaller working groups were also formed to deal with narrower issues within each subcommittee. These working groups acted as problem solvers for specific issues and reported back to their respective subcommittees.

This report provides an explanation of the legislative recommendations submitted by the task force and an explanation of the rationale. It also identifies some of the areas of disagreement on issues, and explains why the task force was unable to reach consensus on all issues.

STATE / FEDERAL JURISDICTION

At the outset, the task force acknowledged that questions regarding the potential for federal preemption of the state's hydroelectric program had not been resolved by the Reauthorization Task Force working on HB 2119, and similarly, could not be resolved in the development of HB 2162.¹ Consistent with this agreement, a provision was developed to protect participants' continuing ability to challenge the constitutionality or validity of any part or parts of HB 2119, or the statutes and amendments which may result from the recommendations of this task force.

The task force agreed that this provision captures and preserves the understanding that all parties have the right to challenge these statutes on a constitutional basis, notwithstanding their participation in the drafting or developing of HB 2119, payment of fees, or use of the benefits provided by these statutes.

FEES

¹The state's hydroelectric program, which includes relicensing, reauthorization and oversight of hydroelectric projects, along with the assessment of fees, is carried out by a combination of programs and efforts by several state agencies. The Departments of Environmental Quality, Fish and Wildlife, and Water Resources have significant involvement in hydroelectric activities and must participate in the reauthorization of any project subject to state jurisdiction.

Hydroelectric operators pay to the Water Resources Department Hydroelectric Fund different types of fees to support the state's hydroelectric program. Currently, all projects pay annual fees and projects holding time-limited licenses pay reauthorization fees, yearly (see *Types of Hydroelectric Operators*, pg.11). During reauthorization, a project may also pay application fees or interim fees. Upon state reauthorization or federal relicensing, the task force recommends that projects pay an adjusted annual fee plus project-specific fees, if applicable. The task force also recommends, under certain circumstances, an interim fee for the period between the issuance of a proposed final order and a final order for a water right. Projects currently paying reauthorization fees would cease to do so upon reauthorization.

The proposed changes in the fee structure are in response to hydroelectric operators' desire to pay fees that more closely

Types of Hydroelectric Operators

There are several types of hydroelectric operators (also called “holders”) that are authorized by the state to operate a hydroelectric project. The different types are as follows:

Licensee is a person authorized to operate a hydroelectric project through the means of a license containing a time-limited water right. After 1931, time-limited licenses were issued to all private hydroelectric developers.

Power Claimant is a person authorized to operate a hydroelectric project through the means of a water right that does not expire. All hydroelectric developers between 1909 and 1931 received a power claim containing a certificated water right good in perpetuity. After 1931, cities, towns, or other municipal corporations, including utility districts, received power claims, and private developers received licenses.

Uncertificated Claimant is a person authorized to operate a hydroelectric project through the means of an uncertificated claim established prior to 1909. Prior to establishment of the state Water Code in 1909, there was no mechanism for the state to issue a water right. Hydroelectric projects established before 1909 must file a claim pursuant to an adjudication within their basin in order to be eligible to receive a certificated water right. Upon adjudication, valid claims receive a certificated water right.

Water Right Certificant is a person authorized to operate a hydroelectric project through the means of a time-limited certificated water right. HB 2119, passed by the 1997 Legislature, created a mechanism to reauthorize time-limited hydroelectric licenses. Upon reauthorization, the operator receives a time-limited water right certificate. Thus, over time, all licensees will be converted to water right certificants.

1) Upon state reauthorization or federal relicensing, the annual fee should be increased to \$.405 per THP or a \$50 minimum fee, whichever is greater.

2) Beginning in the year 2000, increase the annual fees for power claimants and uncertificated claimants by \$.04 per THP.

correspond to the state's involvement with their projects and to the state's desire to have a stable funding base to cover costs associated with implementing the hydroelectric program.

ANNUAL FEES

Recommendation

- (1) The task force proposes to increase the annual fee paid by hydroelectric projects, upon state reauthorization or federal relicensing, to \$.405 per theoretical horsepower (THP) of the project as specified in the water right, or assess a \$50 minimum annual fee for projects under 124 THP.
- (2) The task force recommends a \$.04 increase in the annual fee of power claimants and uncertificated claimants, beginning the year 2000.²

Background

The amount of annual fees a hydroelectric project pays is determined partly by the type of license or water right the project operates under. For hydroelectric projects operating under a time-limited license, the amount of the annual fee is determined in the license and can not be changed during the life of the license.³ For projects operating under a hydroelectric water right or claim that is granted in perpetuity, the annual fee

² Power Claimants and Uncertificated claimants currently pay \$.24/THP according to ORS 543.710. This proposal would increase the annual fee to \$.28/THP until the project is relicensed by FERC, at which time the project will pay fees according to the new fee schedule. Claimants and uncertificated claimants who are not licensed by FERC will begin paying new annual fees in 2008. Licensees will receive a corresponding \$.04/THP increase in the form of a reauthorization fee increase, in the year 2000, which will continue until they are reauthorized by the state.

³ The reauthorization bill, HB 2119, altered the way the Water Resources Department issues time-limited hydroelectric rights. In the past, a person received a license containing the terms and conditions of operation and a time-limited water right. Upon reauthorization, the Department will issue a time-limited water right certificate containing the terms and conditions of the project's operation. The old style licenses specified the amount of the annual fee the project must pay, and the terms and conditions of the license could not be changed. The new certificated water right will contain provisions allowing adjustments to the annual fee based on inflation and review by the "annual fee" panel.

is established in statute and may be changed by the Legislature. The annual fee is based on the THP of the project as specified in the license, water right or claim, and the holder pays a certain number of cents per THP.

In 1997, the Legislature saw the need to strengthen the agencies' hydroelectric programs in order to begin implementing the new reauthorization law. To do that, the Legislature approved task force recommendations to increase the fees paid by both hydroelectric licensees and claimants. A new fee to be paid by hydroelectric licensees, called a reauthorization fee, was established. The reauthorization fee would be calculated so that the current annual fee plus the reauthorization fee would equal \$.24 per THP. Most licensees with large hydroelectric projects were paying \$.15 per THP in annual fees, so the reauthorization fee for these projects was \$.09 per THP, bringing the total paid to \$.24 per THP.

Through enactment of HB 2119, the Legislature also increased the annual fee for power claimants to \$.24 per THP to be consistent with the fees paid by hydroelectric licensees.

Task Force Discussion

In its initial discussions the task force identified certain goals for annual fees. These are: (1) to ensure that annual fees are equitable across all projects, including power claims and licenses; (2) to provide adequate funds to cover the base hydroelectric programs for the Department of Environmental Quality (DEQ), the Department of Fish and Wildlife (ODFW), and WRD; (3) to provide flexibility to allow for increases or decreases in the cost of the base programs; and (4) to cover the costs of management and fiscal oversight of the three agencies' base programs.

Several criteria were considered in developing a fee formula including: (1) a minimum base fee; (2) some type of index or adjustment factor; and (3) a project specific fee to account for the differing impacts projects may have on the state's resources. Several fee formulas were developed each having its own benefits and drawbacks. Some task force members were concerned that an index or adjustment factor may not allow the state to increase annual fees in response to actual increased program

costs. While others were concerned that sharp increases in an index might unnecessarily increase fees without associated increased program needs.

The task force decided to use the Consumer Price Index (CPI) as a measure for adjusting the annual fee. Based on the CPI, the fee may be adjusted annually in either direction. The task force is recommending WRD develop rules to govern the calculation and implementation of the CPI adjustment factor.

Significant time was devoted to identifying what the current annual fee was funding and what it should be funding. The three state agencies, DEQ, ODFW and WRD, which receive portions of the annual fee reviewed their programs and identified what work was being performed and how it was being funded. Each agency provided the task force with breakdowns by fiscal category of how much it would cost to fully fund the hydroelectric programs by annual fees and how much each agency was currently receiving from annual fees. Historically, ODFW and WRD have relied on General Funds and other funds to complement hydroelectric fees. Discussions centered on whether other sources of funding should continue or whether hydroelectric annual fees should pay for all costs associated with the agencies' programs. The task force concluded that while an increase in the annual fee was needed, other existing funding sources for hydroelectric activities should continue to be used, if available.

The agencies provided the task force with estimates of the cost to fund the three agencies' hydroelectric programs beginning in the year 2008.⁴ Concerns were expressed by task force members that these estimates alternatively were too high and that they may be too low.

Utilities were concerned that annual fees not be used to pay for agency work that has other sources of funding or for work that may be performed by other divisions within an agency or by the federal government. Environmental representatives and some state agencies expressed the concern that projected program activities and corresponding funding levels would not be adequate to properly manage impacts hydroelectric projects have on the state's natural resources. There were also concerns that hydroelectric programs have been historically underfunded.

⁴The year 2008 is used as a benchmark because that is when most hydroelectric projects will be paying annual fees under the new system. Hence, state agencies will be receiving most of their annual fee revenues based on the new fee calculations. It is understood that estimates made by the agencies using the year 2008 may contain a significant margin of error.

Eventually, the task force agreed the new annual fee for hydroelectric licensees upon reauthorization would be \$.405 per THP, in 1998 dollars, with the potential for additional amounts to be assessed through project specific fees. Project specific fees would account for the increased fiscal impacts new license requirements may have on state agencies. The bill proposes that power claimants be treated similarly and their annual fee be increased to \$.405 per THP with the possibility of project specific fees. Since power claimants do not go through a state reauthorization process, FERC licensed power claimants would pay the new annual fee upon FERC relicensing and non-FERC power claimants would pay the new annual fee beginning 2008.

The task force instructed the agencies to develop a memorandum of agreement on how the revenues from the new annual fees will be divided among them. It is the understanding of the task force that the allocations in this memorandum may change over time as more projects shift to paying new annual fees, and as the workload of the agencies change.

A panel, as specified in the bill, may review the annual fee during the years of 2003 and 2008 and every eight years thereafter to determine if the fee needs adjustment. A decision to adjust the annual fee formula will require unanimous consent of all members of the panel and the approval of the Director of the Water Resources Department.

PROJECT SPECIFIC FEES

Recommendation

The task force recommends establishing a project-specific fee designed to pay for the ongoing cost of state agencies' involvement in the oversight and administration of protection, mitigation, and enhancement (PM&E) measures included as terms in a reauthorized water right, 401 water quality certification, or FERC license.

Establish a project-specific fee to cover the state's cost of overseeing the protection, mitigation, and enhancement measures in a new water right, §401 certificate, or federal license.

Background

Because of decisions made regarding the amount of the new annual fee, the task force agreed to create a new fee designed to offset the agencies' costs of overseeing the implementation of PM&E measures in a new water right, certificate, or license. The project specific fee attempts to relate the amount of fees a project pays to the amount of effort the state expends on the project. In other words, the more oversight the state agencies are required to perform in regard to the PM&E measures, the greater the fee.

Task Force Discussion

The task force identified a set of factors influencing the assessment of project specific fees. These are: (1) the experimental or unproven nature of the measure; (2) the significance of the resource affected; (3) the need for agency review of the effectiveness of the measure; (4) the need for agency personnel to perform field work or research; and (5) the overall nature of the measure.

Project specific fees must relate directly to the work state agencies are required to provide in overseeing the implementation of the PM&E measures included in the water right, certificate, or license. The task force agreed the fee should be for a limited time, dependent on the nature of the measure. Project specific fees may not be used for: (1) work on projects other than the one for which the fee was paid; (2) work that is already paid for by annual hydroelectric fees; (3) the development of statewide hydroelectric policy; (4) coordination of statewide activities within an agency; (5) attorney general costs associated with ongoing litigation; or (6) routine monitoring of non-adaptive management provisions within a water right, certificate, or license. However, project specific fees may be used for coordination of agency activities associated with the project.

One year prior to the expiration of a project specific fee, the operator and the agencies involved will meet to determine if the fee should be extended, terminated, or modified. Any disputes over the amount of the project specific fee will be referred to an

independent factfinder who will make written findings regarding the appropriateness of the state's proposed fee. If the holder objects to the state's fee action, the holder may initiate the proper review proceeding, either administrative or judicial, in which the factfinder's determination regarding the appropriate fee will be presumed correct unless proven otherwise.

The factfinder's scope of inquiry is limited to the amount of the project specific fee and not to the substance of the PM&E measures. Conversely, limitations on the scope of the factfinder's determination are not intended to limit the holder's ability to challenge the PM&E measures through appropriate processes.

REAUTHORIZATION FEES

Recommendation

The task force proposes to increase the reauthorization fee in ORS 543A.415, beginning January 1, 2000, by \$.04/THP. This would make the total amount a licensee pays in annual fees and reauthorization fees, prior to reauthorization, \$.28/THP. The task force recommends the funds collected from this increase be dedicated to DEQ.

Increase reauthorization fees for licensees in the year 2000 by \$.04 per THP, and dedicate these funds to the Department of Environmental Quality.

Background

Reauthorization fees are paid by hydroelectric licensees holding time-limited licenses. The proposed reauthorization increase is a four-cent increase over the current fee and would be paid until a project undergoes reauthorization and begins paying under the new fee system. Reauthorization fees were originally instituted in 1997 to provide additional funding to DEQ, ODFW, and WRD for work related to the reauthorization of hydroelectric projects holding time-limited licenses.

DEQ must provide Clean Water Act section 401 water quality certification for all new and reauthorized projects in either a state reauthorization or federal relicensing process. Prior to 1997, DEQ did not have staff dedicated to a hydroelectric program and fulfilled its hydroelectric duties by charging for

time spent by staff in other programs. Now that reauthorization is underway, DEQ realizes the need for reliable funding to support staff dedicated to hydroelectric activities.

Task Force Discussion

The task force recognizes that DEQ's full participation in reauthorization activities is essential and believes the additional revenue from the reauthorization fee increase will help the agency meet its needs until sufficient revenues from new annual fees are generated.

Assess an interim application fee during the period that may occur in the event the state issues a proposed final order for the reauthorization of a hydroelectric project prior to the FERC issuing its proposed license terms and conditions for the project.

INTERIM APPLICATION FEES

Recommendation

The task force recommends an interim application fee be assessed during the period that may occur in the event the state issues a proposed final order for the reauthorization of a hydroelectric project prior to the FERC issuing its proposed license terms and conditions for the project.⁵

Background

A project that is under both state and federal jurisdiction may undergo both state reauthorization and federal relicensing simultaneously. According to the reauthorization laws, the state reauthorization process is required to be consistent, to the maximum extent feasible, with the federal process. It is possible that during a joint reauthorization / relicensing process, the state would be prepared to issue a proposed final order and then a final order setting the terms and conditions of the hydroelectric water right by which the project must operate, before the FERC has issued its proposed license terms.

This creates the situation where the conditions of the state water right may be in conflict with the terms and conditions of the subsequent FERC license. To avoid this situation, the task force proposes that the state issue the proposed final order for the water right, but refrain from issuing the final order until the FERC has issued its proposed license terms and conditions. If

⁵This fee could apply to hydroelectric licensees and time-limited water right certificants undergoing a state reauthorization.

the state finds that the FERC's proposed terms and conditions are in conflict with those in the state's proposed final order the state may review its proposed final order and modify it in order to achieve consistency.

Upon the issuance of the final order for the water right, the project would be required to pay new annual fees. The interim application fee allows the state to postpone issuing a final order but still receive the level of funding it would from new annual fees along with the ability to charge additional application fees should the state have to perform significant revisions to the proposed final order for the water right in response to the FERC's proposed license terms and conditions. Once the final order for the water right is issued, there is no mechanism for the state to cover the cost associated with reconsidering the water right's terms and conditions. The interim application fee provides the state with the funding it would have received had it issued a final order, however, allows the state to postpone the final order and charge additional application fees if they are needed.

Task Force Discussion

The task force agreed that the interim application fee should be, at a minimum, the difference between \$.405/THP (the amount of the new annual fee) and the amount per THP the project is paying under its existing license. The state will still be able to charge for the cost of reauthorization application work that might occur in response to the FERC's proposed terms and conditions should the cost of that work exceed the amount the project is paying in existing fees plus the minimum interim application fee. In this way, once the state issues the proposed final order it will be assured of receiving either \$.405/THP or the actual cost of reauthorization application work, whichever is greater.

Create a relicensing fee for power claimants and uncertificated claimants to cover the cost of state involvement in the federal relicensing of hydroelectric projects holding power claims.

POWER AND UNCERTIFICATED CLAIMANT RELICENSING FEE

Recommendation

The task force proposes a relicensing fee for power claimants and uncertificated claimants to cover the actual cost of state involvement in the federal relicensing of hydroelectric projects holding power claims.

Background

The proposed fee for claimants is similar to the application fee assessed hydroelectric licensees undergoing reauthorization of time-limited state licenses. Because claimants have water rights granted in perpetuity, there is no need for the state to reauthorize the water right. However, many of these claimants hold time-limited FERC licenses. The state participates in FERC relicensing, and without this fee there is no ability to offset the state's costs. Agencies such as DEQ must provide a \$401 water quality certification in order for the project to continue to operate. ODFW provides recommendations to the FERC regarding fish and wildlife measures to be included in the federal license. The cost to the agencies is significant and this fee would offset those costs.

Task Force Discussion

In proposing this fee, the task force considered the beneficial value of having the state's full participation in the federal relicensing process and the fact that hydroelectric licensees are required to pay the state's costs associated with a combined state and federal process. Some members were concerned that without the fee, the project would not receive the state's full involvement in the federal process which may lead to less favorable terms and conditions. The relicensing fee will be calculated in the same manner as application fees for projects undergoing state reauthorization.

DECOMMISSIONING

HB 2119 directed the task force to develop recommendations for decommissioning hydroelectric projects which are not reauthorized. While significant agreement and progress was achieved in certain areas, in other areas, such as funding the implementation of a decommissioning plan, task force members held more widely disparate views. Because of the lack of consensus on certain issues, the task force is not recommending decommissioning legislation.

Recommendation

The task force recommends:

- 1) The Water Resources Commission adopt rules for ordering and conducting the decommissioning of hydroelectric projects not subject to FERC jurisdiction.
- 2) The Seventieth Legislature create a new task force to continue the effort established by the current task force to develop a decommissioning program for FERC-licensed projects not reauthorized, and provisions for decommissioning non-FERC projects that could not be addressed through WRD rulemaking.

Background

Prior to the submission of this bill, the task force agreed that if consensus could not be reached on all decommissioning elements, decommissioning provisions would be removed from the bill as a package, with the exception of instream conversions of hydroelectric water rights due to expire. (See discussion on page 24.)

- 1) *The WRC should adopt rules for the decommissioning of non-FERC hydroelectric projects.*
- 2) *Create a legislative task force to develop a decommissioning program for FERC licensed projects that are not reauthorized, and provisions for decommissioning non-FERC projects that could not be addressed through WRD rulemaking.*

The task force could not reach agreement on all aspects of decommissioning given the nature and complexity of the issues. The task force did, however, make significant progress towards developing decommissioning standards and procedures prior to the bill being submitted to the legislature.

Task Force Discussion

A threshold decommissioning issue was the question of to which projects would decommissioning standards and procedures apply. The Assistant Attorney General assigned to the task force briefed the members on their legislative mandate and how they could develop decommissioning standards and procedures without determining applicability. Several representatives to the task force feel the state lacks the authority to decommission FERC-licensed projects. Others feel the state holds jurisdiction over FERC projects through the water right and that a coordinated state process and clear standards are needed to promote efficient and effective management of hydroelectric facilities. In order to address decommissioning, it was agreed that the applicability of decommissioning standards and procedures would not be determined by the task force and members would not concede any issues regarding the state's decommissioning authority. This issue was raised at subsequent task force meetings with members expressing their desire to have the legislative report clearly reflect the understanding that the task force would not determine the applicability of decommissioning standards and procedures, and that participation on the task force and in the development of the decommissioning legislation did not preclude members from later challenging the state's authority in this area.

Early in the decommissioning discussions the task force created a Decommissioning Subcommittee to develop a draft set of decommissioning standards. The subcommittee was asked to consider the concerns and issues raised by the task force, and use the standards set forth for new and reauthorized projects for comparison purposes. The subcommittee, with the help of the task force, developed broad decommissioning concepts (*see attachment E*) to guide its work on developing standards and procedures.

Decommissioning was divided into several elements: (1) standards; (2) procedures; (3) funding the development of a decommissioning plan; and (4) funding the implementation of a decommissioning plan. Standards were addressed first, however, it was acknowledged that consensus reached in one area was contingent on agreements regarding the other elements. For some task force members, decisions regarding funding of decommissioning were key to all elements. Others felt that decommissioning standards should take priority and be established even if other elements could not be resolved.

The framework created in the hydroelectric reauthorization bill (HB 2119) was incorporated into the development of a decommissioning program. A Decommissioning Application Review Team, comprised of state agency representatives, would be created to develop, along with the operator, a decommissioning plan. A public interest standard was also developed along with minimum standards. The minimum standards addressed fish and wildlife issues, water quality, water rights, wetlands, dam safety, recreation, and other resources. In order for a decommissioning plan to be approved, it must satisfy the minimum standards and be in the public interest.

A process, similar to the reauthorization process, for developing the decommissioning plan was being devised that would allow for operator involvement and public input. It had been conceived that funding the state's involvement in this process would be paid for by the operator and the state would develop a unified position. This position would guide state actions and would be submitted to the FERC, if appropriate.

Because of time constraints and complexity of the issues involved, consensus could not be reached on decommissioning issues. The task force agreed that WRD would engage in rulemaking for non-FERC projects first, and then a task force would be developed to address decommissioning for other projects. It was recognized that because of inherent limitations of rulemaking, the new task force may have recommendations for certain issues pertaining to the decommissioning of non-FERC projects.

INSTREAM CONVERSION

Convert hydroelectric water rights to instream water rights prior to their expiration.

Recommendation

The task force recommends, prior to their expiration, the conversion of hydroelectric water rights to instream rights at the original point of the hydroelectric diversion.

Background

The proposed instream water right provision is designed to allow for the conversion of a hydroelectric water right to an instream right either at the election of the operator or at the time the hydroelectric water right would expire for other causes. The instream right would be for up to the full amount of the hydroelectric right, retain the same priority date as the existing hydroelectric water right, and be held in trust by WRD for the people of Oregon.

The quantity of the new instream right may be less than the quantity of the existing hydroelectric right. The reduction of the instream right would take place if WRD finds that the conversion would cause an injury to other water rights existing as of the date HB 2162 is effective. The injury test will consider actual use of the hydroelectric right and actual use of the other existing water rights. Mitigation measures may be included as conditions on the instream conversion to avoid injury to other existing rights. The instream right would be created at the original point of diversion for the hydroelectric right and would not be over a reach of the stream.

If the conversion is of a pre-1909 unadjudicated claim, the actual water use of the project will be calculated based on the previous five years use and the conversion action will not constitute an adjudication of the project's underlying claim.

This provision will not apply to border projects with water rights from the State of Oregon and from another state except upon the request of the holder. For projects where hydroelectric production is not the sole beneficial use, this section will

apply only to that portion of the water right used exclusively for hydroelectric purposes.

A holder may transfer an unexpired water right to another user in conformance with the transfer requirements of the Department and this bill. A time-limited water right transferred to another party will be converted to an instream water right at the time of its expiration.

Task Force Discussion

In developing the instream conversion provision it is the intent of the task force to provide water for instream purposes while maintaining stability and the current water regime among users. It is also the intent of the task force to have WRD convert, without injury to existing water right holders, the maximum amount of water to instream use while reserving from the conversion an amount to satisfy future de minimus uses.

OTHER PROVISIONS

AMENDING WATER RIGHTS AND CLAIMS

Recommendation

The task force recommends creating the ability to amend an existing hydroelectric water right or claim upon the request of the hydroelectric operator and upon approval of WRD.

Background

This provision is intended to resolve the potential problem of having a state hydroelectric water right or claim requiring the project to operate in one manner and a federal license requiring the project to operate differently. The situation is most likely to arise in the case of power claimants and uncertificated claimants receiving a new FERC license with terms and conditions different from the existing state water right or claim.⁶ This

Create authority to amend existing hydroelectric water rights and claims upon the request of the operator and with WRD approval.

⁶The need to amend power claims and uncertificated claims is more likely because they do not go through a state reauthorization process and there is no process for modifying existing terms and conditions for consistency with the FERC license.

provision would allow an amendment to make the water right or claim consistent with the terms and conditions of the FERC license issued for the project. Amending the state license or claim is not mandatory and would be initiated upon the request of the project operator. Time-limited water rights may also face the same situation if the state reauthorization process and federal relicensing process do not take place concurrently. The Director of the Water Resources Department may unilaterally amend a power claim or uncertificated claim in order to assess project specific fees.

Task Force Discussion

Several task force members were concerned that federally licensed projects may be placed in a situation where they can not satisfy both state and federal requirements for project operation. It was noted that situations could exist where both the state and the operator desire to amend a water right or claim to make it consistent with a federal license, but lack the ability to do so.

The task force agreed that WRD should develop rules governing the amendment process, requiring such things as consistency with the reauthorization statutes and the final unified state position for the project. Also, an amendment could not injure other water rights and must allow for public participation in the amendment process.

401 WATER QUALITY CERTIFICATION FEE

Allow DEQ to collect the actual cost of §401 certification for hydroelectric projects.

Recommendation

The task force recommends amendment of ORS 468.065, to allow DEQ to collect the actual cost of §401 certification for hydroelectric projects.

Background

ORS 468.065 is a statutory provision administered by DEQ and deals with the amount of fees allowable for water quality certification of hydroelectric projects. The amendment would

remove the existing fee cap of \$40,000 for new projects and \$30,000 for existing projects, and allow the agency to charge fees for the actual cost of the certification.

Experience at DEQ has shown that the current amounts are not adequate to cover the actual cost of water quality certification for some major hydroelectric projects. The amendment will allow DEQ to recover the cost of §401 certification in instances where other fees for such purpose are not applicable.

Task Force Discussion

Utility representatives on the task force feel it is important to have DEQ's involvement in the relicensing process and are willing to pay reasonable fees over the current specified cap in order to ensure proper water quality certification. Task force members, however, also agreed that DEQ would seek cost reimbursement through WRD whenever possible and would therefore not charge fees through this provision if it is charging application fees, interim fees, or claimant relicensing fees for the same work.

DISBURSEMENT OF FUNDS FROM THE HYDROELECTRIC FUND

Recommendation

The task force proposes certain exceptions to the fixed-ratio disbursement of funds from the Water Resources Department Hydroelectric Fund.

Background

Currently, all money disbursed from the Hydroelectric Fund is done so in a statutorily fixed percentage to WRD, DEQ, and ODFW. The proposed change in ORS 536.015 allows for application fees, a certain percentage of reauthorization fees, and new annual fees to be disbursed from the fund in different proportions.

Application fees which are deposited into the Hydroelectric Fund would be paid to agencies in the proportions specified in

Allow exceptions to the fixed-ratio disbursement of funds from the Water Resources Department Hydroelectric Fund.

the cost reimbursement agreement executed with a project operator. During the reauthorization process, the state may enter into a cost reimbursement agreement with a project operator to cover the cost to the state of the project's reauthorization. Each agency seeking application fees will have an estimated amount specified in the agreement. The operator makes periodic payments towards the total amount which is deposited into the Hydroelectric Fund. This amendment allows WRD to disburse the monies to each agency according to that agency's proportion of the total.

Additionally, a four-cent increase in the reauthorization fee is proposed for the year 2000. This increase is earmarked by the task force for the hydroelectric program at DEQ. The amount collected pursuant to this increase will be paid from the Hydroelectric Fund to DEQ. These payments are an additional exception to the fixed disbursement formula for the fund.

Finally, the revenues generated by the new annual fee will be divided among the three agencies in different proportions than the current annual fees. The proportion of new annual fees each agency receives may vary over time. Because of this, it is proposed that the agencies enter into a memorandum of agreement on how the fees are to be paid out of the Hydroelectric Fund.

Task Force Discussion

This amendment is primarily a housekeeping amendment, however, agency members of the task force feel this amendment is important to allow proper accounting of fund disbursements.

NOTICE OF INTENT TO REAUTHORIZE

Repeal and replace ORS 543A.070 with language to clarify the process of notifying the licensee of state reauthorization requirements.

Recommendation

The task force recommends the repeal of ORS 543A.070, the notification to licensee section of the reauthorization statute, and its replacement with new language clarifying the process.

Background

The new language clarifies when WRD should notify licensees regarding reauthorization of their projects, identifies the obliga-

tions of the hydroelectric operator in responding to the Department, and determines the disposition of an existing water right once a new water right is issued.

The current law requires WRD to notify the owner of a federally licensed project, regarding the expiration of the project's state water right, six years before the expiration date of the federal license. The section also requires the project owner to advise WRD of whether the owner intends to reauthorize the state right for the project and whether the owner intends to apply for a federal license. The timing of the notification based on the federal license did not take into account the circumstance of the state water right expiring before the federal license or expiring many years after the federal license.

If the state water right expires before the federal license, notification based upon the federal license would not allow the project operator to begin state reauthorization activities in a timely manner. If the state water right expires many years after the federal license, notification based on the federal license would require the operator to make reauthorization decisions regarding the state license many years before it is necessary. This amendment would require WRD to notify the operator six years prior to the expiration of either the state right or federal license.

Task Force Discussion

Some task force members represent projects they feel would be adversely affected by the current law. It is believed that requiring a project to commit to reauthorizing its water right, or not, and beginning the process more than ten years before the expiration of the state license was outside the intent of the original legislation. Additionally, some members pointed out that in the circumstance where the state and federal licenses expired many years apart, the current law did not offer a procedure to follow for a project that chose not to combine the relicensing and reauthorization processes. It was believed that while most project operators would choose to consolidate the state and federal processes, any operator choosing not to do so should have defined procedures to follow.

UNRESOLVED ISSUES

DECOMMISSIONING

Because of time constraints and the complexity of the issues involved, the task force was unable to complete its work on a decommissioning package. By mutual agreement, nearly all the draft decommissioning provisions have been removed from the bill. A considerable amount of time was devoted to the decommissioning standards and procedures and significant proposed statutory language was developed. Because of this, the task force is recommending that the progress made on decommissioning issues be continued. The task force is proposing that WRD promulgate rules for ordering and conducting the decommissioning of non-FERC hydroelectric projects. The task force recommends that WRD consider in its rulemaking the decommissioning provisions already developed.

The task force also recommends that another task force be created to develop a comprehensive decommissioning package for projects subject to federal jurisdiction. A successful decommissioning program will involve numerous state agencies and, in the opinion of some task force participants, a linkage between the funding mechanism and the other elements of the decommissioning program. It is believed that the most effective way to address these issues and develop a decommissioning program is by a task force comprised of interested parties developing proposed legislation. While rulemaking will have taken place for non-FERC projects, it is understood that, if necessary, legislative recommendations may also be made regarding non-FERC projects. In addition to developing decommissioning standards, procedures, and funding criteria, the new task force would recommend technical corrections to Oregon Revised Statutes, Chapter 543A, the reauthorization laws.

PROCEDURE FOR ISSUANCE OF NEW HYDROELECTRIC WATER RIGHTS

The task force was asked to provide recommendations for changes to the procedure for obtaining a water right for a new hydroelectric project that would be consistent with the process for reauthorizing existing projects. Due to time constraints the task force did not develop recommendations for new projects. The task force recommends that the proposed new task force address this issue and recommend proposed legislation.

The proposed new task force should address changes to the procedure for obtaining a water right for a new hydroelectric project that would be consistent with the process for reauthorizing existing projects.

CONCLUSION

The Hydroelectric Task Force recommends adoption of the proposed amendments to HB 2162. These amendments create a comprehensive, long-term fee structure for the reauthorization and ongoing monitoring of existing projects.

In addition, the amendments establish a process for conversion of expiring hydroelectric water rights to instream purposes and address technical corrections needed in existing law relating to reauthorization.

Finally, the amendments would establish a new Hydroelectric Task Force to continue work on unresolved issues and report back to the Legislative Assembly in 2001.