

**Enrolled**  
**House Bill 2155**

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Governor Theodore R. Kulongoski for Department of State Lands)

CHAPTER .....

AN ACT

Relating to removal-fill permitting program; creating new provisions; and amending ORS 196.815, 196.825 and 196.905.

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

**SECTION 1.** ORS 196.815 is amended to read:

196.815. (1) A person who is required to have a permit to remove material from the bed or banks or fill any waters of this state shall file a written application with the Director of the Department of State Lands for each individual project before performing any removal or fill.

(2)(a) Each application under subsection (1) of this section must be accompanied by a base fee in accordance with the following schedule:

(A) For a removal by a private operator, or a person contracting to perform services for a private operator, \$85.

(B) For a removal by a public body, \$250.

(C) For a removal by a commercial operator, \$250.

(D) For a fill by a private operator, or a person contracting to perform services for a private operator, \$250.

(E) For a fill by a public body, \$620.

(F) For a fill by a commercial operator, \$620.

(G) For erosion-flood repair, including riprap, no fee.

(b) In addition to the base fee for removal established under paragraph (a) of this subsection, each applicant shall also pay as part of the application fee the following fee based on the volume of removal material:

(A) Less than 500 cubic yards, no volume fee.

(B) 500 to less than 5,000 cubic yards, \$125.

(C) 5,000 to less than or equal to 50,000 cubic yards, \$250.

(D) Over 50,000 cubic yards, \$375.

(c) In addition to the base fee for fill established under paragraph (a) of this subsection, each applicant shall also pay as part of the application fee the following fee based on the volume of fill material:

(A) Less than 500 cubic yards, no volume fee.

(B) 500 to less than 3,000 cubic yards, \$125.

(C) 3,000 to less than or equal to 10,000 cubic yards, \$250.

(D) Over 10,000 cubic yards, \$375.

(d) For the purposes of this subsection:

(A) "Private operator" means any person undertaking a project for exclusively a nonincome-producing and nonprofit purpose;

(B) "Public body" means federal, state, and local governmental bodies, unless specifically exempted by law, engaged in projects for the purpose of providing free public services;

(C) "Commercial operator" means any person undertaking a project having financial profit as a goal;

(D) "Riprap" means the facing of a streambank with rock or similar substance to control erosion in accordance with regulations promulgated by the Department of State Lands; and

(E) "Erosion-flood repair" means riprap or any other work necessary to preserve existing facilities and land from flood and high streamflows, in accordance with regulations promulgated by the department.

(3) For each application that involves both removal and filling, the application fee assessed shall be either for removal or filling, whichever is higher according to the fee schedule in subsection (2) of this section.

(4) The department may waive the fees specified in subsection (2) of this section for a permit that will be used to perform a voluntary habitat restoration project.

(5) A person who receives an emergency authorization under ORS 196.810 to remove material from the beds or banks of any waters of this state or to fill any waters of this state shall, within 45 days after receiving the authorization, submit a fee to the department calculated in the manner provided under this section for permit applications.

(6) *[Prior to or on the anniversary date of the permit,]* Each holder of a material removal or fill permit shall pay a fee during the term of the permit in accordance with the schedule set forth in subsection (2) of this section, except that the applicant shall pay only the base fee. **For multiyear permits valid over a period of more than one year, the department may assess a one-time fee that covers all fees due under subsection (2) of this section for the period of the permit.** The permit shall be suspended during any period of delinquency of payment as though no permit was applied for. Notwithstanding this subsection the director may, before granting a renewal of the permit, require the permittee to show that the continued exercise of the permit is consistent with the protection, conservation and best use of the water resources of this state.

(7) Fees received under this section shall be credited to the Common School Fund for use by the department in administration of ORS 196.600 to 196.905.

(8) The director shall issue an order revising the fees specified in this section on January 1 of each year, beginning in 2009, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. The director shall round the amount of each fee to the nearest dollar. The revised fees shall take effect January 1 and apply for that calendar year.

**SECTION 2.** ORS 196.825 is amended to read:

196.825. (1) The Director of the Department of State Lands shall issue a permit applied for under ORS 196.815 if the director determines that the project described in the application:

(a) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and

(b) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.

(2) In determining whether to issue a permit, the director shall consider all of the following:

(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

(b) The economic cost to the public if the proposed fill or removal is not accomplished.

(c) The availability of alternatives to the project for which the fill or removal is proposed.

(d) The availability of alternative sites for the proposed fill or removal.

(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety.

(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations.

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion.

(h) Whether the proposed fill or removal is for streambank protection.

(i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800. [*If off-site compensatory wetland mitigation is proposed, the applicant shall document the impracticability of on-site compensatory wetland mitigation.*] **In determining whether the applicant has provided all practicable mitigation, the director shall consider the findings regarding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.**

(3) The director may issue a permit for a project that results in a substantial fill in an estuary for a nonwater dependent use only if the project is for a public use and would satisfy a public need that outweighs harm to navigation, fishery and recreation and if the proposed fill meets all other criteria contained in ORS 196.600 to 196.905.

(4) If the director issues a permit, the director may impose such conditions as the director considers necessary to carry out the purposes of ORS 196.805 and 196.830 and subsection (1) of this section and to provide mitigation for the reasonably expected adverse effects of project development. In formulating such conditions the director may request comment from public bodies, as defined in ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid only for the time specified therein. The director shall impose, as conditions to any permit, general authorization or wetland conservation plan, measures to provide mitigation for the reasonably expected adverse effects of project development. Compensatory wetland mitigation shall be limited to replacement of the functional attributes of the lost wetland.

(5) The director may request comment from interested parties and adjacent property owners on any application for a permit. The director shall furnish to any person, upon written request and at the expense of the person who requests the copy, a copy of any application for a permit or authorization under this section or ORS 196.850.

(6) Any applicant whose application for a permit or authorization has been deemed incomplete or has been denied, or who objects to any of the conditions imposed under this section by the director, may, within 21 days of the denial of the permit or authorization or the imposition of any condition, request a hearing from the director. Thereupon the director shall set the matter down for hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order containing findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's initial order. Appeals from the director's final order may be taken to the Court of Appeals in the manner provided by ORS 183.482.

(7) Except for a permit issued under the process set forth in ORS 517.952 to 517.989, the director shall:

(a) Determine whether an application is complete within 30 days from the date the Department of State Lands receives the application. If the director determines that an application is complete, the director shall distribute the application for comment pursuant to subsection (4) of this section. If the director determines that the application is not complete, the director shall notify the applicant in writing that the application is deficient and explain, in the same notice, the deficiencies.

(b) Issue a permit decision within 90 days after the date the director determines that the application is complete unless:

(A) An extension of time is granted under subsection (9)(b) of this section; or

(B) The applicant and the director agree to a longer time period.

(8) Permits issued under this section shall be in lieu of any permit or authorization that might be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

(a) The operation is that for which the permit or authorization is issued; and

(b) The standards for granting the permit or authorization are substantially the same as those established pursuant to ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

(9)(a) Any public body, as defined in ORS 174.109, federal agency or tribal government requested by the director to comment on an application for a permit must submit its comments to the director not more than 30 days after receiving the request for comment. If a public body, federal agency or tribal government fails to comment on the application within 30 days, the director shall assume that the public body, federal agency or tribal government has no objection.

(b) The Department of Environmental Quality shall provide comments to the director within 75 days after receiving notice under subsection (4) of this section if the permit action requires certification under the Federal Water Pollution Control Act (P.L. 92-500), as amended.

(10) In determining whether to issue a permit, the director may consider only standards and criteria in effect on the date the director receives the completed application.

(11) As used in this section:

(a) "Applicant" means a landowner or person authorized by a landowner to conduct a removal or fill activity.

(b) "Completed application" means a signed permit application form that contains all necessary information for the director to determine whether to issue a permit, including:

(A) A map showing the project site with sufficient accuracy to easily locate the removal or fill site;

(B) A project plan showing the project site and proposed alterations;

(C) The fee required under ORS 196.815;

(D) Any changes that may be made to the hydraulic characteristics of waters of this state and a plan to minimize or avoid any adverse effects of those changes;

(E) If the project may cause substantial adverse effects on aquatic life or aquatic habitat within this state, documentation of existing conditions and resources and identification of the potential impact if the project is completed;

(F) An analysis of alternatives that evaluates practicable methods to minimize and avoid impacts to waters of this state;

(G) If the project is to fill or remove material from wetlands, a wetlands mitigation plan; and

(H) Any other information that the director deems pertinent and necessary to make an informed decision on whether the application complies with the policy and standards set forth in this section.

**SECTION 3.** ORS 196.905 is amended to read:

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

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

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

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

(3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted wetlands for normal farming and ranching activities such as plowing, grazing, seeding, **planting**, cultivating, conventional crop rotation[,] **or** harvesting [*for the production of food and fiber, upland soil and water conservation practices or reestablishment of crops under federal conservation reserve program provisions*].

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

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

(b) Maintenance of farm roads in such a manner as to not significantly adversely affect wetlands[;]

*[(c) Subsurface drainage, by deep ripping, tiling or moling, on converted wetlands; and]*

*[(d) Any activity described as a farm use in ORS 215.203 that is conducted on prior converted cropland as described in subsection (8) of this section, so long as agricultural management of the land has not been abandoned for five or more years] or any other waters of this state.*

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

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

(7) **Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablishment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as in effect on the effective date of this act.**

*[(5)]* (8) The *[exemption]* **exemptions** in subsections (3) *[and (4)]* **to (7)** of this section *[shall]* **do** not apply to any fill or removal *[which]* **that** involves changing an area of wetlands to a nonfarm use.

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

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

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

*[(7)]* (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable roads or transportation structures such as groins and riprap protecting roads, causeways and bridge abutments or approaches.

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

*[(8)]* (12) *[For the purposes of this section, “converted wetland”:]*

*[(a) Means wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled, leveled or otherwise manipulated to impair or reduce the flow, circulation or reach of water for the purpose of enabling production of an agricultural commodity and are managed for that purpose; and]*

*[(b) Includes land that the Natural Resources Conservation Service of the United States Department of Agriculture, or its successor agency, certifies as prior converted cropland or farmed wetlands, so long as agricultural management of the land has not been abandoned for five or more years.] As used in this section:*

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

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

**SECTION 4.** ORS 196.905, as amended by section 6, chapter 516, Oregon Laws 2001, and section 13, chapter 253, Oregon Laws 2003, is amended to read:

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

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

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

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

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

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

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

(3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted wetlands for normal farming and ranching activities such as plowing, grazing, seeding, **planting**, cultivating, conventional crop rotation[,] **or** harvesting [*for the production of food and fiber, upland soil and water conservation practices or reestablishment of crops under federal conservation reserve program provisions*].

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

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

[*(b) Subsurface drainage, by deep ripping, tiling or moling, on converted wetlands;*]

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

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

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

(C) Maintenance activities are confined to the scope of construction for the original project.[] *and*]

[*(d) Any activity described as a farm use in ORS 215.203 that is conducted on prior converted cropland as described in subsection (10)(a) of this section, so long as agricultural management of the land has not been abandoned for five or more years.*]

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

**(6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablishment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as in effect on the effective date of this 2009 Act.**

[*(5)*] **(7)** The [*exemption*] **exemptions** in subsections (3) [*and (4)*] **to (6)** of this section [*may*] **do** not apply to any fill or removal [*which*] **that** involves changing an area of wetlands or converted wetlands to a nonfarm use.

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

(a) The structure was serviceable within the past five years; and  
(b) Such maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the wetlands or waters of this state were affected as a result of the original construction of those structures.

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

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

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

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

[(8)] **(10)** Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable roads or transportation structures such as groins and riprap protecting roads, causeways and bridge abutments or approaches.

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

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

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

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

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

[(10)] **(13)** *[For the purposes of this section:]*

[(a)] *“Converted wetland” means:*

[(A)] *Wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled, leveled or otherwise manipulated to impair or reduce the flow, circulation or reach of water for the purpose of producing an agricultural product and are managed for that purpose; or]*

[(B)] *Those areas that the Natural Resources Conservation Service of the United States Department of Agriculture, or its successor agency, certifies as prior converted cropland or farmed wetlands, so long as agricultural management of the land has not been abandoned for five or more years.]* **As used in this section:**

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

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

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

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

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

(B) Rock crushing activities that result in the loss of natural drainage characteristics, the reduction of water storage and recharge capability, or the overburdening of natural water filtration capacity.

(d) "Seeding" means the sowing of seed or placement of seedlings to produce crops or other agricultural products.

**SECTION 5. The amendments to ORS 196.815, 196.825 and 196.905 by sections 1 to 4 of this 2009 Act apply only to permits first applied for or permits renewed on or after the effective date of this 2009 Act.**

**Passed by House May 5, 2009**

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Chief Clerk of House

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Speaker of House

**Passed by Senate May 21, 2009**

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President of Senate

**Received by Governor:**

.....M.,....., 2009

**Approved:**

.....M.,....., 2009

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Governor

**Filed in Office of Secretary of State:**

.....M.,....., 2009

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Secretary of State