



## **ACRONYM QUICK REFERENCE**

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

Well – POLK 50276

FOF – Finding of Fact

## **AUTHORITY**

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

**ORS 537.630(1)** provides in pertinent part that the Oregon Water Resources Department (Department) for good cause shown shall order and allow 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)** 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 therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

**OAR 690-315-0040** provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

**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**

1. On April 24, 1995, Permit G-12037 was issued as a five year permit by the Department. The permit authorizes the use of up to 0.12 cfs of water from a well in the Spring Valley Creek Basin for irrigation of 144.7 acres. The permit specified actual construction of the well to begin by April 24, 1996, construction of the water system was to be completed by October 1, 1997, and complete application of the water was to be made on or before October 1, 1998, and the permit expires five years from the date of issuance. The permit may be extended for additional five year periods if the Director finds the groundwater

source can probably support the extended use. On March 22, 2002, the permit was renewed as a five year permit, and the Department issued Permit G-15042.

2. On October 31, 2004, the permit expired and was renewed as a regular permit. On November 18, 2004, Permit G-15777 was issued by the Department. The permit authorizes the use of up to 0.12 cfs of water from a well in the Spring Valley Creek Basin for irrigation of 144.7 acres. The permit specified to complete development and make beneficial use on or before October 1, 2013.
3. One prior permit extension has been granted for Permit G-15777. The most recent extension request resulted in the completion date for construction being extended from October 1, 1997, to October 1, 2013, and full application of water being extended from October 1, 1998, to October 1, 2013.
4. On January 18, 2017, on behalf of the permit holder, Dai Crisp, manager of Temperance Hill Vineyard, submitted an "Application for Extension of Time" (Application) to the Department, requesting both the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit G-15777 be extended from October 1, 2013, to October 1, 2023.
5. On January 24, 2017, notification of the Application for Extension of Time for Permit G-15777 was published in the Department's Public Notice. No public comments were received regarding the Application.

#### **Review Criteria [OAR 690-315-0040]**

*In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).*

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

6. On January 18, 2017, the Department received a completed Application 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 well began prior to the deadline specified in the permit. According to the permit holder, construction of POLK 50276 (Well) began April 17, 1995.
8. According to the well log received by the Department on March 27, 1997, construction of the Well began April 17, 1995.

The Department has determined based on Finding of Fact (FOF) 7 and 8 that the prosecution of the construction of the well began prior to April 24, 1996.

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

*The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).*

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

*In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.*

**OAR 690-315-0040(3)(a)**

**Amount of Construction** (The amount of construction completed within the time allowed in the previous extension.<sup>2</sup>)

9. Actual construction of the well began prior to the deadline specified in the permit. Construction of the Well was completed May 17, 1995.
10. During the most recent extension period, being from October 1, 1998, to October 1, 2013, the following was accomplished:
  - Installed an airline for the Well; and
  - Installed mainline and sub-main piping, drip irrigation, valves, emitters, and a power inverter.
11. No other work has been accomplished since October 1, 2013.

The Department has determined based on FOF 10, that work has been accomplished during the last extension period, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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<sup>2</sup> "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

**OAR 690-315-0040(3)(c)**

**Compliance with Conditions**

*The water right permit holder's conformance with the previous extension conditions.*

12. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

The Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15777:

- "Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order, 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."
- "A static water level measurement is to be made and submitted before any use of water may commence at the well. Thereafter, the water user shall report a **March** static water level in the well(s) to the Groundwater/Hydrology Section of the Water Resources Department with **30** days, each year."

**OAR 690-315-0040(3)(b)**

**Beneficial Use of Water:** *the amount of beneficial use made of the water during the previous extension.*

13. The Application states a maximum rate of 0.12 cfs of water has been appropriated from the Well for irrigation of 47.3 acres.
14. According to the permit holder, delay of full beneficial use of water under Permit G-15777 was due, in part, to planted sections of the vineyard being devastated by a pest that feeds on grape vines, called Phylloxera. This has cost the permit holder considerable time and money to remove and replace the damaged plantings. The permit holder needs more time in which to develop the full amount of lands allowed for irrigation under the permit.

Based on FOF 12, beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2013.

**OAR 690-315-0040(2)(b),(3)(d),(4)(d)**

**Financial Investments to Appropriate and Apply Water to a Beneficial Purpose**

15. The Application states an approximate total of \$136,577 has been invested, which is about 47 percent of the total projected cost for complete development of this project.

The Application states an additional \$81,500 investment is needed to complete this project, which includes developing the remaining acres for irrigation.

The Department has determined based on FOF 15, that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions, a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-15777.

**The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]**

*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:*

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) 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);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

**OAR 690-315-0040(4)(a)**

The amount of water available to satisfy other affected water rights and scenic waterway flows.

16. A review of 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-15777; 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.

**OAR 690-315-0040(4)(b)**

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).

17. The point of appropriation for Permit G-15777, located within the Willamette River Basin, is within the Eola Hills, Groundwater Limited Area, which conditions groundwater developed from the basalt aquifer as classified for exempt uses, irrigation and rural residential fire protection systems only. Permits may be issued, for a period not to exceed five years, for fire protection and for drip or equally efficient irrigation provided the Director finds the proposed use and amount do not pose a threat to the groundwater resource or existing permit holders.
18. On October 31, 2004, the Department determined that the Well does not develop water from the basalt aquifer that is listed in the Eola Hills Groundwater Limited Area rules. The Well apparently develops water from a sandstone aquifer below the basalt aquifer and is therefore not subject to the Groundwater Limited Area rules contained in OAR 690-502-0200.
19. Willamette River is not located within or above any state or federal scenic waterway.
20. The point of appropriation is not in an area listed by the Department of Environmental Quality as a water quality limited stream.

**OAR 690-315-0040(4)(c)**

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

21. Willamette River is located within an area 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.

**OAR 690-315-0040(4)(d)**

Economic interests dependent on completion of the project.

22. The Application states an approximate total of \$136,577 has been invested in the project.

**OAR 690-315-0040(4)(e)**

Other economic interests dependent on completion of the project.

23. The Application did identify economic interests other than those of the applicant's that may be dependent on completion of the project. Temperance Hill sells fruit to over 20

wineries, and many of these companies are dependent upon the fruit grown by Temperance Hill for the Pinot Noir wines they produce.

**OAR 690-315-0040(4)(f)**

**Other factors relevant to the determination of the market and present demand for water and power.**

24. No other factors relevant to the determination of the market and present demand for water and power have been identified.

**OAR 690-315-0040(2)(f)**

**Fair Return Upon Investment**

25. The Application did identify that the use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The use of water authorized by Permit G-15777 helps establish plants quickly and uniformly. With irrigation it is possible to produce fruit in 4 years. Temperance Hill is one of the top vineyards in the Willamette Valley, and the grapes they produce command high prices, and the per acre price for this fruit is in the \$9,000 to \$10,000 an acre range.

**OAR 690-315-0040(2)(g)**

**Other Governmental Requirements**

26. The Application did not identify any delay in the development of this project that was caused by any other governmental requirements.

**OAR 690-315-0040(2)(h)**

**Unforeseen Events**

27. The Application did not identify unforeseen events.

**OAR 690-315-0040(2)(i)**

**Denial of the Extension Will Result in Undue Hardship**

28. The Application did state that if a denial of the extension would result in undue hardship. Due to the infestation of the pest Phylloxera, Temperance Hill has had to perform replanting of several sections of vines. New replants are easy to kill without water. Each season has its own dynamics given the weather, and the last few vintages have been very challenging to keep replants and young vines alive. At \$3.00 to over \$5.00 a vine, not including the labor to plant, stake, and adding a tube, keeping them hydrated is critical.



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

29. The Application provides evidence of good faith of the appropriator under Permit G-15777.

Based on FOF 7 through 10, 12, 13, 15, and 22, the Department has determined that the applicant has shown good faith and reasonable diligence.

**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.*

30. As of January 18, 2017, the Application states the remaining work to be completed consists of completing construction of the water system, including developing an additional 34.5 acres for irrigation; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2023, to complete construction of the water system, and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15777 is both reasonable and necessary.

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

*The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).*

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).

## LIMITATIONS AND CONDITIONS

1. OAR 690-315-0050(6) requires 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.

## CONCLUSIONS OF LAW

1. 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).
2. The applicant has complied with the construction timeline requirements to begin actual construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 7 through 29, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2023, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure to ensure future diligence; OAR 690-315-0050(6).

**continued on the following page**

## 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 G-15777 from October 1, 2013, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit G-15777 from October 1, 2013, to October 1, 2023.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

**1. Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2022**. ***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: February 28, 2017

  
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 **April 14, 2017**, 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>

