

Senate Bill 712-3

Introduction: Oregon municipal water providers have a duty to serve water to their customers. A reliable and secure municipal water supply is critical to Oregon's economic stability and the health of its growing communities.

Oregon's municipal water providers rely on water rights administered by the Oregon Water Resources Department (OWRD). These water providers depend on the administrative processes and guidance of this agency.

Problem: In 2013, the Oregon Court of Appeals overturned OWRD's interpretation and implementation of "permit extension" statutes. An extension of time is a water rights administrative process to change the timeline to demonstrate full use of the permit. The Court's opinion would retroactively apply restrictive "permit conditions" to municipal water rights as part of the permit extension process, which could jeopardize municipalities' investments of public funds in municipal water supply systems.

Example: In 1999, the City of "Pleasantville" filed a permit extension application, but OWRD has not yet issued an order approving the extension. Since 1999, Pleasantville has planned for the use of its permit, expanded its water treatment plant and make investments in its water supply infrastructure, and continued to increase its use of water. In 2005, HB 3038 required "fish persistence" conditions on the undeveloped portion of many municipal use permits. OWRD interpreted and implemented this provision to relate to the amount of water not used "to date" at the time of extension approval. (See attached.) However, the 2013 Court of Appeal's opinion retroactively applies the conditions to the last extension approved. In this example, conditions would apply to the increased use of water between 1999 and today. So, the amount of water developed by Pleasantville since 1999 would be subject to retroactive conditioning.

Solution: SB 712-3 draws a bright line for when "fish persistence" conditions apply. It equitably resolves this issue for the municipal water providers who relied on OWRD's interpretation and implementation of HB 3038, and creates certainty for municipal water providers.

Additional background can be found on the last page of this handout. For more information, please contact Tracy Rutten at trutten@orcities.or / 503-830-9772, or Mark Landauer at mlandauer@sdao.com / 503-986-2338.

3/16/2015

DIVISION 315

WATER RIGHT PERMIT EXTENSIONS

690-315-0010

(6) For the purpose of the rules in 690-315-0070 through 690-315-0100:

(a) "Municipal Water Use" means the delivery and use of water through the water service system of a municipal corporation for all water uses usual and ordinary to such systems. Examples of these water uses shall include but are not limited to domestic water use, irrigation of lawns and gardens, commercial water use, industrial water use, fire protection, irrigation and other water uses in park and recreation facilities, and street washing. Such uses shall not include generation of hydroelectric power;

(b) "Municipal Corporation" means any county, city, town or district as defined in ORS 198.010 or 198.180(5) that is authorized by law to supply water for usual and ordinary municipal water uses except: an irrigation district organized under ORS Chapter 545, a drainage district organized under ORS Chapter 547, a water improvement district organized under ORS Chapter 552, or a water control district organized under ORS Chapter 553;

(c) "Quasi-Municipal Water Use" means the delivery and use of water through the water service system of a corporation, other than a public corporation, created for the purpose of operating a water supply system, for those uses usual and ordinary to municipal water use, or a federally recognized Indian tribe that operates a water supply system for uses usual and ordinary to a municipal water use;

(d) "Fish species listed as sensitive, threatened, or endangered under state or federal law" and "Listed fish species" means fish species listed as threatened or endangered under the federal Endangered Species Act of 1973 (PL 93-205, 16 U.S.C.) or listed as sensitive, threatened or endangered by the Oregon State Fish and Wildlife Commission under ORS 496.172 to 496.176 and OAR chapter 635, division 100;

(e) "Use of the undeveloped portion of the permit" means the diversion of the undeveloped portion of a surface water permit or the impact on a stream from pumping the undeveloped portion of a ground water permit where the Department has determined there is a potential for substantial interference pursuant to OAR chapter 690, division 9;

(f) "Portions of waterways affected by water use under the permit" means those portions of the drainage basin at or below the point of diversion for a surface water permit or the location of impact on a stream from a ground water permit where the Department has determined there is a potential for substantial interference pursuant to OAR chapter 690, division 9 downstream to the lower-most point within the applicable river basin as identified by the Department pursuant to its authority under ORS 536.700;

(g) "Undeveloped portion of the permit" means the portion of the permit that is the difference between the maximum rate, or duty if applicable, specified in the permit and the maximum rate, or duty if applicable, diverted for beneficial use before the extension; and

690-315-0070

Application for Extension of Time for Municipal and Quasi-Municipal Water Use Permits

(1) Under this rule, holders of municipal and quasi-municipal water use permits may apply to the Department for an extension of time to complete construction and/or apply the water to full beneficial use pursuant to ORS 537.230 or 537.630.

(2) To apply for an extension of time to complete construction and/or to apply the water to the full beneficial use, a holder of a municipal or quasi-municipal water use permit shall submit to the Department a completed extension application. A separate application must be completed for each permit. Application forms are available from the Department.

(3) **The completed application must include** the fee specified in ORS 536.050 and an application form setting forth:

(a) The name and mailing address of the water right permit holder(s);

(b) The permit number for which an extension is requested;

(c) For quasi-municipal water use permit holders, evidence of the actions taken to begin actual construction on the project, as defined in 690-315-0020(3)(d), if required under the applicable statute;

(d) For municipal water use permits issued on or after June 29, 2005, evidence of the actions taken to begin actual construction on the project, as defined in 690-315-0020(3)(d);

(e) Evidence of actions taken to develop the right within the permitted time period and/or time period of the previous extension;

(f) Evidence of compliance with conditions contained in the permit and any previous extension(s) or the reason the condition was not satisfied;

(g) **Evidence of the maximum rate, or duty if applicable, diverted for beneficial use, if any, made to date;**

(h) An estimate of the population served and a description of the methodology(ies) used to make the estimate;

(i) A description of financial expenditures made toward completion of the water development;

(j) An estimate of the cost to complete the water development;

(k) A summary of any events that delayed completion of the water development or application of water to full beneficial use, including other governmental requirements, if any, relating to the project that have significantly delayed completion of construction or perfection of the right;

(l) An estimated demand projection and a description of the methodology(ies) used for the subject water right permit, considering the other water rights held by the municipal or quasi-municipal water use permit holder, and a date by which the water development is anticipated to be completed and water put to full beneficial use. Extension requests for greater than 50 years must include documentation that the demand projection is consistent with the amount and types of lands and uses proposed to be served by the permit holder.

(m) A summary of the applicant's plan and schedule to complete construction and/or perfect the water right;

(n) Justification for the time requested to complete the project and/or apply the water to full beneficial use;

(o) Any other information the applicant determines is relevant to evaluate the application in accordance with applicable statutes and rules;

(p) Any other information required by the Department that is necessary to evaluate the application in accordance with applicable statutory requirements; and

(q) For municipal water use permits issued before November 2, 1998, for the first extension issued after June 29, 2005, the completed application must include a copy of any agreements regarding use of the undeveloped portion of the permit between the permit holder and a federal or state agency that include conditions or required actions that maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit.



Oregon Water Resources Department
 725 Summer Street NE, Suite A
 Salem Oregon 97301
 (503) 986-0900
 www.wrd.state.or.us

Application for Extension of Time for Municipal and Quasi-Municipal Water Use Permits

TO THE DIRECTOR OF THE OREGON WATER RESOURCES DEPARTMENT

A separate extension application must be submitted for each permit as per OAR 690-315-0070(2). This page, with an original signature by the permit holder of record, must accompany any application for extension of time.

This application and a summary of review criteria and procedures that are generally applicable to this application are available at <http://www.wrd.state.or.us/OWRD/PUBS/forms.shtml>

I, _____
NAME OF PERMIT HOLDER [OAR 690-315-0070(1) and (3)(a)] NAME OF CONTACT

ADDRESS CITY STATE ZIP

PHONE E-MAIL ADDRESS

the permit holder of: Application Number _____ - _____

Permit Number _____ - _____
[OAR 690-315-0070(3)(b)]

do hereby request that the time in which to:

complete construction (of diversion/appropriation works and/or purchase and installation of the equipment necessary to the use of water), which time now expires on October 1, _____, be extended to October 1, _____,

and/or the time in which to:

apply water to full beneficial use under the terms and conditions of the permit, which time now expires on October 1, _____, be extended to October 1, _____.

I am the permittee, or have written authorization from the permittee, to apply for an extension of time under this permit. I certify that the information I have provided in this application is true and correct to the best of my knowledge.

 Signature Date

If needed, please contact OWRD for assistance in identifying and/or interpreting which conditions in the water permit are pertinent to the Application for Extension of Time.

Preferred Format for Item 5:

Attach a copy of your permit and, if applicable, any prior permit extension(s) or permit amendments with condition(s) identified and hand-numbered in a continuous numeric sequence throughout all such documents. Your written response to Item 5 should reference each condition(s) by number to correspond with the hand-written numbers on the permit and, if applicable, any prior permit extension(s) or permit amendments.

[OAR 690-315-0070(3)(g)]

6. **Provide evidence of the maximum rate, or duty if applicable, of water diverted for beneficial use under the permit and/or prior extensions of time, if any, made to date.**

The maximum instantaneous rate, or duty if applicable, must be based upon at least a continuous 4-hour period of beneficial water use, and reported in the same units of measurement as specified on the permit, being cfs (cubic feet per second), gpm (gallons per minute), or AF (acre-feet – usually only specified on a reservoir right to store water). *Do not provide daily, monthly or annual water use totals.*



TIP: *Documentary evidence substantiating the maximum instantaneous rate, or duty if applicable, of water diverted as of the date of the extension may include, but is not limited to: water meter records; dedicated electrical meter records; business records; and/or a sworn affidavit.*

Preferred Format for Item 6:

Maximum instantaneous rate = _____ cfs (cubic feet per second) or,

Maximum instantaneous rate = _____ gpm (gallons per minute) or,

Acre Feet Stored = _____ AF

[OAR 690-315-0070(3)(h)]

7. **Provide an estimate of the population served under this permit and a description of the methodology(ies) used to make the estimate.**

Estimate the current population that is supplied water by the municipality or quasi-municipality and if applicable, current population served under this permit. Describe how that estimate was derived, or cite the source document from which the data was obtained. Include any calculations, formulas, supporting documentation, including copies of source documents.

**Municipal Permit Extensions -
Remaining Undeveloped Portion of Water**

Date: January 20, 2006
To: Application # S-69804 (Permit # S-52498)
From: Lisa Jaramillo, Permit Extension of Time Review
Subject: Current remaining undeveloped portion of water under municipal use permit

Today, I spoke with the ~~City of~~ SW Lincoln Co. Water Dist to determine whether or not the quantity of water beneficially used under their municipal use permit has increased from the quantity identified in their pending extension of time application (received on 3-17-2003.)

The permit holder indicated that the quantity of water used for beneficial purposes under this municipal use permit:

- HAS INCREASED** from the quantity identified in their pending extension of time application;

(For permits where beneficial water use has increased, the Department has requested the City to submit a written update identifying the "current" quantity of beneficial water use under this permit in order to maintain official documentation from the City in the file record.)

- OR -

- HAS NOT INCREASED** from the quantity identified in their pending extension of time application.

NOTE: The following information is provided to document "quantity" information obtained during my telephone conversation with the permit holder.

Application # S-69804 / Permit # S-52498
Permitted quantity of water: 1.0 cfs (Aug 1 to June 30) limited to 0.6 cfs (Jul)
Maximum quantity of water developed: 0.81 cfs
Date information obtained by telephone from the City: 1-20-2006
Remaining undeveloped portion: 0.19 cfs



Oregon

John A. Kitzhaber, MD, Governor

Department of Fish and Wildlife

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March 13, 2013

Mr. Phil Ward, Director
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301



Re: ODFW's Division 315 Evaluation of Fish Persistence for Municipal Extension,
City of Medford Application # S-29527

Dear Director ^{Phil} Ward:

The City of Medford has requested an extension of time to develop the municipal water right referenced above; the undeveloped portion of their permit is 39,15 cfs from the Rogue River. ORS 537.230(2)(c) and 537.630(2)(c) direct the Water Resources Department (WRD) to find that the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. WRD is to base their findings on existing data and advice from the Oregon Department of Fish and Wildlife (ODFW). This letter is the advice provided to WRD by ODFW.

Summary

- The Water Resources Commission has recognized the need to maintain flows in the Rogue Basin for aquatic life and to minimize pollution, through the adoption of Minimum Perennial Streamflows (MF).
- MF270, for 1200 cfs, was established in 1966 for the Rogue at Gold Ray Dam.
- Construction of Lost Creek Reservoir was completed in 1977. Authorizing documents for the dam stipulated fishery enhancement, through improved temperature and flow, as one of the important benefits of the dam.
- From May through September, flows in the Rogue are affected by releases from Lost Creek Reservoir. Based on years of research, flow targets have been established to protect Chinook salmon and other species. These flows, referenced to Agness, range from 2000 – 3800 cfs (ODFW Rogue Basin Fisheries Evaluations, 1992-2007).



$$1 - [Q / Q_T]$$

Equation 1

where Q is the flow at the gage and Q_T is the target flow at the applicable gage.

For example, in June, the Target Flow is 3800 cfs (Table 1). If Q is 2600, the percent shortfall is $1 - (2600) / 3800 = 31.6\%$ (Table 2, bold row). The percent shortfall is then used to reduce the amount that can be withdrawn under the extension. In this case, the 39.15 cfs extension would be reduced by 31.6% (or 12.4 cfs), making the allowed withdrawal 26.8 cfs. Table 2 lists curtailment percentages and allowed withdrawals for various Rogue River flows measured.

Table 2. Curtailment calculation for the Rogue River at Medford in June (reference point is Agness gage).

Q- Agness	Q-E	% miss	curtail cfs	Extension diversion
4000	3961	0.0%	0.0	39.2
3500	3461	7.9%	3.1	36.1
3000	2961	21.1%	8.2	30.9
2800	2761	26.3%	10.3	28.8
2600	2561	31.6%	12.4	26.8
2400	2361	36.8%	14.4	24.7
2200	2161	42.1%	16.5	22.7
2000	1961	47.4%	18.5	20.6

ODFW Advice: Use of water under the portion of this permit that was undeveloped as of the date of the extension final order should be conditioned to maintain persistence of listed fish species consistent with the ODFW recommended flows in Table 1. If streamflow falls below recommended levels, the City of Medford should have the amount of water that can be diverted through this extension be reduced, through conditioning the permit. The severity of the measures taken should reflect the degree to which the recommended flows are being missed, the percentage of water that is withdrawn by the municipality vs. the overall streamflow level and an adjustment of the amount to be curtailed by the ratio of water withdrawn to water being returned directly to the same stream through effluent discharges.

Occurrence of flows below persistence levels

Flows at Gold Ray, based on 1980- 2011 gaging records, were above ODFW persistence flows most of the time from mid-September through April; some curtailment could occur in October and November. Flows at Agness indicate that curtailment would be common from May through early September (Table 3). In an 80% exceedance (dry) year, the

Background to Senate Bill 712

Oregon municipal water providers have a responsibility to serve water to their customers. A reliable and secure municipal water supply is critical to Oregon's economic stability, health, and safety of its cities' residents.

Municipal water use permit holders are currently allowed 20 years from the date of permit issuance to commence and complete construction of the necessary water supply infrastructure and to fully beneficially use the water use. The date to complete permit development is referred to as the "completion" date, or C-date. If the permit holder needs longer than 20 years to complete construction or to fully beneficially use the water ("perfect the right") they may apply to the Oregon Water Resources Department (OWRD) for an extension of time under ORS 537.230 (2) for surface water or ORS 537.630 (2) for groundwater.

Municipal water providers must rely on the administrative rules, processes and directions from OWRD regarding "extensions of time" for their permits. Under the provisions of HB 3038 (2005), the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, the "undeveloped portion" of the permit must be conditioned to maintain the persistence of fish species listed as sensitive, threatened or endangered under state or federal law.

Until a recent Oregon Court of Appeals opinion, OWRD interpreted and implemented this permit extension provision (in section 2, subsection(c) of ORS 537.230 for surface water permits) to mean that the "undeveloped portion" of the permit would be determined at the time of processing the application for an extension. Meaning, OWRD would determine the amount of water that had been developed "to date" under the permit. Any water that had not been developed upon issuance of the extension approval would be subject to "fish persistence conditions" per HB 3038 (2005). However, in December 2013, the Oregon Court of Appeals issued an opinion that "fish persistence" conditions should be placed on the permit retroactively to the last "completion", or C-date, on the permit.

In order to alleviate the far reaching impacts of the court's decision on this very small subset of municipal use permit holders from this retroactive application of permit conditions, SB 712 along with the dash 3 amendment modifies and clearly defines what is meant by the "undeveloped portion of a permit." It also modifies the date when "fish persistence" will apply in order to avoid potentially reducing the amount of water a community has developed and spent public resources to treat and deliver to its citizens.