

**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 S-53496, Water Right Application S-83725
in the name of Dyno Nobel, Inc

) PROPOSED
) FINAL
) ORDER

Permit Information

Application:	S-83725
Permit:	S-53496
Basin:	North Coast / Watermaster District 1
Date of Priority:	December 16, 1997
Source of Water:	Columbia River, a tributary of Pacific Ocean
Purpose or Use:	industrial use
Maximum Rate:	38.0 cubic feet per second (cfs)

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

In summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2007, to October 1, 2025.¹
- Make the extension subject to certain conditions set forth below.

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

¹ Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the permit holder shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permit holder shall submit a map of the survey and the claim of beneficial use.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Water Resources Department
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
FOF – Finding of Fact
cfs - cubic feet per second

AUTHORITY

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

ORS 537.230(2) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

ORS 539.010(5) 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(5) states that extension orders may include, but are not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

FINDINGS OF FACT

1. On November 4, 1998 Permit S-53496 was issued by the Department. The permit authorizes the use/storage of up to 38.0 cfs of water from the Columbia River, a tributary of Pacific Ocean, for industrial use. The permit specified actual construction was to begin by September 24, 1999, and complete application of water was to be made on or before October 1, 2002.
2. On January 12, 2004, an assignment from Coastal Refining and Marketing, Herold G. Nelson, to Dyno Nobel, Inc was recorded in the records of the Water Resources Department.

3. One prior permit extension has been granted for S-53496. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2002 to October 1, 2007.
4. On May 10, 2021, Dyno Nobel, Inc, 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 S-53496 be extended from October 1, 2007, to October 1, 2025.
5. On October 26, 2021, notification of the Application for Permit S-53496 was published in the Department's Public Notice. No public comments were received.
6. On October 7, 11, 14, and 16, 2021, the permit holder submitted additional information to supplement their Application. The additional information was to clarify compliance with fish screen requirements, water use to date, and estimated capacity of the system once upgraded.

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)]

7. On May 10, 2021, 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)]

8. Construction of the water system began prior to permit issuance.
9. According to Application, the permit shares an intake with Water Right Certificate 42701, issued December 5, 1975.

Based on Findings of Fact (FOF) 8, and 9, the Department has determined the permit holder began construction prior to September 24, 1999.

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 permit or previous extension.²

10. Construction of the water system or reservoir began prior to permit issuance.
11. During the original development time frame under Permit S-53496, work accomplished includes upgrading of three pumps.
12. During the most recent extension period, being from October 1, 2002, to October 1, 2007, work accomplished includes upgrading an electrical transformer.
13. Since October 1, 2007, no additional work has been accomplished towards the development of water use authorized by the permit.

Based on FOF 10, 11, and 12, the Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards 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.

14. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: the record does not show that ODFW approval of fish screen or by-pass device have not been received by the department.

The Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit S-53496:

- “The permittee shall install, maintain, and operate fish screening and by-pass devices as required by the Oregon Department of Fish and Wildlife to prevent fish

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.

from entering the proposed diversion. The required screens and by-pass devices are to be in place, functional and approved by an ODFW representative prior to diversion of any water.

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

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 time limits.

15. No water has been diverted under Permit S-53496.
16. A delay of full beneficial use of water under Permit S-53496 was due, in part, delays in upgrading cooling water discharge facilities.

Based on FOF 15, and 16, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2007.

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

17. An approximate total of \$2,115,015 has been invested. The costs included items associated with upgrades, repairs and maintenance costs, data collection, engineering, and NPDES permits 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 \$1,240,736 which is about 45 percent of the total projected cost for complete development of this project. An additional \$1,515,128 investment is needed to complete this project. This cost includes items identified as "Construction Contract Costs" specified in Table 4 of the attachment to the Application. The costs not attributed to construction costs have not been included in this determination.

Based on FOF 17, 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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.

18. 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 S-53496; 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.
19. Current Water Availability Analysis for the Columbia River, (Tributary to Pacific Ocean) at the mouth show that water is available at the 80% exceedance level.

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).

20. The point of diversion is located on Columbia River, a tributary of Pacific Ocean, and is not located within a Withdrawn Area.
21. The Columbia River, a tributary of Pacific Ocean is not located within or above a/the state or federal scenic waterway.
22. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream. Columbia River, Frogmore Slough, to Tide Creek, is listed under Water Quality Limited for Total Dissolved Gas; Temperature; Arsenic, Inorganic; Dioxin (2, 3, 7, 8-TCDD); Polychlorinated Biphenyls (PCBs); and DDE 4,4'

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.

23. Columbia River, a tributary of Pacific Ocean 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.

24. An approximate total of \$1,240,736 has been invested in the project.

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

Other economic interests dependent on completion of the project.

25. Other economic interests dependent on the completion of the project have been identified. Other economic interests include 75 full time equivalent staff members, and post-industrial water user with whom the applicant has agreements.

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

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

26. On October 14, 2021, the permit holder submitted additional information identifying the capacity of the facility, once upgraded will be 30 million gallons per day. The permit holder describes the use of water in the facility as being in use 24-hours a day, 7-days a week, 365-days per year. At this rate, a maximum of 46.4 cfs would be necessary to meet the needs of the water user.
27. The permit holder is also the holder of Water Right Certificate 42701, authorizing the use of 40.0 cfs of water for industrial use within the facility. This combined with the 38.0 cfs authorized under Permit S-53496 allows for a total of 70.0 cfs of water for industrial use. This exceeds the planned capacity of the facility by 46.4 cfs.

Based on FOF 26, and 27, the Department has determined the use of water authorized under this permit is not needed to operate the facility at the planned capacity.

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

28. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

Other Governmental Requirements [OAR 690-315-0042(2)(g)]

29. The delay in the timely completion of the development of the project and/or timely application of water to full beneficial use was caused, in part, by additional government requirements, including NPDES permit requirements.

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

30. No unforeseen events were identified that extended the length of time needed to fully develop and perfect Permit S-53496.

Denial of an Extension Would Result in Undue Hardship [OAR 690-315-0040(2)(i)]

31. A denial of the extension would result in undue hardship. An inability to expand the facility to the planned capacity could result in loss of employment for staff, and a shortage of nitrogen fertilizer for agriculture in the area.

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

32. The Application provides evidence of good faith of the appropriator under Permit S-53496.

Based on FOF 8, 9, 10, 11, 12, 17, and 24, 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.

33. As of May 10, 2021, the permit holder states the remaining work to be completed consists of completing construction of the water system 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, 2025, to accomplish the application of water to beneficial use under the terms and conditions of Permit S-53496 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(5) provides for extension orders to include, but are not limited to, mitigate the effects of the subsequent development on competing demands on the resource. Based on FOF 9, 12, 13, 22, 26, and 27, the Department determined the need to place a "Development Limitation" on this extension of time in order to mitigate the effects of the subsequent development on competing demands on the resource. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary because the amount of time allowed for development of this permit since issuance, and the need to develop the full rate under this permit has not been demonstrated to be necessary. In combination with the water authorized under Certificate 42701, the permit holder has demonstrated 6.4 cfs of water authorized under Permit S-53496 is necessary to meet the needs of the facility after the planned upgrades and improvements.
2. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence. Based on FOF 14, and 15, the Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 2 of the "Conditions" section of this PFO, was determined to be necessary due to minimal work accomplished towards development of water authorized under this permit, and because no water has been diverted under this permit in the 23 years since the permit was approved.

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 complied with construction timeline requirements to begin actual construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 8, through 32, full application of water to beneficial use can be accomplished by October 1, 2025³, as required by OAR 690-315-0040(1)(c).

³Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the

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, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

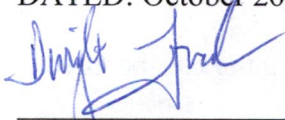
Extend the time to apply water to beneficial use under Permit S-53496 from October 1, 2007, to October 1, 2025.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Development Limitation**
Development of water under Permit S-53496, is limited to no more than 6.4 cfs of water of the 38.0 cfs of water authorized by the permit.
2. **Last Extension Condition**
This may be the last extension of time granted for Permit S-53496. Any future extensions of time request may be denied, unless the permit holder can provide the Department with evidence that the required fish screens have been installed and approved, prior to diversion of more than 40.0 cfs, as authorized by Water Right Certificate 42701. In addition, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

DATED: October 26, 2021



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.*

permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

Proposed 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 **December 10, 2021**, 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 TO ACTIVE DUTY SERVICEMEMBERS: Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

