

A-Engrossed
House Bill 3058

Ordered by the House May 27
Including House Amendments dated May 27

Sponsored by Representative SCHAUFLER; Representative WITT

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.

Changes definition of "applicant" for purposes of removal-fill permitting program. **Specifies procedures by which applicant who proposes removal or fill activity for construction of linear facility may receive and use removal-fill permit.**
Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to removal-fill permitting program; creating new provisions; amending ORS 196.620, 196.643,
3 196.682, 196.686 and 196.825; and declaring an emergency.

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

5 **SECTION 1.** ORS 196.825 is amended to read:

6 196.825. (1) The Director of the Department of State Lands shall issue a permit applied for under
7 ORS 196.815 if the director determines that the project described in the application:

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

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

12 **(2) If the director issues a permit applied for under ORS 196.815 to a person who proposes**
13 **a removal or fill activity for construction of a linear facility, and if that person is not a**
14 **landowner or a person authorized by a landowner to conduct the proposed removal or fill**
15 **activity on a property, then the person may not conduct removal or fill activity on that**
16 **property until the person obtains:**

17 (a) **The landowner's consent;**

18 (b) **A right, title or interest with respect to the property that is sufficient to undertake**
19 **the removal or fill activity; or**

20 (c) **A court order or judgment authorizing the use of the property.**

21 [(2)] **(3)** In determining whether to issue a permit, the director shall consider all of the following:

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

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

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

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

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

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

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

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

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

15 [(3)] (4) The director may issue a permit for a project that results in a substantial fill in an
16 estuary for a nonwater dependent use only if the project is for a public use and would satisfy a
17 public need that outweighs harm to navigation, fishery and recreation and if the proposed fill meets
18 all other criteria contained in ORS 196.600 to 196.905.

19 [(4)] (5) If the director issues a permit, the director may impose such conditions as the director
20 considers necessary to carry out the purposes of ORS 196.805 and 196.830 and subsection (1) of this
21 section and to provide mitigation for the reasonably expected adverse effects of project development.
22 In formulating such conditions the director may request comment from public bodies, as defined in
23 ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid
24 only for the time specified therein. The director shall impose, as conditions to any permit, general
25 authorization or wetland conservation plan, measures to provide mitigation for the reasonably ex-
26 pected adverse effects of project development. Compensatory wetland mitigation shall be limited to
27 replacement of the functional attributes of the lost wetland.

28 [(5)] (6)(a) The director may request comment from interested parties and adjacent property
29 owners on any application for a permit.

30 (b) The director shall furnish to any person, upon written request and at the expense of the
31 person who requests the copy, a copy of any application for a permit or authorization under this
32 section or ORS 196.850.

33 (c) **For permit applications for a removal or fill activity for construction of a linear fa-**
34 **cility that are deemed complete by the director, the director shall notify by first-class mail,**
35 **electronic mail or electronic facsimile transmission all landowners whose land is identified**
36 **in the permit application and all landowners whose land adjoins the property of a landowner**
37 **whose land is identified in the permit application.**

38 [(6)] (7)(a) Any applicant whose application for a permit or authorization has been deemed in-
39 complete or has been denied, or who objects to any of the conditions imposed under this section by
40 the director, may, within 21 days of the denial of the permit or authorization or the imposition of
41 any condition, request a hearing from the director. Thereupon the director shall set the matter down
42 for hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to
43 183.430, 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order con-
44 taining findings of fact and conclusions of law. The order shall rescind, affirm or modify the direc-
45 tor's initial order. Appeals from the director's final order may be taken to the Court of Appeals in

1 the manner provided by ORS 183.482.

2 **(b) If the director issues a permit for a removal or fill activity for construction of a lin-**
3 **ear facility, any person aggrieved or adversely affected by the issuance of the permit may,**
4 **within 21 days of the issuance of the permit, request a hearing from the director in accord-**
5 **ance with ORS 196.835.**

6 [(7)] **(8)** Except for a permit issued under the process set forth in ORS 517.952 to 517.989, the
7 director shall:

8 (a) Determine whether an application is complete within 30 days from the date the Department
9 of State Lands receives the application. If the director determines that an application is complete,
10 the director shall distribute the application for comment pursuant to subsection [(4)] **(5)** of this
11 section. **If the owners of 10 or more properties affected by an application for a permit for a**
12 **removal or fill activity for construction of a linear facility make a written request to the**
13 **director for a public hearing, the director shall conduct a public hearing to gather additional**
14 **information regarding the application.** If the director determines that the application is not
15 complete, the director shall notify the applicant in writing that the application is deficient and ex-
16 plain, in the same notice, the deficiencies.

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

19 (A) An extension of time is granted under subsection [(9)(b)] **(10)(b)** of this section; or

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

21 [(8)] **(9)** Permits issued under this section shall be in lieu of any permit or authorization that
22 might be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045,
23 468.055, 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

25 (b) The standards for granting the permit or authorization are substantially the same as those
26 established pursuant to ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.110, 468.120,
27 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

28 [(9)(a)] **(10)(a)** Any public body, as defined in ORS 174.109, federal agency or tribal government
29 requested by the director to comment on an application for a permit must submit its comments to
30 the director not more than 30 days after receiving the request for comment. If a public body, federal
31 agency or tribal government fails to comment on the application within 30 days, the director shall
32 assume that the public body, federal agency or tribal government has no objection.

33 (b) The Department of Environmental Quality shall provide comments to the director within 75
34 days after receiving notice under subsection [(4)] **(5)** of this section if the permit action requires
35 certification under the Federal Water Pollution Control Act (P.L. 92-500), as amended.

36 [(10)] **(11)** In determining whether to issue a permit, the director may consider only standards
37 and criteria in effect on the date the director receives the completed application.

38 [(11)] **(12)** As used in this section:

39 (a) "Applicant" means a landowner, [or] a person authorized by a landowner to conduct a re-
40 moval or fill activity **or a person who proposes a removal or fill activity for construction of a**
41 **linear facility.**

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

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

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

2 (C) The fee required under ORS 196.815;

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

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

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

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

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

13 (c) **“Linear facility” includes any railway, highway, road, pipeline, communication line,
14 power line or similar facility used for the transportation of people, goods or substances or
15 the transmission of energy.**

16 **SECTION 2.** ORS 196.620 is amended to read:

17 196.620. (1) For each mitigation bank, the Department of State Lands shall establish a system
18 of resource values and credits.

19 (2) A credit from a mitigation bank may be withdrawn for a condition imposed on a permit in
20 accordance with ORS 196.825 [(4)] (5), for any other authorization issued in accordance with ORS
21 196.800 to 196.905 or to resolve a violation of ORS 196.800 to 196.905. At the request of a mitigation
22 bank sponsor, the Director of the Department of State Lands may authorize the withdrawal of mit-
23 igation bank credits by a public benefit corporation as defined in ORS 65.001 or a public body as
24 defined by ORS 174.109 designated by the director for the purpose of reserving credits for future
25 use in accordance with this subsection. The director shall manage such transactions to ensure that
26 each credit is used no more than one time to satisfy a use in accordance with this section.

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

32 (4) Credits from an estuarine mitigation bank may be used only as described in subsection (2)
33 of this section for permits, authorizations or resolutions of violations approved within the same
34 estuarine ecological system.

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

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

37 (b) Conducted other creation, restoration and enhancement actions to establish other wetland
38 functions and values at the mitigation bank site; and

39 (c) Evaluated the results of the actions and determined that a high probability exists that the
40 wetland functions and values of the mitigation bank site are equal to or greater than the functions
41 and the values of the wetland area to be damaged or destroyed.

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

45 (7) The director shall not consider the availability or nonavailability of mitigation bank credits

1 in deciding whether to grant or deny any removal or fill permit under ORS 196.600 to 196.905.

2 (8) The director annually shall:

3 (a) Evaluate the wetlands functions and values created within each wetland mitigation bank site;
4 and

5 (b) Compare the current functions and values with those that the director anticipated that the
6 mitigation bank would provide. If the director finds any significant disparity between the actual and
7 anticipated functions and values, the director shall:

8 (A) Suspend the withdrawal of credits to that mitigation site; or

9 (B) Take prompt action to ensure that the anticipated functions and values are established.

10 (9) The director may not withdraw credits from the mitigation bank for a specific permit, au-
11 thorization or resolution of a violation if the director determines that:

12 (a) The credits for that specific permit, authorization or resolution of a violation would not ad-
13 equately maintain habitat or species diversity; or

14 (b) The mitigation bank site for which credits are proposed to be withdrawn is not sufficiently
15 similar in wetland functions and values to the wetland area to be damaged or destroyed.

16 **SECTION 3.** ORS 196.643 is amended to read:

17 196.643. A person who provides off-site compensatory wetland mitigation in order to comply with
18 a condition imposed on a permit in accordance with ORS 196.825 [(4)] (5), an authorization issued
19 in accordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905
20 may make a payment for credits to an approved mitigation bank with available credits, or to the
21 Oregon Wetlands Mitigation Bank Revolving Fund Account, if credits from a mitigation bank are
22 not available. If the person is making a payment to the Oregon Wetlands Mitigation Bank Revolving
23 Fund Account, the payment shall be equal to the average cost of credits available from all active
24 mitigation banks in the state.

25 **SECTION 4.** ORS 196.682 is amended to read:

26 196.682. (1) Except where otherwise provided by the order approving the plan, individual permit
27 applications shall be required for removal or fill, or both, in areas subject to an approved wetland
28 conservation plan. If individual permit applications are to be reviewed under the authority of the
29 Director of the Department of State Lands, then application fees and review procedures shall be in
30 accordance with ORS 196.815, 196.825 and 196.835. In lieu of the substantive standards for permit
31 issuance in ORS 196.825 [(2)] (3), the Department of State Lands shall issue a permit if the removal
32 or fill, or both, is consistent with the wetland conservation plan or can be conditioned to be con-
33 sistent with the plan. The department shall condition any such permit as necessary to ensure that
34 the project:

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

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

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

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

41 (e) Is conditioned to ensure wetland creation, restoration or enhancement measures are imple-
42 mented to fully replace impacted resources.

43 (2) In any order approving a plan which authorizes any fill or removal or both, without the ne-
44 cessity of subsequently obtaining an individual permit, the director shall condition such approval
45 as necessary to ensure that the project complies with the conditions of subsection (1) of this section

1 and clearly delineates the wetland area in which fill or removal, or both, is to occur.

2 **SECTION 5.** ORS 196.686 is amended to read:

3 196.686. (1) For the purposes of this section, an acknowledged estuary management plan includes
4 the comprehensive plan and land use regulations adopted by cities and counties to satisfy the re-
5 quirement of statewide planning goals related to estuarine resources including shoreland portions
6 of estuarine sites designated for development as those plans and regulations existed on January 1,
7 1989.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43 (11) The director shall approve the acknowledged estuary management plan as a wetland con-
44 servation plan by order unless the director finds by a preponderance of the evidence that the
45 estuary management plan does not meet the standards for approving wetland conservation plans or

1 unreasonably interferes with the use of the estuary for navigation, fisheries or public recreation or
2 that substantial fills proposed in an estuary management plan for nonwater dependent use are not
3 for a public use and would not satisfy a public need that outweighs harm to navigation, fisheries
4 or public recreation.

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

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

11 (14) Individual permit applications shall be required for removal or fill, or both, in areas subject
12 to an approved estuary management plan. Individual permit applications shall be reviewed in ac-
13 cordance with ORS 196.815, 196.825, 196.830 and 196.835. In lieu of the substantive standards for
14 permit issuance in ORS 196.825 [(2)] (3), the department shall issue a permit if the removal or fill,
15 or both, is determined by the director to be consistent with the estuary management plan or can
16 be conditioned to be consistent with the plan. The department shall condition any such permit as
17 necessary to ensure that the project:

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

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

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

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

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

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

27 (16) Following approval by the director of an estuary management plan, the requirements of ORS
28 196.684 shall apply to the approved estuary management plan.

29 **SECTION 6. The amendments to ORS 196.620, 196.643, 196.682, 196.686 and 196.825 by**
30 **sections 1 to 5 of this 2009 Act apply to applications for permits filed with the Director of the**
31 **Department of State Lands under ORS 196.815 on or after the effective date of this 2009 Act.**

32 **SECTION 7. This 2009 Act being necessary for the immediate preservation of the public**
33 **peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect**
34 **on its passage.**

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