

**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-52090, Water Right Application S-74717,)
in the name of the Heceta Water District) **PROPOSED FINAL ORDER**

Permit Information

Application File S-74717/ Permit S-52090

Basin 18 – Mid Coast Basin / Watermaster District 2

Date of Priority: October 13, 1994

Authorized Use of Water

Source of Water: Clear Lake, a Tributary of Ackerly Lake
Purpose or Use: Municipal Use
Maximum Rate: 0.95 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-52090, water right Application S-74717.

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, 2145.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999 to October 1, 2145.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

District – Heceta Water District

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. 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-52090 was granted by the Department on April 26, 1996. The permit authorizes the use of up to 0.95 cfs of water from Clear Lake, a tributary of Ackerly Lake for municipal use. It specified that construction of the water development project was to be completed by October 1, 1998, and that complete application of water was to be made on or before October 1, 1999.
2. 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.
3. 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.
4. On July 25, 2003, Heceta Water District (District) submitted an "Application for Extension of Time" to the Department requesting the time apply water to full beneficial use under the terms and conditions of Permit S-52090 be extended to October 1, 2044. This is the first extension of time request for Permit S-52090.
5. Notification of the District's Application for Extension of Time for Permit S-52090 was published in the Department's Public Notice dated August 26, 2003. No public comments were received regarding the extension application.
6. On August 4, 2005, the District submitted supplemental information and update revisions to their pending Application for Extension of Time.
7. On July 11, 2014, the permit holder submitted additional information to supplement and/or update their Application for Extension of Time. The amendment requested that the amount of time originally asked for in 2003 -- to apply water to full beneficial use

under the terms and conditions of Permit S-52090 by October 1, 2044 -- be changed to the time to complete construction being extended from October 1, 1998 to October 1, 2145, and the time to apply water to full beneficial use being extended from October 1, 1999 to October 1, 2145. The request for this change in the length of the extension is due to a much lower growth rate than anticipated when the application was filed in 2003.

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)]

8. On July 25, 2003, 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)]

9. Permit S-52090 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.

10. The remaining work to be accomplished under Permit S-52090 consists of completing construction including installation of back-up pump stations, improvements to pump stations, expansion and replacement of water lines, expansion of the water treatment plant, new intake pumps; and applying water to full beneficial use.
11. As of October 1, 1999, the permit holder had not diverted any of the 0.95 cfs of water authorized under Permit S-52090 for municipal purposes. There is an undeveloped portion of 0.95 cfs of water under Permit S-52090 as per OAR 690-315-0010(6)(g).

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).

12. In addition to the 0.95 cfs of water authorized under Permit S-52090 the District holds the following municipal use water right certificates and permits:

- Certificate 56356 for 1.55 cfs of water from Clear Lake;
- Certificate 80690 for 1.5 cfs of water from Clear Lake; and
- Permit S-50036 for 2.25 cfs of water from Clear Lake.

These certificates and permits total 6.25 cfs of water from Clear Lake, tributary to Ackerly Lake. Water authorized under Permit S-52090 is restricted to a period of use from November 1 through September 30. The District is diverting water under its two certificates to meet current water demands. The District has not yet made beneficial use of 3.25 cfs of water, being 0.95 cfs under Permit S-52090 and 2.25 cfs under Permit S-50036.

13. The District has two interties with the City of Florence. The District furnishes surplus water to the City of Florence during times of emergency and peak demand. The intertie is most active during the summer months when peak demand in the Florence water system exceeds the supply and treatment capacity of their facilities. The District and City of Florence have a current "Mutual Emergency Water Agreement."
14. According to the District's draft 2012 Water Management and Conservation Plan (2012 WMCP), the population served within the district boundaries was 4,500 in 2012. The District estimates the population will increase at a growth rate of 0.9 percent per year, reaching an estimated population of 14,810 by the year 2145.
15. Although the District's peak water demand was 3.1 in 1994, it has leveled off to an average peak daily demand of 0.54 cfs from 2008 through 2011. The reduction in water use is attributable to a change in water fee charges and continual repair of key infrastructure throughout the water system. (2012 WMCP, p. 5.)
16. The District's peak day demand is projected to be approximately 6.25 cfs of water by the year 2145.
17. According to the District, the service areas for the Heceta Water District have adequate capacity to reach full use of all their water rights without annexation of additional lands. The District anticipates that steady, regular growth in the areas of residential, commercial and industrial development will continue and population densities will increase. In addition, the urban growth boundary of the City of Florence encompasses some of the southern zone of the District.
18. In accordance with OAR 690-315-0080(1)(d), the City demonstrated that their estimated demand projection is consistent with the amount and types of lands and uses proposed to be served by the water user.

19. Full development of Permit S-52090 is needed to address the present and future water demand of Heceta Water District.
20. The District's request for an extension of time until October 1, 2145, to complete construction and to apply water to full beneficial use under the terms of Permit S-52090 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.

21. During the original development time frame the permit holder developed Water Treatment Plant Facilities Plan and made improvements to the distribution system.
22. Since October 1, 1999, the District has accomplished the following:
 - Completed the engineering of design and construction plans for improvements to the water treatment plant and intake;
 - Constructed raw water pipelines;
 - Upgraded the raw water intake;
 - Completed a Water Master Plan;
 - Conducted a rate study;
 - Made improvements to distribution pipelines; and
 - Completed a 2005 WMCP.
23. According to the District, as of July 25, 2003, they have invested approximately \$3,627,000, which is about 19 percent of the total projected cost for complete development of this project. The District estimates a \$15,393,000 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 S-52090, other costs included in this accounting are not partitioned out for S-52090 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the District, 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 District's water rights.

24. As of October 1, 1999, the District has not diverted any of the 0.95 cfs allowed for beneficial municipal purposes under the terms of this permit.
25. The Department has considered the District'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)]

26. According to the District, as of July 25, 2003, they have invested approximately \$3,627,000, which is about 19 percent of the total projected cost for complete development of this project. The District estimates a \$15,393,000 investment is needed for the completion of this project.

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

27. As described in Findings 11 through 19 above, the District has indicated, and the Department finds that the District must rely on full development of their Permit S-52090.
28. The District estimates an annual population growth rate of 0.9 percent per year over a 133 year period, being the years 2012 to 2145.
29. Given the current water supply situation of the District, including current and expected demands, there is a market and present demand for the water to be supplied under Permit S-52090.
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-52090 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. The District expects to obtain a fair and reasonable return on investment by continuing development of Permit S-52090.

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

32. 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)(q)]

33. Delay of development under Permit S-52090 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.

34. The pending municipal Application for Extension of Time for Permit S-52090 was delivered to ODFW on August 3, 2012, for ODFW's review under OAR-690-315-0080.
35. Notification that the pending municipal Application for Extension of Time for Permit S-52090 was delivered to ODFW for review was sent to the District on August 3, 2012.
36. Notification that the pending municipal Application for Extension of Time for Permit S-52090 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.
37. On October 25, 2012, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-52090.
38. Summary and Excerpts of Advice from ODFW:
The lake system that includes Clear Lake is very marginal for anadromous fish. Anadromous fish were not present historically due to lack of spawning habitat, and the few that are present now are mostly of hatchery origin. The use of the undeveloped portion of Permit S-52090 will maintain the persistence of listed fish species in the portions of the waterways affected by water use under this permit.
39. The Department finds, based on ODFW's advice, that in the absence of conditions, the use of the undeveloped portion of Permit S-52090 will maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit.
40. On October 25, 2012, the District was notified per OAR 690-315-0080(2)(f) of ODFW's written advice for maintaining the persistence of listed fish for the pending municipal Application for Extension of Time for Permit S-52090.

CONCLUSIONS OF LAW

1. The District 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 District 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, 2145⁵, as required by OAR 690-315-0080(1)(d). The estimated demand projection is consistent with the amount and types of lands and uses proposed to be served by the permit holder 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 District 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-52090 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).

⁵ Pursuant to ORS 537.230(4), upon the completion of beneficial use of water allowed under the permit, the permit holder shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permit holder shall submit a map of the survey and the claim of beneficial use.

8. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 34 through 40, above, the use of the undeveloped portion of the permit will maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit.

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-52090 from October 1, 1998 to October 1, 2145.

Extend the time to apply the water to beneficial use under Permit S-52090 from October 1, 1999 to October 1, 2145.

Subject to the following conditions:

CONDITIONS

1. **Development Limitations**

Diversion of any water under Permit S-52090 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-52090 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 29, 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 **September 12, 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
