

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number S-85339

**FINAL ORDER
INCORPORATING SETTLEMENT AGREEMENTS**

This Final Order grants approval to application S-85339. A copy of Permit 54217 for application S-85339 is attached. A copy of the Settlement Agreement between the Oregon Water Resources Department ("OWRD" or "Department"), Oregon Department of Fish and Wildlife ("ODFW") and the City of Lincoln City (the "City" or "Lincoln City"), dated August 27, 2004, is attached and incorporated by reference. A copy of the Supplemental Settlement Agreement between the City, the Kerneville-Gleneden Beach-Lincoln Beach Water District (the "District"), OWRD, ODFW, and all protestants to the September 28, 2004 Superseding Proposed Final Order ("SPFO"), dated September 8, 2005, is also attached and is also incorporated by reference.

Summary of Final Order: The Department grants approval to application S-85339 and the attached Permit 54217, incorporating certain conditions provided in the August 27, 2004 Settlement Agreement and the September 8, 2005 Supplemental Settlement Agreement.

Application History

On November 26, 2002, John McKeivitt submitted for the City of Lincoln City an application to the Department for the following water use permit:

- Amount of Water: 6.5 cubic foot per second (CFS)
- Use of Water: Municipal Use
- Period of Use: December 1 through April 30 of each year
- Source of Water: Drift Creek, a tributary of Siletz Bay
- Area of Proposed Use: Lincoln County within the service boundary of Lincoln City

On January 10, 2003, the Department mailed the applicant notice of its Initial Review, determining that "*The use of 6.5 cubic feet per second from Drift Creek, a tributary of Siletz Bay for municipal use is allowable from December 1 through April 30 of each year.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On January 28, 2003, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about both

obtaining future notices and a copy of the proposed final order.

Within 30 days of the Department's public notice, written comments were received from Katheryne McKenzie regarding water quality and fishery concerns on Drift Creek.

On March 18, 2003, a Proposed Final Order was issued recommending denial. The denial was based upon comments received from ODFW on February 7, 2003, providing: "Drift Creek supports several runs of anadromous fish and is one of the more important and productive anadromous fish streams on the mid-coast. It is vital that stream flows be maintained in this creek to support numerous fish populations. ODFW believes that the request for 6.5 CFS will injure the in-stream right which in turn will impact the fish populations by reducing important habitat for crucial life-stages of anadromous and resident fish species." A copy of the ODFW comments was supplied to the applicant.

On April 7, 2003, the Department received the Request for Standing of WaterWatch of Oregon, the Oregon Council of Trout Unlimited, the Salmon/Drift Creek Watershed Council, and the Northwest Environmental Defense Center (Conservation Parties), supporting denial of application S-85339.

On April 28, 2003, the Department received ODFW's Request for Standing, supporting denial of application S-85339.

On April 30, 2003, the City filed a timely protest to the Proposed Final Order (PFO) stating the PFO is in Error and Deficient in the following areas:

- The area proposed for the intake structure does not currently provide essential habitat for fish.
- Fish do not extensively use this area of Drift Creek for any major life-cycle activities, and those activities that do take place will not be adversely impacted by the proposed project.
- The relatively small amount of water proposed to be withdrawn under limited circumstances will not significantly adversely impact Drift Creek's flow level, available fish habitat, salinity gradient, or temperature.
- The PFO erroneously relied on ODFW's letter opinion, as the letter does not provide any scientific data to support its conclusory and incorrect assertions that the project will negatively impact fish in the stream.
- The PFO erroneously determined that no preference for the proposed use was granted under the provisions of ORS 536.310(12).

On May 2, 2003, the Department received Mid-Coast Watersheds Council's Request for Standing, supporting denial of application S-85339.

On August 27, 2004, OWRD, ODFW and the City entered into a Settlement Agreement resolving the issues raised by ODFW in their Request for Standing.

On September 28, 2004, OWRD issued a SPFO recommending approval of application S-85339 according to the conditions specified in the August 27, 2004 Settlement Agreement.

On November 12, 2004, OWRD received protests to the SPFO approving application S-85339 from: WaterWatch of Oregon, the Salmon Drift Creek Watershed Council, the Northwest Environmental Defense Center and the Oregon Council of Trout Unlimited; the Confederated Tribes of the Siletz Indians of Oregon; and the MidCoast Watersheds Council ("MCWC"). MCWC's protest, however, was not accompanied by the appropriate protest fee, and, therefore, OWRD declared the protest invalid. MCWC has challenged this determination by OWRD.

On September 8, 2005, the City, the District, OWRD, ODFW, and the Protestors to the September 28, 2004 SPFO entered into a Supplemental Settlement Agreement resolving the issues raised in the protests. Accordingly, the Department now issues this Final Order granting approval of application S-85339 according to the August 27, 2004 Settlement Agreement and the September 8, 2005, Supplemental Settlement Agreement.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- designations of any critical groundwater areas
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any general basin-wide standard for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the general standard
- any comments received

Findings of Fact

The Mid Coast Basin Program allows the use of water for municipal use.

Senior water rights exist on Drift Creek, a tributary of Siletz Bay, or on downstream waters.

Drift Creek, a tributary of Siletz Bay is not within or above a State Scenic Waterway.

An assessment of water availability has been completed. This assessment compared a calculation of natural stream flow minus the consumption portion of all relevant rights of record. A copy of this

assessment is in the file. This assessment determined that water is available for further appropriation (at percent 80% exceedance probability) for the period of use requested (December 1 through April 30).

In accordance with OAR 690-33-330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from OWRD, the Department of Environmental Quality, ODFW, and the Department of Agriculture. OWRD and ODFW representatives included both technical and field staff.

Pursuant to the August 27, 2004 Settlement Agreement and the September 8, 2005 Supplemental Settlement Agreement which are attached hereto and incorporated by reference herein, the proposed use does not have the potential to adversely impact sensitive, threatened and endangered fish populations provided any permit issued for this use contains the following SPECIFIC CONDITIONS:

1. Lincoln City will only use this water if it experiences a temporary emergency need for water due to a reduction in the City's normal water supply. Accordingly, the permit for application S-85339 shall contain the following specific permit condition in addition to existing conditions as provided on the draft permit that was included in the Superceding Proposed Final Order for S-85339.

PURPOSE OF USE: Emergency Municipal Use

This permit is for emergency use only. Permittee shall only use this water if it experiences a temporary emergency need for water due to a reduction in the City's normal water supply because of abnormal conditions such as drought, significant damage to its municipal system, or catastrophic problem with its normal water supply caused by conditions such as storm, slide or flood.

2. Lincoln City will only withdraw from Drift Creek under a permit issuing from application S-85339 in the event that its current permitted primary source (Schooner Creek), including ground and surface water, or other developed, available and permitted sources are insufficient to meet demand.

3. Lincoln City will commission an engineering study or studies ("Study") to be completed and accepted by the City by June 1, 2006. The Study shall provide recommendations regarding the best, cost-effective methods of increasing the efficiency of the City's water transmission and distribution system ("System Efficiency"). The Study shall include a determination of the existing System Efficiency which shall be the baseline for the efficiency increases referred to in this paragraph. The City will implement, within ten years after the completion of the Study, the recommendations in the Study with the goals of achieving an increase in System Efficiency of ten percent in the first five years following implementation of the recommendations in the Study and an additional five percent in the next five years. No violation of this Final Order will occur if, after a good faith effort by the City to implement the recommendations in the Study, the goals are not achieved. For the purposes of this condition, System Efficiency is defined as the sum of the total annual amount of water

measured on the City's customers' meters and an estimate of the total annual amount of non-metered water used (for example, water used in fire fighting and fire system maintenance) divided by the total annual amount measured on the City's treatment plant production output meter multiplied by one hundred percent.

4. Lincoln City will construct and put into operation an additional two million gallons of water storage by December 31, 2020. This two million gallons of storage is in addition to the two million gallons of storage the City agreed to construct in the August 19, 2004 Settlement Agreement between the City, the Kernville-Gleneden Beach-Lincoln Beach Water District (the "District"), OWRD and ODFW regarding the District's application for extension of time on its Permits S-29267 and S-35106. Note that pursuant to the Supplemental Settlement Agreement, the District's Permits S-29267 and S-35106 have been superseded by Permits S-54186 and S-54187, respectively. If Lincoln City has not completed construction of the additional two million gallons of storage by December 31, 2020, because of reasons beyond the City's control, including, but not limited to, the failure of the City to achieve or realize the currently projected population growth, this condition may be temporarily waived by OWRD at the request of the City. OWRD will not unreasonably withhold approval of the City's request for temporary waiver. OWRD will provide notice and an opportunity for comment prior to deciding whether to grant the temporary waiver.

5. Lincoln City will submit to OWRD a Municipal Water Management Conservation Plan (hereinafter "WMCP") (as described at OAR Chapter 690 division 86) for Lincoln City within 150 days of service of the issuance of this Final Order approving application S-85339.

6. Lincoln City shall implement a water conservation education program promoting the need for conservation of water to protect fish resources. Lincoln City shall provide water conservation information and educational brochures made available by the American Water Works Association, or similar organizations, or developed specifically by Lincoln City to Lincoln City's hotels and motels. Lincoln City will develop and supply signage for cooperating hotels and motels that encourage water conservation and will develop and implement a program designed to publicize the water conservation efforts of those hotels and motels that cooperate with water conservation efforts.

7. If minimum perennial stream flows on Drift Creek as provided at Table 1, OAR Chapter 690 division 518 (below) are unmet for any reason during Lincoln City's usage of the water under a permit issued from application S-85339, then Lincoln City shall implement a city-wide ban on lawn watering for the entire duration of time it withdraws Drift Creek water. Lincoln City will also implement, to the greatest extent practicable, the "Municipal Water Curtailment Element" of its WMCP.

Table 1 of OAR Chapter 690 Division 518 provides minimum perennial streamflows (cfs) as follows:

Drift Creek – to be maintained from its confluence with Gordey Creek (NE ¼, Sec. 1, T 8 S, R 11 W) to the mouth of Drift Creek (Note: where two flow levels are shown, the first

flow level is for the 1st through the 15th of each month and the second flow level is for the 16th through the last day of the month.

Oct 30/80	Nov 100	Dec 100	Jan 100	Feb 100	Mar 100	Apr 100	May 100	Jun 100	July 25	Aug 22	Sep 22
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8. Lincoln City shall measure Drift Creek at a point approximately 240 feet downstream of the proposed intake (adjacent to property located at 2118 S. Drift Creek Road) before beginning use of water from Drift Creek and each day during its use of water from Drift Creek.

9. The Drift Creek intake structure must comply with ODFW's fish passage and screening criteria as provided at ORS 498.301 to 498.346; ORS 509.580 to 509.630; ORS 509.645 to 509.910 and OAR 635-412-0020 to 635-412-0030. ODFW will review Lincoln City's design of the Drift Creek intake structure and will work with Lincoln City to ensure compliance with fish screening and fish passage.

10. Period of Use: December 1 through April 30 of each year.

Conclusions of Law

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

The Mid Coast Basin Program allows the proposed use.

The proposed use requested in this application is allowed in the Mid Coast Basin Plan, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use would not injure other water rights.

The proposed use as conditioned complies with other rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may

be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
 - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
 - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

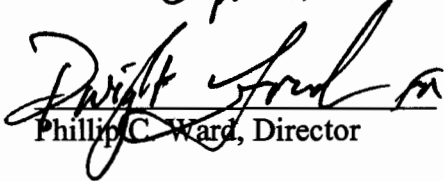
In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that water is available in the amount necessary for the proposed use; the proposed use will not result in injury to existing water rights; and the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

Order

Therefore, application S-85339 is approved as provided herein and in Permit 54217, which is hereby issued and attached hereto.

DATED Sept 16, 2005


Phillip C. Ward, Director

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

Mailing List for Final Order Copies

Application # S-85339

Mailing List Print Date: September 16, 2005

Original mailed to (when permit issued, include copy of permit map):

Applicant: City of Lincoln City
Attn: John McKeivitt, Water Superintendent
PO Box 50
Lincoln City OR 97367

Copies Sent:

By: Mike Reynolds
(SUPPORT STAFF)

on: September 20, 2005
(DATE)

For Permit - Copies sent to:

1. WRD - File # S-85339
2. WRD - Ken Stahr
3. WRD - Doug Parrow or Bill Fujii
4. WRD - Watermaster District #: 1
5. WRD - Regional Manager: NWR
6. ODFW District Biologist: ODFW, Attn: Rick Kepler, 3406 Cherry Ave NE, Salem OR 97303

For FO w/Draft Permit, w/Permit, or for Denial - Copies to Other Interested Persons (*CWRE, Agent, Well Driller, Commenter, etc.*)

1. Robert E. Long, Jr., CH2M HILL, 825 NE Multnomah, Ste 1300, Portland OR 97232-2146
2. Bill Spangley, Lincoln Co. Planning Dept, 225 Olive St, Newport OR 97365
3. Jeff W. Ring, Preston Gates Ellis LLP, 222 SW Columbia St, Ste 1400, Portland OR 97201
4. WaterWatch, 213 SW Ash St, Ste 208, Portland OR 97204
5. Jennifer DeWald, 2121 SW Broadway, Ste 100, Portland OR 97201

"\$10 LETTER" sent to Interested Persons who have not protested or paid for copies

1. Katheryne McKenzie, PO Box 131, Neotsu, OR 97364
2. Mid-Coast Watersheds Council, 157 NW 15th Unit 1, Newport OR 97365

CASEWORKER: JERRY GAINEY

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