

## **Routine Program Change**

### **Updating Oregon's Wetlands Program Enforceable Policies**

**O.R.S. §§ 196.668-196.990**

**July 24, 2014**

#### **I. Introduction**

The Oregon Coastal Management Program requests that the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) approve updates to the OCMP to reflect statutory changes to Oregon's wetlands conservation and fill and removal programs ORS Chapter 196. Oregon requests OCRM's concurrence that these updates constitute a Routine Program Change (RPC).

Section II.A describes the programs and changes to the relevant statutes since OCRM's previous approval of Chapter 196.

Section II.B identifies those sections that state "enforceable policies" that are used in Oregon's federal consistency review determinations.

Section II.C shows that the submitted updates are a Routine Program Change under NOAA regulations and guidelines.

#### **II. Analysis of Routine Program Change**

##### **A. Discussion of Wetlands Program**

The OCMP was initially approved by NOAA in 1977, and was subsequently revised and approved *in toto* by NOAA in 1987. The 1987 OCMP serves as the baseline program for subsequent updates and routine program changes.

In 1987, the effective OCMP included the state's removal/fill law, requiring state permits for fill and removal of material in Oregon's waterways and estuaries, including wetlands. A related law required mitigation of dredging or filling by creation, restoration, or enhancement of an estuarine area. These were codified at former ORS §§ 541.605-541.685. In 1991, OCRM approved a Routine Program Change reflecting the recodification of these laws to ORS Chapter 196 (§§196.800-196.905), and adding the adoption of enforceable wetland conservation plan provisions linking the actions of local governments to state requirements to protect wetlands and provide for mitigation of impacts (§§196.668-196.692). These statutory provisions are administered by the Department of State Lands (renamed in 2003, from the former Division of State Lands).

The attached table includes the full listing of statutory provisions addressing wetlands and waterways, including those which remain unchanged since prior OCRM approval in 1991. This is in order to ensure that the full current program remains part of the OCMP and establishes the 2013 Edition of the Oregon

Revised Statutes as the effective baseline for all of these statutory provisions, should they be further amended in the future. We are also attaching the full current versions of the statutes.

#### *Wetland Conservation Plans*

Sections 196.668-196.692 were added in 1989 and approved by OCRM as part of the OCMP in 1991. As shown in the attached table, the only changes to most of these sections since 1991 were the renaming of the Division of State Lands in 2003, and the correction of cross-references to other sections of Oregon law to reflect renumbering of those sections. Specifically §196.682 and §196.692 each added a cross-reference to ORS §215.284 because six subsections were moved from the previously cross-referenced §215.283 to create §215.284 in 1993. Similarly, cross references to specific subsections within §196.825 were removed because §196.825 was internally renumbered. And §196.692 added a cross-reference to §196.818, which was enacted in 2007 to establish administrative fee requirements.

The only substantive addition since 1991 was the enactment of §196.687 in 1995. That section provides that state or local governments are not to prohibit or restrict the alteration or fill of artificially-created wetlands up to one acre that are used to store, maintain, or control stormwater. However, mitigation of losses or changes in capacity is required if the facility was constructed as a condition of development approval.

#### *Removal of Material/Filling of Waters*

Sections 196.800, *et seq.*, were approved as part of the original OCMP and updated in the 1991 Routine Program Change. As in 1991, this program continues to require permits for removal of material from, or filling of, the waters of the state. It provides for mitigation of impacts, and it identifies conditions for exemptions and authorizations.

Certain minor changes recur across these sections. These include substituting the term Department of State Lands (rather than Division) pursuant to reorganization in 2003; and it replaces numerous cross-references to the Chapter 196 regulatory programs as a whole, formerly listed as “ORS 196.600 to 196.665 and 196.800 to 196.905” with the term “ORS 196.600 to 196.905.” The latter not only simplifies the cross-references, but accurately includes the wetland conservation plan provisions that were incorporated into the OCMP in 1991. These two naming and cross-reference changes are the only changes to the following sections: 196.820, 196.835, 196.845, 196.865, 196.870, 196.875, 196.880, 196.890, 196.900, and 196.990. Two of the sections changed cross-references to appeal procedures to ORS chapter 183: 196.860, 196.895. One section changed a word in its section title, which is not part of the law: 196.855; and one section reflects a change in the name of the mitigation fund account: 196.885.

Only twelve sections of the removal/fill program have had any changes or additions beyond the conforming name changes and cross-references noted above:

196.795 – This administrative provision, enacted in 1995 and last amended in 2007, instructs the Department to streamline its processes.

196.800 – The definition section was revised to simplify the definition for estuary, and improve the definition of “mitigation” to more closely track existing federal definitions. It also redefines terms such as “general authorization” and “person”, to track more closely the terminology used in the program. The definition of “waters of this state” was revised to simplify it, and to align existing state waters as defined on the ocean shore with federal CWA 404 jurisdiction in that area.

196.810 – This section was amended to provide for individual permits in essential indigenous anadromous salmonid habitat where an exemption might otherwise have applied. This section also was amended to allow for small-scale nonmotorized activities, and to provide for the conditioning of emergency authorizations to make repairs or prevent irreparable harm, injury or damage.

196.815 – This existing section was amended to provide an updated fee schedule, to provide for payment of fees for emergency authorizations, to provide for annual adjustment of fees, and to allow fee waivers for voluntary habitat restoration projects. The information to be included in a permit application was moved to 196.825.

196.816 – This section, enacted in 2011, allows a general permit for small-scale activities “maintaining drainage and protecting agricultural lands.”

196.817 – This section, enacted in 2007 and amended in 2011 allows permits by rule on a statewide or geographic basis, and for substantially similar activities with predictable effects; and provides for amendment or rescission if activities result in or would result in unacceptable environmental effects or long-term harm to water resources.

196.818 – This section, enacted in 2007, provides for a fee when submitting a wetland delineation report.

196.825 – This section was simplified to make each reference cover both permits for removal and permits for fill, by rewording the section. Amendments in 1991, 1993, 1995, 2001, 2003, 2007, 2009, and 2011, added a subsection requiring proof of landowner consent if landowner is not the applicant; added consideration of land use regulations, and duty to consider policy objectives for wetland protection. Amendments outlined the timing for comments from interested agencies, parties, and landowners. Amendments added a provision requiring consideration of only standards and criteria in effect on the date of the application; and added internal definitions to define a “completed application,” picking up information found in former 196.815.

196.830 – Added reference to local government planning coordination in estuarine mitigation.

196.850 – Added reference to general authorization on statewide or geographic basis (as above); includes tribal government among entities entitled to notice; establishes fee for authorization to remove more than 50 cubic yds.

196.905 – Deleted list of farm activities for exemptions, incorporates references to federal farm definitions; deletes obsolete exemption for pre-1991 actions; adds exemptions for mining otherwise

regulated, for voluntary habitat restoration, and for approved relocation of water diversion points; conforms definitions of prior converted cropland to federal.

196.910 – This section, enacted in 1997 and last amended in 2005, directs the Department to monitor effects of fills, to cooperate in public education, and inform the legislature.

The updates submitted here simplify the description of the permitting process to use the same references for removals and fills, adjust fee schedules, clarify the existing exemptions and conform them more closely to federal wetland definitions, provide more detail for general authorizations in lieu of permits, and simplify definitions. The program also expressly requires individual permits rather than exemptions or general authorizations for actions in essential indigenous anadromous salmonid habitat. These are minor updates that reflect small changes in the administration of the existing programs.

## **B. Enforceable Policies**

OCRM initially approved Oregon’s Coastal Management Program, including entire state statutes as part of the approved program. Subsequently OCRM has requested that states identify enforceable policies within their statutes as updates are submitted. While Oregon seeks to incorporate the entire updated program of ORS §§ 196.668-196.995 into the OCMP, we have identified specific sections that define enforceable policies for federal consistency purposes.

Each of the sections identified specifies a substantive enforceable policy, defines when a permit or authorization is required or conditions when it is not required, or provides enforceable mechanisms for implementation of the substantive provisions. Statutory sections not defined as enforceable are those that are purely procedural, that contain statements of findings, or that merely grant state officials authority to undertake administrative acts not affecting the potential activities of federal actors or licensees.

Thus, statements of policy, requirements for permits or other authorizations, lists of conditions for permits or authorizations, provisions for rules that define regulatory requirements, and definitions that specify the content of obligations and requirements are enforceable policies. The sections in this Routine Program Change stating enforceable policies are: 196.672, 196.678, 196.681, 196.682, 196.684, 196.686, 196.687, 196.692, 196.800, 196.805, 196.810, 196.815, 196.816, 196.817, 196.820, 196.825, 196.830, 196.845, 196.850, 196.855, 196.860, 196.865, 196.870, 196.875, 196.880, 196.890, 196.900, 196.905, and 196.990. The attached table identifies these with an X and describes the content of each section.

These policies are rendered enforceable by the permits required in 196.682 and 196.810, by general permits in 196.816 and 196.817 and by general authorizations in 196.850 where individual permits are not required. And enforcement implementation includes orders and civil actions under 196.860, revocations and suspensions under 196.865, abatement actions under 196.870, damages for destruction of public rights under 196.870, civil penalties under 196.890 and 196.900, and fines under 196.990.

## **C. Action as Routine Program Change**

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this section explains why this update to Oregon’s program is a Routine Program Change and does not constitute an amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization; and
- (5) coordination, public involvement and the national interest.

OCRM’s 1996 Program Change guidance states that a “substantial change” is a high threshold requiring case-by-case determination. Statutory changes are identified in the attached table. The table relates each change to Oregon’s authority as previously approved as part of the OCMP in 1987 or in subsequent RPCs (1991 in this instance). Each change is described in detail in the right-hand column of the table.

*1. Uses subject to management.*

This submittal does not identify new uses subject to management.

*2. Special management areas.*

This submittal does not designate or change special management areas. It does not establish new criteria for special management areas. Removal/fills in essential indigenous anadromous salmonid habitats will be addressed by individual permitting, a procedure already provided for in the current program.

*3. Boundaries.*

This submittal does not change the boundaries of Oregon’s coastal zone.

*4. Authorities and organization.*

This submittal does not change Oregon’s administration of the OCMP. The same authorities continue to apply these programs; references to Division have become Department in order to reflect the current status of the Department of State Lands.

*5. Coordination, public involvement, and the national interest.*

This submittal does not change any coordination, public involvement, or national interest provisions of the OCMP. Several of the changes clarify coordination and specifically expand the public availability of information and include tribal governments among the entities that may have interests. No new rights of coordination are created nor existing rights removed. No changes affect the national interest; indeed, in a few instances Oregon has more closely linked its definitions and mitigation policies to existing federal norms.

Accordingly, this submittal is a Routine Program Change, and Oregon requests OCRM concurrence.

## Regulation of Wetlands

### Statutes Enacted since Last OCRM Approval

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
<b>WETLAND CONSERVATION PLANS</b>						
196.687	Regulation of alteration or fill of artificially created wetlands	State or local governments shall not prohibit or restrict alteration or fill of wetland areas up to one acre artificially created from upland to control, store, or maintain storm water; areas developed as storm water or detention facility as a condition of development approval not altered or filled without acceptance of plan to mitigate loss of functional capacities.	X		1995	<ul style="list-style-type: none"> <li>• Enacted in 1995</li> </ul>
<b>REMOVAL OF MATERIAL; FILLING</b>						
196.795	Streamlining process for administering state removal or fill permits; application for state program general permit;	Department to streamline permitting process, pursue state programmatic general permit with Corps of Engineers, investigate assumption of program from Corps.			1997 1999 2007	<ul style="list-style-type: none"> <li>• Enacted in 1995, Guidance for Department.</li> </ul>

<sup>1</sup> Oregon is seeking to establish the 2013 Edition of the Oregon Revised Statutes and the 2014 Oregon Laws supplement as the effective baseline for the statutory provisions incorporated into the Oregon Coastal Management Program (OCMP). The year in the “updates adopted and effective” column refers to the year(s) during which the Oregon legislature adopted changes to the statutory provisions incorporated into the OCMP.

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
	periodic reports to legislative committee					
196.816	General permits allowing removal of certain amount of material for maintaining drainage; rules; waiver of fees	Allows Department of State Lands to establish a general permit that allows removal of up to 100 cubic yards for the purpose of “maintaining drainage and protecting agricultural lands.”	X		2011	<ul style="list-style-type: none"> <li>Enacted in 2011</li> </ul>
196.817	General permits; rules	Allows Department to establish removal or fill general permit by rule for processing applications on a statewide or geographic basis; or by order for applicants to cover activities that are substantially similar, recurring or ongoing, and have predictable effects and outcomes. Provides for amendment or rescission if activities result in or would result in “unacceptable individual or cumulative environmental effects or long-term harm to the water resources of the state.”	X		2007 2011	<ul style="list-style-type: none"> <li>Enacted in 2007</li> </ul>
196.818	Wetland delineation reports; review by Department of State	Requires a wetland delineation report in certain circumstances; provides for fee when submitting	X		2007 2012 2013	<ul style="list-style-type: none"> <li>Enacted in 2007</li> </ul>

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	Lands; fees	wetland delineation report to Department for review, and for annual adjustment of fee per consumer price index; requires review of submitted delineation within 120 days.				
196.910	Monitoring fill and removal activities; public education and information materials; periodic reports to legislative committee	Monitoring effects on essential indigenous anadromous salmonid habitat, cooperate in public education, and report on implementation of 196.810			1997 1999 2003 2007	<ul style="list-style-type: none"> <li>Enacted in 1997</li> </ul>

### Changes to Statutes in the Program since Last OCRM Approval

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
WETLAND CONSERVATION PLANS						
196.668	Legislative findings	Lists services provided by wetlands, sources of loss, state interest in regulation		1991		<ul style="list-style-type: none"> <li>None</li> </ul>
196.672	Policy	Announces state policy to maintain resource base of		1991		<ul style="list-style-type: none"> <li>None</li> </ul>

<sup>2</sup> Oregon is seeking to establish the 2013 Edition of the Oregon Revised Statutes and the 2014 Oregon Laws supplement as the effective baseline for the statutory provisions incorporated into the Oregon Coastal Management Program (OCMP). The year in the "updates adopted and effective" column refers to the year(s) during which the Oregon legislature adopted changes to the statutory provisions incorporated into the OCMP.

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		wetlands through mitigation, increase wetland resources, improve coordination and reduce delays				
196.674	Statewide Wetlands Inventory; rules	Requires wetlands inventory uniform identification and delineation, mapping		1991	2003	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.676	Response to notices from local governments	State agency must identify whether permit is needed or has been issued		1991	“	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.678	Wetland conservation plans; contents; procedure for adopting	City or county to develop enforceable wetland conservation plan with specified wetland protection elements.	X	1991	“	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands”</li> </ul>
196.681	Duties of department; standards for approval of plan; conditions for approval; order	Specifies conditions for approval of wetland conservation plans and amendments; director may authorize site-specific fill or removal without an individual permit if certain findings made; director to revise order and require individual permit review if fill or removal will cause more than minimal adverse impact.	X	1991	1999 2003	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.682	Permits required for removal or fill; conditions on issuance of permit	Requires individual permits in areas covered by wetlands conservation plan, except where provided otherwise by order approving plan; lists conditions to be applied to the permit to	X	1991	2007 2009 2011	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes subsection (1) cross-reference to “196.825((5) and (6))” to “196.825” and reference to standards in “ORS 196.815(1) and</li> </ul>

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		protect wetlands and meet state policies.				196.825(1),(2) and (3)” to “ORS 196.825(3)” to reflect renumbering below
196.684	Amendment of plans; review of plans by department; review of orders by Land Use Board of Appeals	Local governments notify of proposed amendments to land use plan and ordinances affecting lands subject to wetland conservation plan; review of amendments by department; approval, amendment or revocation of approval order; review of each approved wetland conservation plan every five years and action by director; action by director if local government is not enforcing.		1991		<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Adds cross-reference to ORS 215.284 because subsections (3-8) in existing cross-reference to 215.283 were moved to 215.284 in 1993.</li> </ul>
196.686	Acknowledged estuary management plan; review and approval; hearings; final order	City or county empowered to develop acknowledged estuary management plan, for approval by director as a wetland conservation plan. Requires individual permits in areas covered by estuary management plan, lists conditions to be applied to the permit to protect wetlands and meet state policies.		1991	2007 2009 2011	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• In subsection (14) changes cross-reference to “196.825((5) and (6)” to “196.825” and reference to substantive standards in “ORS 196.815(1) and 196.825(1),(2) and (3)” to “ORS 196.825(3)” to reflect renumbering amendments below</li> </ul>
196.688	Public information program	Education of public and applicants; assist other agencies		1991		<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> </ul>

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196.692	Rules	Department to adopt rules to carry out substance of the referenced provisions relating to wetlands protection; rules must include permit requirements and criteria.	X	1991	2001 2007	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Adds cross-reference to ORS 215.284 because subsections (3-8) in existing cross-reference to 215.283 were moved to 215.284 in 1993.</li> <li>• Adds cross-reference to ORS 196.818 to reflect enactment of that section (fee requirement) in 2007.</li> </ul>
REMOVAL OF MATERIAL; FILLING						
196.800	Definitions for ORS 196.600 to 196.905	Provides definitions for Oregon’s wetlands conservation plans and regulatory programs	X	1991	1999 2003 2007 2009 2013	<ul style="list-style-type: none"> <li>• Changes title and internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905” for simplicity, reflecting unified definitions for all wetlands programs.</li> <li>• Removes definitions for “Director” and “Division”</li> <li>• Revises definition of “Estuary” for waters other than the Columbia River replacing the words “semi-enclosed by land and connected with the open ocean with “partially enclosed by land” and continuing with the existing language about salt water and dilution by fresh water. Added to the definition of the Columbia River estuary the words “from the mouth of the river up to” the western edge</li> </ul>

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						<p>rather than “extends to” the western edge of Puget Island.</p> <ul style="list-style-type: none"> <li>• Redefines “General authorization” as “an authorization granted under ORS 196.850 for a category of activities involving removal or fill, or both, without a permit” rather than “a rule adopted by the director authorizing, without a permit from the division, a category of activities involving removal or fill, or both, on a state-wide or other geographic basis.”</li> <li>• Adds definition of “General permit” as “a permit for removal activities or fill activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes.”</li> <li>• In definition of “Mitigation” replaces “impact” with “effect”; and says that compensating for the impact is by “creating, restoring, enhancing or preserving substitute functions and values for the waters of this state” rather than “replacing or providing comparable or substitute wetland or water resources”</li> <li>• Adds definition of “Person” as “a person, a public body as defined in ORS 174.109, the federal</li> </ul>

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						<p>government, when operating in any capacity other than navigational servitude, or any other legal entity.”  And deletes definition of “Governmental body” as “includes the Federal Government when operating in any capacity other than navigational servitude, the State of Oregon and every political subdivision therein.”</p> <ul style="list-style-type: none"> <li>• Adds definition of “Practicable” which “means capable of being accomplished after taking into consideration the cost, existing technology and logistics with respect to the overall project purpose.”</li> <li>• Revises definition of “Waters of this state” to put the word “all” before the entire list of water types, and remove “including all”, to change “that portion of the Pacific Ocean which is in the boundaries of this state” to “that portion of the Pacific Ocean that is in the boundaries of this state”, and to remove “and other bodies of water in this state, navigable and nonnavigable, including” and replacing it with “all other navigable and nonnavigable bodies of water in this state and those portions of the</li> </ul>

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						<p>ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated under a state assumed permit as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.”</p> <ul style="list-style-type: none"> <li>• Adds definition of “Large woody debris”</li> </ul>
196.805	Policy	States enforceable policy to protect, conserve and use the water resources of the state; to prevent unregulated filling; to implement control of the removal of material from the beds and banks or filling the waters of the state.	X	1991	2003 2012	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196-905”</li> </ul>
196.810	Permit required to remove material from bed or banks of waters; status of permit; exceptions; rules	Provides requirement for a permit for removal or fill; provides for permit exceptions and requirements for removal or fill in essential indigenous anadromous salmonid habitat, provides how public bodies interact with the permit requirements, and specifies conditions for emergency authorizations.	X	1991	1993 1997 2001 2003 2007	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>• Replaces “no person or governmental body” with “a person may not” [see definition change above].</li> <li>• Adds “of any waters of this state” after “beds or banks”</li> <li>• Provides in (1)(b)-(f) that a permit is required for “any removal or fill activity [that] is proposed in essential</li> </ul>

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						<p>indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture” and provides that the Department shall define such habitat by rule in consultation with the Department of Fish and Wildlife and other affected parties. A person is not required to obtain a permit in the designated essential salmonid habitat area for prospecting or other nonmotorized activities resulting in removal from or fill of less than one cubic yard from any one individual site, and not more than five cubic yards cumulatively in one designated habitat segment in a single year. Prospecting and nonmotorized activities must be within the bed or wet perimeter and not where fish eggs are present. Such a permit is also not required for fish passage and screening structures constructed, operated or maintained under Oregon law; and terms of these subsections are defined.</p> <ul style="list-style-type: none"> <li>• Subsections (2) and (3) substitute “a public body as defined in ORS 174.109” for “governmental body.” And (2) says the public body “may</li> </ul>

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						<p>not” rather than “No governmental body shall...”</p> <ul style="list-style-type: none"> <li>• Subsection (4), dealing with emergency authorizations to make repairs or prevent irreparable harm, injury or damage to persons or property, is revised to clarify that the Department “may issue, orally or in writing, an emergency authorization” and now specifies that the authorization “(a) Shall contain conditions of operation that the department determines are necessary to minimize impacts to water resources or adjoining properties. (b) Shall be based, whenever practicable, on the recommendations contained in an on-site evaluation by an employee or representative of the department. (c) If issued orally, shall be confirmed in writing by the department within five days. (d) Does not relieve the person from payment of a fee...”</li> </ul>
196.815	Application for permit; rules; fees; disposition of fees	Provides for application base fees based on applicant type, and additional fees related to volume of removal or fill and type of activity	X	1991	2007 2009	<ul style="list-style-type: none"> <li>• Adds “rules” to title</li> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• In subsection (1) replaces “Each applicant for a permit” with “A person who is required to have a permit” and deletes the specification</li> </ul>

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						<p>of information required in the application. This application information is now specified in ORS 196.825(12) which defines a “completed application.”</p> <ul style="list-style-type: none"> <li>• Deletes former (2) requiring furnishing copies of permit applications to members of the public on request.</li> <li>• Raises the dollar amounts of all fees, now subsection (2), formerly (3); and authorizes the department to establish by rule a volume-based fee for the commercial removal of sand and gravel.</li> <li>• Adds new subsection (4) allowing waiver of fees “for a permit that will be used to perform a voluntary habitat restoration project.”</li> <li>• Adds a new subsection (5) requiring payment of fees for an emergency authorization within 45 days.</li> <li>• Amends subsection on annual fees, allowing Department to assess a one-time fee for multi-year permits covering all of the fees due for the period of the permit.; amends terminology to say “a renewal” rather than “an extension” of the permit.</li> <li>• Updates subsection (7) (formerly (6))</li> </ul>

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						<p>citations for use of the fee funds to ORS 196-600 to 196.905, eliminating redundant and obsolete citations.</p> <ul style="list-style-type: none"> <li>• Adds subsection (8) providing for annual revision of fees per Consumer Price Index.</li> </ul>
196.820	Prohibition against issuance of permits to fill Smith Lake or Bybee Lake; exception	Prohibits issuing permit to fill these lakes below the 11-foot contour line; but allows if purpose is to enhance or maintain fish and wildlife habitat		1991		<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> </ul>
196.825	Criteria for issuance of permit; conditions; consultation with public bodies; hearing; appeal	Specifies the content of permit applications, applicable conditions, standards to be met, and review and comment procedures and timing.	X	1991	1991 1993 1995 2001 2003 2007 2009 2011	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Simplifies coverage of the section by making each reference to permits cover both permits for removal of material and for addition of fill. Does so by deleting after the word “permit” in subsection (1) the words “to remove material from the beds or banks of any waters of this state”, deleting from former subsection (2) (now renumbered (1)(b)) “the director shall issue a permit...for filling the waters of the state”; and changing the word “removal” in (1) to “project”</li> <li>• Changes (1)(a) from “will not be inconsistent with” to “Is consistent with” ...the protection, conservation</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
						<p>and best use of the water resources of this state; and moves existing standard “would not unreasonably interfere with...” from former (2) to current (1)(b).</p> <ul style="list-style-type: none"> <li>• Changes reference in subsection (1) from 196.805 to “ORS 196.600 to 196.905.”</li> <li>• Adds throughout after the words “proposed fill”, “or removal” These changes make same standards applicable to all removal and fill permits.</li> <li>• Adds new (2) requiring proof of landowner consent; right, title or interest; or court order or judgment if the project applicant is not the landowner.</li> <li>• In (3), makes clear that “all” factors must be considered by the director, replaces “and zoning ordinances” with “and land use regulations”, and allows consideration of whether the approval “can be conditioned on a future local approval” to meet the criterion of compatibility with local land use regulations.</li> <li>• In (3)(i) adds consideration of “whether the applicant has provided all practicable mitigation to reduce the</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
						<p>adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800” and instructs the director to “consider the findings regarding wetland set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.”</p> <ul style="list-style-type: none"> <li>• In (4) adds “a project that results in” before “a substantial fill” and changes internal reference from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>• In (5) adds cross-reference to new subsection (2) of this section, and adds purpose of conditions “to provide mitigation for the reasonably expected adverse effects of project development.” In developing conditions of the permit, replaces long list of state and local agencies that may be consulted with “may request comment from public bodies, as defined in ORS 174.109, federal agencies and tribal governments affected by the permit.” Changes “reasonably expected adverse impacts from” to “reasonably expected adverse effects of” project</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
						<p>development. Adds statement that “compensatory mitigation shall be limited to replacement of the functions and values of the impacted water resources of this state.</p> <ul style="list-style-type: none"> <li>• Adds new (6) allowing the director to request comment from “interested parties and adjacent property owners on any application for a permit”, directing the director to furnish copies on request (moved from former 196.815(2), and to notify all landowners traversed by or adjacent land affected by permit applications for “construction or maintenance of a linear facility.”</li> <li>• In (7) (former (6)) deletes specific cross references to subsections for conditions and refers to entire section; adds “or authorization” after “permit” to reflect other kinds of authorizations above; and changes hearing request timing to 21 days rather than 10.</li> <li>• Replaces former (7) with new (8) specifying timing for determination of completeness and giving time limits for extensions and decisions.</li> <li>• Changes cross references in (9) (former (8)) to delete 468.010 and add 468.020; to delete “468.030 to” and</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
						<p>add 468.035; to delete 468.075; and to delete “468.700 to 468.725 and 468.735 to 468.775” and replace with “468B.005 to 468B.030 and 468B.048 to 468B.085” to reflect recodifications, with corresponding changes in (9)(b).</p> <ul style="list-style-type: none"> <li>• Replaces former (9) providing comment periods of 45 days with subsection (10) providing for comment period of 30 days after agency or public body receives notice and request for comment; and comments by DEQ within 75 days.</li> <li>• Adds (11) requiring director to consider “only standards and criteria in effect on the date the director receives the completed application.”</li> <li>• Adds (12) defining terms as used in this section: applicant, completed application, and linear facility (such as railway, highway, road, pipeline, transmission line). The definition of a completed application requires a signed application, map, project plan, fee, changes to the hydraulic characteristics of waters of the state and a plan to minimize or avoid any adverse effects of those changes, document of existing conditions and</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
						resources if the project may cause substantial adverse effects on aquatic life or habitat, analysis of alternatives that evaluates “practicable methods to minimize and avoid impacts to the waters this states”, a mitigation plan, and any other information deemed pertinent and necessary by the director.
196.830	Estuarine resource replacement as condition for fill or removal from estuary; considerations; other permit conditions	Provides conditions for this form of mitigation	X	1991	2005	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• In subsection (4) adds reference to ORS chapter 195 (Local government planning coordination)</li> <li>• In subsection (5) changes cross-reference to 196.825 to refer to the whole section because of reorganization of 196.825.</li> </ul>
196.835	Hearing regarding issuance of permit; procedure; appeals; suspension of permit pending appeal	Procedures for contesting permit grant; showing needed for suspension pending appeal		1991	2003	<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> <li>• Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>• Changes timing to 21 days from 60.</li> </ul>
196.845	Investigations and surveys	Authorization to investigate or survey location to determine consistency of project with standards	X	1991		<ul style="list-style-type: none"> <li>• Replaces “division” with “Department of State Lands” or “Department”</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
196.850	Waiving permit requirement in certain cases; rules; notice; review; fees; disposition of fees	Authorization other than permit, to remove material or fill waters of the state	X	1991	2003 2007	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Divides existing language into further subsections and renumbers accordingly</li> <li>Add subsection (2) that a general authorization “may be granted on a statewide or other geographic basis”</li> <li>Includes “tribal governments” among entities to be notified</li> <li>New subsection (9) and (10) establish fee for the authorization to move more than 50 cubic yards of material.</li> </ul>
196.855	Noncomplying removal of material or filling as public nuisance	Defines nuisance as removal or fill without permit, contrary to conditions of permit, or contrary to conditions in order approving wetland conservation plan	X	1991	2007	<ul style="list-style-type: none"> <li>Title replaces “constitutes” with “as”</li> </ul>
196.860	Enforcement powers of director	Power to investigate, enter on lands, conduct hearings, give notice, start proceedings, enter cease and desist orders for imminent and substantial risk, hold hearings, seek injunction	X	1991	2007	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>Changes references from “ORS 183.310 to 183.550” to “ORS chapter 183”</li> <li>Re-letters subparts of subsection (2)(a)-(e)</li> </ul>

<b>ORS Section</b>	<b>Current Title</b>	<b>Description</b>	<b>Enf. Policy</b>	<b>Last OCRM Approval</b>	<b>Updates Adopted &amp; Effective<sup>2</sup></b>	<b>Changes Since Last Approval</b>
196.865	Revocation, suspension or refusal to renew permit	Power to revoke, suspend or refuse renewal of permit	X	1991	2007	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.870	Abatement proceedings; restraining order; injunction; public compensation	Enforcement in court; award of natural resource damages	X	1991		<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.875	Double and treble damages for destruction of public right of navigation, fishery or recreation; costs and attorney fees	Award of damages	X	1991	2007	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.880	Fill under permit presumed not to affect public rights; public rights extinguished	Defines effects of fill permit on public rights and access	X	1991		<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> </ul>
196.885	Annual report of fill and removal activities; contents of report	Duty to file report with state land board.		1991	2009	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>Changes name of Oregon Wetlands Mitigation Bank Revolving Fund Account to Oregon Removal-Fill Mitigation Fund</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
196.890	Civil penalties	Amount of penalty not more than \$10,000 per day	X	1991		<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> </ul>
196.895	Imposition of civil penalties	Procedures defined in ORS 183.745	X	1991	1991	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>Deletes most of former subsection (1) and (2)-(4); procedures now in ORS 183.</li> </ul>
196.900	Schedule of civil penalties; rules; factors to be considered in imposing civil penalties	Compliance history and other factors	X	1991		<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> </ul>
196.905	Applicability; rules	Defines exemptions and inapplicability of requirements to various specified activities, mostly regulated by other entities	X	1991	1999 2009 2011	<ul style="list-style-type: none"> <li>Replaces “division” with “Department of State Lands” or “Department”</li> <li>Changes internal references from “ORS 196.600 to 196.665 and 196.800 to 196.905” to “ORS 196.600 to 196.905”</li> <li>Revises Subsection (3) to delete long list of farming activities and minor drainage within farms</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Changes Since Last Approval
						<ul style="list-style-type: none"> <li>• Revises subsection (4)(b) to exempt farm road maintenance impacts on “any other waters of this state”</li> <li>• Adds new subsections (5)-(7) to incorporate exemptions for farm uses including federal definitions and conservation reserve program.</li> <li>• Deleted former subsection (7) dealing with construction completed prior to December 31, 1991.</li> <li>• Adds subsection (11) to exempt surface mining regulated by another agency.</li> <li>• Adds subsection (12) authorizing exemption for voluntary habitat restoration projects with minimal adverse impacts</li> <li>• Adds subsection (13) exempting changes in point of diversion of surface water withdrawal if authorized by Water Resources Department</li> <li>• Revises former definition of “converted wetland” in former (9) to new (14) applying federal definitions and excluding streams, sloughs, etc.</li> </ul>
PENALTIES						
196.990	Penalties	Violation of 196.810 is a misdemeanor		1991		<ul style="list-style-type: none"> <li>• None</li> </ul>

Statutes that Were in the Program but Have Been Repealed since Last OCRM Approval

<b>ORS Section</b>	<b>Title at Last Approval</b>	<b>Description</b>	<b>Last OCRM Approval</b>	<b>Changes since last approval</b>
[196.840]	Closure of specified waters to removal or filling	Allowed closure by rule, after hearing by Water Resources Commission	1991	<ul style="list-style-type: none"> <li>• Repealed in 2005</li> </ul>

**Text of ORS Chapter 196 Wetland Statutes Included in July 24, 2014 RPC  
2013 Edition Oregon Revised Statutes**

**WETLAND CONSERVATION PLANS**

**196.668 Legislative findings.** The Legislative Assembly finds that:

(1) Wetlands provide a natural means of flood and storm damage protection through the absorption and storage of water during high runoff periods, thereby reducing flood crests and preventing loss of life and property;

(2) Wetlands provide essential breeding, spawning, rearing, feeding, nesting and wintering habitats for a major portion of this state's fish and wildlife;

(3) Wetlands provide essential habitat for waterfowl using the Pacific Flyway and for the rearing of salmon and other anadromous and resident fish;

(4) Wetlands act as accumulation areas for sediments which retain nutrients and other pollutants that may prevent entry of the pollutants into other waterways;

(5) Wetlands provide a valuable public service of maintaining clean water by retaining nutrients, metals and toxic materials from the water to protect water quality;

(6) Wetlands provide significant opportunities for environmental and ecological research, public recreation and education and provide scenic diversity and aesthetic value as open space and areas of visual enjoyment;

(7) Much of this state's original wetlands have been diked, drained, filled, dredged, ditched or otherwise altered;

(8) There is continuing development pressure on wetlands in Oregon;

(9) There are often conflicts between wetland protection and other resource values and uses;

(10) Uncoordinated regulation of wetlands by local, state and federal agencies can cause confusion, frustration and unreasonable delay and uncertainty for the general public; and

(11) Wetland management is a matter of this state's concern since benefits and impacts related to wetland resources can be international, national, regional and statewide in scope. [1989 c.837 §2]

**196.672 Policy.** In addition to the policy described in ORS 196.805, it is the policy of the State of Oregon to:

(1) Promote the protection, conservation and best use of wetland resources, their functions and values through the integration and close coordination of statewide planning goals, local comprehensive plans and state and federal regulatory programs.

(2) Use a single definition of "wetlands" for the purposes of ORS 196.800 to 196.905 and statewide planning goals and a single, uniform methodology of delineating wetland boundaries.

(3) Develop a statewide inventory of wetlands based on uniform identification standards and criteria at a scale practicable for planning and regulatory purposes, and to make such inventory available to state agencies and local governments to facilitate better management of wetland resources and closer coordination of local, state and federal wetland programs.

(4) Maintain a stable resource base of wetlands through the mitigation of losses of wetland resources and the adoption of the procedural mitigation standard currently used by federal agencies.

(5) Establish the opportunity to increase wetland resources by encouraging wetland restoration and creation where appropriate.

(6) Reduce the delays and uncertainty which can occur in the current wetland planning and regulatory framework through improved coordination of the provisions in ORS 196.800 to 196.905 with local land use planning and regulation and by providing mechanisms for expedited permit review consistent with the protection and conservation of wetland resources.

(7) Continue to meet the requirements of federal law in the protection and management of wetland resources, while asserting the interests of this state, in concert with those of local governments in urging the federal resource and regulatory agencies to develop a uniform wetland policy and more consistent, cohesive standards to implement the Federal Water Pollution Control Act (33 U.S.C. 1344).

(8) Develop and provide information to the general public concerning the functions, values and distribution of wetlands of this state to raise public awareness of these resources.

(9) Promote the protection of wetland values on private lands by developing and using public recognition programs, incentives and other nonregulatory actions.

(10) Encourage wetlands as an interim use of mining and construction sites on lands that were not originally wetlands and are designated for other than wetland purposes in an acknowledged comprehensive plan, while insuring that interim wetland use does not limit the future use of such sites for mining and construction. [1989 c.837 §3]

**196.674 Statewide Wetlands Inventory; rules.** (1) The Department of State Lands shall compile and maintain a comprehensive Statewide Wetlands Inventory.

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

(3) The Department of State Lands shall revise the inventory maps as new or more complete information becomes available.

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

(5) The Department of State Lands shall provide each state agency with a copy of the inventory upon request.

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

(7) A wetland inventory developed by another party may be utilized by the Department of State Lands if it is consistent with standards adopted pursuant to this section, after consulting with the affected local government, and is reviewed and approved by the Department of State Lands as complying with the standards adopted pursuant to subsection (2) of this section.

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

(9) In compiling and updating the Statewide Wetlands Inventory, the Department of State Lands shall identify opportunities for wetland creation, restoration and enhancement when the information is available. [1989 c.837 §6; 2003 c.253 §6]

**196.676 Response to notices from local governments.** The Department of State Lands shall respond to the notice received from local governments pursuant to ORS 215.418 (1) and 227.350 (1) within 30 days of receipt of the notice. The response shall state whether a permit is or in the future will be required or whether a permit has been issued by the department for the activity which is subject to notice. [1989 c.837 §7]

**196.678 Wetland conservation plans; contents; procedure for adopting.** (1) Any city or county may develop and submit to the Department of State Lands a wetland conservation plan for review pursuant to the provisions of ORS 196.678 to 196.684.

(2) A wetland conservation plan shall include the following elements:

(a) A description and maps of the area to be covered by the plan;

(b) A detailed inventory of the wetlands, identifying the location, quality and quantity of the wetland resource and the source of the water for the wetlands within the area covered by the plan;

(c) An assessment of wetland functions and values, including an historical analysis of wetland degradation, alterations and losses;

(d) Designation of wetland areas for protection, conservation or development. Wetlands within areas designated for development shall be delineated to determine regulatory boundaries;

(e) A mitigation plan, including a program for replacement of planned wetland losses and restoration of lost functions and values through creation of new wetlands or enhancement of existing wetland areas which designates specific sites within the plan area and actions for restoration and enhancement;

(f) Policies and implementing measures establishing protection, conservation and best use of the wetlands in the plan area;

(g) Specification of sites for fill or removal, or both, and the conditions and procedures under which fill or removal, or both, may occur;

(h) Monitoring provisions that insure the wetland mitigation measures are implemented and mitigation goals are achieved;

(i) Identification of public uses of the wetlands and waters and conflicting planned uses; and

(j) Specification of buffer areas and uses allowed on lands which are adjacent to wetlands and which are necessary to maintain, protect or restore wetland functions and values.

(3) The proposed wetland conservation plan shall be adopted by the affected local government according to the procedures set forth in ORS 197.610 to 197.625. [1989 c.837 §10]

**196.681 Duties of department; standards for approval of plan; conditions for approval; order.** (1) In accordance with rules adopted pursuant to this chapter, the Department of State Lands shall:

(a) Review any proposed wetland conservation plan or proposed amendment to an approved wetland conservation plan against the standards in this section;

(b) Prepare a proposed order that approves, approves with conditions or denies the proposed wetland conservation plan or proposed amendment to an approved wetland conservation plan;

(c) Provide notice and the opportunity for public hearing and comment on the proposed order;

(d) Consult with affected local, state and federal agencies; and

(e) Consider the applicable findings made in the order of acknowledgment issued by the

Land Conservation and Development Commission.

(2) The Director of the Department of State Lands may approve by order a wetland conservation plan that includes the necessary elements of ORS 196.678 (2) and meets the standards of subsections (3) and (4) of this section.

(3) A wetland conservation plan shall comply with the following standards:

(a) Uses and activities permitted in the plan including fill or removal, or both, conform to sound policies of conservation and will not interfere with public health and safety;

(b) Uses and activities permitted in the plan including fill or removal, or both, are not inconsistent with the protection, conservation and best use of the water resources of this state and the use of state waters for navigation, fishing and public recreation; and

(c) Designation of wetlands for protection, conservation and development is consistent with the resource functions and values of the area and the capability of the wetland area to withstand alterations and maintain important functions and values.

(4) Wetland areas may be designated for development including fill or removal, or both, only if they meet the following standards:

(a) There is a public need for the proposed uses set forth in the acknowledged comprehensive plan for the area;

(b) Any planned wetland losses shall be fully offset by creation, restoration or enhancement of wetland functions and values or in an estuarine area, estuarine resource replacement is consistent with ORS 196.830; and

(c) Practicable, less damaging alternatives, including alternative locations for the proposed use are not available.

(5) Approval by the director of a wetland conservation plan shall be conditioned upon adoption by the affected local governments of comprehensive plan policies and land use regulations consistent with and sufficient to implement the wetland conservation plan. Appropriate implementing measures may include the following planning and zoning requirements regulating:

(a) Adjacent lands or buffer areas necessary to maintain, protect or restore wetland functions and values, including riparian vegetation, and the uses to be allowed in those areas;

(b) Sites for mitigation of impacts from development activities;

(c) Upland areas adjacent to wetlands; and

(d) Activities or location of buildings, structures and improvements which may affect wetland values or functions, such as storm water runoff.

(6) The director shall issue an order approving, approving with conditions or denying a wetland conservation plan, including a clear statement of findings which sets forth the basis for the approval, conditioning or denial. The order shall include:

(a) A clear statement of findings that the elements specified in ORS 196.678 (2) have been developed;

(b) The findings in support of the determination of compliance or noncompliance with the standards in subsections (3) and (4) of this section; and

(c) The conditions under which fill or removal or both may occur.

(7) The director may, as a part of an order approving a plan, authorize site-specific fill or removal without an individual permit as required by ORS 196.810 provided that:

(a) The director adopts findings demonstrating that fill or removal for any proposed project complies with ORS 196.682 (1)(a) to (e); or

(b) The director adopts findings that specific areas of fill or removal within areas designated

as development in the plan meet the following standards:

(A) The fill or removal approved by the order will result in minimal impacts to the wetland system in the planning area;

(B) The public need for the proposed area of fill or removal outweighs the environmental damage likely to result from full development;

(C) The director conditions any such order as necessary to ensure that the fill or removal, or both, is designed to minimize impacts from implementing the project; and

(D) Full replacement of wetland losses is provided through creation, restoration or enhancement of wetlands with comparable functions and values.

(8) Upon a finding by the director that a fill or removal, or both, authorized under subsection (7)(b) of this section has caused or is likely to cause more than minimal adverse impact to the wetland system considering required mitigation conditions, the director shall revise the order to require individual permit review according to ORS 196.682 or provide additional conditions to ensure that adverse impacts are minimal. Such revision shall not be subject to ORS 196.684. [1989 c.837 §11; 1999 c.59 §52]

**196.682 Permits required for removal or fill; conditions on issuance of permit. (1)**

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

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

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

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

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

(e) Is conditioned to ensure wetland creation, restoration, enhancement or preservation measures are implemented to fully replace impacted resources.

(2) In any order approving a plan that authorizes any fill or removal or both, without the necessity of subsequently obtaining an individual permit, the director shall condition such approval as necessary to ensure that the project complies with the conditions of subsection (1) of this section and clearly delineates the wetland area in which fill or removal, or both, is to occur. [1989 c.837 §12; 2007 c.849 §12; 2009 c.343 §16; 2011 c.370 §4]

**196.684 Amendment of plans; review of plans by department; review of orders by Land Use Board of Appeals. (1)** Local governments shall provide notice to the Department of State Lands of any proposed amendments to the land use plan and ordinances affecting lands subject to a wetland conservation plan approved under this section.

(2) Amendments to plan policies, maps and implementing ordinances by the local government within an approved wetland conservation plan shall be reviewed by the department

against the requirements of this section. These provisions do not exempt local governments from the provisions of ORS 197.610 to 197.625.

(3) The Director of the Department of State Lands shall provide notice and the opportunity for public comment and hearing as defined by rule on the matter of including the amendment in the wetland conservation plan.

(4) If the director finds that the proposed local government amendment to acknowledged comprehensive plan and land use regulations meets the requirements of ORS 196.681, the director shall approve the plan by order, and notify the local government within 10 days of the completion of the public review provided in subsection (3) of this section.

(5) If the amendments to acknowledged comprehensive plan and land use regulations adopted by the local government are determined not to comply with the requirements of ORS 196.668 to 196.692, 196.800, 196.810, 196.825, 196.830, 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350, the director shall revoke the approval order or amend the order to insure compliance with the requirements of ORS 196.668 to 196.692, 196.800, 196.810, 196.825, 196.830, 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350.

(6) The department shall review each approved wetland conservation plan every five years. After such review the director shall either modify, reissue or rescind the order approving the plan.

(7) In conducting the five-year review of an approved wetland conservation plan, the director shall provide notice and the opportunity for public comment and hearing on whether:

(a) There has been a substantial change in circumstances that would affect the wetland resources subject to the plan and would adversely affect the compliance of the plan with the standards in ORS 196.681;

(b) Changes have been made in applicable state law, statewide land use planning goals, federal law or agency rules that require the plan to be changed; and

(c) In the director's evaluation, the plan as implemented over the preceding five years meets the goals established in the plan.

(8) Wetland conservation plans approved by the Director of the Department of State Lands pursuant to ORS 196.668 to 196.692 shall be deemed to comply with the requirements of any statewide planning goals relating to wetlands, other than estuarine wetlands, for those areas, uses and activities which are regulated by the plan.

(9) An order by the director regarding approval, amendment or review of a wetland conservation plan shall be reviewable by the Land Use Board of Appeals as a land use decision of a state agency. For the purpose of such review, the director's order shall not become final until the local government adopts its wetland conservation plan or plan amendment. The Land Use Board of Appeals shall consolidate for review appeals of the director's order and the local government adoption. The Land Use Board of Appeals shall review such order for compliance with the requirements of ORS 196.668 to 196.692, 196.800, 196.810, 196.825, 196.830, 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350.

(10) Nothing in this section shall be construed to require a contested case proceeding regarding approval, amendment or review of a wetland conservation plan.

(11) Nothing in this section shall be construed to affect the evaluation of a permit application in areas that do not have a wetland conservation plan.

(12) Upon a finding by the director, after a public hearing, that an affected local government

is not enforcing the comprehensive plan provisions or land use regulations set forth in the conditions of the order, as specified in ORS 196.681 (5), and that such lack of enforcement has resulted or would result in adverse impacts to wetlands, the director shall modify, suspend or revoke approval of the wetland conservation plan. [1989 c.837 §13]

**196.686 Acknowledged estuary management plans; review and approval; hearings; final order.** (1) For the purposes of this section, an acknowledged estuary management plan includes the comprehensive plan and land use regulations adopted by cities and counties to satisfy the requirement of statewide planning goals related to estuarine resources including shoreland portions of estuarine sites designated for development as those plans and regulations existed on January 1, 1989.

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

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

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

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

(6) Within 10 days of acceptance of a request for review, the department shall provide notice to affected state agencies, local governments, federal agencies and the public of receipt of the acknowledged estuary management plan and of the request for review and approval of the acknowledged estuary management plan as a wetland conservation plan.

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

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

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

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

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

(b) A hearing is requested and the request:

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

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

(C) Provides sufficient information for the director to determine that there is probable cause to believe that the estuary management plan does not meet the standards for approving wetland conservation plans or unreasonably interferes with the use of the estuary for navigation, fisheries

or public recreation.

(11) The director shall approve the acknowledged estuary management plan as a wetland conservation plan by order unless the director finds by a preponderance of the evidence that the estuary management plan does not meet the standards for approving wetland conservation plans or unreasonably interferes with the use of the estuary for navigation, fisheries or public recreation or that substantial fills proposed in an estuary management plan for nonwater dependent use are not for a public use and would not satisfy a public need that outweighs harm to navigation, fisheries or public recreation.

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

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

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

- (a) Is designed or configured to minimize alterations to waters of this state;
- (b) Is the minimum size necessary to reasonably provide for the proposed use;
- (c) Is consistent with the resource capabilities of the area and the purposes of the management unit, unless this has been previously determined in the approved estuary management plan;
- (d) Is designed to minimize impacts from implementing the project; and
- (e) Has estuarine resource replacement measures for creation, restoration, enhancement or preservation that replaces impacted resources.

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

(16) Following approval by the director of an estuary management plan, the requirements of ORS 196.684 shall apply to the approved estuary management plan. [1989 c.837 §14; 2007 c.849 §13; 2009 c.343 §17; 2011 c.370 §5]

**196.687 Regulation of alteration or fill of artificially created wetlands. (1)**

Notwithstanding the provisions of ORS 196.600 to 196.905, state or local governments shall not prohibit or restrict the alteration or fill of wetland areas up to one acre in size that have been artificially created from upland for the purpose of controlling, storing or maintaining storm water.

(2) An area that was developed as a storm water detention or retention facility as a condition of a development approval shall not be altered or filled without acceptance by the approving authority of a plan to mitigate the loss of functional capabilities of the detention or retention facility.

(3) Until a local government adopts an ordinance to conform its comprehensive plan and land use regulations to the provisions of this section, the provisions of subsection (1) of this section

shall apply directly to proposed activities in wetland areas. Any portion of a goal, rule, comprehensive plan, land use regulation or ordinance not in conformance with the provisions of this section on September 9, 1995:

- (a) Shall not be implemented or enforced; and
- (b) Has no legal effect.

(4) The provisions of this section do not apply to land used to mitigate the loss of wetlands.

(5) If the Department of State Lands assumes responsibility under 33 U.S.C. §1344(g) of the Federal Water Pollution Control Act, ORS 196.600 to 196.905 shall apply to artificially created wetlands described in subsections (1) and (2) of this section. [1995 c.482 §1]

**196.688 Public information program.** (1) The Department of State Lands shall develop a public information program to educate permit applicants and the general public about:

- (a) Wetland functions and values.
- (b) The status and trends of Oregon's wetlands.
- (c) The Statewide Wetlands Inventory.
- (d) Wetland regulation.

(2) Upon request, the department shall, within the limits of staffing ability, provide technical assistance to other state agencies and local governments and the public in identifying and delineating the boundaries of wetlands. [1989 c.837 §20]

**196.692 Rules.** (1) The Department of State Lands shall adopt rules to carry out the provisions of ORS 196.668 to 196.692, 196.800, 196.810, 196.818, 196.825, 196.830, 196.850 to 196.860, 196.885, 196.905, 197.015, 197.279, 215.213, 215.283, 215.284, 215.418 and 227.350.

(2) Rules adopted pursuant to subsection (1) of this section shall include rules governing the application for and issuance of permits to remove material from the beds or banks of any waters of this state or to fill any waters of this state including, but not limited to, clear and objective standards and criteria for determining whether to grant or deny a permit. [1989 c.837 §32; 2001 c.460 §1; 2007 c.850 §4]

## REMOVAL OF MATERIAL; FILLING

**196.795 Streamlining process for administering state removal or fill permits; application for state program general permit; periodic reports to legislative committee.** (1)

The Department of State Lands shall continue to pursue methods to streamline the process for administering permits for the removal of material from the bed or banks of any waters of this state or for filling the waters of this state, reducing paperwork, eliminating duplication, increasing certainty and timeliness and enhancing resource protection. The efforts of the Department of State Lands shall include but need not be limited to applying to the United States Army Corps of Engineers for a state program general permit as authorized in federal regulations implementing section 404 of the Federal Water Pollution Control Act, and section 10 of the Rivers and Harbors Act of 1899, as amended. In conjunction with these activities, the Department of State Lands may continue to investigate the possibility of assuming the federal regulatory program under 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act.

(2) The department shall report periodically to the appropriate legislative committee on the progress in implementing subsection (1) of this section. [1995 c.474 §1; 1997 c.116 §1; 1999

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

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

(2) “Estuary” means:

(a) For waters other than the Columbia River, the body of water from the ocean to the head of tidewater that is partially enclosed by land and within which salt water is usually diluted by fresh water from the land, including all associated estuarine waters, tidelands, tidal marshes and submerged lands; and

(b) For the Columbia River, all waters from the mouth of the river up to the western edge of Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged lands.

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

(4) “General authorization” means an authorization granted under ORS 196.850 for a category of activities involving removal or fill, or both, without a permit.

(5) “General permit” means a permit for removal activities or fill activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes.

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

(7) “Large woody debris” means any naturally downed wood that captures gravel, provides stream stability or provides fish habitat, or any wood placed into waters of this state as part of a habitat improvement or conservation project.

(8) “Material” means rock, gravel, sand, silt and other inorganic substances, and large woody debris, removed from waters of this state and any materials, organic or inorganic, used to fill waters of this state.

(9) “Mitigation” means the reduction of adverse effects of a proposed project by considering, in the following order:

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

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

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

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

(e) Compensating for the effect by creating, restoring, enhancing or preserving substitute functions and values for the waters of this state.

(10) “Person” means a person, a public body as defined in ORS 174.109, the federal government, when operating in any capacity other than navigational servitude, or any other legal entity.

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

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

(13) “Removal” means:

(a) The taking of more than 50 cubic yards or the equivalent weight in tons of material in any waters of this state in any calendar year; or

(b) The movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation.

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

(15) “Waters of this state” means all natural waterways, tidal and nontidal bays, intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the boundaries of this state, all other navigable and nonnavigable bodies of water in this state and those portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.

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

(17) “Wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. [Formerly 541.605 and then 196.670; 1999 c.373 §1; 2003 c.253 §7; 2003 c.738 §14; 2007 c.849 §2; 2009 c.343 §18; 2013 c.198 §1]

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

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

(3) There shall be no condemnation, inverse condemnation, other taking, or confiscating of property under ORS 196.600 to 196.905 without due process of law. [Formerly 541.610 and then 196.675; 2003 c.738 §16; 2012 c.108 §7]

**196.810 Permit required to remove material from bed or banks of waters; status of permit; exceptions; rules.** (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, a person may not remove any material from the beds or banks of any waters of this state or fill any waters of this state without a permit issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan.

(b) Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (3) and (12), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required. "Essential indigenous anadromous salmonid habitat" as defined under this section shall be further defined and designated by rule by the Department of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.

(c) A person is not required to obtain a permit under paragraph (b) of this subsection for prospecting or other nonmotorized activities resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a designated essential indigenous anadromous salmonid habitat segment in a single year. Prospecting or other nonmotorized activities may be conducted only within the bed or wet perimeter of the waterway and may not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining require a permit under paragraph (b) of this subsection.

(d) A permit is not required under paragraph (b) of this subsection for construction or maintenance of fish passage and fish screening structures that are constructed, operated or maintained under ORS 498.306, 498.316, 498.326 or 509.600 to 509.645.

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

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

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

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

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

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

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

(2) A public body, as defined in ORS 174.109, may not issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.905.

(3) Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any public body, as defined in ORS 174.109, entered into before September 13, 1967. However, no such contract, permit or lease may be renewed or extended on or after September 13, 1967, unless the person removing the material has obtained a permit under ORS 196.600 to 196.905.

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

(a) Shall contain conditions of operation that the department determines are necessary to minimize impacts to water resources or adjoining properties.

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

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

(d) Does not relieve the person from payment of a fee calculated in the manner provided in ORS 196.815. [Formerly 541.615 and then 196.680; 1993 c.765 §101; 1997 c.190 §1; 1997 c.508 §1; 2001 c.65 §1; 2001 c.923 §4; 2003 c.14 §96; 2003 c.738 §20; 2007 c.71 §63; 2007 c.625 §4; 2007 c.849 §14]

**196.815 Application for permit; rules; fees; disposition of fees.** (1) A person who is required to have a permit to remove material from the bed or banks or fill any waters of this state shall file a written application with the Director of the Department of State Lands for each individual project before performing any removal or fill.

(2)(a) Each application under subsection (1) of this section must be accompanied by a base fee in accordance with the following schedule:

(A) For a removal by a private operator, or a person contracting to perform services for a private operator, \$85.

(B) For a removal by a public body, \$250.

(C) For a removal by a commercial operator, \$250.

(D) For a fill by a private operator, or a person contracting to perform services for a private operator, \$250.

(E) For a fill by a public body, \$620.

(F) For a fill by a commercial operator, \$620.

(G) For erosion-flood repair, including riprap, no fee.

(b) In addition to the base fee for removal established under paragraph (a) of this subsection, each applicant shall also pay as part of the application fee the following fee based on the volume of removal material:

(A) Less than 500 cubic yards, no volume fee.

(B) 500 to less than 5,000 cubic yards, \$125.

(C) 5,000 to less than or equal to 50,000 cubic yards, \$250.

(D) Over 50,000 cubic yards, \$375.

(c) In addition to the base fee for fill established under paragraph (a) of this subsection, each applicant shall also pay as part of the application fee the following fee based on the volume of fill material:

(A) Less than 500 cubic yards, no volume fee.

(B) 500 to less than 3,000 cubic yards, \$125.

(C) 3,000 to less than or equal to 10,000 cubic yards, \$250.

(D) Over 10,000 cubic yards, \$375.

(d) The department may establish by rule a volume-based fee for the commercial removal of sand and gravel from the waters of this state for use in administering the provisions of the fill and

removal law in this state.

(e) For the purposes of this subsection:

(A) "Private operator" means any person undertaking a project for exclusively a nonincome-producing and nonprofit purpose;

(B) "Public body" means federal, state, and local governmental bodies, unless specifically exempted by law, engaged in projects for the purpose of providing free public services;

(C) "Commercial operator" means any person undertaking a project having financial profit as a goal;

(D) "Riprap" means the facing of a streambank with rock or similar substance to control erosion in accordance with rules adopted by the Department of State Lands; and

(E) "Erosion-flood repair" means riprap or any other work necessary to preserve existing facilities and land from flood and high streamflows, in accordance with regulations promulgated by the department.

(3) For each application that involves both removal and filling, the application fee assessed shall be either for removal or filling, whichever is higher according to the fee schedule in subsection (2) of this section.

(4) The department may waive the fees specified in subsection (2) of this section for a permit that will be used to perform a voluntary habitat restoration project.

(5) A person who receives an emergency authorization under ORS 196.810 to remove material from the beds or banks of any waters of this state or to fill any waters of this state shall, within 45 days after receiving the authorization, submit a fee to the department calculated in the manner provided under this section for permit applications.

(6) Each holder of a material removal or fill permit shall pay a fee during the term of the permit in accordance with the schedule set forth in subsection (2) of this section, except that the applicant shall pay only the base fee. For multiyear permits valid over a period of more than one year, the department may assess a one-time fee that covers all fees due under subsection (2) of this section for the period of the permit. The permit shall be suspended during any period of delinquency of payment as though no permit was applied for. Notwithstanding this subsection the director may, before granting a renewal of the permit, require the permittee to show that the continued exercise of the permit is consistent with the protection, conservation and best use of the water resources of this state.

(7) Fees received under this section shall be credited to the Common School Fund for use by the department in administration of ORS 196.600 to 196.905.

(8) The director shall issue an order revising the fees specified in this section on January 1 of each year, beginning in 2009, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. The director shall round the amount of each fee to the nearest dollar. The revised fees shall take effect January 1 and apply for that calendar year.

[Formerly 541.620 and then 196.685; 2007 c.849 §1; 2009 c.342 §1; 2009 c.882 §2]

**196.816 General permits allowing removal of certain amount of material for maintaining drainage; rules; waiver of fees.** Notwithstanding ORS 196.810, the Department of State Lands may establish by rule a general permit that allows the removal of no more than 100 cubic yards of material from waters of this state, including in essential indigenous anadromous salmonid habitat, for the purpose of maintaining drainage and protecting agricultural land. The department may waive the fees specified in ORS 196.815 for removal taking place under the

provisions of this section. [2011 c.713 §7]

**196.817 General permits; rules.** (1)(a) Notwithstanding ORS 196.810, the Department of State Lands may establish a removal or fill general permit:

(A) By rule for processing applications on a statewide or geographic basis; or

(B) By order for an applicant or group of applicants to cover activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes.

(b) The department must find that the project is in compliance with the review standards set forth in ORS 196.600 to 196.905 and would not result in long-term harm to water resources of this state.

(c) The department shall condition any such general permit upon actions necessary to minimize environmental effects.

(2)(a) Any person proposing to conduct an action under a general permit specified in subsection (1)(a)(A) of this section shall apply to the department in accordance with procedures set forth by the department by rule.

(b) Any person proposing to conduct an action under a general permit specified in subsection (1)(a)(B) of this section shall apply to the department in accordance with procedures set forth by the department by order.

(3) The department shall amend or rescind any general permit upon a determination that the activities conducted under the permit have resulted in or would result in unacceptable individual or cumulative environmental effects or long-term harm to the water resources of this state.

(4) Any person proposing to conduct an action under a general permit shall pay the applicable fee required under ORS 196.815 for individual permit applications. [2007 c.849 §9; 2011 c.559 §1]

**196.818 Wetland delineation reports; review by Department of State Lands; fees; rules.**

(1) A person or governmental body requesting a permit under ORS 196.810 shall submit a wetland delineation report to the Department of State Lands for a determination of:

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

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

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

(2) A person or governmental body must pay a nonrefundable fee of \$350 to the department when submitting a wetland delineation report under subsection (1) of this section.

(3) The department shall:

(a) Review the wetland delineation report submitted under subsection (1) of this section no more than 120 days after the date on which the person or governmental body submits the report; and

(b) Give priority to the review of a wetland delineation report that is submitted with or in advance of an application for a permit required under ORS 196.810 if the permit would authorize activities on the land parcel that is the subject of the wetland delineation report.

(4) All determinations made by the department under subsection (1)(a) and (b) of this section:

(a) Must be made by a person with expertise in wetlands hydrology, soil and vegetation; and

(b) Expire five years after the date on which a final determination is made.

(5) Five years after the date on which a final determination has been made under subsection (1)(a) or (b) of this section, if the owner of the land parcel that is the subject of the determination is conducting activities that require a permit under ORS 196.810, the landowner shall conduct a review of the land parcel. If the baseline conditions leading to the final determination have sufficiently changed to require a new determination, then the landowner shall submit a new wetland delineation report under subsection (1) of this section. If the baseline conditions leading to the final determination have not sufficiently changed to require a new determination, then the final determination of the department, notwithstanding subsection (4)(b) of this section, may be extended by five years.

(6) The department may waive or suspend the requirements of this section for the purpose of issuing an emergency authorization under ORS 196.810.

(7) The fee described in subsection (2) of this section is in addition to any permit application fee required under ORS 196.815. A person or governmental body submitting a revised report to replace a previously rejected report must pay an additional nonrefundable fee of \$100.

(8) Delineations made pursuant to this section, and determinations made under this section, must comport with:

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

(b) Any subsequent federal supplements to the manual or applicable guidance documents issued by the United States Army Corps of Engineers, including guidance documents for the area in which a delineation will take place, as adopted by rule of the Director of the Department of State Lands. Such rules must comply with those federal supplements and guidance documents.

(9) The director shall issue an order revising the fee specified in subsection (2) of this section on January 1 of each year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. The director shall round the amount to the nearest dollar. The revised fee shall take effect January 1 and apply for that calendar year.

(10) Fees received under this section shall be credited to the Common School Fund for use by the department in administration of ORS 196.600 to 196.905. [2007 c.850 §2; 2012 c.108 §5]

**Note:** Sections 1 to 4, chapter 108, Oregon Laws 2012, provide:

**Sec. 1.** Section 2 of this 2012 Act is added to and made a part of ORS 196.600 to 196.905. [2012 c.108 §1]

**Sec. 2. Wetland delineation determinations.** (1)(a) A person may request an independent review of a determination made under:

(A) ORS 196.818 (1)(a), if the Department of State Lands determines that wetlands are present on a land parcel owned by the person; or

(B) ORS 196.818 (1)(b), if the department determines where the boundaries of a wetland are located on a land parcel owned by the person.

(b) Notwithstanding paragraph (a) of this subsection, a person may not request an independent review of a determination made under ORS 196.818 (1)(a) or (b) unless the person first applies to the department for reconsideration of the determination, as required by the department by rule.

(2)(a) Upon receiving a request for independent review under subsection (1) of this section, the department shall enter into an agreement with the person making the request under which a panel of independent reviewers may modify a determination made under ORS 196.818 (1)(a) or (b).

(b) Notwithstanding paragraph (a) of this subsection, the department is not required to enter into an agreement with the person making the request if the person does not agree to make the decision of the panel of independent reviewers final and binding.

(3)(a) Review under this section must be conducted by a panel of three individuals who are well informed on matters relating to waters of this state. A reviewer:

(A) Shall disclose all prior knowledge of the land parcel that is the subject of the review and any potential or actual conflicts of interest;

(B) Must have no interest in the land parcel that is the subject of the review;

(C) Must have five years of experience with wetland plant identification, hydric soil determinations, wetland hydrology monitoring, wetland boundary mapping and related data analysis; and

(D) Must have been a principal investigator for four wetland delineation reports submitted under ORS 196.818 and approved by the department within the five years preceding the date on which review is requested.

(b) As used in this subsection, “principal investigator” means an individual who has been responsible for collecting more than 33 percent of the field data for a wetland delineation report and for mapping at least 33 percent of the wetland boundary for a wetland delineation report.

(4) The panel of independent reviewers shall be selected in the following manner:

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

(b) The person requesting the review under subsection (1) of this section shall select one reviewer; and

(c) The reviewers selected under paragraphs (a) and (b) of this subsection shall jointly select one reviewer.

(5) A person must request a review under this section no more than 21 days after the date on which the department reconsiders a determination made under ORS 196.818 (1)(a) or (b).

(6) The panel of independent reviewers must be selected no more than 30 days after the date on which the person requests a review. If the reviewers selected under subsection (4)(a) and (b) of this subsection do not jointly select a third reviewer under subsection (4)(c) of this section on or before the 30th day, the department shall request the United States Army Corps of Engineers to provide a reviewer who has experience reviewing wetland delineations. A reviewer provided under this subsection is exempt from subsection (3)(a)(D) of this section.

(7) The panel of independent reviewers must reach a decision no more than 60 days after the date on which the third reviewer is selected or provided. As part of the decision reached under this subsection, the reviewers must determine the cost of the review, including the reviewers’ expenses and fees. The parties to the agreement shall each pay half of the cost. [2012 c.108 §2]

**Sec. 3.** Section 2 of this 2012 Act applies to determinations made by the Department of State Lands under ORS 196.818 (1)(a) and (b) on or after the effective date of this 2012 Act [January 1, 2013]. [2012 c.108 §3]

**Sec. 4.** Sections 1 and 2 of this 2012 Act are repealed on January 2, 2022. [2012 c.108 §4]

**196.820 Prohibition against issuance of permits to fill Smith Lake or Bybee Lake; exception.** (1) Notwithstanding any provision of ORS 196.600 to 196.905 to the contrary, except as provided in subsection (2) of this section, the Director of the Department of State Lands shall not issue any permit to fill Smith Lake or Bybee Lake, located in Multnomah County, below the contour line which lies 11 feet above mean sea level as determined by the 1947 adjusted United States Coastal Geodetic Survey Datum.

(2) Notwithstanding the provision of subsection (1) of this section, the Director of the Department of State Lands may issue a permit to fill Smith Lake or Bybee Lake, located in Multnomah County, if such fill is to enhance or maintain fish and wildlife habitat at or near Smith Lake or Bybee Lake. A fill shall be considered to be for the purpose of enhancing or maintaining fish and wildlife habitat if the proposed fill is approved by the State Department of Fish and Wildlife. [Formerly 541.622 and then 196.690]

**196.825 Criteria for issuance of permit; conditions; consultation with public bodies; hearing; appeal.** (1) The Director of the Department of State Lands shall issue a permit applied for under ORS 196.815 if the director determines that the project described in the application:

(a) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and  
(b) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.

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

(a) The landowner's consent;  
(b) A right, title or interest with respect to the property that is sufficient to undertake the removal or fill activity; or  
(c) A court order or judgment authorizing the use of the property.  
(3) In determining whether to issue a permit, the director shall consider all of the following:  
(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

(b) The economic cost to the public if the proposed fill or removal is not accomplished.  
(c) The availability of alternatives to the project for which the fill or removal is proposed.  
(d) The availability of alternative sites for the proposed fill or removal.  
(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety.

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

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

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

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

(4) The director may issue a permit for a project that results in a substantial fill in an estuary

for a nonwater dependent use only if the project is for a public use and would satisfy a public need that outweighs harm to navigation, fishery and recreation and if the proposed fill meets all other criteria contained in ORS 196.600 to 196.905.

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

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

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

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

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

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

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

(b) Issue a permit decision within 90 days after the date the director determines that the application is complete unless:

- (A) An extension of time is granted under subsection (10)(b) of this section; or
- (B) The applicant and the director agree to a longer time period.

(9) Permits issued under this section shall be in lieu of any permit or authorization that might be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045,

468.055, 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

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

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

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

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

(12) As used in this section:

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

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

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

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

(C) The fee required under ORS 196.815;

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

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

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

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

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

(c) “Linear facility” includes any railway, highway, road, pipeline, water or sewer line, communication line, overhead or underground electrical transmission or distribution line or similar facility. [Formerly 541.625 and then 196.695; 1991 c.735 §25; 1993 c.741 §18; 1995 c.370 §1; 1995 c.472 §1; 2001 c.460 §2; 2001 c.516 §3; 2003 c.253 §§9,10; 2003 c.738 §§17a,18a; 2007 c.849 §§4,5; 2009 c.342 §2; 2009 c.343 §20; 2011 c.370 §1]

**196.830 Estuarine resource replacement as condition for fill or removal from estuary; considerations; other permit conditions.** (1) As used in this section, “estuarine resource

replacement” means the creation, restoration or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary, such as its natural biological productivity, habitats and species diversity, unique features and water quality.

(2) Except as provided in subsection (4) of this section, the Director of the Department of State Lands shall require estuarine resource replacement as a condition of any permit for filling or removal of material from an intertidal or tidal marsh area of an estuary.

(3) If the director requires estuarine resource replacement, the director shall consider:

(a) The identified adverse impacts of the proposed activity;

(b) The availability of areas in which replacement activities could be performed;

(c) The provisions of land use plans for the area adjacent to or surrounding the area of the proposed activity;

(d) The recommendations of any interested or affected state or local agencies; and

(e) The extent of compensating activity inherent in the proposed activity.

(4) Notwithstanding any provisions of this chapter and ORS chapters 195 and 197 or the statewide planning goals adopted thereunder to the contrary, the director may:

(a) Waive estuarine resource replacement in part for an activity for which replacement would otherwise be required if, after consultation with appropriate state and local agencies the director determines that:

(A) There is no alternative manner in which to accomplish the purpose of the project;

(B) There is no feasible manner in which estuarine resource replacement could be accomplished;

(C) The economic and public need for the project and the economic and public benefits resulting from the project clearly outweigh the potential degradation of the estuary;

(D) The project is for a public use; and

(E) The project is water dependent or the project is publicly owned and water related; or

(b) Waive estuarine resource replacement wholly or in part for an activity for which replacement would otherwise be required if the activity is:

(A) Filling for repair and maintenance of existing functional dikes and negligible physical or biological damage to the tidal marsh or intertidal areas of the estuary will result;

(B) Riprap to allow protection of an existing bankline with clean, durable erosion resistant material when a need for riprap protection is demonstrated that cannot be met with natural vegetation and no appreciable increase in existing upland will occur;

(C) Filling for repair and maintenance of existing roads and negligible physical or biological damage to the tidal marsh or intertidal areas of the estuary will result;

(D) Dredging for authorized navigation channels, jetty or navigational aid installation, repair or maintenance conducted by or under contract with the Army Corps of Engineers;

(E) Dredging or filling required as part of an estuarine resource restoration or enhancement project agreed to by local, state and federal agencies; or

(F) A proposed alteration that would have negligible adverse physical or biological impact on estuarine resources.

(5) Nothing in this section is intended to limit the authority of the director to impose conditions on a permit under ORS 196.825. [Formerly 541.626 and then 196.700; 2005 c.22 §136]

**196.835 Hearing regarding issuance of permit; procedure; appeals; suspension of permit pending appeal.** Any person aggrieved or adversely affected by the grant of a permit by

the Director of the Department of State Lands may file a written request for hearing with the director within 21 days after the date the permit was granted. If the director finds that the person making the written request has a legally protected interest which is adversely affected by the grant of the permit, the director shall set the matter down for hearing within 30 days after receipt of the request. The hearing shall be conducted as a contested case in accordance with ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. The permittee shall be a party to the proceeding. Within 45 days of the hearing the director shall enter an order containing findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's original order. Appeals from the director's final order may be taken to the Court of Appeals in the manner provided by ORS 183.482. A permit to fill granted by the director may be suspended by the director during the pendency of the proceedings before the director and any appeal. The director shall not suspend the permit unless the person aggrieved or adversely affected by grant of permit makes a showing before the director by clear and convincing evidence that commencement or continuation of the fill would cause irreparable damage and would be inconsistent with ORS 196.600 to 196.905. [Formerly 541.627 and then 196.705; 2003 c.738 §19]

**196.845 Investigations and surveys.** In considering applications for permits, the Director of the Department of State Lands may cause investigations or surveys to be made of the location of the work contemplated to determine whether such removal or filling is consistent with ORS 196.805 and 196.825. [Formerly 541.635 and then 196.715]

**196.850 Waiving permit requirement in certain cases; rules; notice; review; fees; disposition of fees.** (1) Notwithstanding ORS 196.810, the Department of State Lands may, by rule, grant general authorization for removal of material from the bed or banks of any waters of this state or the filling of any waters of this state without a permit from the department if the department finds that the activities subject to the general authorization:

- (a) Are substantially similar in nature;
  - (b) Would cause only minimal individual and cumulative environmental impacts; and
  - (c) Would not result in long-term harm to water resources of the state.
- (2) A general authorization may be granted on a statewide or other geographic basis.

(3) The department shall condition any general authorization upon actions necessary to minimize environmental impacts.

(4) The department shall provide notice of any proposed general authorization to affected federal and state agencies, local governments, tribal governments and the public. The notice shall include:

- (a) A clear description of the proposal; and
  - (b) Draft findings and any proposed conditions pursuant to this section.
- (5) Any person proposing to conduct an action under a general authorization shall:

- (a) Notify the department in writing prior to conducting the action.
- (b) Pay the applicable fee to the department as determined under subsection (9) of this section.

(6) The department shall amend or rescind any general authorization upon a determination that the activities conducted under the authorization have resulted in or would result in more than minimal environmental impacts or long-term harm to the water resources of this state.

- (7) The department shall review each general authorization adopted pursuant to this section

every five years. The review shall include public notice and opportunity for public hearing. After the review, the department may either modify, reissue or rescind the general authorization.

(8) In addition to the grounds for review set forth in ORS 183.400 (4), on judicial review of the validity of a rule adopted under this section, the rule shall be reviewable for substantial evidence in the rulemaking record. The record shall include copies of all documents before the agency relevant to the findings required by subsection (1) of this section.

(9) If the rule adopting a general authorization under this section is:

(a) For actions that result in moving less than 50 cubic yards of material, the department may not charge a fee for the general authorization.

(b) For actions that result in moving 50 or more cubic yards of material, the department may establish a fee for the general authorization. The fee may not exceed \$250 and shall be based on the cost of processing the general authorization.

(10) The department shall credit any fee collected under this section to the Common School Fund for use by the department in administration of ORS 196.600 to 196.905. [1989 c.837 §9 (enacted in lieu of 541.640); renumbered 196.850 in 1989; 2003 c.253 §11; 2007 c.849 §6]

**196.855 Noncomplying removal of material or filling as public nuisance.** The removal of material from the beds or banks or filling any of the waters of this state without a permit issued under ORS 196.825, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan, is a public nuisance. [Formerly 541.645 and then 196.720; 2007 c.71 §65]

**196.860 Enforcement powers of director.** (1) If the Director of the Department of State Lands determines that material is being removed from or filling is occurring in any of the waters of this state without a permit issued under ORS 196.825, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan, the director may:

(a) Investigate, hold hearings, make orders and take action, as provided in ORS 196.600 to 196.905, as soon as possible.

(b) For the purpose of investigating conditions relating to the removal or filling, through the employees or the duly authorized representatives of the Department of State Lands, enter at reasonable times upon any private or public property.

(c) Conduct public hearings in accordance with ORS chapter 183.

(d) Publish findings and recommendations as they are developed relative to public policies and procedures necessary for the correction of conditions or violations of ORS 196.600 to 196.905.

(e) Give notice of any proposed order relating to a violation by personal service or by mailing the notice by registered or certified mail to the person affected. Any person aggrieved by a proposed order of the director may request a hearing within 20 days of the date of personal service or mailing of the notice. Hearings shall be conducted under the provisions of ORS chapter 183 applicable to contested cases, and judicial review of final orders shall be conducted in the Court of Appeals according to ORS 183.482. If no hearing is requested or if the party fails to appear, a final order shall be issued upon a prima facie case on the record of the agency.

(f) Take appropriate action for the enforcement of any rules or final orders. Any violation of ORS 196.600 to 196.905 or of any rule or final order of the director under ORS 196.600 to 196.905 may be enjoined in civil abatement proceedings brought in the name of the State of

Oregon. In any such proceedings the director may seek and the court may award a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from the violation. Proceedings thus brought by the director shall set forth if applicable the dates of notice and hearing and the specific rule or order of the director, together with the facts of noncompliance, the facts giving rise to the public nuisance, and a statement of the damages to any public right of navigation, fishery or recreation, if any, resulting from the violation.

(2)(a) In addition to the administrative action the director may take under subsection (1) of this section, the director may enter an order requiring any person to cease and desist from any violation if the director determines that the violation presents an imminent and substantial risk of injury, loss or damage to water resources.

(b) An order under this subsection:

(A) May be entered without prior notice or hearing.

(B) Shall be served upon the person by personal service or by registered or certified mail.

(C) Shall state that a hearing will be held on the order if a written request for hearing is filed by the person subject to the order within 10 days after receipt of the order.

(D) May not be stayed during the pendency of a hearing conducted under paragraph (c) of this subsection.

(c) If a person subject to an order under this subsection files a timely demand for hearing, the director shall hold a contested case hearing according to the applicable provisions of ORS chapter 183. If the person fails to request a hearing, the order shall be entered as a final order upon prima facie case made on the record of the agency.

(d) Neither the director nor any duly authorized representative of the department shall be liable for any damages a person may sustain as a result of a cease and desist order issued under this subsection.

(e) The state and local police shall cooperate in the enforcement of any order issued under this subsection and shall require no further authority or warrant in executing or enforcing the order. If any person fails to comply with an order issued under this subsection, the circuit court of the county in which the violation occurred or is threatened shall compel compliance with the director's order in the same manner as with an order of that court.

(3) As used in this section, "violation" means removing material from or placing fill in any of the waters of this state without a permit or in a manner contrary to the conditions set out in a permit issued under ORS 196.825. [Formerly 541.650 and then 196.725; 2007 c.71 §66; 2007 c.849 §16]

**196.865 Revocation, suspension or refusal to renew permit.** If the Director of the Department of State Lands finds that a person holding a permit issued under ORS 196.825 is removing material from the bed or banks or filling any of the waters of this state contrary to the conditions set out in the permit, the director may revoke, suspend or refuse to renew such permit. The director may revoke a permit only after giving notice and opportunity for a hearing as provided in ORS 183.415 to 183.430, 183.440 to 183.460 and 183.470. [Formerly 541.655 and then 196.730; 2007 c.849 §17]

**196.870 Abatement proceedings; restraining order; injunction; public compensation.**

(1) In addition to any enforcement action taken under ORS 196.860, civil proceedings to abate alleged public nuisances under ORS 196.855 may be instituted at law or in equity, in the name of

the State of Oregon, upon relation of the Director of the Department of State Lands or by any person in the person's name.

(2) Before beginning any action under subsection (1) of this section, a person other than the director shall provide 60 days notice to the director of the intended action. A person other than the director may not begin an action under subsection (1) of this section if the director has commenced and is diligently prosecuting civil, criminal or administrative proceedings in the same matter.

(3) The director may institute an action in the name of the State of Oregon for a temporary restraining order or preliminary injunction if a threatened or existing nuisance under ORS 196.855 creates an emergency that requires immediate action to protect the public health, safety or welfare. The director shall not be required to furnish a bond in such proceeding.

(4) The State Land Board, the Director of the Department of State Lands and the employees or duly authorized representatives of the Department of State Lands shall not be liable for any damages a defendant may sustain as a result of an injunction, restraining order or abatement order issued under this section.

(5) A case filed under this section shall be given preference on the docket over all other civil cases except those given an equal preference by statute.

(6) In any action brought under this section, the plaintiff may seek and the court may award a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from an existing public nuisance under ORS 196.855. Any money received by the plaintiff under this subsection shall be deposited in the Common School Fund. [Formerly 541.660 and then 196.735]

**196.875 Double and treble damages for destruction of public right of navigation, fishery or recreation; costs and attorney fees.** (1) If any person, through negligence, violates ORS 196.810, the Director of the Department of State Lands, in a proceeding brought pursuant to ORS 196.870, may seek and the court may award double a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from such violation.

(2) If any person intentionally violates ORS 196.810, the director, in a proceeding brought pursuant to ORS 196.870, may seek and the court may award treble a sum of money sufficient to compensate the public for any destruction or infringement of any public right of navigation, fishery or recreation resulting from such violation.

(3) An award made pursuant to this section shall be in addition to and not in lieu of any criminal penalties imposed for a violation of ORS 196.810.

(4) In any action brought under ORS 196.870, the court shall award to the prevailing party the costs of suit and reasonable attorney fees at trial and on appeal. Subject to the provisions of ORS 20.140, any costs and attorney fees so awarded to the director shall be deposited in the Common School Fund to offset the director's expenses of bringing such action. [Formerly 541.662 and then 196.740; 2007 c.849 §18]

**196.880 Fill under permit presumed not to affect public rights; public rights extinguished.** If the Director of the Department of State Lands issues a permit to fill pursuant to ORS 196.600 to 196.905, it shall be presumed that such fill does not infringe upon the public rights of navigation, fishery or recreation, and the public rights to lands created by the fill shall be considered extinguished. [Formerly 541.665 and then 196.745]

**196.885 Annual report of fill and removal activities; contents of report.** The Director of the Department of State Lands shall submit an annual report to the State Land Board on the activities conducted under ORS 196.600 to 196.905. The annual report shall include the following:

(1) The number of fill and removal permits applied for, denied and granted, organized according to whether or not the permits were for waters subject to section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended). For all permits granted or outstanding during the prior year, a separate summary shall be included for fills and removals, organized by river or other water body, that shows:

(a) The total number of permits, the number of new permits and the number of renewal permits.

(b) The volume and acreage of fills and removals authorized during the past year, and the volume and acreage of fills and removals completed during the past year.

(2) By river or other water body, a summary of the total volume and acreage of fills and removals made under a general waiver, general permit or similar authority.

(3) A summary of mitigation measures, including a description of each mitigation project approved during the past year including the location and size of each mitigation project and a report on the status of all mitigation projects pending or completed during the past year.

(4) A summary of enforcement activities, including:

(a) The number of potential violations reported.

(b) The number of compliance investigations conducted.

(c) The results of compliance actions, including:

(A) The number of cases resolved by voluntary compliance, administrative hearings and judicial enforcement proceedings;

(B) The amount of damages and penalties assessed;

(C) The amount of damages and penalties recovered; and

(D) A brief description of each after-the-fact permit issued, including the location and size by volume and acreage.

(5) A description of staffing, including the number of full-time equivalent positions devoted to the permit program and, for each position, the qualifications and job description.

(6) The report on the Oregon Removal-Fill Mitigation Fund as required under ORS 196.655.

(7) The number of and average time for responding to notices received by local governments and the number of responses that took more than 30 days.

(8) The number of wetland conservation plans approved by the director and a description of each, including the issues raised during the approval process. [Formerly 541.670 and then 196.750; 2009 c.343 §21]

**196.890 Civil penalties.** Any person who violates any provision of ORS 196.600 to 196.905 or any rule, order or permit adopted or issued under ORS 196.600 to 196.905 shall be subject to a civil penalty in an amount to be determined by the Director of the Department of State Lands of not more than \$10,000 per day of violation. [Formerly 541.675 and then 196.755]

**196.895 Imposition of civil penalties.** (1) Civil penalties under ORS 196.890 shall be imposed as provided in ORS 183.745.

(2) The provisions of this section are in addition to and not in lieu of any other penalty or sanction provided by law. An action taken by the Director of the Department of State Lands under this section may be joined by the director with any other action taken against the same person under ORS 196.860 (1)(f).

(3) Any civil penalty recovered under this section shall be deposited in the Common School Fund for use by the Department of State Lands in administration of ORS 196.600 to 196.905, 196.990 and 541.990 and as otherwise required by law. [Formerly 541.680 and then 196.760; 1991 c.734 §12]

**196.900 Schedule of civil penalties; rules; factors to be considered in imposing civil penalties.** (1) The Director of the Department of State Lands shall adopt by rule the amount of civil penalty that may be imposed for a particular violation.

(2) In imposing a penalty under the schedule adopted under subsection (1) of this section, the director shall consider the following factors:

(a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules, orders and permits pertaining to waters of the state.

(c) The impact of the violation on public interests in fishery, navigation and recreation.

(d) Any other factors determined by the director to be relevant and consistent with the policy of ORS 196.805.

(3) The penalty imposed under this section may be remitted or mitigated upon such terms and conditions as the director determines to be proper and consistent with the policy of ORS 196.805. Upon the request of the person incurring the penalty, the director shall consider evidence of the economic and financial condition of the person in determining whether a penalty shall be remitted or mitigated. [Formerly 541.685 and then 196.765]

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

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

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

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

(3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting, cultivating, conventional crop rotation or harvesting.

(4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on lands zoned for exclusive farm use as described in ORS 215.203 for the following activities:

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

(b) Maintenance of farm roads in such a manner as to not significantly adversely affect wetlands or any other waters of this state.

(5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for subsurface

drainage by deep ripping, tiling or moling on converted wetlands that are zoned for exclusive farm use pursuant to ORS 215.203.

(6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by the Natural Resources Conservation Service of the United States Department of Agriculture, or its successor agency, so long as commercial agricultural production on the land has not been abandoned for five or more years.

(7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablishment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as in effect on January 1, 2010.

(8) The exemptions in subsections (3) to (7) of this section do not apply to any fill or removal that involves changing an area of wetlands to a nonfarm use.

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

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

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

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

(11) Nothing in ORS 196.600 to 196.905 applies to removal or filling, or both, within the beds or banks of any waters of this state conducted as part of a surface mining operation, that is the subject of a memorandum of agreement between the Department of State Lands and the State Department of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries is assigned sole responsibility for permitting as described in ORS 517.797.

(12) The Department of State Lands may adopt a rule that exempts from the requirement to obtain a permit under ORS 196.800 to 196.900 voluntary habitat restoration projects that have only minimal adverse impact on waters of this state.

(13) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the point of diversion to withdraw surface water for beneficial use if the change in the point of diversion is necessitated by a change in the location of the surface water and authorized by the Water Resources Department.

(14) As used in this section:

(a) "Converted wetlands" means agriculturally managed wetlands that, on or before June 30, 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that are managed for commercial agricultural purposes.

(b) "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any other waters of this state that are located within or adjacent to a converted wetland area.

[Formerly 541.695 and then 196.770; 1999 c.610 §1; 2009 c.342 §3; 2011 c.16 §1; 2011 c.406 §3]

**196.910 Monitoring fill and removal activities; public education and information materials; periodic reports to legislative committee.** The Department of State Lands shall:

(1) Monitor removal and fill activities, including but not limited to prospecting and placer mining, within designated essential indigenous anadromous salmonid habitat areas to determine the effects of such activities on salmonid spawning and rearing habitat and compile the results in an annual report.

(2) Cooperate with the State Department of Fish and Wildlife and other interested parties to develop and distribute public education and information materials designed to increase understanding and awareness of permit requirements and acceptable removal and fill practices related to prospecting and placer mining.

(3) Report periodically to the appropriate legislative committee on the progress of the Department of State Lands in implementing ORS 196.810. [1997 c.508 §2; 1999 c.59 §54; 2003 c.253 §14; 2007 c.354 §3]

**PENALTIES**

**196.990 Penalties.** Violation of ORS 196.810 is a misdemeanor. [Formerly subsection (4) of 541.990]