

**Oregon Water Resources Department
Water Rights Division**

In the Matter of the Application for an Extension of Time)
for Permit G-9438, Water Right Application G-9502, in the)
name of Harbor Water People’s Utility District)
FINAL ORDER
INCORPORATING
SETTLEMENT
AGREEMENT

Permit Information

Application File G-9502 / Permit G-9438

Basin 17 – South Coast Basin / Watermaster District 19

Date of Priority: January 3, 1980

Authorized Use of Water

Source of Water: One Well in the Chetco River Basin

Purpose or Use: Quasi-Municipal

Maximum Rate: 7.0 Cubic Feet per Second (cfs)

Appeal Rights

This is a final order in a contested case. This order is subject to judicial review under ORS 183.482. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

Application History

The Department issued Permit G-9438 on October 7, 1981, to Harbor Rural Water District (District). The permit called for completion of construction by October 1, 1983, and complete application of water to beneficial use by October 1, 1984. Three previous Extensions of Time have been approved for Permit G-9438. The most recent extension authorized completion of construction and complete application of water to beneficial use by October 1, 1999. On May 14, 2003, the District submitted an application to the Department for an extension of time for Permit G-9438. In accordance with OAR 690-315-0050(2), on November 13, 2007, the Department issued a Proposed Final Order proposing to extend the time to complete construction to October 1, 2020 and to extend the time to fully apply water to beneficial use to October 1, 2020. The protest period closed December 28, 2007, in accordance with OAR 690-315-0060(1). A timely protest was filed by WaterWatch of Oregon.

On November 19, 2018, Harbor Water People’s Utility District, WaterWatch of Oregon and the Department executed a Settlement Agreement thereby resolving WaterWatch’s protest. 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).

Except as expressly stated herein, the Department adopts and incorporates by reference the findings of fact in the Proposed Final Order for Permit G-9438 dated November 13, 2007.

Findings of Fact

The following corrections to the Findings of Fact section of the Proposed Final Order are necessary to accurately reflect the District's Application for Extension of Time:

Finding 11 of the Proposed Final Order is replaced as follows:

As of July 22, 2005, the permit holder has appropriated 0.4 cfs of the 7.0 cfs of water authorized under Permit G-9438 for quasi-municipal purposes.

Finding 12 of the Proposed Final Order is replaced as follows:

In addition to the 7.0 cfs of water authorized under Permit G-9438 for quasi-municipal use, the District holds the following rights:

- 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 S-43837 for 7.0 cfs of water from the Chetco River for municipal use.

The District's water use permits total 17.5 cfs of water; however, per the Settlement Agreement between Harbor Water People's Utility District, WaterWatch of Oregon and the Department dated November 19, 2018, and per ODFW's Division 315 Fish Persistence Evaluation for Permit S-43837 dated April 22, 2015, 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.

Finding 13 of the Proposed Final Order is replaced as follows:

In 2004, the District utilized a peak demand of 3.9 cfs of water, being 3.5 cfs under Permit G-3240 and 0.4 cfs under Permit G-9438. Due to surface water treatment restrictions, the District's surface water Permits S-43837 and S-31365 are not being exercised at this time.

Finding 18 of the Proposed Final Order is replaced as follows:

Construction of the well and water system began prior to the time specified in the permit, being October 7, 1982.

Finding 22 of the Proposed Final Order is replaced as follows:

Since the issuance of Permit G-9438 on October 7, 1981, approximately 0.4 cfs of the 7.0 cfs allowed has been appropriated for beneficial quasi-municipal purposes under the terms of this permit.

Finding 28 of the Proposed Final Order is replaced as follows:

OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of water beyond 0.4 cfs up to 3.5 cfs under Permit G-9438 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.

The following modification is made to the Conclusions of Law section of the Proposed Final Order:

Conclusion of Law 7 of the Proposed Final Order is replaced as follows:

As required by OAR 690-315-0090(3) and as described in Finding 28 above and specified under Item 2 of the "Conditions" section of this PFO, the diversion of water beyond 0.4 cfs up to 3.5 cfs under Permit G-9438 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).

The Department has concluded, based on the factors demonstrated by the applicant, and the terms of the Settlement Agreement, that Permit G-9438 may be extended 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**

Appropriation of water up to 0.40 cfs is currently allowed under this permit. Any additional appropriation of water up to 6.60 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 G-9438 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 G-9438 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 Limitation**

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, and further limited to the total quantity of water withdrawn under this permit together with the quantity under permit S-43837 shall not exceed 7.0 cubic feet per second.

5. **Point of Diversion Limitation**

Use of the 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 the 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 the 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 G-9438 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 Species 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. Curtaiment 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 authorized¹ 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 the following page

¹ For example, authorization provided through a WMCP or partial perfection)

Conclusion of Law

The applicant has demonstrated good cause for the permit extension pursuant to ORS 537.630, 539.010(5) and OAR 690-315-0080(3).

Order

The Extension of Time for Application G-9502, Permit G-9438, therefore, is approved subject to conditions contained herein. The deadline for completing construction is extended to October 1, 2050. The deadline for applying water to full beneficial use is extended to October 1, 2050.

DATED: March 1, 2019



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

If you have any questions about statements contained in this document, please contact Jeffrey Pierceall at (503) 986-0802.

If you have other questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at (503) 986-0900.
