

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

Application for Extension of Time

In the Matter of the Application for an Extension of Time)
for Permit S-44501, Water Right Application S-57827,) PROPOSED FINAL ORDER
in the name of the City of Dunes City)

Permit Information

Application File S-57827/ Permit S-44501

Basin 18 – Mid Coast Basin / Watermaster District 15

Date of Priority: August 21, 1978

Authorized Use of Water

Source of Water: Woahink Lake, a Tributary of Woahink Creek

Purpose or Use: Municipal Use

Maximum Rate: 1.5 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-44501, water right Application S-57827. A copy of Permit S-44501 is enclosed as Attachment 1.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 1998 to October 1, 2048.
- Grant an extension of time to apply water to full beneficial use from October 1, 1998 to October 1, 2048.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

City – City of Dunes City

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

Units of Measure

AF – acre-feet

cfs – cubic feet per second

gpm – gallons per minute

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.

Under specific circumstances, the Department may condition extensions of time for municipal water use permit holders to provide that use of the undeveloped portion of the permit maintains the persistence of listed fish species in the portions of the waterways affected by water use under 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

Background

1. Permit S-44501 was granted by the Department on November 14, 1979. The permit authorizes the use of up to 1.5 cfs of water from the Woahink Lake, a tributary of the Woahink Creek, for municipal use. It specified that construction of the water development project was to be completed by October 1, 1981, and that complete application of water was to be made on or before October 1, 1982.
2. Four prior permit extensions have been granted for Permit S-44501. The most recent extension request resulted in the completion dates for construction and full application of water being extended to October 1, 1998.
3. Due to an ongoing permit extension rulemaking, in 1998 the Department stopped processing pending Applications for Extension of Time for municipal and quasi-municipal permits, and did not require municipal and quasi-municipal water use permit holders to submit Applications for Extension of Time during the rulemaking process.
4. Municipal and quasi-municipal water use permit extension rules OAR 690-315-0070 through 690-315-0100 became effective on November 1, 2002. The rules were subsequently amended, and the amended rules became effective on November 22, 2005.
5. On December 3, 2007, City of Dunes City (City) submitted an "Application for Extension of Time" to the Department requesting the time to complete construction and the time to apply water to full beneficial use under the terms and conditions of Permit S-44501 be extended from October 1, 1998 to October 1, 2048.
6. Notification of the City's Application for Extension of Time for Permit S-44501 was published in the Department's Public Notice dated December 11, 2007. No public comments were received regarding the extension application.

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

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

7. On December 3, 2007, 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)]

8. Permit S-44501 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.

9. The remaining work to be accomplished under Permit S-44501 consists of completing construction including constructing and equipping a new municipal water system; and applying water to full beneficial use.
10. As of October 1, 1998, the permit holder had not diverted any of the 1.5 cfs of water authorized under Permit S-44501 for municipal purposes. There is an undeveloped portion of 1.5 cfs of water under Permit S-44501 as per OAR 690-315-0010(6)(g).
11. In addition to the 1.5 cfs of water authorized for municipal use under Permit S-44501 the City holds the following domestic use water permits:
 - Permit S 33923, modified by Permit Amendment T-9854 for 1.4 cfs of water from 218 points of diversion on Woahink Lake; and
 - Permit S-54405 for 410 AF of water from the Woahink Lake [diverted for storage from Woahink Creek under Permit R-14131], a tributary of the Woahink Creek.

Water authorized under Permit S-33932, modified by Permit Amendment T-9854, is used to meet current water demands. Water is self-supplied to individual customers. Water will not be available under Permit S-44501 until a public water system has been constructed, or under Permit S-54405 until the City has physical control of storage at an

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.

⁴ Section 5, Chapter 410, Oregon Laws 2005 and OAR 690-315-0070(1)(d).

outlet control structure (OCS) at Lake Woahink. The City's water rights are junior in priority date to the Woahink Creek instream water right Certificate 59892 (MF517).

12. According to the City, in 2006, the population within the service boundary of City of Dunes City was 1,345. The City estimates the population will increase at a growth rate of 1.6 percent per year, reaching an estimated population of 2,660 by the year 2048.
13. The City's peak water demand within its service area boundaries was .077 cfs in 2006.
14. The City's peak day demand is projected to be approximately 0.49 cfs of water by the year 2048, but the water intake will have a capacity to use 0.78 cfs (350 gpm) of water.
15. Full development of Permit S-44501, as limited by subordination to instream water right Certificate 59892, is needed to address the present and future water demand of City of Dunes City.
16. The City's request for an extension of time until October 1, 2048, to complete construction and to apply water to full beneficial use under the terms of Permit S-44501 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. There is no record of work being accomplished during the last extension period, being October 1, 1995 to October 1, 1998.
19. Since October 1, 1998, the City completed a water system feasibility design study and the City council authorized payment for repairs to the Woahink Lake weir outlet-control-structure.
20. According to the City, as of December 3, 2007, they have invested approximately \$19,860, which is less than one percent of the total projected cost for complete development of this project. The City estimates a \$31,421,376 investment (in 2048 dollars) 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-44501, other costs included in this accounting are not partitioned out for S-44501 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 October 1, 1998, the City had not diverted any of the 1.5 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 City, as of December 3, 2007, they have invested approximately \$19,860, which is less than one percent of the total projected cost for complete development of this project. The City estimates a \$31,421,376 (in 2048 dollars) 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 10 through 15 above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-44501.
25. The City estimates an annual population growth rate of 1.6 percent per year over a 42 year period, being the years 2006 to 2048.
26. Given the current water supply situation of the City, including current and expected demands, there is a market and present demand for the water to be supplied under Permit S-44501.
27. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of any water under Permit S-44501 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. Use and income from the permitted water development project would result in reasonable returns upon the investment made in the project to date.

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)(a)]

30. Delay of development under Permit S-44501 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, and to Dunes City voters repeatedly rejecting the issuance of general obligation bonds needed to construct and equip a public municipal water system.

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-44501 was delivered to ODFW on August 3, 2012, for ODFW's review under OAR-690-315-0080.
32. Notification that the pending municipal Application for Extension of Time for Permit S-44501 was delivered to ODFW for review was sent to the City on August 3, 2012.
33. Notification that the pending municipal Application for Extension of Time for Permit S-44501 was delivered to ODFW for review was published in the Department's Public Notice dated August 7, 2012. No public comments were received regarding this notice.
34. On January 9, 2013, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-44501.
35. On January 9, 2013, the City was notified per OAR 690-315-0080(2)(f) of ODFW's written advice including the conditions needed to maintain the persistence of listed fish that would be proposed in this PFO for the pending municipal Application for Extension of Time for Permit S-44501.
36. Summary and Excerpts of Advice from ODFW:
 - a. ODFW has determined that the Woahink Creek will be affected by water use under this permit. ODFW's advice is based on the best available information and existing data.

- b. The target flows for Woahink Creek are equal to the minimum flows required under Oregon Water Resources minimum flow MF517 (Certificate 59892) as follows:

ODFW's Recommended Fish Persistence Target Flows based on MF517 (Certificate 59892)	
Month	Cubic Feet per Second
November – April	20
May – June	10
July – October 15	5
October 16 – October 31	15

- c. The City should be regulated off of any water use under Permit S-44501 when the target flows are not met.

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

When ODFW's recommended flows targets are not met, the Department's proposed conditions will restrict the permit holder's access to any of the undeveloped portion of Permit S-44501 that legally can be diverted. The conditions are based on the following findings:

- a. Permit S-44501 is junior in priority date to instream right MF517, Certificate 59892.
- b. If the instream flow for MF517 is met before water under Permit S-44501 occurs, then use of the undeveloped water made under Permit S-44501 will maintain the persistence of listed fish species.
- c. Under Certificate 59892 flows are to be maintained in Woahink Lake from the outlet of Woahink Lake to its confluence with Siltcoos Lake. Thus flows should be measured in Woahink Creek at the outlet of Woahink Lake.

38. The Department finds, based on ODFW's advice, that in the absence of conditions, the use of the undeveloped portion of Permit S-44501 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.

39. 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-44501, 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

40. On June 20, 2014, ODFW notified the Department that the proposed "Conditions to Maintain the Persistence of Listed Fish" for Permit S-44501 are consistent with their advice.

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), water under Permit S-44501 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, 2048⁶, 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 has determined 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).

⁵ The Department, based on advice from the ODFW, has determined 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.

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.

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 any water under Permit S-44501 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 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 40, 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 0 cfs under Permit S-44501 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-44501 from October 1, 1998 to October 1, 2048.

Extend the time to apply the water to beneficial use under Permit S-44501 from October 1, 1998 to October 1, 2048.

Subject to the following conditions:

CONDITIONS

1. Development Limitations

Diversion of any water under Permit S-44501 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-44501 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, on file with 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**

A. **Fish Persistence Target Flows**

- a. Fish persistence target flows in Woahink Creek as recommended by ODFW are in Table 1, below. Flows are to be measured in Woahink Creek at the outlet of Woahink Lake.

Table 1

ODFW's Recommended Fish Persistence Target Flows based on MF517 (Certificate 59892)	
Month	Cubic Feet per Second
November – April	20
May – June	10
July – October 15	5
October 16 – October 31	15

b. **Alternate Streamflow Measurement Point**

The location of a target flow measurement point as established in these Conditions to Maintain the Persistence of Listed Fish may be revised if SUB provides evidence in writing that ODFW has determined that persistence flows may be measured at an alternate streamflow measurement point and provides an adequate description of the location of the alternate streamflow measurement point, and the Water Resources Director concurs in writing.

B. **Determining Water Use Reductions**

No undeveloped portion of Permit S-44501, being 1.5 cfs, may be diverted when the target flows shown in Table 1 are not met.

DATED: June 24, 2014


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.*

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) and 690-315-0060, 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. The written protest must be received by the Water Resources Department no later than **August 8, 2014**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner'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;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

If you have any questions about statements contained in this document, please contact Ann L. Reece at 503-986-0834.

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
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Fax: 503-986-0901 Salem, OR 97301-1266