

**Oregon Water Resources Department
Water Right Services Division**

Water Rights Application
Number R-88185

Proposed Final Order

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

Findings of Fact

1. On February 26, 2016, Patterson Nursery Sales Inc submitted an application to the Department for the following water use permit:
 - Amount of Water: 33.0 acre feet (AF)
 - Use of Water: storage for nursery use
 - Source of Water: nursery wastewater, a tributary of Eagle Creek
 - Area of Proposed Use: Clackamas County within Section 31, Township 2 South, Range 4 East, W.M.
2. On May 13, 2016, the Department mailed the applicant notice of its Initial Review, determining that *"The diversion of 33.0 AF of water from nursery wastewater, a tributary of Eagle Creek for storage in Patterson Lagoon 2 for nursery use is allowable, November 1 through June 30 of each year."* The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On May 17, 2016, 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. No written comments were received within 30 days.

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
4. The Willamette Basin Program allows storage (OAR 690-502-0040).
 5. Senior water rights exist on nursery wastewater, a tributary of Eagle Creek, or on downstream waters.

6. Nursery wastewater, a tributary of Eagle Creek is above the Clackamas River State Scenic Waterway.
7. 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 a 50 percent exceedance probability) November 1 through June 30.
8. The Department finds that the amount of water requested, 33.0 AF, is an acceptable amount.
9. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates an approved land-use decision is being pursued.
10. 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 DEQ 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:
11. The permittee shall not release stored water from the reservoir July 1 through October 31, unless it is determined necessary by the Department.
12. Any release of water from the lagoons to a surface-water body must be preceded by sampling and analysis performed by a laboratory accredited by the Oregon Environmental Laboratory Accreditation Program to ensure that releases do not violate state and federal water-quality standards.

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 Willamette 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, all criteria for establishing the presumption have been satisfied, as noted above. 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 August 15, 2017



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 **September 29, 2017**. 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 **September 29, 2017**. 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:

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

- 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 Lisa Graham. If you have any questions about any of the statements contained in this document I can be reached at 503-986-0808.

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.
STATE OF OREGON

DRAFT

COUNTY OF CLACKAMAS

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

PATTERSON NURSERY SALES INC
PO BOX 99
BORING, OR 97009

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

APPLICATION FILE NUMBER: R-88185

SOURCE OF WATER: NURSERY WASTEWATER, A TRIBUTARY OF EAGLE CREEK

STORAGE FACILITY: PATTERSON LAGOON 2

PURPOSE OR USE OF THE STORED WATER: STORAGE FOR NURSERY USE

MAXIMUM VOLUME: 33.0 ACRE FEET EACH YEAR

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: NOVEMBER 1
THROUGH JUNE 30

DATE OF PRIORITY: FEBRUARY 26, 2016

THE MAXIMUM HEIGHT OF THE DAM SHALL NOT EXCEED 2.0 FEET

DAM LOCATION: NW $\frac{1}{4}$ SW $\frac{1}{4}$ SECTION 31, T2S, R4E, W.M.; 200 FEET SOUTH AND
1380 FEET WEST FROM C1/4 CORNER, SECTION 31

THE AREA TO BE SUBMERGED BY THE RESERVOIR IS LOCATED AS FOLLOWS:

NE $\frac{1}{4}$ SW $\frac{1}{4}$
NW $\frac{1}{4}$ SW $\frac{1}{4}$
SECTION 31
TOWNSHIP 2 SOUTH, RANGE 4 EAST, W.M.

Measurement Devices, and Recording/Reporting of Annual Water Use
Conditions:

- A. Before water use may begin under this permit, a staff gage that measures the entire range and stage between full reservoir level and dead-pool storage must be installed in the reservoir. If no dead-pool, the gage must measure the full depth of the reservoir. 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 stored each month, and shall submit a report which includes water-storage 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.

The storage of water allowed herein is subject to the installation and maintenance of an outlet pipe (with a minimum diameter of 8" for any in-channel reservoir). This requirement may be waived if the Department determines other means have been provided to evacuate water when necessary.

The permittee shall pass all live flow outside the storage season described above.

The Director may require the user to measure inflow and outflow, above and below the reservoir respectively, to ensure that live flow is not impeded outside the storage season. Measurement devices and their implementation must be acceptable to the Director, and the Director may require that data be recorded on a specified periodic basis and reported to the Department annually or more frequently.

This permit allows an annual appropriation (not to exceed the specified volume). This permit does not provide for the appropriation of water for out-of-reservoir uses, the maintenance of the water level or maintaining a suitable freshwater condition. If any water is to be used for out-of-reservoir purposes, a secondary water right is required. If any additional live flow is to be appropriated to maintain either the water level or a suitable freshwater condition, an additional water right is required.

A fishway to ensure adequate upstream and downstream passage for fish is required for any in-channel obstruction, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission.

DAM CONDITIONS

Prior to commencing construction activity, all design reports, drawings of the dam and critical appurtenant structures, specifications, and plans for construction administration must be approved by the State Engineer as indicated by the State Engineer's stamp and a written letter of approval from the State Engineer.

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.

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 five 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.

The permitted volume of water shall be stored within five years of the date of permit issuance. If additional time is needed, 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 storage 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 #R-88185

PFO Date: August 8, 2017

Original mailed via CERTIFIED MAIL to applicant:

PATTERSON NURSERY SALES INC
PO BOX 99
BORING, OR 97009

SENT VIA EMAIL:

1. WRD - Watermaster # 20

Copies sent to:

1. Water Availability: Hydrographics

PFO and Map Copies sent to:

1. WRD - File # R-88185
2. Oregon State Parks

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

1. a.l.o - Charles and Linda Bonner, PO Box 151, Eagle Creek Or 97022
2. agent - Steven P. Applegate Consulting, 3395 Huckleberry Ct S, Salem OR 97302

Copies Mailed
By: _____ (SUPPORT STAFF)
on: _____ (DATE)

CASEWORKER : Lisa Graham