

Enrolled House Bill 2700

Sponsored by Representatives SCHAUFLER, HUNT, WITT; Representative READ (Pre-session filed.)

CHAPTER

AN ACT

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

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

SECTION 1. 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) If the director issues a permit applied for under ORS 196.815 to a person that proposes a removal or fill activity for construction or maintenance of a linear facility, and if that person is not a landowner or a person authorized by a landowner to conduct the proposed removal or fill activity on a property, then the person may not conduct removal or fill activity on that property until the person obtains:

- (a) The landowner's consent;**
- (b) A right, title or interest with respect to the property that is sufficient to undertake the removal or fill activity; or**
- (c) A court order or judgment authorizing the use of the property.**

[(2)] (3) 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. In determining whether the applicant has provided all practicable mitigation, the director shall consider the findings regarding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.

[(3)] (4) 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)] (5) 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 mitigation shall be limited to replacement of the functions and values of the impacted water resources of this state.

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

(b) 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.

(c) For permit applications for a removal or fill activity for construction or maintenance of a linear facility that are deemed complete by the director, the director shall notify by first-class mail, electronic mail or electronic facsimile transmission all landowners whose land is identified in the permit application and all landowners whose land is adjacent to the property of a landowner whose land is identified in the permit application.

[(6)] (7) 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)] (8) 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)] (5) 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)] (10)(b) of this section; or

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

[(8)] (9) 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)] (10)(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)] (5) of this section if the permit action requires certification under the Federal Water Pollution Control Act (P.L. 92-500), as amended.

[(10)] (11) 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)] (12) As used in this section:

(a) "Applicant" means a landowner, a [or] person authorized by a landowner to conduct a removal or fill activity **or a person that proposes a removal or fill activity for construction or maintenance of a linear facility.**

(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.

(c) "**Linear facility**" includes any railway, highway, road, pipeline, water or sewer line, communication line, overhead or underground electrical transmission or distribution line or similar facility.

SECTION 2. 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)] (5), 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 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 determines 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, enhancement or preservation actions to establish other 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 functions and values of the mitigation bank site are equal to or greater than the functions and values of the area to be 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 functions and values created within each 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;

(b) The mitigation bank site for which credits are proposed to be withdrawn is not sufficiently similar in functions and values to the area to be 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 3. ORS 196.643 is amended to read:

196.643. A person who provides off-site compensatory mitigation in order to comply with a condition imposed on a permit in accordance with ORS 196.825 [(4)] (5), 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 Removal-Fill Mitigation Fund, if credits from a mitigation bank are not available. If the person is making a payment to the Oregon 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 4. 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)] (3), 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, enhancement or preservation measures are implemented to fully replace impacted resources.

(2) In any order approving a plan 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 5. 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)] (3), 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, 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 6. The amendments to ORS 196.620, 196.643, 196.682, 196.686 and 196.825 by sections 1 to 5 of this 2011 Act apply to applications for permits filed with the Director of the Department of State Lands under ORS 196.815 on or after the effective date of this 2011 Act.

SECTION 7. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.

Passed by House March 2, 2011

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Ramona Kenady Line, Chief Clerk of House

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Bruce Hanna, Speaker of House

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Arnie Roblan, Speaker of House

Passed by Senate May 31, 2011

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2011

Approved:

.....M,....., 2011

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M,....., 2011

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Kate Brown, Secretary of State