AGENDA ITEM SUMMARY

BACKGROUND

Maintenance of agricultural drainage is critical to Oregon's economy and the complexity of Oregon's regulatory process for maintenance of agricultural channels may prevent some farmers from complying with the requirements. To address these issues, a legislative subgroup initiated a process to develop an agricultural channel maintenance program that included a simple regulatory process to provide education for farmers and improve compliance. These efforts were put forward in House Bill 2437 during the 2019 legislative session. HB 2437 was passed to address multiple goals: allow for a workable process to maintain traditionally maintained channels, protect the ecological and life history functions of fish and wildlife that inhabit the channels, improve awareness of and compliance with the Oregon removal-fill program, and encourage voluntary actions to restore or improve the ecological health of the traditionally maintained channel.

HB 2437, codified in Oregon Revised Statutes (ORS) Chapter 196, simplified the regulatory process for removing material from seasonally dry, traditionally maintained channels used for agricultural drainage. HB 2437 directed the Oregon Department of Agriculture (ODA) to develop administrative rules for a notification process to remove material from traditionally maintained channels for agricultural drainage.

HB 2437 transferred authority for agricultural channel maintenance from the Oregon Department of State Lands (DSL) to ODA. It created a free, notice-based system which allows a person or drainage district to remove up to 3,000 cubic yards of sediment per mile. The notifications are valid for up to five years and include mandatory provisions aimed to minimize impacts to ecological resources.

The channels that qualify for this program include ditches, intermittent streams, and perennial streams that have provided drainage during the past five years. The channels must be dry at the time of maintenance and cannot be designated and mapped by DSL as essential indigenous anadromous salmonid habitat. Dry is defined in ORS 196.909 (3) as "no flowing or standing water in the channels other than small quantities of water that may occur in low areas of the channel as a direct result of active maintenance activities". For tidal channels, the channel must be dry as defined above during all tidal conditions. On the east side of the state, irrigation ditches do not require an ODA notification or DSL permit if they meet the following criteria: 1) the primary purpose of the channel is to deliver irrigation water, and 2) the water source can be turned off or diverted during non-irrigation season.

HB 2437 requires that the person complete removal activities during the regional dry maintenance time period established by the department. It also allows the person the opportunity to apply for a variance if they believe that the work cannot be accomplished during the prescribed regional dry maintenance time period.

HB 2437 directed the Department of Fish and Wildlife (department) to establish regional dry maintenance time periods for removal of material in dry traditionally maintained channels used for agricultural drainage. The time periods proposed in the rules were identified to avoid the vulnerable life stages of fish including migration, spawning and rearing in traditionally maintained channels and adjacent waterways. The department is concerned about both direct impact to the species in the channels and the effect of sedimentation on species downstream of the channels.

PUBLIC INVOLVEMENT

The department's Habitat Resources Program staff met with constituents, partner agencies, and tribes. Discussions with these groups involved proposed regional dry maintenance time periods, criteria used to develop time periods, the variance process for time periods, and proposed revisions to time periods. Efforts included the following:

- Provided temporary rules for dry maintenance time periods to representatives from the ODA's Rules Advisory Committee in November 2020, with a request for comments. The department received written comments from the ODA, Oregon Farm Bureau, Oregon Cattleman's Association, and the Water Watch of Oregon. ODA requested longer time periods, especially in areas where lots of notifications were anticipated. They are interested in minimizing the number of expedited variance requests. The Oregon Farm Bureau and Oregon Cattleman's Association requested that longer dry maintenance periods generally by at least two weeks to allow the farmers/ranchers to conduct the work after their farming operations were completed. WaterWatch of Oregon supported the proposed time periods as proposed by the department.
- Conducted a virtual meeting with interested parties in December 2020 to listen to and discuss the written comments listed above. Based on the information received, we re-examined the rules for opportunities to lengthen time periods in some regions, while protecting the vulnerable life stages of the fish and wildlife that live in the channels. Where feasible, we lengthened the time period, or split the region into several subregions, so that areas above dams (that blocked anadromous fish) or areas with less vulnerable life stages of fish and wildlife would have less restrictive time periods.
- Participated in the virtual Tribal/State coordination meetings in October 2020 and June 2021. Invited tribal representation to the rules development process in May 2021.
- Held a Zoom meeting June 15, 2021, with representatives from the Oregon Farm Bureau, Oregon Water Resources Congress, Oregon Cattleman's Association, Oregon Association of Conservation Districts, WaterWatch of Oregon, The Nature Conservancy, American Fisheries Society, Association of Northwest Steelheaders, and a representative from the Confederated Tribes of Grande Ronde.
- Conducted a Willamette Valley site visit Sept. 28, 2021, with community constituents and partner agencies. The department examined the presence of water in the channel in late September, discussed the longer regional dry maintenance time periods in several

basins in the lower Willamette watershed, and discussed life stages and vulnerabilities of the federally threatened fish species in the waterways that fed into the Columbia River and Clatskanie River basins, Sandy River Basin, and Molalla and Pudding River basins.
- Provided proposed rules for regional dry maintenance time periods to community constituents, partner agencies, and the tribes, with a request for comments. The department received one written comment. The Oregon Association of Conservation Districts recommended that the department's rules explicitly allow variances for up to five years, depending on site and project specific conditions and that the department conduct a formal evaluation of the regional dry maintenance time periods and variance process to determine whether rule changes are necessary at that time.

The department made some revisions to the time periods that addressed the concerns while adequately protecting the most vulnerable life stages of fish and wildlife. In some watersheds, the department lengthened the time periods that the channel work could be done. We added language to the rules that stated that a statewide review of the regional dry maintenance time period rules would be conducted on a periodic basis as warranted based on new information and adaptive management.

ISSUE

Development of the regional dry maintenance time periods

ANALYSIS

The proposed rules create a new OAR Division in Chapter 635 that designates regional dry maintenance time periods for removal of sediment in dry, traditionally maintained channels, as defined in ORS 196.906-196.919 and OAR 603-095-4005(11). The maintenance time frames are designed to minimize potential impacts to the most vulnerable life stages of fish and wildlife species. The time periods apply to removal of sediment in watersheds across the state.

The proposed regional dry maintenance time periods are based in part on the framework of the "Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources," developed by the department. The time periods combined by watersheds, or sub watersheds where appropriate. The department's District Fish Biologists, using the best available science, identified time periods within each watershed when dry channel maintenance is expected to result in minimal impacts to vulnerable life stages of fish and wildlife species, both in the channel itself and in stream reaches downstream of the channel maintenance activity. The life stages considered include migration, spawning, and rearing of anadromous salmonids, trout, lamprey, and other sensitive, threatened, or endangered fish and wildlife species. Additional considerations include life stage timing data (periodicity) tables, population information, and habitat for the species cited above.

The start date for each regional dry maintenance time period is based on the date that the channel is expected to be dry. The end date is based on both watershed specific life history functions and the average date of the first 0.5" rain event provided by the National Weather Service for each region. The National Weather Service informed the department that the first 0.5" rain event can cause soil movement. This soil movement has the potential to impact sensitive life stages of fish downstream of the channel maintenance activity. In addition, the 0.5" rain event can create enough of a freshet (it increases flow volume and reduces water temperature) that it triggers adult salmonids to move upstream and stage for or begin spawning, and triggers juvenile fish to move downstream.

The department is recommending regional dry maintenance time frames for agricultural channel maintenance activities that are typically 30 to 45 days in length. In addition, if a landowner or drainage district requests that the channel maintenance be conducted outside of the regional dry maintenance time periods, the department will evaluate a variance request on a project-by-project basis. The department would consider these requests based on variations in climate, location, risk to fish and wildlife resources, project size and extent and other factors.

The department previously adopted two sequential sets of temporary rules as ODA's Agricultural Channel Maintenance program was being developed. The first temporary rule set was filed immediately after ODA developed their rules, was effective from 9/18/2020 through 3/16/2021, and covered the first channel maintenance season. The second set of temporary rules was developed after coordinating with interest groups and incorporating eligibility criteria developed by DSL and ODA, which clarified which channels were eligible for this program. The second set of temporary rules were effective from 4/22/2021 through 10/18/2021.

The legislature charged the department with creating regions for dry maintenance time frames. Interested parties involved in the legislation requested that the regions developed be easy for the public to understand. To address this need, the department focused more on combining, versus splitting of regions into smaller areas. The department gathered input from a variety of constituents, partners, and tribes via meetings, a site visit, and mailings. In several cases, where the constituents felt that the time periods were too restrictive, the department split off a portion of the region and created a distinct area that experienced later rain events, was above a dam, or did not support the most vulnerable life stages of fish and wildlife during the proposed regional dry maintenance time period. The department tried to find a balanced approach that provided simplicity to the applicant and protected ecological resources across broad landscapes.

OPTIONS

1. Adopt staff recommendations

2. Amend staff recommendations

STAFF RECOMMENDATION

1. Option 1

DRAFT MOTION:

I move to adopt OAR Chapter 635, Division 418 to establish regional dry maintenance time periods as proposed by staff.

Effective Date: *Upon Filing*