

D R A F T

SUMMARY

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

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

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

SECTION 1. Sections 2 to 4 of this 2016 Act are added to and made

1 a part of ORS 537.505 to 537.795.

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

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

11 (a) **“Adversely affecting or aggrieving” means that a Water Re-**
12 **sources Department proposed final order:**

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

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

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

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

22 (A) **A master’s or higher degree from an accredited educational in-**
23 **stitution in geology or a hydrology-related field; and**

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

26 (2) **If the department issues a proposed final order adversely af-**
27 **fecting or aggrieving a ground water right applicant or ground water**
28 **right holder, the proposed final order must:**

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

31 (b) **Include detailed findings and holdings based on clear and con-**

1 **vincing evidence that supports the proposed final order.**

2 **(3) For purposes of findings and holdings under subsection (2)(b) of**
3 **this section regarding a proposed or existing well, the clear and con-**
4 **vincing evidence must include, but need not be limited to, a report by**
5 **a qualified geologist or hydrologist regarding:**

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

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

9 **(A) Core samples from the well log; or**

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

13 **(4) In addition to any contents required under subsections (2) and**
14 **(3) of this section, if the department issues a proposed final order that**
15 **restricts or conditions the exercise of a proposed or existing ground**
16 **water right for the purpose of preventing impairment of or interfer-**
17 **ence with, or to otherwise benefit, a superior water right, the proposed**
18 **final order must contain clear and convincing evidence that the re-**
19 **striction or condition will have a substantial and quantifiable effect**
20 **on the superior water right. The evidence must demonstrate:**

21 **(a) A substantial and quantifiable hydrologic connectivity between**
22 **the site of the proposed or existing well and the point of appropriation**
23 **for the superior water right; or**

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

30 **(5)(a) The department shall maintain a list of qualified geologists**
31 **or hydrologists available to prepare reports under this section. Except**

1 as provided in paragraph (b) of this subsection, a qualified geologist
2 or hydrologist chosen by the department and a qualified geologist or
3 hydrologist chosen by the ground water right applicant or ground wa-
4 ter right holder shall mutually select a qualified geologist or
5 hydrologist to prepare a report.

6 (b) A ground water right applicant or ground water right holder
7 may waive the right to choose a qualified geologist or hydrologist un-
8 der paragraph (a) of this subsection and allow the department to
9 unilaterally select a qualified geologist or hydrologist to prepare a re-
10 port for purposes of this section.

11 (6) The department shall pay all costs of choosing and selecting
12 qualified geologists or hydrologists under subsection (5) of this section
13 and of reports by selected qualified geologists or hydrologists prepared
14 for possible use under this section. The department shall provide the
15 ground water right applicant or ground water right holder with a copy
16 of all reports prepared by a selected qualified geologist or hydrologist
17 for possible use under this section without charge.

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

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

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

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

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

30 **SECTION 5.** (1) Section 2 of this 2016 Act applies to determinations
31 that the Water Resources Department makes on or after the effective

1 **date of this 2016 Act finding the probability or existence of an impair-**
2 **ment of, or substantial or undue interference with, existing rights to**
3 **appropriate surface water.**

4 **(2) Section 3 of this 2016 Act applies to proposed final orders that**
5 **become final by operation of law or on appeal on or after the effective**
6 **date of this 2016 Act.**

7 **(3) The department may take actions that the department considers**
8 **appropriate to expeditiously develop and issue an initial list of quali-**
9 **fied geologists or hydrologists available to be chosen or selected under**
10 **section 3 of this 2016 Act. The department shall issue the initial list**
11 **of qualified geologists or hydrologists available to be chosen or se-**
12 **lected under section 3 of this 2016 Act no later than 180 days after the**
13 **effective date of this 2016 Act.**

14 **(4) Notwithstanding section 3 of this 2016 Act, if a ground water**
15 **right applicant or ground water right holder has an application pend-**
16 **ing with the department on the effective date of this 2016 Act, the**
17 **applicant or holder may execute a written waiver no later than 180**
18 **days after the effective date of this 2016 Act that allows the depart-**
19 **ment to issue a proposed final order based on a geology or hydrology**
20 **report prepared by a person who:**

21 **(a) Is selected by the department; and**

22 **(b) Does not need to be a qualified geologist or hydrologist as de-**
23 **defined in section 3 of this 2016 Act.**

24 **(5) Section 4 of this 2016 Act applies to department final orders is-**
25 **sued on or after the effective date of this 2016 Act.**

26 **SECTION 6. This 2016 Act being necessary for the immediate pres-**
27 **ervation of the public peace, health and safety, an emergency is de-**
28 **clared to exist, and this 2016 Act takes effect on its passage.**

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