

Enrolled House Bill 2437

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Agriculture and Natural Resources)

CHAPTER

AN ACT

Relating to removal-fill laws; creating new provisions; amending ORS 196.816; and declaring an emergency.

Whereas maintenance of channels used for agricultural drainage is critical to the operational and economic viability of Oregon's farm and ranch lands; and

Whereas there is a need for maintenance of channels used for agricultural drainage to be conducted in a manner that protects, maintains or improves ecological function of the channels and that upholds state objectives for fish recovery; and

Whereas channels used for agricultural drainage, in conjunction with wetlands, provide valuable flood and storm damage protection and habitat for Oregon's fish and wildlife and act as accumulation areas for sediments, which retain nutrients and other pollutants and may prevent entry of the pollutants into other waterways; and

Whereas the current permit process administered by the Department of State Lands for maintenance of channels used for agricultural drainage can be complex, burdensome and unclear for the agricultural community; and

Whereas agricultural landowners are often faced with competing and sometimes contradictory state policies, goals or requirements that apply to channels used for agricultural drainage; and

Whereas the State of Oregon has not achieved the desired goals of the people of this state for maintaining channels used for agricultural drainage while providing for habitat protection; now, therefore,

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

SECTION 1. Sections 2 to 8 of this 2019 Act are added to and made a part of ORS 196.600 to 196.905.

SECTION 2. (1) The Legislative Assembly finds and declares that:

(a) It is in the best interest of the state to create a simple regulatory approach for the maintenance of channels used for agricultural drainage and to improve awareness of, and compliance with, the removal and fill program provided for under ORS 196.600 to 196.905.

(b) The provisions of sections 2 to 8 of this 2019 Act are designed to protect the economic viability of Oregon's farmers and ranchers by allowing for the maintenance of channels used for agricultural drainage to be conducted in a manner that protects, maintains or improves ecological function of the channels.

(2) The Legislative Assembly declares that it is the policy of the state:

(a) To adaptively manage the implementation of sections 2 to 8 of this 2019 Act to allow for a workable process for persons to maintain traditionally maintained channels while pro-

protecting the ecological and life history functions of fish and wildlife that inhabit the channels; and

(b) To place a high priority on and to encourage the identification and development of opportunities for voluntary actions to restore, improve or enhance the ecological health or benefits of traditionally maintained channels.

SECTION 3. As used in sections 2 to 8 of this 2019 Act:

(1) "Adaptive management" has the meaning given that term in ORS 541.890.

(2) "Channel" means the defined bed and bank that serve to confine where a stream of water runs.

(3) "Dry" means:

(a) Channel conditions where no flowing or standing water is present, other than small quantities of water that may occur in low areas of the channel as a direct result of active maintenance activities; and

(b) For the channel of a waterway that is subject to tidal influence, the existence of channel conditions described in paragraph (a) of this subsection during all tidal conditions.

(4) "Maintenance" means channel upkeep and removal from the channel of sediment, vegetation or debris, in the minimum amount necessary to restore the serviceability of the channel for facilitating drainage.

(5) "Traditionally maintained channel" means the channel of a segment, set of segments or the entirety of a drainage ditch, intermittent stream or perennial stream that:

(a) Has been routinely subject to maintenance to facilitate drainage related to farming or ranching operations; and

(b) Has been serviceable for facilitating drainage within the past five years.

SECTION 4. (1) Notwithstanding the permit requirements of ORS 196.810, a person may engage in removal activities or fill activities, or both, for conducting maintenance of a traditionally maintained channel without a permit from the Department of State Lands if:

(a) The person has a valid notice of maintenance activities on file with the State Department of Agriculture prior to initiating activities for the maintenance of a traditionally maintained channel; and

(b) The maintenance activities are conducted in compliance with the notice described in paragraph (a) of this subsection and with sections 5 and 6 of this 2019 Act.

(2) Notwithstanding the permit requirements of ORS 196.810, a district organized under ORS chapter 545, 547, 552 or 553 or a district improvement company or district improvement corporation organized under ORS chapter 554 may engage in removal activities or fill activities, or both, for conducting maintenance of a traditionally maintained channel without a permit from the Department of State Lands if:

(a) The district, company or corporation has a valid notice of maintenance activities on file with the State Department of Agriculture prior to initiating activities for the maintenance of a traditionally maintained channel;

(b) The maintenance activities are conducted in compliance with the notice described in paragraph (a) of this subsection and with sections 5 and 6 of this 2019 Act; and

(c) The governing body of the district, company or corporation, as part of the notice filed pursuant to subsection (3) of this section, agrees to submit to the jurisdiction of the Department of State Lands and the State Department of Agriculture for purposes of enforcement of sections 2 to 8 of this 2019 Act.

(3) A person shall file a notice of maintenance activities with the State Department of Agriculture on a form developed by the department. A notice filed under this subsection is valid for a period of five years from the date that the notice is filed. The notice must:

(a) Identify the location of the traditionally maintained channel in which the maintenance activities will occur;

(b) Include a description of the maintenance activities that, at a minimum, identifies the linear miles of channel to be maintained and the estimated volume per linear mile of material that will be removed from the channel over the course of a five-year period; and

(c) If the maintenance activities will be undertaken in part by a district, company or corporation described in subsection (2) of this section and in part by persons subject to the jurisdiction of the district, company or corporation, clearly identify which activities will be undertaken by the district, company or corporation and which activities will be undertaken by a person subject to the jurisdiction of the district, company or corporation.

(4) A district, company or corporation described in subsection (2) of this section shall endeavor to submit the notice required under subsection (2) of this section in coordination with submission of notices under subsection (1) of this section by persons subject to the jurisdiction of the district, company or corporation. The State Department of Agriculture may develop a consolidated form for the filing of notices by districts, companies and corporations and persons subject to the jurisdiction of the districts, companies and corporations.

SECTION 5. (1) Activities for conducting maintenance of a traditionally maintained channel pursuant to a notice submitted under section 4 of this 2019 Act may not result in:

(a) The removal of more than 3,000 cubic yards per linear mile of traditionally maintained channel over the course of the five-year period for which the notice is valid;

(b) The spreading of material in a wetland or converted wetland pursuant to subsection (2)(k) of this section in a volume greater than 3,000 cubic yards per linear mile of traditionally maintained channel over the course of the five-year period for which the notice is valid;

(c) The removal or fill of material, or any other maintenance, occurring in a channel that has been designated by rule and mapped by the Department of State Lands as essential indigenous anadromous salmonid habitat as defined in ORS 196.810; or

(d) The enlargement of a water right or in otherwise causing injury to another existing water right.

(2) In addition to complying with all applicable laws related to fish passage as described in ORS 509.585 and all applicable laws related to water quality, maintenance activities conducted pursuant to a notice submitted under section 4 of this 2019 Act must comply with the following conditions:

(a) A traditionally maintained channel must be dry before the commencement of any removal activities in the channel. If there is standing water in the channel that is due to a rain event and not indicative of a perennial stream, a person must request a variance under section 6 (5) of this 2019 Act prior to initiation of maintenance activities.

(b) A person must complete removal activities during the applicable regional dry maintenance time period established by the State Department of Fish and Wildlife for the region where the traditionally maintained channel is located.

(c) The body of motorized equipment used to conduct removal or fill activities must be operated from the bank of the channel, with only the bucket or portion of the motorized equipment that actively removes material operating within the channel.

(d) The bottom of the channel bed must be excavated on a smooth grade, in a manner that avoids creating depressions or grade changes within the channel.

(e) Maintenance activities must be conducted in a manner that minimizes new erosion into the channel.

(f) Removal of woody vegetation must be limited to the minimum amount needed to complete the maintenance activity.

(g) Revegetation must occur for any riparian areas that serve as a buffer adjacent to the channel and that experience vegetation loss as a result of the maintenance activity. This condition is satisfied whether revegetation occurs naturally or after seeding.

(h) Work related to the maintenance activity must be conducted only from one bank of the channel, on either the north or east side, when practicable, to minimize the ecological impacts of the maintenance activity.

(i) Motorized equipment used for maintenance activities must utilize existing crossings, if crossing the channel is necessary to complete maintenance activities.

(j) Maintenance activities must begin at the most upstream location of the traditionally maintained channel and progress downstream.

(k) Material that is removed from the channel may be temporarily placed in a wetland or converted wetland to dry, provided that the material must, no later than one year after the date that the maintenance activity was completed, be moved to uplands or be spread in a thin layer outside the riparian area that serves as a buffer adjacent to the channel. Fill activities related to the maintenance of a traditionally maintained channel must be limited to fill pursuant to this paragraph.

(L) Maintenance activities may not result in converting wetlands to uplands and may not materially change the depth or functionality of a wetland.

(m) Impacts to wetlands by the maintenance activities must be temporary and must be limited to impacts related to accessing the site to conduct removal activities in the channel, the removal of material and the disposal of removed material.

(n) Maintenance activities may not result in a change in location of a channel through the digging of a new channel and the diversion of the flow from the old channel into the new channel or in increasing the width or depth of the channel beyond the width or depth to which the channel has routinely been maintained to facilitate drainage.

(o) The maintenance activities must not alter any existing inlet or outlet connections with other waterways.

SECTION 6. (1) The State Department of Agriculture shall, no later than five days after the date the department receives a notice filed pursuant to section 4 of this 2019 Act, provide a copy of the notice to the State Department of Fish and Wildlife. The State Department of Fish and Wildlife shall, within 30 days after receiving a copy of the notice, provide a response to the State Department of Agriculture. The response may indicate that a review was conducted and the work may proceed, or may provide recommendations on:

(a) Whether the maintenance activities described in the notice will meet the requirements of section 5 of this 2019 Act; and

(b) Whether conditions in addition to those required under section 5 of this 2019 Act are necessary to address the presence of endangered or threatened species, to protect endangered or threatened species' habitat quality or quantity, or to otherwise protect the existing functions of the channel.

(2)(a) Except as provided under paragraph (b) of this subsection, the State Department of Agriculture shall include any conditions recommended by the State Department of Fish and Wildlife in the response to the notice required under subsection (3) of this section.

(b) If the State Department of Agriculture disagrees with the recommendations of the State Department of Fish and Wildlife, the State Department of Agriculture shall provide a copy of the notice and of the recommendations to the Department of State Lands for the Department of State Lands to make a final determination regarding:

(A) Whether the maintenance activities described in the notice may occur without a removal or fill permit; and

(B) What conditions in addition to those required under section 5 of this 2019 Act, if any, are necessary for the maintenance activities to occur without a removal or fill permit.

(c) The Department of State Lands shall provide any final determination required pursuant to paragraph (b) of this subsection to the State Department of Agriculture within five days after receiving the copies of the notice and recommendations.

(3) The State Department of Agriculture shall provide a response to a notice filed pursuant to section 4 of this 2019 Act no later than 45 days after the date that the notice is

received. The response must include any conditions in addition to those required under section 5 of this 2019 Act that the departments have determined are necessary, pursuant to the process described in subsection (2) of this section, for maintenance activities to occur in the traditionally maintained channel without a removal or fill permit. If the State Department of Agriculture does not provide a response to a notice within the time period described in this subsection, maintenance activities may proceed as described in the notice and pursuant to section 5 of this 2019 Act.

(4) Upon a request from the person submitting a notice under section 4 of this 2019 Act, the State Department of Agriculture and the State Department of Fish and Wildlife may provide for expedited review under subsections (1) to (3) of this section, if the expedited review is necessary to allow for maintenance activities to occur within a specific time period.

(5) Prior to initiation of maintenance activities, a person who has a notice of maintenance activities on file with the State Department of Agriculture may request from the State Department of Agriculture a variance from any condition required under section 5 (2) of this 2019 Act or this section. The State Department of Agriculture shall consult with the State Department of Fish and Wildlife before granting a variance under this subsection. A person that has applied for a variance may not commence maintenance activities until after the State Department of Agriculture has granted the variance and informed the person of any modifications to conditions or additional conditions that must be met for the maintenance to occur.

(6)(a) Subject to paragraph (b) of this subsection, the State Department of Agriculture or the State Department of Fish and Wildlife may enter onto and inspect lands for which notices have been filed under section 4 of this 2019 Act in order to develop the recommendations and response required by subsections (1) to (3) of this section or to ascertain compliance with sections 2 to 8 of this 2019 Act.

(b) To enter onto and inspect lands under this subsection:

(A) The Department of Agriculture shall first make a reasonable attempt to notify the landowner;

(B) The departments may only enter onto and inspect the lands at a reasonable time; and

(C) The State Department of Fish and Wildlife may not, without the express agreement of the person, district, company or corporation that filed the notice, enter onto and inspect the lands unless accompanied by the State Department of Agriculture.

(7) The State Department of Agriculture shall maintain a record of a notice filed pursuant to section 4 of this 2019 Act and any related correspondence for 10 years after the date that the notice is received.

(8)(a) The Department of State Lands may, after consultation with the State Department of Agriculture and the State Department of Fish and Wildlife, adopt rules as necessary to implement sections 2 to 8 of this 2019 Act. Rules adopted pursuant to this subsection may include, but need not be limited to, rules:

(A) Modifying the volume limits for removal or fill set forth in section 5 (1) of this 2019 Act or applying different volume limits within certain geographies for certain types or categories of traditionally maintained channels; or

(B) Modifying the conditions that apply for maintenance of a traditionally maintained channel set forth in section 5 (2) of this 2019 Act.

(b) Any rules adopted under paragraph (a)(A) or (B) of this subsection must be based on the best available scientific information and on findings that the rules will:

(A) Allow for maintenance of traditionally maintained channels to be conducted in a manner that protects, maintains or improves the existing ecological and habitat function of traditionally maintained channels; and

(B) Result in appropriate changes to the conditions required for conducting maintenance activities, under an adaptive management approach, for carrying out the state policy stated in section 2 of this 2019 Act.

(9) Nothing in sections 2 to 8 of this 2019 Act limits or otherwise changes the exemptions under ORS 196.905.

(10) The costs of activities taken by the State Department of Fish and Wildlife to carry out the duties of the department under sections 2 to 8 of this 2019 Act may not be charged to another state agency as recompensable assistance under ORS 496.167 and 496.168.

SECTION 7. Upon finding that a person has engaged in removal activities or fill activities for the maintenance of a traditionally maintained channel without a permit required under ORS 196.810 and in violation of section 4, 5 or 6 of this 2019 Act, the State Department of Agriculture or the Department of State Lands, in consultation with the State Department of Fish and Wildlife, shall notify the person and direct the person to take any actions necessary to bring the maintenance activities into compliance with ORS 196.600 to 196.905 within a reasonable period of time. In all cases, the State Department of Agriculture or the Department of State Lands shall make reasonable efforts to induce voluntary compliance, prior to the assessment of any civil penalty under ORS 196.890 for violation of section 4, 5 or 6 of this 2019 Act.

SECTION 8. (1) The Department of State Lands and the State Department of Agriculture shall enter into a memorandum of understanding providing for the State Department of Agriculture to implement sections 2 to 8 of this 2019 Act. Subject to the terms of the memorandum of understanding, the State Department of Agriculture:

(a) May perform the functions of the Department of State Lands in implementing and enforcing sections 2 to 8 of this 2019 Act.

(b) Shall, in coordination with soil and water conservation districts, work to provide education on the requirements of sections 2 to 8 of this 2019 Act.

(c) Shall, in coordination with the Department of State Lands, develop and implement a process for responding to requests to review the accuracy of the designation by the Department of State Lands and mapping of essential indigenous anadromous salmonid habitat as defined in ORS 196.810.

(2) The Department of State Lands may enter into any memorandum of understanding other than that required under subsection (1) of this section that is necessary for the implementation and enforcement of sections 2 to 8 of this 2019 Act.

(3) The State Department of Agriculture, in consultation with the Department of State Lands and the State Department of Fish and Wildlife, shall biennially conduct an adaptive management review of the implementation of sections 2 to 8 of this 2019 Act to determine whether implementation changes are required to best carry out the policy stated in section 2 of this 2019 Act.

SECTION 9. ORS 196.816 is amended to read:

196.816. (1) As used in this section, “traditionally maintained channel” has the meaning given that term in section 3 of this 2019 Act.

(2) Notwithstanding ORS 196.810, the Department of State Lands may establish by rule a general permit that allows the removal of no more than 100 cubic yards of material from waters of this state, including in essential indigenous anadromous salmonid habitat, for the purpose of maintaining drainage and protecting agricultural land.

(3) Notwithstanding ORS 196.810, the department shall establish by rule one or more general permits that allow the removal of material from waters of this state, including in essential indigenous anadromous salmonid habitat, to conduct maintenance of traditionally maintained channels during channel conditions where flowing or standing water is present. The general permits must require the maintenance to be conducted in a manner that protects, maintains or improves existing agricultural and ecological functions of the channels, including the life history functions of fish and wildlife that inhabit the channels. In establishing a general permit under this subsection, the department shall utilize best available science and shall consult with the State Department of Agriculture, the State Department

of Fish and Wildlife, other relevant state or federal agencies and representatives of agricultural interests and conservation interests.

(4) The Department of State Lands may waive the fees specified in ORS 196.815 for removal taking place under the provisions of this section.

SECTION 10. (1) The College of Agricultural Sciences of Oregon State University shall conduct a study of the benefits and impacts of maintenance activities in traditionally maintained channels on habitat complexity and other biological parameters, including the benefits and impacts of maintenance activities for fish and wildlife that inhabit the channels. In conducting the study, the college shall assess the impacts of maintenance activities at a variety of geographic locations, in a variety of channel types and on a variety of channel conditions.

(2) In designing and implementing the study, the college shall consult with representatives of agricultural interests and conservation interests, the Department of State Lands, the State Department of Agriculture, the State Department of Fish and Wildlife and any other interested agencies of state government, as defined in ORS 174.111, as necessary to develop study questions and to design the study in a manner that will best align with the needs of the Department of State Lands, the State Department of Agriculture and the State Department of Fish and Wildlife in applying adaptive management to the implementation of sections 2 to 8 of this 2019 Act and ORS 196.816 (3).

(3) The college shall submit a report on the study required by this section, and may include recommendations for legislation, to the interim committees of the Legislative Assembly related to agriculture in the manner provided under ORS 192.245, and to the Department of State Lands, the State Department of Agriculture and the State Department of Fish and Wildlife no later than January 1, 2025.

SECTION 11. Section 10 of this 2019 Act is repealed on January 2, 2025.

SECTION 12. Upon receipt of the study results contained in the report required under section 10 of this 2019 Act, the State Department of Agriculture shall consider the results in developing adaptive management recommendations pursuant to section 8 (3) of this 2019 Act.

SECTION 13. Section 12 of this 2019 Act is repealed on January 2, 2027.

SECTION 14. (1) The State Department of Agriculture, the Department of State Lands and the State Department of Fish and Wildlife shall jointly prepare a report on activities in this state for the maintenance of traditionally maintained channels. The State Department of Agriculture shall coordinate preparation of the report.

(2) The report shall:

(a) Describe activities related to the implementation of sections 2 to 8, 10 and 12 of this 2019 Act and the amendments to ORS 196.816 by section 9 of this 2019 Act, including methods of implementation, compliance information and outcomes;

(b) Provide a discussion of the biennial adaptive management review required under section 8 (3) of this 2019 Act;

(c) Include information on the number of notices required under section 4 of this 2019 Act on file with the Department of Agriculture, the linear miles of traditionally maintained channel in this state being maintained and the amount of cubic yards of material being removed pursuant to sections 2 to 8 of this 2019 Act;

(d) Provide a discussion of the potential impacts and benefits to agricultural lands and ecological function by maintenance conducted pursuant to sections 2 to 8 of this 2019 Act;

(e) Provide a discussion of opportunities to provide incentives to landowners to improve or enhance the ecological functions of channels maintained under sections 2 to 8 of this 2019 Act, including incentives provided to landowners during the period covered by the report; and

(f) Include any other relevant information on the implementation and effectiveness of sections 2 to 8 of this 2019 Act.

(3) The report may include recommendations for legislation.

(4) The report shall be submitted to the interim committees of the Legislative Assembly related to agriculture in the manner provided under ORS 192.245 no later than December 15 of each odd-numbered year.

SECTION 15. Section 14 of this 2019 Act is repealed on January 2, 2030.

SECTION 16. (1) In addition to and not in lieu of any other appropriation, there is appropriated to the State Department of Agriculture, for the biennium beginning July 1, 2019, out of the General Fund, the amount of \$251,043, which may be expended for the department to carry out the duties of the department under sections 2 to 8 of this 2019 Act.

(2) In addition to and not in lieu of any other appropriation, there is appropriated to the State Department of Fish and Wildlife, for the biennium beginning July 1, 2019, out of the General Fund, the amount of \$202,433, which may be expended for the department to carry out the duties of the department under sections 2 to 8 of this 2019 Act.

(3) In addition to and not in lieu of any other appropriation, there is appropriated to the Higher Education Coordinating Commission, for distribution to the College of Agricultural Sciences of Oregon State University, for the biennium beginning July 1, 2019, out of the General Fund, the amount of \$239,583, which may be expended by the college to conduct the study required under section 10 of this 2019 Act.

SECTION 17. (1) Sections 2 to 8 of this 2019 Act and the amendments to ORS 196.816 by section 9 of this 2019 Act become operative on January 1, 2020.

(2) The State Department of Agriculture, the Department of State Lands and the State Department of Fish and Wildlife may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the State Department of Agriculture, the Department of State Lands and the State Department of Fish and Wildlife, on and after the operative date specified in subsection (1) of this section, to exercise all of the duties, powers and functions conferred on the State Department of Agriculture, the Department of State Lands and the State Department of Fish and Wildlife by sections 2 to 8 of this 2019 Act and the amendments to ORS 196.816 by section 9 of this 2019 Act.

SECTION 18. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect on its passage.

Passed by House June 17, 2019

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate June 29, 2019

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2019

Approved:

.....M,....., 2019

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2019

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Bev Clarno, Secretary of State