

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time	)	
for Permit R-12028, Water Right Application R-80289	)	PROPOSED FINAL
in the name of Aquatic Lawn Growers, Inc.	)	ORDER

Permit Information

Application:	R-80289
Permit:	R-12028
Basin:	Klamath / Watermaster District 17
Date of Priority:	May 3, 1995
Source of Water:	Surface runoff, tributary of Sprague River and a well, to be constructed under Application G-14085, Permit G-12772
Storage Facility:	Unnamed Reservoir
Purpose or Use:	To be maintained under Application G-14085 for multi-purpose use
Maximum Volume:	150.0 Acre-Feet (AF) per year

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

In summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2009 to October 1, 2035.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999 to October 1, 2035.¹
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

¹ Pursuant to ORS 537.230(4), upon the completion of beneficial use of water allowed under the permit, the permit holder 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 permit holder shall submit a map of the survey and the claim of beneficial use.

ACRONYM QUICK REFERENCE

Department – Oregon Water Resources Department
USACOE – United States Army Corps of Engineers
ODSL – Oregon Department of State Lands
ODEQ – Oregon Department of Environmental Quality
PFO – Proposed Final Order
cfs – cubic feet per second
gpm – gallons per minute
AF – acre-feet

AUTHORITY

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

ORS 537.230(3) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works shall be completed or the right perfected. 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 690-315-0040 provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

OAR 690-315-0050(6) requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

FINDINGS OF FACT

Background

1. Permit R-12028 was issued by the Department on September 11, 1996. The permit authorizes storage of up to 150.0 AF of water in an unnamed reservoir from surface runoff, tributary of Sprague River and a well, to be constructed under Application G-14085, Permit G-12772, to be maintained under Application G-14085 for multi-purpose use. The permit specified actual construction was to begin by September

11, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.

2. One prior permit extension has been granted for Permit R-12028. The most recent extension resulted in the completion dates for construction being extended from October 1, 1998 to October 1, 2009, and full application of water being extended from October 1, 1999 to October 1, 2010.
3. On January 5, 2006, the permit holder submitted a Progress Report to the Department, as a condition required by the previous extension of time.
4. On behalf of the permit holder, Casey C. Reed, President of Aquatic Lawn Growers, Inc., submitted an "Application for Extension of Time" to the Department on May 17, 2016, requesting the time to complete construction of the water system be extended from October 1, 2009 to October 1, 2035, and the time to apply water to full beneficial use under the terms of Permit R-12028 be extended from October 1, 2010 to October 1, 2035.
5. Notification of the Application for Extension of Time for Permit R-12028 was published in the Department's Public Notice dated May 24, 2016. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

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 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230², 537.248³ and/or 539.010(5)⁴.

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

6. On May 17, 2016, 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 690-315-0040(1)(b) and 690-315-0040(5)]

7. Actual construction of the water system began prior to the September 11, 1997 deadline specified in the permit. According to the permit holder, construction of the reservoir began September 8, 1997.

According to the Notice of Beginning of Construction (A-Form) submitted to the Department October 16, 1997, actual construction began September 8, 1997. The Department has determined the permit holder has satisfied the condition requiring beginning of construction of the reservoir.

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 539.010(5) applies to surface water and ground water permits.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

8. As of May 17, 2016, the permit holder states the remaining work to be completed consists of receiving a wetland remove/fill permit from the Oregon Department of State Lands (ODSL); excavation according to ODSL Remove/Fill Permit when received; completing construction of the water system; meeting all permit conditions; and applying water to full beneficial use, by storing 150.0 AF of water.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2035, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit R-12028 is both reasonable and necessary.

Good Cause [OAR 690-315-0040(1)(d)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:

Amount of Construction [OAR 690-315-0040(3)(a)]

9. According to the application and previous extension, work was accomplished within the time allowed in the permit or previous extension as follows:
- a. Actual construction of the water system began prior to the September 11, 1997 deadline specified in the permit. The permit holder constructed Well (KLAM 10752) in 1993. Construction of the reservoir began September 8, 1997. Prior to permit issuance, the permit holder applied for the following permits on August 2, 1996:
 - Wetland remove/fill – USACOE
 - Wetland remove/fill – ODSL
 - 401 Certification – Oregon Department of Environmental Quality (ODEQ)
 - b. Work was completed during the original development time frame under Permit R-12028. The permit holder began excavation of the reservoir, moving 2,000 cubic yards of dirt to the west shoreline of the reservoir, and 500 cubic yards of dirt to the east shoreline of the reservoir. ODEQ issued a 401 Certification on April 19, 1999.

- c. During the most recent extension period, being from October 1, 1999, to October 1, 2010, USACOE issued wetland remove/fill permit No. 96-01152 to the permit holder.

The Department has determined that work has been accomplished within the time allowed in the permit, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

Beneficial Use of Water [OAR 690-315-0040(3)(b)]

- 10. The application states no water has been stored for multi-purpose use.
- 11. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2010.
- 12. According to the permit holder, delay of full beneficial use of water under Permit R-12028 was due, in part, to the length of time needed to acquire the required wetland removal/fill permits from the USACOE and ODSL, and a 401 Certification from ODEQ to complete the project.

According to the Progress Report submitted to the Department on January 5, 2006, the USACOE issued wetland/remove fill permit No. 96-01152 on November 21, 2000. The ODSL permit still has not been issued. The only issue left is the details of a surety bond for the project. ODSL is unable to give the permit holder a time when this issue will be settled, and the permit issued. The project and use of water cannot begin until a permit is issued by ODSL. The permit holder needs more time in which to obtain the full quantity of water allowed under the permit. Progress in perfecting the permit has been delayed due to the agencies involved in denial of permits, appeal hearings, and agencies complying with court orders.

The Department has determined that this extension will allow the permit holder to complete construction of the reservoir, to obtain the full volume of water authorized under the permit and to apply the water to full beneficial use.

Compliance with Conditions [OAR 690-315-0040(3)(c)]

- 13. The water right permit holder's conformance with the permit or previous extension conditions.
 - a. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed, and (2) annual reports of the amount of water used each month have not been received by the Department. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Beneficial use of water under this permit, therefore, has not yet been demonstrated. In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

The Department has determined that this extension will allow the meter or other suitable measuring device installed after October 1, 2010, to satisfy compliance of the condition of, "Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director," in an effort to make proof of beneficial use of the water as required by Permit R-12028.

The Department has also determined that this extension will allow the annual water use reports submitted after October 1, 2010, to satisfy compliance of the condition of, "shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director," in an effort to make proof of beneficial use of the water as required by Permit R-12028.

Financial Investments to appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b),(3)(d),(4)(d)]

14. The applications states the permit holder has invested about \$8,000, which is about 8 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$90,000 investment is needed for the completion of this project. According to the permit holder, they have invested \$15,000 in regulatory compliance costs, which are associated with obtaining permits through other government agencies, and are required in the development of the reservoir.

Good Faith of the Appropriator [OAR 690-315-0040(2)(c)]

15. The Department has found good faith of the appropriator under Permit R-12028.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:

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 690-315-0040(4)(a-c)].

16. The amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit R-12028; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an application for a new water right is submitted. The points of diversion are located on a tributary of Sprague River, and are not located within a Withdrawn Area. The Sprague River is located above the Klamath Scenic Waterway, and it is located within an area ranked "moderate" 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 points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.
17. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
18. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
 - a. None have been identified.
19. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 1 of the "Conditions" section of this PFO to meet this condition.

Fair Return Upon Investment [OAR 690-315-0040(2)(f)]

20. Use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

Other Governmental Requirements [OAR 690-315-0040(2)(g)]

21. Delay in the development of this project was caused by other governmental requirements. The permit holder is required to obtain Wetland Remove/Fill permits from the U. S. Army Corps of Engineers and Oregon Department of State Lands. The permit holder applied for the permits on August 2, 1996, and the permits are still pending. Progress in perfecting the permit has been delayed due to the agencies involved in denial of permits, appeal hearings, and agencies complying with court orders.

Unforeseen Events [OAR 690-315-0040(2)(h)]

22. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit R-12028, in that the permit holder was faced with a lengthy time period in which to acquire the required wetland removal/fill permits from

U.S. Army Corps of Engineers and Oregon Department of State Lands, which restricted their ability to complete development of the project in a timely manner.

CONCLUSIONS OF LAW

1. The applicant is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.230(3).
2. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
3. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 6 through 14, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2035⁵, as required by OAR 690-315-0040(1)(c).
5. 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 fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).
6. As required by OAR 690-315-0050(6) and as described in Finding 18, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit R-12028.

Continued on the following page

⁵Pursuant to ORS 537.230(3), 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 complete construction of the water system under Permit R-12028 from October 1, 2009 to October 1, 2035.

Extend the time to apply water to beneficial use under Permit R-12028 from October 1, 2010 to October 1, 2035.

Subject to the following conditions:

CONDITIONS

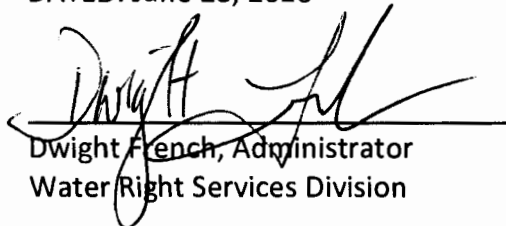
1. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2020, 2025, 2030, and 2034. A form will be enclosed with your Final Order.**

(a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;

(b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: June 28, 2016


Dwight French, Administrator
Water Right Services Division

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

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **August 12, 2016**, 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 Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

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- If you have any questions about statements contained in this document, please contact Corey Courchane at (503) 986-0825.
 - 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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