

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for Extension of Time for) Proposed Final Order
Permit S-43837, Water Right Application S-58045, in the) Incorporating Settlement
name of Harbor Water People's Utility District) Agreement

Permit Information

Application File S-58045/ Permit S-43837

Basin 17 – South Coast Basin / Watermaster District 19

Date of Priority: October 26, 1978

Authorized Use of Water

Source of Water: Chetco River, a tributary of Pacific Ocean
Purpose or Use: Municipal Use
Maximum Rate: 7.0 Cubic Feet per Second (cfs)

**This Extension of Time request is being processed in accordance with Oregon
Administrative Rule Chapter 690, Division 315.**

*Please read this Proposed Final Order in its entirety as it contains
additional conditions not included in the original permit.*

This Proposed Final Order applies only to Permit S-43837, water right Application S-58045.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 2000 to October 1, 2050.
- Grant an extension of time to apply water to full beneficial use from October 1, 2000 to October 1, 2050.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department or OWRD – Oregon Department of Water Resources
Harbor – Harbor Water People's Utility District
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
WMCP – Water Management and Conservation Plan
WSMP – Water System Master Plan

Units of Measure

cfs – cubic feet per second
gpm – gallons per minute
mgd – million gallons per day

AUTHORITY

Generally, see ORS 537.230 and OAR Chapter 690 Division 315.

ORS 537.230(3) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown and subject to certain requirements, 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

1. On February 7, 1979, the Department issued Permit S-43837. The permit authorizes the use of up to 7.0 cfs of water from the Chetco River, a tributary of the Pacific Ocean, for municipal use. It specified that construction of the water development project was to be completed by October 1, 1980, and that complete application of water was to be made on or before October 1, 1981.
2. Four prior permit extensions have been granted for Permit S-43837. The most recent extension request resulted in the completion dates for construction and full application of water being extended to October 1, 2000.
3. Due to an ongoing permit extension rulemaking, in 1998 the Department stopped processing pending Applications for Extension of Time for municipal and quasi-municipal permits, and did not require municipal and quasi-municipal water use permit holders to submit Applications for Extension of Time during the rulemaking process.
4. Municipal and quasi-municipal water use permit extension rules OAR 690-315-0070 through 690-315-0100 became effective on November 1, 2002. The rules were subsequently amended, and the amended rules became effective on November 22, 2005.
5. On May 14, 2003, Harbor Water People's Utility District (Harbor) submitted an "Application for Extension of Time" to the Department requesting the time to complete construction and the time to apply water to full beneficial use under the terms and conditions of Permit S-43837 be extended from October 1, 2000 to October 1, 2050.
6. On June 17, 2003, notification of Harbor's Application for Extension of Time for Permit S-43837 was published in the Department's Weekly Public Notice. No public comments were received regarding the extension application.
7. On July 22, 2005, the permit holder submitted additional information to supplement and/or update their Application for Extension of Time. The amendment requested the extended time to complete construction be changed from October 1, 2050 to October 1, 2027, and the extended time to apply water to full beneficial use be changed from October 1, 2050 to October 1, 2027.
8. Harbor, Water Watch of Oregon and the Department entered into settlement discussions to resolve protests submitted on PFOs the Department issued approving Extensions of Time for three other permits held by Harbor. The Department has delayed issuance of a PFO on the Extension of Time request for Permit S-43837 pending resolution of these protests.
9. On August 1, 2017, again Harbor submitted additional supplemental information clarifying the projected peak daily demand and update revisions to their pending Application for Extension of Time. Harbor also requested to amend the time to complete construction be changed from October 1, 2027, to October 1, 2050, and the time to apply water to full beneficial use be changed from October 1, 2027, to October 1, 2050.

10. On November 19, 2018, Harbor Water People's Utility District, WaterWatch of Oregon and the Department executed a Settlement Agreement in the matter of Applications for Extensions of Time for Permit S-43837 (Application S-58045), Permit S-31365 (Application S-41825), Permit G-3240 (Application G-3316), and G-9438 (Application G-9502) all in the name of Harbor Water People's Utility District. The Settlement Agreement set forth certain terms and conditions to be included in the Proposed Final Order for the Extension of Time for Permit S-43837 and in the Final Orders for the Extensions of Time for Permits G-3240, G-9438, and S-31365. The Settlement Agreement is adopted and incorporated as if set forth fully herein (see Attachment A).

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)]

11. On May 14, 2003, the Department received a completed application for extension of time and the fee specified in ORS 536.050.

Start of Construction [OAR 690-315-0080(1)(b)]

12. Permit S-43837 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.

13. The remaining work to be accomplished under Permit S-43837 consists of completing construction including a surface water collector, the addition of six new pressure zones, and the installation of storage tanks, pressure reducing valves, and distribution lines; and applying water to full beneficial use.
14. As of June 29, 2005, the permit holder had not diverted any of the 7.0 cfs of water authorized under Permit S-43837 for municipal purposes. There is an undeveloped portion of 7.0 cfs of water under Permit S-43837 as per ORS 537.230(1).⁵

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 537.010(5) applies to surface water and ground water permits.

⁴ Section 5, Chapter 410, Oregon Laws 2005 and OAR 690-315-0070(3)(d).

⁵ Section 1, Chapter 704, Oregon Laws 2017.

15. In addition to the 7.0 cfs of water authorized under Permit S-43837 Harbor holds the following water use permits:
 - Permit S-31365 for 3.5 cfs of water from the Chetco River for quasi-municipal use;
 - Permit G-3240 for 3.5 cfs of water from a well within the Chetco River Basin for domestic use; the total quantity of water used under this permit together with the quantity used under Permit S-31365 may not exceed a total of 3.5 cfs;
 - Permit G-9438 for 7.0 cfs of water from a well within the Chetco River Basin for quasi-municipal use.
16. Harbor's water use permits total 17.5 cfs of water; however, per Settlement Agreement between Harbor Water People's Utility District, WaterWatch of Oregon and the Department dated November 19, 2018, water diverted and/or appropriated at any one time under any combination of Permits S-43837, S-31365, G-3240, or G-9438 may not exceed an instantaneous rate of 10.5 cfs, subject to additional conditions below.
17. According to Harbor, up to 0.5 cfs of water⁶ was diverted at a surface water intake well on the Chetco River under Permits S-31365 and G-3240 between the years 1967 and 1982. In 1982, the surface water intake well was abandoned when a Ranney Collector was constructed in the Chetco River. Water is currently utilized under Harbor's two groundwater Permits G-3240 and G-9438. Due to surface water treatment restrictions, Harbor's surface water use permits are not being exercised at this time. (*See also* 2000 Water System Master Plan (WSMP). (WSMP Section 4, Page 1)
18. Harbor's instantaneous peak water demand within its service area boundaries was 3.9 cfs in 2004.
19. According to Harbor's WSMP, in 2000, the population within the service boundary of Harbor Water People's Utility District was 3,800. Harbor estimates the population will increase at a growth rate of about 1 percent per year within its current boundaries, reaching an estimated population of 6,250 by the year 2050. (WSMP Section 2, Page 7)
20. According to Harbor, the City of Brookings and Harbor have an agreement that Harbor will serve water within City of Brookings' expanded Urban Growth Boundary (UGB) south of the Chetco River, which encompasses about 1,800 acres. According to Harbor, this will increase the population serviced by Harbor by over 2,800 people over the next 20 years.
21. According to Harbor, Harbor's peak day demand is projected to be approximately 10.5 cfs of water by the year 2050.

⁶ Extension applications for Permit S-31365 and Permit R-3240 each dated November 11, 1975 indicates water use in the maximum month was 10 million gallons, which is equivalent to 0.5 cfs.

22. Full development of Permit S-43837 is needed to address the present and future water demand of Harbor Water People's Utility District, including system redundancy and emergency use.
23. Harbor's request for an extension of time until October 1, 2050, to complete construction and to apply water to full beneficial use under the terms of Permit S-43837 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.

24. Prior to the issuance of Permit S-43837 on February 7, 1979, Harbor installed a surface water intake facility and the Hall Way II 500,000 gallon storage tank.
25. Work was accomplished (specified in the Application for Extension of Time) during the original development time frame.
26. During the last extension period, being October 1, 1995 to October 1, 2000, Harbor has accomplished the following work:
 - replaced the storage tank; and
 - replaced the pump station at Crown Terrace I.
27. Since October 1, 2000, Harbor has prepared a Water System Master Plan (WSMP) and prematurely submitted it to the Department on May 14, 2003 in an attempt to satisfy the condition requiring submittal of a Water Management and Conservation Plan (WMCP) that was proposed in the PFOs issued in 2004 and 2007 for the Extensions of Time for Harbor's three other permits.
28. According to Harbor, \$334,500 was invested to replace the existing surface water intake with a Ranney Collector. According to Harbor, the amount of investment in the original surface water intake, transmission line, and Hall Way II storage tank is unknown. Harbor estimates a \$35,700,000 investment is needed for the completion of this project. The Department recognizes that the investments to date are not unique to construction and development solely under S-43837 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by Harbor, 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 Harbor's water rights.

29. As of October 1, 2000, Harbor had not diverted any of the 7.0 cfs of water allowed for municipal purposes under the terms of this permit.
30. The Department has considered Harbor'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)]

31. The amount of investment in Ranney Collector is \$334,500. Harbor estimates an additional \$35,700,000 investment is needed for the completion of this project.

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

32. As described in Findings 13 through 22 above, Harbor has indicated, and the Department finds that Harbor must rely on full development of their Permit S-43837.
33. Harbor estimates an annual population growth rate of about 1 percent per year over a 50 year period, being the years 2000 to 2050.
34. Given the current water supply situation of Harbor, including current and expected demands, the need for system redundancy, and emergency water supply, there is a market and present demand for the water to be supplied under Permit S-43837.
35. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of any water, up to 7.0 cfs of water under Permit S-43837, shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). A "Development Limitation" condition" is specified under Item 3 of the "Conditions" section of this PFO to meet this requirement.

Fair Return Upon Investment *[OAR 690-315-0080(3)(e)]*

36. Harbor expects to obtain a fair and reasonable return on investment by continuing development of Permit S-43837.

Other Governmental Requirements *[OAR 690-315-0080(3)(f)]*

37. 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)]

38. Delay of development under Permit S-43837 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 to surface water treatment regulations which made it more economical in 1982 to install a Ranney Collector and develop Harbor's groundwater use.

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.

39. The pending municipal Application for Extension of Time for Permit S-43837 was delivered to ODFW on March 16, 2015, for ODFW's review under OAR-690-315-0080.
40. Notification that the pending municipal Application for Extension of Time for Permit S-43837 was delivered to ODFW for review was sent to Harbor on March 16, 2015.
41. Notification that the pending municipal Application for Extension of Time for Permit S-43837 was delivered to ODFW for review was published in the Department's Public Notice dated March 17, 2015. No public comments were received regarding this notice.
42. On May 29, 2015, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-43837 dated April 22, 2015.
43. Summary and Excerpts of Advice from ODFW:

Use of water under the portion of this permit that is undeveloped as of October 1, 2000,⁷ which is the completion date for application of water to full beneficial use authorized in the most recent extension of time, 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 the Chetco River will be affected by water use under this permit. ODFW's advice is based on the best available information and existing data.

ODFW has determined that use of the undeveloped portion of Permit S-43837 with recommended fish persistence conditions, in conjunction with use of water as authorized under three other permits also held by Harbor Water PUD, being S-31365, G-3240, or G-9438, also as conditioned, will maintain the persistence of listed fish species in the portions of waterways affected by water use under Permit S-43837. This determination includes the following parameters and conditions:

⁷ The analysis remains accurate under the revised date of June 29, 2005 because no water was diverted between October 1, 2000 and June 29, 2005.

- a. Harbor Water PUD holds four water rights on the Chetco River totaling 17.5 cfs, being Permit S-43837 for 7.0 cfs, Permit S-31365 for 3.5 cfs, G-3240 for 3.5 cfs and G-9438 for 7.0 cfs. The total quantity of water used under Permit G-3240 together with the quantity used under Permit S-31365 may not exceed 3.5 cfs.
- b. Water diverted and/or appropriated at any one time from any combination of Permits S-43837, S-31365, G-3240, or G-9438 will not exceed 10.5 cfs.
- c. With implementation of the conditions, the first 5.0 cfs of water used from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438 will maintain the persistence of listed fish species in the portions of waterways affected by water use under Permit S-43837.
- d. Without conditions, the use of additional water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438 beyond the first 5.0 cfs expressed in 43.c., above, will not maintain the persistence of listed fish species in the portions of waterways affected by water use under Permit S-43837.

ODFW recognizes that long term climatic variations will affect the amount of water in the Chetco River in any given year. In favorable water years, fish populations tend to increase and in unfavorable water years, fish populations contract. The long term objective for a listed species is to have the population increase to a sustainable level over time and to be able to maintain itself through natural fluctuations in the environment.

The target flows, in Table 1, below, are ODFW's recommended flows at or near the mouth of the Chetco River for maintaining the persistence of listed fish species in the Chetco River. Flows at the mouth were estimated at USGS Gage 1440000, plus 15%.

Additionally, when target flows at the mouth are less than or equal to 80.0 cfs, ODFW recommends diversion and/or appropriation of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438 be limited to 5.0 cfs.

Table 1

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN CHETCO RIVER AT OR NEAR THE MOUTH NEAR BROOKINGS, OREGON	
Month	Cubic Feet per Second
January – May	595
June	350
July	213
August	129
September	101

ODFW'S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN CHETCO RIVER AT OR NEAR THE MOUTH NEAR BROOKINGS, OREGON	
October	246
November – December	595

Location of Streamflow Measurement Point

ODFW has determined that adding 15% to the flows measured on the Chetco River at USGS Gage 14400000 near Brookings, OR is sufficient to determine if the target flows needed to maintain the persistence of listed fish are met within the Chetco River.

44. Department's Findings Based on Review of ODFW's Advice and Settlement Agreement between Harbor Water People's Utility District, WaterWatch of Oregon and the Department dated (Day, Month, Year):

There is an undeveloped portion of 7.0 cfs of water under Permit S-43837 as per OAR 690-315-0010(6)(g). For the purpose of conditioning this permit to maintain the persistence of fish, the Department finds that the amount of the undeveloped portion of water under Permit S-43837 is 7.0 cfs. Therefore, 7.0 cfs is the amount of water from the Chetco River under Permit S-30624 that must be conditioned for the persistence of listed fish species. Authorization to use any water under this permit can only be granted through the Department's review and approval of the municipal water user's future WMCPs (OAR 690-086). When ODFW's recommended target flows are missed, the Department's proposed conditions will result in a reduction in the amount of water conditioned for fish persistence under Permit S-43837 that can be diverted. The proposed conditions in this extension of time are based on the following findings:

- a. By Settlement Agreement dated November 19, 2018, the use of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438 is limited to a maximum total instantaneous rate of 10.5 cfs.
- b. By Settlement Agreement dated November 19, 2018, the total quantity of water withdrawn under this permit together with the quantity under permit G-9438 shall not exceed 7.0 cubic feet per second.
- c. With implementation of the **Conditions to Maintain the Persistence of Listed Fish Species**, the persistence of listed fish species in the portions of waterways affected by water use under the permit will be maintained by use of up to 5.0 cfs of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438. The use of up to the first 5.0 cfs of water authorized from any combination of Permits S-31365, S-43837, G-3240, or G-9438 is not subject to the water use reductions based on target flows described in the **LIMITATIONS AND CONDITIONS** section, 7.C.b below.

With implementation of the **Conditions to Maintain the Persistence of Listed Fish Species**, the persistence of listed fish species in the portions of waterways affected by water use under the permit will be maintained by use of up to 10.5 cfs of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438. The use of up to the 5.5 cfs of water authorized from any combination of Permits S-31365, S-43837, G-3240, or G-9438 beyond the first 5.0 cfs expressed in 44.b. above, is subject to curtailment under the fish persistence conditions described in the **LIMITATIONS AND CONDITIONS** section, 7.C.a, 7.C.b below and to the conditions in 6.

- d. The target flows needed to maintain the persistence of fish were determined at or near the mouth of the Chetco River.
- e. The flows needed to maintain the persistence of fish must be determined by the water user by adding 15% to a three-day average of the mean daily flows measured at USGS Gage 14400000 (located on the Chetco River near Brookings, OR). The 15% increase to the measured flows is to adjust for inflow into the Chetco River below the gage.
- f. When flows as determined in 44.d. above, are greater than 80.0 cfs, the use the 5.5 cfs of water subject to curtailment must be reduced in proportion to the degree to which the recommended target flows are being missed. ODFW's formula for determining the percent shortfall, or missed target flow is defined as:

$$(1 - [(Q - 5.5 \text{ cfs}) / Q_T]) \times 100\%,$$

where Q is the three-day average of the mean daily flows measured at USGS Gage 14400000 plus 15%; QT is the target flow (from Table 1); and 5.5 cfs is amount of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438 that is water subject to curtailment under these fish persistence conditions.

- g. When $Q \leq 80.0$ cfs, diversion and/or appropriation of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438 is limited to 5.0 cfs.

ODFW's advice recognized the diversions during the months of June through October are more likely to have adverse effects on fishery resources because significant rearing and migration are taking place, and natural flows are often low during this period of time.

- 45. The Department finds, based on ODFW's advice, that in the absence of conditions, the use of the undeveloped portion of Permit S-43837 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, stream flows would be a limiting factor for the listed fish species.
- 46. Based on ODFW's advice, the Department proposes to require conditions to maintain, in the portions of the waterways affected by water use under Permit S-43837, the

persistence of fish species listed as sensitive, threatened or endangered under state or federal law. (See Item 6 of the “Conditions” section of this PFO.)⁸

47. On December 1, 2015, the Department notified Harbor as per OAR 690-315-0080(2)(f) of ODFW’s written advice and the “Conditions to Maintain the Persistence of Listed Fish Species” proposed in this PFO for the pending municipal Application for Extension of Time for Permit S-43837.
48. On August 23, 2017, ODFW notified the Department that the “Conditions to Maintain the Persistence of Listed Fish” in the SETTLEMENT AGREEMENT are consistent with their advice.

CONCLUSIONS OF LAW

1. Harbor 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. Harbor has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. Pursuant to Section 5, Chapter 410, Oregon Laws 2005, the permit holder is not required to demonstrate that actual construction of the project began within one year of the date of issuance of the permit, as otherwise required by OAR 690-315-0080(1)(b).
4. Pursuant to ORS 540.510(3)(a), water under Permit S-43837 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
6. Completion of construction and full application of water to beneficial use can be completed by October 1, 2050⁹, as required by OAR 690-315-0080(1)(d).
7. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and the fair return upon the investment, the requirements of other governmental agencies, and

⁸ 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.

⁹ 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.

unforeseen events over which the water right permit holder had no control, and the Department has determined that Harbor has shown good cause for an extension of time to complete construction and to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).

8. As required by OAR 690-315-0090(3) and as described in Finding 34, above, and specified under Item 3 of the “Conditions” section of this PFO, the diversion of any water up to 7.0 cfs under Permit S-43837 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7).
9. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 37 through 46, 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 under this municipal use permit, in the absence of special conditions. Therefore, the diversion of water under Permit S-43837 will be subject to the conditions specified under Item 6 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-43837 from October 1, 2000 to October 1, 2050.

Extend the time to apply the water to beneficial use under Permit S-43837 from October 1, 2000 to October 1, 2050.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

For purposes of the “Limitations and Conditions,” permit shall mean the permit being referred to and any certificates, transfers, or permits arising out of the permit.

1. **Future Use Condition**

Any change of character of use under Permits G-3240, G-9438, S-31365 and S-43837 shall comply with existing statutes and rules and shall be limited to municipal purposes. Any change in the location of use shall comply with existing statutes and rules and shall be limited to the designated service areas for Harbor or the City of Brookings. This condition reflects an agreement that the Water Rights will not be offered for sale or be used by parties other than municipal providers, and will be limited to municipal purposes within the service area of Harbor and potentially City of Brookings in the future under a cooperative arrangement with the City of Brookings.

2. **Water Management and Conservation Plan**

In accordance with the Settlement Agreement, the permit holder shall submit a Water Management and Conservation Plan under OAR Chapter 690, Division 86 within 3 years of issuance of a final order approving Extensions of Time for Permits G-3240, G-9438, and S-31365. The Water Management and Conservation Plan for S-43837 shall be submitted in accordance with ORS 537.230, relating to permits issued for “municipal” use.

3. **Development Limitations**

No appropriation of water is currently allowed under this permit. Any appropriation of water up to 7.0 cfs shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of the Extension of Time Final Order. The amount of water used under Permit S-43837 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-43837 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.

4. **Combined Rate Limitations**

The point of appropriation for ground water permits G-3240 and G-9438 is identical to the points of diversion for surface water permits S-31365 and S-43837, and authorization for the use of ground water under Permits G-3240 and G-9438 is intended as an alternative to the use of surface water under Permits S-31365 and S-43837, respectively. Use of ground water or surface water under these four permits, and under any transfers or certificates issued for these four permits, shall be limited to the rates specified in each permit, and further limited pursuant to the conditions below, to a combined instantaneous rate of no more than 10.5 cfs.

Additionally, the total quantity of water withdrawn under this permit together with the quantity under permit G-9438 shall not exceed 7.0 cubic feet per second.

5. **Point of Diversion Limitation**

Use of Harbor point(s) of diversion specified in the permits or any subsequently issued certificates, transfers or permit amendments shall be limited to a combined total of no more than 10.5 cfs under any water rights held by Harbor or in combination with any permits held or utilized by the City of Brookings using Harbor point(s) of diversion.

6. **Limiting Water Use When Flows are at or Below 80 cfs at the Mouth of the Chetco River.**

When the three-day average in-stream flow in the Chetco River is less than 80 cfs at the mouth of the river, use of water under Permits G-3240, G-9438, S-31365 and S-43837 shall be limited to a combined total of 5.0 cfs and shall be further limited to use within the place of use of those permits. This limit shall also apply to any other water rights using Harbor point(s) of diversion. For purposes of this condition, flow at the mouth shall be calculated by using the three-day average of the mean daily flows measured at USGS Gage # 14400000 plus 15% to account for inflow below the gage. If a future replacement gage is installed, WRD, WaterWatch, Harbor and ODFW shall confer regarding a suitable way to calculate flow at the mouth of the Chetco River.

7. **Conditions to Maintain the Persistence of Listed Fish Species**

A. Use of any water under Permit S-43837 is subject to the following provisions:

- a. Water diverted and/or appropriated at any one time from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, may not exceed 10.5 cfs.
- b. The use of the first 5.0 cfs of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438, or subsequent water rights originating from these permits, is not and will not be subject to the fish persistence conditions described at 7.C.a below.
- c. The use any water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, beyond the first 5.0 cfs expressed in 7.A.b., above and up to the maximum allowed amount of 10.5 cfs , is subject to: 1) curtailment based on the Fish Persistence Target Flows described at 7.C.a below; and 2) limiting the combined diversion under Permits S-43837, S-31365, G-3240, or G-9438 to 5.0 cfs when the flow at or near the mouth of the Chetco River is less than or equal to 80 cfs described at 7.C.b below.

Therefore, all subsequent water right(s) originating from any of these water rights will include these Conditions to Maintain the Persistence of

Listed Fish Species. The legal use of this permit which is subject to conditions to maintain the persistence of listed fish species shall be determined among all the permit/water right holders of record; all the permit/water right holders of record subject to these Conditions to Maintain the Persistence of Listed Fish must ensure that these fish persistence conditions are met.

B. Fish Persistence Target Flows

Fish persistence target flows in the Chetco River as recommended by ODFW are in Table 2, below; flows “at or near the mouth of the Chetco River near Brookings, Oregon” are to be calculated by using the three-day average of the mean daily flows measured at the USGS Gage 14400000 plus 15%.

Table 2

ODFW’S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN CHETCO RIVER AT OR NEAR THE MOUTH near Brookings, Oregon	
Month	Cubic Feet per Second
January – May	595
June	350
July	213
August	129
September	101
October	246
November – December	595

a. Alternate Streamflow Measurement Point

The location of a streamflow measurement point as established in these Conditions to Maintain the Persistence of Listed Fish Species may be revised if the permit or water right holder 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.

C. Determining Water Use Reductions – Generally

a. Curtailment based on the Fish Persistence Target Flows

The maximum amount of water that can be diverted as a result of this fish persistence condition is determined by the total amount of water beyond 5.0 cfs being diverted and/or appropriated from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, in proportion to the amount by which the flows shown in Table 2 are missed. The percent of missed target flows is defined as:

$$(1 - [(QADJ - 5.5) / QT]) \times 100\%$$

where QADJ is the flow measured at USGS Gage 14400000 based on a three-day rolling average, plus 15%; QT is the target flow (from Table 2); and 5.5 cfs is the amount of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438, or subsequent water rights originating from these permits, subject to curtailment under these fish persistence conditions.

The percent by which the target flow is missed applied to the 5.5 cfs provides the maximum combined amount of water from these four permits that can be used as a result of this fish persistence condition, and is defined as:

$$5.5 - (5.5 \times \% \text{ missed target flows}),$$

where 5.5 cfs is the maximum amount of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438, or subsequent water rights originating from these permits, subject to curtailment under these fish persistence conditions.

b. Limiting the combined diversion under Permits S-43837, S-31365, G-3240, or G-9438 to 5.0 cfs when the flow at or near the mouth of the Chetco River is less than or equal to 80 cfs:

When $QADJ > 80.0$ and $QADJ - 5.5 > QT$, the amount of water being diverted and/ or appropriated from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438, or subsequent water rights originating from these permits, would not need to be reduced as a result of this fish persistence condition.

When $QADJ \leq 80.0$ cfs, diversion and/or appropriation of water from any combination, as authorized by Permits S-31365, S-43837, G-3240, or

G-9438, or subsequent water rights originating from these permits, is limited to 5.0 cfs.

D. Examples

Example 1: Target flow met

If on September 15, the last three mean daily flows at the gage were 109, 106, and 104 cfs, then the three-day rolling average would be 106.3 cfs, and QADJ would be 122.2 cfs.

$$106.3 + [(15\%/100\%) \times 106.3] = 122.2$$

The target flow (QT) for September 15 is 101 cfs. In this example, $QADJ - 5.5 \geq QT$.

$$122.2 - 5.5 \geq 101$$

Thus, the target flow (QT) would be met and the water user could divert and/or appropriate up to 10.5 cfs of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438.

Example 2: Target flow missed; QADJ > 80.0

Step 1: If on September 15, the average of the last three mean daily flows was 74.3 cfs, then the adjusted flow (QADJ) would be 85.4 cfs

$$74.3 + [(15\%/100\%) \times 74.3] = 85.4$$

Step 2: The adjusted flow of 85.4 is greater than 80.0, therefore $QADJ > 80.0$. Thus, the diversion and/or appropriation of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438 is not limited to 5.0 cfs, however, the use of water up to an additional 5.5 cfs is subject to curtailment under these fish persistence conditions as illustrated in Step 3, below.

Step 3: Since the adjusted flow (QADJ) is 85.4 cfs and the target flow (QT) is 101 cfs, then the target flow would be missed by 20.9%.

$$(1 - [(85.4 - 5.5) / 101]) \times 100\% = 20.9\%$$

Step 4: Given that 5.5 cfs is subject to curtailment, and this amount needs to be reduced by 20.9% (from Step 3), or 1.1 cfs, then 4.4 cfs is the maximum amount of the 5.5 cfs that could be diverted under any combination of the four permits.

$$(5.5 \times 20.9\%) / 100\% = 1.1$$

$$5.5 - 1.1 = 4.4$$

Step 5: The maximum amount of water that may be diverted and/or appropriated from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438 after curtailment would be 9.4 cfs (4.4 cfs from Step 4, plus the 5.0 cfs not subject to curtailment). (This maximum amount may be limited as illustrated in Step 6, below.)

$$4.4 + 5.0 = 9.4$$

Step 6: The calculated maximum amount of water that could be diverted due to the fish persistence condition may not exceed the amount of water to which the City is legally entitled to divert. For example, if the water user is only accessing water under the surface water rights, and the amount of water legally authorized¹⁰ for diversion is 2.5 cfs under Permit S-31365 and 2.0 cfs under Permit S-43837 then 4.5 cfs would be the maximum amount of diversion allowed under these permits, rather than 9.4 cfs from Step 5.

(Conversely, if the amount of water legally authorized for diversion under both permits is 10.5 cfs, then 9.4 cfs (from Step 5) would be the maximum amount of diversion allowed under these two permits – again assuming for the purpose of this example that the water user is only accessing surface water rights).

Example 3: Flows are less than or equal to 80.0 cfs (QADJ ≤ 80.0)

Step 1: If on September 15, the average of the last three mean daily flows was 61.9 cfs, then the adjusted flow (QADJ) would be 71.2 cfs

$$61.9 + [(15\%/100\%) \times 61.9] = 71.2$$

Step 2: The adjusted flow of $71.2 \leq 80.0$, therefore $QADJ \leq 80.0$.

Because the $QADJ \leq 80.0$, the water user could not divert and/or appropriate more than 5.0 cfs of water from any combination as authorized by Permits S-31365, S-43837, G-3240, or G-9438.

continued on following page

¹⁰ For example, authorization provided through a WMCP or partial perfection)

DATED: January 8, 2019



Dwight French
Water Right Services Division Administrator

*If you have any questions,
please check the information
box on the last page for the
appropriate names and phone
numbers.*

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **February 22, 2019** 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 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 Jeffrey D. Pierceall at 503-986-0802.

If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.

If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.

Address any correspondence to: Water Right Services Division
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266

Mailing List for Extension PFO Copies

PFO Date: January 8, 2019

Application S-58045

Permit S-43837

Original mailed to:

Harbor Water People's Utility District
PO Box 2437
Harbor, OR 97415

Copies sent to:

1. WRD - App. File S- 58045/ Permit S-43837
2. WRD - Watermaster District: 19 – Greg Wacker
3. Martha Pagel, Schwabe, Williamson & Wyatt
4. WaterWatch of Oregon

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

5. WRD – Kerry Cope– Notify of WMCP needed
Done by _____ *Date* _____

CASEWORKER: JDP

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