

Follow up and Revision Tracker**Division 2 – PROTESTS AND CONTESTED CASES**

Acronyms: OWRD=Oregon Water Resources Department, OAH=Office of Administrative Hearings, RACM=Rules Advisory Committee Member

Section	Issue	Response/Modified Language	Status (as of 10/16)
690-002-0005 9/23 Draft.	RACM - “this 2025 Act” - should be updated.	Change made.	Complete Changed 10/16 draft.
690-002 (Division level issues) 9/23 Draft.	RACM - This section is complicated and RACM members most likely will need legal guidance to evaluate.	OWRD agreed that there would be the need and an opportunity to revisit Division 2; OWRD convening subgroup meeting focused solely on Div 2	Complete. Meeting set.
690-002-0010 (5) 9/23 Draft	OWRD Change: Rule allows proof of service by fax, mail, hand delivery or electronic mail, but does not require the associated info with any of those types of methods except an address.	Adds, “as applicable, the address, electronic mail address, or facsimile number,”	Complete. Changed 10/16 draft.
690-002-0010 (5) 9/23 Draft.	RACM - Change “...to which the document was mailed.” to “...to which the document was sent.”	Change made.	Complete. Changed 10/16 draft.
690-002-0085 9/23 Draft.	RACM - “subject to this Division” is confusing and applicability of the rule to timing in the process.	OWRD will delete “subject to this Division” and clarify that the new rules apply to cases once referred, which was the intent. After referral also addresses some of the concerns over electronic notice and folks needing a mailed notice first.	Complete. Changed 10/16 draft.
690-002-0095 (6) 9/23 Draft.	RACM - Public records request should specifically reference OWRD	Revision made.	Complete. Changed 10/16 draft.
690-002-0095 (4)	Concerns about site visits expressed by RAC Members (See other comments below)	OWRD: Revised to propose a new option for discussion: A site visit requires the consent of the Department, the parties, and the administrative law judge.	Complete. Changed 10/16 draft. Note anticipate subgroup discussion.
690-002-0175 (1) 9/23 Draft.	RACM - “Administrative Law Judge” should not be capitalized; it’s not capitalized anywhere else and is not a defined term	Revision made.	Complete. Changed 10/16 draft.
690-002-0205	OWRD/OAH – Agencies were in the middle of conferring on this issue and had sent out a placeholder with a note that it would be updated after consulting.	Revised default schedule after consult with OAH. This does not yet reflect input and discussion with RAC, as a subgroup is scheduled to discuss.	Complete. Changed 10/16 draft.

690-002-0210	OWRD/OAH had noted confusion over language and whether it was about the means of testimony or that oral testimony was to be given greater weight.	OWRD revised to attempt to address to make clear that the preference is about the means of providing testimony not that it shall be given greater consideration.	Complete Changed 10/16 draft.
690-002-0220 (3) 9/23 Draft.	Need to renumber to (4)	Revision made.	Complete. Changed 10/16 draft.
690-002-0225 (6)-(11) 9/23 Draft.	Need to renumber	Revision made.	Complete. Changed 10/16 draft.
690-002 (Division level issues) 9/23 Draft.	RACM - Implementation of HB 3544 appears to be less well thought out than implementation of HB 3342	Thank you for the feedback. OWRD is still working through implementation details of both bills. As the RAC flags items for us to consider, we will add it to our implementation list.	Complete. No change made.
690-002 (Division level issues) 9/23 Draft.	RACM - Implementation of HB 3544 appears to be less well thought out than implementation of HB 3342; also, why implement process improvements not spelled out by legislation?	There is an expectation from OWRD director, legislature, and Governor that OWRD make progress on contested case backlog as well as water right transactions.	Complete. No change made.
690-002-0005 (6) 9/23 Draft.	RACM - What standards re: protests apply in this case?	This is outlined in the statute. See section 3(1)(c) of HB 3544	Complete. No change made.
690-002-0005 9/23 Draft.	RACM - Is reference to APA ORS 183 appropriate as statutory implementation?	OWRD will review. OWRD reviewed after meeting: ORS 183 reference is appropriate, which is the administrative procedures act.	Complete. No change made.

Pending

Section	Issue	Status
690-002-0000 9/23 Draft.	<p>RACM - Examples of potential conflicts include</p> <ul style="list-style-type: none"> • OAR 690-002-0000 (which is not being changed) provides that "[c]ontested case hearings for [OWRD] are heard by administrative law judges from the Office of Administrative Hearings. The procedural rules for these hearings are provided in OAR 137-003-0501 to 137-003-0700 (the Model Rules of Procedure). The rules in [OAR chapter 690, division 2] are intended to supplement the Model Rules of Procedure by providing additional procedures governing requests for and conduct of contested case hearings." <p>OAR chapter 137, division 3 has its own discovery rules. OWRD can deviate from those rules, but only in specified ways. For instance, OWRD may "provide by rule that some or all discovery methods ... do not apply to a specified program or category of cases if: it finds that the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because</p>	No changes made as time set for discussion in small group.

	of the volume of the applicable caseload and the need for speed and informality in that process, and that alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings." OAR 137-003-0566(2).	
690-002-0075 9/23 Draft.	RACM - "and as identified by the administrative law judge" is confusing. RACM - We would suggest cutting the qualifier "and as identified by the administrative law judge as allowed by applicable law". In our experience, it adds confusion about the authority of an ALJ to add to, or subtract from, issues raised in protests, etc.	No changes made as time set for discussion in small group.
690-002-0095 (2) 9/23 Draft.	RACM - What is the justification for the 5-interrogatory limit, which is less than the model rules specify? Doesn't this undermine the ALJs judgement? Isn't this fewer than what is prescribed by the Model Rules? RACM - Interrogatories: The suggested limit of 5 seems arbitrary and too low. The presumptive limit in federal court is 25. Unclear where this came from.	No changes made as time set for discussion in small group.
690-002-0095 (3) 9/23 Draft.	RACM - How did you get to 25-hour limit on staff time to produce documents? Did OWRD consider charging fees after the first 25 hours? RACM – Examples of potential conflicts include Proposed rule language in 0095(3), which effectively allows OWRD to convert certain requests for production into public records requests, appears to conflict with OAR 137-003-0568(9), which provides that, "[i]n addition to or in lieu of any other discovery method, a party may ask an agency for records under the Public Records Law." Proposed rule language in 0095(3) is also potentially in conflict with OAR 137-003-0566(3), which allows an "agency [to], by rule, limit a party's ability to obtain discovery from the agency <i>when the agency merely is providing a forum for the parties and is not an active participant in the case.</i> " (<i>Emphasis added</i>). RACM - Production of documents: This section is unfair. It could make public participation cost prohibitive, especially with protest fees now over \$1,000. It also raises questions as to how the OWRD will make determinations as to the time fulfilling any request would take. Overly broad document requests can be addressed by objections to discovery based on relevance, undue burden, etc.	No changes made as time set for discussion in small group.
690-002-0095 (4) 9/23 Draft.	RACM - Examples of potential conflicts include See comment under (2)	No changes made as time set for discussion in small group.
690-002-0095 (5) 9/23 Draft.	RACM - Subpoenas: This seems random and arbitrary, especially the level of detail on this one subject, which seems to be coming from one party's grievances instead of a thoughtful discussion. These provisions also may be inconsistent with ORS 183.400, which they cannot be unless the legislature said so, which it has not.	No changes made as time set for discussion in small group.
690-002-0095 (6) 9/23 Draft.	RACM - Public record request/extension: This seems random and ill-conceived, and appeals to be addressing an undisclosed party's grievance, which is not a good basis for a generally applicable rule. Discovery in contested cases was not addressed in the bills and needs to be a more thoughtful discussion than this	No changes made as time set for discussion in small group.

	<p>rulemaking is allowing. Also, this issue should not be addressed in this cookie-cutter way. Different cases require different treatments. Justification for an extension will depend on the particulars.</p> <p>RACM - What is the justification for the 2 weeks deadline on public records request w/ respect to the motion to compel?</p> <p>RACM - Does OWRD have authority to limit ALJ's discretion?</p>	
<p>690-002-0095 9/23 Draft.</p>	<p>RACM - These draft rules do not implement HB 3544; much of what is contained herein was opposed by certain parties during the legislative session; where did this all come from? Some lobbied against these constraints during the legislative session. They were not included in HB 3544. Does not seem fair to do so now.</p> <p>RACM - Proposed rules may prejudice protestors because of truncated timelines. In other instances, limiting discovery may actually increase workloads/and slow things down because back and forth between OWRD and the requestor of documents may narrow the request.</p> <p>RACM - understand and generally support OWRD's goals here of supporting due process while also providing timely decision by moving through the contested case process efficiently. However, we have several concerns with the Department's proposed changes to OAR690-002-0095. As such, LandWatch supports the request by RACM members to give this section more discussion, potentially outside of the RACM process.</p> <p>In addition, we want to echo the discussion during the September 24th RACM meeting that the proposed rule changes appear to limit discovery in arbitrary ways, as well as conflict with or fail to satisfy requirements of several existing rules.</p> <p>RACM - In addition to these potential conflicts with existing rules, we want to emphasize that one of the points of referring a case to an ALJ is to allow a neutral hearing officer to manage the case and make context-sensitive judgment calls about things like the propriety of requests for discovery.</p> <p>ALJs should be left to do that job; OWRD should neither categorically predetermine the propriety of certain discovery methods (as with requests for admission) nor reserve for itself the ability to veto discovery on a case-by-case basis (as with interrogatories and site visits). The provisions of OAR 137-003-0565 through 0595 already provide ALJs with the direction they need to limit discovery to promote efficiency. See, e.g., OAR 137-003-0567 ("Any discovery request must be reasonably likely to produce information that is generally relevant and necessary to the case, or is likely to facilitate resolution of the case.")</p> <p>RACM - As noted in the RACM #2 meeting, WaterWatch has significant concerns with this section of the proposed rules (subsections (1) through (6)). Discovery is a big subject and should be broken out and handled separately. Discovery was not limited by HB 3544, in part, we believe, because WaterWatch raised concerns in the process about any attempt do to that. We do not support the draft's seemingly arbitrary limits on discovery. This proposed rule seems designed specifically to help the agency and applicants and to prejudice groups representing the public interest, whether conservation group, environmental justice group or citizen</p>	<p>No changes made as time set for discussion in small group.</p>

	group. This section of the rule is very important because a party representing public interests typically needs to get relevant information from the agency and the applicant, whereas the applicant typically does not.	
690-002-0205 9/23 Draft.	<p>RACM - Move away from “cookie cutter” approach and defer to OAH</p> <p>RACM - WaterWatch has significant concerns with the cookie-cutter approach of these rules. Deadlines should be set in each case by conferral and prehearing conference. Cases may require more or less time for certain things. (e.g. This schedule seems built around motions for summary determination, which, although some counsel seem to love to file them, often add considerable unnecessary time and expense to the process). We appreciate that HB 3544 calls for a default scheduling including discovery requests and responses and motions to compel. We suggest leaving it at those and allowing other deadlines to be set in prehearing conferences. For example, the parties may agree that the issues cannot be resolved on motions for summary determination, or that all of them can, which would change the need to set deadlines for those motions</p>	No changes made as time set for discussion in small group.
690-002-0205 9/23 Draft.	RACM - recommends OWRD provides a party with an opportunity to submit a reply brief in support of a motion for summary judgment.	No changes made as time set for discussion in small group.
690-002-0095 9/23 Draft.	<p>RACM - Barring requests for admission as a means of discovery will slow things down; admissions help to narrow issues down.</p> <p>RACM - Examples of potential conflicts include The proposed provisions related to interrogatories (0095(2)) and site visits (0095(4)) are also problematic from the standpoint of OAR 137-003-0056(2). The proposed rule changes would give OWRD -- not the ALJ -- final say over certain discovery questions in contested cases. In essence, OWRD is reserving for itself the ability to decide, on a case-by-case basis, whether more than five interrogatories or a site visit should be allowed. Per OAR 137-003-0056(2), though, OWRD can only make those kinds of decisions "by rule," not on a case-by-case basis.</p> <p>Proposed rule language in 0095(2) and 0095(4) also conflict with OAR 137-003-0568, which allows an ALJ to order discovery without an agency's consent once the case is before the ALJ. In essence, OWRD is trying to rewrite this rule, at least insofar as it applies to interrogatories and site visits.</p> <p>RACM - Requests for admission: Disagree with this restriction. Requests for admission can be useful in narrowing the issues in dispute and making resolution more efficient, which was the articulated goal of HB 3544. That's why they are included in both state and federal court discovery. To make them more useful, we suggest some provisions, similar to those in the ORCP, limiting blanket denials and allowing for cost recovery for proof of something that should have been admitted</p> <p>RACM - Seems unnecessary to bar ALJ from ordering a site visit.</p> <p>RACM - Site Visits: This section seems arbitrary. The Department should not have unfettered veto power and site visits may be appropriate in some cases and should be an allowed form of discovery.</p>	Partial change made for discussion related to site visits. Additional changes may occur after discussion in small group.

690-002-0005 9/23 Draft.	<p>RACM - If the purpose of the rule changes is to create a uniform process across the board, the current proposed rules are confusing. Some of the statutes weren't called out in the HB 3544 (2025) or HB 3342 (2025). They also have no statutory authority or direction on protests, e.g., hydro conversions. Although there is nothing in statute allowing for protests or standing statements, the state decided to put that in Division 54. This is confusing if we aren't consistent across the board. What is the point the Department is making regarding the APA? I.e., if OWRD is saying the APA allows for changes across the board, then why can't OWRD make changes across the board here to decrease confusion.</p> <p>RACM - As we noted in meetings #1 and #2, except in cases where there are specific statutory provisions to the contrary, WaterWatch would encourage the OWRD to make these rules applicable to all water related contested cases, including hydro conversions, for consistency and to avoid confusion.</p>	Under review.
690-002-0005 (6)	<p>Will D. Comment: I thought this requirement would not apply to unresolved protests that were both filed and referred to OAH prior to 1/1/2026, but now I am not so sure. Section 24(1) of HB 3544 says that <i>RULES</i> adopted under Sections 2 and 3 do not apply to contested case proceedings referred to OAH prior to 1/1/2025, but it does not say that Sections 2 and 3 themselves do not apply to such proceedings. And Section 24(2) appears to require this notice for all protests that were pending as of 1/1/2026, without making any exception for protests that are already at OAH.</p> <p>Can we assume that, because HB 3544 grants authority to adopt rules necessary to implement Sections 2 and 3, and provides that those rules will not apply to pending protests referred to OAH prior to 1/1/2026, that means that Sections 2 and 3 (and Section 24(2)) do not apply to pending protests referred to OAH prior to 1/1/2026? I think that was the intent during the legislative session...</p>	Under review.
690-002-0005 (6) 9/23 Draft.	<p>RACM - If someone seeks standing, but the case is not advanced to OAH by April 1, 2026 (see (4)(a), how do you go from standing to party status?</p>	Under review.
690-002-0005 (6) 9/23 Draft.	<p>RACM - Given later sections on electronic notice, need to clarify here that first contact with past protestants will be via mail given previous protest requirements did not include email.</p>	Under review.
690-002-0005 (6)(a) 9/23 Draft.	<p>RACM - "in an existing contested case proceeding" seems to lack of clarity regarding what an existing contested case proceeding is.</p> <p>RACM - Need to clarify "in an existing contested case proceeding" means that a contested case proceeding starts when a protest is submitted, not when it is referred (if this is what OWRD means). There also needs to be consistency on this point both with the Div 300 rules and ORS 183.310.</p>	Under review.
690-002-0005 9/23 Draft.	<p>Also, we suggest some language about the extent to which OAR Division 137 continues to apply, and making it clear that, unless HB 3544 says otherwise, ORS Chapter 183 continues to apply.</p>	Under review.

690-002-0023 9/23 Draft.	<p>RACM - Intro passage does not align with statute</p> <p>RACM - Comment on proposed “may appear and participate”: ORS 183.452 is about when an agency “can be represented at contested case hearing” by an agency employee (for example, Will Davidson cross examining a witness). The words “may appear and participate” seems broad enough to include agency employees as witnesses, but the draft language then seeks to limit what kinds of cases they can appear. It is unclear what OWRD is trying to do here.</p>	Under review.
690-002-0025 (3) 9/23 Draft.	<p>RACM - How does Dept ensure receipt of electronic documents?</p> <p>RACM - What constitutes timely electronic payment?</p> <p>RACM - What incentive is there to file electronically if payment must still occur by check in the mail?</p> <p>RACM - Are we setting people up for failure because they will file last minute and expect to be able to pay simultaneously?</p> <p>RACM - We support the ability to file electronically. However, the rule should also specify how to comply with (1)(b) (payment of fee) when one files electronically. We would also suggest provisions requiring OWRD to immediately acknowledge receipt of electronic filing and payment. Suggest amending sub (3) to read something like: (3) A person may file a protest by electronic mail to the electronic mail address provided for submission of protests in the notice of agency action or proposed agency action to which the protestant objects. A protestant filing a protest electronically may pay the statutorily required fee by including in the protest an authorization for the Department to deduct the fee from the protestant’s Customer Account, or XXX</p>	Under review.
690-002-0030 (1) 9/23 Draft.	<p>RACM - To the extent not dictated by other statutes, the Department ensure consistency across programs for form and content. E.g., although standing was removed in the hydro rules, the relevant statute does not have a protest provision.</p> <p>RACM members suggested the Department check to make sure 690-052-110 & 690-053-040 & 690-002-0030 all work together, i.e., look at cross references.</p>	Under review.
690-002-0030 9/23 Draft.	<p>RACM - As stated previously, to the extent not dictated by statute, we believe that the protest and request for party status provisions should be consistent across all processes so as to avoid confusion, promote uniformity of process and gain efficiencies. For example, the hydroelectric conversion statutes do not set forth direction on protest, so the OWRD could and should not put those in this section to be guided by an alternative process (addition of ORS 543).</p>	Under review.
690-002-0080 (2) 9/23 Draft.	<p>RACM - Why documents served through USPS presumed “received,” given how unreliable mail service often is? Why does the presumption not work in both directions (i.e., documents put into the mail by applicants are presumed received)?</p> <p>RACM - what qualifies as “subject to evidence to the contrary”?</p>	Under review.
690-002-0085 (3) 9/23 Draft.	<p>RACM - We would suggest adding a subsection (3): For protests, standing statements and petitions for party status filed prior to amendment of these rules,</p>	Under review.

	the Department must initially serve the filer by paper and request an email address for electronic filing.	
690-002-0090 9/23 Draft.	<p>RACM - There was a lot of discussion back and forth over the ability for parties to object to a consolidation. Some RAC members suggested that parties should be able to object to consolidation. Other RAC members supported streamlining by allowing for consolidation if all parties agree consolidation is a good idea.</p> <p>RACM - We would urge the OWRD to include some process around this. Eg: parties should have a chance to object to consolidation or bifurcation and have that ruled on by the ALJ and/or agency</p> <p>OWRD/OAH – There is a typo of repeating the parties. OWRD will clarify that parties may still file a motion to consolidate or bifurcate with the ALJ if OWRD has not. Further changes needed but still under review.</p>	Under review.
690-002-0190 9/23 Draft.	RACM - Rather than leaving filing method to what it says in the final order, which is sometimes ambiguous (e.g., “with the Department”), we suggest saying exceptions (to final order and proposed orders) “may be filed with the Department in person, by mail such that they arrive by the deadline, and/or by electronic mail or other electronic means provided by the Department.	Under review.
690-002 (Division level issues) 9/23 Draft.	RACM - Can we add a section to the rules that makes it clear for those people already in the queue that the new rules do not apply?	Under review. Implementation item. No rule change.
690-002-0025 9/23 Draft.	<p>RACM - OWRD provide an “auto-receipt” message when an email filing goes through to avoid problems related to technical issues preventing receipt by the agency.</p> <p>RACM - Is there an auto-email receipt?</p>	Under review. Implementation item. No rule change.
690-002-0085 9/23 Draft.	RACM - Will Dept notify those subject to the new rules in writing re: switch to electronic default?	Under review. Implementation Item. No rule change.