

Senate Bill 710

Sponsored by Senator KRUSE

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**.

Defines isolated wetlands and marginal wetlands for purposes of regulation of removal and filling of material. Allows removal and filling of material in certain isolated and marginal wetlands and in wetlands of less than one acre in size to occur without permit. Allows city with population of 50,000 or fewer persons to develop approval or denial procedures for development permits, building permits or actions that affect marginal and isolated wetlands.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to wetlands; creating new provisions; amending ORS 196.800, 196.810, 196.825 and 196.905;
3 and declaring an emergency.

4 Whereas the United States Supreme Court has ruled that some isolated wetlands do not meet
5 the classification of navigable waters such as would subject the wetlands to regulation by Congress;
6 and

7 Whereas isolated wetlands interrupt economic development and restrict the ability of urban
8 areas to achieve compact development; and

9 Whereas there is a need to encourage and enhance economic development in rural communities;
10 and

11 Whereas actual wetlands perform valuable biological functions but all wet areas are not actual
12 wetlands; and

13 Whereas cities must be able to make prudent land use decisions regarding wet areas within the
14 city limits and are restricted by the expansive definition of wetlands used by the state; now, there-
15 fore,

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

17 **SECTION 1. Section 2 of this 2005 Act is added to and made a part of ORS 196.600 to**
18 **196.905.**

19 **SECTION 2. (1) A city with a population of 50,000 or fewer persons may create procedures**
20 **for approving or denying development permits, building permits or actions within marginal**
21 **or isolated wetlands that require filling or removing any material from the marginal or iso-**
22 **lated wetlands or wetlands of less than one acre in size.**

23 **(2) A city may develop procedures, criteria or other guidelines for determining whether**
24 **the area for which a permit is sought contains a wetland, the type of wetland and the size**
25 **of the wetland. The city may use information provided by persons with expertise in wetlands**
26 **and wetlands biology to determine the type of wetland and the size of the wetland.**

27 **(3) If a city develops procedures to approve or deny development permits, building per-**
28 **mits or actions for filling and removing material under this section:**

29 **(a) The city shall be the final authority on the determination of whether a wetland is a**

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 **marginal wetland or isolated wetland or comprises less than one acre in size.**

2 **(b) The city shall be the final authority on the determination of mitigation required, if**
 3 **any, to offset the loss of wetlands under the action.**

4 **(c) The approval or denial by the city of the development permit, building permit or**
 5 **action is not subject to appeal by the state or other affected party other than the applicant.**

6 **(d) The approval or denial of the development permit, building permit or action shall be**
 7 **issued by the city within 60 days after the applicant has provided evidence that the action**
 8 **would occur only within marginal wetlands, isolated wetlands or wetlands comprising less**
 9 **than one acre in size.**

10 **(4) A local government, as defined in ORS 174.116, and a city with a population of 50,000**
 11 **or fewer persons may adopt a plan for the regulation of marginal or isolated wetlands that**
 12 **are located outside the limits of the city but within an acknowledged urban growth boundary.**

13 **SECTION 3.** ORS 196.800 is amended to read:

14 196.800. As used in ORS 196.600 to 196.905, unless the context requires otherwise:

15 (1) "Channel relocation" means a change in location of a channel in which a new channel is dug
 16 and the flow is diverted from the old channel into the new channel if more than 50 cubic yards of
 17 material is removed in constructing the new channel or if it would require more than 50 cubic yards
 18 of material to completely fill the old channel.

19 (2) "Department" means the Department of State Lands.

20 (3) "Director" means the Director of the Department of State Lands.

21 (4) "Estuary" means a body of water semienclosed by land and connected with the open ocean
 22 within which salt water is usually diluted by fresh water derived from the land. "Estuary" includes
 23 all estuarine waters, tidelands, tidal marshes and submerged lands extending upstream to the head
 24 of tidewater. However, the Columbia River Estuary extends to the western edge of Puget Island.

25 (5) "Fill" means the total of deposits by artificial means equal to or exceeding 50 cubic yards
 26 or more of material at one location in any waters of this state.

27 (6) "General authorization" means a rule adopted by the director authorizing, without a permit
 28 from the department, a category of activities involving removal or fill, or both, on a statewide or
 29 other geographic basis.

30 (7) "Governmental body" includes the federal government when operating in any capacity other
 31 than navigational servitude, the State of Oregon and every political subdivision therein.

32 (8) "Intermittent stream" means any stream which flows during a portion of every year and
 33 which provides spawning, rearing or food-producing areas for food and game fish.

34 **(9) "Isolated wetlands" means those wetlands that otherwise meet the definition of**
 35 **wetlands but are less than three contiguous acres in size. In calculating the size of the**
 36 **wetlands, wetlands are contiguous only if hydraulically connected and if not separated by**
 37 **more than 20 yards.**

38 **(10) "Marginal wetlands" means areas that may meet the criteria for classification as**
 39 **wetlands but:**

40 **(a) Are covered by visible surface water for fewer than 335 days per year, not including**
 41 **temporary surface wetness that may remain for up to 24 hours after rainfall;**

42 **(b) Are located on a slope of one percent or greater; or**

43 **(c) Contain any plants not classified as hydrophytes.**

44 **[(9)] (11) "Material" means rock, gravel, sand, silt and other inorganic substances removed from**
 45 **waters of this state and any materials, organic or inorganic, used to fill waters of this state.**

1 [(10)] (12) “Mitigation” means the reduction of adverse effects of a proposed project by consid-
 2 ering, in the following order:

- 3 (a) Avoiding the impact altogether by not taking a certain action or parts of an action;
 4 (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
 5 (c) Rectifying the impact by repairing, rehabilitating or restoring the affected environment;
 6 (d) Reducing or eliminating the impact over time by preservation and maintenance operations
 7 during the life of the action by monitoring and taking appropriate corrective measures; and
 8 (e) Compensating for the impact by replacing or providing comparable substitute wetland or
 9 water resources.

10 [(11)] (13) “Practicable” means capable of being accomplished after taking into consideration the
 11 cost, existing technology and logistics with respect to the overall project purpose.

12 [(12)] (14) “Public use” means a publicly owned project or a privately owned project that is
 13 available for use by the public.

14 [(13)] (15) “Removal” means the taking of more than 50 cubic yards or the equivalent weight in
 15 tons of material in any waters of this state in any calendar year; or the movement by artificial
 16 means of an equivalent amount of material on or within the bed of such waters, including channel
 17 relocation.

18 [(14)] (16) “Water resources” includes not only water itself but also aquatic life and habitats
 19 therein and all other natural resources in and under the waters of this state.

20 [(15)] (17) “Waters of this state” means natural waterways including all tidal and nontidal bays,
 21 intermittent streams, constantly flowing streams, lakes, wetlands and other bodies of water in this
 22 state, navigable and nonnavigable, including that portion of the Pacific Ocean which is in the
 23 boundaries of this state. “Waters of this state” does not include the ocean shore, as defined in ORS
 24 390.605, with the exception of those areas where removal or fill activities are regulated under a
 25 state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Con-
 26 trol Act, as amended.

27 [(16)] (18) “Wetland conservation plan” means a written plan providing for wetland management
 28 containing a detailed and comprehensive statement of policies, standards and criteria to guide public
 29 and private uses and protection of wetlands, waters and related adjacent uplands and which has
 30 specific implementing measures and which apply to designated geographic areas of the State of
 31 Oregon.

32 [(17)] (19) “Wetlands” means those areas **that are not marginal or isolated wetlands located**
 33 **within the acknowledged urban growth boundary or limits of a city with a population of**
 34 **50,000 or fewer persons and** that are inundated or saturated by surface or ground water at a fre-
 35 quency and duration sufficient to support, and that under normal circumstances do support, a pre-
 36 valence of vegetation typically adapted for life in saturated soil conditions.

37 **SECTION 4.** ORS 196.800, as amended by section 1, chapter 516, Oregon Laws 2001, section 8,
 38 chapter 253, Oregon Laws 2003, and section 15, chapter 738, Oregon Laws 2003, is amended to read:

39 196.800. As used in ORS 196.600 to 196.905, unless the context requires otherwise:

40 (1) “Channel relocation” means a change in location of a channel in which a new channel is dug
 41 and the flow is diverted from the old channel into the new channel.

42 (2) “Department” means the Department of State Lands.

43 (3) “Director” means the Director of the Department of State Lands.

44 (4) “Estuary” means a body of water semienclosed by land and connected with the open ocean
 45 within which salt water is usually diluted by fresh water derived from the land. “Estuary” includes

1 all estuarine waters, tidelands, tidal marshes and submerged lands extending upstream to the head
2 of tidewater. However, the Columbia River Estuary extends to the western edge of Puget Island.

3 (5) "Fill" means the deposit by artificial means of material at one location in any waters of this
4 state.

5 (6) "General authorization" means a rule adopted by the director authorizing, without a permit
6 from the department, a category of activities involving removal or fill, or both, on a statewide or
7 other geographic basis.

8 (7) "Governmental body" includes the federal government when operating in any capacity other
9 than navigational servitude, the State of Oregon and every political subdivision therein.

10 (8) "Intermittent stream" means any stream which flows during a portion of every year and
11 which provides spawning, rearing or food-producing areas for food and game fish.

12 (9) **"Isolated wetlands" means those wetlands that otherwise meet the definition of
13 wetlands but are less than three contiguous acres in size. In calculating the size of the
14 wetlands, wetlands are contiguous only if hydraulically connected and if not separated by
15 more than 20 yards.**

16 (10) **"Marginal wetlands" means areas that may meet the criteria for classification as
17 wetlands but:**

18 (a) **Are covered by visible surface water for fewer than 335 days per year, not including
19 temporary surface wetness that may remain for up to 24 hours after rainfall;**

20 (b) **Are located on a slope of one percent or greater; or**

21 (c) **Contain any plants not classified as hydrophytes.**

22 [(9)] (11) "Material" means rock, gravel, sand, silt and other inorganic substances removed from
23 waters of this state and any materials, organic or inorganic, used to fill waters of this state.

24 [(10)] (12) "Mitigation" means the reduction of adverse effects of a proposed project by consid-
25 ering, in the following order:

26 (a) Avoiding the impact altogether by not taking a certain action or parts of an action;

27 (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

28 (c) Rectifying the impact by repairing, rehabilitating or restoring the affected environment;

29 (d) Reducing or eliminating the impact over time by preservation and maintenance operations
30 during the life of the action by monitoring and taking appropriate corrective measures; and

31 (e) Compensating for the impact by replacing or providing comparable substitute wetland or
32 water resources.

33 [(11)] (13) "Practicable" means capable of being accomplished after taking into consideration the
34 cost, existing technology and logistics with respect to the overall project purpose.

35 [(12)] (14) "Public use" means a publicly owned project or a privately owned project that is
36 available for use by the public.

37 [(13)] (15) "Removal" means the taking of material in any waters of this state or the movement
38 by artificial means of material within the bed of such waters, including channel relocation.

39 [(14)] (16) "Water resources" includes not only water itself but also aquatic life and habitats
40 therein and all other natural resources in and under the waters of this state.

41 [(15)] (17) "Waters of this state" means natural waterways including all tidal and nontidal bays,
42 intermittent streams, constantly flowing streams, lakes, wetlands and other bodies of water in this
43 state, navigable and nonnavigable, including that portion of the Pacific Ocean which is in the
44 boundaries of this state. "Waters of this state" does not include the ocean shore, as defined in ORS
45 390.605, with the exception of those areas where removal or fill activities are regulated under a

1 state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Con-
2 trol Act, as amended.

3 [(16)] (18) "Wetland conservation plan" means a written plan providing for wetland management
4 containing a detailed and comprehensive statement of policies, standards and criteria to guide public
5 and private uses and protection of wetlands, waters and related adjacent uplands and which has
6 specific implementing measures and which apply to designated geographic areas of the State of
7 Oregon.

8 [(17)] (19) "Wetlands" means those areas **that are not marginal or isolated wetlands located**
9 **within the acknowledged urban growth boundary or limits of a city with a population of**
10 **50,000 or fewer persons and** that are inundated or saturated by surface or ground water at a fre-
11 quency and duration sufficient to support, and that under normal circumstances do support, a pre-
12 valence of vegetation typically adapted for life in saturated soil conditions.

13 **SECTION 5.** ORS 196.810 is amended to read:

14 196.810. (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, no per-
15 son or governmental body may remove any material from the beds or banks or fill any waters of this
16 state without a permit issued under authority of the Director of the Department of State Lands, or
17 in a manner contrary to the conditions set out in the permit, or in a manner contrary to the con-
18 ditions set out in an order approving a wetlands conservation plan.

19 (b) Notwithstanding the permit requirements of this section and notwithstanding the provisions
20 of ORS 196.800 (5) and [(13)] (15), if any removal or fill activity is proposed in essential indigenous
21 anadromous salmonid habitat, except for those activities customarily associated with agriculture, a
22 permit is required. "Essential indigenous anadromous salmonid habitat" as defined under this section
23 shall be further defined and designated by rule by the Department of State Lands in consultation
24 with the State Department of Fish and Wildlife and in consultation with other affected parties.

25 (c) No person may be required to obtain a permit under paragraph (b) of this subsection for
26 prospecting or other nonmotorized activities resulting in the removal from or fill of less than one
27 cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards
28 of material within a designated essential indigenous anadromous salmonid habitat segment in a sin-
29 gle year. Prospecting or other nonmotorized activities may be conducted only within the bed or wet
30 perimeter of the waterway and may not occur at any site where fish eggs are present. Removal or
31 filling activities customarily associated with mining require a permit under paragraph (b) of this
32 subsection.

33 (d) No permit may be required under paragraph (b) of this subsection for construction or main-
34 tenance of fish passage and fish screening structures that are constructed, operated or maintained
35 under ORS 498.311, 498.316, 498.326 or 509.600 to 509.645.

36 (e) Nothing in this section limits or otherwise changes the exemptions under ORS 196.905.

37 (f) As used in paragraphs (b) and (c) of this subsection:

38 (A) "Bed" means the land within the wet perimeter and any adjacent nonvegetated dry gravel
39 bar.

40 (B) "Essential indigenous anadromous salmonid habitat" means the habitat that is necessary to
41 prevent the depletion of indigenous anadromous salmonid species during their life history stages of
42 spawning and rearing.

43 (C) "Indigenous anadromous salmonid" means chum, sockeye, Chinook and Coho salmon, and
44 steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive,
45 threatened or endangered by a state or federal authority.

1 (D) "Prospecting" means searching or exploring for samples of gold, silver or other precious
2 minerals, using nonmotorized methods, from among small quantities of aggregate.

3 (E) "Wet perimeter" means the area of the stream that is under water or is exposed as a non-
4 vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the
5 activity occurs.

6 (2) No governmental body may issue a lease or permit contrary or in opposition to the condi-
7 tions set out in the permit issued under ORS 196.600 to 196.905.

8 (3) Subsection (1) of this section does not apply to removal of material under a contract, permit
9 or lease with any governmental body entered into before September 13, 1967. However, no such
10 contract, permit or lease may be renewed or extended on or after September 13, 1967, unless the
11 person removing the material has obtained a permit under ORS 196.600 to 196.905.

12 (4) Notwithstanding subsection (1) of this section, the Department of State Lands may issue,
13 orally or in writing, an emergency authorization for the removal of material from the beds or banks
14 or filling of any waters of this state in an emergency, for the purpose of making repairs or for the
15 purpose of preventing irreparable harm, injury or damage to persons or property. The emergency
16 authorization issued under this subsection:

17 (a) Shall contain conditions of operation that the department determines are necessary to mini-
18 mize impacts to water resources or adjoining properties.

19 (b) Shall be based, whenever practicable, on the recommendations contained in an on-site eval-
20 uation by an employee or representative of the department.

21 (c) If issued orally, shall be confirmed in writing by the department within five days.

22 **(5) Notwithstanding subsection (1) of this section, the director may not require that a**
23 **person obtain a permit if a city with a population of 50,000 or fewer persons has made a de-**
24 **termination under section 2 of this 2005 Act that the removal or fill action will occur within:**

25 **(a) A marginal wetland;**

26 **(b) An isolated wetland; or**

27 **(c) A wetland of less than one acre in size for which adverse effects can be adequately**
28 **mitigated.**

29 **SECTION 6.** ORS 196.810, as amended by section 2, chapter 516, Oregon Laws 2001, and section
30 97, chapter 14, Oregon Laws 2003, is amended to read:

31 196.810. (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, a person
32 or governmental body may not remove any material from the beds or banks or fill any waters of this
33 state without a permit issued under authority of the Director of the Department of State Lands, or
34 in a manner contrary to the conditions set out in the permit, or in a manner contrary to the con-
35 ditions set out in an order approving a wetlands conservation plan.

36 (b) A permit is not required under paragraph (a) of this subsection for prospecting or other
37 nonmotorized activities resulting in the removal from or fill of less than one cubic yard of material
38 at any one individual site and, cumulatively, not more than five cubic yards of material within a
39 particular stream segment in a single year. Prospecting or other nonmotorized activities may be
40 conducted only within the bed or wet perimeter of the waterway and may not occur at any site
41 where fish eggs are present. Removal or filling activities customarily associated with mining require
42 a permit under paragraph (a) of this subsection.

43 (c) A permit is not required under paragraph (a) of this subsection for construction or mainte-
44 nance of fish passage and fish screening structures associated with irrigation ditches or the main-
45 tenance of drainage ditches that are constructed, operated or maintained under ORS 498.311,

1 498.316, 498.326 or 509.600 to 509.645.

2 (d) Nothing in this section limits or otherwise changes the exemptions under ORS 196.905.

3 (2) A governmental body may not issue a lease or permit contrary or in opposition to the con-
4 ditions set out in the permit issued under ORS 196.600 to 196.905.

5 (3) Subsection (1) of this section does not apply to removal of material under a contract, permit
6 or lease with any governmental body entered into before September 13, 1967. However, a contract,
7 permit or lease may not be renewed or extended on or after September 13, 1967, unless the person
8 removing the material has obtained a permit under ORS 196.600 to 196.905.

9 (4) Notwithstanding subsection (1) of this section, the Department of State Lands may issue,
10 orally or in writing, an emergency authorization for the removal of material from the beds or banks
11 or filling of any waters of this state in an emergency, for the purpose of making repairs or for the
12 purpose of preventing irreparable harm, injury or damage to persons or property. The emergency
13 authorization issued under this subsection:

14 (a) Shall contain conditions of operation that the department determines are necessary to mini-
15 mize impacts to water resources or adjoining properties.

16 (b) Shall be based, whenever practicable, on the recommendations contained in an on-site eval-
17 uation by an employee or representative of the department.

18 (c) If issued orally, shall be confirmed in writing by the department within five days.

19 (5) As used in this section:

20 (a) "Bed" means the land within the wet perimeter and any adjacent nonvegetated dry gravel
21 bar.

22 (b) "Prospecting" means searching or exploring for samples of gold, silver or other precious
23 minerals, using nonmotorized methods, from among small quantities of aggregate.

24 (c) "Wet perimeter" means the area of the stream that is under water or is exposed as a non-
25 vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the
26 activity occurs.

27 **(6) Notwithstanding subsection (1) of this section, the director may not require that a**
28 **person obtain a permit if a city with a population of 50,000 or fewer persons has made a de-**
29 **termination under section 2 of this 2005 Act that the removal or fill action will occur within:**

30 **(a) A marginal wetland;**

31 **(b) An isolated wetland; or**

32 **(c) A wetland of less than one acre in size for which adverse effects can be adequately**
33 **mitigated.**

34 **SECTION 7.** ORS 196.825 is amended to read:

35 196.825. (1) The Director of the Department of State Lands shall issue a permit to remove ma-
36 terial from the beds or banks of any waters of this state applied for under ORS 196.815 if the di-
37 rector determines that the removal described in the application will not be inconsistent with the
38 protection, conservation and best use of the water resources of this state as specified in ORS
39 196.805.

40 (2) The director shall issue a permit applied for under ORS 196.815 for filling waters of this state
41 if the director determines that the proposed fill would not unreasonably interfere with the para-
42 mount policy of this state to preserve the use of its waters for navigation, fishing and public recre-
43 ation.

44 (3) In determining whether or not a permit shall be issued, the director shall consider all of the
45 following:

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

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

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

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

7 (e) Whether the proposed fill conforms to sound policies of conservation and would not interfere
8 with public health and safety.

9 (f) Whether the proposed fill is in conformance with existing public uses of the waters and with
10 uses designated for adjacent land in an acknowledged comprehensive plan and zoning ordinances.

11 (g) Whether the proposed fill is compatible with the acknowledged comprehensive plan and land
12 use regulations for the area where the proposed fill is to take place or can be conditioned on a fu-
13 ture local approval to meet this criterion.

14 (h) Whether the proposed fill is for streambank protection.

15 (i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects
16 of the proposed fill in the manner set forth in ORS 196.800 [(10)] (12). If off-site compensatory
17 wetland mitigation is proposed, the applicant shall document the impracticability of on-site
18 compensatory wetland mitigation.

19 (4) The director may issue a permit for a substantial fill in an estuary for a nonwater dependent
20 use only if the fill is for a public use and would satisfy a public need that outweighs harm to navi-
21 gation, fishery and recreation and if the proposed fill meets all other criteria contained in ORS
22 196.600 to 196.905.

23 (5) If the director issues a permit, the director may impose such conditions as the director con-
24 siders necessary to carry out the purposes of ORS 196.805, 196.830 and subsections (1) and (2) of this
25 section and to provide mitigation for the reasonably expected adverse impacts from project devel-
26 opment. In formulating such conditions the director may request comment from the State Geologist,
27 the State Fish and Wildlife Director, the State Forester, the Director of the Department of Envi-
28 ronmental Quality, the administrative officer of the Soil and Water Conservation Commission, the
29 Director of Agriculture, the State Parks and Recreation Director, the State Marine Director, the
30 Director of Transportation, the Director of the Economic and Community Development Department,
31 the Water Resources Director and affected local governmental units. Each permit is valid only for
32 the time specified therein. Obtaining a lease from the Department of State Lands may not be one
33 of the conditions to be considered in granting a permit under ORS 196.815. The Director of the De-
34 partment of State Lands shall impose, as conditions to any permit, general authorization or wetland
35 conservation plan, measures to provide mitigation for the reasonably expected adverse impacts from
36 project development. Compensatory wetland mitigation shall be limited to replacement of the func-
37 tional attributes of the lost wetland.

38 (6) Any applicant whose application for a permit has been deemed incomplete or has been de-
39 nied, or who objects to any of the conditions imposed under subsections (1), (2) and (5) of this section
40 by the Director of the Department of State Lands, may, within 21 days of the denial of the permit
41 or the imposition of any condition, request a hearing from the director. Thereupon the director shall
42 set the matter down for hearing, which shall be conducted as a contested case in accordance with
43 ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. After such hearing, the director shall enter
44 an order containing findings of fact and conclusions of law. The order shall rescind, affirm or modify
45 the director's initial order. Appeals from the director's final order may be taken to the Court of

1 Appeals in the manner provided by ORS 183.482.

2 (7) Except for a permit issued under the process set forth in ORS 517.952 to 517.989, the director
3 shall:

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

9 (b) Issue a permit decision involving fill or removal of material within 90 days after the date the
10 director determines that the application is complete unless:

11 (A) An extension of time is granted under subsection (9)(b) of this section; or

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

13 (8) Permits issued under this section shall be in lieu of any permit that might be required for
14 the same operation under ORS 164.775, 164.785, 468.010, 468.030 to 468.045, 468.055, 468.060, 468.075,
15 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

16 (a) The operation is that for which the permit is issued; and

17 (b) The standards for granting such permits are substantially the same as those established
18 pursuant to ORS 164.775, 164.785, 468.010, 468.035, 468.040, 468.055, 468.110, 468.120, 468B.005 to
19 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

20 (9)(a) Any agency or other unit of government requested by the director to comment on an ap-
21 plication for a permit under subsection (5) of this section must submit its comments to the director
22 not more than 30 days after receiving the request for comment. If an agency or other unit of gov-
23 ernment fails to comment on the application within 30 days, the director shall assume the agency
24 or other unit of government has no objection and shall approve or deny the application.

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

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

30 (11) As used in this section:

31 (a) "Applicant" means a landowner or person authorized by a landowner to conduct a removal
32 or fill activity.

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

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

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

38 (C) The fee required under ORS 196.815;

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

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

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

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

2 (H) Any other information that the director deems pertinent and necessary to make an informed
3 decision on whether the application complies with the policy and standards set forth in subsections
4 (1) to (5) of this section.

5 **SECTION 8.** ORS 196.825, as amended by section 3, chapter 516, Oregon Laws 2001, section 10,
6 chapter 253, Oregon Laws 2003, and section 18a, chapter 738, Oregon Laws 2003, is amended to read:

7 196.825. (1) The Director of the Department of State Lands shall issue a permit to remove ma-
8 terial from the beds or banks of any waters of this state applied for under ORS 196.815 if the di-
9 rector determines that the removal described in the application is consistent with the protection,
10 conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905.

11 (2) The director shall issue a permit applied for under ORS 196.815 for filling waters of this state
12 if the director determines that the proposed fill:

13 (a) Would not unreasonably interfere with the paramount policy of this state to preserve the use
14 of its waters for navigation, fishing and public recreation; and

15 (b) Is consistent with ORS 196.600 to 196.905.

16 (3) In determining whether to issue a permit under subsection (1) or (2) of this section, the di-
17 rector shall consider all of the following:

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

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

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

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

24 (e) Whether the proposed fill conforms to sound policies of conservation and would not interfere
25 with public health and safety.

26 (f) Whether the proposed fill is in conformance with existing public uses of the waters and with
27 uses designated for adjacent land in an acknowledged comprehensive plan and zoning ordinances.

28 (g) Whether the proposed fill is compatible with the acknowledged comprehensive plan and land
29 use regulations for the area where the proposed fill is to take place or can be conditioned on a fu-
30 ture local approval to meet this criterion.

31 (h) Whether the proposed fill is for streambank protection.

32 (i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects
33 of the proposed fill in the manner set forth in ORS 196.800 [(10)] (12). If off-site compensatory
34 wetland mitigation is proposed, the applicant shall document the impracticability of on-site
35 compensatory wetland mitigation.

36 (4) The director may issue a permit for a substantial fill in an estuary for a nonwater dependent
37 use only if the fill is for a public use and would satisfy a public need that outweighs harm to navi-
38 gation, fishery and recreation and if the proposed fill meets all other criteria contained in ORS
39 196.600 to 196.905.

40 (5) If the director issues a permit, the director may impose such conditions as the director con-
41 siders necessary to carry out the purposes of ORS 196.805, 196.830 and subsections (1) and (2) of this
42 section and to provide mitigation for the reasonably expected adverse impacts from project devel-
43 opment. In formulating such conditions the director may request comment from the State Geologist,
44 the State Fish and Wildlife Director, the State Forester, the Director of the Department of Envi-
45 ronmental Quality, the administrative officer of the Soil and Water Conservation Commission, the

1 Director of Agriculture, the State Parks and Recreation Director, the State Marine Director, the
2 Director of Transportation, the Director of the Economic and Community Development Department,
3 the Water Resources Director and affected local governmental units. Each permit is valid only for
4 the time specified therein. Obtaining a lease from the Department of State Lands may not be one
5 of the conditions to be considered in granting a permit under ORS 196.815. The Director of the De-
6 partment of State Lands shall impose, as conditions to any permit, general authorization or wetland
7 conservation plan, measures to provide mitigation for the reasonably expected adverse impacts from
8 project development. Compensatory wetland mitigation shall be limited to replacement of the func-
9 tional attributes of the lost wetland.

10 (6) Any applicant whose application for a permit has been deemed incomplete or has been de-
11 nied, or who objects to any of the conditions imposed under subsections (1), (2) and (5) of this section
12 by the director, may, within 21 days of the denial of the permit or the imposition of any condition,
13 request a hearing from the director. Thereupon the director shall set the matter down for hearing,
14 which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430, 183.440
15 to 183.460 and 183.470. After such hearing, the director shall enter an order containing findings of
16 fact and conclusions of law. The order shall rescind, affirm or modify the director's initial order.
17 Appeals from the director's final order may be taken to the Court of Appeals in the manner provided
18 by ORS 183.482.

19 (7) Except for a permit issued under the process set forth in ORS 517.952 to 517.989, the director
20 shall:

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

26 (b) Issue a permit decision involving fill or removal of material within 90 days after the date the
27 director determines that the application is complete unless:

28 (A) An extension of time is granted under subsection (9)(b) of this section; or

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

30 (8) Permits issued under this section shall be in lieu of any permit that might be required for
31 the same operation under ORS 164.775, 164.785, 468.010, 468.030 to 468.045, 468.055, 468.060, 468.075,
32 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

33 (a) The operation is that for which the permit is issued; and

34 (b) The standards for granting such permits are substantially the same as those established
35 pursuant to ORS 164.775, 164.785, 468.010, 468.035, 468.040, 468.055, 468.110, 468.120, 468B.005 to
36 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

37 (9)(a) Any agency or other unit of government requested by the director to comment on an ap-
38 plication for a permit under subsection (5) of this section must submit its comments to the director
39 not more than 30 days after receiving the request for comment. If an agency or other unit of gov-
40 ernment fails to comment on the application within 30 days, the director shall assume the agency
41 or other unit of government has no objection and shall approve or deny the application.

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

45 (10) In determining whether to issue a permit, the director may consider only standards and

1 criteria in effect on the date the director receives the completed application.

2 (11) As used in this section:

3 (a) "Applicant" means a landowner or person authorized by a landowner to conduct a removal
4 or fill activity.

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

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

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

10 (C) The fee required under ORS 196.815;

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

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

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

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

19 (H) Any other information that the director deems pertinent and necessary to make an informed
20 decision on whether the application complies with the policy and standards set forth in subsections
21 (1) to (5) of this section.

22 **SECTION 9.** ORS 196.905 is amended to read:

23 196.905. (1) Nothing in ORS 196.600 to 196.905 applies to filling the beds of the waters of this
24 state for the purpose of constructing, operating and maintaining dams or other diversions for which
25 permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which
26 preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.610.

27 (2) Nothing in ORS 196.600 to 196.905 applies to removal of materials from the beds or banks
28 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

29 (a) Such waterway or portion is situated within forestland; and

30 (b) Such removal or filling is directly connected with a forest management practice conducted
31 in accordance with ORS 527.610 to 527.770, 527.990 and 527.992.

32 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
33 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, cultivating,
34 conventional crop rotation, harvesting for the production of food and fiber, upland soil and water
35 conservation practices or reestablishment of crops under federal conservation reserve program pro-
36 visions.

37 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the following
38 activities on exclusive farm use zoned lands:

39 (a) Drainage or maintenance of farm or stock ponds;

40 (b) Maintenance of farm roads in such a manner as to not significantly adversely affect
41 wetlands;

42 (c) Subsurface drainage, by deep ripping, tiling or moling, on converted wetlands; and

43 (d) Any activity described as a farm use in ORS 215.203 that is conducted on prior converted
44 cropland as described in subsection [(8)] (10) of this section, so long as agricultural management of
45 the land has not been abandoned for five or more years.

1 (5) The exemption in subsections (3) and (4) of this section shall not apply to any fill or removal
2 which involves changing an area of wetlands to a nonfarm use.

3 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
4 or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage
5 ditches, irrigation ditches and tile drain systems, provided that:

6 (a) The structure was serviceable within the past five years; and

7 (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or
8 other waters of this state to a greater extent than the wetlands or waters of this state were affected
9 as a result of the original construction of those structures.

10 (7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
11 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
12 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
13 ments or approaches.

14 **(8) Nothing in ORS 196.800 to 196.900 applies to removal or filling within marginal or**
15 **isolated wetlands that are located within the urban growth boundary or city limits of a city**
16 **with a population of 50,000 or fewer persons.**

17 **(9) Nothing in ORS 196.800 to 196.900 applies to removal or filling within wetlands:**

18 **(a) That are less than one acre in size;**

19 **(b) That are located within the urban growth boundary or city limits of a city with a**
20 **population of 50,000 or fewer persons; and**

21 **(c) For which the city determines any adverse effects can be mitigated.**

22 [(8)] **(10) For the purposes of this section, "converted wetland":**

23 (a) Means wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled,
24 leveled or otherwise manipulated to impair or reduce the flow, circulation or reach of water for the
25 purpose of enabling production of an agricultural commodity and are managed for that purpose; and

26 (b) Includes land that the Natural Resources Conservation Service of the United States De-
27 partment of Agriculture, or its successor agency, certifies as prior converted cropland or farmed
28 wetlands, so long as agricultural management of the land has not been abandoned for five or more
29 years.

30 **SECTION 10.** ORS 196.905, as amended by section 6, chapter 516, Oregon Laws 2001, and sec-
31 tion 13, chapter 253, Oregon Laws 2003, is amended to read:

32 196.905. (1) Notwithstanding the exemptions in subsections (3) to (8) of this section, a permit
33 under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters
34 of this state when:

35 (a) The fill or removal is a part of an activity whose purpose is to bring an area of state waters
36 into a use to which it was not previously subject; and

37 (b)(A) The flow or circulation of the waters of this state may be impaired; or

38 (B) The reach of the waters may be reduced.

39 (2) Nothing in ORS 196.600 to 196.905 applies to removal of materials from the beds or banks
40 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

41 (a) Such waterway or portion is situated within forestland; and

42 (b) Such removal or filling is directly connected with a forest management practice conducted
43 in accordance with ORS 527.610 to 527.770, 527.990 and 527.992.

44 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
45 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, cultivating,

1 conventional crop rotation, harvesting for the production of food and fiber, upland soil and water
2 conservation practices or reestablishment of crops under federal conservation reserve program pro-
3 visions.

4 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the following
5 activities on exclusive farm use zoned lands:

6 (a) Drainage or maintenance of farm or stock ponds;

7 (b) Subsurface drainage, by deep ripping, tiling or moling, on converted wetlands;

8 (c) Maintenance of farm roads, provided that:

9 (A) The farm roads are constructed and maintained in accordance with construction practices
10 designed to minimize any adverse effects to the aquatic environment;

11 (B) Borrow material for farm road maintenance does not come from waters of this state unless
12 authorized by the Department of State Lands; and

13 (C) Maintenance activities are confined to the scope of construction for the original project; and

14 (d) Any activity described as a farm use in ORS 215.203 that is conducted on prior converted
15 cropland as described in subsection [(10)(a)] (12) of this section, so long as agricultural management
16 of the land has not been abandoned for five or more years.

17 (5) The exemption in subsections (3) and (4) of this section may not apply to any fill or removal
18 which involves changing an area of wetlands or converted wetlands to a nonfarm use.

19 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
20 or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage
21 ditches, irrigation ditches and tile drain systems, provided that:

22 (a) The structure was serviceable within the past five years; and

23 (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or
24 other waters of this state to a greater extent than the wetlands or waters of this state were affected
25 as a result of the original construction of those structures.

26 (7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for temporary dams
27 constructed for crop or pasture irrigation purposes that are less than 50 cubic yards, provided the
28 following conditions are satisfied:

29 (a) The removal or filling is conducted during periods that minimize adverse effects to fish and
30 wildlife in accordance with guidance provided by the State Department of Fish and Wildlife;

31 (b) The removal or filling does not jeopardize a threatened or endangered species or adversely
32 modify or destroy the habitat of a threatened or endangered species listed under federal or state
33 law; and

34 (c) Temporary fills are removed in their entirety and the area is restored to its approximate
35 original elevation.

36 (8) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
37 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
38 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
39 ments or approaches.

40 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
41 of access roads constructed to move mining equipment, subject to the following conditions:

42 (a) The access roads are constructed and maintained in accordance with construction practices
43 that minimize adverse effects to the aquatic environment;

44 (b) Borrow material for access road maintenance does not come from waters of this state unless
45 authorized by the Department of State Lands; and

1 (c) Maintenance activities are confined to the scope of construction for the original project.

2 (10) **Nothing in ORS 196.800 to 196.900 applies to removal or filling within marginal or**
3 **isolated wetlands that are located within the urban growth boundary or city limits of a city**
4 **with a population of 50,000 or fewer persons.**

5 (11) **Nothing in ORS 196.800 to 196.900 applies to removal or filling within wetlands:**

6 (a) **That are less than one acre in size;**

7 (b) **That are located within the urban growth boundary or city limits of a city with a**
8 **population of 50,000 or fewer persons; and**

9 (c) **For which the city determines any adverse effects can be mitigated.**

10 [(10)] (12) For the purposes of this section:

11 (a) "Converted wetland" means:

12 (A) Wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled, leveled
13 or otherwise manipulated to impair or reduce the flow, circulation or reach of water for the purpose
14 of producing an agricultural product and are managed for that purpose; or

15 (B) Those areas that the Natural Resources Conservation Service of the United States Depart-
16 ment of Agriculture, or its successor agency, certifies as prior converted cropland or farmed
17 wetlands, so long as agricultural management of the land has not been abandoned for five or more
18 years.

19 (b) "Harvesting" means physically removing crops or other agricultural products.

20 (c) "Plowing" includes all forms of primary tillage, including moldboard, chisel or wide-blade
21 plowing, discing, harrowing or similar means of breaking up, cutting, turning over or stirring soil
22 to prepare it for planting crops or other agricultural products. "Plowing" does not include:

23 (A) The redistribution of soil, rock, sand or other surface materials in a manner that changes
24 areas of waters of this state into dry land; or

25 (B) Rock crushing activities that result in the loss of natural drainage characteristics, the re-
26 duction of water storage and recharge capability, or the overburdening of natural water filtration
27 capacity.

28 (d) "Seeding" means the sowing of seed or placement of seedlings to produce crops or other
29 agricultural products.

30 **SECTION 11. This 2005 Act being necessary for the immediate preservation of the public**
31 **peace, health and safety, an emergency is declared to exist, and this 2005 Act takes effect**
32 **on its passage.**

33