

Enrolled House Bill 2156

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CHAPTER

AN ACT

Relating to mitigation for water resources; amending ORS 196.600, 196.605, 196.610, 196.615, 196.620, 196.623, 196.625, 196.640, 196.643, 196.645, 196.650, 196.655, 196.660, 196.665, 196.682, 196.686, 196.800, 196.825 and 196.885.

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

SECTION 1. ORS 196.600 is amended to read:

196.600. As used in ORS 196.600 to 196.655:

(1) "Compensatory [*wetland*] mitigation" means activities conducted by a permittee or third party to create, restore, [*or*] enhance [*wetland functional attributes*] **or preserve the functions and values of the water resources of this state** to compensate for the **removal-fill related** adverse effects of project development **to waters of this state** or to resolve violations of ORS 196.800 to 196.905. **Compensatory mitigation for removal-fill activities does not affect permit requirements of other state departments.**

(2) "Credit" means the measure of the increase in [*wetland functional attributes*] **the functions and values of the water resources of this state** achieved at a mitigation bank site.

(3) "Mitigation bank" means a [*wetland*] site[,] created, restored, [*or*] enhanced **or preserved** in accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts **to waters of this state** due to activities which otherwise comply with the requirements of ORS 196.600 to 196.905.

(4) "Mitigation bank instrument" means the legally binding and enforceable agreement between the Director of the Department of State Lands and a mitigation bank sponsor that formally establishes the mitigation bank and stipulates the terms and conditions of the mitigation bank's construction, operation and long-term management.

(5) "Off-site compensatory [*wetland*] mitigation" means activities conducted away from the project site that [*restore, create or enhance wetland functional attributes*] **create, restore, enhance or preserve the functions and values of the water resources of this state** in order to compensate for the adverse impacts to [*wetlands*] **waters of this state** from project development.

(6) "On-site compensatory [*wetland*] mitigation" means activities conducted at the project site to [*restore, create or enhance wetland functional attributes*] **create, restore, enhance or preserve the functions and values of the water resources of this state** in order to compensate for the adverse impacts to [*wetlands*] **waters of this state** from project development.

(7) "Permit action" means activity under a specific removal or fill permit or other authorization requested or issued under ORS 196.600 to 196.905.

(8) "Service area" means the boundaries set forth in a mitigation bank instrument that include one or more watersheds identified on the United States Geological Survey, Hydrologic Unit Map - 1974, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects from project developments **to waters of this state**. Service areas for mitigation banks are not mutually exclusive.

(9) "Statewide Comprehensive Outdoor Recreation Plan" means the plan created by the State Parks and Recreation Department pursuant to the federal Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 460-L et seq.).

SECTION 2. ORS 196.605 is amended to read:

196.605. It is the purpose of ORS 196.600 to 196.655 to:

(1) Promote, in concert with other federal and state programs as well as interested parties, the maintenance and conservation of *[wetlands]* **the water resources of this state**;

(2) Improve cooperative efforts among private, nonprofit and public entities for the management and protection of *[wetlands]* **the waters of this state**;

(3) Offset losses of *[wetland functional attributes]* **the functions and values of the water resources of this state** caused by activities *[which]* **that** otherwise comply with state and federal law in order to create, restore, *[or]* enhance *[wetland functional attributes]* **or preserve those functions and values**;

(4) Maintain and encourage a predictable, efficient regulatory framework for environmentally acceptable development; *[and]*

(5) Provide an option for accomplishing off-site compensatory *[wetland]* mitigation when on-site compensatory *[wetland]* mitigation is not practicable*[,]*; **and**

(6) Allow the use of mitigation banks to offset adverse effects from removal or fill activities on the waters of this state.

SECTION 3. ORS 196.610 is amended to read:

196.610. Subject to approval by the State Land Board, the Director of the Department of State Lands may:

(1) Charge a fee for purchase of credits in the mitigation bank as provided by ORS 196.600 to 196.655.

(2) Acquire or accept title to lands suitable for use in mitigation banks or actions, or to *[protect]* **preserve** sensitive or unique *[wetlands]* habitat **in or near the waters of this state**.

(3) Pay costs incurred for alterations needed to create, restore, *[or]* enhance *[wetland areas]* **or preserve waters of this state** for purposes of carrying out the provisions of ORS 196.600 to 196.655 or 196.800 to 196.905.

(4) Authorize payment of administrative, research or scientific monitoring expenses of the Department of State Lands in carrying out the provisions of ORS 196.600 to 196.655 or 196.800 to 196.905.

(5) Disburse funds received under the federal Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.), for such purposes as specifically stipulated in a grant award.

(6) Receive funds under the federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, for the voluntary acquisition of wetlands and interests therein according to the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan. Funds received under the federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, shall be used for nonmitigation complementary purposes and programs of ORS 196.600 to 196.655.

SECTION 4. ORS 196.615 is amended to read:

196.615. (1) In accordance with the provisions of ORS 196.600 to 196.655, upon the approval of the State Land Board, the Director of the Department of State Lands shall initiate and implement a program for *[wetlands]* mitigation banks. The director shall encourage the development of and the expeditious approval of mitigation banks and other types of compensatory *[wetland]* mitigation.

(2) Subject to the approval of the State Land Board, the Department of State Lands shall adopt, by rule, standards and criteria for the site selection process, operation and evaluation of mitigation banks. Criteria to be considered shall include but need not be limited to:

(a) Historical [*wetland*] trends **relating to the waters of this state**, including the estimated rate of current and future losses of the respective types of [*wetlands*] **waters of this state**.

(b) The contributions of the [*wetlands*] **waters of this state** to:

(A) Wildlife, migratory birds and resident species;

(B) Commercial and sport fisheries;

(C) Surface and ground water quality and quantity, and flood moderation;

(D) Outdoor recreation including enhancement of scenic waterways; and

(E) Scientific and research values.

(c) Regional economic needs.

(3) The rules adopted by the department under this section must also include:

(a) Guidelines for the use of mitigation banks to compensate for adverse effects of project development or to resolve violations of ORS 196.800 to 196.905 related to waters of this state; and

(b) Guidelines for allowing a permittee or third party to create a mitigation bank or to conduct compensatory mitigation in order to create, restore, enhance or preserve water resources of this state.

[3] (4) For each mitigation bank, the department shall establish a well-defined plan, including preliminary objectives, inventory of resource values and an evaluation and monitoring program.

SECTION 5. ORS 196.620 is amended to read:

196.620. (1) For each mitigation bank, the Department of State Lands shall establish a system of resource values and credits.

(2) A credit from a mitigation bank may be withdrawn for a condition imposed on a permit in accordance with ORS 196.825 (4), for any other authorization issued in accordance with ORS 196.800 to 196.905 or to resolve a violation of ORS 196.800 to 196.905. At the request of a mitigation bank sponsor, the Director of the Department of State Lands may authorize the withdrawal of mitigation bank credits by a public benefit corporation as defined in ORS 65.001 or a public body as defined by ORS 174.109 designated by the director for the purpose of reserving credits for future use in accordance with this subsection. The director shall manage such transactions to ensure that each credit is used no more than one time to satisfy a use in accordance with this section.

(3) Credits from a [*freshwater*] mitigation bank may be used only as described in subsection (2) of this section for permits, authorizations or resolutions of violations approved within the service area of the mitigation bank, consistent with the mitigation bank instrument, unless the [*Director of the Department of State Lands*] **director** determines[, *in exceptional circumstances,*] that it is environmentally preferable to exceed this limitation.

(4) Credits from an estuarine mitigation bank may be used only as described in subsection (2) of this section for permits, authorizations or resolutions of violations approved within the same estuarine ecological system **unless the director determines that it is environmentally preferable to exceed this limitation.**

(5) The director may not withdraw any credits from any mitigation bank until the director has:

(a) Taken actions sufficient to establish hydrological function of the mitigation bank site;

(b) Conducted other creation, restoration [*and*], enhancement **or preservation** actions to establish other [*wetland*] functions and values at the mitigation bank site; and

(c) Evaluated the results of the actions and determined that a high probability exists that the [*wetland*] functions and values of the mitigation bank site are equal to or greater than the functions and [*the*] values of the [*wetland*] area to be [*damaged or destroyed*] **impacted or that the functions and values of the mitigation bank compensate for unavoidable adverse effects on the waters of this state due to the activities otherwise allowed under ORS 196.600 to 196.905.**

(6) The price for any mitigation credit shall be set at an amount that will compensate the state for all of the costs and expenses the state has incurred[,] and is expected to incur in establishing and maintaining that portion of the mitigation bank.

(7) The director shall not consider the availability or nonavailability of mitigation bank credits in deciding whether to grant or deny any removal or fill permit under ORS 196.600 to 196.905.

- (8) The director annually shall:
- (a) Evaluate the [wetlands] functions and values created within each [wetland] mitigation bank site; and
- (b) Compare the current functions and values with those that the director anticipated that the mitigation bank would provide. If the director finds any significant disparity between the actual and anticipated functions and values, the director shall:
- (A) Suspend the withdrawal of credits to that mitigation site; or
- (B) Take prompt action to ensure that the anticipated functions and values are established.
- (9) The director may not withdraw credits from the mitigation bank for a specific permit, authorization or resolution of a violation if the director determines that:
- (a) The credits for that specific permit, authorization or resolution of a violation would not adequately maintain habitat or species diversity; [or]
- (b) The mitigation bank site for which credits are proposed to be withdrawn is not sufficiently similar in [wetland] functions and values to the [wetland] area to be [damaged or destroyed] **impacted; or**
- (c) **The functions and values of the mitigation bank do not compensate for unavoidable adverse effects on the waters of this state due to the activities otherwise allowed under ORS 196.600 to 196.905.**

SECTION 6. ORS 196.623 is amended to read:

196.623. (1) The Department of State Lands may approve a watershed enhancement program and certify the project as a [wetlands] mitigation bank under ORS 196.600 to 196.655 if the watershed enhancement program complies with the rules adopted by the department under ORS 196.615 for certification of a program as a [wetlands] mitigation bank.

(2) A person, state agency, federal agency, federally recognized Indian tribe, watershed council or political subdivision in this state that owns land upon which is located a watershed enhancement program that qualifies as a [wetlands] mitigation bank under subsection (1) of this section may sell mitigation credit from the mitigation bank subject to ORS 196.600 to 196.655 and the rules of the Department of State Lands adopted under ORS 196.600 to 196.655.

SECTION 7. ORS 196.625 is amended to read:

196.625. (1) The Director of the Department of State Lands shall maintain a record of fill and removal activities and actions for each mitigation bank implemented and conduct monitoring of mitigation banks with moneys from the Oregon [Wetlands Mitigation Bank Revolving Fund Account] **Removal-Fill Mitigation Fund.**

(2) The director shall provide annual reports to the State Land Board on moneys spent and received for each [wetland] mitigation bank.

NOTE: Section 8 was deleted by amendment. Subsequent sections were not renumbered.

SECTION 9. ORS 196.640 is amended to read:

196.640. (1) The Oregon [Wetlands Mitigation Bank Revolving Fund Account] **Removal-Fill Mitigation Fund** is established, separate and distinct from the General Fund. All moneys received under ORS 196.645 shall be paid into the State Treasury and credited to the [account] **Oregon Removal-Fill Mitigation Fund.** All moneys in the [account] **fund** are appropriated continuously to the Department of State Lands to be used by the department as set forth in ORS 196.650. The moneys in the [account] **fund** may be invested and reinvested as provided in ORS 293.701 to 293.820. Interest earned by the [account] **fund** shall be credited to the [account] **fund.**

(2) The department shall keep a record of all moneys deposited in the [account] **fund.** The record shall indicate by separate cumulative accounts the source from which the moneys are derived and the individual activity or program against which each withdrawal is charged.

(3) The department shall publish annually the record of moneys deposited in and removed from the [account] **fund.**

(4) The [Director of the] department [of State Lands] may adopt rules for prioritizing expenditures from the [account] **fund** for the purposes specified in ORS 196.650.

SECTION 10. ORS 196.643 is amended to read:

196.643. A person who provides off-site compensatory [*wetland*] mitigation in order to comply with a condition imposed on a permit in accordance with ORS 196.825 (4), an authorization issued in accordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905 may make a payment for credits to an approved mitigation bank with available credits, or to the Oregon [*Wetlands Mitigation Bank Revolving Fund Account*] **Removal-Fill Mitigation Fund**, if credits from a mitigation bank are not available. If the person is making a payment to the Oregon [*Wetlands Mitigation Bank Revolving Fund Account*] **Removal-Fill Mitigation Fund**, the payment shall be equal to the average cost of credits available from all active mitigation banks in the state.

SECTION 11. ORS 196.645 is amended to read:

196.645. The following moneys shall be paid into the Oregon [*Wetlands Mitigation Bank Revolving Fund Account*] **Removal-Fill Mitigation Fund**:

- (1) Any moneys appropriated for that purpose by the Legislative Assembly;
- (2) Moneys received from conditions imposed on a permit, authorizations or resolutions of violations, except civil penalties, involving compensatory [*wetland*] mitigation in which the Department of State Lands is the party responsible for the compensatory [*wetland*] mitigation;
- (3) Moneys awarded for such purposes as specifically stipulated under grants through the federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, or the federal Coastal Zone Management Act of 1972, 16 U.S.C. 1451 et seq., as amended;
- (4) Moneys obtained by gift, bequest, donation or grant from any other public or private source for the purposes of ORS 196.600 to 196.655 or 196.800 to 196.905;
- (5) Repayment of moneys from the [*account*] **fund**, including interest on such moneys; and
- (6) Moneys obtained from interest or other earnings from investments of moneys in the [*account*] **fund**.

SECTION 12. ORS 196.650 is amended to read:

196.650. The Department of State Lands may use the moneys in the Oregon [*Wetlands Mitigation Bank Revolving Fund Account*] **Removal-Fill Mitigation Fund** for the following purposes:

- (1) For the voluntary acquisition of land **or interests therein** suitable for use in mitigation banks.
- (2) To pay for specific projects to create, restore, [*or*] enhance [*wetland areas*] **or preserve water resources of this state** for purposes of carrying out the provisions of ORS 196.600 to 196.905. Moneys deposited in the [*account*] **fund** for [*wetland*] impacts **to the waters of this state** may be used only for [*wetland creation, restoration and enhancement*] **projects that create, restore, enhance or preserve water resources of this state**.
- (3) **For the implementation of long-term protection measures related to projects that create, restore, enhance or preserve water resources of this state.**

[~~(3)~~] (4) For purchase of credits from approved mitigation banks.

[~~(4)~~] (5) For payment of administrative, research or scientific monitoring expenses of the department in carrying out the provisions of ORS 196.600 to 196.655.

[~~(5)~~] (6) For the disbursement of funds received under the federal Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.), for such purposes as specifically stipulated in a grant award.

[~~(6)~~] (7) For the disbursement of funds received under the federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, for the voluntary acquisition of wetlands and interests therein as identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan.

SECTION 13. ORS 196.655 is amended to read:

196.655. As part of the report to the State Land Board required under ORS 196.885, the Director of the Department of State Lands shall prepare an annual report on the Oregon [*Wetlands Mitigation Bank Revolving Fund Account*] **Removal-Fill Mitigation Fund**. The report shall include, but need not be limited to:

- (1) The financial status of the [*account*] **fund**;
- (2) Creation, restoration, [*or*] enhancement **or preservation** activities and credits sold, granted or otherwise disposed of or remaining in mitigation banks established under ORS 196.600 to 196.655;

(3) **Portions of the waters of this state, including but not limited to** wetlands, acquired with moneys in the [account] **fund**;

(4) Compensatory [wetland] mitigation projects financed with moneys in the [account] **fund**; and

(5) For each mitigation bank, a summary of activities, including but not limited to:

(a) A description of the location, size, number of potential credits and credits withdrawn for each specific permit action; and

(b) The status of all mitigation bank activities pending or completed during the past year.

SECTION 14. ORS 196.660 is amended to read:

196.660. ORS 196.600 to 196.655 are intended to be supplementary to, and are not intended to abrogate, any state or federal law relating to [wetlands] **the waters of this state**.

SECTION 15. ORS 196.665 is amended to read:

196.665. ORS 196.600 to 196.655 may be cited as the “Oregon [Wetlands Mitigation Bank Act of 1987] **Removal-Fill Mitigation Fund Act**.”

SECTION 16. ORS 196.682 is amended to read:

196.682. (1) Except where otherwise provided by the order approving the plan, individual permit applications shall be required for removal or fill, or both, in areas subject to an approved wetland conservation plan. If individual permit applications are to be reviewed under the authority of the Director of the Department of State Lands, then application fees and review procedures shall be in accordance with ORS 196.815, 196.825 and 196.835. In lieu of the substantive standards for permit issuance in ORS 196.825 (2), the Department of State Lands shall issue a permit if the removal or fill, or both, is consistent with the wetland conservation plan or can be conditioned to be consistent with the plan. The department shall condition any such permit as necessary to ensure that the project:

(a) Is properly designed or configured to minimize the need for alterations to waters of this state;

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

(c) Complies with applicable provisions of the acknowledged comprehensive plan and land use regulations for the area;

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

(e) Is conditioned to ensure wetland creation, restoration, [or] enhancement **or preservation** measures are implemented to fully replace impacted resources.

(2) In any order approving a plan [which] **that** authorizes any fill or removal or both, without the necessity of subsequently obtaining an individual permit, the director shall condition such approval as necessary to ensure that the project complies with the conditions of subsection (1) of this section and clearly delineates the wetland area in which fill or removal, or both, is to occur.

SECTION 17. ORS 196.686 is amended to read:

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

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

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

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

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

(6) Within 10 days of acceptance of a request for review, the department shall provide notice to affected state agencies, local governments, federal agencies and the public of receipt of the acknowledged estuary management plan and of the request for review and approval of the acknowledged estuary management plan as a wetland conservation plan.

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

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

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

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

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

(b) A hearing is requested and the request:

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

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

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

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

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

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

(14) Individual permit applications shall be required for removal or fill, or both, in areas subject to an approved estuary management plan. Individual permit applications shall be reviewed in accordance with ORS 196.815, 196.825, 196.830 and 196.835. In lieu of the substantive standards for permit issuance in ORS 196.825 (2), the department shall issue a permit if the removal or fill, or both, is determined by the director to be consistent with the estuary management plan or can be conditioned to be consistent with the plan. The department shall condition any such permit as necessary to ensure that the project:

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

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

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

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

(e) Has estuarine resource replacement measures for creation, restoration, [or] enhancement **or preservation** that replaces impacted resources.

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

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

SECTION 18. ORS 196.800 is amended to read:

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

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

(2) "Estuary" means:

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

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

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

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

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

(6) "Intermittent stream" means any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.

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

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

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

(b) Minimizing the effect by limiting the degree or magnitude of the action and its implementation;

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

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

(e) Compensating for the effect by [*replacing or providing comparable*] **creating, restoring, enhancing or preserving** substitute [*wetland or water resources*] **functions and values for the waters of this state.**

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

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

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

(12) "Removal" means:

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

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

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

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

(15) “Wetland conservation plan” means a written plan providing for wetland management containing a detailed and comprehensive statement of policies, standards and criteria to guide public and private uses and protection of wetlands, waters and related adjacent uplands and which has specific implementing measures and which apply to designated geographic areas of the State of Oregon.

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

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

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

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

(2) “Estuary” means:

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

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

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

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

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

(6) “Intermittent stream” means any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.

(7) “Material” means rock, gravel, sand, silt and other inorganic substances removed from waters of this state and any materials, organic or inorganic, used to fill waters of this state.

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

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

(b) Minimizing the effect by limiting the degree or magnitude of the action and its implementation;

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

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

(e) Compensating for the effect by *[replacing or providing comparable]* **creating, restoring, enhancing or preserving** substitute *[wetland or water resources]* **functions and values for the waters of this state.**

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

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

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

(12) "Removal" means:

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

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

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

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

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

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

SECTION 20. 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.

(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*] **functions and values** of the [*lost wetland*] **impacted water resources of this state**.

(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 21. ORS 196.885 is amended to read:

196.885. The Director of the Department of State Lands shall submit an annual report to the State Land Board on the activities conducted under ORS 196.600 to 196.905. The annual report shall include the following:

(1) The number of fill and removal permits applied for, denied and granted, organized according to whether or not the permits were for waters subject to section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended). For all permits granted or outstanding during the prior year, a separate summary shall be included for fills and removals, organized by river or other water body, that shows:

(a) The total number of permits, the number of new permits and the number of renewal permits.

(b) The volume and acreage of fills and removals authorized during the past year, and the volume and acreage of fills and removals completed during the past year.

(2) By river or other water body, a summary of the total volume and acreage of fills and removals made under a general waiver, general permit or similar authority.

(3) A summary of mitigation measures, including a description of each mitigation project approved during the past year including the location and size of each mitigation project and a report on the status of all mitigation projects pending or completed during the past year.

(4) A summary of enforcement activities, including:

(a) The number of potential violations reported.

(b) The number of compliance investigations conducted.

(c) The results of compliance actions, including:

(A) The number of cases resolved by voluntary compliance, administrative hearings and judicial enforcement proceedings;

(B) The amount of damages and penalties assessed;

(C) The amount of damages and penalties recovered; and

(D) A brief description of each after-the-fact permit issued, including the location and size by volume and acreage.

(5) A description of staffing, including the number of full-time equivalent positions devoted to the permit program and, for each position, the qualifications and job description.

(6) The report on the Oregon [*Wetlands Mitigation Bank Revolving Fund Account*] **Removal-Fill Mitigation Fund** as required under ORS 196.655.

(7) The number of and average time for responding to notices received by local governments and the number of responses that took more than 30 days.

(8) The number of wetland conservation plans approved by the director and a description of each, including the issues raised during the approval process.

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

.....
Governor

Filed in Office of Secretary of State:

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

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Secretary of State