

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-17001, Water Right Application G-17461, in) PROPOSED FINAL
the name of Willamette Egg Farms) ORDER

Permit Information

Application: G-17461
Permit: G-17001
Basin: 2B – Middle Willamette / Watermaster District 16
Date of Priority: April 19, 2011
Source of Water: Well 1 (CLAC 2430), Well 2 (CLAC 2431), and Well 3 in Bear Creek
Basin
Purpose or Use: Industrial Uses
Maximum Rate: 0.56 cubic foot per second (cfs)

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 January 31, 2018, to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from January 31, 2018, 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

PFO – Proposed Final Order

cfs – cubic foot per second

gpm – gallons per minute

Well 1 – CLAC 2430

Well 2 – CLAC 2431

FOF – Finding of Fact

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 January 31, 2013, Permit G-17001 was issued by the Department. The permit authorizes the use of up to 0.56 cfs of water from Well 1 (CLAC 2430), Well 2 (CLAC 2431), and Well 3 in Bear Creek Basin for industrial uses. The permit specified completion of construction, and complete application of water was to be made within five years of the date of permit issuance, being January 31, 2018.
2. On February 13, 2018, the permit holder, Willamette Egg Farms, 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-17001 be extended from January 31, 2018, to October 1, 2023.

3. On February 20, 2018, notification of the Application for Permit G-17001 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)]

4. On February 13, 2018, 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)]

5. Construction of the well began prior to permit issuance.
6. According to the well log received by the Department on September 10, 1974, construction of CLAC 2431 (Well 2) began September 6, 1974.

Based on Finding of Fact (FOF) 5 and 6, the Department has determined that the prosecution of the construction of the well began prior to January 31, 2018.

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.

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

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

7. Construction of CLAC 2430 (Well 1) and Well 2, and installation of a pipeline began prior to permit issuance.
8. Work was accomplished during the original development time frame under Permit G-17001. Flowmeters were installed on Well 1 and Well 2.

Based on FOF 7 and 8, the Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit, 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 or previous extension conditions.

9. The Department has considered the permit holder's compliance with conditions for Well 1 and Well 2, and did not identify any concerns.

Based on FOF 9, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-17001 for Well 1 and Well 2.

10. The Department has considered the permit holder's compliance with conditions for Well 3, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed, (2) the required March static water level measurements have not been received by the Department, and (3) 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.

Based on FOF 10, the Department has determined that the permit holder has not demonstrated compliance with any of the permit conditions for Well 3, as required by Permit G-17001 as Well 3 has not yet been constructed.

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

The amount of beneficial use made of the water during the permit time.

11. A maximum rate of 210 gallons per minute (gpm) (0.47 cfs) of water has been appropriated being 120 gpm (0.27 cfs) from Well 1, and 90 gpm (0.2 cfs) from Well 2 for industrial uses.

Based on FOF 9 and 11, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by January 31, 2018.

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.

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

12. An approximate total of \$76,000 has been invested. The costs included items associated with repair and maintenance costs of a system, and static water level measurement costs, which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$67,000 which is about 24 percent of the total projected cost for complete development of this project. An additional \$210,000 investment is needed to complete this project, which includes requesting a change in location of Well 3 through a permit amendment, and if approved, constructing Well 3 in the newly authorized location and connecting the well to the water system and the Nest Fresh facility.

Based on FOF 12, 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, 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-17001.

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.

13. 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-17001; 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).

14. The points of appropriation for Permit G-17001, located within the Bear Creek Basin, are not located within a limited or critical groundwater area.
15. Bear Creek is not located within or above any state or federal scenic waterway.
16. 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.

17. Bear Creek 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.

18. An approximate total of \$67,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. Willamette Egg Farms employs 15 full time employees and 6 part time employees, and the eggs produced at the Nest Fresh facility are considered specialty eggs and are purchased by supermarkets, institutions and restaurants. Loss of production of these specialty eggs may result in a shortened supply of these eggs in the market, driving up costs and increasing distribution cost.

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

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

20. 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)]

21. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The ability to have more consistent supply of water during the summer months, which would allow for increased production and less bird fatality.

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

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

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

23. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17001.

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

24. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The use of water from Well 3 would allow for better supply of water to the Nest Fresh facility during hot summer months. Without the use, providing proper care for the birds is difficult and labor intensive. Though water is available through Well 1 and Well 2, the undersized pipeline and production limitations of the wells reduces the effective utilization in the Nest Fresh facility. Other sources of water are not available as the facility is not near to any water service providers, and no surface water is available near the facility.

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

25. The Application provides evidence of good faith of the appropriator under Permit G-17001.

Based on FOF 5 through 9, and 11, 12, and 18, the Department has determined that the applicant has shown good faith and reasonable diligence.

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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.

26. As of February 13, 2018, the remaining work to be completed consists of completing construction of the water system, which includes constructing Well 3; meeting all permit conditions, which include installing a totalizing flow meter, submitting annual static water level measurements and reporting the amount of water used annually; 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-17001 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 5 through 25, 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.

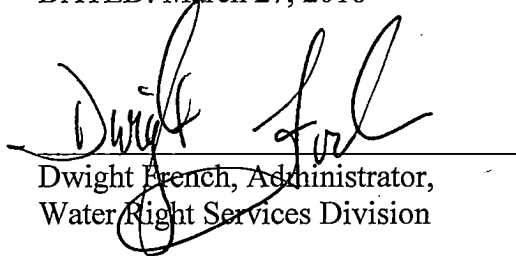
PROPOSED ORDER

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-17001 from January 31, 2018, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit G-17001 from January 31, 2018, to October 1, 2023.

DATED: March 27, 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 **May 11, 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
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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