

Background to Senate Bill 971

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 971 clearly defines what is meant by the "undeveloped portion of a permit." The bill also clarifies the applicability date of the "fish persistence" provisions in order to provide certainty and avoid potentially reducing the amount of water a community has developed and spent public resources to treat and deliver to its citizens.

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 (July)
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

Theodore R. Kulongoski, Governor

Water Resources Department

North Mall Office Building

725 Summer Street NE, Suite A

Salem, OR 97301-1271

503-986-0900

FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item G, October 28, 2005
Water Resources Commission Meeting

Request for Adoption of Administrative Rules, OAR Chapter 690, Division 315 – Water Right Permit Extensions

I. Issue Statement

The Commission is asked to adopt rules under OAR Chapter 690 Division 315 pertaining to water right permit extensions. The final proposed rules are Attachment 1. The proposed rules implement House Bill 3038 (Chapter 410, 2005 Oregon Water Laws) which adjusted the standards the Department uses to review certain applications for extensions of time filed by holders of municipal use permits. The proposed final rules also clarify the process for submitting protests on extension proposed final orders (PFOs).

II. Background

The issuance of a water right permit triggers statutory timelines for constructing the associated works and making full beneficial use of the water. If construction is not complete or full beneficial use is not attained within the statutory timelines (generally five-years), the Department can grant an extension of time upon a finding of "good cause." An extension of time can be granted for the reasonable time necessary to complete construction or apply the water to full beneficial use.

Historically, the Department has interpreted and applied the statutory permit development timelines differently for municipal use permits in terms of the "construction" requirement. Specifically, the Department has not interpreted the development timelines to require holders of municipal (surface water) use permits to initiate construction of works within five years of permit issuance. (ORS 537.230)

Recently, in a case before the Oregon Court of Appeals, the Court concluded that the surface water permit development timelines, specifically the requirement to begin construction within five years, applies to municipal water use permits. Moreover, the Court concluded that the statutory term "construction" means dirt-and-shovel type work as compared to planning, raising revenue or other associated efforts.

The Court's interpretation raised significant concern by the holders of these yet to be developed permits that past actions by the Department (permit issuance or extension issuance) could somehow be deemed invalid. Second, the Court's conclusion that a holder of a municipal water use permit must begin dirt-and-shovel construction within five years presents a significant obstacle to reasonable planning for future water supply. House Bill 3038 established a statutory timeline of 20 years to commence and complete construction for new surface water and ground water permits for municipal use. The bill also ensured that previous actions by the Department to issue municipal use permits and extensions are valid with respect to construction timelines.

House Bill 3038 also adjusted the statutory standards the Department uses to review applications for extensions of time filed by holders of municipal use permits. It requires that all municipal permit extensions be conditioned to require a Department approved Water Management and Conservation Plan (OAR Chapter 690 Division 86) prior to diverting water beyond the maximum amount currently beneficially used by the municipality. It clarified that, in determining permit extensions for municipal use permits, the Department shall give due weight to the considerations in ORS 539.010(5). The legislation also required that, for the first extension issued after June 29, 2005 (the effective date of the bill) for a municipal use permit issued before November 2, 1998, the Department must find that the undeveloped portion of the permit is conditioned to maintain, in the portions of the waterways affected by water use under the permit, the persistence of listed fish species.

Following passage of the bill, the Department organized a Rules Advisory Committee to assist in the development of amended rules related to water right permit extensions (OAR Chapter 690, Division 315). Committee members are listed in Attachment 2 and included groups that participated in the legislative crafting of HB 3038 and the Oregon Department of Fish and Wildlife (ODFW), the advisory agency identified in the legislation. The committee met twice, focusing their discussion on rule changes to implement HB 3038.

Based on input from the RAC, Department staff, and the Department of Justice, the Department developed a September 1, 2005 hearing draft of proposed rules for permit extensions (Division 315). The Department held public rulemaking hearings in Salem on September 19, 2005. Oral testimony was provided by three organizations. Attachment 3 is a summary of oral testimony provided at the public rulemaking hearings. The written comment period closed on September 21, 2005. Twenty-two written comments were received. Attachment 4 is a copy of the written comments.

III. Discussion

A. Proposed Final Rule Highlights

Based on an analysis of the public comment the Department has developed the final proposed rules for Division 315 in Attachment 1.

Highlights of the proposed rules regarding municipal use permit extensions:

- Implement HB 3038 by requiring approval of a water management and conservation plan under OAR Chapter 690 Division 86 prior to diverting water beyond the maximum amount currently beneficially used by a municipality. OAR 690-315-0090.
- Implement HB 3038 by requiring holders of municipal use permits issued on or after June 29, 2005 to provide evidence of actions taken to begin actual construction of the project. OAR 690-315-0070(3)(d).
- For the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998, implement HB 3038 by requiring the Department to condition extensions to maintain the persistence of listed fish species in the portions of waterways affected by use under the permit where streamflow is a limiting factor for listed fish species. OAR 690-315-0080(1)(f).
- For the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998, implement HB 3038 by providing a process for soliciting advice from ODFW on whether use of the undeveloped portion of a municipal use permit will maintain the persistence of listed fish species. OAR 690-315-0080(2).
- For the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998, provide opportunities for municipal use permit holders to interact with the Department and ODFW as our agencies implement the maintain persistence provision and prior to issuance of a proposed final order and final order on the extension application. OAR 690-315-0080(2)(b) and (2)(e).

Highlights of the proposed rules regarding protests on extension proposed final orders include:

- Add a definition for the term “protest” for the purposes of water right permit extensions. OAR 690-315-0010(5).
- Clarify terminology and process for submitting a protest on a proposed final order on an extension application to provide greater consistency with other rule divisions. OAR 690-315-0060.

Issues identified in public comments on the hearing draft regarding the first extension issued after June 29, 2005 for a municipal use permit issued before November 2, 1998:

Maintain the persistence of listed fish species

The Rules Advisory Committee discussed possible rule definitions for “maintain the persistence of listed fish species” but was not able to reach consensus on a definition. As a result, in the hearing draft of the rules, the Department proposed a definition that was based in part on the RAC discussion and in part on terminology used in a recent assessment for Oregon Coastal Coho.

The hearing draft of the rules defined “maintain the persistence of listed fish species” as “the use of the undeveloped portion of the permit in such a way as to maintain the viability of listed fish species populations in the portions of waterways affected by water use under the permit.” September 1, 2005 Hearing Draft OAR 690-315-0010(6)(d). The Department went on to define “viability” based on the recent Oregon Coastal Coho Assessment and to define “population” based on Oregon Plan statutes.

The definition of maintaining persistence was a central issue identified in the written and oral comments received on the hearing draft of the rules. Municipalities and those representing municipal water providers felt the proposed definition applied a standard beyond the statutory intent while conservation groups and some individuals felt that the definition did not meet the minimum standard required by the statutory language.

Oral and written comments from the Oregon Water Utilities Council (OWUC), League of Oregon Cities (LOC), Oregon Association of Water Utilities (OAWU), Special Districts Association of Oregon (SDAO), and a number of individual and regional municipal water providers opposed the Department's proposed definition. They suggested that, based on the legislative record for HB 3038, maintain persistence of listed fish species is use of the undeveloped portion of the permit in such a way as to "not extirpate" listed fish species. They also asserted that during the legislative discussion of the bill maintaining the persistence of listed fish species was not intended to be a "no harm" or "recovery" standard. Finally, they requested that the Department clarify that the maintain persistence evaluation focus on flow-related aspects of the use of the undeveloped portion of the permit and where flow is a limiting factor for the subject listed species.

WaterWatch of Oregon, the Oregon Natural Resources Council (ONRC), and the Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources felt the Department's definition needed to be strengthened to prevent any harm to listed fish species or any decline to their existing condition or state. They suggested that, based on the legislative record, maintain persistence means use of the undeveloped portion of the permit "will cause no net loss or declining trend" in "viability metrics" such as abundance, productivity, persistence, distribution, and diversity. ODFW also commented that maintain persistence should be a "do no further harm" standard.

In response to comments, the Department is proposing to delete the definition of "maintain the persistence of listed fish species" and related definitions that were included in the hearing draft of the rules. In lieu of a definition and based on comments received by OWUC, the Department has adjusted the hearing draft to clarify that the conditions to maintain persistence be included where streamflow is a limiting factor for listed fish species. OAR 690-315-0080(2). The Department has over 100 applications for municipal use permits pending. We believe that the proposed final rules provide sufficient clarification to move forward with review of these applications. We also recommend that the Department report back to the Commission after one year on implementation of the rules and specifically on the conditions to maintain the persistence of listed fish species recommended by ODFW on individual extension applications.

Portions of waterways affected

In the hearing draft of the rules, the Department based the definition of the "portions of the waterways affected by water use under the permit" on the RAC discussion. However, several comments were received from OWUC and other municipal interests suggesting clarification of this definition. WaterWatch and ONRC also commented that the definition of portions of waterways affected be deleted and that the Department defer to ODFW in making this determination.

The final proposed rules clarify that the portions of the waterways affected by water use include the portion of the drainage basin at or below the location of the diversion. OAR 690-315-0010(6)(f). This definition is consistent with our understanding of ODFW's approach to this analysis.

Agreements with federal and state agencies

HB 3038 provided that agreements with federal and state agencies that include conditions to maintain the persistence of listed fish species would be conclusive evidence for the Department's finding under the maintain persistence provision. In the hearing draft of the rules, the Department proposed to share any agreements provided by a municipal use permit holder with ODFW for their advice as to whether it includes conditions to maintain the persistence of listed fish species. OWUC and other municipal interests expressed opposition to this approach. They recommended that the Department make this determination without soliciting advice from ODFW. ODFW, WaterWatch, ONRC, the Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources, and other commenters expressed support for a process that provides for ODFW review of these agreements.

The Department is not proposing any changes in response to comments by municipal interests. Our staff are not trained to review these types of agreements to determine whether conditions or actions identified in the agreements would maintain the persistence of listed fish species. The proposed final rules allow the Department to share these agreements with ODFW and receive their input on whether they include conditions to maintain the persistence of listed fish species. OAR 690-315-0080(2).

WaterWatch and ONRC commented that conditions or actions included in an agreement with federal or state fish agencies should be included as permit conditions. The Department is not proposing any changes in the draft rules based on this comment. Agreements that include conditions to maintain the persistence of listed fish species will be referenced in the final order approving an extension and will be made part of the record.

Ground water permits for municipal use

HB 3038 applied to the first extension of time issued after June 29, 2005 for surface water and ground water municipal use permits issued before November 2, 1998. Under hearing draft and the proposed final rules, "use of the undeveloped portion of the permit," includes the undeveloped portion of ground water permits where the Department has determined there is the potential for substantial interference with surface water pursuant to OAR Chapter 690 Division 09. OAR 690-315-0010(6)(e). OWUC and other municipal interests preferred that the maintain persistence provision only apply to ground water permits with substantial interference with surface water.

No changes were made in response to these comments. Since use of the undeveloped portion of the ground water permit has not yet occurred, the Department cannot determine whether there actually is substantial interference with surface water as OWUC suggests. We must rely on analysis by our hydrogeologists to determine if there is the potential for substantial interference as provided for in the Division 09 rules.

OWUC and other municipal interests also asserted that the "portion of the waterway affected by water use under the permit" defined in OAR 690-315-0010(6)(f) for ground water permits should be at or below the point of appropriation of the undeveloped portion of the ground water permit downstream to the lower-most portion within the applicable river basin. The Department is not proposing any changes in response to these comments. The portion of the waterway affected by the "use" of a ground water permit with the potential for substantial interference with surface water would not be the point of appropriation (i.e. the well location) identified in the permit but rather the location where the impact on the stream would occur as a result of pumping the undeveloped portion of a ground water permit. Further, for the purpose of evaluating whether use of the undeveloped portion of a ground water permit will maintain the persistence of listed fish species on a waterway, the Department must evaluate the potential impact on the relevant surface water source.

Processing extensions

OWUC and other municipal interests commented that they would like opportunities for the applicant to interact with the Department and ODFW regarding the maintain persistence evaluation. In particular, they requested an opportunity to review the Department's determination of the potential for substantial interference for ground water permits, notification when the Department forwards their extension application to ODFW for its advice, an opportunity to review proposed conditions for maintaining the persistence of listed fish species, and an opportunity to place an extension application on administrative hold after review of any proposed conditions to maintain the persistence of listed fish species. In response to these comments, the Department has adjusted the hearing draft of the rules to provide these review and notice opportunities. OAR 690-315-0080.

Other Changes and Corrections

OWUC and other municipal interests recommended that OAR 690-315-0080(1)(f) be clarified to provide for the three conclusions the Department can make regarding a municipal permit extension under this rule. The Department has modified the hearing draft of the rules in response to these comments. OAR 690-315-0080(1)(f) clarifies that the Department can find that 1) there are agreements that include conditions to maintain the persistence of listed fish species; 2) the use of the undeveloped portion of the permit will maintain the persistence of listed fish species; or 3) the use of the undeveloped portion of the permit is conditioned to maintain the persistence of listed fish species.

Issues identified in public comments on the hearing draft regarding protests on extension proposed final orders:

Protests on Extensions

In the hearing draft of the rules, the Department is proposing to amend rules to clarify the fee and request for contested case hearings for municipal extensions. WaterWatch and ONRC commented that they are concerned that the changes proposed in OAR 690-315-0060(3)(b)(B) would allow applicants 30 extra days beyond the close of the protest period to request a contested case hearing.

The Department is not proposing any changes in the final proposed rules in response to this comment. The actual protest period remains 45 days for everyone. The proposed change addresses what OWRD must do after the close of a protest period when a protest is filed. The Department proposed this change in order to make the extension protest process consistent with the protest process for surface and ground water permits, as set forth in ORS 537.153(8)(b)(B) and ORS 537.621(9)(b)(B), as well as OAR 690-310-0170. The proposed language is essentially the same provision as OAR 690-310-0170 allowing applicants to request a contested case hearing 30 days after the close of protest period for surface and ground water permits.

B The final proposed rules reflect the Department's statutory requirements

The final proposed rules implement new statutory provisions under HB 3038 by requiring that all municipal permit extensions be conditioned to require a water management and conservation plan prior to diverting water beyond the maximum amount currently beneficially used by the municipality. The final proposed rules also implement HB 3038 by requiring that the Department find that the undeveloped portion of a municipal use permit will maintain or is conditioned to maintain the persistence of listed fish species for the first extension issued after the effective date of the bill for a permit for municipal use issued before November 2, 1998.

C. The final proposed rules advance the Department's co-equal goals of protecting streamflow and addressing Oregon's water supply needs

The final proposed rules further the Department's co-equal goals of stewardship and supply. The rules provide a new, one-time look at municipal use permits issued before November 2, 1998 to ensure use of the undeveloped portion of the permit will maintain the persistence of listed fish species. By allowing for extensions of municipal use permits, the rules also recognize the importance for securing long-term municipal water supplies. They also assure that all municipal use permits are developed in a fashion that emphasizes a commitment to water conservation and management.

D. The final proposed rules fit within staff capabilities

The Department has over 100 pending extension applications for municipal use permits and intends to utilize existing staff to implement the proposed Division 315 rules. For this reason, it is important that the Department rely on existing expertise at ODFW to gain advice on resource protection conditions to maintain the persistence of listed fish species and to solicit their input on existing fish agreements that include conditions to maintain the persistence of listed fish when applying the proposed amendments to the rules.

To help staff and municipalities move forward under new extension rules, the Department is also proposing to "batch" extension applications by municipality and by ODFW district biologist region. This "batching" approach will assist ODFW in their review of pending applications where their advice is needed. This approach will also assist municipalities so that they can track multiple extensions and water management and conservation plan requirements as we move forward.

E. The final proposed rules provide for adaptive management

The final proposed rules provide an adaptive management approach to municipal use permit extensions by providing additional notice and administrative hold opportunities for municipalities so these applicants can work with ODFW as they consider fishery resource conditions to maintain the persistence of listed fish species. In the spirit of adaptive management, the Department is also recommending that it report back on the implementation of these rules in one year, with particular attention to conditions proposed and included on extensions applications to maintain the persistence of listed fish species.

IV. Alternatives

The Commission may consider the following alternative actions:

1. Adopted the proposed rules under OAR Chapter 690 Division 315 (Attachment 1).
2. Adopt the proposed rules with revisions.
3. Not adopt rules and request the Department to further evaluate the issues.

V. Recommendation

The Director recommends that the Commission adopt the proposed final rules as provided in Attachment 1.

Attachments:

1. Final Proposed Rules, OAR Chapter 690, Division 315 - Water Right Permit Extensions
2. Rules Advisory Committee members
3. Summary of Hearing Comments
4. Copies of Written Public Comment on September 1, 2005 Hearing Draft

Debbie Colbert
503-986-0878

**Rules Advisory Committee
OAR Chapter 690 Division 315 – Water Right Permit Extensions**

Rules Advisory Committee

Lisa Brown
WaterWatch of Oregon

Kelly Burnett
Oregon State University

Rick Glick
Davis Wright Tremaine LLP

Rick Kepler
Oregon Department of Fish and Wildlife

Lorna Stickle
Portland Water Bureau

Adam Sussman
CHM2 Hill

Willie Tiffany
League of Oregon Cities

Department Participants

Debbie Colbert
Senior Policy Coordinator

Dwight French
Water Rights and Adjudication
Administrator

Tom Paul
Deputy Director

Phil Ward
Director



Oregon

John A. Kitzhaber, MD, Governor

Department of Fish and Wildlife

Office of the Director
3406 Cherry Ave NE
Salem, OR 97303-4924
503.947.6044
Fax 503.947.6042
www.dfw.state.or.us

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 ^{Phil} Director 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