

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an Extension of Time) PROPOSED
for Permit G-15325, Water Right Application G-15716,) FINAL
in the name of the City of Rockaway Beach) ORDER

Permit Information

Application File G-15716/ Permit G-15325

Basin 1 – North Coast Basin / Watermaster District 1

Date of Priority: February 28, 2002

Authorized Use of Water

Source of Water: a well in McMillan Creek Basin
Purpose or Use: Municipal
Maximum Rate: 0.223 cubic foot 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 G-15325, water right Application G-15716.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2007, to October 1, 2057.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources
City – City of Rockaway Beach
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
WMCP – Water Management and Conservation Plan
Manhattan Well - TILL 50955

Units of Measure

cfs – cubic feet per second

gpm – gallons per minute

AUTHORITY

Generally, see ORS 537.630 and OAR Chapter 690 Division 315.

ORS 537.630(3) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order and allow an extension of time, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use. 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.

OAR 690-315-0050(5) authorizes the Department to include in an extension order, but is not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for 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 Water Management and Conservation Plan under OAR Chapter 690, Division 86.

FINDINGS OF FACT

1. On January 30, 2003, Permit G-15325 was issued by the Department. The permit authorizes the use of up to 0.223 cfs of water from a well in McMillan Creek Basin for municipal use. The permit specifies that complete application of water was to be made on or before October 1, 2007.
2. The permit holder, the City of Rockaway Beach (City), submitted an “Application for Extension of Time” (Application) to the Department on August 16, 2019, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15325 be extended from October 1, 2007, to October 1, 2057. This is the first extension request for Permit G-15325.
3. Notification of the City’s Application for Extension of Time for Permit G-15325 was published in the Department’s Public Notice dated August 20, 2019. No public comments were received regarding the extension application.

Review Criteria for Municipal 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. 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)]

4. On August 16, 2019, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

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

5. Construction of the well began prior to permit issuance.
6. According to the well log received by the Department on February 20, 2002, TILL 50955 (Manhattan Well) began June 8, 2001.

Based on Findings of Fact (FOF) 5 and 6, the Department has determined that construction of Manhattan Well began prior to October 1, 2007.

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c), (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.

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 539.010(5) applies to surface water and ground water permits.

7. The remaining work to be accomplished under Permit G-15325 consists of completing construction and applying water to full beneficial use.
8. As of October 1, 2017, the City had appropriated 0.156 cfs of the 0.223 cfs of water authorized under Permit G-15325 for municipal purposes. There is an undeveloped portion of 0.067 cfs of water under Permit G-15325.
9. In addition to the 0.223 cfs of water authorized under Permit G-15325 the City holds the following rights for municipal use:
 - Transfer T-11986 (Certificate 47952) for 1.0 cfs of water from Jetty Creek tributary to Pacific Ocean;
 - Transfer T-11986 (Certificate 88869) for 1.0 cfs of water from Jetty Creek tributary to Pacific Ocean;
 - Certificate 26097 for 0.26 cfs of water from McMillan Creek tributary to Nehalem Bay (river);
 - Certificate 30421 for 0.26 cfs of water from McMillan Creek tributary to Nehalem River;
 - Certificate 30423 for 0.5 cfs of water from McMillan Creek tributary to Nehalem River;
 - Certificate 38987 for 0.5 cfs of water from Heitmiller Creek, tributary to Pacific Ocean;
 - Certificate 936 for 0.5 cfs of water from Spring Creek and Steinhilber Creek, tributaries to Nehalem Bay; and
 - Certificate 82449 for 0.78 cfs of water from two wells in the Nehalem Bay basin.

These water rights and permits total 5.023 of water, being 1.003 cfs of ground water, and 4.02 cfs of live flow (surface) water. The City currently utilizes water only under Certificate 82249, Transfer T-11986, and Permit G-15325. The City currently does not have infrastructure to utilize water under any other municipal certificate held by the City.

10. According to the City, their peak water demand within its service area boundaries was 2.79 cfs in 2012.
11. As of 2012, the permanent population within the service boundary of the City of Rockaway Beach was 1,350, with an estimated non-permanent resident population of 4,731. The City of Rockaway Beach estimates the population will increase at growth rate of 1.0 percent per year, reaching an estimated permanent population of 1,990, with an estimated non-permanent resident population of 6,974 by the year 2057. The City's non-permanent residents include the tourist population as well as the populations of areas served which are outside the City's service area.
12. The City supplies water to Nedonna Beach, Twin Rocks, Manhattan Beach, and Ocean Lake Development.
13. According to the City, their peak day demand is projected to be approximately 4.21 cfs of water by the year 2057.

14. Nedonna Beach, Twin Rocks, Manhattan Beach, and Ocean Lake Development are located outside of the place use authorized by Permit G-15325. However, ORS 540.510(3)(a) allows water use under a permit issued to a municipality to be applied to beneficial use on lands to which the right is not appurtenant if the use continues to be for municipal purposes and would not interfere or impair prior vested water rights.
15. Full development of Permit G-15325 is needed to address the present and future water demand of the City, including system redundancy and emergency use.
16. Based on Findings of Fact 9 through 15, the Department has determined that the City's request for an extension of time until October 1, 2057, to apply water to full beneficial use under the terms and conditions of Permit G-15325 is both reasonable and necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g) and (4)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3) and OAR 690-315-0080(4).

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.

17. Prior to the issuance of Permit G-15325 on January 30, 2003, the City constructed Manhattan Well.
18. Work was accomplished (specified in the Application for Extension of Time) during the original development time frame under Permit G-15325.
19. Since October 1, 2007, the City has submitted a Water Management and Conservation Plan.

The Department has determined that work has been accomplished within the time authorized by the permit, which provides evidence of good cause and reasonable diligence in developing the permit.

20. As of August 16, 2019, the City has invested approximately \$100,000, which is approximately 17 percent of the total projected cost for complete development of this project. The City estimates an additional \$500,000 investment is needed for the completion of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under G-15325, other costs included in this accounting are not partitioned out for G-15325 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the City, and/or (2) they are generated from individual activities counted towards reasonable diligence and good faith as listed in OAR 690-315-0080(4) which are not associated with just this permit, but with the development and exercise of all the City's water rights.

21. As of October 1, 2017, 0.156 cfs of the 0.223 cfs allowed has been appropriated from Manhattan Well for beneficial municipal purposes under the terms of this permit.
22. The Department has considered the City's compliance with conditions, and did not identify any concerns.

Cost to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0080(3)(b)]

23. As of August 16, 2019, the City has invested approximately \$100,000, which is 17 percent of the total projected cost for complete development of this project. The City estimates an additional \$500,000 investment is needed for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d) and (5)(a-f)]

For municipal or quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to 690-315-0080(3)(d), the Department shall also consider, but is not limited to, the factors in 690-315-0080(5)(a-f).

24. The amount of water available to satisfy other affected water rights and scenic waterway flows; special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0080(5)(a-f)].
 - a. The amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit G-15325; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined at such time that such application for a new water right is submitted. The point of appropriation for Permit G-15325 is not located within a limited or critical ground water area. The point of appropriation for Permit G-15325, located within the McMillan Creek Basin, is not located within or above any state or federal scenic waterway. The point of appropriation is within areas ranked low for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife. The point of appropriation is not in an area listed by the Department of Environmental Quality as a water quality limited stream.

Economic investment in the project to date [OAR 690-315-0080(5)(d)].

25. As of August 16, 2019, the City has invested \$100,000, which is 17 percent of the total projected cost for complete development of this project. The City estimates an additional \$500,000 investment is needed for the completion of this project.

Other economic interests dependent on completion of the project [OAR 690-315-0080(5)(e)].

26. None have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0080(5)(f)].

27. As described in Findings 9 through 15 the City of Rockaway Beach has indicated, and the Department finds that the City must rely on full development of Permit G- 15325 to meet its present and future water demands.
28. City of Rockaway Beach projects a population increase of 1 percent per year over the next 45 years and also expects commercial and industrial growth.
29. Given the current water supply situation of the City as well as current and expected demands, there is a market and present demand for the water to be supplied under Permit G-15325.
30. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that appropriation of water beyond 0.156 cfs (not to exceed the maximum amount authorized under this permit, being 0.223 cfs) under Permit G-15325 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 which grants access to a greater appropriation of water under the permit consistent with OAR 690-086-0130(7). A “Development Limitation” condition” is specified under Item 1 of the “Conditions” section of this PFO to meet this requirement.

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

31. The City employs generally accepted utility rate structure, which includes a basic service charge for water use up to 1,600 cubic feet, with an additional charge for each 100 cubic feet consumed above the base volume. Use and income from the permitted water development project would likely result in reasonable returns upon the investment made in the project to date.

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

32. 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)]

33. Delay of development under Permit G-15325 was due, in part, to the water quality issues with the Manhattan Well, and the cost associated with the construction of an additional well.

CONCLUSIONS OF LAW

1. The City is entitled to apply for an extension of time to completely apply water to the full beneficial use pursuant to ORS 537.630(2).
2. The City 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. As required by OAR 690-315-0080(1)(b), the permit holder was able to demonstrate that construction of the well began (commenced) within the time period required by ORS 537.630(2), being no later than October 1, 2007, as specified in the permit. ORS 537.630(2) provides that the Department may only allow an extension of time to complete construction or to perfect a water right beyond the specified permit under certain conditions. The time to begin construction may not be extended.
4. Pursuant to ORS 540.510(3)(a) and (b), water under Permit G-15325 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
6. Full application of water to beneficial use can be completed by October 1, 2057⁴ pursuant to 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 unforeseen events over which the water right permit holder had no control, and the Department has determined that the City has shown good cause for an extension of time 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 30, above, and specified under Item 1 of the "Conditions" section of this PFO, the appropriation of water beyond 0.156 cfs (not to exceed the maximum amount authorized under this permit, being 0.223 cfs) under Permit G-15325 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of appropriation of water under the permit consistent with OAR 690-086-0130(7).

⁴ Pursuant to ORS 537.630(5), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

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 apply the water to beneficial use under Permit G-15325 from October 1, 2007, to October 1, 2057.

Subject to the following condition:

CONDITIONS

1. **Development Limitations**

A maximum appropriation of 0.156 cfs of water is currently allowed under Permit G-15325. Any appropriation of water beyond 0.156 cfs (not to exceed the maximum amount authorized under the permit, being 0.223 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 appropriation 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 this Final Order. The amount of water used under Permit G-15325 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

The Development Limitation established in the above paragraph supersedes any prior limitation of the appropriation of water under Permit G-15325 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.

DATED: October 1, 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 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 **November 15, 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 the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have any questions about statements contained in this document, please contact Jeffrey 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
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