

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-17766, Water Right Application G-16790, in) PROPOSED FINAL
the name of Ash Grove Cement Company) ORDER

Permit Information

Application: G-16790
Permit: G-17766
Basin: 9 – Powder / Watermaster District 8
Date of Priority: February 5, 2007
Source of Water: Well 3 (BAKE 1474), Well 4, Well 5, Well 6, Well 7, Well 8, Well 9,
Well 10, Well 11, and proposed Well 12, in Burnt River Basin
Purpose or Use: Mining; Industrial Use
Maximum Rate: 0.66 cubic foot per second (cfs), being 0.22 cfs from each well

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2017, to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from October 1, 2017, to October 1, 2023¹.

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(5), 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
FOF – Finding of Fact
PFO – Proposed Final Order
cfs – cubic foot per second

WELL INVENTORY

Well 3 – BAKE 1474
Well 4 – 271.WP1
Well 5 – BAKE 51875
Well 11 – BAKE 52250
Well 12 – 702.WP3

AUTHORITY

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

ORS 537.630(2) 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 November 29, 2007, Permit G-16250 was issued by the Department. The permit authorized the use of up to 0.66 cfs of water, being 0.22 cfs from each well from Well 3 (BAKE 1474), Well 4, and Proposed Well 5, in Burnt River Basin for mining and industrial use. The permit specified completion of construction and complete application of water was to be made on or before October 1, 2012.
2. On February 17, 2010, the Department approved Permit Amendment T-10902 (Special Order Volume 79, Page 67) authorizing Well 6, Well 7, Well 8, Well 9, and Well 10, as additional points of appropriation under Permit G-16250 (modified by Permit Amendment T-10909) which is hereafter referred to simply as Permit G-16250. The Department issued a Correcting Final Order in the matter of Permit Amendment T-10902 (Special Order Volume 80, Page 272) correcting the location of Well 9.

3. One prior permit extension has been granted for Permit G-16250. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2012, to October 1, 2017.
4. On January 15, 2015, the Department approved Permit Amendment T-11808 (Special Order Volume 93, Page 1099) authorizing Well 11 as an additional point of appropriation under Permit G-16250. Superseding Permit G-17306 was issued by the Department on January 15, 2015, to reflect the changes.
5. On April 17, 2017, the Department approved Permit Amendment T-12572 (Special Order Volume 104, Page 645) authorizing Well 12 as an additional point of appropriation under Permit G-17306. Superseding Permit G-17766 was issued by the Department on April 17, 2017, to reflect the changes.
6. On November 27, 2017, Terry Kelly, Plant Manager for Ash Grove Cement Company, 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-17766 be extended from October 1, 2017, to October 1, 2023.
7. On December 12, 2017, Norma Job, Environmental Manager for Ash Grove Cement Company, submitted additional information to supplement their Application. The additional information was to clarify which wells have been constructed and used under Permit G-17766; and which wells meters are installed on.
8. On December 12, 2017, notification of the Application for Permit G-17766 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)]

9. On November 27, 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)]

10. Construction of BAKE 1474 (Well 3) began prior to permit issuance.
11. According to the well log received by the Department on July 30, 1979, construction of Well 3 began June 8, 1979.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2012.

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.

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

The amount of construction completed within the time allowed in the previous extension.²

12. Construction of Well 3 began prior to permit issuance.
13. During the most recent extension period, being from October 1, 2012, to October 1, 2017, BAKE 52250 (Well 11) was constructed.
14. Since October 1, 2017, construction began on Owner Well 702.WP3 (Well 12).

Based on FOF 12, 13, and 14, the Department has determined 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.

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

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

15. The Department has considered the permit holder’s compliance with conditions, and did not identify any concerns for Well 3 and Owner Well 271.WP1 (Well 4).

Based on FOF 15, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-17766 for Well 3 and Well 4.

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.

16. The Department has considered the permit holder's compliance with conditions for BAKE 51875 (Well 5), Well 6, Well 7, Well 8, Well 9, Well 10, BAKE 52250 (Well 11), and Well 12, and has identified the following concern, the record does not show that a totalizing flow meter or other suitable measuring device has been installed.

Based on FOF 16, the Department has determined that the permit holder has not demonstrated compliance with the following permit condition for Well 5, Well 6, Well 7, Well 8, Well 9, Well 10, Well 11, Well 12:

- "Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of appropriation."

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.

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.

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

The amount of beneficial use made of the water during the permit time limits or previous extension conditions.

17. A maximum combined rate of 0.44 cfs of water, being 0.22 cfs from Well 3 and 0.22 cfs from Well 4, has been appropriated for mining and industrial use.

Based on FOF 15 and 17, the Department has determined that beneficial use of water has been demonstrated from Well 3 and Well 4 under this permit as all permit conditions were satisfied by October 1, 2017.

18. No water has been appropriated from Well 5, Well 6, Well 7, Well 8, Well 9, Well 10, or Well 12, under Permit G-17766 as the wells are not constructed.
19. No water is currently being appropriated from Well 11 under Permit G-17766.
20. Delay of full beneficial use of water under Permit G-17766 was due, in part; to Well 5 not producing any water and an inability to locate a well constructor willing to reconstruct Well 11 so it may be used under the permit. The permit holder needs more time in which to continue construction of Well 12, and if needed, to gain approval of a permit amendment for additional points of appropriation, to obtain the full quantity of water allowed under the permit.

Based on FOF 16, 18, and 19, the Department has determined that beneficial use of water has not yet been demonstrated from Well 5, Well 6, Well 7, Well 8, Well 9, Well 10, Well 11, or Well 12, under Permit G-17766 as not all permit conditions were satisfied by October 1, 2017.

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

21. An investment of approximately \$181,970, which is approximately 76 percent of the total projected cost for complete development of this project. An additional \$58,000 investment is needed for the completion of this project.

Based on FOF 21, the Department has determined 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 for Well 3 and Well 4, a financial investment has been made, and; beneficial use of water has been demonstrated from Well 3 and Well 4. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-17766.

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.

22. 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-17766; 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).

23. The points of appropriation for Permit G-17766, located within the Burnt River Basin, are not located within a limited or critical groundwater area.
24. Burnt River is not located within or above any state or federal scenic waterway.
25. 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.

26. Burnt River 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.

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

Economic interests dependent on completion of the project.

27. An approximate total of \$181,970 has been invested in the project.

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

Other economic interests dependent on completion of the project.

28. There are no other economic interests dependent on completion of the project identified.

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

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

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

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

30. There is no direct income from the use of the water. The permit is to provide water for dust suppression as required by Oregon Department of Environmental Quality Title V Permit issued to the plant. Income from operation of the plant will likely result in a fair return on investment.

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

31. Delay in the development of this project was not caused by any other governmental requirements.

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

32. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17766.

Denial of the Extension Will Result in Undue Hardship [OAR 690-315-0040(2)(h)]

33. A denial of the extension would not result in undue hardship.

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

34. The Application provides evidence of good faith of the appropriator under Permit G-17766.

Based on FOF 10 through 15 and 17 and 21, 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.

35. As of November 27, 2017, the remaining work to be completed consists of completing construction of Well 12, and if necessary, applying for a permit amendment to add additional points of appropriation; meeting all permit conditions, which include installing a totalizing flow meter at each point of appropriation; 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-17766 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).

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 10 through 34, 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.
5. The applicant has demonstrated good cause for the extension.

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-17766 from October 1, 2017, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit G-17766 from October 1, 2017, to October 1, 2023.

DATED: January 16, 2018


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 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 **March 2, 2018**, 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 questions about statements contained in this document, please contact Jeffrey D. Pierceall at (503)986-0802.
 - 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 503-986-0900.
 - Address any correspondence to : Water Right Services Division
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Salem, OR 97301-1266
Fax: 503-986-0901
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