

**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-35222, Water Right Application S-47642,)
in the name of the City of Falls City) **PROPOSED FINAL ORDER**

Permit Information

Application File S-47642/ Permit S-35222

Basin 2 – Willamette Basin / Watermaster District 16

Date of Priority: October 14, 1970

Authorized Use of Water

Source of Water: Berry Creek, a Tributary of Little Luckiamute River

Purpose or Use: Municipal Use

Maximum Rate: 1.0 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-35222, water right Application S-47642.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2001 to October 1, 2043.
- Grant an extension of time to apply water to full beneficial use from October 1, 2001 to October 1, 2043.
- 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 Falls City
IGA – Intergovernmental Agreement
LDWC – Luckiamute Domestic Water Cooperative
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
gpm – gallons per minute
mgd – million gallons per day

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

Final Order: Permit S-35222

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.

FINDINGS OF FACT

Background

1. Permit S-35222 was granted by the Department on May 26, 1971. The permit authorizes the use of up to 1.0 cfs of water from Berry Creek, a tributary of the Little Luckiamute River, for municipal use. It specified that construction of the water development project was to be completed by October 1, 1973, and that complete application of water was to be made on or before October 1, 1974.
2. Six prior permit extensions have been granted for Permit S-35222. The most recent approved extension request resulted in the completion dates for construction and full application of water being extended to October 1, 2001. The last extension of time was denied by Final Order dated December 1, 2011.
3. On December 12, 2012, City of Falls City (City) submitted an "Application for Extension of Time" to the Department requesting the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit S-35222 be extended from October 1, 2001 to October 1, 2043.
4. Notification of the City's Application for Extension of Time for Permit S-35222 was published in the Department's Public Notice dated January 8, 2013. 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

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.

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

5. On December 12, 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)]

6. Permit S-35222 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.

7. The remaining work to be accomplished under Permit S-35222 consists of completing construction of the water system including preliminary engineering, easements and land acquisition, intake design and construction, conveyance system design and construction, connecting to the existing water supply system; and applying water to full beneficial use.
8. As of October 1, 2001, the permit holder has not diverted any of the 1.0 cfs of water authorized under Permit S-35222 for municipal purposes. There is an undeveloped portion of 1.0 cfs of water under Permit S-35222 as per OAR 690-315-0010(6)(g).
9. In addition to the 1.0 cfs of water from Berry Creek authorized under Permit S-35222 the City holds the following municipal use water right certificates:
- Certificate 1832 for 1.0 cfs of water from Teal Creek, a tributary of Little Luckiamute River;
 - Certificate 5072 for 0.5 cfs of water from Boughey Creek, a tributary of Teal Creek;
 - Certificate 39319 for 0.26 cfs of water from a spring, a tributary of Teal Creek; and
 - Certificate 82931 for 2 cfs of water from Glaze Creek, a tributary of Teal Creek.
10. The City's municipal surface water rights total 4.76 cfs. Teal Creek is used to meet water demand in the summer months; the turbidity is too high for the slow sand water treatment plant during the winter months. Glaze Creek is not available in summer months due to very low streamflows, but is used to meet water demand in the winter months. Thus, during peak periods of use the City has 2.76 cfs of reliable water rights. Water is not currently being utilized from Berry Creek, Boughey Creek or the spring.
11. The City has an intergovernmental agreement (IGA) with the Luckiamute Domestic Water Cooperative (LDWC) to supply up to 5 million gallons of potable water per month.

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

12. According to the City, in 2010, the population within the service boundary of Falls City was 945. The City anticipates the population to increase at an estimated growth rate of 0.8 percent per year, reaching an estimated population of 1,229 by the year 2043.
13. The City's peak water demand was 1.17 cfs in 2010, including the water supplied to LDWC. Approximately 0.12 cfs was diverted for LDWC, and the remaining 1.05 cfs was diverted for the City.
14. According to the City, their peak day demand is projected to be 2.76 cfs, being 1.22 cfs for Falls City, 1.54 cfs for water supplied to LDWC.
15. Full development of Permit S-35222 is needed to address the present and future water demand of City of Falls City and to meet the terms of their IGA with LDWC.
16. The City's request for an extension of time until October 1, 2043, to complete construction of the water system and to apply water to full beneficial use under the terms of Permit S-35222 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. Since the issuance of Permit S-35222 on May 26, 1971, the City has accomplished reservoir and distribution system engineering and construction (1998) and water system distribution engineering and construction (2000).
18. Since October 1, 2001, the City entered into an IGA with LDWC to supply up to 5 million gallons of potable water per month.
19. According to the City, as of December 12, 2012, they have invested approximately \$481,540, which is 34 percent of the total projected cost for complete development of this project. The City anticipates a \$948,000 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 Permit S-35222, other costs included in this accounting are not partitioned out for Permit S-35222 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.

20. Since the issuance of Permit S-35222 on May 26, 1971, the City has not diverted any of the 1.0 cfs allowed for beneficial municipal purposes under the terms of this permit.
21. 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)]

22. According to the City, as of December 12, 2012, they have invested approximately \$481,540, which is 34 percent of the total projected cost for complete development of this project. The City anticipates a \$948,000 investment is needed for the completion of this project.

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

23. As described in Findings 8 through 15 above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-35222 to meet its present and future summertime peak water demands, and to meet the terms of their IGA with LDWC.
24. The City anticipates an annual population growth rate of 0.8 percent per year over a thirty-three year period, being the years 2010 to 2043.
25. Given the current water supply situation of the City, including current and expected demands, and limitations under its other water rights, there is a market and present demand for water to be supplied under Permit S-35222.
26. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of any water up to 1.0 cfs under Permit S-35222 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 which grants access to a greater appropriation 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)]

27. Use and income from the permitted water development project will likely result in reasonable returns upon the investment made in the project to date.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

28. 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)(g)/

29. Delay of development under Permit S-35222 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.

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.

30. The pending municipal Application for Extension of Time for Permit S-35222 was delivered to ODFW on February 2, 2010, for ODFW's review under OAR-690-315-0080.
31. Notification that the pending municipal Application for Extension of Time for Permit S-35222 was delivered to ODFW for review was sent to the City on April 29, 2010.
32. Notification that the pending municipal Application for Extension of Time for Permit S-35222 was delivered to ODFW for review was published in the Department's Public Notice dated May 4, 2010. No public comments were received regarding this notice.
33. On February 7, 2011 the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-35222.

34. Summary and Excerpts of Advice from ODFW:

Use of water under the portion of this permit that is undeveloped as of the date of the extension final order should be conditioned to maintain, in the portions of waterways affected by water use under the permit, persistence of listed fish species. ODFW has determined that the Little Luckiamute River will be affected by water use under this permit. ODFW's advice is based on the best available information and existing data.

ODFW recognizes that climatic variations will affect the amount of water in the system over time. In favorable water years, fish populations tend to increase and in unfavorable water years, fish populations contract. Climate change is likely to cause a long-term reduction in the frequency of favorable water years. The long term objective for a listed species is to have the population increase to a sustainable level over time and to be able to maintain itself through natural fluctuations in the environment.

The target flows, in Table 1, below, are ODFW's recommended flows measured at Falls City, Oregon, for maintaining the persistence of listed fish species in the Little Luckiamute River. ODFW advises the Water Resources Department to develop conditions that allow municipalities to meet their water needs while maintaining the persistence of listed fish species.

The severity of the measures to be taken by the permit holder should reflect the degree to which the recommended streamflows are being missed and the percentage of water that is withdrawn by the municipality as compared to the overall streamflow level, and may be adjusted by the ratio of water withdrawn to water being returned directly to the Little Luckiamute River through effluent discharges.

Table 1

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN THE LITTLE LUCKIAMUTE RIVER AT FALLS CITY, OREGON	
Month	Cubic Feet per Second
October	20
November – May	80
June	50
July	35
August – September	15

Streamflow Measurement Point

After analysis of flow records, ODFW has determined that measuring flows at the Falls City gage is sufficient for ensuring that flows to maintain the persistence of listed fish are met throughout the Little Luckiamute River. Therefore, ODFW advises the Department to establish the Falls City gage as the point for determining whether fish flows are being met for this municipal permit extension.

35. Department's Findings Based on Review of ODFW's Advice

There is an undeveloped portion of 1.0 cfs of water under Permit S-35222 as per OAR 690-315-0010(6)(g). Authorization to the use of any water under this permit up to the permitted quantity of 1.0 cfs can only be granted through the Department's review and approval of the municipal water user's future WMCPs (OAR 690-086). When ODFW's recommended target flows are not met, the Department's proposed conditions may result in a reduction in the amount of the undeveloped portion of water under Permit S-35222 that can be diverted. The proposed conditions in this extension of time are based on the following findings:

- a. The target flows needed to maintain the persistence of fish must be measured in the Little Luckiamute River at Falls City, Oregon, USGS GAGE No.14190100, or its equivalent.
- b. When flow targets are not met, use of the undeveloped portion of the permit may need to be reduced in proportion to the degree to which the recommended streamflows are being missed. ODFW's formula for determining the percent shortfall, or missed target flow is defined as:

$$1 - [(Q - E) / Q_T],$$

where Q is the flow at the point of interest, E is the undeveloped portion of the permit, and Q_r is the target flow (from Table 1).

- c. ODFW's advice recognized that the use of the undeveloped portion of the permit represents greater than 1% of the natural stream flow during the summer months, but much less from November through May.
 - d. ODFW's advice recognizes that municipalities may return a certain amount of flow to a river or stream through their effluent discharge. If the withdrawal points and effluent discharges are within reasonable proximity to each other, such that fish habitat between the two points is not impacted significantly, then ODFW recommends that any reduction to use of the undeveloped portion of Permit S-35222 should be adjusted by the monthly estimated percentage of the difference between the total water withdrawals and their return flows. Therefore, consistent with ODFW's advice, when appropriate, the Department proposes to adjust any reduction by a "Consumptive Use Percentage," as generally determined by $(1 - [\text{total municipal wide returned flows} / \text{total municipal wide diverted flows}])$.
36. The Department finds, based on ODFW's advice, that in the absence of conditions, the use of the undeveloped portion of Permit S-35222 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, streamflows would be a limiting factor for the listed fish species.
37. 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-35222, 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
38. On May 23, 2011, ODFW notified the Department that the proposed "Conditions to Maintain the Persistence of Listed Fish" for Permit S-35222 are consistent with their advice.
39. On May 24, 2011, the Department notified the City as per OAR 690-315-0080(2)(f) of ODFW's written advice and the "Conditions to Maintain the Persistence of Listed Fish" proposed in this PFO for the pending municipal Application for Extension of Time for Permit S-35222.

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.

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. 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, 2043⁶ pursuant to 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 City has shown good cause for an extension of time to complete construction of the water system 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 26, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of any water up to 1.0 cfs under Permit S-35222 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of appropriation of water under the permit consistent with OAR 690-086-0130(7).
8. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 30 through 39, 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 any water up to 1.0 cfs under Permit S-35222 will be subject to the conditions specified under Item 2 of the "Conditions" section of this PFO.

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.

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 of the water system under Permit S-35222 from October 1, 2001 to October 1, 2043.

Extend the time to apply the water to beneficial use under Permit S-35222 from October 1, 2001 to October 1, 2043.

Subject to the following conditions:

CONDITIONS

1. Development Limitations

Diversion of any water up to 1.0 cfs under Permit S-35222 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 appropriation 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-35222 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 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 the Little Luckiamute River as recommended by ODFW are in Table 2, below; flows are to be measured in the Little Luckiamute River at Falls City, Oregon (USGS Gage Number 14190100, or its equivalent).

Table 2

FISH PERSISTENCE TARGET FLOWS IN THE LITTLE LUCKIAMUTE RIVER MEASURED AT USGS GAGE 14190100, AT FALLS CITY, OREGON	
Month	Cubic Feet per Second
October	20
November – May	80
June	50
July	35
August – September	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 the City 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 - Generally

The maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition is determined in proportion to the amount by which the flows shown in Table 2 are missed based on a seven day rolling average⁷ of mean daily flows measured in the Little Luckiamute River at Falls City (USGS Gage Number 14190100, or its equivalent). The percent of missed target flows is defined as:

$$(1 - [(Q_A - E) / Q_T]) \times 100\%,$$

where Q_A is the actual flow measured at the designated gage based on the seven day rolling average, E is the undeveloped portion of the permit, and Q_T is the target flow (from Table 2).

The percent by which the target flow is missed applied to the undeveloped portion of the permit provides the maximum amount of undeveloped portion of the permit

⁷ Alternatively, the permit holder may use a single daily measurement.

that can be diverted as a result of this fish persistence condition, and is defined as:

$$E - (E \times \% \text{ missed target flows}),$$

where E is the undeveloped portion of the permit, being 1.0 cfs.

The maximum amount of undeveloped portion of the permit that can be diverted as a result of this fish persistence condition may be adjusted by a Consumptive Use Percentage, when applicable, as per Item 2.C., below.

When $Q_A - E \geq Q_T$, the amount of the undeveloped portion of the permit that can be diverted would not need to be reduced as a result of this fish persistence condition.

C. Consumptive Use Percentages

a. Initial Consumptive Use Percentages

The City of Falls City has not identified any Consumptive Use Percentages based on the return of flows to the Little Luckiamute River through effluent discharge. Thus, at this time the City may not utilize Consumptive Use Percentages for the purpose of calculating the maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition.

b. First Time Utilization of Consumptive Use Percentages

Utilization of Consumptive Use Percentages for the purpose of calculating the maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition may begin after the issuance of the Final Order for this extension of time.

First time utilization of Consumptive Use Percentages is contingent upon the City (1) providing evidence in writing that ODFW has determined that withdrawal points and effluent discharges are within reasonable proximity to each other, such that fish habitat between the two points is not impacted significantly, and (2) submitting monthly Consumptive Use Percentages and receiving the Water Resources Director's concurrence with the proposed Consumptive Use Percentages. Utilization of Consumptive Use Percentages is subject to an approval period described in 2.C.f., below.

Consumptive Use Percentages submitted to the Department for review must (1) be specified as a percentage (may be to the nearest 1/10 percent) for each month of the year and (2) include a description and justification of the methods utilized to determine the percentages. The proposed Consumptive Use Percentages should be submitted on the *Consumptive Use Percentages Update Form* provided with the Final Order for this extension of time.

c. Consumptive Use Percentages Updates

Continuing the utilization of Consumptive Use Percentages for the purpose of calculating the maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition

beyond an approval period (as described in 2.C.f., below) is contingent upon the City submitting updated Consumptive Use Percentages and receiving the Water Resources Director's concurrence with the proposed Consumptive Use Percentages Updates. Utilization of Consumptive Use Percentages Updates is subject to an approval period described in 2.C.f., below.

The updates to the Consumptive Use Percentages must (1) be specified as a percentage (may be to the nearest 1/10 percent) for each month of the year and (2) include a description and justification of the methods utilized to determine the percentages. The updates should be submitted on the *Consumptive Use Percentages Update Form* provided with the Final Order for this extension of time.

d. Changes to Wastewater Technology and/or Wastewater Treatment Plant Practices

If there are changes to either wastewater technology or the practices at the City's waste water treatment facility resulting in 25% or more reductions in average monthly return flows to the Little Luckiamute River, then the Consumptive Use Percentages in effect at that time may no longer be utilized for the purposes of calculating the maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition. The 25% reduction is based on a 10-year rolling average of monthly wastewater return flows to the Little Luckiamute River as compared to the average monthly wastewater return flows from the 10 year period just prior to date of the first approval period described in 2.C.f., below.

If such changes to either wastewater technology or the practices at the City's waste water treatment facility occur resulting in 25% reductions, further utilization of Consumptive Use Percentages is contingent upon the City submitting Consumptive Use Percentages Updates as per 2.C.c., above, and receiving the Water Resources Director's concurrence with the proposed Consumptive Use Percentages.

e. Relocation of the Point(s) of Diversion(s) and/or Return Flows

If the point(s) of diversion(s) and/or return flows are relocated, Consumptive Use Percentages in effect at that time may no longer be utilized for the purposes of calculating the maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition.

After relocation of the point(s) of diversion(s) and/or return flows, further utilization of Consumptive Use Percentages is contingent upon the City (1) providing evidence in writing that ODFW has determined that any relocated withdrawal points and effluent discharge points are within reasonable proximity to each other, such that fish habitat between the two points is not impacted significantly, and (2) submitting Consumptive Use Percentages Updates as per 2.C.c., above, and receiving the Water Resources Director's concurrence with the proposed Consumptive Use Percentages.

f. Approval Periods for Utilization of Consumptive Use Percentages

The utilization of Consumptive Use Percentages for the purpose of calculating the maximum amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition may continue for a 10 year approval period that ends 10 years from the Water Resources Director's most recent date of concurrence with Consumptive Use Percentages Updates as evidenced by the record, unless sections 2.C.d., or 2.C.e. (above) are applicable.

Consumptive Use Percentages (first time utilization or updates) which are submitted and receive the Director's concurrence will begin a new 10 year approval period. The approval period begins on the date of the Water Resources Director's concurrence with Consumptive Use Percentages Updates, as evidenced by the record. The City at its discretion may submit updates prior to the end of an approval period.

D. Examples

Example 1: Target flow met.

On August 15, the last seven mean daily flows were 16, 17, 18, 19, 20, 19 and 17 cfs. The seven day rolling average (Q_A) is 18.0 cfs. Given that the undeveloped portion of this permit (E) is 1.0 cfs, then the 7 day average of mean daily flows minus the undeveloped portion is greater than the 15.0 cfs target flow (Q_T) for August 15. In this example, $Q_A - E \geq Q_T$.

$$18.0 - 1.0 \geq 15.0$$

The amount of the undeveloped portion of the permit that can be diverted would not be reduced because the target flow is considered met.

Example 2: Target flow missed.

Step 1: Given that the undeveloped portion of this permit (E) is 1.0 cfs, if on August 15, the average of the last seven mean daily flows (Q_A) was 12.0 cfs, and the target flow (Q_T) is 15.0 cfs, then the target flow would be missed by 26.7%.

$$(1 - [(12.0 - 1.0) / 15.0]) \times 100\% = 26.7\%$$

Step 2: Assuming the Consumptive Use Percentage is 78.7%⁸ during the month of August and the utilization of this percentage is authorized, and the target flow is missed by 26.7% (from Step 1), then the amount of the

⁸ Currently, the City of Falls City may not utilize Consumptive Use Percentages for the purpose of calculating the amount of the undeveloped portion of Permit S-35222 that can be diverted as a result of this fish persistence condition. The utilization of the Consumptive Use Percentage 78.7% is only for illustrative purposes in this example.

undeveloped portion of the permit that could be diverted would be reduced by 21.0%.

$$(78.7\% \times 26.7\%) / 100 = 21.1\%$$

(If adjustments are not to be made by a Consumptive Use Percentage, then the undeveloped portion of the permit would only be reduced by the % by which the target flow is missed – 26.7% in this example).

Step 3: Given that the undeveloped portion of the permit (E) is 1.0 cfs, and the undeveloped portion of the permit needs to be reduced by 21.1%, (from Step 2), or 0.21 cfs, then the maximum amount of the undeveloped portion of Permit S-35222 that could be diverted as a result of this fish persistence condition is 0.79 cfs. (This maximum amount may be limited as illustrated in Step 4, below.)

$$(1.0 \times 21.0\%) / 100 = 0.21$$

$$1.0 - 0.21 = 0.79$$

Step 4: The calculated maximum amount of water that could be diverted under the permit due to the fish persistence condition may not exceed the amount of water to which the City is legally entitled to divert. In this example, if the amount of water legally authorized for diversion under this permit is 0.50 cfs (for example, authorization provided through a WMCP), then 0.50 cfs would be the maximum amount of diversion allowed under this permit, rather than 0.79 cfs from Step 3.

(Conversely, if the amount of water legally authorized for diversion under this permit is 0.85 cfs, then 0.79 cfs (from Step 3) would be the maximum amount of diversion allowed under this permit.)

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
