

Background Information on Municipal Extensions and Fish Persistence



Overview of Water Law

Under Oregon law, all water belongs to the public. With some exceptions, cities, irrigators, businesses, and other water users must obtain a permit or license from the Water Resources Department to use water from any source - whether it is underground, or from lakes or streams.

Most water rights are obtained in a three-step process. The applicant first must apply to the Department for a permit to use water. Once a permit is granted, the applicant must construct a water system and begin using water. After water is applied, the permit holder must submit specific information to the Department detailing how and where water has been applied. If water has been used according to the provisions of the permit, a water right certificate is issued.

Permits generally require the water user to develop the water use within a specific amount of time. If development cannot be completed, the permit holder may apply for an extension of time to fully develop the water use.

Municipal water providers may be required to provide a water conservation and management plan (WMCP) before being able to further develop water under the permit extension. A WMCP provides a description of the water system, identifies the sources of water used by the community, and explains how the water supplier will manage and conserve supplies to meet future needs.

History of Municipal Extensions

Water right holders generally have five years to develop water under a permit, or request an extension of time. In the late 1990s, new interpretations of the Department's authorities led to a shift in policy for municipal water rights. The Department had originally determined that municipal permits could only be extended in five year increments, but later determined that extensions should be issued for a longer time period to allow development. This change in Department policy led to several rulemaking efforts in 1998 related to extensions of water right permits. During these rulemaking efforts, municipal extensions were put on hold, and it was eventually determined that a separate process was needed from other permits.

The Department formed a community water supply work group in November 1998 to review permit extensions and other issues related to these water systems. Municipal permit holders were exempted from the obligation to seek a permit extension until 2001 in order to allow further work on policy development. Some of these systems continued to develop water under these permits, while determinations were made on the extensions process.

By December of 2000, it became apparent that the work group needed more time; the Water Resources Commission extended the exemption for municipal use permits to seek an extension to July 1, 2003. By that time, there were more than a hundred municipal use permits with extension applications pending and "on-hold," awaiting the outcomes of the work group.

In April of 2002, rules were amended that provided the municipal permit holders the option to apply for a permit extension under the existing extension rules; however, they were not required to apply for an extension until July 2003. In 2003, new rules were adopted for municipal permit extensions, which required a Water Management and Conservation Plan as a condition of an extension.

In 2004, the Court of Appeals in *Waterwatch v. North Bend* stated that municipalities only had five years to develop their permits, which resulted in House Bill 3038 (2005). House Bill 3038 (2005) provided municipalities 20 years to develop their permits, and allowed for extensions for a longer period of time. The legislation required the development of Water Management and Conservation Plans as a condition of an extension. In addition, for permits issued prior to November 2, 1998, it required that for the first extension issued after June 28, 2005, that the use of the undeveloped portion of water be conditioned to maintain the persistence of listed fish species.

The Department did not begin processing most municipal extensions for permits issued prior to November 2, 1998 until 2006. Due to the new requirement for fish persistence review by the Oregon Department of Fish and Wildlife (ODFW), the Department did not process the extensions in order, but rather sent them over in batches based on geography for review efficiency purposes. Because this was the first time that ODFW was conducting fish persistence reviews, the first batch of extensions took time to review and develop a methodology.

The issuance of extensions several years later led to a series of lawsuits, involving both the fish persistence standard, as well as the determination of what was the “undeveloped portion of the permit.” The *Cottage Grove* case, which was decided by the Court of Appeals in 2013, focused on the definition of “undeveloped portion of the permit.”

Departments and Court’s Interpretation of “Undeveloped Portion”

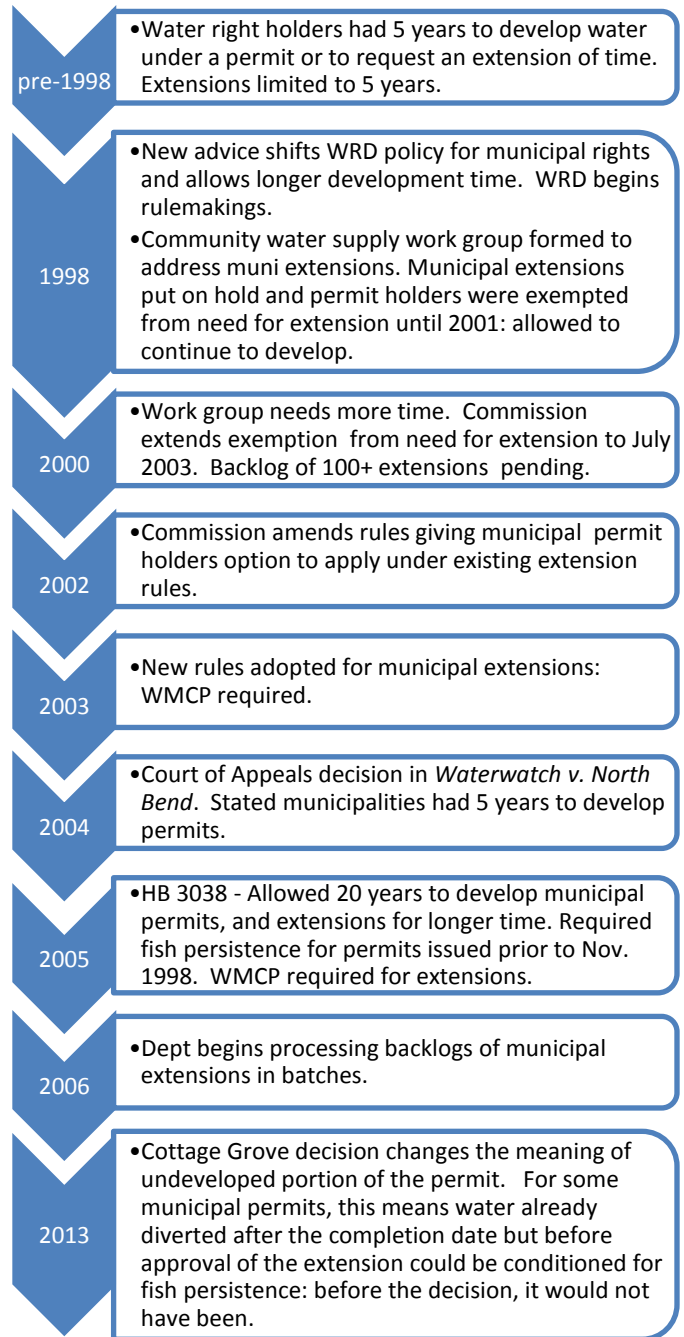
In order to accommodate the needs of the communities and to address the backlog of over a hundred municipal extension requests, the Department had allowed the municipal permit holders to develop water past their last completion date, without obtaining an extension. Prior to the *Cottage Grove* decision in 2013, the Department had interpreted the “developed portion” of the permit to mean the amount of water developed as of the final order of the extension. The Court held in *Cottage Grove*, however, that the “developed portion” was the portion of the permit developed as of the date of the last approved extension, or the completion date on the permit. In other words, any water that had been developed after the extension date or the date of completion based on the Department’s rules was, after the Court ruling, considered “undeveloped” for the purposes of the extension and determining the quantity of water that would be considered for potential application of fish persistence conditions.

How are Fish Persistence Conditions Placed on Extended Permits?

Fish persistence is the long-term ability of a species to survive in a stream or river. Persistence flows are targets, which will provide the necessary flow conditions for the population over the long-term. The Department’s finding related to fish persistence must be based upon existing data and advice from ODFW, and is limited to impacts related to streamflow as a result of use of the undeveloped portion of the permit.

The Department consults with ODFW and then determines if use of the undeveloped portion of the permit would maintain the persistence of listed fish species in the portions of the waterway(s) affected by water use under the permit. If the use would not maintain the persistence of listed fish species, further conditions to maintain the persistence must be placed upon the undeveloped portion of the permit. These conditions typically range from partial curtailment to full curtailment of the undeveloped portion when the target flows are not being met.

Timeline of the History of Municipal Extensions



Example of How the Undeveloped Portion Changed from the Cottage Grove Decision

A city holds a permit for 10 cubic feet per second (cfs), which was issued in 1995. The completion date for the permit was 2000. The city submitted a request for an extension. They had diverted 5 cfs as of the completion date (2000), but due to the hold on processing municipal extensions, the extension has not been processed and the city was allowed to continue to divert water. The city diverted a total of 7 cfs in 2004 and an additional 1 cfs in 2014, for a total of 8 cfs diverted of the 10 cfs permit. The Department began processing the extension in late 2014.

Under the definition of “undeveloped portion” used prior to the Cottage Grove decision, the developed portion of the permit would have been 8 cfs and the undeveloped portion would have been 2 cfs. The 2 cfs could be conditioned for fish persistence.

After the Cottage Grove decision, the developed portion of the permit would be the 5 cfs developed prior to the completion date (2000). The remaining 5 cfs would have been processed as “undeveloped” and could be conditioned for fish persistence.

In either instance, the conditioning may require reductions in diversion of the undeveloped portion of the permit if the fish persistence flows are not met. The reductions may be partial, or in some cases can require that no portion of the undeveloped portion is diverted while the fish persistence flows are not met.

How Many Permits are Affected by the Cottage Grove Decision?

The Department has less than 60 extensions pending. The Department has attempted to collect more information over the past year about how the Cottage Grove decision may affect processing of each extension. This effort included sending a survey to those that had extensions pending. This survey was conducted under a short timeline to help inform a workgroup effort. Extension applicants were asked to provide as accurate of information as they could given the short deadline. *Preliminary information is provided below to help understand the potential scope of permits affected; but the data is subject to change and should not be considered final.* The Department will not be able to determine how the Cottage Grove decision will affect each individual permit until an extension is processed.

The Department has received survey responses for several permits that show that water was developed after the completion date and before the Cottage Grove decision. (Note: The Department used January 1, 2014 for the survey, instead of December 11, 2013, and July 1, 2005 instead of June 29, 2005). More specifically, it appears from the survey data that the City of Bend, City of Sandy, Southwest Lincoln County Water District, and City of Philomath diverted water after their completion date and before July 2005. The Tri City Water District diverted some water prior to July 2005 and some additional water thereafter but prior to January 1, 2014. The City of Cottage Grove, City of Hood River, City of Detroit, and North Clackamas County Water Commission diverted some water after July 2005 and before January 2014. Another two permits diverted water after their completion data and after the Cottage Grove decision (City of Lake Oswego and Lakeside Water District).

Additional extensions are pending for which the Department did not receive survey data, or was unable to make conclusions from the survey data. The Department expects that a subset of these permits, likely less than ten will be affected by the Cottage Grove decision. In addition to these, there are another seven permits that need to submit information to the Department about the need for an extension, and do not currently have an extension application pending.