

**Oregon Water Resources Department
Water Rights/Adjudications Division**

Water Rights Application
Number S-87663

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$400.00. Please include your application number on your check made out to the Oregon Water Resources Department.

Proposed Final Order

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

Application History

On November 3, 2010, Byron and Susan Nofrey submitted an application to the Department for the following water use permit:

- Amount of Water: 0.015 cubic foot per second (CFS)
- Use of Water: domestic use expanded for one household
- Source of Water: Siuslaw River, a tributary of Pacific Ocean
- Area of Proposed Use: Lane County within Section 23, Township 17 South, Range 10 West, W.M.

On December 3, 2010, the Department mailed the applicant notice of its Initial Review, determining that "*the use of 0.015 CFS of water from Siuslaw River, a tributary of Pacific Ocean, for year-round domestic use expanded for one household is not allowable, and it appears unlikely that you will be issued a permit. However, by providing additional information you may request a limited permit for human consumption use (indoor use only: cooking, drinking, sanitation), limited to 500 gallons per day.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On December 7, 2010, 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 obtaining future notices and a copy of the Proposed Final Order. No written comments were received within 30 days.

On December 9, 2010, and January 20, 2011, the Department received information from the applicant intending to document that no alternate water source is available, and that denial of the permit would cause loss of reasonable expectation for use of the property. The applicant also

requested that conditions for installation of a totalizing flow meter or other suitable measuring device, monthly recording of water use, and annual reporting of water use be waived.

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 Middle Coast Basin Program allows domestic use expanded, which includes human consumption (cooking, drinking, and sanitation).

Senior water rights exist on Siuslaw River, a tributary of Pacific Ocean, or on downstream waters.

Siuslaw River, a tributary of Pacific Ocean, is not within or above a State Scenic Waterway.

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 an 80 percent exceedance probability) November through June.

The Department finds that the amount of water requested, 0.005 CFS, is an acceptable amount if further limited to 500 gallons per day.

In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

- 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.

Allow 0.005 cubic foot per second, and 500 gallons per day.

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.

Public Interest Findings Regarding Human Consumption Use

The proposed diversion is necessary to uses designated in ORS 536.310(12), specifically human consumption use (cooking, drinking, and sanitation).

After considering various alternative water sources, including groundwater, stored water, purchased trucked water, community and municipal suppliers, and transfers of existing water rights, the applicant provided documentation that there are no reasonable alternative sources of water.

The Department has considered the following factors:

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.

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.

The amount of waters available for appropriation for beneficial use: Water is not available for the proposed use during the full period requested.

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 installation of equipment to permit water use measurement and reporting.

All vested and inchoate rights to the waters of this state or to the use of waters of this state, and the means necessary to protect such rights: Issuance of this right may increase the likelihood that water may not be available for all water rights.

The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534: ORS 536.310(12) provides that "[w]hen available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses." Because the proposed use is human consumption there is a preference for this use over all other uses.

Applying these factors one may conclude that the proposed use could increase the likelihood that water may not be available for all existing water rights (including those for the protection of fish and wildlife) because water is not available for the proposed use during the full period requested. However, because the proposed use is preferred above all other uses, is for sanitation and will not be wasteful, uneconomic, impracticable or unreasonable, and because denial of this application will result in the loss of reasonable expectations for use of the property, the public interest in the proposed use outweighs water availability concerns.

The Department acknowledges the applicant's request that conditions for installation of a totalizing flow meter or other suitable measuring device, monthly recording of water use, and annual reporting of water use be waived. However, the Department finds these conditions are necessary to protect the public interest, and are included on the attached draft permit.

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 Middle Coast Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water **is not** available for the proposed use.

The proposed use will not injure other water rights.

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.

Because water **is not** available, the required presumption **has not** been established.

OAR 690-310-120(2)(b) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors in ORS 537.170(8), and may 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.

In consideration of findings described above under "Public Interest Findings Regarding Human Consumption Use", even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest if approved with the following conditions:

1. The use shall be limited to human consumption for one household at a diversion rate of 0.005 CFS, further limited to 500 gallons per day.
2. 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.

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 February 15, 2011

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 **April 1, 2011**. 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 **April 1, 2011**. 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 Jeana Eastman. 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 503-986-0859.

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 LANE

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

BYRON AND SUSAN NOFREY
12000 E MAPLETON RD
MAPLETON, OR 97453

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

APPLICATION FILE NUMBER: S-87663

SOURCE OF WATER: SIUSLAW RIVER, A TRIBUTARY OF PACIFIC OCEAN

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

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

PERIOD OF USE: YEAR ROUND

DATE OF PRIORITY: NOVEMBER 3, 2010

POINT OF DIVERSION LOCATION: NW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 23, T17S, R10W, W.M.;
SOUTH 52 DEGREES 34 MINUTES 0 SECONDS EAST, 1168 FEET FROM W1/4 CORNER,
SECTION 23

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NW $\frac{1}{4}$ SW $\frac{1}{4}$
SECTION 23
TOWNSHIP 17 SOUTH, RANGE 10 WEST, W.M.

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.

Notwithstanding that Oregon Department of Fish and Wildlife has made a determination that fish screens and/or by-pass devices are not necessary at the time of permit issuance, the permittee may be required in the future to install, maintain, and operate fish screening and/or by-pass devices to prevent fish from entering the proposed diversion, and to provide adequate upstream and downstream passage for fish.

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.

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.

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, except where those instream water rights allow for the use authorized herein.

Completion of construction and 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.

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

Mailing List for PFO Copies

Application #S-87663

PFO Date February 1, 2011

Original mailed to applicant:

BYRON AND SUSAN NOFREY
12000 E MAPLETON RD
MAPLETON, OR 97453

Copies sent to:

1. WRD - File # S-87663
2. Water Availability: Ken Stahr

| |
|--|
| Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE) |
|--|

PFO and Map Sheet Copies sent to:

3. WRD - Watermaster # 2

| |
|--|
| Protest/ Standing Dates checked _____ |
|--|

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

1. Larry Null, PO Box 2716, Florence OR 97439
2. Wobbe, Eugene, CWRE #225
PO Box 3093, Florence OR 97439

CASEWORKER : jme