

B-Engrossed
House Bill 2436

Ordered by the House June 21
Including House Amendments dated April 16 and June 21

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Agriculture and Natural Resources)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Directs Department of State Lands to collaborate with certain entities to develop proposal, including recommended legislation for introduction in 2020 regular session, for department to assume partial authority to administer federal wetland dredge and fill permits. Sunsets January 2, 2021. [*Appropriates moneys to department for proposal purposes.*]

Allows payment for off-site compensatory mitigation to be made to Oregon Removal-Fill Mitigation Fund even if mitigation bank credits are available.

Modifies requirements applicable to Director of Department of State Lands in determining whether to issue fill or removal permit.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to removal-fill laws; creating new provisions; amending ORS 196.643 and 196.825; and de-
3 claring an emergency.

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

5 **SECTION 1. (1) As used in this section:**

6 (a)(A) **“Development activities” includes dredging, filling, grading, paving, excavation and**
7 **other activities related to making man-made changes to improved or unimproved real estate.**

8 (B) **“Development activities” does not include farming, ranching or forestry activities,**
9 **or activities that would otherwise be considered development activities under subparagraph**
10 **(A) of this paragraph if the activities are associated with:**

11 (i) **Farming, ranching or forestry activities; or**

12 (ii) **Activities by a district organized under ORS chapter 545, 547, 552, 553 or 554, including**
13 **activities that occur outside the district’s boundaries but that are related to the district’s**
14 **operations.**

15 (b) **“Mining and activities associated with mining” includes any activity involving ex-**
16 **traction of materials from the ground that is subject to regulation by the State Department**
17 **of Geology and Mineral Industries, the processing or manufacturing of the materials, mining**
18 **reclamation activities and voluntary restoration activities associated with a mining opera-**
19 **tion.**

20 (2) **The Department of State Lands shall develop a proposal, including recommendations**
21 **for legislation to be introduced during the 2020 regular session of the Legislative Assembly,**
22 **for partial assumption by the department of the authority to administer permits for the**
23 **discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 Act (P.L. 92-500, as amended).

2 (3) In developing the proposal, the Department of State Lands shall collaborate with the
3 Department of Justice, the Department of Environmental Quality, the Department of Land
4 Conservation and Development, the State Department of Fish and Wildlife, the State De-
5 partment of Agriculture, the State Forestry Department, the State Department of Geology
6 and Mineral Industries, the National Marine Fisheries Service, the United States Fish and
7 Wildlife Service, the United States Environmental Protection Agency and representatives of
8 any other state or federal agency as the Department of State Lands determines is necessary
9 for developing the proposal in a manner that will satisfy federal and state legal requirements.

10 (4) The proposal shall include provisions necessary for the Department of State Lands to
11 assume authority to administer permits for the discharge of dredge or fill materials under
12 section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended) only for:

13 (a) Development activities within an acknowledged urban growth boundary;

14 (b) Mining and activities associated with mining; and

15 (c) The creation and operation of mitigation banks.

16 (5)(a) The proposal shall include:

17 (A) Recommendations, in both narrative form and in the form of requested draft statu-
18 tory language, for the enactment of statutes, or for the amendment or repeal of ORS 196.600
19 to 196.905, section 2, chapter 45, Oregon Laws 1989, sections 1 to 14, chapter 516, Oregon
20 Laws 2001, or any other statutes or session laws, as necessary to demonstrate that the
21 statutory laws and regulations of the State of Oregon provide adequate legal authority for
22 the state to receive a grant of authority from the United States Environmental Protection
23 Agency to implement the program for partial assumption; and

24 (B) Any other provisions that the department determines are necessary to provide the
25 Legislative Assembly the opportunity, during the 2020 regular session of the Legislative As-
26 sembly, to take all actions necessary to allow for the department to formally submit to the
27 United States Environmental Protection Agency a complete application for partial assump-
28 tion, such that the United States Environmental Protection Agency may have the opportu-
29 nity to review and consider approval of the application before the convening of the 2021
30 regular session of the Legislative Assembly.

31 (b) The recommendations required under paragraph (a) of this subsection must include
32 recommendations on the amendments to statutes and session laws necessary to ensure that,
33 if any of the amendments to ORS 196.800, 196.810, 196.825, 196.850, 196.895, 196.905, 196.990,
34 390.835, 421.628 and 459.047 by sections 1 to 10, chapter 516, Oregon Laws 2001, or the repeal
35 of section 2, chapter 45, Oregon Laws 1989, by section 13, chapter 516, Oregon Laws 2001,
36 become operative, the operation will not result in permitting or regulatory requirements
37 pursuant to ORS 196.600 to 196.905 on and after the operative date that exceed the permitting
38 or regulatory requirements pursuant to ORS 196.600 to 196.905, as in effect on the effective
39 date of this 2019 Act, for activities for which the Department of State Lands is not directed
40 to propose assumption of authority to administer permits as described in subsection (4) of
41 this section.

42 **SECTION 2.** Section 1 of this 2019 Act is repealed on January 2, 2021.

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

44 196.643. (1) A person who provides off-site compensatory mitigation in order to comply with a
45 condition imposed on a permit in accordance with ORS 196.825 (5), an authorization issued in ac-

1 cordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905 may
2 make a payment for credits to **an approved mitigation bank with available credits or to** the
3 Oregon Removal-Fill Mitigation Fund. [*when:*]

4 [(a) Credits from an approved mitigation bank are not available; or]

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

7 [(B) The expenses associated with a Department of State Lands mitigation bank project in the re-
8 gion in accordance with this section and ORS 196.650 have not been fully recovered by the Department
9 of State Lands.]

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

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

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

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

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

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

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

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

37 **SECTION 4.** ORS 196.825 is amended to read:

38 196.825. (1) The Director of the Department of State Lands shall issue a permit applied for under
39 ORS 196.815 if the director determines that the project described in the application:

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

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

44 (2) If the director issues a permit applied for under ORS 196.815 to a person that proposes a
45 removal or fill activity for construction or maintenance of a linear facility, and if that person is not

1 a landowner or a person authorized by a landowner to conduct the proposed removal or fill activity
2 on a property, then the person may not conduct removal or fill activity on that property until the
3 person obtains:

4 (a) The landowner's consent;

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

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

8 (3)(a) In determining whether to issue a permit, the director shall consider [*all of*] the following:

9 [(a)] (A) The public need for the proposed fill or removal and the social, economic or other
10 public benefits likely to result from the proposed fill or removal. When the applicant for a permit
11 is a public body, the director may accept and rely upon the public body's findings as to local public
12 need and local public benefit.

13 [(b)] (B) The economic [*cost*] **impact** to the public if the proposed fill or removal is not accom-
14 plished.

15 [(c)] (C) The availability of alternatives to the project for which the fill or removal is proposed.

16 [(d)] (D) The availability of alternative sites for the proposed fill or removal.

17 [(e)] (E) Whether the proposed fill or removal conforms to sound policies of conservation and
18 would not interfere with public health and safety.

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

22 [(g)] (G) Whether the proposed fill or removal is compatible with the acknowledged comprehen-
23 sive plan and land use regulations for the area where the proposed fill or removal is to take place
24 or can be conditioned on a future local approval to meet this criterion.

25 [(h)] (H) Whether the proposed fill or removal is for streambank protection.

26 [(i)] (I) Whether the applicant has provided all practicable mitigation to reduce the adverse ef-
27 fects of the proposed fill or removal in the manner set forth in ORS 196.800. In determining whether
28 the applicant has provided all practicable mitigation, the director shall consider the findings re-
29 garding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy
30 objectives for the protection of wetlands set forth in ORS 196.672.

31 **(J) Any other standard that the director may determine to be relevant to the specific**
32 **proposed fill or removal.**

33 **(b) Nothing in this subsection limits the director's authority to determine that a pro-**
34 **posed fill or removal is consistent or inconsistent with the purposes set forth in subsection**
35 **(1) of this section.**

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

40 (5) If the director issues a permit, the director may impose such conditions as the director con-
41 siders necessary to carry out the purposes of ORS 196.805 and 196.830 and subsection (1) of this
42 section and to provide mitigation for the reasonably expected adverse effects of project development.
43 In formulating such conditions the director may request comment from public bodies, as defined in
44 ORS 174.109, federal agencies and tribal governments affected by the permit. Each permit is valid
45 only for the time specified therein. The director shall impose, as conditions to any permit, general

1 authorization or wetland conservation plan, measures to provide mitigation for the reasonably ex-
2 pected adverse effects of project development. Compensatory mitigation shall be limited to replace-
3 ment of the functions and values of the impacted water resources of this state.

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

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

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

14 (7) Any applicant whose application for a permit or authorization has been deemed incomplete
15 or has been denied, or who objects to any of the conditions imposed under this section by the di-
16 rector, may, within 21 days of the denial of the permit or authorization or the imposition of any
17 condition, request a hearing from the director. Thereupon the director shall set the matter down for
18 hearing, which shall be conducted as a contested case in accordance with ORS 183.415 to 183.430,
19 183.440 to 183.460 and 183.470. After such hearing, the director shall enter an order containing
20 findings of fact and conclusions of law. The order shall rescind, affirm or modify the director's initial
21 order. Appeals from the director's final order may be taken to the Court of Appeals in the manner
22 provided by ORS 183.482.

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

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

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

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

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

34 (C) The director determines that an extension is necessary to coordinate the issuance of a prop-
35 rietary authorization decision for an ocean renewable energy facility under ORS 274.873 and a re-
36 moval or fill permit decision.

37 (9) Permits issued under this section shall be in lieu of any permit or authorization that might
38 be required for the same operation under ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055,
39 468.060, 468.110, 468.120, 468B.005 to 468B.030 and 468B.048 to 468B.085, so long as:

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

41 (b) The standards for granting the permit or authorization are substantially the same as those
42 established pursuant to ORS 164.775, 164.785, 468.020, 468.035, 468.045, 468.055, 468.110, 468.120,
43 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

44 (10)(a) Any public body, as defined in ORS 174.109, federal agency or tribal government re-
45 quested by the director to comment on an application for a permit must submit its comments to the

1 director not more than 30 days after receiving the request for comment. If a public body, federal
2 agency or tribal government fails to comment on the application within 30 days, the director shall
3 assume that the public body, federal agency or tribal government has no objection.

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

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

9 (12) As used in this section:

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

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

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

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

18 (C) The fee required under ORS 196.815;

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

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

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

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

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

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

31 **SECTION 5. Notwithstanding any other law limiting expenditures, the limitation on**
32 **expenditures established by section 1 (1), chapter _____, Oregon Laws 2019 (Enrolled House**
33 **Bill 5035), for the biennium beginning July 1, 2019, as the maximum limit for payment of ex-**
34 **penses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding**
35 **lottery funds, federal funds and funds described in section 2, chapter _____, Oregon Laws**
36 **2019 (Enrolled House Bill 5035), collected or received by the Department of State Lands, for**
37 **Common School Fund programs, is increased by \$355,776.**

38 **SECTION 6. This 2019 Act being necessary for the immediate preservation of the public**
39 **peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect**
40 **on its passage.**