

Oregon DEQ Division 33 Review Summary Sheet



Application Information

Applicant Name:	Yoram Levy; Jai B Levy	Application Number:	G-18774
Basin & Sub-basin:	Applegate River Basin; Williams Creek Subbasin	Requested Water Amount:	0.01 CFS
Nearest Surface Water:	East Fork Williams Creek; Williams Creek	Nearest Receiving Waterbody:	East Fork Williams Creek; Williams Creek
Proposed Use:	Nursery Use	Requested Period of Use:	Year Round

Division 33 Geographic Area

<input type="checkbox"/> Lower Columbia <input type="checkbox"/> Upper Columbia <input checked="" type="checkbox"/> Statewide	
Upper and Lower Columbia Basins only: Based upon the review completed below, does the proposed use comply with existing state and federal water quality standards or may conditions be applied to bring the use into compliance?	<input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> Insufficient data
Statewide: Will the proposed use result in water quality impacts that will cause either "loss" or "net loss" of essential habitat of sensitive threatened or endangered (ST&E) fish species? (Note: the presence of ST&E fish species is determined by Oregon Department of Fish and Wildlife.)	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> Insufficient data

Recommended Pre-Proposed Final Order Actions

1.	DEQ recommends that the applicant provide suitable replacement water as mitigation for anticipated impacts to water quality and more specifically the habitat of sensitive, threatened, and endangered fish species. Additional mitigation may be required from other Interagency Review Team members (for example: OWRD may require mitigation for periods when water is not available). Surface water flow mitigation is unlikely to provide the same benefit that groundwater can provide to gaining stream reaches. However, if groundwater mitigation is unavailable within the same aquifer, surface water mitigation may provide suitable mitigation.
2.	
3.	
Mitigation Obligation <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes	
Prior to issuance of a Proposed Final Order, the applicant shall submit a mitigation proposal that is of no less volume and rate than the permitted use. The proposal shall include water that is sourced upstream of the point of diversion or appropriation, or the uppermost point on the stream at which the potential for surface water interference occurs. If a surface water right is used for mitigation, it shall be instream for the April 1 – November 30 time period and of similar water quality. The applicant should contact their OWRD caseworker to discuss flow mitigation options.	

Recommended Permit Conditions

1.	Water Quality: All water use under this permit shall comply with state and federal water quality laws. The permittee shall not violate any state and federal water quality standards, shall not cause pollution of any waters of the state, and shall not place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means. The use may be restricted if the
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quality of source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards.	
2. Agricultural Water Quality Management Area Rules: The permittee shall comply with basin-specific Agricultural Water Quality Management Area Rules described in Oregon Administrative Rule Chapter 603-095. The permittee shall protect riparian areas, including through irrigation practices and the management of any livestock, allowing site capable vegetation to establish and grow along streams, while providing the following functions: shade (on perennial and some intermittent streams), bank stability, and infiltration or filtration of overland runoff.	
3.	
4.	
Additional Reviewer comments <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	
[Use this space to describe any of the following: reasoning to substantiate permit conditions; examples of additional information that may allow or disallow the use; and why any variations to the standard Division 33 review process were necessary. Designate conditions related to Division 310 with an asterisk.]	
Interagency consultation: [Describe any substantial interagency consultation. Who was contacted and what was discussed?]	
DEQ review prepared by: Brian Creutzburg	Date complete: 09/09/2019

ODA Review Request

ODA review requested: <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes	Date review sent to ODA: 09/09/2019
ODA reviewer: Paul Measeles	ODA review date: 09/18/2018
ODA comments <input checked="" type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/> Yes	
[ODA: enter the results of your review here. Designate conditions related to Division 310 with an asterisk.]	

Antidegradation Policy:

The purpose of DEQ’s Antidegradation Policy (OAR 340-041-0004(1)) is to guide decisions that affect water quality to prevent unnecessary further degradation from new or increased point and nonpoint sources of pollution, and to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses. Oregon’s Antidegradation Policy allows exemptions and conditions for new or increased water use.

1. Temporary Use or Net Benefit

Does the applicant propose a temporary use in response to an emergency, a restoration activity that the DEQ has determined provides a net ecological benefit, or a temporary (lasting less than six months) use to protect human health and welfare, for which the applicant has demonstrated that they will minimize adverse effects to threatened and endangered species? No Yes

If yes, recommend approval of the application and identify conditions necessary to protect water quality for the habitat of ST&E fish species. You may skip to Question 7.

2. Outstanding Resource Water

Does the applicant propose withdrawing directly from an **Outstanding Resource Water** with critical habitat for ST&E fish species? No Yes

If yes, then prior to permit issuance, the applicant must provide suitable flow mitigation. You may skip to question 7.

3. Water Quality Limited

Is this source **Water Quality Limited** or a tributary to a water quality limited water body? Note: limit downstream review to 6th field HUC for parameters that diminished flow can affect (temperature, dissolved oxygen, pH, etc.). No Yes

Integrated Report 303(d) List Summary Table

Water Body (Stream/Lake)	River Miles	Parameter	Season	Criteria	Beneficial Uses	Status
Applegate River	0 to 46.8	Temperature	Summer	Rearing: 17.8 C	Anadromous fish passage; Salmonid fish rearing	Cat 4A: Water quality limited, TMDL approved
Applegate River	0 to 46.8	Flow Modification	Undefined	The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish may not be allowed.	Resident fish and aquatic life; Salmonid fish rearing; Salmonid fish spawning	Cat 4C: Water quality limited, not a pollutant
Applegate River	0 to 32.4	Dissolved Oxygen	October 15 - May 15	Spawning: Not less than 11.0 mg/L or 95% of saturation	Salmon and steelhead spawning	Cat 5: Water quality limited, 303(d) list, TMDL needed
Applegate River	0 to 46.8	pH	Summer	pH 6.5 to 8.5	Water contact recreation; Resident fish and aquatic life; Salmonid fish spawning; Salmonid fish rearing; Anadromous fish passage	Cat 5: Water quality limited, 303(d) list, TMDL needed
Williams Creek	0 to 7.1	Temperature	Summer	Rearing: 17.8 C	Anadromous fish passage; Salmonid fish rearing	Cat 4A: Water quality limited, TMDL approved
Williams Creek	0 to 7.1	Dissolved Oxygen	Summer	Cold water: Not less than 8.0 mg/l or 90% of saturation	Salmonid fish rearing; Anadromous fish passage	Cat 5: Water quality limited, 303(d) list, TMDL needed
East Fork Williams Creek	0 to 2.4	Dissolved Oxygen	Summer	Cold water: Not less than 8.0 mg/l or 90% of saturation	Salmonid fish rearing; Anadromous fish passage	Cat 5: Water quality limited, 303(d) list, TMDL needed

Analysis: Streamflow rates are known to strongly influence temperature and metals concentrations. When stream-flow rates are lowered, the remaining flow will have a lower heat capacity. Oxygen is less readily dissolved in warm water, and cooler water tends to have higher amounts of dissolved oxygen. Species that are adapted to cold water environments tend to require higher levels of dissolved oxygen. High water temperatures combined with low dissolved oxygen concentrations are among the strongest stressors to aquatic life. Temperature and dissolved oxygen impairments will be exacerbated by any stream-flow reduction associated with the proposed withdrawal. The capacity of a waterway to assimilate pollution is also

flow dependent. In summary, reduced flows can harm or stress stream biota, increase the concentrations of metals, and extirpate cold-adapted species from areas where they have occurred historically.

Recommended Conditions: **Flow Mitigation Obligation, Water Quality, Agricultural Water Quality Management Area Rules**

4. Total Maximum Daily Load Summary

Are there TMDLs established for parameters identified as being affected by flow modification? No Yes

Analysis: Applegate Subbasin Total Maximum Daily Load, 2003; Rogue River Basin TMDL, 2008. Temperature TMDL includes all perennial and intermittent streams within the Rogue Basin that are not already addressed by an existing TMDL.

Salmonids, often referred to as cold water fish, and some amphibians are highly sensitive to temperature. In particular, Chinook salmon (*Oncorhynchus tshawytscha*) and coho salmon (*Oncorhynchus kisutch*) are among the most temperature sensitive of the cold water fish species in the Applegate subbasin. Excessive summer water temperatures have been recorded in a number of tributaries and the mainstem Applegate River. These high summer temperatures are reducing the quality of rearing and spawning habitat for chinook and coho salmon, steelhead and resident rainbow trout. The potential causes of the high water temperatures include past forest management within riparian areas, upslope timber harvest practices, agricultural land use within the riparian area, road construction and maintenance, and rural residential development near streams and rivers.

All of the streams in the Rogue River Basin are designated as either core cold-water habitat or salmon and trout rearing and migration habitat. In most streams, a major source of temperature impairment is the removal of near stream vegetation leading to increased solar radiation reaching the water. The influence of river flow is generally inversely related to the daily maximum stream temperature with higher flows moderating the diel swing of temperatures holding everything else unchanged. Diversion of water from the Rogue River and tributaries was generally shown via water quality modeling to decrease the ability of stream to assimilate heat load and result in warmer stream temperatures.

Monitoring has shown that water quality in the Applegate Subbasin does not meet state water quality criteria at all times of the year. The numeric temperature criteria for cold water salmonids in the Applegate Subbasin is a seven (7) day moving average of daily maximum temperature not to exceed 64°F (17.8°C) during times when salmonid rearing is a beneficial use (August-September) and 55°F (12.8°C) during times and in waters that support salmon spawning, egg incubation and fry emergence from the egg and in gravels (October-July).

The Oregon Environmental Quality Commission (OEQC) has adopted numeric and narrative water quality standards to protect designated beneficial uses. In practice, water quality standards have been set at a level to protect the most sensitive beneficial uses and seasonal standards may be applied for uses that do not occur year-round. Cold-water aquatic life such as salmon and trout are the most sensitive beneficial uses occurring in the Applegate Subbasin.

A seven-day moving average of daily maximums (7-day statistic) was adopted as the statistical measure of the stream temperature standard. Absolute numeric criteria are deemed action levels and indicators of water quality standard compliance. Unless specifically allowed under a DEQ approved surface water temperature management plan (as required under (OAR 340-041-0026(3)(a)(D))), no measurable surface water temperature increase resulting from anthropogenic activities is allowed in State of Oregon Waters determined out of compliance with the temperature criteria.

Pollutants: Human caused temperature increases from (1) warm water discharge to surface waters (2) increased solar radiation loading, and (3) flow modification that affects natural thermal regimes.
The proposed withdrawal may impact instream flows during critical periods of the salmonid life cycle.

Recommended Conditions: **Flow Mitigation Obligation, Water Quality, Agricultural Water Quality Management Area Rules**

5. Cumulative Withdrawals Effects

Is it likely that the proposed activity, together with existing withdrawals in the OWRD’s Water Availability Basin (WAB), will lower water quality and impair aquatic life? No Yes

Water Availability Summary Table

Percent of natural flow = (consumptive use/natural stream flow)*100. See Appendix for additional instructions.

[Water Availability Basin]: WILLIAMS CR > APPLGATE R - AT MOUTH

Watershed ID	Exceedance Level	Month	Natural Stream Flow	Consumptive Use	Expected Stream Flow	Instream Requirement	Net Water Available	Percent of Flow
70981	50	JAN	175	1.1	174	110	63.9	0.6
70981	50	FEB	235	1.5	234	110	124	0.6
70981	50	MAR	173	1.1	172	110	61.9	0.6
70981	50	APR	111	3.7	107	110	-2.7	3.3
70981	50	MAY	45.9	5.81	40.1	65	-24.9	12.7
70981	50	JUN	18.4	8.13	10.3	40	-29.7	44.2
70981	50	JUL	6.26	10.9	-4.6	15	-19.6	174.1
70981	50	AUG	3.17	9.03	-5.86	5	-10.9	284.9
70981	50	SEP	2.37	6.02	-3.65	50	-53.7	254.0
70981	50	OCT	3.79	2.15	1.64	80	-78.4	56.7
70981	50	NOV	22.7	0.457	22.2	80	-57.8	2.0
70981	50	DEC	120	0.759	119	110	9.24	0.6
70981	50	ANN	54800	3070	52600	53300	15200	5.6

Monthly flow in Cubic Feet per Second (CFS). Annual flow in Acre Feet (AF). Highlight months that exceed 20% of percent of flow.

6. Flow Modification Compliance with State and Federal Water Quality Standards

Based on responses to questions 3, 4, and 5, is the use in compliance with state and federal water quality standards or can compliance with state and federal water quality standards be assured, and ST&E habitat loss prevented by limiting the amount diverted, period of use, or by imposing permit condition(s)?

No Yes

- If yes:

Recommended Conditions: **Flow Mitigation Obligation, Water Quality, Agricultural Water Quality Management Area Rules**

- If no, can **flow mitigation** ensure compliance with state and federal water quality standards and prevent loss of ST&E habitat? No Yes

7. Compliance with other State and Federal Water Quality Standards

ORS 468B.025 prohibits pollution of waters of the state. Are there additional water quality impairments that would result from this proposed use by degrading surface water or groundwater quality?

No Yes

If water quality can be protected by applying permit conditions, then select all appropriate conditions from the standardized menu of conditions.

Recommended conditions: Flow Mitigation Obligation, Water Quality, Agricultural Water Quality Management Area Rules
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PRE-PROPOSED FINAL ORDER ACTIONS

DEQ recommends that the applicant provide suitable replacement water as mitigation for anticipated impacts to water quality and more specifically the habitat of sensitive, threatened, and endangered fish species. Additional mitigation may be required from other Interagency Review Team members (for example: OWRD may require mitigation for periods when water is not available). Surface water flow mitigation is unlikely to provide the same benefit that groundwater can provide to gaining stream reaches. However, if groundwater mitigation is unavailable within the same aquifer, surface water mitigation may provide suitable mitigation.

Flow Mitigation Obligation:

Prior to issuance of a Proposed Final Order, the applicant shall submit a mitigation proposal that is of no less volume and rate than the permitted use. The proposal shall include water that is sourced upstream of the point of diversion or appropriation, or the uppermost point on the stream at which the potential for surface water interference occurs. If a surface water right is used for mitigation, it shall be instream for the *month - month time period* and of similar water quality. The applicant should contact their OWRD caseworker to discuss flow mitigation options.

Riparian: If the riparian area is disturbed in the process of developing, modifying or repairing a point of diversion under this water use permit, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with the Oregon Department of Fish and Wildlife's Habitat Mitigation Policy described in Oregon Administrative Rule OAR Chapter 635-415. Prior to development, modification or repairs at the point of diversion, the permittee shall submit, to the Oregon Water Resources Department, either a Riparian Mitigation Plan approved in writing by Oregon Department of Fish and Wildlife (ODFW) or a written declaration from ODFW that riparian mitigation is not necessary. The permittee shall maintain the riparian area for the life of the permit and subsequent certificate per the approved Riparian Mitigation Plan. The permittee is hereby directed to contact the local Oregon Department of Fish and Wildlife Fish Biologist prior to development of the point of diversion.

Water Storage Construction: The applicant shall locate the reservoir outside of the stream's natural channel. *Identify waterbody and set back to prevent stream capture and justification for distance selected.*

(Note to reviewer: The 1200C permit requires a 50-foot setback, which is cited from the National General Construction Permit OAR-660-023-0090(5). Requiring the storage reservoir to be outside of the mapped 100 year floodway may also be a protective buffer.)

STANDARDIZED MENU OF CONDITIONS

Water Quality: All water use under this permit shall comply with state and federal water quality laws. The permittee shall not violate any state and federal water quality standards, shall not cause pollution of any waters of the state, and shall not place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means. The use may be restricted if the quality of source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards.

Agricultural Water Quality Management Area Rules: The permittee shall comply with basin-specific Agricultural Water Quality Management Area Rules described in Oregon Administrative Rule Chapter 603-095. The permittee shall protect riparian areas, including through irrigation practices and the management of any livestock, allowing site capable vegetation to establish and grow along streams, while providing the following functions: shade (on perennial and some intermittent streams), bank stability, and infiltration or filtration of overland runoff.

Flow Restrictor: The permittee shall install a flow control valve on the diversion system to limit use to the permitted rate. The valve shall be in place, functional, and verified by the Certified Water Rights Examiner before a certificate is issued. The valve or a suitable replacement shall remain in place for the life of the water right.

Limit Rate: Water withdrawal shall be limited to *Enter CFS or AF for the defined period, or a month by month rate or volume.*

Limit Period of Use: Water use shall be limited to the period: *start date through end date.*
(Note to reviewer: Do not split the irrigation season. Require mitigation if water is not available during the requested time period.)

Limit Diversion: The permittee shall not divert water under this water use permit unless streamflow in the *waterbody name* is at or above *CFS* cubic foot per second, as determined at Gaging Station ID _____.

Off-Channel Stored Water Releases: The permittee shall not release polluted water from this off-channel reservoir into waters of the state except when the release is directed by the State Engineer to prevent dam failure.

On-Channel Reservoir: The permittee shall design and operate the water storage facility such that all waters within and below the reservoir meet water quality criteria. The permittee shall develop a reservoir operations plan that details how water quality criteria and standards will be met. A Certified Water Rights Examiner shall verify that the reservoir operations are consistent with the plan before a certificate is issued. The reservoir operator shall maintain a copy of the plan and make it available for review upon request.

Restrict Reservoir Release: To prevent pollution downstream, the permittee shall not release water from the reservoir when the flow at Gaging Station ID _____ (*gage name*) is below the Mean Daily Discharge of *CFS* (discharge which was equaled or exceeded for 90% percent of the time) except when the release is directed by the State Engineer to prevent dam failure.

Live Flow: Once the allocated volume has been stored, permittee shall pass all live flow downstream at a rate equal to inflow, using methods that protect instream water quality.

Lining: The permittee shall line the reservoir with *include material or allowable infiltration rate* to minimize seepage and protect groundwater quality per Oregon Administrative Rule 340-040. The liner is to be in place, inspected, and approved by the Certified Water Rights examiner prior to storage of water.* If the liner fails, the water user shall replace it within one calendar year.

Site-Specific Condition: The permittee shall

* OAR 690-410-0010(2)(a), OAR 690-310-0120, OAR 690-310-0140

Appendix: General Overview, Instructions for Water Availability Analysis, and Process Flow Chart

General Overview

The purpose of OAR Chapter 690, Division 33 is to aid the Oregon Water Resources Department (OWRD) in determining whether a proposed use will impair or be detrimental to the public interest with regard to listed sensitive, threatened, or endangered (ST&E) fish species. Oregon's stream temperature, dissolved oxygen (DO), pH and several other water quality standards are based on the life cycle needs of salmonids and other resident fish and aquatic life. Exceeding the standards can disrupt the life cycle of a ST&E fish species and may cause death. In addition, OWRD must consider water quality impacts as part of a public interest review, OAR 690-310-0120. Water quality impacts and conditions unrelated to ST&E species should be noted as "Division 310" in the recommendations to OWRD. The DEQ's Water Right Application Review Procedures document contains a full description of the review process.

The two main categories of Division 33 reviews are based on the geographic distribution of ST&E fish species:

- **For Proposed Uses in the Columbia River Basin**, reviews must determine whether a proposed use complies with existing state and federal water quality standards. Upper Columbia applications specifically require applicants to provide evidence that the proposed use complies with existing state and federal water quality standards. Geographic scope: Columbia River Basin (includes all waters that ultimately drain into the Columbia River).
- **For Proposed Uses Statewide**, review is conducted under the "Statewide review" procedure. Statewide reviews must determine whether a proposed use may affect ST&E fish species habitat. The statewide review procedure is intended to identify permit conditions that can prevent the "loss" or "net loss" of essential habitat of ST&E fish species. When permit conditions cannot be identified that meet this standard, then the DEQ recommends denial of the permit. Geographic scope: all areas outside the Columbia River Basin where OWRD determines ST&E fish species are present.

Instructions for Populating the Water Availability Summary Table using data from OWRD's WAB (Section 5)

- Open OWRD's Water Availability Reporting System.
- Search for the water availability basin of interest. Select 50% exceedance. The 50% exceedance stream flow is the stream flow that occurs at least half of the time.
- The water availability analysis will display a nested list of watersheds that contain the POD. Select the highest nesting order WAB that contains the POD.
- Download to an Excel spreadsheet. Percent of flow is calculated using this equation:

$$\text{Percent of Flow} = \frac{\text{Consumptive Use}}{\text{Natural Stream Flow}} * 100$$

You may choose to add the proposed rate (or storage amount) to the consumptive use.

Instructions for Water Availability Analysis

To complete Section 6, review and consider the cumulative impact of consumptive withdrawals using the OWRD WAB. All water withdrawals and the following factors should be considered when conducting a water availability analysis.

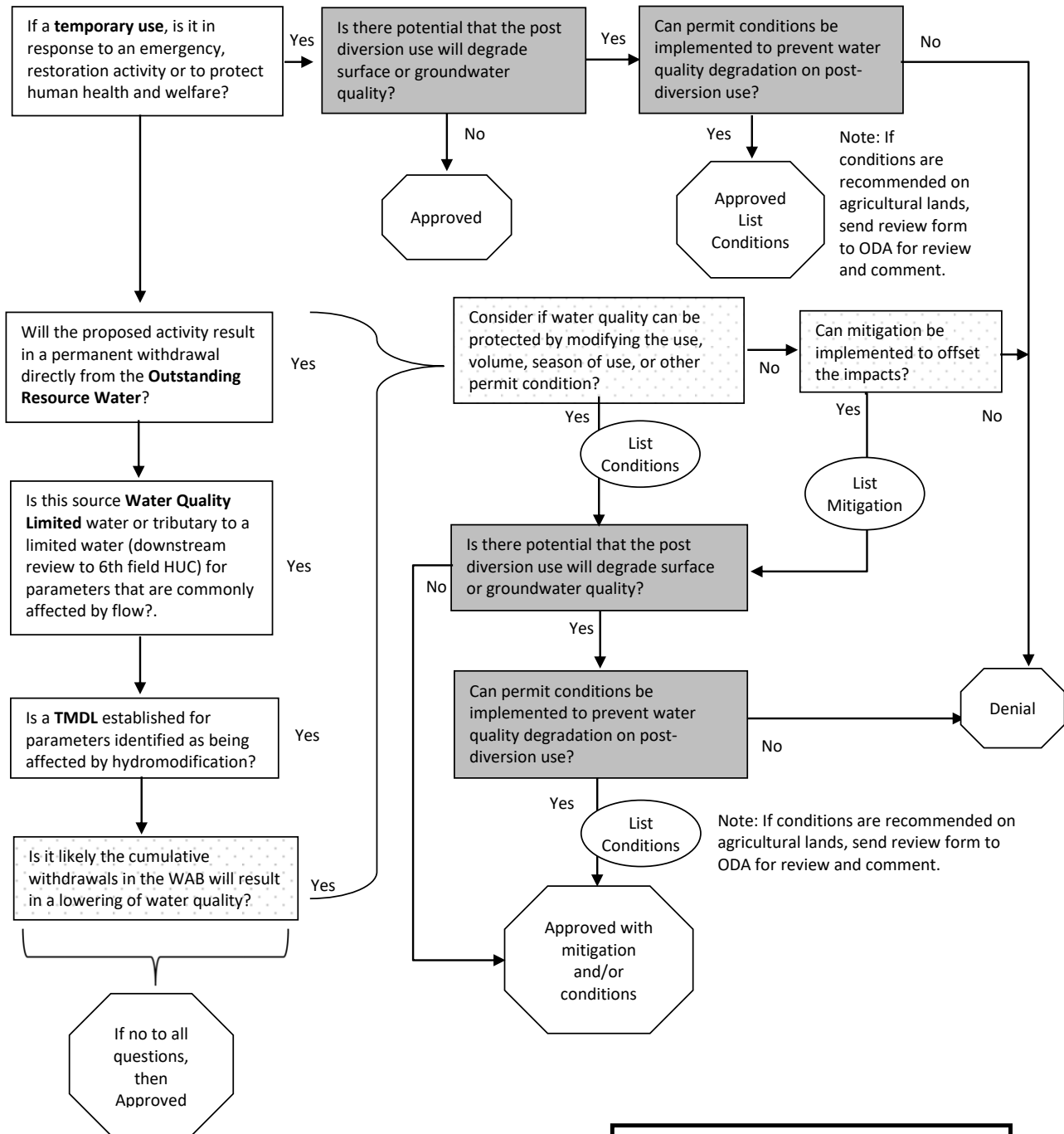
- **Instream Flow:** Consider the percent of natural flow left instream in each month (see right-most column in Table 1). Based on best professional judgment, evaluate if the cumulative withdrawal is likely to cause

impairment to aquatic life or water quality. Water quality standards are established to protect aquatic life. In scientific literature, researchers have identified ecological harm occurring when flows are reduced by [>6-35% of daily flow](#)¹. Consider the seasonality of any listings and season of withdrawal to determine impact for each month of the year.

- **Antidegradation:** Rule 340-041-0004 applies: withdrawals cannot cumulatively increase a waterbody's temperature by more than 0.5 degrees Fahrenheit or cause a 0.1 mg/l decrease in dissolved oxygen from the upstream end of a stream reach to the downstream end of the reach so long as it has no adverse effects on threatened and endangered species. See OAR [340-041-0004\(3\)-\(5\)](#) for a description in rule of activities that do not result in lowering of water quality.
- **Flow modification:** Consider if cumulative withdrawals are contributing to flow modification and a likely limiting factor in the waterbody at certain times of the year. Temperature and dissolved oxygen are flow-related parameters. When streamflow is reduced, assimilative capacity is reduced. As a waterbody heats up, dissolved oxygen concentrations decline. Reduced stream flows (including groundwater inputs to streamflow), exacerbate temperature and/or dissolved oxygen impairments.
- **Temperature:** Increases in temperature or a reduction in dissolved oxygen adversely impacts ST&E fish. Fish require different temperature and concentrations of dissolved oxygen based on species and life history stage. Oregon's temperature and dissolved oxygen limits are based on the most sensitive species and the life history stage of those species at the location and season of concern. Additional heat or reduction in dissolved oxygen concentrations will further impact these species habitat. Reduced flows can also increase the concentrations of phosphorous, bacteria, pesticides and metals.

¹ Richter BD, Davis MM, Apse C, Konrad C. 2011. *Short Communication, A Presumptive Standard For Environmental Flow Protection*. River Research and Applications. Published online in Wiley Online Library (wileyonlinelibrary.com), DOI: 10.002/rra.1551

DEQ Water Right Review Flow Chart



Each yes will need to be explained by how the use does not comply with existing state and federal water quality standards and how the use may affect sensitive, threatened or endangered fish species habitat.

Note: Review based on DEQ's anti-degradation rule (340-041-0004).

	Best Professional Judgment and Data
	Data
	Best Professional Judgment