

**Oregon Water Resources Department  
Water Right Services Division**

|                                        |   |                      |
|----------------------------------------|---|----------------------|
| Water Right Application S-89274 in the | ) |                      |
| name of BRIAN POGUE and PEGGY POGUE    | ) | PROPOSED FINAL ORDER |
|                                        | ) |                      |

**Summary:** The Department proposes to issue an order approving Application S-89274, as amended, and a permit consistent with the attached draft permit.

**Authority**

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.170, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 33, 300, 310, 400, 410 and the North Coast Basin Program (OAR 690-501). These statutes and rules can be viewed on the following website: <https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>.

The Department's main website can be found at: <https://www.oregon.gov/OWRD>.

The Department shall presume that a proposed use will not impair or be detrimental to the public interest if:

- a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12);
- b) Water is available;
- c) The proposed use will not injure other water rights; and
- d) The proposed use complies with the rules of the Commission.

ORS 537.153(2); OAR 690-310-0110(1)

All four criteria must be met for a proposed use to be presumed to not impair or be detrimental to the public interest. When the criteria are met and the presumption is established, or if the proposed use can be modified or conditioned to meet the presumption criteria, the Department must further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. OAR 690-310-0120(3).

If the Department determines that the presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest under ORS 537.153 and may either:

- a) Propose denial of the application upon a finding that the use will impair or be detrimental to the public interest; or

- b) Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest and propose approval of the application with appropriate modifications or conditions. OAR 690-310-0120(2)

### **FINDINGS OF FACT**

#### **Application History**

1. On October 3, 2022, Brian Pogue and Peggy Pogue filed a complete application for the following water use:

**Source:** MAIL CREEK, TRIBUTARY TO NECANICUM RIVER  
**Use:** DOMESTIC USE FOR ONE HOUSEHOLD  
**Rate/Volume:** 0.01 CUBIC FOOT PER SECOND (CFS)  
**Period of Use:** JANUARY 1 THROUGH DECEMBER 31  
**County:** CLATSOP COUNTY  
**Place of Use:** SECTION 24, TOWNSHIP 5 NORTH, RANGE 10 WEST, W.M.

2. On November 11, 2022, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 0.01 CFS of water from Mail Creek, tributary to the Necanicum River, for domestic use for one household is not allowable January 1 through December 31 of each year; however, by providing additional information, the applicant may request a limited permit for human consumption use (indoor use only: cooking, drinking and sanitation) at 0.005 CFS, further limited to 500 gallons per day per household. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On November 15, 2022, the Department noticed the application in its weekly public notice, requesting comments, and providing information for interested persons about obtaining future notices and a copy of the Proposed Final Order.
4. On November 21, 2022, the Department received a completed "Application Supplement for Human Consumption & Livestock Uses" from the applicant.

#### **Presumption Criterion (a) - Consistency with Basin Program**

5. Domestic use (including human consumption use) is allowed under the North Coast Basin Program (OAR 690-501-0005(1)). ORS 537.153(2); OAR 690-310-0110(1)(a)

#### **Presumption Criterion (b) - Water Availability**

6. An assessment of water availability at 80% exceedance for the proposed use was completed using the Department's Water Availability Reporting System. A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(a). During the period of use requested, the assessment established that surface water is available November 1 through June 30 of each year. ORS 537.153(2); OAR 690-310-0150(2)(c)

**Presumption Criterion (c) - Injury Determination**

7. The proposed use, if authorized, will not injure other water rights. ORS 537.153(3)(d); OAR 690-310-0150(2)(e)

**Presumption Criterion (d) - Whether the use complies with rules of the Commission**

8. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.153(3)(b); OAR 690-310-0150(2)(b)
9. The proposed use is in an area of the state in which OAR 690-033-0310 thru -0340 applies. These rules establish definitions, additional procedures, and standards to aid the Department in determining whether a proposed use will impair or be detrimental to the public interest with regard to sensitive, threatened, or endangered fish species.

**OAR 690-033-0310 Statewide Rules**

- A. The proposed use occurs in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0310(2)
  - B. The applicant has been notified that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied. OAR 690-033-0330(1)(a)
  - C. The interagency review team has been notified that an application has been received in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0330(1)(b)
  - D. The interagency review team was convened to review the application and recommended conditions as necessary to achieve the standards listed in OAR 690-033-0330(2)(a) and (b). As a result of this review, Permit Specific Conditions #2 through #7 have been included in the draft permit.
10. The proposed use is not within or above a state scenic waterway under ORS 390.826.

**Determination of Presumption and whether the proposed use will impair or be detrimental to the public interest under ORS 537.153**

Because the criteria are not met (surface water is not available) the presumption is **not** established. OAR 690-310-0120(1)

**Further Evaluation of the Proposed Use**

11. OAR 690-310-0120(2) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public interest, and may make specific findings to demonstrate that, even though the presumption is not established, the proposed use will not impair or adversely affect the public interest, and propose approval of the application with appropriate modifications or conditions.

12. To determine whether the proposed use will preserve the public interest, the factors in ORS 537.170(8) have been considered as follows:

- A. The conservation of the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public:

*Domestic use (including human consumption) is a classified use under the North Coast Basin Program, and therefore is one of the highest and best uses.*

- B. The maximum economic development of the waters involved:

*The applicant has demonstrated that denial of this application would result in loss of reasonable expectations for use of the property.*

- C. The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control:

*Human consumption includes uses of water for sanitation (OAR 690-300-0010(24)). Because the applicant has no other reasonable source of water to provide sanitation to their home, human consumption use is necessary to provide the beneficial use of sanitation to the applicant.*

- D. The amount of waters available for appropriation for beneficial use:

*Water is not available for the proposed use during the full period requested; however, the Oregon Department of Fish and Wildlife and Department of Environmental Quality have recommended Permit Specific Conditions #2 through #7 to reduce the impacts of the proposed use.*

- E. The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved:

*The use will be conditioned to require reasonable use of the water and measurement, recording and reporting conditions as required under ORS 390.835(6)(d)(C).*

- F. All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights:

*The pending application's priority date and the Department's existing system of regulation are the means necessary to protect existing vested and inchoate rights, thus the protection of rights consideration is satisfied.*

- G. The state water resources policy:

*The Department determined the proposed use is consistent with the state water resources policy formulated under ORS 536.295 to 536.350.*

13. No written comments were received by the close of the comment period. OAR 690-310-0120(3)

14. The Department therefore concludes that, in accordance with OAR 690-310-0120(2)(b), although the presumption is not established, the proposed use as modified and conditioned in the attached draft permit will not impair or be detrimental to the public interest.

**Other Criteria and Requirements**

15. The amount requested, 0.01 CFS, further limited by the Department to 0.005 CFS, is necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
16. The applicant proposed methods to measure the amount of water appropriated, prevent damage to aquatic life and riparian habitat, prevent discharge of contaminated water to a surface stream and to prevent damage to public uses of any affected surface waters. These measures are included in Sections 6 and 7 of the application. OAR 690-310-0150(2)(j)
17. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

**CONCLUSIONS OF LAW**

1. The proposed use, as conditioned, would not impair or be detrimental to the public interest as described in ORS 537.153.

NOTE: When issuing permits, ORS 537.170(6) authorizes the Department to include provisions or restrictions concerning the use, control and management of water to be appropriated for the project.

**PROPOSED ORDER**

The Department recommends approval of Application S-89274, as amended, and issuance of a permit consistent with the attached draft permit.

DATED March 28, 2023



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Katherine Ratcliffe  
Water Rights Section Manager, for  
Douglas E. Woodcock, Acting Director  
Oregon Water Resources Department

## Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.153(8) (for groundwater), you can protest this Proposed Final Order. If you wish to submit a protest by U.S. mail, please consider mailing early to ensure the Department receives the protest by the deadline specified. Protests must be received by the Water Resources Department no later than **May 12, 2023**.

Protests must be in writing and include the following:

- Your name, address, and telephone number;
- A description of your interest in the Proposed Final Order, and, if you claim 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 your interest;
- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known;
- To effect the Department's determination that the proposed use in this application will, or will not, impair or be detrimental to the public interest, ORS 537.153(6) requires that a protest demonstrate, by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) The specific aspect of the public interest under ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified aspect of the public interest under ORS 537.170(8) would be impaired or be detrimentally affected;
- If you are the applicant, a protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, a protest fee of \$950 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing.

## Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **May 12, 2023**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and

- A standing fee of \$270. If a hearing is scheduled, an additional fee of \$680 must be submitted along with a petition for party status.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and either:

- upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

If you do not timely file a protest or timely request a hearing, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail 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 that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default. OAR 137-003-0670.

You 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 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll-free telephone number.

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- If you have any questions about statements contained in this document, please contact Amanda Mather at 971-718-7937 or [Amanda.L.Mather@water.oregon.gov](mailto:Amanda.L.Mather@water.oregon.gov).
  - 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 503-979-9160.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
  - Address any correspondence to: Water Right Services Division  
725 Summer St NE, Suite A  
Salem, OR 97301-126
- Fax: 503-986-0901
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**DRAFT**

**This is not a permit.**

**DRAFT**

STATE OF OREGON

COUNTY OF CLATSOP

**DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS**

THIS DRAFT PERMIT IS HEREBY ISSUED TO

BRIAN POGUE  
PEGGY POGUE  
35103 HWY 26  
SEASIDE OR 97138

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: S-89274

SOURCE OF WATER: MAIL CREEK, TRIBUTARY TO NECANICUM RIVER

PURPOSE OR USE: HUMAN CONSUMPTION USE (INDOOR USE ONLY: COOKING, DRINKING,  
SANITATION) FOR ONE HOUSEHOLD

MAXIMUM RATE: 0.005 CUBIC FOOT PER SECOND, FURTHER LIMITED TO 500 GALLONS PER DAY

PERIOD OF USE: JANUARY 1 THROUGH DECEMBER 31

DATE OF PRIORITY: OCTOBER 3, 2022

**AUTHORIZED POINT OF DIVERSION:**

| Twp | Rng  | Mer | Sec | Q-Q   | Measured Distances                                            |
|-----|------|-----|-----|-------|---------------------------------------------------------------|
| 5 N | 10 W | WM  | 24  | NE SW | 650 FEET SOUTH AND 172 FEET WEST FROM C1/4 CORNER, SECTION 24 |

**AUTHORIZED PLACE OF USE:**

| Twp | Rng  | Mer | Sec | Q-Q   |
|-----|------|-----|-----|-------|
| 5 N | 10 W | WM  | 24  | NE SW |

## PERMIT SPECIFIC CONDITIONS

1. Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

2. **Water Use Measurement, Recording, and Reporting:**

- A. The Director may require the permittee to install a totalizing flow meter at each point of diversion. If the Director notifies the permittee to install a measuring device, the permittee shall install such device within the period stated in the notice. Once installed, the permittee shall maintain the device in good working order, and shall allow the watermaster access to the device.
- B. The Director may require the permittee to keep and maintain a record of the volume of water diverted, and may require the permittee to report water-use on a periodic schedule as established by the Director. In addition, the Director may require the permittee to report general water-use information, the periods of water use and the place and nature of use of water under the permit.
- C. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

3. **Maintain Passage:**

The permittee shall maintain adequate passage of native migratory fish at all times (ORS 509.610) and shall not construct, operate or maintain any dam or artificial obstruction to fish passage across any waters of the state that are inhabited, or where historically inhabited by native migratory fish (ORS 509.585).

4. **Fish Screen:**

The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards or submit documentation that ODFW has determined fish screening is not necessary or is exempted. Fish screening is to prevent fish from entering the proposed diversion. The required screen is to be in place and functional, and approved in writing by ODFW **prior to diversion of any water**. The permittee shall operate and maintain the fish screen consistent with ODFW's operation and maintenance standards. The permittee is hereby directed to schedule a consultation with an ODFW Fish Screen Coordinator.

5. **Riparian Area Restoration:**

If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

## **6. In-Water Work:**

Any in-water work related to construction, development, or maintenance of the proposed use shall be conducted during the preferred work period of July 1 through September 15, unless an alternate time period is approved by Oregon Department of Fish and Wildlife.

## **7. Water Quality:**

All water use under this permit shall comply with state and federal water quality laws. The permittee shall not violate any state and federal water quality standards, shall not cause pollution of any waters of the state, and shall not place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means. The use may be restricted if the quality of source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards.

### **STANDARD CONDITIONS**

1. Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.
2. This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.
3. By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.
4. The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows.

### **DEVELOPMENT AND COMPLETION TIMELINE REQUIREMENTS**

1. Construction of the water system shall begin within five years of the date of permit issuance. The deadline to begin construction may not be extended. This permit is subject to cancellation proceedings if the begin construction deadline is missed.
2. Complete application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

3. Within one year after complete application of water to the proposed use, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued \_\_\_\_\_

**DRAFT - THIS IS NOT A PERMIT**

Katherine Ratcliffe  
Water Rights Section Manager, for  
Douglas E. Woodcock, Acting Director  
Oregon Water Resources Department