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Attachment 3 – Comments Received by Division, Department Response, and Whether Changes Were Made

Table of comments received on Divisions 52, 53, and 54, with Department’s response and whether changes were made as a result of comment. No comments were received on proposed rule changes for Divisions 305, 320, or 330.

Rule(s)	Commenter (date)/Comment	OWRD Response	Change Made?
General	WaterWatch (WW) (6/12/26) - We strongly support the agency’s work to try to expunge rule sections that are not supported by statute; that said, we think there is quite a bit more work to be done here. We will note specifics by section.	Noted.	N/A
Petitions for Party Status, protests, contested case hearings, exceptions OAR 690-052, -053, -054	WW (6/12/26) - To the extent the OWRD is attempting to create efficiencies, we would urge the OWRD to ensure that all processes across all water right transactions are uniform, unless otherwise directed by statute. While we understand that HB 3544 and HB 3342 didn’t directly apply to all the hydro statutes (e.g. conversions), OWRD is proposing to align some sections (e.g. contested cases and exceptions), but not others (petitions for party status). Having disparate processes for different transactions will only create confusion and inefficiencies, which is counter to the intent behind both bills.	Out of Scope - HB 3544 sections 2 and 3, which address contested case hearing processes, protests, and requests for party status, only applies to transactions governed by ORS 537, 540, or 541, not those governed by ORS 543 or 543A. See HB 3544 section 2(2)(a) and (2)(b). Absent statutory authority or an exemption from the Attorney General providing otherwise, ORS 183.630(1) requires OWRD contested case hearings to be governed by the Attorney General’s Model Rules of Procedure for Contested Case Hearings at OAR 137-003-0501 to -0700. Requests for party status in Division 52, 53, and 54 contested case hearings are governed by OAR 137-003-0535, which are similar to those adopted for HB 3544 in OAR 690-002-0225. Revision of protest requirements for hydro was beyond the scope of this rulemaking and would require further analysis.	No
Agency discretion not to go to	WW (6/12/26) - To the extent the rules retain the existing discretion of the Director to assess	The proposed rule language (included below) retains agency discretion, is consistent with changes made	No

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contested case hearing if significant issues are not raised OAR 690-052-0110(6); OAR 690-053-0045(1); OAR 690-054-0060(5)(b)	significant issues in relation to third party protests, this same discretion should apply to water right holder/operator protests. Absent that, a water right holder/operator could file a frivolous protest that raises no legal or factual arguments to refute the OWRD decision, which would result in a waste of state agency time/resources.	during Phase 1 of this rulemaking effort, increases contested case management efficiency, and allows for required due process by providing the holder/ operator/ applicant the opportunity for a hearing.	
Protest Fees OAR 690-052-0110(4)(f); OAR 690-053-0040(1)(f)	WW (6/12/26) - All rule provisions related to protest fees should be aligned with existing statute. For example, Div 52 and Div 53 only have a third-party protestant paying a protest fee. While the original rules were adopted before the state started requiring protest fees for applicants; since that time the state has updated Oregon's statutes to require fees for applicant protests (albeit only ½ of a third-party protestant). The rules should reflect this.	Agreed. ORS 536.050(1)(j)(A) and (B) authorize protest fees for both third party protestants and project operators and holders. Rule language was updated and re-noticed July 1, 2026.	Yes

Division 53 - Hydroelectric License, Power Claim and Certificate Amendments

Evidence of Use OAR 690-053-0010(10)	WW (6/12/26) - The rules propose to alter language related to the proof of use requirement. The proposed rule language qualifies the current requirement for "proof of use" with the language "or the right is not subject to forfeiture under ORS 540.610" (emphasis added). We have significant concerns with this addition given the interplay with other statutes. It is important to note that ORS 540.610(2), which represents the bulk of the forfeiture statute, allows a water right holder that is	Depending on the specific facts, conversion or forfeiture may apply. Further refinement of this issue is beyond the scope of this rulemaking and requires further policy discussion. OWRD has stricken the proposed forfeiture language but has inserted "beneficially" to clarify that use must be beneficial: (10) Evidence that the water has been used <u>beneficially</u> within the past five years in accordance with the terms and conditions of the permit,	Yes
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	presumed to have forfeited their water right due to non-use a process to “rebut” the presumption, it does not stipulate that the right is not subject to forfeiture. This section of statute only comes into play upon a showing of a failure to use water beneficially for five years. So in other words, ORS 540.610(2) cannot be used to assert that the use is not subject to forfeiture; rather, it only allows a rebuttal to the presumption that comes about from non-use. This makes the proof of use language very important. The only section of statute that allows an assertion of “the right is not subject to forfeiture” is Subsection (3), but even here some use is required, just not full use. In other words, in order employ Subsection (3), the applicant still needs to show proof of use. All of this makes the proposed rule language not only unnecessary, but also contrary to statute. WW Recommendation - Strike the new proposed language from rule.	certificate or license, or the right is not subject to forfeiture under ORS 540.610. The evidence may include:	
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Division 54 - Conversion of a Hydroelectric Water Right to an Instream Water Right

Rule(s)	Commenter (date)/Comment	OWRD Response	Change Made?
Note	See below	The referenced rules were not proposed for revisions during this rulemaking and therefore, not noticed for public comment or scoped as part of this rulemaking effort. Since the sections were not included in the notice for this rulemaking, changes cannot be considered for these sections. Note also that the Division 54 rules were first adopted in 2022 with the support of a Rule Advisory Committee (RAC). Due to the complexity of the statutory authorities and the issues, that effort involved a significant time investment from the RAC and OWRD. Many of the comments received are similar to comments made during the 2022 adoption of these rules, which were considered by the Commission during adoption. See Commission Staff Report from March 2022, Item J. Response to	No

		comments were addressed in Attachment 7.	
General	WW (6/12/26) - Part of the stated purpose of this rulemaking is to clean up old rules to ensure that rules align with statute. To this end, the Div 54 rules need significant updating. Despite concerns raised by conservation groups, [T]ribes and sister agencies in the previous Division 54 rulemaking, the Commission adopted rules that veer significantly from statute and undermine the very purposes of the law. WW (6/12/26) - In closing, while we appreciate the OWRD's hard work to align rules with statute we would urge further consideration of the Div 54 draft rules to better align them with existing law, and/or schedule an additional rulemaking to address longstanding concerns raised in past rulemakings on these rules and their deviation from statute.	See response above.	No
Definitions - Injury OAR 690-054-0010(7)	WW (6/12/26) - The Div 54 definition of injury adds new considerations that apply only to instream conversions. The new considerations are found in OAR 690-054-0040(6) and include provisions such as the possibility of future regulation. This is not directed by statute and does not align with the OWRD's determination of injury in any other process. This rule language places instream conversions at a distinct disadvantage as compared to consumptive use transfers. WW Recommendation – Remove reference to OAR 690-054-0040(6). Confederated Tribes of Grand Ronde (7/8/26 email inquiry) - Water Watch's comment about Section 54 Injury and having to prove that an instream right doesn't cause an injury if it takes water from an unused hydro use and that standard is not used for any other situation...I'm trying to understand the reasoning for why that is and from the perspective of what they wrote, I'd say the Tribe would agree with WW.	See response above.	No
Notice of Consideration for Conversion,	WW (6/12/26) - The Div 54 rules do not allow for the conversion of a hydro right issued in conjunction with another right that is part of a larger distribution system, or storage. This is a gross misinterpretation	See response above.	No

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Eligibility Determinations and Preliminary Findings of Fact OAR 690-054-0020(1)(c), (d)	of statute. ORS 543A.305(6) states: If hydroelectric production is not the sole beneficial use authorized by a water right, this section shall apply only to that portion that is used exclusively for hydroelectric purposes. Rules cannot narrow statutory language or intent. WW Recommendation - Sections (c) and (d) should be struck and replaced with statutory language.		
Notice of Consideration for Conversion, Eligibility Determinations and Preliminary Findings of Fact - Director's preliminary finding on injury OAR 690-054-0020(3)(b)(B)	WW (6/12/26) - This section expands the definition of injury to require consideration of whether the proposed conversion would result in new regulation. In no other instance (transfers, permit amendments, new water rights, etc.) does the OWRD look at this in determining injury. This provision of the rules is not supported by statute, and strays significantly from the historical understanding of injury. WW Recommendation - This section of rule should be struck.	See response above.	No
Proposed Final Order; Final Determinations and Findings of Fact OAR 690-054-0040(8), (9), (10) Note, OWRD staff assume “-0020(8)” means “-0040(8).”	WW (6/12/26) - Subsection 0020(8): This section automatically subordinates the instream right resulting from the conversion to authorized water uses by other existing water rights as of October 23, 1999. This section not only makes all processes related to mitigation in the previous sections moot but does not follow the statutory structure that only protects “actual use” of authorized water uses by other existing water rights as of October 23, 1999. This is a significant departure from statute and significantly undercuts the purposes of the conversion statute. There are similar problems with Subsections (9) and (10). WW Recommendation - To bring the rules into alignment with statute, this section should be struck, or, at the very least, insert the words “actual use”.	See response above.	No

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Issuance of Instream Water Right OAR 690-054-0080	WW (6/12/26) - This section restricts the instream right associated with the conversion so that it “is not additive” to other instream rights. There is nothing in the Hydro Conversion statutes (ORS 543A.305) or the Instream Water Rights Act (ORS 537.332 et al) that directs or allows this. WW Recommendation - Delete language from the rules.	See response above.	No
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Other

Rule(s)	Commenter (date)/Comment	OWRD Response	Change Made?
General OAR 690-051	WW (6/12/26) - “...we would also urge the OWRD to update the Div 51 rules, which are also related to hydroelectric use. There are provisions in the Div 51 rules that have no statutory basis (e.g. subordinating all new hydro rights to all other uses) and implicate other hydro processes.”	Out of Scope – Division 51 was not part of the original rulemaking effort and was not included in the notice of proposed rulemaking	No