

Senate Bill 958

Sponsored by Senator DEMBROW (at the request of Friends of the Columbia Gorge)

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**.

Conditions issuance of certain Department of State Lands permit on balancing test that weighs potential environmental harm of proposed project against public need.

A BILL FOR AN ACT

1
2 Relating to state transportation of crude oil; creating new provisions; and amending ORS 196.620,
3 196.643 and 196.825.

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 a
13 removal or fill activity for construction or maintenance of a linear facility, and if that person is not
14 a landowner or a person authorized by a landowner to conduct the proposed removal or fill activity
15 on a property, then the person may not conduct removal or fill activity on that property until the
16 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 the re-
19 moval or fill activity; or

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

21 (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
30 not interfere with public health and safety.

31 (f) Whether the proposed fill or removal is in conformance with existing public uses of the wa-

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 ters and with uses designated for adjacent land in an acknowledged comprehensive plan and land
2 use regulations.

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

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

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

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

16 **(5) The director may issue a permit for a project that facilitates the transportation of**
17 **crude oil only if the project is for a public use and would satisfy a public need that outweighs**
18 **harm to navigation, fishery and recreation and if the proposed fill meets all other criteria**
19 **contained in ORS 196.600 to 196.905.**

20 [(5)] (6) If the director issues a permit, the director may impose such conditions as the director
21 considers necessary to carry out the purposes of ORS 196.805 and 196.830 and subsection (1) of this
22 section and to provide mitigation for the reasonably expected adverse effects of project development.
23 In formulating such conditions the director may request comment from public bodies, as defined in
24 ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid
25 only for the time specified therein. The director shall impose, as conditions to any permit, general
26 authorization or wetland conservation plan, measures to provide mitigation for the reasonably ex-
27 pected adverse effects of project development. Compensatory mitigation shall be limited to re-
28 placement of the functions and values of the impacted water resources of this state.

29 [(6)(a)] (7)(a) The director may request comment from interested parties and adjacent property
30 owners on any application for a permit.

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

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

39 [(7)] (8) Any applicant whose application for a permit or authorization has been deemed incom-
40 plete or has been denied, or who objects to any of the conditions imposed under this section by the
41 director, may, within 21 days of the denial of the permit or authorization or the imposition of any
42 condition, request a hearing from the director. Thereupon the director shall set the matter down for
43 hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430,
44 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order containing
45 findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's initial

1 order. Appeals from the director's final order may be taken to the Court of Appeals in the manner
2 provided by ORS 183.482.

3 [(8)] (9) Except for a permit issued under the process set forth in ORS 517.952 to 517.989, the
4 director shall:

5 (a) Determine whether an application is complete within 30 days from the date the Department
6 of State Lands receives the application. If the director determines that an application is complete,
7 the director shall distribute the application for comment pursuant to subsection [(5)] (6) of this
8 section. If the director determines that the application is not complete, the director shall notify the
9 applicant in writing that the application is deficient and explain, in the same notice, the deficiencies.

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

12 (A) An extension of time is granted under subsection [(10)(b)] (11)(b) of this section;

13 (B) The applicant and the director agree to a longer time period; or

14 (C) The director determines that an extension is necessary to coordinate the issuance of a pro-
15 prietary authorization decision for an ocean renewable energy facility under ORS 274.873 and a re-
16 moval or fill permit decision.

17 [(9)] (10) Permits issued under this section shall be in lieu of any permit or authorization that
18 might be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045,
19 468.055, 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

21 (b) The standards for granting the permit or authorization are substantially the same as those
22 established pursuant to ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.110, 468.120,
23 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

24 [(10)(a)] (11)(a) Any public body, as defined in ORS 174.109, federal agency or tribal government
25 requested by the director to comment on an application for a permit must submit its comments to
26 the director not more than 30 days after receiving the request for comment. If a public body, federal
27 agency or tribal government fails to comment on the application within 30 days, the director shall
28 assume that the public body, federal agency or tribal government has no objection.

29 (b) The Department of Environmental Quality shall provide comments to the director within 75
30 days after receiving notice under subsection [(5)] (6) of this section if the permit action requires
31 certification under the Federal Water Pollution Control Act (P.L. 92-500), as amended.

32 [(11)] (12) In determining whether to issue a permit, the director may consider only standards
33 and criteria in effect on the date the director receives the completed application.

34 [(12)] (13) As used in this section:

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

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

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

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

43 (C) The fee required under ORS 196.815;

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

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

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

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

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

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

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

12 196.620. (1) For each mitigation bank, the Department of State Lands shall establish a system
 13 of resource values and credits.

14 (2) A credit from a mitigation bank may be withdrawn for a condition imposed on a permit in
 15 accordance with ORS 196.825 [(5)] (6), for any other authorization issued in accordance with ORS
 16 196.800 to 196.905 or to resolve a violation of ORS 196.800 to 196.905. At the request of a mitigation
 17 bank sponsor, the Director of the Department of State Lands may authorize the withdrawal of mit-
 18 igation bank credits by a public benefit corporation as defined in ORS 65.001 or a public body as
 19 defined by ORS 174.109 designated by the director for the purpose of reserving credits for future
 20 use in accordance with this subsection. The director shall manage such transactions to ensure that
 21 each credit is used no more than one time to satisfy a use in accordance with this section.

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

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

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

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

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

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

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

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

44 (8) The director annually shall:

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

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

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

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

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

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

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

12 (c) The functions and values of the mitigation bank do not compensate for unavoidable adverse
13 effects on the waters of this state due to the activities otherwise allowed under ORS 196.600 to
14 196.905.

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

16 196.643. (1) A person who provides off-site compensatory mitigation in order to comply with a
17 condition imposed on a permit in accordance with ORS 196.825 [(5)] (6), an authorization issued in
18 accordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905 may
19 make a payment for credits to the Oregon Removal-Fill Mitigation Fund when:

20 (a) Credits from an approved mitigation bank are not available; or

21 (b)(A) Credits from an approved mitigation bank were not available in a region at the time the
22 first payment for credits was made to the Oregon Removal-Fill Mitigation Fund; and

23 (B) The expenses associated with a Department of State Lands mitigation bank project in the
24 region in accordance with this section and ORS 196.650 have not been fully recovered by the De-
25 partment of State Lands.

26 (2) Any payments for off-site compensatory mitigation made to the Oregon Removal-Fill Miti-
27 gation Fund under subsection (1) of this section must be sufficient to cover the costs and expenses
28 of land acquisition, project design and engineering, construction, planting, monitoring, maintenance,
29 long-term management and protection activities, administration and other costs and expenses related
30 to the off-site compensatory mitigation, which may vary depending on the region of this state where
31 the off-site compensatory mitigation is conducted, and shall be calculated by the Department of State
32 Lands as follows:

33 (a) If the off-site compensatory mitigation project and project costs and expenses are identified
34 at the time of payment to the Oregon Removal-Fill Mitigation Fund, the department shall calculate
35 the payment based on the actual costs and expenses of the off-site compensatory mitigation.

36 (b) If the off-site compensatory mitigation project and project costs and expenses are not iden-
37 tified at the time of payment to the Oregon Removal-Fill Mitigation Fund, the department shall
38 calculate the payment based on the estimate of costs and expenses for off-site compensatory miti-
39 gation, as set forth in rules adopted by the department, for the region of this state where the de-
40 partment, to the greatest extent practicable, determines the off-site compensatory mitigation may
41 be conducted.

42 (3) No later than December 1 of each year, the Director of the Department of State Lands shall
43 submit to the Legislative Assembly and the State Land Board a detailed report that specifies:

44 (a) The costs and expenses related to off-site compensatory mitigation, including variations and
45 trends in costs and expenses over time.

1 (b) Efforts undertaken by the department to reduce the costs and expenses specified in para-
2 graph (a) of this subsection.

3 (c) Efforts undertaken by the department to improve efficiencies of the department related to
4 off-site compensatory mitigation.

5 (d) The effectiveness of the July 2010 "Oregon Rapid Wetland Assessment Protocol" of the de-
6 partment in protecting the functions and values of wetlands through off-site compensatory miti-
7 gation.

8 **SECTION 4. The amendments to ORS 196.620, 196.643 and 196.825 by sections 1 to 3 of this**
9 **2017 Act apply to applications for permits received by the Department of State Lands on or**
10 **after the effective date of this 2017 Act.**

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