

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)

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**.

Modifies definition of "intermittent stream." Repeals estuarine resource replacement statute. Allows Department of State Lands to assess one-time fee that covers all fees due for removal or fill permit valid for more than one year. Modifies factors Director of Department of State Lands considers in determining whether to issue permit. Modifies exemptions for lands zoned for exclusive farm use. Allows department to establish by rule exemption from removal or fill permitting requirements for voluntary habitat restoration projects that have only minimal adverse impact.

A BILL FOR AN ACT

1
2 Relating to removal-fill permitting program; creating new provisions; amending ORS 196.681, 196.684,
3 196.686, 196.692, 196.800, 196.815, 196.825 and 196.905; and repealing ORS 196.830.

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

5 **SECTION 1.** ORS 196.681 is amended to read:

6 196.681. (1) In accordance with rules adopted pursuant to this chapter, the Department of State
7 Lands shall:

8 (a) Review any proposed wetland conservation plan or proposed amendment to an approved
9 wetland conservation plan against the standards in this section;

10 (b) Prepare a proposed order that approves, approves with conditions or denies the proposed
11 wetland conservation plan or proposed amendment to an approved wetland conservation plan;

12 (c) Provide notice and the opportunity for public hearing and comment on the proposed order;

13 (d) Consult with affected local, state and federal agencies; and

14 (e) Consider the applicable findings made in the order of acknowledgment issued by the Land
15 Conservation and Development Commission.

16 (2) The Director of the Department of State Lands may approve by order a wetland conservation
17 plan that includes the necessary elements of ORS 196.678 (2) and meets the standards of subsections
18 (3) and (4) of this section.

19 (3) A wetland conservation plan shall comply with the following standards:

20 (a) Uses and activities permitted in the plan including fill or removal, or both, conform to sound
21 policies of conservation and will not interfere with public health and safety;

22 (b) Uses and activities permitted in the plan including fill or removal, or both, are not incon-
23 sistent with the protection, conservation and best use of the water resources of this state and the
24 use of state waters for navigation, fishing and public recreation; and

25 (c) Designation of wetlands for protection, conservation and development is consistent with the
26 resource functions and values of the area and the capability of the wetland area to withstand al-
27 terations and maintain important functions and values.

28 (4) Wetland areas may be designated for development including fill or removal, or both, only if

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 they meet the following standards:

2 (a) There is a public need for the proposed uses set forth in the acknowledged comprehensive
3 plan for the area;

4 (b) Any planned wetland losses shall be fully offset by creation, restoration or enhancement of
5 wetland functions and values [*or in an estuarine area, estuarine resource replacement is consistent*
6 *with ORS 196.830*]; and

7 (c) Practicable, less damaging alternatives, including alternative locations for the proposed use
8 are not available.

9 (5) Approval by the director of a wetland conservation plan shall be conditioned upon adoption
10 by the affected local governments of comprehensive plan policies and land use regulations consistent
11 with and sufficient to implement the wetland conservation plan. Appropriate implementing measures
12 may include the following planning and zoning requirements regulating:

13 (a) Adjacent lands or buffer areas necessary to maintain, protect or restore wetland functions
14 and values, including riparian vegetation, and the uses to be allowed in those areas;

15 (b) Sites for mitigation of impacts from development activities;

16 (c) Upland areas adjacent to wetlands; and

17 (d) Activities or location of buildings, structures and improvements which may affect wetland
18 values or functions, such as storm water runoff.

19 (6) The director shall issue an order approving, approving with conditions or denying a wetland
20 conservation plan, including a clear statement of findings which sets forth the basis for the approval,
21 conditioning or denial. The order shall include:

22 (a) A clear statement of findings that the elements specified in ORS 196.678 (2) have been de-
23 veloped;

24 (b) The findings in support of the determination of compliance or noncompliance with the stan-
25 dards in subsections (3) and (4) of this section; and

26 (c) The conditions under which fill or removal or both may occur.

27 (7) The director may, as a part of an order approving a plan, authorize site-specific fill or re-
28 moval without an individual permit as required by ORS 196.810 provided that:

29 (a) The director adopts findings demonstrating that fill or removal for any proposed project
30 complies with ORS 196.682 (1)(a) to (e); or

31 (b) The director adopts findings that specific areas of fill or removal within areas designated as
32 development in the plan meet the following standards:

33 (A) The fill or removal approved by the order will result in minimal impacts to the wetland
34 system in the planning area;

35 (B) The public need for the proposed area of fill or removal outweighs the environmental damage
36 likely to result from full development;

37 (C) The director conditions any such order as necessary to ensure that the fill or removal, or
38 both, is designed to minimize impacts from implementing the project; and

39 (D) Full replacement of wetland losses is provided through creation, restoration or enhancement
40 of wetlands with comparable functions and values.

41 (8) Upon a finding by the director that a fill or removal, or both, authorized under subsection
42 (7)(b) of this section has caused or is likely to cause more than minimal adverse impact to the
43 wetland system considering required mitigation conditions, the director shall revise the order to
44 require individual permit review according to ORS 196.682 or provide additional conditions to ensure
45 that adverse impacts are minimal. Such revision shall not be subject to ORS 196.684.

SECTION 2. ORS 196.684 is amended to read:

196.684. (1) Local governments shall provide notice to the Department of State Lands of any proposed amendments to the land use plan and ordinances affecting lands subject to a wetland conservation plan approved under this section.

(2) Amendments to plan policies, maps and implementing ordinances by the local government within an approved wetland conservation plan shall be reviewed by the department against the requirements of this section. These provisions do not exempt local governments from the provisions of ORS 197.610 to 197.625.

(3) The Director of the Department of State Lands shall provide notice and the opportunity for public comment and hearing as defined by rule on the matter of including the amendment in the wetland conservation plan.

(4) If the director finds that the proposed local government amendment to acknowledged comprehensive plan and land use regulations meets the requirements of ORS 196.681, the director shall approve the plan by order, and notify the local government within 10 days of the completion of the public review provided in subsection (3) of this section.

(5) If the amendments to acknowledged comprehensive plan and land use regulations adopted by the local government are determined not to comply with the requirements of ORS 196.668 to 196.692, 196.800, 196.810, 196.825, [196.830,] 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350, the director shall revoke the approval order or amend the order to insure compliance with the requirements of ORS 196.668 to 196.692, 196.800, 196.810, 196.825, [196.830,] 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350.

(6) The department shall review each approved wetland conservation plan every five years. After such review the director shall either modify, reissue or rescind the order approving the plan.

(7) In conducting the five-year review of an approved wetland conservation plan, the director shall provide notice and the opportunity for public comment and hearing on whether:

(a) There has been a substantial change in circumstances that would affect the wetland resources subject to the plan and would adversely affect the compliance of the plan with the standards in ORS 196.681;

(b) Changes have been made in applicable state law, statewide land use planning goals, federal law or agency rules that require the plan to be changed; and

(c) In the director's evaluation, the plan as implemented over the preceding five years meets the goals established in the plan.

(8) Wetland conservation plans approved by the Director of the Department of State Lands pursuant to ORS 196.668 to 196.692 shall be deemed to comply with the requirements of any statewide planning goals relating to wetlands, other than estuarine wetlands, for those areas, uses and activities which are regulated by the plan.

(9) An order by the director regarding approval, amendment or review of a wetland conservation plan shall be reviewable by the Land Use Board of Appeals as a land use decision of a state agency. For the purpose of such review, the director's order shall not become final until the local government adopts its wetland conservation plan or plan amendment. The Land Use Board of Appeals shall consolidate for review appeals of the director's order and the local government adoption. The Land Use Board of Appeals shall review such order for compliance with the requirements of ORS 196.668 to 196.692, 196.800, 196.810, 196.825, [196.830,] 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350.

1 (10) Nothing in this section shall be construed to require a contested case proceeding regarding
2 approval, amendment or review of a wetland conservation plan.

3 (11) Nothing in this section shall be construed to affect the evaluation of a permit application
4 in areas that do not have a wetland conservation plan.

5 (12) Upon a finding by the director, after a public hearing, that an affected local government is
6 not enforcing the comprehensive plan provisions or land use regulations set forth in the conditions
7 of the order, as specified in ORS 196.681 (5), and that such lack of enforcement has resulted or would
8 result in adverse impacts to wetlands, the director shall modify, suspend or revoke approval of the
9 wetland conservation plan.

10 **SECTION 3.** ORS 196.686 is amended to read:

11 196.686. (1) For the purposes of this section, an acknowledged estuary management plan includes
12 the comprehensive plan and land use regulations adopted by cities and counties to satisfy the re-
13 quirement of statewide planning goals related to estuarine resources including shoreland portions
14 of estuarine sites designated for development as those plans and regulations existed on January 1,
15 1989.

16 (2) Any city or county may submit an acknowledged estuary management plan for review and
17 approval by the Department of State Lands pursuant to the provisions of this section. The plan shall
18 be submitted with a written request for review.

19 (3) To allow timely and effective review of acknowledged estuary management plans, the de-
20 partment may limit acceptance for review to two plans but not more than one plan for a deep draft
21 development estuary at any one time.

22 (4) With the consent of the city or county submitting an estuary management plan for review
23 and approval, the department may extend any or all of the deadlines set forth in this section.

24 (5) Acknowledged estuary management plans shall be presumed to comply with requirements for
25 approval of wetland conservation plans specified in ORS 196.681.

26 (6) Within 10 days of acceptance of a request for review, the department shall provide notice to
27 affected state agencies, local governments, federal agencies and the public of receipt of the ac-
28 knowledged estuary management plan and of the request for review and approval of the acknowl-
29 edged estuary management plan as a wetland conservation plan.

30 (7) Within 30 days of acceptance of a request for review and upon provision of at least two
31 weeks' notice, the department shall hold a public informational hearing on the proposed approval
32 of the acknowledged estuary management plan as a wetland conservation plan.

33 (8) Within 60 days of acceptance of the request for review, the department shall conduct a pre-
34 liminary review of the acknowledged estuary management plan. The department shall consult with
35 the affected local government prior to finalizing the preliminary review.

36 (9) Except as provided in subsection (10) of this section, the Director of the Department of State
37 Lands shall approve the acknowledged estuary management plan by order within 60 days of com-
38 pletion of the preliminary review.

39 (10) A contested case hearing shall be held within 30 days of the completion of the preliminary
40 review or receipt of a request for hearing if:

41 (a) The director determines there is probable cause to believe that the estuary management plan
42 does not meet the standards for approving wetland conservation plans or unreasonably interferes
43 with the use of the estuary for navigation, fisheries or public recreation; or

44 (b) A hearing is requested and the request:

45 (A) Is made in writing within 60 days of the date of mailing of notice of completion of review;

1 (B) Clearly states the reasons for requesting the hearing; and

2 (C) Provides sufficient information for the director to determine that there is probable cause to
 3 believe that the estuary management plan does not meet the standards for approving wetland con-
 4 servation plans or unreasonably interferes with the use of the estuary for navigation, fisheries or
 5 public recreation.

6 (11) The director shall approve the acknowledged estuary management plan as a wetland con-
 7 servation plan by order unless the director finds by a preponderance of the evidence that the
 8 estuary management plan does not meet the standards for approving wetland conservation plans or
 9 unreasonably interferes with the use of the estuary for navigation, fisheries or public recreation or
 10 that substantial fills proposed in an estuary management plan for nonwater dependent use are not
 11 for a public use and would not satisfy a public need that outweighs harm to navigation, fisheries
 12 or public recreation.

13 (12) The director shall prepare a proposed order for review by the parties within 30 days of any
 14 contested case hearing held pursuant to subsection (10) of this section.

15 (13) A final order from the director that recommends, pursuant to subsection (8) of this section,
 16 denial of an estuary management plan as a wetland conservation plan shall identify deficient ele-
 17 ments and provisions of the acknowledged estuary management plan and what measures may be
 18 taken to correct those deficiencies.

19 (14) Individual permit applications shall be required for removal or fill, or both, in areas subject
 20 to an approved estuary management plan. Individual permit applications shall be reviewed in ac-
 21 cordance with ORS 196.815, 196.825[, 196.830] and 196.835. In lieu of the substantive standards for
 22 permit issuance in ORS 196.825 (2), the department shall issue a permit if the removal or fill, or
 23 both, is determined by the director to be consistent with the estuary management plan or can be
 24 conditioned to be consistent with the plan. The department shall condition any such permit as nec-
 25 essary to ensure that the project:

26 (a) Is designed or configured to minimize alterations to waters of this state;

27 (b) Is the minimum size necessary to reasonably provide for the proposed use;

28 (c) Is consistent with the resource capabilities of the area and the purposes of the management
 29 unit, unless this has been previously determined in the approved estuary management plan;

30 (d) Is designed to minimize impacts from implementing the project; and

31 (e) Has estuarine resource replacement measures for creation, restoration or enhancement that
 32 replaces impacted resources.

33 (15) Judicial review of an order granting or denying approval of an estuary management plan
 34 as provided in this section shall be as provided in ORS 183.470.

35 (16) Following approval by the director of an estuary management plan, the requirements of ORS
 36 196.684 shall apply to the approved estuary management plan.

37 **SECTION 4.** ORS 196.692 is amended to read:

38 196.692. (1) The Department of State Lands shall adopt rules to carry out the provisions of ORS
 39 196.668 to 196.692, 196.800, 196.810, 196.818, 196.825, [196.830,] 196.850 to 196.860, 196.885, 196.905,
 40 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350.

41 (2) Rules adopted pursuant to subsection (1) of this section shall include rules governing the
 42 application for and issuance of permits to remove material from the beds or banks of any waters of
 43 this state or to fill any waters of this state including, but not limited to, clear and objective stan-
 44 dards and criteria for determining whether to grant or deny a permit.

45 **SECTION 5.** ORS 196.800 is amended to read:

1 196.800. As used in ORS 196.600 to 196.905, unless the context requires otherwise:

2 (1) "Channel relocation" means a change in location of a channel in which a new channel is dug
 3 and the flow is diverted from the old channel into the new channel if more than 50 cubic yards of
 4 material is removed in constructing the new channel or if it would require more than 50 cubic yards
 5 of material to completely fill the old channel.

6 (2) "Estuary" means:

7 (a) For waters other than the Columbia River, the body of water from the ocean to the head of
 8 tidewater that is partially enclosed by land and within which salt water is usually diluted by fresh
 9 water from the land, including all associated estuarine waters, tidelands, tidal marshes and sub-
 10 merged lands; and

11 (b) For the Columbia River, all waters from the mouth of the river up to the western edge of
 12 Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged
 13 lands.

14 (3) "Fill" means the total of deposits by artificial means equal to or exceeding 50 cubic yards
 15 or more of material at one location in any waters of this state.

16 (4) "General authorization" means an authorization granted under ORS 196.850 for a category
 17 of activities involving removal or fill, or both, without a permit.

18 (5) "General permit" means a permit for removal activities or fill activities that are substantially
 19 similar in nature, are recurring or ongoing, and have predictable effects and outcomes.

20 (6) "Intermittent stream" means any stream [*which*] **that** flows during a portion of [*every*] **any**
 21 year [*and which provides spawning, rearing or food-producing areas for food and game fish*] **that has**
 22 **normal or more than normal annual precipitation.**

23 (7) "Material" means rock, gravel, sand, silt and other inorganic substances removed from wa-
 24 ters of this state and any materials, organic or inorganic, used to fill waters of this state.

25 (8) "Mitigation" means the reduction of adverse effects of a proposed project by considering, in
 26 the following order:

27 (a) Avoiding the effect altogether by not taking a certain action or parts of an action;

28 (b) Minimizing the effect by limiting the degree or magnitude of the action and its implementa-
 29 tion;

30 (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment;

31 (d) Reducing or eliminating the effect over time by preservation and maintenance operations
 32 during the life of the action by monitoring and taking appropriate corrective measures; and

33 (e) Compensating for the effect by replacing or providing comparable substitute wetland or wa-
 34 ter resources.

35 (9) "Person" means a person, a public body as defined in ORS 174.109, the federal government,
 36 when operating in any capacity other than navigational servitude, or any other legal entity.

37 (10) "Practicable" means capable of being accomplished after taking into consideration the cost,
 38 existing technology and logistics with respect to the overall project purpose.

39 (11) "Public use" means a publicly owned project or a privately owned project that is available
 40 for use by the public.

41 (12) "Removal" means:

42 (a) The taking of more than 50 cubic yards or the equivalent weight in tons of material in any
 43 waters of this state in any calendar year; or

44 (b) The movement by artificial means of an equivalent amount of material on or within the bed
 45 of such waters, including channel relocation.

1 (13) "Water resources" includes not only water itself but also aquatic life and habitats therein
 2 and all other natural resources in and under the waters of this state.

3 (14) "Waters of this state" means all natural waterways, tidal and nontidal bays, intermittent
 4 streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the
 5 boundaries of this state, all other navigable and nonnavigable bodies of water in this state and those
 6 portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated
 7 under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pol-
 8 lution Control Act, as amended.

9 (15) "Wetland conservation plan" means a written plan providing for wetland management con-
 10 taining a detailed and comprehensive statement of policies, standards and criteria to guide public
 11 and private uses and protection of wetlands, waters and related adjacent uplands and which has
 12 specific implementing measures and which apply to designated geographic areas of the State of
 13 Oregon.

14 (16) "Wetlands" means those areas that are inundated or saturated by surface or ground water
 15 at a frequency and duration sufficient to support, and that under normal circumstances do support,
 16 a prevalence of vegetation typically adapted for life in saturated soil conditions.

17 **SECTION 6.** ORS 196.800, as amended by section 1, chapter 516, Oregon Laws 2001, section 8,
 18 chapter 253, Oregon Laws 2003, section 15, chapter 738, Oregon Laws 2003, and section 3, chapter
 19 849, Oregon Laws 2007, is amended to read:

20 196.800. As used in ORS 196.600 to 196.905, unless the context requires otherwise:

21 (1) "Channel relocation" means a change in location of a channel in which a new channel is dug
 22 and the flow is diverted from the old channel into the new channel.

23 (2) "Estuary" means:

24 (a) For waters other than the Columbia River, the body of water from the ocean to the head of
 25 tidewater that is partially enclosed by land and within which salt water is usually diluted by fresh
 26 water from the land, including all associated estuarine waters, tidelands, tidal marshes and sub-
 27 merged lands; and

28 (b) For the Columbia River, all waters from the mouth of the river up to the western edge of
 29 Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged
 30 lands.

31 (3) "Fill" means the deposit by artificial means of material at one location in any waters of this
 32 state.

33 (4) "General authorization" means an authorization granted under ORS 196.850 for a category
 34 of activities involving removal or fill, or both, without a permit.

35 (5) "General permit" means a permit for removal activities or fill activities that are substantially
 36 similar in nature, are recurring or ongoing, and have predictable effects and outcomes.

37 (6) "Intermittent stream" means any stream [*which*] **that** flows during a portion of [*every*] **any**
 38 year [*and which provides spawning, rearing or food-producing areas for food and game fish*] **that has**
 39 **normal or more than normal annual precipitation.**

40 (7) "Material" means rock, gravel, sand, silt and other inorganic substances removed from wa-
 41 ters of this state and any materials, organic or inorganic, used to fill waters of this state.

42 (8) "Mitigation" means the reduction of adverse effects of a proposed project by considering, in
 43 the following order:

44 (a) Avoiding the effect altogether by not taking a certain action or parts of an action;

45 (b) Minimizing the effect by limiting the degree or magnitude of the action and its implementa-

1 tion;

2 (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment;

3 (d) Reducing or eliminating the effect over time by preservation and maintenance operations
4 during the life of the action by monitoring and taking appropriate corrective measures; and

5 (e) Compensating for the effect by replacing or providing comparable substitute wetland or wa-
6 ter resources.

7 (9) "Person" means a person, a public body, as defined in ORS 174.109, the federal government,
8 when operating in any capacity other than navigational servitude, or any other legal entity.

9 (10) "Practicable" means capable of being accomplished after taking into consideration the cost,
10 existing technology and logistics with respect to the overall project purpose.

11 (11) "Public use" means a publicly owned project or a privately owned project that is available
12 for use by the public.

13 (12) "Removal" means:

14 (a) The taking of material in any waters of this state; or

15 (b) The movement by artificial means of material within the bed of such waters, including
16 channel relocation.

17 (13) "Water resources" includes not only water itself but also aquatic life and habitats therein
18 and all other natural resources in and under the waters of this state.

19 (14) "Waters of this state" means all natural waterways, tidal and nontidal bays, intermittent
20 streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the
21 boundaries of this state, all other navigable and nonnavigable bodies of water in this state and those
22 portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated
23 under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pol-
24 lution Control Act, as amended.

25 (15) "Wetland conservation plan" means a written plan providing for wetland management con-
26 taining a detailed and comprehensive statement of policies, standards and criteria to guide public
27 and private uses and protection of wetlands, waters and related adjacent uplands and which has
28 specific implementing measures and which apply to designated geographic areas of the State of
29 Oregon.

30 (16) "Wetlands" means those areas that are inundated or saturated by surface or ground water
31 at a frequency and duration sufficient to support, and that under normal circumstances do support,
32 a prevalence of vegetation typically adapted for life in saturated soil conditions.

33 **SECTION 7.** ORS 196.815 is amended to read:

34 196.815. (1) A person who is required to have a permit to remove material from the bed or banks
35 or fill any waters of this state shall file a written application with the Director of the Department
36 of State Lands for each individual project before performing any removal or fill.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 (d) For the purposes of this subsection:

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

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

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

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

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

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

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

34 (5) A person who receives an emergency authorization under ORS 196.810 to remove material
35 from the beds or banks of any waters of this state or to fill any waters of this state shall, within
36 45 days after receiving the authorization, submit a fee to the department calculated in the manner
37 provided under this section for permit applications.

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

1 the protection, conservation and best use of the water resources of this state.

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

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

9 **SECTION 8.** ORS 196.825 is amended to read:

10 196.825. (1) The Director of the Department of State Lands shall issue a permit applied for under
11 ORS 196.815 if the director determines that the project described in the application:

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

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

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

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

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

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

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

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

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

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

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

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

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

44 (4) If the director issues a permit, the director may impose such conditions as the director con-
45 siders necessary to carry out the purposes of ORS 196.805 *[and 196.830]* and subsection (1) of this

1 section and to provide mitigation for the reasonably expected adverse effects of project development.
2 In formulating such conditions the director may request comment from public bodies, as defined in
3 ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid
4 only for the time specified therein. The director shall impose, as conditions to any permit, general
5 authorization or wetland conservation plan, measures to provide mitigation for the reasonably ex-
6 pected adverse effects of project development. Compensatory wetland mitigation shall be limited to
7 replacement of the functional attributes of the lost wetland.

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

12 (6) Any applicant whose application for a permit or authorization has been deemed incomplete
13 or has been denied, or who objects to any of the conditions imposed under this section by the di-
14 rector, may, within 21 days of the denial of the permit or authorization or the imposition of any
15 condition, request a hearing from the director. Thereupon the director shall set the matter down for
16 hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430,
17 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order containing
18 findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's initial
19 order. Appeals from the director's final order may be taken to the Court of Appeals in the manner
20 provided by ORS 183.482.

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

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

28 (b) Issue a permit decision within 90 days after the date the director determines that the appli-
29 cation is complete unless:

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

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

32 (8) Permits issued under this section shall be in lieu of any permit or authorization that might
33 be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055,
34 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

36 (b) The standards for granting the permit or authorization are substantially the same as those
37 established pursuant to ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.110, 468.120,
38 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

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

44 (b) The Department of Environmental Quality shall provide comments to the director within 75
45 days after receiving notice under subsection (4) of this section if the permit action requires certif-

1 ication under the Federal Water Pollution Control Act (P.L. 92-500), as amended.

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

4 (11) As used in this section:

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

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

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

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

12 (C) The fee required under ORS 196.815;

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

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

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

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

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

23 **SECTION 9.** ORS 196.905 is amended to read:

24 196.905. (1) Nothing in ORS 196.600 to 196.905 applies to filling the beds of the waters of this
25 state for the purpose of constructing, operating and maintaining dams or other diversions for which
26 permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which
27 preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.610.

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

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

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

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

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

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

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

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

45 [(d) *Any activity described as a farm use in ORS 215.203 that is conducted on prior converted*

1 *cropland as described in subsection (8) of this section, so long as agricultural management of the land*
 2 *has not been abandoned for five or more years] or any other waters of this state.*

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

6 **(6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity**
 7 **defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS**
 8 **215.203, if the lands are converted wetlands that are also certified as prior converted**
 9 **cropland by the Natural Resources Conservation Service of the United States Department**
 10 **of Agriculture, or its successor agency, so long as commercial agricultural production on the**
 11 **land has not been abandoned for five or more years.**

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

15 [(5)] **(8) The [exemption] exemptions in subsections (3) [and (4)] to (7) of this section [shall] do**
 16 **not apply to any fill or removal [which] that involves changing an area of wetlands to a nonfarm**
 17 **use.**

18 [(6)] **(9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the main-**
 19 **tenance or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drain-**
 20 **age ditches, irrigation ditches and tile drain systems, provided that:**

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

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

25 [(7)] **(10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for mainte-**
 26 **nance, including emergency reconstruction of recently damaged parts, of currently serviceable roads**
 27 **or transportation structures such as groins and riprap protecting roads, causeways and bridge**
 28 **abutments or approaches.**

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

32 [(8)] **(12) [For the purposes of this section, “converted wetland”:]**

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

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

40 (a) **“Converted wetlands” means agriculturally managed wetlands that, on or before June**
 41 **30, 1989, were brought into commercial agricultural production by diking, draining or any**
 42 **similar hydrologic manipulation that resulted in the removal or manipulation of natural**
 43 **vegetation, and that are managed for commercial agricultural purposes.**

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

1 **area.**

2 **SECTION 10.** ORS 196.905, as amended by section 6, chapter 516, Oregon Laws 2001, and sec-
 3 tion 13, chapter 253, Oregon Laws 2003, is amended to read:

4 196.905. (1) Notwithstanding the exemptions in subsections (3) to (8) of this section, a permit
 5 under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters
 6 of this state when:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (5) **Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity**
 37 **defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS**
 38 **215.203, if the lands are converted wetlands that are also certified as prior converted**
 39 **cropland by the Natural Resources Conservation Service of the United States Department**
 40 **of Agriculture, or its successor agency, so long as commercial agricultural production on the**
 41 **land has not been abandoned for five or more years.**

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

45 [(5)] (7) The [*exemption*] **exemptions** in subsections (3) [*and (4)*] **to (6)** of this section [*may*] **do**

1 not apply to any fill or removal [*which*] **that** involves changing an area of wetlands or converted
 2 wetlands to a nonfarm use.

3 [(6)] **(8)** Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the main-
 4 tenance or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drain-
 5 age ditches, irrigation ditches and tile drain systems, provided that:

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

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

10 [(7)] **(9)** Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for temporary
 11 dams constructed for crop or pasture irrigation purposes that are less than 50 cubic yards, provided
 12 the following conditions are satisfied:

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

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

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

20 [(8)] **(10)** Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for mainte-
 21 nance, including emergency reconstruction of recently damaged parts, of currently serviceable roads
 22 or transportation structures such as groins and riprap protecting roads, causeways and bridge
 23 abutments or approaches.

24 [(9)] **(11)** Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the main-
 25 tenance of access roads constructed to move mining equipment, subject to the following conditions:

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

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

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

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

34 [(10)] **(13)** [*For the purposes of this section:*]

35 [(a) "*Converted wetland*" means:]

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

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

43 **(a)(A) "Converted wetlands" means agriculturally managed wetlands that, on or before**
 44 **June 30, 1989, were brought into commercial agricultural production by diking, draining or**
 45 **any similar hydrologic manipulation that resulted in the removal or manipulation of natural**

1 **vegetation, and that are managed for commercial agricultural purposes.**

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

5 (b) "Harvesting" means physically removing crops or other agricultural products.

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

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

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

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

16 **SECTION 11. ORS 196.830 is repealed.**

17 **SECTION 12. (1) The amendments to ORS 196.686, 196.800, 196.815, 196.825 and 196.905 by**
18 **sections 3 and 5 to 10 of this 2009 Act apply only to permits first applied for or permits re-**
19 **newed on or after the effective date of this 2009 Act.**

20 **(2) The repeal of ORS 196.830 by section 11 of this 2009 Act does not apply to the re-**
21 **quirement of estuarine resource replacement included as a condition in a permit applied for**
22 **or renewed before the effective date of this 2009 Act. The repeal of ORS 196.830 by section**
23 **11 of this 2009 Act applies to permits first applied for or permits renewed on or after the**
24 **effective date of this 2009 Act.**

25 _____