

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 1997 to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from October 1, 1998 to October 1, 2023.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

NKNWD – Neah-Kah-Nie 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

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 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-51578 was granted by the Department on January 13, 1995. The permit authorizes the use of up to 0.32 cfs of water from Three Springs, , being 0.06 cfs from Springs 1 and 2, and 0.20 cfs from Spring 3, all tributaries of the Pacific Ocean, for municipal use. It specified that construction of the water development project was to be completed by October 1, 1997, and that complete application of water was to be made on or before October 1, 1998.
2. On August 12, 1999, Neah-Kah-Nie Water District (the NKNWD) submitted an "Application for Extension of Time" to the Department requesting the time to complete construction be extended from October 1, 1997 to October 1, 2018, and the time to apply water to full beneficial use under the terms and conditions of Permit S-51578 be extended from October 1, 1998 to October 1, 2018. This is the first extension of time request for Permit S-51578.
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 April 1, 2003, the permit holder submitted an amended extension of time consistent with the new Division 315 rules. The amendment requested the extended time to complete construction be changed from October 1, 2018 to October 1, 2023, and the extended time to apply water to full beneficial use be changed from October 1, 2018 to October 1, 2023.
6. Notification of the NKNWD's Application for Extension of Time for Permit S-51578 was published in the Department's Public Notice dated April 8, 2003. No public comments were received regarding the extension application.
7. On February 11, 2003, January 10, 2005, and August 13, 2014, the NKNWD submitted supplemental information and update revisions to their pending Application for Extension of Time.

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 August 12, 1999, 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-51578 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-51578 consists of completing construction including upgrading the existing spring box at Spring 1, improving the collection system at Spring 2, replacing distribution pipes, installing transmission lines, constructing a 130,000 gallon storage tank, constructing a new pump station at Hillcrest

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(3)(d).

Tank, and installing new connections to water users; and applying water to full beneficial use.

11. As of October 1, 1998, the permit holder had diverted 0.16 cfs of the 0.32 cfs of water authorized under Permit S-51578 for municipal purposes. There is an undeveloped portion of 0.16 cfs of water under Permit S-51578 as per OAR 690-315-0010(6)(g).
12. In addition to the 0.32 cfs of water from Three Springs, being 0.06 from Spring 1, 0.06 from Spring 2, and 0.20 cfs from Spring 3, authorized under Permit S-51578 the NKNWD holds the following water right certificates and permit:
 - Certificate 21423 for 0.17 cfs of water from Three Springs, tributary to the Pacific Ocean, being 0.01 from Spring 1, 0.01 from Spring 2, and 0.15 cfs from Spring 3 for domestic use;
 - Certificate 80934 for 0.17 cfs of water from Three Springs, tributary to the Pacific Ocean, being 0.01 from Spring 1, 0.01 from Spring 2, and 0.15 cfs from Spring 3 for municipal use; and
 - Permit S-34032 for 0.45 cfs of water from Pirate Springs, tributary to the Pacific Ocean for municipal use.

In summary, the NKNWD has water rights 1.11 cfs, being 0.45 cfs from Pirate Springs, 0.08 cfs from Spring 1, 0.08 cfs from Spring 2, and 0.5 cfs from Spring 3.

13. The NKNWD currently takes most of its water from Spring 1 and Spring 3 by gravity to its distribution system. Spring 2 is not used at this time to meet current demand. Water from the Pirate Spring Pump Station is only used during the months of August and September when the spring flows in Springs 1 and 3 are lowest. The NKNWD utilizes a storage system to meet peak demands.
14. According to the NKNWD, within the service boundary of Neah-Kah-Nie Water District there were 309 connections in 2001. The NKNWD estimates the connections will increase at a growth rate of 1.7 percent per year, reaching an estimated 450 connections by the year 2023.
15. According to the NKNWD, as the size of the population increases, the peak demand on the system does not increase on a directly proportional basis due to the vacation and recreational residential nature of the Neah-Kah-Nie community.
16. The NKNWD's peak water instantaneous demand drawn from the storage tanks was 2.09 cfs (942 gpm) in 2001. (2002 Water Master Plan, Table 2.4)
17. The NKNWD's peak instantaneous demand drawn from the storage tanks is projected to be approximately 2.27 cfs (1020 gpm) of water by the year 2020. (2002 Water Master

Plan, Table 2.5)

18. Full development of Permit S-51578 is needed to address the present and future water demand of Neah-Kah-Nie Water District, including system redundancy and emergency use.
19. The NKNWD's request for an extension of time until October 1, 2023, to complete construction and to apply water to full beneficial use under the terms of Permit S-51578 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.

20. During the original development time frame, NKNWD constructed new 80,000 gallon storage tank near the existing Hillcrest tank, installed 625 feet of new distribution pipe, installed a pump at the Reservoir Park site, and completed a Water Master Plan.
21. Since October 1, 1997, the NKNWD updated the Master Water Plan, completed a Water Management Conservation Plan (WMCP), redeveloped Springs 1, 2 and 3 with new spring boxes, and made improvements to the distribution system.
22. According to the NKNWD, as of April 1, 2003, they have invested approximately \$488,000, which is about 28 percent of the total projected cost for complete development of this project. The NKNWD estimates a \$1,268,000 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-51578, other costs included in this accounting are not partitioned out for S-51578 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the NKNWD, 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 NKNWD's water rights.
23. As of October 1, 1998, the NKNWD had diverted 0.16 cfs of the 0.32 cfs allowed for beneficial municipal purposes under the terms of this permit.

24. The Department has considered the NKNWD'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)]

25. According to the NKNWD, as of April 1, 2003, they have invested approximately \$488,000, which is about 28 percent of the total projected cost for complete development of this project. The NKNWD estimates a \$1,268,000 investment is needed for the completion of this project.

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

26. As described in Findings 11 through 18 above, the NKNWD has indicated, and the Department finds that the NKNWD must rely on full development of their Permit S-51578.
27. The NKNWD estimates an increase of 141 connections over a 22 year period, being the years 2001 to 2023.
28. Given the current water supply situation of the NKNWD, including current and expected demands, the need for system redundancy, and emergency water supply, there is a market and present demand for the water to be supplied under Permit S-51578.
29. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of water beyond 0.16 cfs up to 0.32 cfs under Permit S-51578 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)]

30. 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)]

31. 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)]

32. Delay of development under Permit S-51578 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.

33. The pending municipal Application for Extension of Time for Permit S-51578 was delivered to ODFW on December 14, 2012, for ODFW's review under OAR-690-315-0080.
34. Notification that the pending municipal Application for Extension of Time for Permit S-51578 was delivered to ODFW for review was sent to the NKNWD on December 14, 2012.
35. Notification that the pending municipal Application for Extension of Time for Permit S-51578 was delivered to ODFW for review was published in the Department's Public Notice dated December 18, 2012. No public comments were received regarding this notice.
36. On February 5, 2014, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-51578.
37. Summary and Excerpts of Advice from ODFW:
Three Springs (Unnamed Springs) drain directly into the Pacific Ocean. A Department of Fish and Wildlife biologist has determined that there are no fish in Three Springs. Since there are no listed fish species in the waterways affected by use of the undeveloped portion of the permit, ODFW finds that the use of the undeveloped portion will not affect fish persistence.
38. The Department finds, based on ODFW's advice, that in the absence of conditions, the persistence of listed fish species will be maintained in the portions of the waterways affected by water use of the undeveloped portion of Permit S-51578.
39. On February 5, 2014, the NKNWD was notified as per OAR 690-315-0080(2)(f) of ODFW's written evaluation for the pending municipal Application for Extension of Time for Permit S-51578.

CONCLUSIONS OF LAW

1. The NKNWD 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 NKNWD 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, 2023⁵, 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 NKNWD 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 29, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of water beyond 0.16 cfs up to 0.32 cfs under Permit S-51578 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).
8. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 33 through 39,

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.

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-51578 from October 1, 1997 to October 1, 2023.

Extend the time to apply the water to beneficial use under Permit S-51578 from October 1, 1998 to October 1, 2023.

Subject to the following conditions:

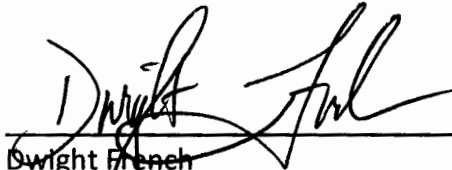
CONDITIONS

1. Development Limitations

Diversion of any water beyond 0.16 cfs up to 0.32 cfs under Permit S-51578 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-51578 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: August 26, 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 **October 10, 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
