

**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-32426, Water Right Application S-44016,) PROPOSED FINAL ORDER
in the name of the City of Sutherlin)

Permit Information

Application File S-44016/ Permit S-32426

Basin 16 – Umpqua Basin / Watermaster District 15

Date of Priority: January 29, 1979

Authorized Use of Water

Source of Water: Cooper Creek and Cooper Creek Reservoir,
Tributary to Sutherlin Creek
Purpose or Use: Municipal Use
Maximum Rate: 5.0 Cubic Feet per Second (CFS) from Cooper Creek
and 500.0 Acre-feet (AF) from Cooper Creek
Reservoir

**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-32426, water right Application S-44016.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 2010 to October 1, 2026.
- Grant an extension of time to apply water to full beneficial use from October 1, 2010 to October 1, 2026.
- 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 Sutherlin

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

WTP – Water Treatment Plant

Units of Measure

cfs – cubic feet per second

AF – acre feet per year

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-32426 was granted by the Department on May 11, 1979. The permit authorizes the use of up to 5.0 cfs of water from Cooper Creek (live flow) and 500 AF of water from Cooper Creek Reservoir (stored water)[*storage of water in the reservoir is authorized under Certificate 48586*], tributaries of Sutherlin Creek, for municipal use. The permit specified that construction of the water development project was to be completed by October 1, 1969, and that complete application of water was to be made on or before October 1, 1970.
2. Seven prior permit extensions have been granted for Permit S-32426. The most recent extension request resulted in the completion dates for construction and full application of water being extended to October 1, 2010.
3. On July 11, 2011, City of Sutherlin (City) submitted an "Application for Extension of Time" (Application) 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-32426 be extended from October 1, 2010 to October 1, 2020.
4. Notification of the City's Application for Extension of Time for Permit S-32426 was published in the Department's Public Notice dated July 19, 2011. No public comments were received regarding the extension application.
5. On February 25, 2016, additional information was submitted to supplement and/or update the Application for Extension of Time. The amendment requested the extended time to complete construction be changed from October 1, 2020 to October 1, 2026, and the extended time to apply water to full beneficial use be changed from October 1, 2020 to October 1, 2026.

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)]

6. On July 11, 2011, 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)]

7. Permit S-32426 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.

8. The remaining work to be accomplished under Permit S-32426 consists of constructing a new Cooper Creek Water Treatment Plant (WTP) and three storage reservoirs; installing cathodic protection and a hypo-limnetic aeration system; reconditioning a tank; making SCADA improvements; upsizing and improving various water mains and waterlines; and applying water to full beneficial use.
9. Prior to October 1, 2010, the permit holder had diverted 3.0 cfs of water from Cooper Creek (live flow) and 179.5 AF of water from Cooper Creek Reservoir (stored water) authorized under Permit S-32426 for municipal purposes. There are undeveloped portions of 2.0 cfs of water (live flow) from Cooper Creek and 320.5 AF of water from Cooper Creek Reservoir (stored water), under Permit S-32426 as per OAR 690-315-0010(6)(g). The storage of water in Cooper Creek Reservoir is authorized under Certificate 48586.
10. In addition to the 5.0 cfs from Cooper Creek (live flow) and 500 AF of water from Cooper Creek Reservoir (stored water) authorized under Permit S-32426, the City holds the following municipal use water right certificates and permits:

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).

- Certificate 6344 for 0.75 cfs of water from Calapooia Creek, tributary to the Umpqua River;
- Certificate 19629 for 2.25 cfs of water from Calapooia Creek, tributary to the Umpqua River;
- Permit S-44066 for 1.0 cfs of water from Calapooia Creek, tributary to the Umpqua River; and
- Permit S-44926 for 3.0 cfs of water from the North Umpqua River, tributary to the Umpqua River.

In summary, the City has water rights for diversion of 4.0 cfs from Calapooia Creek, 5.0 cfs from Cooper Creek (live flow), 500 AF from Cooper Creek Reservoir (stored water), and 3.0 cfs from the North Umpqua River. Two of the water rights (1.0 cfs on Calapooia Creek and 3.0 cfs on North Umpqua River) are junior to instream water rights.

11. Water from Cooper Creek is treated at the Cooper Creek WTP; water from Calapooia Creek is treated at the Nonpareil WTP. The Nonpareil WTP is currently the primary water treatment production facility. This facility operates at maximum capacity during the peak demand season (June through October). The Cooper Creek WTP is currently operated in the peak demand season to supplement production at the Nonpareil WTP to meet demand. After the new Cooper Creek WTP is constructed it will become the primary water production facility. This will decrease the production requirements of the Nonpareil WTP and allow planned improvements to occur there.
12. The City has an existing Water Access Agreement with the Umpqua Basin Water Association for diversion and treatment of water diverted from the North Umpqua River under Permit S-44926.
13. The City's water service area includes users within the City limits, the Union Gap Water District (between the Cities of Sutherlin and Oakland), and outside users located between the City and the Nonpareil WTP located approximately eight miles east of town.
14. According to the Application, in 2010, population within the service boundary of City of Sutherlin was 7,840. The City estimates the population will increase at a growth rate of 1.7 percent per year, which calculates to a population of 10,290 by the year 2026.
15. The City's peak water demand within its service area boundaries was 5.68 cfs in 2010, being 3.0 from the Cooper Creek WTP, and 3.45 cfs from the Nonpareil WTP.
16. The City's peak day demand is projected to be approximately 6.72 cfs of water by the year 2026.

17. Full development of Permit S-32426 is needed to address the present and future water demand of City of Sutherlin, including system redundancy.
18. Based on Findings of Fact 8-17, the Department has determined that the City's request for an extension of time until October 1, 2026, to complete construction and to apply water to full beneficial use under the terms of Permit S-32426 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.

19. Work was accomplished (specified in the Application for Extension of Time) during the original development time frame.
20. During the last extension period, being October 1, 2000 to October 1, 2010, the City accomplished the following:
 - Received Department approval on a 2005 WMCP;
 - Completed a Water Master Plan;
 - Completed reservoir modeling and analysis;
 - Completed a study to address the anoxia issue in Cooper Creek Reservoir;
 - Submitted an extension of time progress report; and
 - Repaired and improved various water lines.
21. Since October 1, 2010, the City has repaired and improved various water lines, and made improvements to the Cooper Creek WTP.

The Department has determined that work has been accomplished since the beginning of the last authorized extension time period, which provides evidence of good cause and reasonable diligence in developing the permit.

22. According to the Application, as of July 11, 2011, they have invested approximately \$3,145,596, which is about 13 percent of the total projected cost for complete development of this project. The City estimates a \$21,655,000 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-32426,

other costs included in this accounting are not partitioned out for S-32426 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.

23. As of October 1, 2010, the City had diverted 3.0 cfs of the 5.0 cfs from Cooper Creek (live flow) and 179.5 AF of the 500 AF from Cooper Creek Reservoir (stored water) as allowed for beneficial municipal purposes under the terms of this permit.
24. 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)]

25. According to the Application, as of July 11, 2011, they have invested approximately \$3,145,596, which is about 13 percent of the total projected cost for complete development of this project. The City estimates a \$21,655,000 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 9 through 17 above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-32426.
27. The City estimates an annual population growth rate of 1.7 percent per year over a 16 year period, being the years 2010 to 2026.
28. Given the current water supply situation of the City, including current and expected demands, and the need for system redundancy, there is a market and present demand for the water to be supplied under Permit S-32426.
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 3.0 cfs from Cooper Creek (live flow) (not to exceed the maximum amount authorized under this permit, being 5.0 cfs) and that diversion of water beyond 179.5 AF from Cooper Creek Reservoir (stored water) (not to exceed the maximum amount authorized under this permit, being 500 AF) 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 live flow and a greater amount of stored 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-32426 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, and the construction of the new Cooper Creek WTP taking longer than anticipated.

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-32426 was delivered to ODFW on March 21, 2012, for ODFW's review under OAR-690-315-0080.
34. Notification that the pending municipal Application for Extension of Time for Permit S-32426 was delivered to ODFW for review was sent to the City on March 22, 2012.
35. Notification that the pending municipal Application for Extension of Time for Permit S-32426 was delivered to ODFW for review was published in the Department's Public Notice dated March 27, 2012. No public comments were received regarding this notice.
36. On August 15, 2012, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-32426. The Department received an e-mail addendum to the advice on October 26, 2015.
37. Summary and Excerpts of Advice from ODFW:
Use of stored water from Cooper Creek Reservoir (stored water) under the portion of this permit that is undeveloped as of October 1, 2010, will maintain the persistence of listed fish species. Use of water from Cooper Creek (live flow) under the portion of this permit that is undeveloped as of October 1, 2010, should be conditioned to maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit. ODFW has determined that

Cooper Creek will be affected by water use under the permit. ODFW's advice is based on the best available information and existing data.

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 persistence flows for Cooper Creek are estimated as a proportion of Basin Investigation Report (BIR) (Oregon State Game Commission 1972) flows for Sutherlin Creek. The proportion is calculated using the ratio of the drainage area of the two creeks. These drainage areas are 4.61 square miles and 45.7 square miles, respectively, with a ratio of 1:10, or 0.10. The target flows for fish persistence in Cooper Creek are equal to the Sutherlin BIR flows, multiplied by 0.10. ODFW's recommended target flows for maintaining the persistence of listed fish species in Cooper Creek are shown in Table 1, below.

Table 1

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN COOPER CREEK MEASURED IN COOPER CREEK ABOVE COOPER CREEK RESERVOIR^a	
Month	Cubic Feet per Second
January – April	2.3
May	1.5
June	0.6
July – September	0.2
October 1 – October 15	0.6
October 16 – October 31	1.5
November – December	2.3

^aFlows are measured above the POD and therefore must be adjusted for the developed portion, being 3.0 cfs.

Streamflow Measurement Point

After analysis of flow records, ODFW has determined that measuring flows in Cooper Creek above Cooper Creek Reservoir⁵ is sufficient to ensure that target flows are met in order to maintain the persistence of listed fish species with use of the undeveloped portion of the permit.

⁵ Live flow from Cooper Creek is actually diverted from Cooper Creek Reservoir as authorized in the permit.

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

This permit, in part, authorizes the use of stored water from Cooper Creek Reservoir (stored water). The undeveloped portion of water from Cooper Creek Reservoir (stored water) under Permit S-32426 is 320.5 AF as per 690-315-0010(6)(g). Water is authorized for storage in the reservoir under Certificate 48586. ODFW found that fish persistence will be maintained by use of the water stored under Certificate 48586. (10-26-2015 email from ODFW, T. Hardin.) Authorization to incrementally expand use of water from Cooper Creek Reservoir (stored water) under this permit beyond 179.5 AF up to the permitted quantity of 500 acre-feet can only be granted through the Department's review and approval of the municipal permit holder's future WMCPs (OAR 690-086).

There is an undeveloped portion of 2.0 cfs of water from Cooper Creek (live flow) under Permit S-32426 as per OAR 690-315-0010(6)(g). Authorization to incrementally expand use of water from Cooper Creek (live flow) under this permit beyond 3.0 cfs up to the permitted quantity of 5.0 cfs can only be granted through the Department's review and approval of the municipal permit holder's future WMCPs (OAR 690-086). The Department's proposed conditions may result in no diversion, or a limit on diversion, of the undeveloped portion from Cooper Creek (live flow) under Permit S-32426. 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 in Cooper Creek must be determined or measured by the water user in Cooper Creek above Cooper Creek Reservoir. *(Note: the flows used to compare to the target flows must take into account full amount of the developed portion, being 3.0 cfs; therefore, since the authorized POD is below the measurement point 3.0 cfs must be subtracted from the measured flow.)*
- b. Target flows (Q_T) must be compared to the measured flow above the reservoir minus 3.0 cfs (Q). The undeveloped portion from live flow under the extension (E) is *greater than* the target flow (Q_T) during each month. Therefore,
 - i. When $Q \leq Q_T$:
No undeveloped portion of the permit may be diverted from Cooper Creek (live flow).
 - ii. When $Q > Q_T$:
The maximum amount of the undeveloped portion (live flow) of Permit S-32426 that could be diverted based on Cooper Creek target flows would equal the difference of $(Q - Q_T)$, not to exceed the amount of the undeveloped portion (E), and is defined as:

$$(Q - Q_T), \text{ not to exceed } E,$$

where Q is the flow in Cooper Creek above the reservoir minus 3.0, Q_T is

the target flow (from Table 1), and E is the undeveloped portion of the permit from Cooper Creek (live flow), being 2.0 cfs.

- c. ODFW's advice recognized that the use of the undeveloped portion of the permit (live flow) represents a high percentage (perhaps all) of the streamflow, at least during the summer months.
 - 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 (live flow) of Permit S-32426 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 based on Cooper Creek flows by a "Consumptive Use Percentage," as generally determined by $(1 - [\text{total municipal wide returned flows} / \text{total municipal wide diverted flows}])$.
39. The Department finds, based on ODFW's advice, that in the absence of conditions, the use of the undeveloped portion of Permit S-32426 from Cooper Creek (live flow) 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 from Cooper Creek (live flow), stream flows would be a limiting factor for the listed fish species.
40. Based on ODFW's advice, the Department proposes to require conditions to maintain, in the portions of the waterways affected by water use (live flow) under Permit S-32426, 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.)⁶
41. On February 5, 2016, ODFW notified the Department that the proposed "Conditions to Maintain the Persistence of Listed Fish" for Permit S-32426 are consistent with their advice.
42. On February 10, 2016, the Department notified the City as per OAR 690-315-0080(2)(f) of ODFW's written advice and addendum, and the "Conditions to Maintain the Persistence of Listed Fish" as proposed in this PFO for the pending municipal Application for Extension of Time for Permit S-32426.

⁶ 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, 2026⁷, 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 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).
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 3.0 cfs (live flow)(not to exceed the maximum amount authorized under this permit, being 5.0 cfs) and the diversion of water beyond 179.5 AF of stored water from Cooper Creek Reservoir (stored water) (not to exceed the maximum amount authorized under this permit, being 500 AF) under Permit 32426 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 live flow and a greater amount of stored water under the permit consistent with OAR 690-086-0130(7).

⁷ 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.

8. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 33 through 42, 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 from Cooper Creek (live flow) under this municipal use permit, in the absence of special conditions. Therefore, the diversion of water beyond 3.0 cfs from Cooper Creek (live flow) under Permit S-32426 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-32426 from October 1, 2010 to October 1, 2026.

Extend the time to apply the water to beneficial use under Permit S-32426 from October 1, 2010 to October 1, 2026.

Subject to the following conditions:

CONDITIONS

1. Development Limitations

Maximum diversions of 3.0 cfs of water from Cooper Creek and 179.5 AF from Cooper Creek Reservoir are currently allowed under Permit S-32426. Any diversion of water beyond 3.0 cfs (live flow)(not to exceed the maximum amount authorized under the permit, being 5 cfs) and any diversion of water beyond 179.5 AF from Cooper Creek Reservoir (stored water) (not to exceed the maximum amount authorized under this permit, being 500 AF) 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 live flow and a greater amount of stored 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-32426 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-32426 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

The undeveloped portion of the permit from Cooper Creek (live flow) subject to these fish persistence conditions is 2.0 cfs. The developed portion of the permit from Cooper Creek (live flow), being 3.0 cfs, is not subject to these fish persistence conditions. The use of 500 AF of stored water from Cooper Creek Reservoir (stored water) is not subject to these fish persistence conditions.

A. Fish Persistence Target Flows

- a. Fish persistence target flows in Cooper Creek as recommended by ODFW are in Table 2, below; flows are to be determined or measured by the water user in Cooper Creek above Cooper Creek Reservoir.

Table 2

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN COOPER CREEK MEASURED IN COOPER CREEK ABOVE COOPER CREEK RESERVOIR^a	
Month	Cubic Feet per Second
January – April	2.3
May	1.5
June	0.6
July – September	0.2
October 1 – October 15	0.6
October 16 – October 31	1.5
November – December	2.3

^aFlows are measured above the POD and therefore must be adjusted for the developed portion, being 3.0 cfs.

b. Alternate Streamflow Measurement Point

The location of a the 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-32426 from Cooper Creek (live flow) that can be diverted as a result of this fish persistence condition is based on a comparison of the target flows (Q_T) to the corresponding actual flows (Q_A), where Q_A = measured flow above the reservoir minus 3.0 cfs.⁸

a. When $Q_A \leq Q_T$ in Cooper Creek:

No water may be diverted from Cooper Creek under the undeveloped portion of this permit (live flow) when $Q_A \leq Q_T$, where Q_A is the actual flow and Q_T is the target flow (from Table 2). Q_A is based on a seven day rolling average⁹ of mean daily flows.

b. When $Q_A > Q_T$ in Cooper Creek:

The maximum amount of undeveloped portion of the permit (live flow) that can be diverted is defined as:

$$(Q_A - Q_T), \text{ not to exceed } E,$$

where Q_A is the actual flow, based on the seven-day rolling average; Q_T is the target flow (from Table 2); and E is the undeveloped portion of the permit from Cooper Creek (live flow), being 2.0 cfs.

c. When $Q_A - Q_T \geq E$, the undeveloped portion of the permit from Cooper Creek (live flow) that can be diverted would not need to be reduced.

C. Consumptive Use Percentages for Utilization in Cooper Creek Calculations

a. Initial Consumptive Use Percentages

The City of Sutherlin has not identified any Consumptive Use Percentages based on the return of flows to Cooper Creek 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 (live flow) of Permit S-32426 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 (live flow) of Permit S-32426 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.

⁸ The flows used to compare to the target flows must take into account full amount of the developed portion, being 3.0 cfs; therefore, since the authorized POD is below the measurement point 3.0 cfs must be subtracted from the measured flow.

⁹ Alternatively, the water user may use a single daily measurement.

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 (live flow) of Permit S-32426 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 Cooper Creek, 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 (live flow) of Permit S-32426 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 Cooper Creek 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 (live flow) of Permit S-32426 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 (live flow) of Permit S-32426 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 flows met in Cooper Creek ($Q_A > Q_T$), no reduction needed.

On June 15, the last seven mean daily flows in Cooper Creek above Cooper Creek Reservoir were 3.1, 3.4, 3.5, 3.6, 3.6, 3.7 and 3.6 cfs. The seven day rolling average (Q_A) is 3.5 cfs¹⁰. Given that the undeveloped portion of this permit (E) is 2.0 cfs, then the 7 day average of mean daily flows minus the 0.6 cfs target flow (Q_T) for June 15 is greater than undeveloped portion of the permit (E). At this location, $Q_A - Q_T \geq E$.

$$3.5 - 0.6 \geq 2.0$$

In this example, the maximum amount of the undeveloped portion (live flow) of the permit that could be diverted would be 2.0 cfs.

Example 2: Target flows met in Cooper Creek ($Q_A > Q_T$), reduction needed

Formula: ($Q_A - Q_T$), not to exceed 2.0 cfs

Step 1: If on June 15, the average of the last seven mean daily flows (Q_A) was 2.0 cfs, and the target flow (Q_T) is 0.6, then the maximum amount of the undeveloped portion (live flow) of the permit that could be diverted would be 1.4 cfs.

$$2.0 - 0.6 = 1.4 \text{ (does not exceed 2.0 cfs)}$$

Step 2: Assuming the Consumptive Use Percentage is 62.9%¹¹ during the month of June and the utilization of this percentage is authorized, then the maximum amount of the undeveloped portion (live flow) of the permit that can be diverted determined in Step 1, being 1.4 cfs, would be proportionally increased. The resulting maximum amount of the undeveloped portion (live flow) of the permit that could be diverted would be 1.62 cfs. (This maximum amount may be limited as illustrated in Step 3, below.)

$$(62.9\% \times 0.6) / 100 = 0.38$$

$$2.0 - 0.38 = 1.62 \text{ (does not exceed 2.0 cfs)}$$

¹⁰ Q_A is the actual flow after taking the developed amount in to account. Thus, since the gage is upstream of the authorized point of diversion (POD), if it reads 6.5 cfs, then $Q_A = 6.5 - 3.0$ developed portion = 3.5 cfs. In this example, the measured flows above the reservoir would have been 6.1, 6.4, 6.5, 6.6, 6.6, 6.7, and 6.6.

¹¹ Currently, the City of Sutherlin may not utilize Consumptive Use Percentages for the purpose of calculating the amount of the undeveloped portion of Permit S-32426 that can be diverted as a result of this fish persistence condition. The utilization of the Consumptive Use Percentage 62.9%¹⁵ only for illustrative purposes in this example.

(If adjustments are not to be made by a Consumptive Use Percentage, then the maximum amount of the undeveloped portion (live flow) of the permit that could be diverted would be 1.4 cfs as shown in Step 1.)

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 from live flow under this permit is 4.0 cfs (for example, authorization provided through a WMCP), then 4.0 cfs would be the maximum amount of (live flow) diversion allowed under this permit including the developed portion of the permit, being 3.0 cfs.

(Conversely, if the amount of water legally authorized for (live flow) diversion under this permit is 5.0 cfs, then 4.62 cfs (1.62 from Step 2 + the 3.0 developed portion) would be the maximum amount of (live flow) diversion allowed under this permit.)

Example 3: Actual flows are less or equal to than the target flows ($Q_A \leq Q_T$)

If on September 15, the average of the last seven mean daily flows (Q_A) in Cooper Creek was 0.15 cfs, and the target flow (Q_T) is 0.2, then $Q_A \leq Q_T$.

In this example, no water may be diverted from Cooper Creek (live flow) under the undeveloped portion of this permit as a result of this fish persistence condition because the flow target is missed.

DATED: March 8, 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 **April 22, 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 SERVICEMEMBERS: Active Duty servicemembers have a right to stay these stay these proceedings under federal Servicemembers 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 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
Salem, OR 97301-1266

Fax: 503-986-0901
