

DYNAVAX TECHNOLOGIES CORP

FORM S-8

(Securities Registration: Employee Benefit Plan)

Filed 11/30/17

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Sector	Healthcare
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**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

FORM S-8

**REGISTRATION STATEMENT
UNDER THE SECURITIES ACT OF 1933**

DYNAVAX TECHNOLOGIES CORPORATION
(Exact Name of Registrant as Specified in its Charter)

Delaware
(State of Incorporation)

33-0728374
(I.R.S. Employer Identification Number)

2929 Seventh Street, Suite 100
Berkeley, CA 94710
(510) 848-5100
(Address, Including Zip Code, and Telephone Number,
Including Area Code, of Registrant's Principal Executive Offices)

Dynavax Technologies Corporation Inducement Award Plan
(Full Title of the Plan)

Michael Ostrach
Senior Vice President, Chief Financial Officer
Dynavax Technologies Corporation
2929 Seventh Street, Suite 100
Berkeley, CA 94710
(510) 848-5100
(Name, Address, Including Zip Code, and Telephone Number,
Including Area Code, of Agent for Service)

Copies to:

Glen Y. Sato, Esq.
Cooley LLP
3175 Hanover St.
Palo Alto, CA 94304
(650) 843-5000

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer Accelerated filer
Non-accelerated filer (Do not check if a smaller reporting company) Smaller reporting company
Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered	Amount to be Registered(2)	Proposed Maximum Offering Price Per Share(3)	Proposed Maximum Aggregate Offering Price(2)	Amount of Registration Fee
Common Stock, \$0.001 par value per share				
Inducement Award Plan, including related rights to purchase Series A Junior Participating Preferred Stock(1)	1,200,000	\$18.35	\$22,020,000	\$2,741.49
Total	1,200,000	\$18.35	\$22,020,000	\$2,741.49

- (1) Each share of the Registrant's common stock, par value \$0.001 per share ("Common Stock") being registered hereunder, if issued prior to the termination by the Registrant of its Rights Agreement, dated as of November 5, 2008, between the Registrant and the rights agent named therein, includes Series A Junior Participating Preferred Stock purchase rights (the "Rights"). Prior to the occurrence of certain events, the Rights will not be exercisable or evidenced separately from the Registrant's Common Stock and have no value except as reflected in the market price of the shares to which they are attached.
- (2) Pursuant to Rule 416(a) promulgated under the Securities Act of 1933, as amended (the "Securities Act"), this Registration Statement shall also cover any additional shares of Common Stock that become issuable under the Dynavax Technologies Corporation Inducement Award Plan by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without receipt of consideration that increases the number of outstanding shares of the Registrant's Common Stock.
- (3) Estimated solely for the purpose of calculating the registration fee pursuant to Rules 457(c) and 457(h)(1) of the Securities Act based on the average of the high (\$18.65) and low (\$18.05) sales prices for the Registrant's Common Stock reported by the Nasdaq Capital Market on November 27, 2017.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

ITEM 1. PLAN INFORMATION.

Not required to be filed with this Registration Statement.

ITEM 2. REGISTRANT INFORMATION AND EMPLOYEE PLAN ANNUAL INFORMATION.

Not required to be filed with this Registration Statement.

PART II
INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

ITEM 3. INCORPORATION OF DOCUMENTS BY REFERENCE.

The following documents filed by the Registrant with the Securities and Exchange Commission (the “Commission”) are incorporated by reference into this registration statement:

- the Company’s Annual Report on Form 10-K for the year ended December 31, 2016, filed with the Commission on March 13, 2017 (the “2016 Form 10-K”);
- the information specifically incorporated by reference into the 2016 Form 10-K from the Company’s definitive proxy statement on Schedule 14A, filed with the Commission on April 21, 2017;
- The Company’s Quarterly Reports on Form 10-Q for the quarters ended March 31, 2017, June 30, 2017 and September 30, 2017, filed with the Commission on May 8, 2017, August 7, 2017 and November 3, 2017, respectively;
- The Company’s Current Reports on Form 8-K or 8-K/A (other than information furnished rather than filed) filed with the Commission on January 5, 2017, January 13, 2017, February 28, 2017, March 6, 2017, April 3, 2017, May 25, 2017, May 30, 2017, June 2, 2017, June 5, 2017, July 31, 2017, August 7, 2017, August 10, 2017, September 1, 2017 and November 14, 2017; and
- The description of the Company’s common stock contained in the Company’s Registration Statement on Form 8-A (No. 000-50577), filed with the Commission on February 6, 2004, as amended by Form 8-A, filed with the Commission on November 6, 2008, including any amendments or reports filed for the purpose of updating such description.

All documents subsequently filed by the Registrant pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), other than current reports furnished under Item 2.02 or Item 7.01 of Form 8-K and exhibits furnished on such form that relate to such items, prior to the filing of a post-effective amendment to this Registration Statement which indicates that all of the shares of Common Stock offered have been sold or which deregisters all of such shares then remaining unsold, shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the date of the filing of such documents.

For purposes of this Registration Statement, any statement contained in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded to the extent that a statement contained herein or in any other subsequently filed document which also is or is deemed to be incorporated by reference herein modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

ITEM 4. DESCRIPTION OF SECURITIES.

Not applicable.

ITEM 5. INTERESTS OF NAMED EXPERTS AND COUNSEL.

Not applicable.

ITEM 6. INDEMNIFICATION OF DIRECTORS AND OFFICERS.

As permitted by Delaware law, the Registrant's amended and restated certificate of incorporation provides that no director will be personally liable to the Registrant or the Registrant's stockholders for monetary damages for breach of fiduciary duty as a director, except for liability:

- for any breach of the duty of loyalty to the Registrant or the Registrant's stockholders;
- for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law;
- for unlawful payment of dividends or unlawful stock repurchases or redemptions under Section 174 of the Delaware General Corporation Law; and
- for any transaction from which the director derived an improper personal benefit.

The Company's amended and restated certificate of incorporation further provides that the Registrant must indemnify the Registrant's directors to the fullest extent permitted by Delaware law. In addition, the Registrant's amended and restated bylaws provide that:

- the Registrant is required to indemnify the Registrant's directors and executive officers to the fullest extent not prohibited by Delaware law, subject to limited exceptions;
- the Registrant may indemnify the Registrant's other employees and agents as set forth in the Delaware General Corporation Law;
- the Registrant is required to advance expenses to the Registrant's directors and executive officers as incurred in connection with legal proceedings against them for which they may be indemnified, against an undertaking by the indemnified party to repay such advances if it is ultimately determined that the indemnified party is not entitled to indemnification; and
- the rights conferred in the amended and restated bylaws are not exclusive.

The Company has entered into indemnification agreements with each of the Registrant's directors and executive officers that require the Registrant to indemnify these individuals against expenses, witness fees, damages, judgments, fines and settlement amounts incurred by the director or officer in any action or proceeding, whether actual, pending or threatened, subject to certain limitations, to which any of these individuals may be made a party by reason of the fact that he or she is or was a director or an executive officer of the Registrant or is or was serving or at any time serves at the request of the Registrant as a director, officer, employee or other agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise.

ITEM 7. EXEMPTION FROM REGISTRATION CLAIMED.

Not applicable.

ITEM 8. EXHIBITS.

Exhibit Number	Document	Incorporated by Reference				Filed Herewith
		Exhibit Number	Filing	Filing Date	File No.	
3.1	Sixth Amended and Restated Certificate of Incorporation	3.1	S-1/A	February 5, 2004	333-109965	
3.2	Amended and Restated Bylaws	3.2	S-1/A	February 5, 2004	333-109965	
3.3	Form of Certificate of Designation of Series A Junior Participating Preferred Stock	3.3	8-K	November 6, 2008	000-50577	
3.4	Certificate of Amendment of Amended and Restated Certificate of Incorporation	3.1	8-K	January 4, 2010	001-34207	
3.5	Certificate of Amendment of Amended and Restated Certificate of Incorporation	3.1	8-K	January 5, 2011	001-34207	
3.6	Certificate of Amendment of Amended and Restated Certificate of Incorporation	3.6	8-K	May 30, 2013	001-34207	
3.7	Certificate of Amendment of the Sixth Amended and Restated Certificate of Incorporation	3.1	8-K	November 10, 2014	001-34207	
3.8	Certificate of Amendment of the Sixth Amended and Restated Certificate of Incorporation	3.1	8-K	June 2, 2017	001-34207	
3.9	Certificate of Amendment of the Sixth Amended and Restated Certificate of Incorporation	3.1	8-K	July 31, 2017	001-34207	
4.1	Reference is made to Exhibits 3.1 , 3.2 , 3.3 , 3.4 , 3.5 , 3.6 , 3.7 , 3.8 and 3.9 above					
4.2	Form of Specimen Common Stock Certificate	4.2	S-1/A	January 16, 2004	333-109965	
4.3	Rights Agreement dated as of November 5, 2008, by and between the Company and Mellon Investor Services LLC	4.4	8-K	November 6, 2008	000-50577	
4.4	Form of Right Certificate	4.5	8-K	November 6, 2008	000-50577	
5.1	Opinion of Cooley LLP					X
23.1	Consent of Independent Registered Public Accounting Firm					X
23.2	Consent of Cooley LLP (contained in Exhibit 5.1 to this Registration Statement)					
24.1	Power of Attorney (see Signature Page)					
99.1	Dynavax Technologies Corporation Inducement Award Plan, and Form of Stock Option Grant Notice, Option Agreement and Notice of Exercise, and Form of Restricted Stock Unit Award Grant Notice and Restricted Stock Unit Award Agreement	10.1	8-K	November 30, 2017	001-34207	

ITEM 9. UNDERTAKINGS

1. The undersigned registrant hereby undertakes:

(a) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by section 10(a)(3) of the Securities Act;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

Provided, however, that paragraphs (a)(i) and (a)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Exchange Act that are incorporated by reference in the registration statement.

(b) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered herein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

2. The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Exchange Act) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered herein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

3. Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Berkeley, State of California, on November 30, 2017.

DYNAVAX TECHNOLOGIES CORPORATION

By: /s/ EDDIE GRAY
Eddie Gray
Chief Executive Officer
(Principal Executive Officer)

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENT, that each person whose signature appears below does hereby constitute and appoint Eddie Gray and Michael Ostrach, and each of them, with full power of substitution and full power to act without the other, his true and lawful attorney-in-fact and agent to act for him in his name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file this Registration Statement, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in order to effectuate the same as fully, to all intents and purposes, as they or he might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, as amended, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

<u>Signature</u>	<u>Title</u>	<u>Date</u>
<u>/s/ EDDIE GRAY</u> Eddie Gray	Chief Executive Officer and Director (Principal Executive Officer)	November 30, 2017
<u>/s/ MICHAEL OSTRACH</u> Michael Ostrach	Senior Vice President, Chief Financial Officer (Principal Financial Officer)	November 30, 2017
<u>/s/ DAVID JOHNSON</u> David Johnson	Vice President, Chief Accounting Officer (Principal Accounting Officer)	November 30, 2017
<u>/s/ ARNOLD L. ORONSKY, Ph.D.</u> Arnold L. Oronsky, Ph.D.	Director	November 30, 2017
<u>/s/ LAURA BREGE</u> Laura Brege	Director	November 30, 2017
<u>/s/ FRANCIS R. CANO, Ph.D.</u> Francis R. Cano, Ph.D.	Director	November 30, 2017

<u>Signature</u>	<u>Title</u>	<u>Date</u>
<hr/> <i>/s/ DENNIS A. CARSON, M.D.</i> Dennis A. Carson, M.D.	Director	November 30, 2017
<hr/> <i>/s/ DANIEL L. KISNER, M.D.</i> Daniel L. Kisner, M.D.	Director	November 30, 2017
<hr/> <i>/s/ PEGGY V. PHILLIPS</i> Peggy V. Phillips	Director	November 30, 2017
<hr/> Stanley A. Plotkin, M.D.	Director	
<hr/> <i>/s/ NATALE S. RICCIARDI</i> Natale S. Ricciardi	Director	November 30, 2017



Glen Y. Sato
+1 650 843 5502
gsato@cooley.com

November 30, 2017

Dynavax Technologies Corporation
2929 Seventh Street, Suite 100
Berkeley, California 94710-2753

Ladies and Gentlemen:

We have acted as counsel to Dynavax Technologies Corporation, a Delaware corporation (the “*Company*”), in connection with the filing of a Registration Statement on Form S-8 (the “*Registration Statement*”) with the Securities and Exchange Commission covering the offering of up to 1,200,000 shares (the “*Inducement Shares*”) of the Company’s Common Stock, \$0.001 par value (the “*Common Stock*”), pursuant to the Company’s Inducement Plan (the “*Plan*”) (and the preferred stock purchase rights (the “*Rights*”) associated with the Common Stock pursuant to that certain Rights Agreement (the “*Rights Agreement*”), dated November 5, 2008, between the Company and Mellon Investor Services LLC, as Rights Agent (the “*Rights Agent*”).

In connection with this opinion, we have examined and relied upon (a) the Registration Statement and related prospectus, (b) the Plan, (c) the Company’s Restated Certificate of Incorporation, as amended, the Company’s Amended and Restated Bylaws and the Rights Agreement, each as currently in effect, and (d) the originals or copies certified to our satisfaction of such records, documents, certificates, memoranda and other instruments as in our judgment are necessary or appropriate to enable us to render the opinion expressed below. We have assumed the genuineness and authenticity of all documents submitted to us as originals, and the conformity to originals of all documents submitted to us as copies thereof. As to certain factual matters, we have relied upon a certificate of an officer of the Company and have not sought to independently verify such matters.

We have also assumed that the Rights Agreement has been duly authorized, executed and delivered by the Rights Agent and that the members of the Board of Directors of the Company have acted in a manner consistent with their fiduciary duties as required under applicable law in adopting the Rights Agreement. This opinion does not address whether the Board of Directors of the Company may be required to redeem or terminate, or take other action with respect to, the Rights in the future based on the facts and circumstances then existing. Moreover, this opinion addresses corporate procedures in connection with the issuance of the Rights associated with the Inducement Shares, and not any particular provision of the Rights or the Rights Agreement. It should be understood that it is not settled whether the invalidity of any particular provision of a rights agreement or purchase rights issued thereunder would invalidate such rights in their entirety.

Our opinion is expressed solely with respect to the General Corporation Law of the State of Delaware. We express no opinion to the extent that any other laws are applicable to the subject matter hereof and provide no assurance as to compliance with any federal or state securities law, rule or regulation.



Dynavax Technologies Corporation
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On the basis of the foregoing, and in reliance thereon, we are of the opinion that the Inducement Shares and the associated Rights, when sold and issued in accordance with the Plan, the Registration Statement and related prospectus, will be validly issued, and the Inducement Shares will be fully paid, and nonassessable (except as to shares issued pursuant to certain deferred payment arrangements, which will be fully paid and nonassessable when such deferred payments are made in full).

We consent to the filing of this opinion as an exhibit to the Registration Statement.

Sincerely,

Cooley LLP

By: /s/ Glen Y. Sato
Glen Y. Sato

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in the Registration Statement on Form S-8 pertaining to the Dynavax Technologies Corporation Inducement Award Plan of Dynavax Technologies Corporation of our reports dated March 13, 2017, with respect to the consolidated financial statements of Dynavax Technologies Corporation and the effectiveness of internal control over financial reporting of Dynavax Technologies Corporation, included in its Annual Report (Form 10-K) for the year ended December 31, 2016, filed with the Securities and Exchange Commission.

/s/ Ernst & Young LLP

Redwood City, California
November 30, 2017