

Senate Bill 429

Sponsored by Senator FERRIOLI (Pre-session 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**.

Requires Water Resources Department to establish expedited process for approval of permits and certificates to construct and operate ponds on agricultural lands to capture runoff or ephemeral or intermittent stream water.

A BILL FOR AN ACT

1
2 Relating to expedited approvals for ponds on agricultural lands; creating new provisions; and
3 amending ORS 196.905.

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

5 **SECTION 1. (1) The Legislative Assembly finds and declares that the collection and re-**
6 **tention of runoff water and water from ephemeral or intermittent streams for agricultural**
7 **irrigation is a beneficial use of the water.**

8 **(2) The Water Resources Department shall establish an expedited process to accept, re-**
9 **view and approve applications for the construction and operation of storage ponds described**
10 **in this section. An application reviewed and processed by the department as required by this**
11 **section is not subject to ORS 537.143, 537.147 or 537.150 to 537.230 or any other application,**
12 **review or approval process for a permit, license or other authorization by the department**
13 **to store water or to use stored water.**

14 **(3) To qualify under this section, a pond:**

15 **(a) Must be located on a property zoned for exclusive farm use;**

16 **(b) Must be located on a property, or an identified area on a property, that is at least 50**
17 **acres in size;**

18 **(c) May not be within an area subject to a wetland conservation plan;**

19 **(d) May not be located within 500 feet of a perennial waterway;**

20 **(e) May not divert waters from a stream that supports state or federally listed sensitive,**
21 **threatened or endangered fish species;**

22 **(f) Must be entirely above ground level;**

23 **(g) Must be no more than one acre in size;**

24 **(h) Must be no more than 10 feet in height; and**

25 **(i) Must be designed and operated for the purpose of collecting:**

26 **(A) Runoff water, which may include water from drainage tiles;**

27 **(B) Water from an ephemeral stream; or**

28 **(C) Water from an intermittent stream outside the normal irrigation season.**

29 **(4) A pond described in this section must be for the purpose of applying the stored water**
30 **for irrigation of agricultural lands.**

31 **(5) If a property is 100 or more acres in size, an applicant may identify one or more areas**

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 on the property, each at least 50 acres in size. The identification of areas by the applicant
2 is not subject to department approval, other than to verify that the areas meet or exceed the
3 minimum size requirement. If an applicant identifies areas on a property, a pond may be
4 applied for and approved for each identified area. An applicant may file applications for each
5 identified area on the property separately and at different times. The identification of areas
6 on a property for purposes of this section affects only the number of ponds that the depart-
7 ment may approve under this section for the property and does not partition, divide, rezone
8 or otherwise affect the legal characteristics or use of the property.

9 (6) An application filed under this section must include information identifying the lo-
10 cation to be used for the pond. If the location is entirely within the property or an identified
11 area on the property and conforms to subsection (3) of this section, the department may not
12 require a change of location.

13 (7) Upon the filing of an application under this section, the department shall give notice
14 by publication in a newspaper having general circulation in the area where the property is
15 located, for a period of at least two weeks with not less than one publication each week. The
16 notice must include the date on which the last notice by publication will occur. The applicant
17 shall pay the cost of the publication in advance to the department.

18 (8) On or before 30 days after the later of the last publication of a newspaper notice of
19 the application or the mailing of the department's weekly notice, any person may file, jointly
20 or severally, with the department, a protest against approval of the application. The only
21 grounds for protest is that the pond would injure an existing water right held by the pro-
22 testing party.

23 (9) If no timely protest is filed, the department shall approve the application and issue a
24 permit for the pond unless the department finds that the proposed pond does not qualify
25 under subsection (3) of this section.

26 (10) If a timely protest is filed, the department shall hold a hearing on the matter. Notice
27 and conduct of the hearing shall be under the provisions of ORS chapter 183, pertaining to
28 contested cases, and shall be held in the area where the property is located unless all parties
29 and persons who filed a protest under this subsection stipulate otherwise.

30 **SECTION 2.** (1) A permit issued under section 1 of this 2017 Act is valid for five years.
31 If the permit holder develops the pond and applies the water to beneficial use prior to expi-
32 ration of the permit, the permit holder may apply for a water right certificate for the pond
33 as a water storage facility and for use of the stored water.

34 (2) If a water right certificate is issued under this section, the certificate holder shall file
35 proof with the Water Resources Department every five years establishing that the water has
36 been applied to beneficial use in accordance with the terms and conditions of the certificate.
37 If proof is not timely filed as provided in this section, there is a rebuttable presumption of
38 forfeiture. A water right certificate issued under this section is not subject to forfeiture for
39 nonuse if the nonuse is due to a lack of runoff or ephemeral or intermittent stream water.

40 (3) An application under section 1 of this 2017 Act to construct a pond:

41 (a) Is not a land use decision; and

42 (b) Is an application for a lawful structure for lawful use in a lawful location for purposes
43 of ORS 215.185.

44 (4) A pond authorized by a permit issued under section 1 of this 2017 Act or a water right
45 certificate issued under this section and constructed and operated in conformance with the

1 **terms and conditions of the permit or certificate:**

2 (a) **Is a farming practice for purposes of ORS 30.930 to 30.947;**

3 (b) **Is a lawful structure in lawful use at a lawful location for purposes of ORS 215.185;**
 4 **and**

5 (c) **Is conclusively presumed to be a water impoundment lying in, and in common own-**
 6 **ership with, farm use land for purposes of ORS 215.203 (2)(b)(G).**

7 (5) **The department may charge reasonable fees for applications, permits and certificates**
 8 **described in this section and section 1 of this 2017 Act.**

9 **SECTION 3. The Water Resources Department may accept an application and issue a**
 10 **permit under section 1 of this 2017 Act for a pond that meets the requirements in section 1**
 11 **(3) of this 2017 Act and was constructed prior to the effective date of this 2017 Act. For**
 12 **purposes of issuing a water right certificate for the pond under section 2 of this 2017 Act,**
 13 **the department may consider any beneficial use made of the pond on or after the date that**
 14 **is five years prior to the application date for the certificate.**

15 **SECTION 4. Section 3 of this 2017 Act is repealed January 2, 2023.**

16 **SECTION 5. ORS 196.905 is amended to read:**

17 196.905. (1) Nothing in ORS 196.600 to 196.905 applies to filling the beds of the waters of this
 18 state for the purpose of constructing, operating and maintaining dams or other diversions for which
 19 permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which
 20 preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.610.

21 (2) Nothing in ORS 196.600 to 196.905 applies to removal of materials from the beds or banks
 22 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

23 (a) Such waterway or portion is situated within forestland; and

24 (b) Such removal or filling is directly connected with a forest management practice conducted
 25 in accordance with ORS 527.610 to 527.770, 527.990 and 527.992.

26 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
 27 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting,
 28 cultivating, conventional crop rotation or harvesting.

29 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on lands zoned for
 30 exclusive farm use as described in ORS 215.203 for the following activities:

31 (a) Drainage or maintenance of farm or stock ponds; [or]

32 (b) **Construction, maintenance, removal or relocation of ponds for agricultural irrigation**
 33 **described in section 1 of this 2017 Act; or**

34 [(b)] (c) Maintenance of farm roads in such a manner as to not significantly adversely affect
 35 wetlands or any other waters of this state.

36 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for subsurface
 37 drainage by deep ripping, tiling or moling on converted wetlands that are zoned for exclusive farm
 38 use pursuant to ORS 215.203.

39 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity
 40 defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS
 41 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by
 42 the Natural Resources Conservation Service of the United States Department of Agriculture, or its
 43 successor agency, so long as commercial agricultural production on the land has not been aban-
 44 doned for five or more years.

45 (7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablish-

1 ment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as
2 in effect on January 1, 2010.

3 (8) The exemptions in subsections (3) to (7) of this section do not apply to any fill or removal
4 that involves changing an area of wetlands to a nonfarm use.

5 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
6 or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage
7 ditches, irrigation ditches and tile drain systems, provided that:

8 (a) The structure was serviceable within the past five years; and

9 (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or
10 other waters of this state to a greater extent than the wetlands or waters of this state were affected
11 as a result of the original construction of those structures.

12 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
13 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
14 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
15 ments or approaches.

16 (11) Nothing in ORS 196.600 to 196.905 applies to removal or filling, or both, within the beds or
17 banks of any waters of this state conducted as part of a surface mining operation, that is the subject
18 of a memorandum of agreement between the Department of State Lands and the State Department
19 of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries
20 is assigned sole responsibility for permitting as described in ORS 517.797.

21 (12) The Department of State Lands may adopt a rule that exempts from the requirement to
22 obtain a permit under ORS 196.800 to 196.900 voluntary habitat restoration projects that have only
23 minimal adverse impact on waters of this state.

24 (13) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the
25 point of diversion to withdraw surface water for beneficial use if the change in the point of diversion
26 is necessitated by a change in the location of the surface water and authorized by the Water Re-
27 sources Department.

28 (14) As used in this section:

29 (a) "Converted wetlands" means agriculturally managed wetlands that, on or before June 30,
30 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or
31 any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that
32 are managed for commercial agricultural purposes.

33 (b) "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any
34 other waters of this state that are located within or adjacent to a converted wetland area.

35 **SECTION 6.** ORS 196.905, as amended by section 6, chapter 516, Oregon Laws 2001, section 13,
36 chapter 253, Oregon Laws 2003, section 4, chapter 342, Oregon Laws 2009, section 2, chapter 16,
37 Oregon Laws 2011, and section 4, chapter 406, Oregon Laws 2011, is amended to read:

38 196.905. (1) Notwithstanding the exemptions in subsections (3) to (8) of this section, a permit
39 under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters
40 of this state when:

41 (a) The fill or removal is a part of an activity whose purpose is to bring an area of state waters
42 into a use to which it was not previously subject; and

43 (b)(A) The flow or circulation of the waters of this state may be impaired; or

44 (B) The reach of the waters may be reduced.

45 (2) Nothing in ORS 196.600 to 196.905 applies to removal of materials from the beds or banks

1 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

2 (a) Such waterway or portion is situated within forestland; and

3 (b) Such removal or filling is directly connected with a forest management practice conducted
4 in accordance with ORS 527.610 to 527.770, 527.990 and 527.992.

5 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
6 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting,
7 cultivating, conventional crop rotation or harvesting.

8 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on lands zoned for
9 exclusive farm use as described in ORS 215.203 for the following activities:

10 (a) Drainage or maintenance of farm or stock ponds; [*or*]

11 **(b) Construction, maintenance, removal or relocation of ponds for agricultural irrigation**
12 **described in section 1 of this 2017 Act; or**

13 [*b*] (c) Maintenance of farm roads, provided that:

14 (A) The farm roads are constructed and maintained in accordance with construction practices
15 designed to minimize any adverse effects to the aquatic environment;

16 (B) Borrow material for farm road maintenance does not come from waters of this state unless
17 authorized by the Department of State Lands; and

18 (C) Maintenance activities are confined to the scope of construction for the original project.

19 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity
20 defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS
21 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by
22 the Natural Resources Conservation Service of the United States Department of Agriculture, or its
23 successor agency, so long as commercial agricultural production on the land has not been aban-
24 doned for five or more years.

25 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablish-
26 ment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as
27 in effect on January 1, 2010.

28 (7) The exemptions in subsections (3) to (6) of this section do not apply to any fill or removal
29 that involves changing an area of wetlands or converted wetlands to a nonfarm use.

30 (8) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
31 or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage
32 ditches, irrigation ditches and tile drain systems, provided that:

33 (a) The structure was serviceable within the past five years; and

34 (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or
35 other waters of this state to a greater extent than the wetlands or waters of this state were affected
36 as a result of the original construction of those structures.

37 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for temporary dams
38 constructed for crop or pasture irrigation purposes that are less than 50 cubic yards, provided the
39 following conditions are satisfied:

40 (a) The removal or filling is conducted during periods that minimize adverse effects to fish and
41 wildlife in accordance with guidance provided by the State Department of Fish and Wildlife;

42 (b) The removal or filling does not jeopardize a threatened or endangered species or adversely
43 modify or destroy the habitat of a threatened or endangered species listed under federal or state
44 law; and

45 (c) Temporary fills are removed in their entirety and the area is restored to its approximate

1 original elevation.

2 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
 3 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
 4 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
 5 ments or approaches.

6 (11) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
 7 of access roads constructed to move mining equipment, subject to the following conditions:

8 (a) The access roads are constructed and maintained in accordance with construction practices
 9 that minimize adverse effects to the aquatic environment;

10 (b) Borrow material for access road maintenance does not come from waters of this state unless
 11 authorized by the Department of State Lands; and

12 (c) Maintenance activities are confined to the scope of construction for the original project.

13 (12) Nothing in ORS 196.600 to 196.905 applies to removal or filling, or both, within the beds or
 14 banks of any waters of this state conducted as part of a surface mining operation that is the subject
 15 of a memorandum of agreement between the Department of State Lands and the State Department
 16 of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries
 17 is assigned sole responsibility for permitting as described in ORS 517.797.

18 (13) The department may adopt a rule that exempts from the requirement to obtain a permit
 19 under ORS 196.800 to 196.900 voluntary habitat restoration projects that have only minimal adverse
 20 impact on waters of this state.

21 (14) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the
 22 point of diversion to withdraw surface water for beneficial use if the change in the point of diversion
 23 is necessitated by a change in the location of the surface water and authorized by the Water Re-
 24 sources Department.

25 (15) As used in this section:

26 (a)(A) “Converted wetlands” means agriculturally managed wetlands that, on or before June 30,
 27 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or
 28 any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that
 29 are managed for commercial agricultural purposes.

30 (B) “Converted wetlands” does not include any stream, slough, ditched creek, spring, lake or any
 31 other waters of this state that are located within or adjacent to a converted wetland area.

32 (b) “Harvesting” means physically removing crops or other agricultural products.

33 (c) “Plowing” includes all forms of primary tillage, including moldboard, chisel or wide-blade
 34 plowing, disking, harrowing or similar means of breaking up, cutting, turning over or stirring soil
 35 to prepare it for planting crops or other agricultural products. “Plowing” does not include:

36 (A) The redistribution of soil, rock, sand or other surface materials in a manner that changes
 37 areas of waters of this state into dry land; or

38 (B) Rock crushing activities that result in the loss of natural drainage characteristics, the re-
 39 duction of water storage and recharge capability, or the overburdening of natural water filtration
 40 capacity.

41 (d) “Seeding” means the sowing of seed or placement of seedlings to produce crops or other
 42 agricultural products.

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