

Proposed Rule Revision Tracker**Division 2 – PROTESTS AND CONTESTED CASES**

Changes made between v3 and v4 RAC version. Changes are highlighted in the v4 RAC version of the rules for RAC member convenience. V4 is the same as the public comment draft except no highlights.

Section / Version comment	Issue	Response/Modified Language	Status / Version change made in
690-002-0025 12/6	<p>RACM - We support electronic filing and payment. In addition to exploring electronic payment options, which we urge the Department to prioritize to make electronic filing meaningful, please expressly allow payment by deduction from a filer's user account with the Department. We see no reason not to allow that as an alternative method of payment.</p> <p>RACM - RAC members discussed options for electronic payment, including the option for entities with existing accounts with OWRD to have OWRD deduct fees from those accounts</p>	<p>OWRD has made a change to allow for these accounts, but with the caveat that there are no guarantee that these will be allowed in perpetuity or that the Department is required to setup new accounts. OWRD does not have plans to discontinue these at this time, but should there be a need to in the future, OWRD would like this flexibility in the rule.</p> <p>OWRD has added to other rule sections as discussed below.</p>	Complete. Change made in v4.
690-002-0025(3) 12/5	<p>RACM - OAN appreciates the addition of language clarifying the jurisdictional deadline for submitting a payment accompanying a protest, but we encourage OWRD to work as quickly as possible to implement a system that can accept electronic payments for protests and other water right transactions. We also request that OWRD add language that clarifies that once an electronic payment system is implemented, payments will be considered received on the day they are made in the electronic system.</p>	<p>OWRD is aware of the interest in an electronic payment system and it is one of the projects that is higher on the list of priorities for IT's limited resources. OWRD has added to other rule sections as discussed below.</p> <p>OWRD considered the request to add language that clarifies receipt of electronic payment. However, OWRD is concerned that adding this language would necessitate further specifying details that have not been discussed – such as what happens if the electronic payment is later declined. We do not think the proposed language is essential, therefore, we have not included at this time.</p>	Complete. No change made.
690-002-0090 12/6	<p>RACM - This section continues to allow the Department to consolidate cases unilaterally. While proposed new language would allow another party to file a motion to consolidate or bifurcate, that misses, at least in part, the point of our prior comments. The Department, as just one party to the case, should not be able to</p>	<p>OWRD understands the commenters position but declines to make the requested change. OWRD's previous change was an attempt to partially address the concern.</p>	Complete. No change made.

	unilaterally consolidate cases, in advance of referral or otherwise. Doing so may significantly impact a party's right to a fair hearing. The rule should be revised to allow consolidation before referral only if all parties agree; and otherwise only on a motion to be decided by the ALJ subject to arguments against consolidation by any party		
690-002-0095 12/6	RACM - We continue to oppose elimination of requests for admission as a discovery method. The Department's view that they are not useful is inconsistent with the view of both state and federal courts and the DOJ for contested cases generally. We continue to oppose limits on interrogatories beyond those in the model rules. There has been no legitimate policy directive to do that.	OWRD disagrees as it has stated previously. OWRD welcomes proposals for ensuring efficient cases or proposals to modify the proposed efficiency measures.	Complete. No change made.
690-002-0095(3) 12/6	RACM As noted above, we strongly oppose the Department charging for responses to discovery requests, even if the free time threshold is extended to 30 hours, the estimates for which would be subjective and difficult to test. The Department can object to discovery requests it considers unduly burdensome, overbroad, etc. Parties will already have an incentive to use the public records process in advance given the new time limit for completing contested cases and the default schedule. RACM - OWRD's proposed language identifies circumstances in which an applicant may be required to file a public records request instead of a request for production based on anticipated OWRD staff time. This proposal is incongruous with the goals of due process and fundamental fairness, and OAN requests that OWRD remove the requirement for parties to shift to a public records request after threshold set forth in the proposed rule.	OWRD disagrees as it has articulated previously. The Department is allowed to set limits on methods of discovery.	Complete. No rule change made.
690-002-0095 12/6	The revised draft rules and tracker do not appear to acknowledge our comments regarding site visits. Like any request for discovery, information or hearing procedure, they should not be limited to only those cases in which all parties agree. Any party should be able to request one, for discovery or hearing, and any party should be able to object and get a	OWRD has provided its prior response on site visits for convenience: "OWRD has considered this comment but does not propose a change to the rule draft. Site visits are time consuming both from a scheduling standpoint and for attendance; they also	Complete. No change.

	ruling from the ALJ. The ALJ can adequately take into account whether the burdens would exceed the benefits.	increase expenses for travel; and they increase the likelihood of exceeding 180 days.”	
690-002-0095 12/6	<p>The subsection on subpoenas (5) is still not clear regarding whether it refers to discovery subpoenas, hearing subpoenas or both. We presume the intent is to refer to discovery subpoenas and suggest making that clear.</p> <p>Our comments regarding (6) have not been addressed. Whether a public records request is a basis for extension of a hearing schedule should be decided case by case and it should not depend on who the request is to. Moreover, saying when it is not a basis for extension suggests that it is a basis in other instances. We suggest striking this subsection entirely.</p>	<p>Subsection (5): Because the language does not differentiate between hearing and discovery subpoenas, it applies to both. The rule is intended to prevent the use of document subpoenas made to the Department or parties (or their employees or agents) as late-filed discovery requests. The rule language has been clarified to provide that it applies to subpoenas made to both parties and the Department.</p> <p>Subsection (6): The rule is intended to prevent the use of public records requests as late-filed discovery requests in a manner that would be disruptive to the hearing schedule. While a party (or any member of the public) may make a public records request at any time, the use of a pending public records request as a basis for a hearing extension, without sideboards, is counter to the goal of accomplishing most contested case hearings within 180 days.</p>	Complete. Partial change made in v4.
690-002-0095(2) 12/6	RACM - We appreciate that OWRD has increased the number of interrogatories that are available to a party. We request that OWRD develop a clear standard that it will apply to determine whether it will consent to additional interrogatories so parties can better assess whether additional interrogatories may be available to them based on the particular nature or scope of the contested case at issue.	The Department has considered the comment but declines to make the requested change. A similar standard does not exist in the Model Rules and this request would seek to have the Department create a new standard.	Complete. No change made.
690-002-0175 12/6	<p>RACM - This rule addresses exceptions to agency final orders (subsection 5) as well as exceptions to ALJ proposed orders. The title should reflect that.</p> <p>The rule should provide additional requirements for advising a party on how it may present arguments on exceptions. See OAR 137-003-0645(5), -0650(5). In particular, the rule should require this for exceptions filed with the commission, on which there has been</p>	<p>Subsection (5) does not address exceptions to agency final orders. It addresses circumstances where the Commission has not delegated authority to the Department to consider exceptions to proposed orders.</p> <p>The Department provides information about how and when</p>	Complete. No change made.

	<p>some ambiguity and confusion regarding presentation of argument. The rules should require the Department to advise all parties, either in the final order or by written notice to each party at least 14 days before the exceptions are to be considered by the commission, of whether, when and how the party may present oral argument on its exceptions, and how much time each party will have for doing so.</p>	<p>parties may file exceptions in proposed order issued by the OAH. It is not necessary to provide this information in rule. OWRD would need to have further conversations with the commission before including this in rule or order. OWRD may address the recent issue with oral presentation of exceptions to the Commission by providing instructions in future proposed orders. This matter is beyond the scope issues identified for this particular rulemaking.</p>	
690-002-205 12/6	RACM - OAN understands that HB 3544 mandates that OWRD identify a specific contested case schedule to fit within 180 days, and we appreciate that OWRD has added additional language allowing parties to alter the timeline by agreement.	Thank you.	Complete. No change made.
690-002-205 12/6	<p>RACM - We continue to believe that creation of an “issue list” and proceedings on that, including briefing, are unnecessary and unfair and add significant work, time and expense to the process, contrary to the stated goals of this rulemaking. The protest is sufficient to define the issues. Any argument that an issue is not sufficiently raised or is otherwise invalid should be addressed by dispositive motion or at hearing (preferably the later). There is no statutory directive to create an “issue list,” and there is no analogy to an “issue list” in civil proceedings in state or federal court, where a complaint filed by a plaintiff, which is analogous to a protest, is deemed sufficient to define the issues. Contested cases on a 180-day schedule should not add process steps that are seen as unnecessary in other civil proceedings. Moreover, creation of an “issue list” to define the scope of proceedings is unfair to protestants because it leads to removal of issues without adequate process and because it prevents reference to the protest, on which protestants are being required to provide increasing levels of detail.</p> <p>The default schedule leaves too little time between discovery responses and motions to compel. There needs to be time to review the</p>	<p>OWRD remains open to discussion about another default schedule that includes other procedural scenarios, such as no motions for summary determination.</p> <p>To preserve this as an option to develop other default schedules that do not contain motions for summary determination OWRD has added to the rules: OWRD, in consultation with OAH, may establish other alternate default schedules to govern cases in which parties and OWRD have agreed that certain case events listed in the default schedule in subsection 1 are unnecessary.</p>	Complete. Change made in v4.

	<p>responses and confer before a party can determine if a motion to compel is necessary.</p> <p>Motions for summary determination should not be part of the default schedule. Having them in the schedule will tend to encourage them and, in our experience, they add significant work, time and expense to the process. We recognize a party may be entitled to file them – though the Department may have rulemaking authority to say otherwise for its cases – but suggest discouraging them and adding them to the schedule at the prehearing conference only if a party will not agree to not file them</p>		
690-002-0210 12/5	<p>RACM - One RAC member flagged the second half of the rule was missing.</p> <p>RACM - The revised rule draft still does not adequately describe the preference for oral testimony (procedurally v. substantively). Something appears to be inadvertently deleted. Again, our suggestion (slightly modified) is: "An administrative law judge shall, to the extent practicable, give preference for testimony to be provided orally rather than in writing, without requiring testimony in writing. If written testimony is submitted, it must be subject to oral cross-examination at hearing."</p>	<p>OWRD has revised for further clarity: An administrative law judge shall, to the greatest extent practicable, require testimony to be provided orally. If written testimony is submitted, it must be subject to oral cross-examination at hearing.</p>	Complete. Change made in v4
690-002-0220 12/6 Comment also applies to -0225	<p>RACM - This rule should include language similar to the language that OWRD added to OAR 690-002-0025(3) regarding electronic payments. As written, the rule provides for filing via email but also retains the language that a filing should "include any required fees" without addressing the electronic payment issue.</p>	<p>OWRD agrees. Language added here as well as to -0225. Also included new language as a result of commenters above.</p>	Complete. Change made in v4
690-002-0005 12/6	<p>RACM - Again, we believe the rules should be made applicable to all agency orders for consistency and to avoid confusion, including hydro conversions under ORS Chapter 543A. Even if HB 3544 does not require that, it does not preclude the Department from using its general rulemaking authority, as it did for hydro conversions generally, for which no rulemaking or protest procedure at all is directed by statute.</p>	<p>Further changes to hydro conversions is beyond the scope of this rulemaking. <i>As a reminder, parts of the rules apply to all contested cases, including hydro, and parts of the rules do not.</i> OWRD has a limited scope on this rulemaking as it pertains to hydro and will not be taking up broader changes to hydro in this rulemaking effort. See further discussion in prior responses provided on this matter.</p>	Complete. No rule change made.

690-002 General 12/6	<p>RACM - OAN recognizes that HB 3544 introduced changes to the contested case process, and therefore it is appropriate to revise Division 2 to reflect the changes set forth in this legislation.</p> <p>RACM - WaterWatch appreciates changes to the proposed rules based on its previous comments, including: clarification that ORS Chapter 183 (the Oregon APA) and OAR Chapter 137 (Attorney General model rules) continue to apply except to the extent the Department has expressly deviated by rule and has authority to do so; clarifying language regarding what constitutes “electronic filing”; elimination of ambiguous language regarding determinations by the ALJ of issues for hearing; what constitutes “filing” of exceptions to proposed orders; and altering the default contested-case schedule to some extent.</p> <ul style="list-style-type: none"> WaterWatch opposes proposed rule changes that would limit the scope of discovery allowed under the Oregon APA and Attorney General model rules for contested cases. There was no directive in HB 3544 to do that, there is no directive for that otherwise in statute, and the proposed changes may deprive parties of the process they need to fairly present a case on significant water resource matters. Indeed, limits on discovery were discussed in the process that led to passage of HB 3544 and were specifically and deliberately not included in the bill. While there may be an “expectation” that the Department “make progress on [a] contested case backlog,” there has been no directive from the legislature or governor (as far as we know) to do that by limiting discovery in the contested case process beyond the limits already provided for contested cases generally. Moreover, while the model rules invite different limits on discovery in “specified program or category of cases” based on specified findings, the proposed rules would do that for all programs and cases based only on an apparent perception that it might speed up the process, without balancing that perception against the rights of stakeholders to fairly present their cases or the decision of the legislature to address the “backlog” in other ways. 	<p>Appreciate and acknowledge comments identifying areas of support.</p> <p>OWRD does not agree as has been specified previously. OWRD has not stated that the legislature or Governor has directed the agency to limit discovery. That said there are expectations that the agency make progress on the backlog. There also continues to be limited funding and staff resources to do so. This also recognizes the significant impact on the ability to get to other contested cases and the ability to accomplish other work. As an example, if all ~220 water right-related cases were allocated 30 hours of discovery, this would be 6,600 hours of staff time just on discovery, which is equal to 162 hours of work. Given that several cases have been consolidated, if we assume ~120 cases, that is still 3600 hours of work, which is still equivalent to 90 weeks of work. This is just for water rights cases and not other cases in the agency that parts of these rules would apply to.</p>	<p>Complete. No rule change.</p>
---	---	---	----------------------------------

	<ul style="list-style-type: none"> WaterWatch opposes proposed rule changes that would allow the Department to charge for providing discovery. Charging for discovery could make meaningful participation cost prohibitive for parties with fewer resources, contrary to the state's interest in promoting equity and good government. To the extent discovery requests are unreasonably burdensome relative to the nature of the proceeding, that can be addressed through objections to the requests, subject to rulings by the ALJ in disputed instances. 		
OAR 690-002-0235	OWRD staff	Added: (4) Notwithstanding subsection (1), not more than 33 days after the close of the time period for submitting a protest, the Department may withdraw a proposed final order for reconsideration and issuance of a superseding proposed final order.	Complete change made in v4.
690-002-0075	OWRD Staff	Update rules to add requests for party status as some cases no longer have requests for standing	Complete change made in v4.
690-002-0080	OWRD Staff	Add: or standing, as applicable, for instances where standing statement still exists.	Complete change made in v4.