

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	PROPOSED
for Permit S-49245, Water Right Application S-68266,)	FINAL
in the name of the City of Philomath)	ORDER

Permit Information

Application File S-68266/ Permit S-49245

Basin 16 – Willamette Basin / Watermaster District 16

Date of Priority: January 28, 1985

Authorized Use of Water

Source of Water:	Mary's River, a tributary of Willamette River
Purpose or Use:	Municipal Use
Maximum Rate:	3.50 Cubic Feet per Second (cfs)

This Extension of Time request is being processed in accordance with Oregon Administrative Rule Chapter 690, Division 315.

Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.

This Proposed Final Order applies only to Permit S-49245, water right Application S-68266.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 1993, to October 1, 2043.
- Grant an extension of time to apply water to full beneficial use from October 1, 1993, to October 1, 2043.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
City – City of Philomath
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
WSMP – Water System Master Plan
WMCP – Water Management and Conservation Plan
IGA – Intergovernmental Agreement

Units of Measure

cfs – cubic feet per second
gpm – gallons per minute
mgd – million gallons per day

AUTHORITY

Generally, see ORS 537.230 and OAR Chapter 690 Division 315.

ORS 537.230(2) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order and allow an extension to complete construction or perfect a water right. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

ORS 539.010(5) provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0080 provides in pertinent part that the Department shall make findings to determine if an extension of time for municipal and/or quasi-municipal water use permit holders may be approved to complete construction and/or apply water to full beneficial use.

OAR 690-315-0050(5) authorizes the Department to include in an extension order, but is not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

OAR 690-315-0090(3) authorizes the Department, under specific circumstances, to condition an extension of time for municipal and/or quasi-municipal water use permit holders to provide that diversion of water beyond the maximum rate diverted under the permit or previous extension(s) shall only be authorized upon issuance of a final order approving a WMCP Plan under OAR Chapter 690, Division 86 which grants access to water under this extended permit.

FINDINGS OF FACT

1. On April 8, 1985, Permit S-49245 was issued by the Department. The permit authorizes the use of up to 3.50 cfs of water from the Mary's River, a tributary of the Willamette River, for municipal use. It specified that construction of the water development project was to be completed by October 1, 1987, and that complete application of water was to be made on or before October 1, 1988.
2. One prior permit extension has been granted for Permit S-49245. The extension request resulted in the completion dates for construction and full application of water being extended to October 1, 1993.
3. Notification of the City's Application for Extension of Time for Permit S-49245 was published in the Department's Public Notice dated May 8, 2012. No public comments were received regarding the extension application.
4. Effective August 15, 2017, HB 2099 (Chapter 704, 2017 Oregon Laws), modifies the definition of the undeveloped portion of a municipal water right permit for the purpose of determining the amount of water that may be subject to fish persistence conditioning and diversion limitations to specify that the undeveloped portion of a municipal permit is the amount of water that has not been diverted as of the later of June 29, 2005, or the date specified in the permit or last approved extension.

Review Criteria for Municipal and Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0080(1). This determination shall consider the applicable requirements of ORS 537.230¹, 537.630² and/or 539.010(5)³

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 537.010(5) applies to surface water and ground water permits.

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

5. On May 1, 2012, the Department received a completed application for extension of time and the fee specified in ORS 536.050.

Start of Construction [OAR 690-315-0080(1)(b)]

6. Permit S-49245 was issued prior to June 29, 2005; therefore, the permit holder is not required to provide evidence of actions taken to begin actual construction of the project.⁴

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c) and (1)(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

7. The remaining work to be accomplished under Permit S-49245 consists of completing construction, including expansion of the pump station, wand water treatment facility, improvements to the finish water transmission mains, and completion of a new water storage reservoir; and applying water to full beneficial use.
8. As of June 29, 2005, the permit holder had diverted 1.68 cfs of the 3.50 cfs of water authorized under Permit S-49245 for municipal purposes. There is an undeveloped portion of 1.82 cfs of water under Permit S-49245 as per OAR 690-315-0010(6)(g).
9. In addition to the 3.50 cfs of water authorized under Permit S-49245 the City holds the following municipal use water right certificates and permits:
 - Certificate 62441 for 0.56 cfs of water from the 11th Street Well ;
 - Certificate 82856 for 0.55 cfs of water from the 9th Street Well;
 - Certificate 89715 for 1.0 cfs of water from the Mary's River, limited to use only during the irrigation season;
 - Certificate 91001 for 0.22 cfs of water from the 11th Street Well; and
 - Inchoate Transfer T-8527 (originating from Certificates 33572, and 48112) for 1.19 cfs of water from the Mary's River, limited to an annual maximum volume of 240.5 acre feet and to a period of use of April 1 to September 30 of each year.

These water rights and permits total 4.83 cfs of water for year round use, being 3.5 cfs of surface water and 1.33 cfs of groundwater; and an additional 2.19 cfs of surface water use from April 1, through September 30 of each year. Due to turbidity, the City only utilized water from the 9th Street Well and the 11th Street Well when needed to meet the peak demand. City of Philomath

⁴ Section 5, Chapter 410, Oregon Laws 2005 and OAR 690-315-0070(3)(d).

has not yet made use of 1.9 cfs of water under Inchoate Transfer T-8527 and 1.82 cfs of water under Permit S-49245.

10. The City has an existing Intergovernmental Agreement (IGA) with the City of Corvallis for the purchase of between 10 million and 60 million gallons of treated water annually. However, this IGA is not a long-term source of water for the City. The City anticipates renewal of the IGA in the future, however it is not a guaranteed long term water source.
11. According to the City's Draft Water System Master Plan from August 2005, the majority of future development will fall outside of the current city limits, but within the Urban Growth Boundary. The majority of the expected growth is anticipated to be residential, with approximately 1,400 acres available for development. The City has set aside an additional 800 acres of land for industrial development, of which 500 acres remains undeveloped.
12. According to the Application, in 2011, the population within the service boundary of City of Philomath was 4,610. The City estimates the population will increase at a growth rate of 1.8 percent per year, reaching an estimated population of 8,242 by the year 2043.
13. In 2011, the City's peak day demand was 4.24 cfs of water.
14. The City's peak day demand is projected to be approximately 7.60 cfs of water by the year 2043.
15. Full development of Permit S-49245 is needed to address the present and future water demand of City of Philomath, including system redundancy and emergency use.
16. Based on Findings of Fact 10 through 15, the Department finds that the City's request for an extension of time until October 1, 2043, to complete construction and to apply water to full beneficial use under the terms of Permit S-49245 is both reasonable and necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a), (3)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the

right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

17. Work was accomplished (specified in the Application for Extension of Time) during the original development time frame.
18. During the most recent extension period, being October 1, 1988, to October 1, 1993, the City accomplished the following:
 - need to explore work accomplished
19. Since October 1, 1993, the City has accomplished the following:
 - constructed a 1.25 million gallon storage reservoir (Neaback Hill Reservoir);
 - completed a Water System Master Plan (WSMP);
 - completed an intertie with the City of Corvallis; and
 - drafted a Water Management and Conservation Plan (WMCP).

The Department finds that work has been accomplished since the beginning of the last authorized extension time period, which provides evidence of good cause and reasonable diligence in developing the permit.

20. According to the Application, as of May 1, 2012, the City has invested approximately \$1,025,000, which is about 10 percent of the total projected cost for complete development of this project. The City estimates a \$9,500,000 investment is needed for the completion of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under S-49245, other costs included in this accounting are not partitioned out for S-49245 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the City, and/or (2) they are generated from individual activities counted towards reasonable diligence and good faith as listed in ORS 690-315-0080(4) which are not associated with just this permit, but with the development and exercise of all the City's water rights.
21. As of June 29, 2005, the City had diverted 1.68 cfs of the 3.50 cfs allowed for beneficial municipal purposes under the terms of this permit.
22. The Department has considered the City's compliance with conditions, and did not identify any concerns.

Financial Investment and Cost to Appropriate and Apply Water to a Beneficial Purpose

[OAR 690-315-0080(3)(b)]

23. According to the Application, as of May 1, 2012, they have invested approximately \$1,025,000, which is about 10 percent of the total projected cost for complete development of this project. The City estimates a \$9,500,000 investment is needed for the completion of this project.

The Market and Present Demands for Water *[OAR 690-315-0080(3)(d)]*

24. As described in Findings 9, through 16, above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-49245.
25. The City estimates an annual population growth rate of 1.8 percent per year over the period between 2011 and 2043..
26. Given the current water supply situation of the City, including current and expected demands, the need for system redundancy, and emergency water supply, there is a market and present demand for the water to be supplied under Permit S-49245.
27. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of water beyond 1.68cfs (not to exceed the maximum amount authorized under this permit, being 3.5 cfs) shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). A "Development Limitation" condition" is specified under Item 1 of the "Conditions" section of this PFO to meet this requirement.

Fair Return Upon Investment *[OAR 690-315-0080(3)(e)]*

28. The City utilizes a generally accepted fee model to generate revenue for the maintenance and operation of the water system. According to their WSMP, User fees are monthly charges to all residences, businesses, and other users connected to the water system. Additionally, a system development charge is collected for each new connection developed, and is used to fund improvements to the water system.

Other Governmental Requirements *[OAR 690-315-0080(3)(f)]*

29. Delays caused by any other governmental requirements in the development of this project have not been identified.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

30. Delay of development under Permit S-49245 was due, in part, to the size and scope of the municipal water system, which was designed to be phased in over a period of years.

Maintaining the Persistence of Listed Fish Species [OAR 690-315-0080(1)(f) and (2)]

The Department's determination regarding maintaining the persistence of listed fish species shall be based on existing data and advice of the Oregon Department of Fish and Wildlife (ODFW). The determination shall be limited to impacts related to stream flow as a result of use of the undeveloped portion of the permit and further limited to where, as a result of use of the undeveloped portion of the permit, ODFW indicates that stream flow would be a limiting factor for the subject listed fish species.

31. The pending municipal Application for Extension of Time for Permit S-49245 was delivered to ODFW on May 1, 2013, for ODFW's review under OAR-690-315-0080.
32. Notification that the pending municipal Application for Extension of Time for Permit S-49245 was delivered to ODFW for review was sent to the City on May 2, 2013.
33. Notification that the pending municipal Application for Extension of Time for Permit S-49245 was delivered to ODFW for review was published in the Department's Public Notice dated May 7, 2013. No public comments were received regarding this notice.
34. On November 4, 2022, the Department received ODFW's Division 315 Fish Persistence Evaluation and Proposed Fish Persistence Conditions for Permit S-49245.
35. Summary and Excerpts of Advice from ODFW:
- The City of Philomath has a surface water right permit from the Marys River of 3.5 cfs; the undeveloped portion of the permit is 1.82 cfs.
 - The Marys River provides habitat for the following STE species: Winter Steelhead (Federal-Threatened, State-Sensitive), Coastal Cutthroat Trout (State-Sensitive), Pacific and Western Brook Lamprey (State-Sensitive), and Oregon chub (State-Sensitive). It also provides important habitat for Coho Salmon.
 - ODFW develops target flows based on available data including (but not limited to) instream water rights on the impacted reach, flows recommended in Basin Investigation Reports, instream flow studies, and modeled or measured streamflow data. Target flows for the Marys River are presented in Table 1.
 - Conditions outlined in this letter are based on **target flow achievement (T_a)**, which is calculated using monthly target flows, measured daily flows, and the portion of the undeveloped amount that applies to the stream (see Equation 1).

- USGS streamgage #14171000, Marys River near Philomath, OR was used to assess fish persistence flows. The gage is operational and should provide satisfactory data for the City of Philomath to evaluate ODFW target flow achievement on a daily basis.
- Fish persistence target flows were established for the assumed monitoring location, USGS streamgage #14171000, ~3.5 miles downstream of the point of diversion (POD). If the City of Philomath elects to install an appropriate streamflow measurement device near the POD for compliance purposes in place of the USGS gage, ODFW will provide revised target flows to reflect the POD monitoring location.
- ODFW recommends **partial curtailment** of the undeveloped portion of the water right when T_a is missed ($T_a < 1$).

Table 1. ODFW flow targets for the Marys River at Gage 14171000.

Month	ODFW Target Flows at Gage 14171000 (cfs)
JAN	135.0
FEB	135.0
MAR	135.0
APR	135.0
MAY	135.0
JUN 1-15	70.0
JUN 16-30	40.0
JUL 1-15	20.0
JUL 16-31	15.0
AUG	15.0
SEPT	15.0
OCT 1-15	20.0
OCT 16-31	38.7
NOV 1-15	70.0
NOV 16-30	135.0
DEC	135.0

When Marys River flows are less than those associated with MF-122, the City's water right is subject to regulation by OWRD. This regulation would apply to the developed as well as the undeveloped portion because MF-122 is senior to Permit S-49245. When Marys River flows are greater than those associated with MF-122 but target flow achievement (T_a) < 1, the following advice applies:

ODFW evaluates water right permit curtailment need based on the fraction of target flow achievement (*Equation 1*). ODFW recommends **partial curtailment** of the undeveloped portion following the formula described below (*Equation 2*) when T_a is missed ($T_a < 1$).

$$T_a = (Q_g - P)/Q_t \quad (\text{Equation 1})$$

T_a = target flow achievement

Q_g = gaged daily flow

P = amount of water conditioned for fish persistence (1.82 cfs)

Q_t = target flow

When target flow achievement (T_a) is greater than 1, no curtailment is recommended. When target flow achievement is less than 1, curtailment of the undeveloped portion is recommended. For partial curtailment, the curtailed permit rate is determined by scaling the undeveloped portion of the permit by the fraction the flow target is not met (*Equation 2*).

If $T_a \geq 1$, no curtailment necessary. Otherwise:

$$D_m = T_a * P \quad (\text{Equation 2})$$

D_m = maximum amount of water conditioned for fish persistence that can be appropriated as a result of this fish persistence condition.

36. Department's Findings Based on Review of ODFW's Advice:

There is an undeveloped portion of 1.82 cfs of water under Permit S-49245 as per OAR 690-315-0010(6)(g). For the purpose of conditioning this permit to maintain the persistence of fish, the Department finds that the amount of the undeveloped portion of water under Permit S-49245 is 1.82 cfs, therefore, 1.82 cfs is the amount of water under Permit S-49245 that must be conditioned for the persistence of listed fish species.

Authorization to incrementally expand use of water under this permit beyond 1.68 cfs up to the permitted quantity of 3.5 cfs can only be granted through the Department's review and approval of the municipal permit holder's future WMCPs (OAR 690-086).

When ODFW's recommended target flows are missed, the proposed conditions may result in a reduction in the amount of water from live flow conditioned for fish persistence under Permit S-49245 that can be diverted.

The proposed conditions are based on the following findings:

- Fish persistence target flows were established for the assumed monitoring location, USGS streamgage #14171000, ~3.5 miles downstream of the point of diversion (POD). If the City of Philomath elects to install an appropriate streamflow measurement device near the POD for compliance purposes in place of the USGS gage, ODFW will provide revised target flows to reflect the POD monitoring location.

- ODFW recommends **partial curtailment** of the undeveloped portion following the formula described below (*Equation 2*) when T_a is missed ($T_a < 1$).

$$T_a = (Q_g - P) / Q_t \quad (\text{Equation 1})$$

T_a = target flow achievement

Q_g = gaged daily flow

P = amount of water conditioned for fish persistence (1.82 cfs)

Q_t = target flow

When target flow achievement (T_a) is greater than 1, no curtailment is recommended. When target flow achievement is less than 1, curtailment of the undeveloped portion is recommended. For partial curtailment, the curtailed permit rate is determined by scaling the undeveloped portion of the permit by the fraction the flow target is not met (*Equation 2*).

If $T_a \geq 1$, no curtailment necessary. Otherwise:

$$D_m = T_a * P \quad (\text{Equation 2})$$

D_m = maximum amount of water conditioned for fish persistence that can be appropriated as a result of this fish persistence condition

37. The Department finds, based on ODFW's advice, that in the absence of conditions, the use of the undeveloped portion of Permit S-49245 will not maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit, and as a result of the use of the undeveloped portion of the permit, stream flows would be a limiting factor for the listed fish species.
38. Based on ODFW's advice, the Department proposes to require conditions to maintain, in the portions of the waterways affected by water use under Permit S-49245, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. (See Item 2 of the "Conditions" section of this PFO.)⁵
39. On November 9, 2022, the Department notified the City as per OAR 690-315-0080(2)(f) of ODFW's written advice and the "Conditions to Maintain the Persistence of Listed Fish" proposed in this PFO for the pending municipal Application for Extension of Time for Permit S-49245.

⁵ The Department, based on advice from the ODFW, finds that the conditions contained in this PFO are appropriate for this extension. In other municipal extensions that require conditions to maintain the persistence of listed species, different conditions may be warranted depending on the advice received from ODFW and communications with the particular extension applicant.

CONCLUSIONS OF LAW

1. The City is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.230(2).
2. The City has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. Pursuant to Section 5, Chapter 410, Oregon Laws 2005, the permit holder is not required to demonstrate that actual construction of the project began within one year of the date of issuance of the permit, as otherwise required by OAR 690-315-0080(1)(b).
4. Pursuant to ORS 540.510(3)(a) and (b), water under Permit S-49245 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
6. Completion of construction and full application of water to beneficial use can be completed by October 1, 2043⁶, as required by OAR 690-315-0080(1)(d).
7. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department finds that the City has shown good cause for an extension of time to complete construction and to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
8. As required by OAR 690-315-0090(3) and as described in Finding 27, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of water beyond 1.68 cfs (not to exceed the maximum amount authorized under this permit, being 3.50 cfs) under Permit S-49245 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter

⁶ For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7).

9. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 31, through 35, above, the persistence of listed fish species will not be maintained in the portions of the waterways affected by water use of the undeveloped portion under this municipal use permit, in the absence of special conditions. Therefore, the diversion of water beyond 1.68 cfs under Permit S-49245 will be subject to the conditions specified under Item 2 of the "Conditions" section of this PFO.

Proposed Order

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Extend the time to complete construction under Permit S-49245 from October 1, 1993, to October 1, 2043.

Extend the time to apply the water to beneficial use under Permit S-49245 from October 1, 1993, to October 1, 2043.

Subject to the following conditions:

CONDITIONS

1. Development Limitations

A maximum diversion of 1.68 cfs of water is currently allowed under Permit S-49245. Any diversion of water beyond 1.68 cfs (not to exceed the maximum amount authorized under the permit, being 3.50 cfs) shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of this Final Order. The amount of water used under Permit S-49245 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, on file with the Department.

The Development Limitation established in the above paragraph supersedes any prior limitation of the diversion of water under Permit S-49245 that has been established under a prior WMCP or Extension final order issued by the Department.

The deadline established in the Extension Final Order for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at

an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of the final order may also meet the WMCP submittal requirements of other Department orders.

2. Conditions to Maintain the Persistence of Listed Fish

Up to 1.68 cfs of water from Marys River under this or any subsequent water right(s) originating from Permit S-49245 is not and will not be conditioned to maintain fish persistence.

The undeveloped portion of the permit from Marys River subject to these fish persistence conditions is established as 1.82 cfs in accordance with 537.230(2)(c). The use of 1.82 cfs of water from Marys River as authorized under this permit must be hereafter conditioned with these fish persistence conditions. Therefore, all subsequent water right(s) originating from Permit S-49245 must include these Conditions to Maintain the Persistence of Listed Fish. If more than one resulting water right is subject to these Conditions to Maintain the Persistence of Listed Fish, then legal use of the 1.82 cfs conditioned to maintain the persistence of listed fish species shall be determined among all the permit/water right holders of record; all the permit/water right holders of record subject to these Conditions to Maintain the Persistence of Listed Fish must ensure that these fish persistence conditions are met.

A. Minimum Target Flows

Fish persistence target flows in Marys River as recommended by ODFW are in Table 2, below; flows are to be measured USGS streamgage #14171000, ~3.5 miles downstream of the point of diversion (POD).

Table 2

Month	ODFW Target Flows at Gage 14171000 (cfs)
JAN	135.0
FEB	135.0
MAR	135.0
APR	135.0
MAY	135.0
JUN 1-15	70.0
JUN 16-30	40.0
JUL 1-15	20.0
JUL 16-31	15.0
AUG	15.0
SEPT	15.0

OCT 1-15	20.0
OCT 16-31	38.7
NOV 1-15	70.0
NOV 16-30	135.0
DEC	135.0

Alternate Streamflow Measurement Point

The location of a streamflow measurement point as established in these Conditions to Maintain the Persistence of Listed Fish may be revised if the permit or water right holder provides evidence in writing that ODFW has determined that flows may be measured at an alternate streamflow measurement point and the permit or water right holder provides an adequate description of the location of the alternate streamflow measurement point, and the Water Resources Director concurs in writing. If the City of Philomath elects to install an appropriate streamflow measurement device near the POD for compliance purposes in place of the USGS gage, ODFW will provide revised target flows to reflect the POD monitoring location.

B. Determining Water Use Reductions - Generally

The maximum amount of the 1.82 cfs conditioned for fish persistence that can be appropriated is determined in proportion to the amount by which the target flows shown in Table 2 are missed as measured at USGS streamgage #14171000, ~3.5 miles downstream of the point of diversion (POD). The fraction of target flow achievement is defined as:

$$T_a = (Q_g - P) / Q_t \quad \text{(Equation 1)}$$

T_a = target flow achievement

Q_g = gaged daily flow

P = amount of water conditioned for fish persistence (1.82 cfs)

Q_t = target flow

When target flow achievement (T_a) is greater than 1, no curtailment is recommended. When target flow achievement is less than 1, curtailment of the undeveloped portion is recommended. For partial curtailment, the curtailed permit rate is determined by scaling the undeveloped portion of the permit by the fraction the flow target is not met (Equation 2).

If $T_a \geq 1$, no curtailment necessary. Otherwise:

$$D_m = T_a * P \quad \text{(Equation 2)}$$

D_m = maximum amount of water conditioned for fish persistence that can be appropriated as a result of this fish persistence condition

For descriptive purposes only, expected levels of target flow achievement based on historical data are shown in Table 3, which tabulates the analysis described above using daily gage data for the period of record from 10/1/2000-5/20/2018, the undeveloped water right, and monthly target flows for fish persistence. For the years analyzed, the fraction of target non-achievement by month (Table 3-column 2) ranged from 0 to 0.62. Target flows are generally met during winter and early spring. The most frequent incidences of target non-achievement occur in late summer and fall.

Table 3. Fraction of the time monthly target flows were missed and the median of target flow achievement when missed.

Month	Fraction of period target missed	Median of Target Flow Achievement (T_a) when $T_a < 1$
JAN	0.03	0.91
FEB	0.02	0.87
MAR	0.04	0.69
APR	0.00	na
MAY	0.32	0.80
JUN 1-15	0.20	0.87
JUN 16-30	0.08	0.78
JUL 1-15	0.05	0.91
JUL 16-31	0.06	0.78
AUG	0.37	0.71
SEP	0.62	0.74
OCT 1-15	0.48	0.61
OCT 16-31	0.60	0.57
NOV 1-15	0.37	0.51
NOV 16-30	0.30	0.64
DEC	0.12	0.59

C. Examples

Example 1: Target flow met.

On August 15, the gaged daily flow is (Q_g) 19.0 cfs. Given that the amount of water conditioned for fish persistence (P) is 1.82 cfs, then the gaged daily flow (Q_g) minus 1.82 is (P) greater than the 15.0 cfs target flow (Q_t) for August 15. In this example, $(Q_g - P)/Q_t \geq 1$.

$$(19.0 - 1.82)/15.0 \geq 1$$

The amount of water conditioned for fish persistence that can be diverted would not be reduced because the target flow is considered met.

Example 2: Target flow missed.

On August 15, the gaged daily flow (Q_g) is 12.0 cfs. Given that the amount of water conditioned for fish persistence (P) is 1.82 cfs, then the gaged daily flow (Q_g) minus 1.82 cfs (P) is less than the 15.0 cfs target flow (Q_t) for August 15.

Step 1: Given that the amount of water conditioned for fish persistence (P) is 1.82 cfs, if on August 15, the average of the gaged daily flow (Q_g) is 12.0 cfs and the target flow (Q_t) is 15.0 cfs, the fraction of target flow achievement (T_a) is less than 1.

$$(12.0 - 1.82) / 15 = 0.679$$

$$0.679 < 1$$

Step 2: Given the fraction of target flow achievement (T_a) is less than 1 (from Step 1), and amount of water conditioned for fish persistence (P) is 1.89 cfs; the maximum amount of water conditioned for fish persistence that can be appropriated as a result of this fish persistence condition (D_m) is 1.28 cfs.

$$0.679 * 1.82 \text{ cfs} = 1.24 \text{ cfs}$$

DATED: February 21, 2023


Dwight French
Water Right Services Division Administrator

*If you have any questions,
please check the information
box on the last page for the
appropriate names and phone
numbers.*

Protests

Pursuant to OAR 690-315-0060(1), the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. Protests must be received by the Water Resources Department no later than **April 7, 2023**, at this address: Oregon Water Resources Department, Water Right Services Division, 725 Summer St NE, Suite A, Salem, OR 97301-1266. Protests may not be submitted by electronic mail. OAR 690-002-0025(3).

Protests must be in writing and include all of the following:

- The name, address, and telephone number of the protestant
- A detailed description of the protestant's interest in the proposed final order, and, if the protestant claims to represent the public interest, a precise statement of the public interest represented
- A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency
- If the applicant protests, a statement of whether a hearing is requested
- Citation of legal authority supporting the protestant, if known
- Proof of service of the protest on the water right permit holder, if protestant is other than the water right permit holder, and
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$950 required by ORS 536.050.

Within 60 days after the close of the period for requesting a contested case hearing, the Director shall either issue a final order on the extension request, or schedule a contested case hearing if a protest has been submitted, and, upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or, the applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests. The hearing will be conducted as provided in Oregon Revised Statutes (ORS) Chapter 183, and

Oregon Administrative Rules (OAR) 137-003-0501 to 137-003-0700.

If the applicant does not request a hearing within 30 days after the close of the protest period, or if the request for a hearing is withdrawn, or the Department or the administrative law judge is notified that the protestant will not appear, or the protestant fails to appear, at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

A party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active-duty service members have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-8260, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

If you have any questions about statements contained in this document, please contact Jeffrey Pierceall at 503-986-0802.

If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.

If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.

Address any correspondence to: Water Right Services Division
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
