

**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-54344, Water Right Application S-70256,)
in the name of the Coos Bay - North Bend Water Board) **PROPOSED FINAL ORDER**

Permit Information

Application File S-70256/ Permit S-54344

Basin 17 – South Coast Basin / Watermaster District 19

Date of Priority: March 23, 1990

Authorized Use of Water

Source of Water: Tenmile Creek, a Tributary of Pacific Ocean
Purpose or Use: Municipal Use
Maximum Rate: 23.2 Cubic Feet per Second (cfs)

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

This Proposed Final Order applies only to Permit S-54344, water right Application S-70256.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 2010 to October 1, 2035.
- Grant an extension of time to apply water to full beneficial use from October 1, 2010 to October 1, 2035.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

Water Board – Coos Bay - North Bend Water Board

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

Units of Measure

cfs – cubic feet per second

AUTHORITY

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

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

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

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

OAR 690-315-0090(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-54344 was granted by the Department on October 4, 2006. The permit authorizes the use of up to 23.2 cfs of water from Tenmile Creek, a tributary of the Pacific Ocean, for municipal use. It specified that construction of the water development project was to be completed by October 1, 2010, and that complete application of water was to be made on or before October 1, 2010.
2. On November 8, 2012, Coos Bay - North Bend Water Board (Water Board) 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-54344 be extended from October 1, 2010 to October 1, 2035. This is the first extension of time request for Permit S-54344.
3. Notification of the Water Board's Application for Extension of Time for Permit S-54344 was published in the Department's Public Notice dated November 27, 2012. 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)]

4. On November 8, 2012, the Department received a completed application for extension of time and the fee specified in ORS 536.050.

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

5. A date by which actual construction was to begin is not specified in Permit S-54344.

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.

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.

6. The remaining work to be accomplished under Permit S-54344 consists of a planning stage including feasibility studies, baseline monitoring, pilot testing, and predesign reporting; completing construction including that of collector wells, a pump station, conveyance pipelines, dual purpose wells, a water treatment plant, and modifying an existing well; and applying water to full beneficial use.
7. As of October 1, 2010, the permit holder had not diverted any of the 23.2 cfs of water authorized under Permit S-54344 for municipal purposes. There is an undeveloped portion of 23.2 cfs of water under Permit S-54344 as per OAR 690-315-0010(6)(g).
8. In addition to the 23.2 cfs of water from Tenmile Creek authorized under Permit S-54344 the Water Board holds the following municipal use surface water right certificates and permits from three related systems:

Joe Ney System

- Permit S-26223 for 8.0 cfs of water from Joe Ney Slough and Joe Ney Reservoir, *[storage of 2500 AF of water from Joe Ney Slough, tributary to South Slough, in Joe Ney Reservoir authorized under Permit R-2252]*

Upper Pony System

- Certificate 32416 for 10.0 cfs of water from Pony Creek and Reservoir, *[storage of 1685 AF of water from Pony Creek, tributary to Pony Slough (Coos Bay), in (Upper) Pony Creek Reservoir authorized under Certificate 32415]*
- Permit S-47095 for 465 AF of water from Upper Pony Creek Reservoir, *[storage of 465 AF of water from Pony Creek, tributary to Pony Slough (Coos Bay), in Upper Pony Creek Reservoir authorized under Permit R-8518]*
- Permit S-53683 for 4100 AF of water from Upper Pony Creek Reservoir, *[storage of 4100 AF of water from Pony Creek, tributary to Pony Slough (Coos Bay), in Upper Pony Creek Reservoir authorized under Permit R-12870]*

Lower Pony System

- Permit S-50155 for 18.0 cfs of water from Pony Creek and Lower Upper Pony Creek Reservoir (aka Merrit Lake), *[storage of 383 AF of water from Pony Creek, tributary to Pony Slough (Coos Bay), in Lower Pony Creek Reservoir authorized under Certificate 83502]*

The Water Board's storage rights total 9133.0 AF of stored water, being 2500.0 AF in the Joe Ney Slough Reservoir, 6250.0 AF in the Upper Pony Creek Reservoir, and 383.0 AF in the Lower Pony creek Reservoir. Currently, a maximum of 6908.3 AF of water has been stored to meet demands within the service boundaries of the Water Board. The Water Board has not yet stored 2224.7 AF of water in Joe Ney Slough Reservoir (Permit R-2252),

Water Board's surface water rights that can be appropriated for municipal use total 59.2 cfs and 4565.0 AF of water. A maximum 26.05 cfs, being 8.0 cfs from the Joe Ney system and 18.05 cfs from the Pony Creek system has been appropriated to meet demands within the service boundaries of the Water Board. Under Permit S-50155, 9.95 cfs of water has not yet been appropriated from Pony Creek and Pony Creek Reservoir; and under Permit S-54344, 23.2 cfs of water has not yet been appropriated from Tenmile Creek.

The use 8.0 cfs of water from the Joe Ney Slough and Reservoir, authorized under Permit S-26223 is restricted during critical anadromous fish months pursuant to a Memorandum of Understanding with the Oregon Department of Fish and Wildlife.

9. The Water Board also holds Permit S-18955 for 8.0 cfs of water from Winchester Creek, and Certificate for 53521 for 3.1 cfs of water from Fourth Creek and Tarheel Creek. Prior to diverting water from Tenmile Creek Permit S-18955 must be cancelled, and Certificate 53521 must be cancelled or transferred instream or to another user. If Permit S-18955 is not developed, then Permit S-18955 will be developed for back-up /emergency use.
10. The Water Board holds an un-adjudicated Surface Water Registration SW-297 for 10.0 cfs of water from Upper Pony Creek.
11. The Water Board holds ground water Permit G-10132, modified by Permit Amendment T-7815 for 1.6 cfs of water for municipal use, and Permit G-1389, modified by Permit Amendment T-8161 for 46.0 cfs of water for industrial/manufacturing uses, each from the same 64 wells within the North Slough and Tenmile Creek Basins (Dunes Aquifer Wells).
12. According to the Water Board, in 2009, the population within the service boundary of Coos Bay - North Bend Water Board was 34,500. The Water Board estimates the population will reach 37,496 by the year 2035, which calculates to an average growth rate of 0.35 percent per year.
13. The Water Board's peak water demand within its service area boundaries was 18.05 cfs in 2003.

14. According to the Water Board's WMCP, their peak day demand is projected to be approximately 21.9 cfs of water by the year 2035.
15. Full development of Permit S-54344 is needed to address the present and future water demand of Coos Bay - North Bend Water Board, including system redundancy and emergency use.
16. The Water Board's request for an extension of time until October 1, 2035, to complete construction and to apply water to full beneficial use under the terms of Permit S-54344 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. Prior to the issuance of Permit S-54344 on October 4, 2006, the Water Board pursued permitting and installed required flow monitoring systems on Eel and Tenmile Creeks.
18. During the original development time frame designated on the permit, the Water Board completed a PRELIMINARY FEASIBILITY STUDY (2007) on the use of water from Tenmile Creek and of ground water from the Sand Dune Aquifer, and conducted annual monitoring and reporting of flow gauge readings.
19. Since October 1, 2009, the Water Board submitted final revisions and received approval on a Water Management and Conservation Plan (2009 WMCP).
20. According to the Water Board, as of November 8, 2012, they have invested approximately \$326,936, which is about 0.7 percent of the total projected cost for complete development of this project. The Water Board estimates a \$45,892,420 investment is needed for the completion of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under S-54344, other costs included in this accounting are not partitioned out for S-54344 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the Water Board, 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 Water Board's water rights.

21. As of October 1, 2010, the Water Board had not diverted any of the 23.2 cfs allowed for beneficial municipal purposes under the terms of this permit.
22. The Department has considered the Water Board'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 Water Board, as of November 8, 2012, they have invested approximately \$326,936, which is about 0.7 percent of the total projected cost for complete development of this project. The Water Board estimates a \$45,892,420 investment is needed for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d) and (5)(a-f)]

For municipal or quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to 690-315-0080(3)(d), the Department shall also consider, but is not limited to, the factors in 690-315-0080(5)(a-f).

24. The amount of water available to satisfy other affected water rights and scenic waterway flows; special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0080(5)(a-f)].
 - a. The amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit S-54344; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined at such time that such application for a new water right is submitted. The point of diversion for Permit S-54344, located on Tenmile Creek, is not located within a Withdrawn Area. Tenmile Creek is not located within or above any state or federal scenic waterway, however it is located within an area ranked high for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife. Tenmile Creek is listed by the Department of Environmental Quality as a water quality limited stream.

Economic investment in the project to date [OAR 690-315-0080(5)(d)]

25. According to the Water Board, as of November 8, 2012, they have invested \$326,936, which is about 0.7 percent of the total projected cost for complete development of this

project. The permit holder estimates an additional \$45,892,420 investment is needed for the completion of this project.

Other economic interests dependent on completion of the project [OAR 690-315-0080(5)(e)].

26. None have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0080(5)(f)].

27. As described in Findings 7 through 15 the Water Board has indicated and the Department finds that Coos Bay - North Bend Water Board must rely on full development of Permit S-54344 to meet its present and future water demands.
28. The Water Board estimates an annual population growth rate of 0.35 percent per year a 26 year period, being 2009 to 2035.
29. Given the current water supply situation of Coos Bay - North Bend Water Board, as well as current and expected demands including system redundancy and emergency use, there is a market and present demand for the water to be supplied under Permit S-54344.
30. 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-54344 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)]

31. 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)]

32. The Water Board's water system will entail the use of the Sand Dune aquifer for seasonal storage of waters of water from Tenmile Creek, authorized under Permit S-54344. Pilot and final system designs, pilot scale construction, land use agreements and permits from the US Forest Service, Oregon Department of Environmental Quality, and an Environmental Impact Study will all be required prior to final system construction and application of water.

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

33. Delay of development under Permit S-54344 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. Furthermore, the development of this permit requires an extensive design, permitting and budgeting effort.

CONCLUSIONS OF LAW

1. The Water Board 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 Water Board 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. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
5. Completion of construction and full application of water to beneficial use can be completed by October 1, 2035⁴, as required by OAR 690-315-0080(1)(d).
6. 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 Water Board 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).
7. As required by OAR 690-315-0090(3) and as described in Finding 30, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of any water under Permit S-54344 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter

⁴ For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

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

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-54344 from October 1, 2010 to October 1, 2035.

Extend the time to apply the water to beneficial use under Permit S-54344 from October 1, 2010 to October 1, 2035.

Subject to the following conditions:

CONDITIONS

1. Development Limitations

Diversion of any water under Permit S-54344 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-54344 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.

DATED: July 8, 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 22, 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
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
