

Oregon Water Resources Department
Water Rights/Adjudications Division

Water Rights Application
Number S-71072

Proposed Final Order

Summary of Recommendation: The Department recommends that the attached draft permit be issued with conditions.

Application History

On December 27, 1990, Canby Utility Board submitted an application to the Department for the following water use permit:

- Amount of Water: 12.4 CUBIC FEET PER SECOND (CFS)
- Use of Water: MUNICIPAL USE
- Source of Water: WILLAMETTE RIVER, A TRIBUTARY OF COLUMBIA RIVER
- Area of Proposed Use: CLACKAMAS COUNTY WITHIN THE SERVICE AREA OF THE CITY OF CANBY

On July 24, 2009, the Department mailed the applicant notice of its Initial Review, determining that "*The use of 12.4 CFS from Willamette River, tributary of Columbia River, for municipal use is allowable during the full period requested, year round.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On July 28, 2009, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about both obtaining future notices and a copy of the Proposed Final Order.

The Department received public interest comments from the Oregon Department of Environmental Quality (DEQ) and Oregon Department of Fish and Wildlife (ODFW).

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- recommendations by other state agencies
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record

- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

Findings of Fact

The Willamette Basin Program allows municipal use.

Senior water rights exist on Willamette River, a tributary of Columbia River, or on downstream waters.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that water is available for further appropriation (at a 50 percent exceedance probability) during the full season requested.¹

The Department finds that the amount of water requested, 12.4 CFS, is an acceptable amount.

In their November 13, 2009 public interest comments, ODFW stated that the proposed use will occur in an area that may affect the habitat of fish or wildlife species. ODFW identified Spring and Fall Chinook Salmon, Winter Steelhead, Coho, Pacific Lamprey and Cutthroat. In order to mitigate for the effects of the proposed use, ODFW recommended the following conditions:

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.

The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices

¹Applications filed before July 17, 1992 were evaluated at a 50 percent exceedance probability rather than an 80 percent exceedance probability.

provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

The following minimum flows should be met at Willamette River at Salem, Oregon, gage 14191000:

November - March - 6,000 CFS
April 1 - April 15 - 15,000 to 19,200 CFS
April 16 - April 30 - 17,000 CFS
May - 15,000 CFS
June 1 - June 15 - 12,600 CFS
June 16 - June 30 - 8,500 CFS
July - October - 5,630 CFS or TMDL flow needs, if higher

In their public interest comments, DEQ stated that their primary interest is in protecting the beneficial uses of salmonid migration, rearing and spawning. The Willamette River mainstem is presently too warm to fully support these uses. The Willamette River is listed 303(d) for temperature from its mouth to River Mile 186. The Total Maximum Daily Load (TMDL), finalized by DEQ in 2006, established load and wasteload allocations for temperature, and demonstrated the connection between flow and river temperatures in the basin. DEQ recommended conditions consistent with the ODFW recommended minimum flows, and stated no other water-quality conditions are necessary.²

Conclusions of Law

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if 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), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Willamette Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use will not injure other water rights.

²Applications filed prior to July 17, 1992 are not subject to Oregon Administrative Rule (OAR) 690-033.

The proposed use complies with other rules of the Water Resources Commission not otherwise described above.

The application is in compliance with the State Agency Coordination Program regarding land use.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
 - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
 - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED October 19, 2010

E. Timothy Wall.

for Phillip C. Ward, Director
Water Resources Department

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

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **December 3, 2010**. Protests must be in writing, and must 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 this 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;
- If you are the applicant, the protest fee of \$300 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$600 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. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.
- *If you do not protest this Proposed Final Order and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.*

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), 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 **December 3, 2010**. 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 \$150. If a hearing is scheduled, an additional fee of \$350 must be submitted along with a request for intervention.

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 request a hearing within 30 days after the close of the protest period, 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.

This document was prepared by Kerry Kavanagh. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0816.

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to:

Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF CLACKAMAS

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

CANBY UTILITY BOARD
154 NW 1ST PO BOX 1070
CANBY, OREGON 97013

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

APPLICATION FILE NUMBER: S-71072

SOURCE OF WATER: WILLAMETTE RIVER, A TRIBUTARY OF COLUMBIA RIVER

PURPOSE OR USE: MUNICIPAL USE

MAXIMUM RATE: 12.4 CUBIC FOOT PER SECOND

PERIOD OF USE: JANUARY 1 THROUGH DECEMBER 31

DATE OF PRIORITY: DECEMBER 27, 1990

POINT OF DIVERSION LOCATION: SW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 22, T 3S, R1E, W.M.;
102 FEET NORTH & 855 FEET EAST FROM SW CORNER, SECTION 22

THE PLACE OF USE IS LOCATED AS FOLLOWS: WITHIN THE SERVICE BOUNDARY OF
THE CITY OF CANBY

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of diversion. The permittee shall maintain the meter or measuring device in good working order.
- B. The permittee shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.

- C. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where any meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

Diversion shall occur only when flows in the mainstem Willamette River at Salem, OR, USGS gage 1419100 meet or exceed those shown in the table below.

Month	Minimum Flows (cfs) for Willamette River at Salem, OR, USGS gage 1419100
November 1 - March 31	6,000
April 1 - 15	15,000
April 16 - 30	17,000
May 1 - 31	15,000
June 1 - 15	12,600
June 16 - 30	8,500
July 1 - October 31	5,630

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.

STANDARD CONDITIONS

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.

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.

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.

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.

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.

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.

Completion of construction and application of the water shall be made within twenty 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.

Within one year after making beneficial use of water, 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

for Phillip C. Ward, Director
Water Resources Department

Application S-71072 Water Resources Department
Basin 02 Volume 26 WILLAMETTE R & TRIBS

PERMIT DRAFT
District 16

Mailing List for PFO Copies

Application #S-71072

PFO Date October 19, 2010

Original mailed to applicant:

CANBY UTILITY BOARD
ATTENTION: MATT MICHEL, ASSISTANT GENERAL MANAGER
154 NW 1ST AVENUE
PO BOX 1070
CANBY, OREGON 97013

Copies sent to:

1. WRD - File # S-71072
2. Water Availability: Ken Stahr

PFO and Map Sheet Copies sent to:

3. WRD - Watermaster District # 20
4. Oregon State Parks
5. ODFW: Todd Alsbury
6. DEQ: Doug Drake

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/
Standing Dates
checked

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

5. Adam Sussman, GSI Water Solutions, 1600 Western Blvd., Ste 240, Corvallis OR 97333
6. David Doughman, Beery, Elsner & Hammond, LLP,
1750 SW Harbor Way, Suite 380, Portland, OR 97201-5106

"\$20 LETTER" sent to Interested Persons who have not protested or paid for copies

1. WaterWatch of Oregon, 213 SW Ash, Suite 208, Portland, OR 97204
2. The Freshwater Trust, 65 SW Yamhill Street, Suite 200, Portland, OR 97204

CASEWORKER : Kerry Kavanagh