

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

Water Right Application S-88186 in the)
name of PATTERSON NURSERY)
SALES INC.) PROPOSED FINAL ORDER

Summary: The Department proposes to issue an order approving Application S-88186 and a permit consistent with the attached draft permit.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.175, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 33, 300, 310, 400, 410, and Willamette Basin Program OAR 690-502. These statutes and rules can be viewed on the Oregon Water Resources website:
<http://www.oregon.gov/owrd/pages/law/index.aspx>

The Department's main page is <http://www.oregon.gov/OWRD/pages/index.aspx>

The Department shall presume that a proposed use will not impair or be detrimental to the public interest if:

- a) 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);
- b) Water is available;
- c) The proposed use will not injure other water rights; and
- d) The proposed use complies with the rules of the Commission. ORS 537.153(2); OAR 690-310-0110(1)

All four criteria must be met for a proposed use to be presumed to not impair or be detrimental to the public interest. When the criteria are met and the presumption is established, or if the proposed use can be modified or conditioned to meet the presumption criteria, the Department must further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. OAR 690-310-0120(3).

If the Department determines that the presumption is established and not overcome, the Department shall issue a proposed final order recommending issuance of the permit subject to any appropriate modifications or conditions.

FINDINGS OF FACT

Application History

1. On February 26, 2016, Patterson Nursery Sales Inc. filed a complete application for the following water use:

Amount of Water: 2.48 cubic feet per second (CFS)
Use of Water: nursery use on 16.5 acres
County: Clackamas County
Location: within Section 31, Township 2 South, Range 4 East, W.M.
Source of Water: Patterson Lagoon 2, constructed under Permit R-88185, tributary of Eagle Creek
2. On November 17, 2017, the Department mailed the applicant notice of its Initial Review, determining that "**The diversion of 2.48 CFS of water from Patterson Lagoon 2, constructed under permit R-15260, a tributary of Eagle Creek, for year-round nursery use on 16.5 acres is allowable.**" The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On November 21, 2017, 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.

Presumption Criteria (a) Consistency with Basin Program

4. Uses included in nursery use are included in irrigation and agriculture uses, both of which are allowed under the Willamette Basin Program (OAR 690-502-0040). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criteria (b) Water Availability

5. Stored water is available during the full period requested. ORS 537.153(2); OAR 690-310-0110(1)(b)

Presumption Criteria (c) Injury Determination

6. The proposed use will not injure other water rights. ORS 537.153(2); OAR 690-310-0110(1)(c)

Presumption Criteria (d) Whether the Use Complies with Rules of the Commission

7. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.621(3)(b); OAR 690-310-0150(2)(b) ORS 537.153(2)(b); OAR 690-310-0110(2)(d)

8. The proposed use is in an area of the state in which OAR 690-033-0210 thru -0230 applies. These rules establish definitions, additional procedures, and standards to aid the Department in determining whether a proposed use will impair or be detrimental to the public interest with regard to threatened or endangered fish species.

690-033-0210 Lower Columbia Rules (Below Bonneville Dam)

- A. The proposed use is located in the Willamette Basin and the Lower Columbia Rules apply. OAR 690-033-0210(1)
- B. The Oregon Fish and Wildlife Department has indicated that the proposed use will not occur in an area that may affect the essential habitat of sensitive, threatened or endangered fish species.
- C. Because the source of water is stored water, and water will not be released into the natural stream channel, the use will not have a negative impact on state and federal water quality standards.
- D. The proposed use of water is not detrimental to the protection or recovery of a threatened or endangered species. OAR 690-033-0220(1)
- E. The application is not presumed to impair or be detrimental to the public interest.

Determination of Presumption that a Proposed Surface Water Use will not Impair or be Detrimental to the Public Interest

Based on the review of the presumption criteria (a)-(d) above, the presumption has been established. ORS 537.153(2); OAR 690-310-0110(1)(a)-(d)

Further Evaluation of the Proposed Use

9. No comments were received by the close of the comment period. OAR 690-310-0120(3).
10. Information available in department files, received from other interested agencies, and other available information does not provide a preponderance of evidence that the proposed use would not impair or be detrimental to the public interest under ORS 537.153. OAR 690-310-0120(3)

Other Criteria and Requirements

11. The proposed use is located above the Clackamas Scenic Waterway, as designated under ORS 390.826.
12. The amount requested, 2.48 CFS, is necessary for the proposed use. However, because the source of water is stored water, the annual volume will be limited to the volume stored, being 33.0 AF.
13. The applicant proposed to apply water when needed and use the most efficient method of water application for the crop being irrigated. These measures are adequate at this time. OAR 690-310-0150(2)(j)

CONCLUSION OF LAW

1. The proposed use would not impair or be detrimental to the public interest.

NOTE: When issuing permits, ORS 537.170(6) authorizes the Department to include provisions or restrictions concerning the use, control and management of water to be appropriated for the project. The attached draft permit is conditioned accordingly.

PROPOSED ORDER

The Department recommends approval of Application S-88186 and issuance of a permit consistent with the attached draft permit.

DATED June 5, 2018



Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **July 20, 2018**. 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(6) 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 aspect of the public welfare, safety and health under ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.170 (8) would be impaired or be adversely affected;
- If you are the applicant, the protest fee of \$410 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$810 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.

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), 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 **July 20, 2018**. 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

STATE OF OREGON

COUNTY OF CLACKAMAS

DRAFT PERMIT TO APPROPRIATE 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: S-88186

SOURCE OF WATER: PATTERSON LAGOON 2, CONSTRUCTED UNDER PERMIT R-15260, A TRIBUTARY OF EAGLE CREEK

PURPOSE OR USE OF THE WATER: NURSERY (IRRIGATION AND AGRICULTURE USE) USE ON 16.5 ACRES

MAXIMUM RATE: 2.48 CUBIC FEET PER SECOND, FURTHER LIMITED TO 33.0 AF ANNUALLY

PERIOD OF USE: JANUARY 1 THROUGH DECEMBER 31

DATE OF PRIORITY: FEBRUARY 26, 2016

POINT OF DIVERSION:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
PATTERSON LAGOON 2	2 S	4 E	WM	31	NW SW	200 FEET SOUTH AND 1380 FEET WEST FROM C1/4 CORNER, SECTION 31

The amount of water used for nursery use under this right, together with the amount secured under any other right existing for the same lands, is limited to 0.15 cubic foot per second per acre and 5.0 acre feet per acre per year. For irrigation of containerized nursery plants, the amount of water diverted under this right, together with the amount secured under any other right existing for the same lands, is limited to ONE-FORTIETH of one cubic foot per second and 5.0 acre feet per acre per year. For irrigation of in-ground nursery plants, the amount of water diverted under this right, together with the amount secured under any other right existing for the same lands, is limited to ONE-EIGHTIETH of one cubic foot per second and 2.5 acre feet per acre per year. The use of water for nursery use may be made at any time, during the period of allowed use specified above, that the use is beneficial. For irrigation of any other crop, the amount of water diverted under this right, together with the amount secured under any other right existing for the same lands, is limited to ONE-EIGHTIETH of one cubic foot per second and 2.5 acre feet per acre during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	Acres
2 S	4 E	WM	31	NW NE	1.3
2 S	4 E	WM	31	SW NE	1.2
2 S	4 E	WM	31	NE NW	4.0
2 S	4 E	WM	31	SE NW	2.5
2 S	4 E	WM	31	NW SW	7.5

1. Measurement Devices and Recording/Reporting of Annual Water Storage 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.

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 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.

Complete application of the water shall be made within five 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.

Issued

DRAFT - THIS IS NOT A PERMIT

Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department