

Senate Bill 1582

Sponsored by Senator MORSE (Presession filed.)

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**.

Creates process by which applicant for permit to remove material from beds or banks of waters of this state, or for permit to fill waters of this state, may request arbitration of final order issued by Director of Department of State Lands.

Changes certain processes related to wetlands delineation.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to the Department of State Lands; creating new provisions; amending ORS 196.674, 196.805, 196.818 and 196.825; and declaring an emergency.

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

ARBITRATIONAL REVIEW OF FILL AND REMOVAL FINAL ORDERS

SECTION 1. Section 2 of this 2012 Act is added to and made a part of ORS 196.600 to 196.905.

SECTION 2. (1) An applicant for a permit to remove material from the beds or banks of any waters of this state, or for a permit to fill any waters of this state, may request arbitration of a final order issued by the Director of the Department of State Lands under ORS 196.825.

(2) Arbitration under this section must be conducted by a panel of three individuals who are well informed on matters related to the removal of material from the beds or banks of waters of this state and the filling of waters of this state. The arbitrators must be certified by and in good standing with the Soil Science Society of America and shall be selected in the following manner:

(a) The Department of State Lands shall select one arbitrator;

(b) The applicant shall select one arbitrator; and

(c) The department and the applicant shall jointly select one arbitrator.

(3) A request for arbitration of a final order issued by the director under ORS 196.825 must be filed with the department within 21 days following the date on which the director enters the final order. Filing a request for the arbitration with the department is a condition of arbitration.

(4) The arbitrators must be selected within 10 days following the date on which the applicant files the request for arbitration. If the department and the applicant do not jointly select an arbitrator under subsection (2)(c) of this section on or before the 10th day, then the department shall randomly select that arbitrator from a list of four arbitrators, two of

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 whom have been suggested by the department and two of whom have been suggested by the
2 applicant.

3 (5) The panel of arbitrators must reach a decision within 30 days following the date on
4 which the last arbitrator is selected. The decision of the panel of arbitrators is limited to:

5 (a)(A) Affirming the director's final order; or

6 (B) Setting aside the director's final order and approving the applicant's application for
7 a permit; and

8 (b) Determining the share of the arbitrators' expenses and fees to be paid by the de-
9 partment and the applicant.

10 (6) In determining the share of expenses and fees to be paid under subsection (5)(b) of
11 this section, the panel of arbitrators shall require each party to pay for:

12 (a) The expenses for which each party is reasonably responsible; and

13 (b) The percentage of fees equivalent to the percentage of time the panel spent reviewing
14 each party's materials.

15 (7) Except as otherwise provided by this section, the arbitration must be conducted in
16 the manner provided by ORS 36.600 to 36.740.

17 **SECTION 3.** ORS 196.825 is amended to read:

18 196.825. (1) The Director of the Department of State Lands shall issue a permit applied for under
19 ORS 196.815 if the director determines that the project described in the application:

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

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

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

29 (a) The landowner's consent;

30 (b) A right, title or interest with respect to the property that is sufficient to undertake the re-
31 moval or fill activity; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 (a) The Court of Appeals in the manner provided by ORS 183.482; **or**

42 (b) **Arbitration in the manner provided by section 2 of this 2012 Act.**

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

45 (a) Determine whether an application is complete within 30 days from the date the Department

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

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

7 (A) An extension of time is granted under subsection (10)(b) of this section; or

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

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

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

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

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

21 (b) The Department of Environmental Quality shall provide comments to the director within 75
22 days after receiving notice under subsection (5) of this section if the permit action requires certif-
23 ication under the Federal Water Pollution Control Act (P.L. 92-500), as amended.

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

26 (12) As used in this section:

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

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.

1 (c) "Linear facility" includes any railway, highway, road, pipeline, water or sewer line, commu-
2 nication line, overhead or underground electrical transmission or distribution line or similar facility.

3 **SECTION 4. Section 2 of this 2012 Act and the amendments to ORS 196.825 by section 3**
4 **of this 2012 Act apply to appeals from final orders issued by the Director of the Department**
5 **of State Lands on or after the effective date of this 2012 Act.**

6 7 WETLAND DELINEATION

8
9 **SECTION 5.** ORS 196.674 is amended to read:

10 196.674. (1) The Department of State Lands shall compile and maintain a comprehensive State-
11 wide Wetlands Inventory.

12 (2) In compiling the Statewide Wetlands Inventory, the department shall develop, by rule, a
13 system for uniform wetland identification, delineation and comprehensive mapping. Initial invento-
14 ries shall be based upon the National Wetlands Inventory prepared by the United States Department
15 of the Interior, Fish and Wildlife Service. The Department of State Lands shall consult with the
16 public, local governments and affected state and federal agencies concerning the accuracy of the
17 inventory.

18 **(3) A system for delineating wetlands adopted by the Department of State Lands under**
19 **this section must comport with:**

20 **(a) The United States Army Corps of Engineers Wetlands Delineation Manual of 1987; and**

21 **(b) Any subsequent federal supplements to the manual or applicable guidance documents**
22 **issued by the United States Army Corps of Engineers, including guidance documents for the**
23 **area in which a delineation will take place, as adopted by rule of the Director of the De-**
24 **partment of State Lands, provided that in no event may any rule specify any guidelines or**
25 **methods that exceed those specified in federal supplements to the manual or applicable**
26 **guidance documents issued by the United States Army Corps of Engineers.**

27 [(3)] (4) The Department of State Lands shall revise the **Statewide Wetlands** Inventory [maps]
28 as new or more complete information becomes available.

29 **(5) When the vegetation, soil or hydrology of an area is sufficiently altered by recent**
30 **human activities or natural events in such a manner that the vegetation, soil or hydrology**
31 **indicates that a wetland is not present, the Department of State Lands, in delineating the**
32 **area or revising the Statewide Wetlands Inventory, shall determine whether the area is the**
33 **subject of an atypical situation as described in the United States Army Corps of Engineers**
34 **Wetlands Delineation Manual of 1987 and, as adopted by rule by the director under subsection**
35 **(3) of this section, any subsequent federal supplements to the manual. If the area is not the**
36 **subject of an atypical situation, the department:**

37 **(a) May not, if the area is delineated as a wetland in the Statewide Wetlands Inventory,**
38 **delineate the area as a wetland; or**

39 **(b) Shall, if the area is delineated as a wetland in the Statewide Wetlands Inventory, re-**
40 **move the area from the inventory.**

41 **(6) To make a determination under subsection (5) of this section, the Department of**
42 **State Lands must use:**

43 **(a) For alterations to vegetation, a botanist who is certified by and in good standing with**
44 **a third-party organization that certifies botanists;**

45 **(b) For alterations to soil, a soil classifier who is certified by and in good standing with**

1 **the Soil Science Society of America; or**

2 **(c) For alterations to hydrology, an expert in soil water who is certified by and in good**
 3 **standing with a third-party organization that certifies experts in soil water.**

4 [(4)] (7) The Department of State Lands shall provide each city and county planning office with
 5 copies of the Statewide Wetlands Inventory covering the local jurisdiction.

6 [(5)] (8) The Department of State Lands shall provide each state agency with a copy of the in-
 7 ventory upon request.

8 [(6)] (9) Copies of the Statewide Wetlands Inventory shall be made available to the general
 9 public, through the Department of State Lands, upon payment of a fee to offset administrative and
 10 reproduction costs.

11 [(7)] (10) A wetland inventory developed by another party may be utilized by the Department
 12 of State Lands if it is consistent with standards adopted pursuant to this section, after consulting
 13 with the affected local government, and is reviewed and approved by the Department of State Lands
 14 as complying with the standards adopted pursuant to [subsection (2)] **subsections (2) and (3)** of this
 15 section.

16 [(8)] (11) Nothing in this section shall restrict the regulatory jurisdiction of the Department of
 17 State Lands under ORS 196.800 to 196.905.

18 [(9)] (12) In compiling and updating the Statewide Wetlands Inventory, the Department of State
 19 Lands shall identify opportunities for wetland creation, restoration and enhancement when the in-
 20 formation is available.

21 **SECTION 6.** ORS 196.805 is amended to read:

22 196.805. (1) The protection, conservation and best use of the water resources of this state are
 23 matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in
 24 this state, including not only water and materials for domestic, agricultural and industrial use but
 25 also habitats and spawning areas for fish, avenues for transportation and sites for commerce and
 26 public recreation, are vital to the economy and well-being of this state and its people. Unregulated
 27 removal of material from the beds and banks of the waters of this state may create hazards to the
 28 health, safety and welfare of the people of this state. Unregulated filling in the waters of this state
 29 for any purpose, may result in interfering with or injuring public navigation, fishery and recre-
 30 ational uses of the waters. In order to provide for the best possible use of the water resources of
 31 this state, it is desirable to centralize authority in the Director of the Department of State Lands,
 32 and implement control of the removal of material from the beds and banks or filling of the waters
 33 of this state.

34 (2) The director shall take into consideration all beneficial uses of water including streambank
 35 protection when administering fill and removal statutes.

36 (3) There shall be no condemnation, inverse condemnation, other taking, or confiscating of
 37 property under ORS 196.600 to 196.905 without due process of law.

38 [(4)] *The director shall delineate wetlands in accordance with the United States Army Corps of*
 39 *Engineers Wetlands Delineation Manual of 1987, or subsequent federal manual as adopted by rule by*
 40 *the director, and applicable guidance issued by the United States Army Corps of Engineers for the area*
 41 *in which the wetlands are located.]*

42 **(4) A system for delineating wetlands adopted by the Department of State Lands under**
 43 **ORS 196.674, and for reviewing wetland delineation reports under ORS 196.818, must comport**
 44 **with:**

45 **(a) The United States Army Corps of Engineers Wetlands Delineation Manual of 1987; and**

1 **(b) Any subsequent federal supplements to the manual or applicable guidance documents**
 2 **issued by the United States Army Corps of Engineers, including guidance documents for the**
 3 **area in which a delineation will take place, as adopted by rule of the director, provided that**
 4 **in no event may any rule specify any guidelines or methods that exceed those specified in**
 5 **federal supplements to the manual or applicable guidance documents issued by the United**
 6 **States Army Corps of Engineers.**

7 (5) The Department of State Lands shall give priority to the review of wetland delineation re-
 8 ports submitted with or in advance of an application for fill or removal of material from the waters
 9 of this state.

10 **SECTION 7.** ORS 196.818 is amended to read:

11 196.818. (1) A person or governmental body [*must pay to the Department of State Lands a*
 12 *nonrefundable fee of \$350 when submitting*] **may submit** a wetland delineation report to the De-
 13 partment **of State Lands** for a determination of:

14 (a) Whether waters of this state are present on a specific land parcel;

15 (b) Where the boundaries of waters of this state are located on a land parcel; or

16 (c) Whether the waters of this state or a proposed activity in the waters of this state is subject
 17 to permit requirements.

18 **(2) A wetland delineation report submitted under subsection (1) of this section must**
 19 **contain the following:**

20 **(a) A map or maps showing:**

21 **(A) All property boundaries within the area that is the subject of the report;**

22 **(B) The location of the applicable parcel or parcels with respect to major roads; and**

23 **(C) The approximate location of the waters of this state that are the subject of the de-**
 24 **termination;**

25 **(b) A copy of the applicable assessor's tax map or maps;**

26 **(c) A copy of any applicable map and report created as part of the Statewide Wetlands**
 27 **Inventory pursuant to ORS 196.674 or, if the area that is the subject of the report is not in-**
 28 **cluded in the Statewide Wetlands Inventory, a copy of a map of the area as developed by the**
 29 **United States Department of the Interior, Fish and Wildlife Service, for the National**
 30 **Wetlands Inventory; and**

31 **(d) A copy of the soil survey map developed by the United States Department of Agri-**
 32 **culture for the area that is the subject of the report.**

33 **(3) A person or governmental body may include in a wetland delineation report submitted**
 34 **under this section an explanation of why the area that is the subject of the report meets or**
 35 **does not meet wetlands criteria.**

36 **(4) The Department of State Lands by rule may specify conditions for the submission of**
 37 **information required by subsection (2) of this section or allowed under subsection (3) of this**
 38 **section, but the department may not condition its determination on the submission of addi-**
 39 **tional information.**

40 **(5) A person or governmental body must pay a nonrefundable fee of \$350 to the Depart-**
 41 **ment of State Lands when submitting a wetland delineation report to the department under**
 42 **subsection (1) of this section.**

43 [(2)] **(6) The Department of State Lands shall review the wetland delineation report submitted**
 44 **under subsection (1) of this section within 120 days after submission of the wetland delineation re-**
 45 **port to the department.**

