

House Bill 4137

Sponsored by Representative WHITSETT; Representatives BARRETO, NEARMAN, OLSON, SPRENGER, WILSON
(Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes standard for measuring distance between proposed or existing well and surface water source for purpose of determining probability or existence of impairment of, or substantial or undue interference with, existing rights of others to appropriate surface water.

Requires that Water Resources Department proposed final order adversely affecting or aggrieving ground water right applicant or ground water right holder state all facts, grounds or legal theories relied upon to support proposed final order. Requires that proposed final order include detailed findings and holdings based on clear and convincing evidence supporting proposed final order. Requires that evidence regarding proposed or existing well include report by qualified geologist or hydrologist containing certain information specific to well site.

Provides that proposed final order restricting or conditioning exercise of proposed or existing ground water right for purpose of preventing impairment of, preventing interference with or otherwise benefiting superior water right must include evidence demonstrating that restriction or condition will accomplish purpose.

Prohibits department or court from requiring undertaking as condition for filing or maintaining petition with circuit court for review of department order other than contested case. Prohibits department or court from requiring undertaking as condition of issuing or maintaining stay of order other than contested case while review of order by circuit court or appeal of circuit court judgment to Court of Appeals is available or pending.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to regulatory action by the Water Resources Department; and declaring an emergency.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. Sections 2 to 4 of this 2016 Act are added to and made a part of ORS 537.505**
5 **to 537.795.**

6 **SECTION 2. For purposes of determining the probability or existence of impairment of,**
7 **or substantial or undue interference with, existing rights of others to appropriate surface**
8 **water, any measurement of the distance between a surface water source and a proposed or**
9 **existing well location must be determined using the global positioning system coordinates of**
10 **the proposed or existing well and the ordinary high water mark, as defined in 33**
11 **C.F.R. 328.3(e), for a perennial stream, lake or spring.**

12 **SECTION 3. (1) As used in this section:**

13 (a) **“Adversely affecting or aggrieving” means that a Water Resources Department pro-**
14 **posed final order:**

15 (A) **Rejects or terminates a ground water right;**

16 (B) **Imposes conditions, limitations or restrictions that would result in a materially lesser**
17 **ground water right than the ground water right sought by a ground water right applicant;**
18 **or**

19 (C) **Conditions, limits, restricts or otherwise impairs the value of a ground water right**
20 **or use previously granted to a ground water right holder.**

21 (b) **“Qualified geologist or hydrologist” means an individual who has:**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 (A) A master's or higher degree from an accredited educational institution in geology or
2 a hydrology-related field; and

3 (B) Five or more years of professional-level experience in a field related to geology or
4 hydrology.

5 (2) If the department issues a proposed final order adversely affecting or aggrieving a
6 ground water right applicant or ground water right holder, the proposed final order must:

7 (a) State all facts, grounds and legal theories relied upon by the department to support
8 the proposed final order; and

9 (b) Include detailed findings and holdings based on clear and convincing evidence that
10 supports the proposed final order.

11 (3) For purposes of findings and holdings under subsection (2)(b) of this section regarding
12 a proposed or existing well, the clear and convincing evidence must include, but need not be
13 limited to, a report by a qualified geologist or hydrologist regarding:

14 (a) The permeability, porosity and transmissivity of the water-bearing intervals at the
15 specific well site; and

16 (b) The stratigraphy for the specific well site as determined by:

17 (A) Core samples from the well log; or

18 (B) If core samples are unavailable, a determination of the hydrologic characteristics of
19 the water-bearing zones made by well logging equipment.

20 (4) In addition to any contents required under subsections (2) and (3) of this section, if
21 the department issues a proposed final order that restricts or conditions the exercise of a
22 proposed or existing ground water right for the purpose of preventing impairment of or in-
23 terference with, or to otherwise benefit, a superior water right, the proposed final order
24 must contain clear and convincing evidence that the restriction or condition will have a
25 substantial and quantifiable effect on the superior water right. The evidence must demon-
26 strate:

27 (a) A substantial and quantifiable hydrologic connectivity between the site of the pro-
28 posed or existing well and the point of appropriation for the superior water right; or

29 (b) A rate of ground water flow between the site of the proposed or existing well and the
30 point of appropriation for the superior water right that is likely to result in a substantial and
31 quantifiable amount of additional water reaching the point of appropriation within 180 days
32 after enforcement of the restriction or condition at the site of the proposed or existing well.

33 (5)(a) The department shall maintain a list of qualified geologists or hydrologists available
34 to prepare reports under this section. Except as provided in paragraph (b) of this subsection,
35 a qualified geologist or hydrologist chosen by the department and a qualified geologist or
36 hydrologist chosen by the ground water right applicant or ground water right holder shall
37 mutually select a qualified geologist or hydrologist to prepare a report.

38 (b) A ground water right applicant or ground water right holder may waive the right to
39 choose a qualified geologist or hydrologist under paragraph (a) of this subsection and allow
40 the department to unilaterally select a qualified geologist or hydrologist to prepare a report
41 for purposes of this section.

42 (6) The department shall pay all costs of choosing and selecting qualified geologists or
43 hydrologists under subsection (5) of this section and of reports by selected qualified
44 geologists or hydrologists prepared for possible use under this section. The department shall
45 provide the ground water right applicant or ground water right holder with a copy of all re-

1 ports prepared by a selected qualified geologist or hydrologist for possible use under this
2 section without charge.

3 **SECTION 4.** If a Water Resources Department final order is other than a contested case:

4 (1) The department or a circuit court may not require a bond, irrevocable letter of credit
5 or other undertaking as a condition for obtaining consideration of a petition for review under
6 ORS 183.484; and

7 (2) The department or a court may not require a bond, irrevocable letter of credit or
8 other undertaking as a condition for issuing or maintaining a stay of the order while:

9 (a) The order is subject to or pending circuit court review under ORS 183.484; or

10 (b) The circuit court judgment under ORS 183.484 is subject to or pending appeal to the
11 Court of Appeals under ORS 183.500.

12 **SECTION 5.** (1) Section 2 of this 2016 Act applies to determinations that the Water Re-
13 sources Department makes on or after the effective date of this 2016 Act finding the proba-
14 bility or existence of an impairment of, or substantial or undue interference with, existing
15 rights to appropriate surface water.

16 (2) Section 3 of this 2016 Act applies to proposed final orders that become final by oper-
17 ation of law or on appeal on or after the effective date of this 2016 Act.

18 (3) The department may take actions that the department considers appropriate to ex-
19 peditiously develop and issue an initial list of qualified geologists or hydrologists available to
20 be chosen or selected under section 3 of this 2016 Act. The department shall issue the initial
21 list of qualified geologists or hydrologists available to be chosen or selected under section 3
22 of this 2016 Act no later than 180 days after the effective date of this 2016 Act.

23 (4) Notwithstanding section 3 of this 2016 Act, if a ground water right applicant or ground
24 water right holder has an application pending with the department on the effective date of
25 this 2016 Act, the applicant or holder may execute a written waiver no later than 180 days
26 after the effective date of this 2016 Act that allows the department to issue a proposed final
27 order based on a geology or hydrology report prepared by a person who:

28 (a) Is selected by the department; and

29 (b) Does not need to be a qualified geologist or hydrologist as defined in section 3 of this
30 2016 Act.

31 (5) Section 4 of this 2016 Act applies to department final orders issued on or after the
32 effective date of this 2016 Act.

33 **SECTION 6.** This 2016 Act being necessary for the immediate preservation of the public
34 peace, health and safety, an emergency is declared to exist, and this 2016 Act takes effect
35 on its passage.

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