

Oregon Water Resources Department
Water Right Services Division

Water Rights Application
Number S-88124

Proposed Final Order

Summary of Recommendation: The Department recommends that the attached draft permit be issued with conditions.

Findings of Fact

1. On August 26, 2015, Seal Rock Water District submitted an application to the Department for the following water use permit:
 - Amount of Water: 2.0 cubic feet per second (CFS)
 - Use of Water: municipal use
 - Source of Water: Beaver Creek, a tributary of Pacific Ocean
 - Area of Proposed Use: Lincoln County within the Seal Rock Water District boundaries
2. The applicant proposed the following two conditions:
 - The diversion of water under this water right, in combination with that under Permit S-40277, shall not exceed a total of 2.6 CFS; and
 - The authorized place of use under this permit shall be limited to the District boundaries, but the District can provide water outside of the boundary for short-term or emergency supply.
3. On September 11, 2015, the Department mailed the applicant notice of its Initial Review, determining that "*the diversion of 2.0 CFS of water from Beaver Creek, a tributary of Pacific Ocean, for year-round municipal use is allowable.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.
4. On September 15, 2015, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about obtaining future notices and a copy of the Proposed Final Order.
5. Within 30 days of the Department's public notice, written comments were received from WaterWatch of Oregon expressing concern for protection of the resource. The Department considered the comments, however its findings remain unchanged.
6. On May 18, 2016, the Department received correspondence from the applicant's attorney, Steven Shropshire, requesting that the

Department issue a permit while land-use approvals are pending, and condition the permit to preclude the use of water and any associated construction until all required land-use approvals have been obtained.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- any applicable basin program
 - applicable statutes, administrative rules, and case law
 - the amount of water available
 - the rate and duty for the proposed use
 - pending senior applications and existing water rights of record
 - any applicable comprehensive plan or zoning ordinance
 - recommendations by other state agencies
 - the Scenic Waterway requirements of ORS 390.835
 - any comments received
7. The Middle Coast Basin Program allows municipal use (OAR 690-518-0010).
 8. Senior water rights exist on Beaver Creek, a tributary of Pacific Ocean, or on downstream waters.
 9. Beaver Creek, a tributary of Pacific Ocean, is not within or above a State Scenic Waterway.
 10. An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that water is available for further appropriation (at an 80 percent exceedance probability) during the full season requested.
 11. The Department finds that the amount of water requested, 2.0 CFS, is an acceptable amount.
 12. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates an approved land-use decision is being pursued. Pursuant to OAR 690-005-0035(4)(c), when local land use approvals are pending, the Department may issue a permit that contains conditions that the preclude use of water and any associated construction until the applicant obtains all local land-use approvals.
 13. In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and

Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

- A. The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet state or federal water quality standards due to reduced flows.
- B. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion. The permittee shall maintain the device in good working order.
- C. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.
- D. The permittee shall keep a complete record of the volume of water diverted each month, and shall submit a report which includes water-use measurements to the Department annually, or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- E. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.
- F. Prior to initiating water diversion from Beaver Creek, the permittee shall install and operate a suitable streamflow gaging station at or near the point of diversion on Beaver Creek. Such installation shall be made under the supervision of and approved by the Watermaster. The permittee, following USGS protocol and standards, shall operate and maintain the streamflow gaging station during the period of May 15 to October 15 of each year. A minimum of eight streamflow measurements, at various rates of flow, are required during the first full period of operation, one measurement every four to six weeks is required thereafter. The streamflow and gage height data shall be collected for five years. Measurement and flow data shall be completed to the Department's standards and shall be provided to the Department by December 31 of each year. The permittee can satisfy the streamflow monitoring requirement above by entering into an agreement with the

Department, or any qualified person of permittee's choosing to install, maintain, and operate the required gage.

- G. Prior to initiating water diversion from Beaver Creek, the permittee shall install temperature data loggers that meet DEQ specifications at locations upstream and downstream of the point of diversion. The temperature monitoring shall be conducted during the period from May 15 to October 31 of each year for five years after water use begins. The permittee shall record water temperature data at a minimum of 30 minute intervals and provide the collected data to the Department and DEQ at the end of each month.

The Permittee shall develop a sampling and analysis plan (SAP) to identify project management responsibilities, monitoring locations, schedule, quality assurance and data management activities. The permittee shall submit the SAP to the Department and DEQ prior to initiating the five years of temperature monitoring. Data loggers shall be operated and maintained consistent with the SAP.

- H. If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.
- I. The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.
- J. Water use under this permit shall be consistent with the permittee's Water Management and Conservation Plan under OAR Chapter 690, Division 86.

Conclusions of Law

- 1. Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or

given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

2. The proposed use requested in this application is allowed in the Middle Coast Basin Program.
3. Water is available for the proposed use.
4. The proposed use will not injure other water rights.
5. The application is in compliance with the State Agency Coordination Program regarding land use.
6. The proposed use complies with rules of the Water Resources Commission not otherwise described above.
7. For these reasons, the required presumption has been established.
8. Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:
 - A. One or more of the criteria for establishing the presumption are not satisfied; or
 - B. The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
 - a. The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
 - b. Specifically how the identified public interest would be impaired or detrimentally affected.
9. In this application, the Department considered the comments submitted, information received from interested agencies, and information available in the application file. Based on that information, the Department concludes that the presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.
10. The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

11. When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED June 21, 2016



E. Timothy Wallin, Water Rights Program Manager
for Thomas M. Byler, Director

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **August 5, 2016**. Protests must be in writing, and must include the following:

- Your name, address, and telephone number;
- A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in the Proposed Final Order would impair or be detrimental to your interest;
- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known;
- To affect the Department's determination that the proposed use in this application will, or will not, impair or be

detrimental to the public interest ORS 537.153(2)(b) requires that a protest demonstrate, by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) the specific public interest in ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified public interest in ORS 537.170(8) would be impaired or be detrimentally affected;

- If you are the applicant, the protest fee of \$350 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$700 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **August 5, 2016**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and
- A standing fee of \$200. If a hearing is scheduled, an additional fee of \$500 must be submitted along with a petition for party status.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and either:

A. upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or

B. the applicant requests a contested case hearing within 30 days after the close of the protest period.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail to appear at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is:
<http://legalassistance.law.af.mil>

This document was prepared by Kim French. If you have any questions about any of the statements contained in this document I can be reached at 503-986-0816.

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to:

Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF LINCOLN

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

SEAL ROCK WATER DISTRICT
1037 NW GREBE STREET
SEAL ROCK, OR 97376

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: S-88124

SOURCE OF WATER: BEAVER CREEK, A TRIBUTARY OF PACIFIC OCEAN

PURPOSE OR USE: MUNICIPAL USE

MAXIMUM RATE: 2.0 CUBIC FEET PER SECOND

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: AUGUST 26, 2015

POINT OF DIVERSION LOCATION: NE ¼ SW ¼ SECTION 20, T12.0S, R11.0W,
W.M.; 610 FEET SOUTH AND 1360 FEET EAST FROM W1/4 CORNER, SECTION 20

THE PLACE OF USE IS LOCATED AS FOLLOWS:

WITHIN THE SEAL ROCK WATER DISTRICT BOUNDARIES

Measurement devices, and recording/reporting of annual water use conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.

- C. The permittee shall keep a complete record of the volume of water diverted each month, and shall submit a report which includes water-use measurements to the Department annually, or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

Streamflow Monitoring

Prior to initiating water diversion from Beaver Creek, the permittee shall install and operate a suitable streamflow gaging station at or near the point of diversion on Beaver Creek. Such installation shall be made under the supervision of and approved by the Watermaster. The permittee, following USGS protocol and standards, shall operate and maintain the streamflow gaging station during the period of May 15 to October 15 of each year. A minimum of eight streamflow measurements, at various rates of flow, are required during the first full period of operation, one measurement every four to six weeks is required thereafter. The streamflow and gage height data shall be collected for five years. Measurement and flow data shall be completed to the Department's standards and shall be provided to the Department by December 31 of each year.

The permittee may satisfy the streamflow-monitoring requirement above by entering into an agreement with the Department, or any qualified person selected by the permittee to install, maintain, and operate the required gage.

Water Temperature Monitoring

Prior to initiating water diversion from Beaver Creek, the permittee shall install temperature data loggers that meet DEQ specifications at locations upstream and downstream of the point of diversion. The temperature monitoring shall be conducted during the period from May 15 to October 31 of each year for five years after water use begins. The permittee shall record water temperature data at a minimum of 30 minute intervals. Temperature data and supporting audit documentation shall be made available to DEQ and the Department by December 31 each year or upon request of the Director.

The Permittee shall develop a sampling and analysis plan (SAP) to identify project management responsibilities, monitoring locations,

schedule, quality assurance and data management activities. The permittee shall submit the SAP to the Department and DEQ prior to initiating the five years of temperature monitoring. Data loggers shall be operated and maintained consistent with the SAP.

Fish Screening and By-Pass Condition

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

Other Conditions

Water use under this permit shall be consistent with the permittee's Water Management and Conservation Plan under OAR Chapter 690, Division 86.

The authorized place of use under this permit shall be limited to the district boundaries. This restriction does not prevent the permittee from providing water outside its district boundaries for short-term or emergency supply.

For purposes of this condition, "short-term" supply means supplying water for not more than one continuous period of two calendar years, and "emergency" supply means supplying water for not more than one continuous period of one calendar year to an entity in the event the entity loses its water supply due to unforeseen circumstances.

The diversion of water under this permit in combination with that under Permit S-40277 shall not exceed a total of 2.6 CFS.

Prior to diversion of water or any associated construction, the permittee shall submit all required land use approvals.

STANDARD CONDITIONS

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet state or federal water quality standards due to reduced flows.

This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows.

Construction of the water system shall begin within twenty years of the date of permit issuance. The deadline to begin construction may not be extended. This permit is subject to cancellation proceedings if the begin construction deadline is missed.

Complete application of the water shall be made within twenty years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after making beneficial use of water, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued

DRAFT - THIS IS **NOT** A PERMIT

E. Timothy Wallin, Water Rights Program Manager
for Thomas M. Byler, Director

Mailing List for PFO Copies

Application #S-88124

PFO Date June 21, 2016

Original mailed via CERTIFIED MAIL to applicant:

SEAL ROCK WATER DISTRICT, 1037 NW GREBE STREET, SEAL ROCK, OR 97376

SENT VIA EMAIL:

1. WRD - Watermaster # 1
2. Agent - asussman@gsiws.com

Copies sent to:

1. Water Availability: Shawn Ortiz-Turner

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/
Standing Dates
checked

CASEWORKER : Kim French