Oregon Farm Bureau Urges Support of SB 1517-3
Senate Environmental and Natural Resources Committee
February 3, 2015

Chair Edwards and Members of the Committee,

We write you today to urge support of SB 1517, as amended by the -3 amendments. Oregon Farm Bureau has been working for the past two sessions to seek resolution to the issues associated with Oregon's current system for creating wetlands projects on farmland, and we really appreciate the time and effort you have put into this issue over the past several months.

By way of background, the Oregon Farm Bureau is a voluntary, grassroots, nonprofit agricultural organization representing Oregon's farmers and ranchers in the public and policymaking arena. As Oregon's largest general farm organization, its primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry as a whole. Today, Oregon Farm Bureau represents over 7,000 member families professionally engaged in the industry and has a total membership of over 60,000 families.

Explanation of the Issue

Due to very wet conditions most of the year, the ability to maintain adequate drainage on their fields is critical to dairy farmers, particularly in coastal regions. In recent years, our members have noticed an increase in the purchase and conversion of farmland to large-scale conservation use, particularly to wetlands. The construction of wetlands in agricultural areas can alter the drainage patterns in the area around the project and create flooding issues on neighboring farms. Over time, increased flooding on these properties can result in changes in vegetation, causing farmed crops to be replaced by hydrophytic vegetation. Given that farmers in wetland areas already struggle to combat flooding in wet years, these projects can drastically decrease the productivity of the impacted farms.

This issue has become particularly problematic in the coastal regions of the state, where the farmers – most of whom have been in the area for generations – have found themselves competing with conservation groups for the agricultural land necessary to continue to run their operations. The increase in conservation spending in coastal regions has been dramatic, and has resulted in the permanent conversion of hundreds of acres of agricultural land. Agriculture forms the backbone of the economy in most of these counties, and it is essential that these operations continue to be able to coexist with local conservation projects while maintaining the functioning agricultural land base they need to be successful. Current Oregon law poses some challenges to farmers in maintaining adequate drainage, which is only compounded by the increase in wetlands projects in these areas.

Presently, wetlands projects do not require review under Oregon land use laws for impacts to neighboring agricultural operations. As a result, wetlands projects are often not designed with an eye toward minimizing impacts to neighboring agricultural operations, particularly in regard to hydrologic impacts from the project. Compounding this issue, agricultural landowners impacted by a wetlands project presently do not have any legal recourse against neighboring landowners, such a conservation groups, who are also project contractors and designers when their wetland projects impact neighboring landowners if OWEB or ODFW were involved in the design or creation of the project, which in western Oregon, ends up being almost all of the wetlands projects constructed. Further, current removal-fill policy from the Department of State Lands makes it difficult for farmers and ranchers to clean existing ditches necessarily to facilitate proper drainage.

Our proposed legislation is designed to address these issues and ensure that farmers and ranchers in western Oregon can continue to be partners in conservation while maintaining their farming and ranching operations in the face of increasing conservation projects in their area. It does this by: 1) requiring county review of wetlands projects in agricultural operations in order to ensure that the project is designed to minimize the impacts on agricultural operations, 2) removing the liability shield of landowner contractors and designers – often conservation groups – who engage in wetlands projects, and 3) allowing farmers and ranchers to remove up to 100 cubic yards of material in order to maintain agricultural drainage.

History of the Legislation

The Oregon Farm Bureau has been working to create a more fair and inclusive process around wetlands development for several years, and most recently put forward legislation addressing these issues in the 2015 session. In early November, Oregon Farm Bureau hosted a legislative tour with interested legislators. The tour visited some of the biggest conservation projects adjacent to agricultural land in Tillamook County, and discussed the importance of enabling neighboring landowners to raise concerns with a project design at the front end of the project. Oregon Farm Bureau also convened an informal workgroup in late December with members of the conservation community, counties, and others to solicit feedback on their proposal. Since that time, Oregon Farm Bureau has actively solicited feedback from interested stakeholders on their proposal, and made modifications found in the -3 amendments to address stakeholder concerns. It is these amendments that we seek to move forward.

Land Use Provisions (-3 Amendments)

Under current law, the construction of a wetland is permitted outright in an exclusive farm use zone. Our legislation would allow counties the opportunity to review wetlands projects proposed in their county to determine whether the project will significantly increase the cost of neighboring agricultural operations, force a significant change in agricultural operations, or materially alter the existing land use patterns in the area, either alone or in conjunction with other projects. This permit process would give neighboring landowners a forum to provide evidence on impacts to their farming operations from the project, and would require the local governing body to make findings regarding impacts to agricultural lands..

Requiring wetlands to go through the conditional use process will result in better project design that minimizes the potential impacts to neighbor, and provides a forum for neighbors to express concerns about the potential impacts to their operations from the wetland. Requiring wetlands to go through the conditional use process will help minimize the impacts from wetlands on neighboring agricultural

operations, and help ensure that farmers in can continue to productively farm if their neighbor sells to a conservation group. .

It is important to note that we are not seeking halt or otherwise make the construction of wetlands projects more difficult – we understand that this work is important in the wet regions of the state, and we always strive to be partners in conservation where possible. However, we believe in considerate conservation – that is, conservation projects that are considerate to their neighbors and designed to avoid negative impacts on pre existing land uses. The local land use review would allow farmers the opportunity to raise concerns about project design and impacts, and would enable counties to impose conditions designed to mitigate or control those impacts. We think that this public vetting will only help improve projects, and subject conservation partners to the same process any other non-farm use must go through in an agricultural area.

Liability Provisions (-3 Amendments)

As amended, our legislation would also close a loop-hole Oregon law regarding the liability allocation for trespass, negligence, and other causes of action that arise when a conservation project causes flooding or other damage to a neighbor's property. Oregon Farm Bureau believes its amendments would bring ORS 496.270 more in line with its original context, and ensure that all farmland is on equal footing. ORS 496.270 was originally enacted in 1993, and provides for liability protection for "operators," "timber owners" and "landowners" from damages resulting from fish and wildlife habitat improvement projects completed in cooperation and consultation with the Oregon Department of Fish and Wildlife or Oregon Watershed Enhancement Board.

Ordinarily, a project designer or contractor is liable for damages resulting from negligent or unintended consequences of a conservation project. For example, if a farmer were to authorize a conservation group to construct a wetland on his or her property, that conservation group would be responsible of that project caused water trespass or other impacts to neighboring property. This liability scheme worked well when the majority of projects were done in cooperation with landowners, with the landowner supplying the property. However, in recent years, we've seen an increase in conservation groups purchasing agricultural land to do conservation projects. When this occurs, the landowner liability protection remains in effect even when the conservation group is also the project designer or contractor. The result is that where their neighbor is a conservation group who designed and implemented a project themselves, a farmer would not have recourse for any trespass or damage caused by the faulty design or construction of the project. Our amendments would close this loophole, and ensure that project designers and contractors are always liable for faulty project design or construction, regardless of whether they own the property or are working with a landowner. **It is important to note that our amendments do not change the liability scheme for an innocent landowner – one who is not responsible for project design or construction.** They would remain insulated from liability under our proposed amendments. It is important to note that our proposed legislation does not create a new cause of action for damages or in any way reduce the burden that neighbors would have to show that damage has occurred. Instead, it would simply ensure that conservation landowners are on equal footing with other project contractors and designers, and are responsible for any adverse impacts from their projects.

To put this issue in perspective, we believe there is nearly 1,000 acres of land in Tillamook County that is in conservation ownership, largely former farmlands that were converted from farm use when they were sold into conservation ownership. The vast majority of these projects received funding from

OWEB for their restoration work. Under current law, the groups that designed and implemented these projects would be exempt from liability for any harm to neighbors caused by their wetland construction or operation. Removing the liability exemption for landowner designers and constructors of ODFW and OWEB projects will ensure that farmers have recourse for any damage caused by these publicly funded projects.

Removal-Fill (-3 Amendments)

The proposed legislation also addresses maintenance of agricultural drainage in wet areas of the state. As amended, the legislation allows for the removal and fill of up to 100 cubic yards of material from waters of the state, subject to certain conditions. Currently, Oregon producers are allowed to remove up to 50 cubic yards of material without a removal-fill permit. In 2011, the legislature authorized the Department of State Lands to create a general permit that would allow for the removal of up to 100 cubic yards of material for the purposes of maintaining agricultural drainage. However, the notice and reporting requirements of the permit, coupled with the incorporation of confusing and unclear conditions from other permitting requirements, has made the general permit not workable for Oregon producers seeking to maintain agricultural drainage.

The amendments proposed by the Oregon Farm Bureau incorporate the specific conditions from the Department of State Lands General Permit (OAR 141-093-0240), but do not contain the notice and reporting requirement or general conditions that proved confusing and cumbersome for landowners seeking to use the authorization. The conditions imposed by the Department are designed to protect riparian values and ensure that the activity is conducted in an environmentally sound manner.

In effect, Oregon Farm Bureau's proposal creates a regulatory scheme wherein producers who meet the current requirements of the DSL general permit in their removal of up to 100 cubic yards of material will be exempt from permitting requirements and will not be subject to regulatory enforcement. However, if a landowner conducts a removal activity that does not meet the specific conditions contained in the amendments, the landowner will not be protected by the exemption and will be subject to regulatory enforcement. We think this approach appropriately balances environmental considerations and agricultural landowners' need for timely and efficient methods to clean their ditches.

We appreciate this committee's work on an issue of great importance to farmers in coastal regions of the state. This is an important issue throughout western Oregon, and will only grow in importance as the state works to implement several recent Endangered Species Act mandates around salmon recovery. We think this is balanced legislation that will address these critical issues for the state.

Please contact Mary Anne Nash with the Oregon Farm Bureau at maryanne@oregonfb.org or 541-740-4062 with any questions.

Answers to Frequently Asked Questions::

Land Use Proposal

Q: *Do counties need funding to implement these measures?*
A: It is our understanding that, for the most part, counties recoup their costs associated with processing permit applications that require county review. Our proposal seeks to impose a review standard that is already part of existing law for most non-farm uses in farm zones, so it is a standard that the counties are very familiar with implementing. While there would be some cost to the applicant for a project, we anticipate that it will be small in comparison to the costs of the project and the other permits needed for a project, and that the permitting will not result in a material delay in the project.

Q: Are the review standards new law?
A: No. The first two review standards regarding impacts to agricultural lands come directly from ORS 215.296, which has a long-standing body of legal interpretation behind it. The concept for the third component is pulled from ORS 215.284(1)(d), though this would be the first time it has been applied to wetlands. Given that the standards are found in other areas of the law, we do not anticipate the counties will have difficulty interpreting or implementing these standards.

Q: *Can counties use this authority to not authorize wetlands projects in their area?*
A: The counties will not have the authority under our proposal to add additional review criteria other than those we are proposing. While there is a chance that a county could find that a project is so poorly designed or otherwise so incompatible with neighboring agricultural operations that it would not approve the permit, we think this would be very rare. Instead, we think that this process will most likely result in the county imposing certain mitigation criteria (like monitoring or alterations in project design) that are designed to mitigate for any impact on neighboring operations.

Q: *What are some examples of land use conditions a county may impose?*
A: One example is that, on projects where the conservation partners have chosen to work with neighbors, they have often modified project design to minimize the potential for flooding, and even installed groundwater monitoring wells on the boundaries to particularly difficult to evaluate projects to ensure that the project was not altering existing hydraulic patterns. We think this type of mitigation is most likely to be used to address potential impacts from the project.

Q: Why are surface mining, private mitigation banks, and farmed wetlands excluded from the legislation?
A: For surface mining, those projects already require county land use approval, and their reclamation plans are part of that approval. To the extent that the reclamation plan involves creation of wetlands, that plan already receives county approval. For private mitigation banks, these projects do not receive the same preference treatment that habitat restoration projects receive within the existing permitting processes.

Private mitigation banks always require an individual permit, and are carefully scrutinized by the Department of State Lands in ways habitat projects are not. Wetlands restoration projects are streamlined by the Department, and there is a general authorization covering wetland restoration that does not require public notice or approval before the project moves forward. A December 2015 assessment of the general authorization by the Department found that "several site involve large removal-fill volumes that could create significant changes to the hydrology." (*Review of the General*

Authorizations Governing Removal-Fill Activities in the Waters of the State of Oregon, December 2015, Page 24). This hydrologic impacts need to be addressed.

Finally, farmed wetlands have been farmed and in agricultural use for generations. If the agricultural activities on the property stop or the property is sold to a different use, a permit is needed for the new activity on the property. Therefore, there are no scenarios in which farmed wetlands would need to be regulated under this legislation.

Liability Exemption Section:
Q: *Are you changing the current liability scheme*?
A: Yes, but only to achieve parity between projects done by landowners and projects done by contractors. We believe that it is not fair that a farmer has a remedy if their neighbor partners with a conservation group to do a project, but does not have a remedy if their neighbor sells their land to a conservation group, and then that group does a project.

Q: *Does this bill create a new cause of action?*
A: No, it does not. It simply seeks parity between landowner contractors/designers and non-landowner contractors/designers.

Removal-fill Proposal:
Q: *Why do we need to increase the exemption*?
A: Currently, agricultural landowners can remove up to 50 cubic yards of material in a year. For landowners with a lot of drainage ditches, this can make it difficult for them to get all of their ditches cleaned in a timely manner. Increasing the exemption will enable farmers to more effectively clean their ditches and maintain drainage.

Q: *What about salmon/environmental impacts*?
A: The amendments to the bill incorporate the current environmental sideboards from the existing general permit.