

**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 G-15385, Water Right Application G-15307, in) PROPOSED FINAL ORDER
the name of Yamhill Valley Vineyards and AXA Equitable Life)
Insurance Company, c/o AXA Equitable AgriFinance, LLC)

Permit Information

Application: G-15307
Permit: G-15385
Basin: 2B – Middle Willamette / Watermaster District 16
Date of Priority: February 7, 2001
Source of Water: Four wells in Muddy Creek Basin
Purpose or Use: Irrigation of 141.46 acres
Maximum Rate: 0.353 cubic foot per second (cfs), being 0.11 cfs from Well 1, 0.025 cfs from Well 2, 0.05 cfs from Well 3, and 0.168 cfs from Well 4

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2012, to October 1, 2018¹.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

¹Pursuant to ORS 537.630(4), 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.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

Well 1 – YAMH 7279

Well 3 – YAMH 52061

Well 4 – YAMH 52170/53729

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.

FINDINGS OF FACT

1. On April 10, 2003, Permit G-15385 was issued by the Department. The permit authorizes the use of up to 0.353 cfs of water, being 0.11 cfs from Well 1, 0.025 cfs from Well 2, 0.05 cfs from Well 3, and 0.168 cfs from Well 4 in Muddy Creek Basin for irrigation of 141.46 acres. The permit specified complete application of the water to the use was to be made on or before October 1, 2007.
2. On November 20, 2016, an assignment from Yamhill Valley Vineyards to AXA Equitable Life Insurance Company, c/o AXA Equitable was recorded in the records of the Water Resources Department.

3. On January 4, 2017, a partial assignment from AXA Equitable Life Insurance Company, c/o AXA Equitable AgriFinance, LLC to Yamhill Valley Vineyards was recorded in the records of the Water Resources Department.
4. One prior permit extension has been granted for Permit G-15385. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2007, to October 1, 2012.
5. On February 15, 2017, Stephen Cary of Yamhill Valley Vineyards, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15385 be extended from October 1, 2012, to October 1, 2018.
6. On February 21, 2017, notification of the Application for Permit G-15385 was published in the Department's Public Notice. No public comments were received regarding the Application.
7. On February 28, 2017, the permit holder submitted additional information to supplement their Application. The additional information provided was to make findings on the Market and Present Demands.

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)]

8. On February 15, 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)]

9. Construction of the well began prior to permit issuance. The permit holder states, construction of YAMH 7279 (Well 1) began November 22, 1980.
10. According to the well log received by the Department on December 2, 1980, construction of Well 1 began November 20, 1980.

The Department has determined based on Finding of Fact (FOF) 9 and 10 that the prosecution of the construction of the well began prior to October 1, 2007.

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.²)

11. During the most recent extension period, being from October 1, 2007, to October 1, 2012, the following was accomplished:
 - Installed drip irrigation; and
 - Installed a meter on Well 1, YAMH 52061 (Well 3), and YAMH 52170/53729 (Well 4).
12. No other work has been accomplished since October 1, 2012.

The Department has determined based on FOF 11, 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.

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

Compliance with Conditions

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

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

² "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.

The Department has determined, based on FOF 13 that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15385:

- “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director”; and
- “Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements.”

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

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

14. The Application states a maximum combined rate of 0.36 cfs of water, being 0.04 cfs from Well 1, 0.16 cfs from Well 3, and 0.16 cfs from Well 4 has been appropriated for irrigation of 53.6 acres. The appropriation of 0.16 cfs of water water from Well 3 exceeds the amount of water for irrigation authorized under this permit. The authorized amount of water for irrigation from Well 3 is 0.05 cfs.
15. According to the permit holder, delay of full beneficial use of water under Permit G-15385 was due, in part, to the permit holder not fully understanding the need to apply water to the entire authorized place of use. Due to the nature of grape production, the permit holder has been phasing in additional acres of grapes over time. The permit holder needs more time in which to apply water to the entire authorized place of use, to obtain the full quantity of acres allowed under the permit.

The Department has determined based on FOF 13 and 14 that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2012.

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

Financial Investments to Appropriate and Apply Water to a Beneficial Purpose

16. The Application states the permit holder has invested about \$114,110, which is the total projected cost for complete development of this project.

The Department has determined based on FOF 16, 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-15385.

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.

17. 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-15385; 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).

18. The points of appropriation for Permit G-15385, located within the South Yamhill River Basin, are not located within a limited or critical groundwater area.
19. South Yamhill River is not located within or above any state or federal scenic waterway.
20. The points of appropriation are 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. South Yamhill River is located within an area ranked "high" 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 \$114,110 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 not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

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

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

24. The Application identified other factors relevant to the determination of the market and present demand for water and power.

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

Fair Return Upon Investment

25. The Application states without the ability to replace vines as they mature, and get new crops started with irrigation, the permit holder would not be able to continue their operation as a wine producer.

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 states financial constraints brought on by the economic recession in 2008, and the slow recovery since has delayed the permit holder's ability to finance the high costs of installing additional drip lines and irrigation mainlines to the additional acres.

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

Denial of the Extension Will Result in Undue Hardship

28. The Application states the permit holder consists of a vineyard. New grapes need more water after they are planted, and less as they get older. The permit holder has several sections with different stages of maturity, and they need to be able to irrigate at different volumes as the vines are rotated. If the extension is denied, the permit holder would stand to lose out on a number of acres they could not prove up on for irrigation.
29. The Application states municipal water is not available, nor are there available surface water sources nearby. The permitted use of groundwater is the only way they can irrigate the vineyard.

OAR 690-315-0040(2)(c)

Good Faith of the Appropriator

30. The Application provides evidence of good faith of the appropriator under Permit G-15385.

Based on FOF 9, 10, 11, 13, 14, 16, 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.

31. As of February 15, 2017, the Application states the remaining work to be completed consists of applying water to full beneficial use on the remaining 87.86 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2018, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15385 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

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 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 9 through 30, full application of water to beneficial use can be accomplished by October 1, 2018, 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. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension. OAR 690-315-0050(5).

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 apply water to beneficial use under Permit G-15385 from October 1, 2012, to October 1, 2018.

DATED: March 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 **May 12, 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.

