

House Bill 2156

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**.

Authorizes Department of State Lands to allow mitigation banks for effects on waters of state. Changes name of Oregon Wetlands Mitigation Bank Revolving Fund Account to Oregon Mitigation Bank Account. Clarifies certain references to mitigation.

A BILL FOR AN ACT

1
2 Relating to mitigation for water resources; creating new provisions; and amending ORS 196.600,
3 196.605, 196.610, 196.615, 196.620, 196.623, 196.625, 196.630, 196.640, 196.643, 196.645, 196.650,
4 196.655, 196.660, 196.665, 196.682, 196.686, 196.800, 196.825 and 196.885.

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

6 **SECTION 1.** ORS 196.600 is amended to read:

7 196.600. As used in ORS 196.600 to 196.655:

8 (1) "Compensatory [*wetland*] mitigation" means activities conducted by a permittee or third
9 party to create, restore, [*or*] enhance [*wetland functional attributes*] **or preserve the functions and**
10 **values of the water resources of this state** to compensate for the adverse effects of project de-
11 velopment **to waters of this state** or to resolve violations of ORS 196.800 to 196.905.

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

14 (3) "Mitigation bank" means a [*wetland*] site[,] created, restored, [*or*] enhanced **or preserved** in
15 accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts **to waters**
16 **of this state** due to activities which otherwise comply with the requirements of ORS 196.600 to
17 196.905.

18 (4) "Mitigation bank instrument" means the legally binding and enforceable agreement between
19 the Director of the Department of State Lands and a mitigation bank sponsor that formally estab-
20 lishes the mitigation bank and stipulates the terms and conditions of the mitigation bank's con-
21 struction, operation and long-term management.

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

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

30 (7) "Permit action" means activity under a specific removal or fill permit or other authorization

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 requested or issued under ORS 196.600 to 196.905.

2 (8) "Service area" means the boundaries set forth in a mitigation bank instrument that include
 3 one or more watersheds identified on the United States Geological Survey, Hydrologic Unit Map -
 4 1974, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects
 5 from project developments **to waters of this state**. Service areas for mitigation banks are not mu-
 6 tually exclusive.

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

10 **SECTION 2.** ORS 196.605 is amended to read:

11 196.605. It is the purpose of ORS 196.600 to 196.655 to:

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

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

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

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

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

24 **(6) Allow the use of mitigation banks to offset adverse effects on the waters of this state.**

25 **SECTION 3.** ORS 196.610 is amended to read:

26 196.610. [*Subject to approval by the State Land Board,*] The Director of the Department of State
 27 Lands may:

28 (1) Charge a fee for purchase of credits in the mitigation bank as provided by ORS 196.600 to
 29 196.655.

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

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

35 (4) Authorize payment of administrative, research or scientific monitoring expenses of the De-
 36 partment of State Lands in carrying out the provisions of ORS 196.600 to 196.655 or 196.800 to
 37 196.905.

38 (5) Disburse funds received under the federal Coastal Zone Management Act of 1972, as amended
 39 (16 U.S.C. 1451 et seq.), for such purposes as specifically stipulated in a grant award.

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

45 **SECTION 4.** ORS 196.615 is amended to read:

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

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

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

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

11 (A) Wildlife, migratory birds and resident species;

12 (B) Commercial and sport fisheries;

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

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

15 (E) Scientific and research values.

16 (c) Regional economic needs.

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

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

21 (b) **Guidelines for allowing a permittee or third party to create a mitigation bank or to**
 22 **conduct compensatory mitigation in order to create, restore, enhance or preserve water re-**
 23 **sources of this state.**

24 [(3)] (4) For each mitigation bank, the department shall establish a well-defined plan, including
 25 preliminary objectives, inventory of resource values and an evaluation and monitoring program.

26 **SECTION 5.** ORS 196.620 is amended to read:

27 196.620. (1) For each mitigation bank, the Department of State Lands shall establish a system
 28 of resource values and credits.

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

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

42 (4) Credits from an estuarine mitigation bank may be used only as described in subsection (2)
 43 of this section for permits, authorizations or resolutions of violations approved within the same
 44 estuarine ecological system **unless the director determines that it is environmentally prefera-**
 45 **ble 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

1 mitigation banks with moneys from the Oregon [Wetlands] Mitigation Bank [Revolving Fund] Ac-
 2 count.

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

5 **SECTION 8.** ORS 196.630 is amended to read:

6 196.630. [Subject to the approval of the State Land Board, the Director of] The Department of
 7 State Lands shall adopt rules according to the provisions of ORS chapter 183 to carry out the pro-
 8 visions of ORS 196.600 to 196.655.

9 **SECTION 9.** ORS 196.640 is amended to read:

10 196.640. (1) The Oregon [Wetlands] Mitigation Bank [Revolving Fund] Account is established,
 11 separate and distinct from the General Fund. All moneys received under ORS 196.645 shall be paid
 12 into the State Treasury and credited to the account. All moneys in the account are appropriated
 13 continuously to the Department of State Lands to be used by the department as set forth in ORS
 14 196.650. The moneys in the account may be invested and reinvested as provided in ORS 293.701 to
 15 293.820. Interest earned by the account shall be credited to the account.

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

19 (3) The department shall publish annually the record of moneys deposited in and removed from
 20 the account.

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

23 **SECTION 10.** ORS 196.643 is amended to read:

24 196.643. A person who provides off-site compensatory [wetland] mitigation in order to comply
 25 with a condition imposed on a permit in accordance with ORS 196.825 (4), an authorization issued
 26 in accordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905
 27 may make a payment for credits to an approved mitigation bank with available credits, or to the
 28 Oregon [Wetlands] Mitigation Bank [Revolving Fund] Account, if credits from a mitigation bank are
 29 not available. If the person is making a payment to the Oregon [Wetlands] Mitigation Bank [Re-
 30 volving Fund] Account, the payment shall be equal to the average cost of credits available from all
 31 active mitigation banks in the state.

32 **SECTION 11.** ORS 196.645 is amended to read:

33 196.645. The following moneys shall be paid into the Oregon [Wetlands] Mitigation Bank [Re-
 34 volving Fund] Account:

35 (1) Any moneys appropriated for that purpose by the Legislative Assembly;

36 (2) Moneys received from conditions imposed on a permit, authorizations or resolutions of vio-
 37 lations, except civil penalties, involving compensatory [wetland] mitigation in which the Department
 38 of State Lands is the party responsible for the compensatory [wetland] mitigation;

39 (3) Moneys awarded for such purposes as specifically stipulated under grants through the federal
 40 Emergency Wetlands Resources Act of 1986, P.L. 99-645, or the federal Coastal Zone Management
 41 Act of 1972, 16 U.S.C. 1451 et seq., as amended;

42 (4) Moneys obtained by gift, bequest, donation or grant from any other public or private source
 43 for the purposes of ORS 196.600 to 196.655 or 196.800 to 196.905;

44 (5) Repayment of moneys from the account, including interest on such moneys; and

45 (6) Moneys obtained from interest or other earnings from investments of moneys in the account.

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 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 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. The report shall include, but need not be limited to:

(1) The financial status of the account;

(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;

(4) Compensatory [wetland] mitigation projects financed with moneys in the account; 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].”

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

1 Director of the Department of State Lands, then application fees and review procedures shall be in
 2 accordance with ORS 196.815, 196.825 and 196.835. In lieu of the substantive standards for permit
 3 issuance in ORS 196.825 (2), the Department of State Lands shall issue a permit if the removal or
 4 fill, or both, is consistent with the wetland conservation plan or can be conditioned to be consistent
 5 with the plan. The department shall condition any such permit as necessary to ensure that the
 6 project:

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

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

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

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

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

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

19 **SECTION 17.** ORS 196.686 is amended to read:

20 196.686. (1) For the purposes of this section, an acknowledged estuary management plan includes
 21 the comprehensive plan and land use regulations adopted by cities and counties to satisfy the re-
 22 quirement of statewide planning goals related to estuarine resources including shoreland portions
 23 of estuarine sites designated for development as those plans and regulations existed on January 1,
 24 1989.

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

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

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

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

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

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

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

45 (9) Except as provided in subsection (10) of this section, the Director of the Department of State

1 Lands shall approve the acknowledged estuary management plan by order within 60 days of com-
2 pletion of the preliminary review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44 (16) Following approval by the director of an estuary management plan, the requirements of ORS
45 196.684 shall apply to the approved estuary management plan.

1 **SECTION 18.** ORS 196.800 is amended to read:

2 196.800. As used in ORS 196.600 to 196.905, unless the context requires otherwise:

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

7 (2) “Estuary” means:

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

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

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

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

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

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

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*] **creating, restoring, en-**
34 **hancing or preserving** substitute [*wetland or water resources*] **functions and values for the wa-**
35 **ters of this state.**

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

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

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

42 (12) “Removal” means:

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

45 (b) The movement by artificial means of an equivalent amount of material on or within the bed

1 of such waters, including channel relocation.

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

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

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

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

18 **SECTION 19.** ORS 196.800, as amended by section 1, chapter 516, Oregon Laws 2001, section
19 8, chapter 253, Oregon Laws 2003, section 15, chapter 738, Oregon Laws 2003, and section 3, chapter
20 849, Oregon Laws 2007, is amended to read:

21 196.800. As used in ORS 196.600 to 196.905, unless the context requires otherwise:

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

24 (2) "Estuary" means:

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

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

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

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

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

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

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*] **creating, restoring, en-**
6 **hancing or preserving** substitute [*wetland or water resources*] **functions and values for the wa-**
7 **ters of this state.**

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

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

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

14 (12) "Removal" means:

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

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

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

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

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

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

34 **SECTION 20.** ORS 196.825 is amended to read:

35 196.825. (1) The Director of the Department of State Lands shall issue a permit applied for under
36 ORS 196.815 if the director determines that the project described in the application:

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

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

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

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

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

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

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

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

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

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

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

13 (i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects
14 of the proposed fill or removal in the manner set forth in ORS 196.800. If off-site compensatory
15 [wetland] mitigation is proposed, the applicant shall document the impracticability of on-site
16 compensatory [wetland] mitigation.

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

21 (4) If the director issues a permit, the director may impose such conditions as the director con-
22 siders necessary to carry out the purposes of ORS 196.805 and 196.830 and subsection (1) of this
23 section and to provide mitigation for the reasonably expected adverse effects of project development.
24 In formulating such conditions the director may request comment from public bodies, as defined in
25 ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid
26 only for the time specified therein. The director shall impose, as conditions to any permit, general
27 authorization or wetland conservation plan, measures to provide mitigation for the reasonably ex-
28 pected adverse effects of project development. Compensatory [wetland] mitigation shall be limited to
29 replacement of the [functional attributes] **functions and values** of the [lost wetland] **impacted water**
30 **resources of this state.**

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

35 (6) Any applicant whose application for a permit or authorization has been deemed incomplete
36 or has been denied, or who objects to any of the conditions imposed under this section by the di-
37 rector, may, within 21 days of the denial of the permit or authorization or the imposition of any
38 condition, request a hearing from the director. Thereupon the director shall set the matter down for
39 hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430,
40 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order containing
41 findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's initial
42 order. Appeals from the director's final order may be taken to the Court of Appeals in the manner
43 provided by ORS 183.482.

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

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

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

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

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

10 (8) Permits issued under this section shall be in lieu of any permit or authorization that might
 11 be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055,
 12 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

14 (b) The standards for granting the permit or authorization are substantially the same as those
 15 established pursuant to ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.110, 468.120,
 16 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

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

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

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

27 (11) As used in this section:

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

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

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

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

35 (C) The fee required under ORS 196.815;

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

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

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

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

44 (H) Any other information that the director deems pertinent and necessary to make an informed
 45 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 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.

SECTION 22. (1) The amendments to ORS 196.640 by section 9 of this 2009 Act are intended to change the name of the “Oregon Wetlands Mitigation Bank Revolving Fund Account” to the “Oregon Mitigation Bank Account.”

(2) For the purpose of harmonizing and clarifying statute sections published in Oregon Revised Statutes, the Legislative Counsel may substitute for words designating the “Oregon Wetlands Mitigation Bank Revolving Fund Account,” wherever they occur in Oregon Revised Statutes, other words designating the “Oregon Mitigation Bank Account.”