

**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-45419, Water Right Application S-50753,)
in the name of the City of Depoe Bay) PROPOSED FINAL ORDER

Permit Information

Application File S-50753/ Permit S-45419

Basin 18 – Mid Coast Basin / Watermaster District 1

Date of Priority: June 27, 1973

Authorized Use of Water

Source of Water: Rocky Creek, a tributary of Pacific Ocean

Purpose or Use: Municipal Use

Maximum Rate: 4.00 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-45419, water right Application S-50753.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 1996 to October 1, 2055.
- Grant an extension of time to apply water to full beneficial use from October 1, 1996 to October 1, 2055.
- 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 Depoe Bay

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-45419 was issued by the Department on January 26, 1981. The permit authorizes the use of up to 4.00 cfs of water from the Rocky Creek, a tributary of Pacific Ocean, for municipal use. It specified that actual construction work to being on or before January 26, 1982, construction of the water development project was to be completed by October 1, 1982, and that complete application of water was to be made on or before October 1, 1983.
2. Three prior permit extensions have been granted for Permit S-45419. The most recent extension request resulted in the completion dates for construction and full application of water being extended to October 1, 1996.
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 2, 2003, City of Depoe Bay (City) submitted an "Application for Extension of Time" to the Department requesting the time to complete construction and the time to apply water to full beneficial use under the terms and conditions of Permit S-45419 be extended from October 1, 1996 to October 1, 2050.
6. Notification of the City's Application for Extension of Time for Permit S-45419 was published in the Department's Public Notice dated April 15, 2003. No public comments

were received regarding the extension application.

7. On April 9, 2003, and on January 23, 2006, the City submitted supplemental information and update revisions to their pending Application for Extension of Time.
8. On March 13, 2015, the permit holder submitted additional information to supplement and update their Application for Extension of Time. The amendment requested the extended time to complete construction be changed from October 1, 1996 to October 1, 2055, and the extended time to apply water to full beneficial use be changed from October 1, 1996 to October 1, 2055.

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)]

9. On April 2, 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)]

10. Permit S-45419 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.

11. The remaining work to be accomplished under Permit S-45419 consists of installing a meter on raw water pipeline; upgrading the water treatment plant; increasing intake and raw water line capacity to 4.0 cfs; adding additional water users to the system; completing construction and applying water to full beneficial use.
12. As of October 1, 1996, the permit holder had diverted 0.97 cfs of the 4.00 cfs of water

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).

authorized under Permit S-45419 for municipal purposes. There is an undeveloped portion of 3.03 cfs of water under Permit S-45419 as per OAR 690-315-0010(6)(g).

13. In addition to the 4.00 cfs of water authorized under Permit S-45419 the City holds the following municipal use water right certificates and permits:

- Certificate 41345 for storage of 8.66 AF of water from North Fork Depoe Creek;
- Certificate 41346 for 0.56 cfs of water from North Fork Depoe Creek and Reservoir constructed under Certificate 41345;
- Certificate 64894 for 0.5 cfs of water from South Depoe Bay Creek;
- Permit S-50604 for 2.0 cfs of water from South Fork Depoe Bay Creek.

The City holds the following domestic use water right certificates:

- Certificate 8651 for 0.25 cfs of water from the North Depoe Bay Creek;
- Certificate 11566 for 0.12 cfs of water from the unnamed stream;
- Certificate 12329 for 0.65 cfs of water from the North Depoe Bay Creek;
- Certificate 27840 for 0.4 cfs of water from an unnamed spring, a tributary of the Pacific Ocean;
- Certificate 14258 for 0.1 cfs of water from the unnamed stream, a tributary of an unnamed creek.

These water rights and permits total 8.58 cfs of live flow (surface) water and the storage and use of 8.66 AF of water. City of Depoe Bay has not yet made use of 1.5 cfs of water under Permit S-50604 and 3.03 cfs of water under Permit S-45419. The City's water rights are not necessarily additive, water is not available at all sources for all seasons. Winter tides make South Depoe Bay Creek less reliable due to salt water contamination. Rocky Creek suffers from high turbidity during the winter and spring. During the summer, at minimum flow conditions water cannot be pumped from South Creek and Rock Creek at the same time. The City relies on Rocky Creek during the summer because flows on the North Depoe Bay Creek can fall as low as 0.18 cfs. Rocky Creek is the City's most reliable source of supply during the peak demand months of July through September.

14. The City has more than 100 acres of undeveloped land available for development within the Urban Growth Boundary (UGB). Much of this land is already owned by developers or is held by the City for development within the next 20 years. There are additional large plots of land currently in timber conservation within the UGB. These lands can be developed on a 20-50 year timeline. .
15. According to the City, in 2008, the population within the service boundary of City of Depoe Bay was 1,484. The City estimates the population will increase at a growth rate of 2.2 percent per year in-City and 1.5 percent in Miroco Water District, reaching an estimated population of 4,111 by the year 2055. During the summer, when peak demand occurs, the City serves a population that is greater than its full-time resident

population due to a large seasonal residential population and increased tourist activity.

16. The City's peak water demand within its service area boundaries was 0.9 cfs in 2008.
17. The City's peak day demand is projected to be approximately 4.54 cfs of water by the year 2055.
18. The City sells treated water to Miroco Water District and provides water to Boiler Bay and Rocky Creek State Parks.
19. Full development of Permit S-45419 is needed to address the present and future water demand of City of Depoe Bay, including system redundancy and emergency use.
20. In accordance with OAR 690-315-0080(1)(d) and as described by Findings 14 - 19, 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.
21. The City's request for an extension of time until October 1, 2055, to complete construction and to apply water to full beneficial use under the terms of Permit S-45419 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.

22. Work was accomplished (specified in the Application for Extension of Time) during the original development time frame. Between 1982 and 1983 the City installed 6,000 feet of raw water line in the vicinity of Rocky Creek.
23. During the last extension period, being October 1, 1996, the City accomplished the following:
 - the water treatment plant was expanded in 1994;
 - Intake station and transmission lines were installed to the water treatment plant in 1995.
24. Since October 1, 1997, the City has accomplished the following:
 - Installed raw water pipelines to the treatment plant;

- Installed a dual 40 horse-power pumps;
 - Installed a full SCADA system at the water treatment plant;
 - Installed a new filter media at the water treatment plant; and
 - Submitted a draft WMPC in 1999.
25. According to the City, as of April 2, 2003, they have invested approximately \$850,000, which is about 30 percent of the total projected cost for complete development of this project. The City estimates a \$2 million to \$3 million 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-45419, other costs included in this accounting are not partitioned out for S-45419 because they are incurred under the development of a water supply system jointly utilized under other rights held by the City.
 26. As of October 1, 1996, the City had diverted 0.97 cfs of the 4.00 cfs allowed for beneficial municipal purposes under the terms of this permit.
 27. 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)]

28. According to the City, as of April 2, 2003, they have invested approximately \$850,000, which is about 30 percent of the total projected cost for complete development of this project. The City estimates a \$2 million to \$3 million investment is needed for the completion of this project..

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

29. As described in Findings 12 through 26 above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-45419.
30. The City estimates an annual population growth rate of 2.2 percent per year in-City and 1.5 percent in Miroco Water District over a 59 year period, being the years 1996 to 2055.
31. Given the current water supply situation of the City, 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-45419.
32. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of any water beyond 0.97 cfs (not to exceed the maximum amount authorized under this permit, being 4.00 cfs) 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)]

33. 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)]

34. 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)]

35. Delay of development under Permit S-45419 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. Also the City's use of water under Permit S-45419 has been limited by the City's water treatment capacity. Due to solid loading, the capacity of the treatment plant declined from its design capacity of 510 gpm to 320 gpm. The City lacks the financial resources to upgrade or replace the water treatment plant at this time. The City has increased treated water storage to 1.7 million gallons as a stopgap measure to meet short-term fluctuation in demand until the necessary funds to increase treatment capacity can be secured.

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.

36. The pending municipal Application for Extension of Time for Permit S-45419 was delivered to ODFW on August 3, 2012, for ODFW's review under OAR-690-315-0080.
37. Notification that the pending municipal Application for Extension of Time for Permit S-45419 was delivered to ODFW for review was sent to the City on August 3, 2012.
38. Notification that the pending municipal Application for Extension of Time for Permit S-45419 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.

39. On January 11, 2013, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-45419.

40. Summary and Excerpts of Advice from ODFW:

In the absence of anadromous fish passage, ODFW finds that the persistence of listed fish species will be maintained in the portions of the waterways affected by water use of the undeveloped portion under this municipal use permit without fish persistent conditions. That is, if anadromous fish passage is not restored to Rocky Creek, no curtailment is recommended by ODFW under ORS 537.230.

However, if anadromous fish passage is restored to Rocky Creek in the future, then the use of water under the portion of this permit that is undeveloped as of October 1, 1996, should be conditioned to maintain persistence of listed fish species in the portions of waterways affected by water use under the permit. ODFW has determined that Rocky Creek will be affected by water use under this permit. ODFW's advice is based on the best available information and existing data.

The following paragraphs pertain to use of the undeveloped portion of the permit only if anadromous fish passage is restored to Rocky Creek.

ODFW recognizes that long term climatic variations will affect the amount of water in the system. In favorable water years, fish populations tend to increase and in unfavorable water years, fish populations contract. 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 target flows in Rocky Creek. In the absence of flow data on Rocky Creek, ODFW relied on the ratio of Basin Investigation Report (BIR) flows to estimated natural median monthly flows for 17 small mid-coast streams within the mid-Coast drainage basin. This ratio was applied to OWRD's Water Availability Analysis at the 50% exceedance level for Rocky Creek to determine the target flows. 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 ratio of water that is withdrawn by the municipality as compared to the overall streamflow level.

Table 1

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN ROCKY CREEK MEASURED NEAR THE MOUTH	
Month	Cubic Feet per Second
January	30.2
February	25.4
March	24.6
April	20.4
May	11.8
June	8.5
July	6.1
August	4.5
September	4.1
October	3.8
November	16.4
December	30.6

Streamflow Measurement Point

ODFW has determined that measuring flows near the mouth of Rocky Creek is sufficient for ensuring that flows to maintain the persistence of listed fish are met within Rocky Creek.

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

At this time there is a complete barrier to anadromous salmonids near the mouth of Rocky Creek. Use of the undeveloped portion of the permit is not subject to fish persistence conditions unless anadromous fish passage is restored to Rocky Creek.

The Department is proposing conditions in this extension of time that must be implemented if anadromous fish passage is restored to Rocky Creek in the future. These conditions are consistent with ODFW's advice that should be implemented only if anadromous fish passage is restored to Rocky Creek (See Item 1 of the "Conditions" section). There is an undeveloped portion of 3.03 cfs of water under Permit S-45419 as per OAR 690-315-0010(6)(g). Authorization to incrementally expand use of water under this permit beyond 0.97 cfs up to the permitted quantity of 4.0 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-45419 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 determined or measured by the water user near the mouth of Rocky Creek.

b. When target flows are not met, use of the undeveloped portion of the permit must 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_T is the target flow (from Table 1).

c. ODFW's advice recognized that the use of the undeveloped portion of the permit represents most of the natural streamflow during the summer months, and about 10% during the winter and spring.

42. The Department finds, based on ODFW's advice, that in the absence of anadromous fish passage, the use of the undeveloped portion of Permit S-45419 will maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit, and as a result of the use of the undeveloped portion of the permit, stream flows would be a limiting factor for the listed fish species.
43. Based on ODFW's advice, the Department proposes to require conditions to maintain, in event that anadromous fish passage is restored on Rocky Creek. The portions of the waterways affected by water use under Permit S-45419, 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
44. On December 8, 2015, ODFW notified the Department that the proposed "Conditions to Maintain the Persistence of Listed Fish" for Permit S-45419 are consistent with their advice.
45. On December 9, 2015, 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-45419.

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. Pursuant to ORS 540.510(3)(a) and (b), water under Permit S-45419 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
6. Completion of construction and full application of water to beneficial use can be completed by October 1, 2055⁶. 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).
7. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department has determined that the City has shown good cause for an extension of time to complete construction and to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
8. As required by OAR 690-315-0090(3) and as described in Finding 32, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of water beyond 0.97 cfs (not to exceed the maximum amount authorized under this permit, being 4.00 cfs) under Permit S-45419 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7).

9. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 40 through 45, above, In the absence of anadromous fish passage on Rocky Creek , the persistence of listed fish species will 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. In the event that anadromous fish passage is restored to Rocky Creek, use of undeveloped portion of the permit, being 3.03 cfs, is subject to fish persistence conditions. Therefore, the diversion of water beyond 0.97 cfs under Permit S-45419 will be subject to the conditions specified under Item 2 of the "Conditions" section of this PFO.

Proposed Order

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Extend the time to complete construction under Permit S-45419 from October 1, 1996 to October 1, 2055.

Extend the time to apply the water to beneficial use under Permit S-45419 from October 1, 1996 to October 1, 2055.

Subject to the following conditions:

CONDITIONS

1. **Development Limitations**

A maximum diversion of 0.97 cfs of water is currently allowed under Permit S-45419. Any diversion of water beyond 0.97 cfs (not to exceed the maximum amount authorized under the permit, being 4.00 cfs) 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-45419 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, on file with the Department.

The Development Limitation established in the above paragraph supersedes any prior limitation of the diversion of water under Permit S-45419 that has been established under a prior WMCP or Extension final order issued by 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**

In the absence of anadromous fish passage on Rocky Creek, the undeveloped portion of the permit, being 3.03 cfs, is not subject to these fish persistence conditions. (Nor is the developed portion of the permit, being 0.97 cfs, subject to these fish persistence conditions).

In the event that anadromous fish passage is restored to Rocky Creek, use of the undeveloped portion of the permit, being 3.03 cfs, is subject to these fish persistence conditions. The developed portion of the permit, being 0.97 cfs, is not subject to these fish persistence conditions.

A. **Fish Persistence Target Flows**

- a. Fish persistence target flows in Rocky Creek as recommended by ODFW are in Table, 2 below; flows are to be measured near the mouth of Rocky Creek.

Table 2

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN ROCKY CREEK MEASURED NEAR MOUTH	
Month	Cubic Feet per Second
January	30.2
February	25.4
March	24.6
April	20.4
May	11.8
June	8.5
July	6.1
August	4.5
September	4.1
October	3.8
November	16.4
December	30.6

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-45419 that can be

diverted as a result of these fish persistence conditions is determined in proportion to the amount by which the flows shown in Table 2 are missed based on a seven day rolling average⁶ of mean daily flows as determined or measured by the water user in Rocky Creek near the mouth. The percent of missed target flows is defined as:

$$(1 - [(QA - E) / QT]) \times 100\%,$$

where QA is the actual flow⁷, measured near the mouth based on the seven-day rolling average, E is the undeveloped portion of the permit, being 3.03 cfs, and QT 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 that can be diverted as a result of this fish persistence condition, and is defined as:

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

where E is the undeveloped portion of the permit, being 3.03 cfs.

When $QA - E \geq QT$, 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. Examples

Example 1: Target flow met.

On August 15, the last seven mean daily flows in Rocky Creek near the mouth were 9.8, 9.8, 9.9, 10.0, 10.1, 10.2 and 10.2 cfs. The seven day rolling average (QA) is 10.0 cfs⁸. Given that the undeveloped portion of this permit (E) is 3.03, then the 7 day average of mean daily flows minus the undeveloped portion is greater than the 4.5 cfs target flow (QT) for August 15. In this example, $QA - E \geq QT$.

$$10.0 - 3.03 \geq 4.5$$

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

⁶ Alternatively, the water user may use a single daily measurement.

⁷ Note: the full amount of the developed portion, being 0.97 cfs, must be assumed to be already diverted from the creek prior to determining the quantity of the actual flow.

⁸ QA is the actual flow after taking the developed amount in to account. For example, if the flow at the downstream gage is determined when only 0.5 cfs of the developed portion is currently diverted, and the gage reads 10.47 cfs, then $QA = 10.47 - 0.47 \text{ un-diverted developed portion} = 10.0 \text{ cfs}$. [$0.5 + 0.47 = 0.97$ the developed amount]

Example 2: Target flow missed.

Step 1: Given that the undeveloped portion of this permit (E) is 3.03, if on August 15, the average of the last seven mean daily flows (QA) was 5.0 cfs, and the target flow (QT) is 4.5, then the target flow would be missed by 56.2%.

$$(1 - [(5.0 - 3.03) / 4.5]) \times 100\% = 56.2\%$$

Step 2: Given that the undeveloped portion of this permit (E) is 3.03 cfs, and the undeveloped portion of the permit needs to be reduced by 56.2% (from Step 1), or 1.7 cfs, then the maximum amount of the undeveloped portion of Permit S-45419 that could be diverted as a result of this fish persistence condition would be 1.3 cfs. (This maximum amount may be limited as illustrated in Step 3, below.)

$$(3.03 \times 56.2\%) / 100\% = 1.7$$

$$3.03 - 1.7 = 1.3$$

Step 3: 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 2.0 cfs (for example, authorization provided through a WMCP), then 2.0 cfs would be the maximum amount of diversion allowed under this permit including the developed portion of the permit, being 0.97 cfs.

(Conversely, if the amount of water legally authorized for diversion under this permit is 4.0 cfs, then 2.27 cfs (1.3 from Step 2 + the 0.97 developed portion) would be the maximum amount of diversion allowed under this perm

DATED: January 12, 2016


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 **February 26, 2016**, 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.

NOTICE TO ACTIVE DUTY SERVICE MEMBERS: Active Duty service members have a right to stay these stay these proceedings under federal Service members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.of.mil>

If you have any questions about statements contained in this document, please contact Machel A Bamberger at 503-986-0802.

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

Mailing List for Extension PFO Copies

PFO Date: January 12, 2016

Application S-50753

Permit S-45419

Copies Mailed

By: _____
(SUPPORT STAFF)

On: _____
(DATE)

Original mailed to:

City of Depoe Bay
Attn: Brady Weidner
PO Box 8
Depoe Bay, OR 97341

Copies sent to:

1. WRD - App. File S- 50753/ Permit S-45419
2. WRD - Watermaster District: 1 - Nickki Hendricks
3. GSI Water Solutions, Inc.
Attention: Adam Sussman
1600 Western Blvd., Suite 240
Corvallis, OR 97333

Fee paid as specified under ORS 536.050 to receive copy:

4. None

Receiving electronic copy of PFO via e-mail (10 AM Tuesday of signature date)

5. WRD – Watermaster 1- Nikki Hendricks

6. WRD – Lisa Jaramillo

Done by _____ Date _____

CASEWORKER: MAB