DYNAVAX TECHNOLOGIES CORP
Form S-8
August 04, 2014

As filed with the Securities and Exchange Commission on August 4, 2014

Registration No. 333 -

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	**33-0728374**
(State of Incorporation)	**(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 2014 Employee Stock Purchase Plan

(Full Title of the Plan)

Michael Ostrach

Vice President, Principal 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) 843-5502

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

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

CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered	**Amount to be registered[(1)]**	**Proposed maximum offering price per share [(3)]**	**Proposed maximum aggregate offering price [(3)]**	**Amount of registration fee**
Common Stock ($0.001 par value per share), including related rights to purchase Series A Junior Participating Preferred Stock[(2)]	500,000	$1.49	$745,000	$95.96

(1) 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 the Registrant s common stock, par value $0.001 per share (Common Stock), that become issuable under the Dynavax Technologies Corporation 2014 Employee Stock Purchase Plan (2014 ESPP) 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.

(2) Each share of the Registrant s 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.

(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 and low prices for the Registrant s Common Stock reported by The NASDAQ Capital Market on July 31, 2014.

PART I

INFORMATION REQUIRED IN THE

SECTION 10(a) PROSPECTUS

The documents containing the information specified in this Part I of Form S-8 will be sent or given to employees as specified by Rule 428(b)(1) under the Securities Act. Such documents need not be filed with the Securities and Exchange Commission (the Commission) either as part of this Registration Statement or as prospectuses or prospectus supplements pursuant to Rule 424 under the Securities Act. These documents and the documents incorporated by reference in this Registration Statement pursuant to Item 3 of Part II of this Form S-8, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents filed by Dynavax Technologies Corporation (the Company , the Registrant or Dynavax) with the Securities and Exchange Commission (the Commission or the SEC) are incorporated by reference into this Registration Statement:

(a) the Registrant s annual report on Form 10-K for the year ended December 31, 2013 filed with the Commission on March 10, 2014;

(b) the Registrant s quarterly report on Form 10-Q for the quarterly period ended March 31, 2014 filed with the Commission on May 5, 2014;

(c) the Registrant s current reports on Form 8-K, filed with the Commission on February 7, 2014, February 18, 2014, April 16, 2014 and May 29, 2014; and

(d) The description of the Registrant s common stock contained in the Registrant s registration statement on Form 8-A (No. 000-50577), filed by the Registrant 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 reports and other documents subsequently filed by the Company 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 securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference herein and to be a part of this Registration Statement from the date of the filing of such reports and documents.

Any statement contained in a document incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement 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 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

Under Section 145 of the General Corporation Law of Delaware (Delaware Law), the Registrant has broad powers to indemnify its directors and officers against liabilities they may incur in such capacities, including liabilities under the Securities Act.

The Registrant s amended and restated certificate of incorporation and bylaws include provisions which (i) eliminate the personal liability of its directors for monetary damages resulting from breaches of their fiduciary duty to the extent permitted by Delaware Law and (ii) require the Registrant to indemnify its directors, officers, employees and agents to the fullest extent permitted by Delaware Law, including circumstances in which indemnification is otherwise discretionary. Pursuant to Section 145 of the Delaware Law, a corporation generally has the power to indemnify its present and former directors, officers, employees and agents against expenses incurred by them in connection with any suit to which they are, or are threatened to be made, a party by reason of their serving in such positions so long as they acted in good faith and in a manner they reasonably believed to be in or not opposed to, the best interests of the corporation and, with respect to any criminal action, had no reasonable cause to believe their conduct was unlawful. The Registrant believes that these provisions are necessary to attract and retain qualified persons as directors and executive officers. These provisions do not eliminate the directors duty of care, and, in appropriate circumstances, equitable remedies such as injunctive or other forms of non-monetary relief will remain available under Delaware Law. In addition, each director will continue to be subject to liability for breach of the director s duty of loyalty to the Registrant, for acts or omissions not in good faith or involving intentional misconduct, for knowing violations of law, for acts or omissions that the director believes to be contrary to the Registrant s best interests or the best interests of the Registrant s stockholders, for any transaction from which the director derived an improper personal benefit, and any act related to unlawful stock repurchases, redemptions or other distribution or payments of dividends. The provision also does not affect a director s responsibilities under any other law, such as the federal securities law or state or federal environmental laws.

The Registrant has entered into indemnity agreements with certain of its directors and executive officers that require the Registrant to indemnify such persons against expenses, judgments, fines, settlements and other amounts incurred (including expenses of a derivative action) in connection with any proceeding, whether actual or threatened, to which any such person may be made a party by reason of the fact that such person is or was one of the Registrant s directors or executive officers, provided, among other things, that such person s conduct was not knowingly fraudulent or deliberately dishonest or constituted willful misconduct. The indemnification agreements also set forth certain procedures that will apply in the event of a claim for indemnification thereunder.

At present, there is no pending litigation or proceeding involving any of the Registrant s directors or executive officers as to which indemnification is being sought nor is the Registrant aware of any threatened litigation that may result in claims for indemnification by any executive officer or director.

The Registrant maintains an insurance policy covering its officers and directors with respect to certain liabilities, including liabilities arising under the Securities Act or otherwise.

That certain Amended Registration Rights Agreement, dated as of November 9, 2009, between Dynavax Technologies Corporation and Symphony Dynamo Holdings LLC provides for cross-indemnification in connection with the registration of common stock of the Registrant on behalf of such party and its permitted transferees.

Item 7. Exemption from Registration Claimed

Not Applicable

Item 8.	Exhibits.
3.1[(1)]	Sixth Amended and Restated Certificate of Incorporation
3.2[(1)]	Amended and Restated Bylaws
3.3[(2)]	Form of Certificate of Designation of Series A Junior Participating Preferred Stock
3.4[(3)]	Certificate of Amendment of Amended and Restated Certificate of Incorporation
3.5[(4)]	Certificate of Amendment of Amended and Restated Certificate of Incorporation
3.6[(5)]	Certificate of Amendment of Amended and Restated Certificate of Incorporation
3.7[(6)]	Certificate of Amendment of Amended and Restated Certificate of Incorporation
4.1	Reference is made to Exhibits 3.1, 3.2, 3.3, 3.4 , 3.5, 3.6 and 3.7
4.2[(7)]	Registration Rights Agreement
4.3[(8)]	Form of Specimen Common Stock Certificate
4.4[(2)]	Rights Agreement dated as of November 5, 2008, by and between the Company and Mellon Investor Services LLC
4.5[(2)]	Form of Right Certificate
4.6[(9)]	Amended and Restated Registration Rights Agreement, dated as of November 9, 2009, between the Company and Symphony Dynamo Holdings LLC
5.1	Opinion of Cooley LLP
23.1	Consent of Independent Registered Public Accounting Firm
23.2	Consent of Cooley LLP (contained in Exhibit 5.1 to this Registration Statement)
24.1	Power of Attorney (see Signatures Page)
99.1[(10)]	Dynavax Technologies Corporation 2014 Employee Stock Purchase Plan

(1) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Amendment No. 4 to Registration Statement on Form S-1/A, as filed with the SEC on February 5, 2004 (File No. 000-50577) and such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K, as filed with the SEC on January 5, 2011.

(2) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K (File No. 000-50577), as filed with the SEC on November 6, 2008.

(3) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K, as filed with the SEC on January 4, 2010.

(4) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K, as filed with the SEC on January 5, 2011.

(5) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K, as filed with the SEC on May 30, 2013.

(6) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K, as filed with the SEC on November 1, 2013.

(7) Incorporated by reference to Dynavax s Registration Statement (File No. 333-145836) on Form S-3 filed on August 31, 2007.

(8) Incorporated by reference to Dynavax s Registration Statement (File No. 333-109965) on Form S-1/A filed on January 16, 2004.

(9) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Annual Report on Form 10-K, for the fiscal year ended December 31, 2009.

(10) Incorporated by reference from such document filed with the SEC as an exhibit to Dynavax s Current Report on Form 8-K, as filed with the SEC on May 29, 2014.

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 August 4, 2014.

DYNAVAX TECHNOLOGIES CORPORATION

By: /s/ EDDIE GRAY
Eddie Gray

Chief 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 S. 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.

Signature	Title	Date
/s/ EDDIE GRAY	Chief Executive Officer and Director	August 4, 2014
Eddie Gray	*(Principal Executive Officer)*	
/s/ MICHAEL S. OSTRACH	Vice President	August 4, 2014
Michael S. Ostrach	*(Principal Financial Officer)*	
/s/ DAVID JOHNSON	Vice President	August 4, 2014
David Johnson	*(Principal Accounting Officer)*	
/s/ ARNOLD L. ORONSKY, PH.D.	Director	August 4, 2014

Arnold L. Oronsky, Ph.D.		
/s/ FRANCIS R. CANO, PH.D.		August 4, 2014
Francis R. Cano, Ph.D.	Director	
/s/ DENNIS A. CARSON, M.D.		August 4, 2014
Dennis A. Carson, M.D.	Director	
/s/ DINO DINA, M.D		August 4, 2014
Dino Dina, M.D.	Director	

Signature	Title	Date
/s/ DENISE M. GILBERT, PH.D.		August 4, 2014
Denise M. Gilbert, Ph.D.	Director	
/s/ DANIEL L. KISNER, M.D.		August 4, 2014
Daniel L. Kisner, M.D.	Director	
/s/ PEGGY V. PHILLIPS		August 4, 2014
Peggy V. Phillips	Director	
/s/ STANLEY A. PLOTKIN, M.D.		August 4, 2014
Stanley A. Plotkin, M.D.	Director	
/s/ NATALE RICCIARDI		August 4, 2014
Natale Ricciardi	Director	

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