

# Senate Bill 261

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## 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**.

Expands definition of "applicant" for purposes of removal-fill permitting program. Specifies procedures by which applicant that 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 that 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.

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

29 (e) Whether the proposed fill or removal conforms to sound policies of conservation and would

**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 not interfere with public health and safety.

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

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

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

9 (i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects  
10 of the proposed fill or removal in the manner set forth in ORS 196.800. In determining whether the  
11 applicant has provided all practicable mitigation, the director shall consider the findings regarding  
12 wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objec-  
13 tives for the protection of wetlands set forth in ORS 196.672.

14 [(3)] (4) The director may issue a permit for a project that results in a substantial fill in an  
15 estuary for a nonwater dependent use only if the project is for a public use and would satisfy a  
16 public need that outweighs harm to navigation, fishery and recreation and if the proposed fill meets  
17 all other criteria contained in ORS 196.600 to 196.905.

18 [(4)] (5) If the director issues a permit, the director may impose such conditions as the director  
19 considers necessary to carry out the purposes of ORS 196.805 and 196.830 and subsection (1) of this  
20 section and to provide mitigation for the reasonably expected adverse effects of project development.  
21 In formulating such conditions the director may request comment from public bodies, as defined in  
22 ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid  
23 only for the time specified therein. The director shall impose, as conditions to any permit, general  
24 authorization or wetland conservation plan, measures to provide mitigation for the reasonably ex-  
25 pected adverse effects of project development. Compensatory mitigation shall be limited to re-  
26 placement of the functions and values of the impacted water resources of this state.

27 [(5)] (6)(a) The director may request comment from interested parties and adjacent property  
28 owners on any application for a permit.

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

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

37 [(6)] (7)(a) Any applicant whose application for a permit or authorization has been deemed in-  
38 complete or has been denied, or who objects to any of the conditions imposed under this section by  
39 the director, may, within 21 days of the denial of the permit or authorization or the imposition of  
40 any condition, request a hearing from the director. Thereupon the director shall set the matter down  
41 for hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to  
42 183.430, 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order con-  
43 taining findings of fact and conclusions of law. The order shall rescind, affirm or modify the  
44 director's initial order. Appeals from the director's final order may be taken to the Court of Appeals  
45 in the manner provided by ORS 183.482.

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

5       [(7)] (8) Except for a permit issued under the process set forth in ORS 517.952 to 517.989, the  
 6 director shall:

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

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

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

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

20       [(8)] (9) Permits issued under this section shall be in lieu of any permit or authorization that  
 21 might be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045,  
 22 468.055, 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

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

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

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

35       [(10)] (11) In determining whether to issue a permit, the director may consider only standards  
 36 and criteria in effect on the date the director receives the completed application.

37       [(11)] (12) As used in this section:

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

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

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

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

1 (C) The fee required under ORS 196.815;

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

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

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

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

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

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

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

16 196.620. (1) For each mitigation bank, the Department of State Lands shall establish a system  
 17 of resource values and credits.

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

26 (3) Credits from a mitigation bank may be used only as described in subsection (2) of this section  
 27 for permits, authorizations or resolutions of violations approved within the service area of the mit-  
 28 igation bank, consistent with the mitigation bank instrument, unless the director determines that it  
 29 is environmentally preferable to exceed this limitation.

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

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

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

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

38 (c) Evaluated the results of the actions and determined that a high probability exists that the  
 39 functions and values of the mitigation bank site are equal to or greater than the functions and val-  
 40 ues of the area to be impacted or that the functions and values of the mitigation bank compensate  
 41 for unavoidable adverse effects on the waters of this state due to the activities otherwise allowed  
 42 under ORS 196.600 to 196.905.

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

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

3 (8) The director annually shall:

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

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

16 (c) The functions and values of the mitigation bank do not compensate for unavoidable adverse  
 17 effects on the waters of this state due to the activities otherwise allowed under ORS 196.600 to  
 18 196.905.

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

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

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

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

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

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

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

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

43 (e) Is conditioned to ensure wetland creation, restoration, enhancement or preservation meas-  
 44 ures are implemented to fully replace impacted resources.

45 (2) In any order approving a plan that authorizes any fill or removal or both, without the ne-

1    cessity of subsequently obtaining an individual permit, the director shall condition such approval  
2    as necessary to ensure that the project complies with the conditions of subsection (1) of this section  
3    and clearly delineates the wetland area in which fill or removal, or both, is to occur.

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

5    196.686. (1) For the purposes of this section, an acknowledged estuary management plan includes  
6    the comprehensive plan and land use regulations adopted by cities and counties to satisfy the re-  
7    quirement of statewide planning goals related to estuarine resources including shoreland portions  
8    of estuarine sites designated for development as those plans and regulations existed on January 1,  
9    1989.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45   (11) The director shall approve the acknowledged estuary management plan as a wetland con-

1 servation plan by order unless the director finds by a preponderance of the evidence that the  
2 estuary management plan does not meet the standards for approving wetland conservation plans or  
3 unreasonably interferes with the use of the estuary for navigation, fisheries or public recreation or  
4 that substantial fills proposed in an estuary management plan for nonwater dependent use are not  
5 for a public use and would not satisfy a public need that outweighs harm to navigation, fisheries  
6 or public recreation.

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

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

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

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

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

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

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

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

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

29 (16) Following approval by the director of an estuary management plan, the requirements of ORS  
30 196.684 shall apply to the approved estuary management plan.

31 **SECTION 6. The amendments to ORS 196.620, 196.643, 196.682, 196.686 and 196.825 by**  
32 **sections 1 to 5 of this 2011 Act apply to applications for permits filed with the Director of the**  
33 **Department of State Lands under ORS 196.815 on or after the effective date of this 2011 Act.**

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

37