



## Municipal Water Right Extensions

### SB 466/HB 2099 (2017 Legislative Session)

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**Background:** Oregon water law typically allows 5 years for water users to use all water under a water right permit – i.e. put the water to “full beneficial use”. However, historically, municipalities have had an extended amount of time to develop water under their water right permits in order to allow for communities to grow over time. This has also supported Oregon land use planning which requires communities to plan for future growth.

**Prior to 1998** – the Oregon Water Resources Department (OWRD) would provide municipalities with extensions of time to develop their water right permits through a simple process that continually allowed additional 5 year increments to develop and full use the water right.

**1998** – OWRD received advice from the Department of Justice that they could streamline the permit extension process and provide extensions for a longer period of time than every 5 years. Most municipal water extensions were put on administrative hold, a work group was formed, and OWRD began the process of adopting new rules to allow for longer extensions.

**In 2003** – WaterWatch (WW) protested OWRDs issuance of a water right permit to Coos Bay North Bend Water Board. WW challenged the permit application on several grounds, including that the applicant could not make beneficial use of the water within the 5-year limit provided in ORS 537.230(1) (1997).

**In April 2004**, the Oregon Court of Appeals ruled in favor of WW, and remanded the water right permit to OWRD, citing the water board’s failure to have any intention of initiating construction and use of the water within five years of being granted the permit. While the court indicated that it made sense for municipalities to have more than 5-years to develop all of the water under a permit, the court could find no statutory support for this.

**In 2005**, the League of Oregon Cities (LOC) and Special District Association of Oregon (SDAO) worked to pass legislation that would allow communities more than five years of future water supply. WW opposed the legislation. An agreement was made in the final days of the legislative session that municipalities would have 20 years to develop water under their permits. If they need more time, they would need to file for an extension. In order to receive an extension, they would need to demonstrate due diligence and adopt a water management conservation plan. In addition, specific provisions were adopted that applied to the

older, pre-1998 permits that had been on administrative hold (awaiting new rules). The language specific to those pre-1998 permits reads:

For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, the department finds that the undeveloped portion of the permit (*as of when?*) 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. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife.

In **2006**, OWRD adopted rules and began to process the backlog of extension requests that was in large part created by the department placing permits on administrative hold in 1998. The requests were processed in batches based on geographic location (this was easier for the Oregon Department of Fish and Wildlife as they could collect data for one stream/river at a time). To this day, there remain approximately 60 requests from the backlog of permits placed on hold in 1998 that have yet to be processed (mostly from central Oregon, eastern Oregon and the south Coast). OWRD rules, adopted by the Water Resources Commission, applied fish persistence to the undeveloped portion of the permit *on a going forward basis*, or in other words, as of the date of the next approved extension of time (post-2005).

In **2008**, WW protested an extension for the city of Cottage Grove. The issue was eventually litigated and taken to the Oregon Court of Appeals.

In **December of 2013**, the Oregon Court of Appeals ruling indicated that fish persistence conditions should have been applied as of the date of the *last* approved extension of time. For many of these pre-1998 permit holders, this would mean that conditions would be applied retroactively to the 1990s, when the municipality last had an extension processed by OWRD (prior to when extensions were put on hold by OWRD in 1998).

#### **What is the result?**

- For those communities who had extensions processed prior to the court's 2013 decision, they are okay as they would have had the benefit of the law as it had been interpreted by OWRD. The non-retroactive application of fish persistence conditions is a "final order" and will not be re-evaluated. These communities received the benefit of the law and administrative rules as applied by OWRD prior to the court's decision (i.e. – no retroactive conditions).
- However, for those who have either had extensions held up in litigation or who have yet to be processed by OWRD, they are now subject to retroactive application of the conditions. The conditions weren't adopted until 2005 when the legislation was passed, however, the court's ruling means the application would go back to the 1990s (date of last approved extension). For many of these communities, this means that they will have to curtail, or bypass, water during certain times of the year. It also means that while the community may have grown and made investments to develop additional water over the past 20 years, their water supply will be retroactively curtailed as though that growth did not occur.

## 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  
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 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.

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

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

7. **Provide an estimate of the population served under this permit and a description of the methodology(ies) used to make the estimate.** [OAR 690-315-0070(3)(h)]

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

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 <sup>Phil</sup> 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<sub>T</sub> 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
<b>2600</b>	<b>2561</b>	<b>31.6%</b>	<b>12.4</b>	<b>26.8</b>
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

