

# Chapter 196

1989 EDITION

## Wetlands and Rivers; Removal and Fill; Ocean Resource Planning

### COLUMBIA RIVER GORGE

- 196.105 Definitions for ORS 196.105 to 196.115
- 196.110 Land use regulation in Columbia River Gorge National Scenic Area
- 196.115 Appeal from decision of Columbia River Gorge Commission or county
- 196.120 Exercise of eminent domain; property value
- 196.125 Buffer by regulation around Columbia River Gorge National Scenic Area prohibited

### COLUMBIA RIVER GORGE COMPACT

- 196.150 Compact provisions
- 196.155 Authority for state officers and agencies to carry out duties under compact
- 196.160 Membership on Columbia River Gorge Commission
- 196.165 Status of commission employees for purposes of certain benefits

### OREGON OCEAN RESOURCES MANAGEMENT

- 196.405 Definitions for ORS 196.405 to 196.515
- 196.407 Policy for ORS 196.408
- 196.408 Duties of state agencies
- 196.410 Legislative findings for offshore oil and gas leasing
- 196.415 Legislative findings for ocean resources management
- 196.420 Policy
- 196.425 Oregon Ocean Resources Management Program
- 196.435 Primary agency for certain federal purposes; rules; restrictions
- 196.445 Task force; members; duties
- 196.450 Advisory committee; members; duties
- 196.455 Coordination with federal programs
- 196.465 Compatibility of acknowledged comprehensive plans
- 196.470 Citizen involvement; public workshops; information distribution; public hearing
- 196.475 Consultation with state and interstate organizations
- 196.485 State agency coordination requirements; incorporation of plan
- 196.490 Support services
- 196.495 Plan; contents
- 196.500 Plan preparation; public workshops and programs
- 196.505 Distribution of copies of plan
- 196.515 Short title

### WETLANDS

#### (Definitions)

- 196.600 Definitions for ORS 196.600 to 196.655

### (Wetlands Mitigation Banks)

- 196.605 Policy
- 196.610 Wetlands; acquisition and protection; powers of Director of Division of State Lands
- 196.615 Program for wetlands mitigation banks; program criteria
- 196.620 Resource values and credits for mitigation banks; use and withdrawal of credits; annual evaluation of system by director
- 196.625 Fill and removal activities in mitigation banks; reports
- 196.630 Rules
- 196.635 Director to consult and cooperate with other agencies and interested parties
- 196.640 Oregon Wetlands Mitigation Bank Revolving Fund Account
- 196.645 Sources of account
- 196.650 Use of account
- 196.655 Report on Oregon Wetlands Mitigation Bank Revolving Fund; contents
- 196.660 Effect of ORS 196.600 to 196.665 and 196.885
- 196.665 Short title

### (Wetland Conservation Plans)

- 196.668 Legislative findings
- 196.672 Policy
- 196.674 State-wide Wetlands Inventory
- 196.676 Response to notices from local governments
- 196.678 Wetland conservation plans; contents; procedure for adopting
- 196.680 Duties of division; standards for approval of plan; conditions for approval; order
- 196.682 Permits required for removal or fill; conditions on issuance of permit
- 196.684 Amendment of plans; review of plans by division; review of orders by Land Use Board of Appeals
- 196.686 Acknowledged estuary management plans; review and approval; hearings; final order
- 196.688 Public information program
- 196.692 Rules

### REMOVAL OF MATERIAL; FILLING

- 196.800 Definitions for ORS 196.600 to 196.665 and 196.800 to 196.900
- 196.805 Policy
- 196.810 Permit required to remove material from bed or banks of waters; exceptions
- 196.815 Application for permit; fees; disposition of fees
- 196.820 Prohibition against issuance of permits to fill Smith Lake or Bybee Lake; exception
- 196.825 Conditions of permit; consultation with other agencies; hearing; appeal

## MISCELLANEOUS MATTERS

- 196.830 Estuarine resource replacement as condition for fill or removal from estuary; considerations; other permit conditions
- 196.835 Hearing regarding issuance of permit; procedure; appeals; suspension of permit pending appeal
- 196.840 Closure of specified waters to removal or filling
- 196.845 Investigations and surveys
- 196.850 Waiving permit requirement in certain cases; notice; review
- 196.855 Noncomplying removal of material or filling constitutes public nuisance
- 196.860 Enforcement powers of director
- 196.865 Revocation, suspension or refusal to renew permit
- 196.870 Abatement proceedings; restraining order; injunction; public compensation
- 196.875 Double and treble damages for destruction of public right of navigation, fishery or recreation; costs and attorney fees
- 196.880 Fill under permit presumed not to affect public rights; public rights extinguished
- 196.885 Annual report of fill and removal activities; contents of report

- 196.890 Civil penalties
- 196.895 Procedures for civil penalties
- 196.900 Schedule of civil penalties; factors to be considered in imposing civil penalties
- 196.905 Application of ORS 196.600 to 196.665 and 196.800 to 196.900

### PENALTIES

- 196.990 Penalties

### CROSS REFERENCES

Definitions, 197.005

#### 196.600 to 196.900

Beds of streams, lakes and bays, 274.425 to 274.640

Definitions, 536.007

Liability for main or outfall relocation costs caused by material removal, 273.765

Reclamation of surface mining lands, prevention of water resource damage, 517.750 to 517.955

State policy on outdoor recreation resources, 390.010

#### 196.825

Lease of stream beds by State Lands Division for removal of material, 274.530

**COLUMBIA RIVER GORGE**

**196.105 Definitions for ORS 196.105 to 196.115.** As used in ORS 196.110 and 196.115, "commission" means the Columbia River Gorge Commission established under section 5 of the Columbia River Gorge National Scenic Area Act, P.L. 99-663. [1987 c.856 §1]

**196.110 Land use regulation in Columbia River Gorge National Scenic Area.** (1) Notwithstanding any provision of ORS chapter 92, 196, 197 or 215 or local ordinance or charter, a county may deny any permit or otherwise refuse to take any action that is inconsistent with the purposes and standards as provided in sections 3 and 6(d) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663, the interim guidelines or the scenic area management plan adopted pursuant to the Columbia River Gorge National Scenic Area Act, P.L. 99-663. If a county chooses to exercise this authority the county shall follow procedures consistent with ORS 215.402 to 215.428. The authority of a county to deny a permit or otherwise take action under this section shall be in addition to and not in lieu of any other authority for denial that may be exercised by the county pursuant to the provisions of ORS chapters 196 and 197. Any action of a county taken pursuant to this subsection shall be appealed to the commission as provided in section 15(a)(2) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(2) Notwithstanding any other provision of law, a state agency shall take no action that must be reviewed for compatibility with an acknowledged comprehensive plan or land use regulation in the Columbia River Gorge National Scenic Area until the agency determines through written findings that the action is consistent with the purposes and standards as provided in sections 3 and 6(d) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663, and the interim guidelines or the scenic area management plan.

(3) A state agency may seek any of the administrative or judicial remedies or participate in any proceeding provided by the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(4) The provisions of ORS 197.180 do not apply to the Columbia River Gorge Commission. [1987 c.856 §2]

Note: See note under 196.115.

**196.115 Appeal from decision of Columbia River Gorge Commission or county.** (1) For purposes of judicial review, the Columbia River Gorge Commission shall be considered a state agency, and decisions of the commission shall be subject to review solely as provided in this section, except as

otherwise provided by the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(2)(a) A final order by the commission in a review or appeal of any action of a county pursuant to section 10(c) or 15(a)(2) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663, shall be reviewed by the Court of Appeals on a petition for judicial review filed and served as provided in subsections (3) and (4) of this section and ORS 183.482.

(b) On a petition for judicial review under paragraph (a) of this subsection the Court of Appeals also shall review the action of the county that is the subject of the commission's order, if requested in the petition.

(c) The Court of Appeals shall issue a final order on review under this subsection within the time limits provided by ORS 197.855.

(d) In lieu of judicial review under paragraphs (a) and (b) of this subsection, a county action may be appealed to the Land Use Board of Appeals under ORS 197.805 to 197.855. A notice of intent to appeal the county's action shall be filed not later than 21 days after the commission's order on the county action becomes final.

(e) Notwithstanding ORS 197.835, the scope of review in an appeal pursuant to paragraph (d) of this subsection shall not include any issue relating to interpretation or implementation of the Columbia River Gorge National Scenic Area Act, P.L. 99-663, and any issue related to such interpretation or implementation shall be waived by the filing of an appeal under paragraph (d) of this subsection.

(3)(a) If a petition for judicial review of a commission order is filed pursuant to paragraph (a) of subsection (2) of this section, the procedures to be followed by the parties, the commission and the court, and the court's review, shall be in accordance with ORS 183.480, 183.482 (1) to (7), 183.485, 183.486, 183.490 and 183.497, except as this section or the Columbia River Gorge National Scenic Area Act, P.L. 99-663, otherwise provides.

(b) Notwithstanding any provision of ORS 183.482:

(A) The commission shall transmit the original record or the certified copy of the entire record within 21 days after service of a petition for judicial review is served on the commission; and

(B) The parties shall file briefs with the court within the times allowed by rules of the court.

(c) The court may affirm, reverse or remand the order. If the court finds that the

agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall:

(A) Set aside or modify the order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(d) The court shall remand the order to the agency if the court finds the agency's exercise of discretion to be:

(A) Outside the range of discretion delegated to the agency by law;

(B) Inconsistent with an agency rule, an officially stated agency position or a prior agency practice, unless the inconsistency is explained by the agency; or

(C) Otherwise in violation of a constitutional or statutory provision.

(e) The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the whole record.

(f) Notwithstanding any other provision of this section, in any case where review of a county action as well as a commission order is sought pursuant to paragraphs (a) and (b) of subsection (2) of this section, the court shall accept any findings of fact by the commission which the court finds to be supported by substantial evidence in the whole record, and such findings by the commission shall prevail over any findings by the county concerning the same or substantially the same facts.

(4)(a) Except as otherwise provided by this section or the Columbia River National Scenic Area Act, P.L. 99-663, if review of a county action is sought pursuant to paragraph (b) of subsection (2) of this section, the procedures to be followed by the parties, the county and the court, and the court's review, shall be in accordance with those provisions governing review of county land use decisions by the Land Use Board of Appeals set forth in ORS 197.830 (2) to (7), (9), (15) and (16) and 197.835 (2) to (8), (10) and (11). As used in this section, "board" as used in the enumerated provisions shall mean "court" and the term "notice of intent to appeal" in ORS 197.830 (9) shall refer to the petition described in subsection (2) of this section.

(b) In addition to the other requirements of service under this section, the petitioner shall serve the petition upon the persons and bodies described in ORS 197.830 (8), as a prerequisite to judicial review of the county action.

(c) In accordance with subparagraph (B) of paragraph (b) of subsection (3) of this section, a party to a review of both a commission order and a county action shall file only one brief with the court, which shall address both the commission order and the county action.

(d) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record. Subject to paragraph (f) of subsection (3) of this section, the court shall be bound by any finding of fact of the county for which there is substantial evidence in the whole record. The court may appoint a master and follow the procedures of ORS 183.482 (7) in connection with matters that the board may take evidence for under ORS 197.830 (13).

(5) Approval of county land use ordinances by the commission pursuant to section 7 of the Columbia River Gorge National Scenic Area Act, P.L. 99-663, may be reviewed by the Court of Appeals, as provided in ORS 183.482.

(6) Notwithstanding ORS 183.484, any proceeding filed in circuit court by or against the commission shall be filed with the circuit court for the county in which the commission has a principal business office or in which the land involved in the proceeding is located. [1987 c.856 §3, 1989 c.761 §17]

**196.120 Exercise of eminent domain; property value.** Notwithstanding any other provision of law, in any proceeding by a state agency or local government to acquire property within the Columbia River Gorge National Scenic Area, through the exercise of the power of eminent domain, the property value shall not be reduced because of any diminution in value resulting from the potential of the taking. [1987 c.856 §6]

**196.125 Buffer by regulation around Columbia River Gorge National Scenic Area prohibited.** (1) Notwithstanding any other provision of law, no state agency, special district or local government may exercise any regulatory power for the purpose of establishing a scenic buffer around the Columbia River Gorge National Scenic Area. Such regulatory powers include but are not limited to:

(a) Exercising the power of eminent domain;

(b) Establishing scenic easements; or

(c) Adopting ordinances or land use plans that prohibit or limit the use of land.

(2) As used in this section, "Columbia River Gorge National Scenic Area" means that area designated in the Columbia River Gorge National Scenic Area Act, P.L. 99-663. [1987 c.856 §7]

**COLUMBIA RIVER GORGE COMPACT**

**196.150 Compact provisions.** The Legislative Assembly of the State of Oregon hereby ratifies the Columbia River Gorge Compact set forth below, and the provisions of such compact hereby are declared to be the law of this state upon such compact becoming effective as provided in Article III.

A compact is entered into by and between the states of Washington and Oregon, signatories hereto, with the consent of the Congress of the United States of America, granted by an Act entitled, "The Columbia River Gorge National Scenic Area Act," P.L. 99-663.

**ARTICLE I**Columbia Gorge Commission Established

a. The States of Oregon and Washington establish by way of this interstate compact a regional agency known as the Columbia River Gorge Commission. The commission established in accordance with this compact shall have the power and authority to perform all functions and responsibilities in accordance with the provisions of this compact and of the Columbia River Gorge National Scenic Area Act (the federal Act), which is incorporated by this specific reference in this agreement. The commission's powers shall include but not be limited to:

1. The power to sue and be sued.
2. The power to disapprove a land use ordinance enacted by a county if the ordinance is inconsistent with the management plan, as provided in P.L. 99-663 §7(b)(3)(B).
3. The power to enact a land use ordinance setting standards for the use of non-federal land in a county within the scenic area if the county fails to enact land use ordinances consistent with the management plan; as provided in P.L. 99-663 §7(c).
4. According to the provisions of P.L. 99-663 §10(c), the power to review all proposals for major development action and new residential development in each county in the scenic area, except urban areas, and the power to disapprove such development if the commission finds the development is inconsistent with the purposes of P.L. 99-663.

b. The commission shall appoint and remove or discharge such personnel as may be necessary for the performance of the commission's functions, irrespective of the civil service, personnel or other merit system laws of any of the party states.

c. The commission may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the commission shall be eligible for social security coverage in respect of old age and survivors insurance provided that the commission takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The commission may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

d. The commission shall obtain the services of such professional, technical, clerical and other personnel as may be deemed necessary to enable it to carry out its functions under this compact. The commission may borrow, accept, or contract for the services of personnel from any state of the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

e. Funds necessary to fulfill the powers and duties imposed upon and entrusted to the commission shall be provided as appropriated by the legislatures of the states in accordance with Article IV. The commission may also receive gifts, grants, endowments and other funds from public or private sources as may be made from time to time, in trust or otherwise, for the use and benefit of the purposes of the commission and expend the same or any income therefrom according to the terms of the gifts, grants, endowments or other funds.

f. The commission may establish and maintain such facilities as may be necessary for the transacting of its business. The commission may acquire, hold and convey real and personal property and any interest therein.

g. The commission shall adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules and regulations. The commission shall publish its bylaws, rules and regulations in convenient form and shall file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states.

**ARTICLE II**The Commission Membership

a. The commission shall be made up of twelve voting members appointed by the states, as set forth herein, and one non-voting member appointed by the U.S. Secretary of Agriculture.

b. Each state governor shall appoint the members of the commission as provided in the federal Act (three members who reside in the State of Oregon, including one resident of the scenic area, to be appointed by the Governor of Oregon, and three members who reside in the State of Washington, including one resident of the scenic area, appointed by the Governor of Washington).

c. One additional member shall be appointed by the governing body of each of the respective counties of Clark, Klickitat, and Skamania in Washington, and Hood River, Multnomah, and Wasco in Oregon, provided that in the event the governing body of a county fails to make such an appointment, the Governor of the state in which the county is located shall appoint such a member.

d. The terms of the members and procedure for filling vacancies shall all be as set forth in the federal Act.

### ARTICLE III

#### Effective Date of Compact and Commission

This compact shall take effect, and the commission may exercise its authorities pursuant to the compact and pursuant to the Columbia River Gorge National Scenic Area Act when it has been ratified by both states and upon the appointment of four initial members from each state. The date of this compact shall be the date of the establishment of the commission.

### ARTICLE IV

#### Funding

a. The States of Washington and Oregon hereby agree to provide by separate agreement or statute of each state for funding necessary to effectuate the commission, including the establishment of compensation or expenses of commission members from each state which shall be paid by the state of origin.

b. The commission shall submit to the Governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

c. Subject to appropriation by their respective legislatures, the commission shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the commission.

d. The commission's proposed budget and expenditures shall be apportioned equally between the states.

e. The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the commission shall be audited yearly by the appropriate state auditing official and the report of the audit shall be included in and become a part of the annual report of the commission.

f. The accounts of the commission shall be open at any reasonable time for inspection by the public.

### ARTICLE V

#### Severability

If any provision of this compact, or its application to any person or circumstance, is held to be invalid, all other provisions of this compact, and the application of all of its provisions to all other persons and circumstances, shall remain valid, and to this end the provisions of this compact are severable.

[Formerly 390.500]

**196.155 Authority for state officers and agencies to carry out duties under compact.** The Governor, the Columbia River Gorge Commission and all state agencies and counties are hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the compact executed under ORS 196.150 to 196.165 and the Columbia River Gorge National Scenic Area Act. [Formerly 390.505]

**196.160 Membership on Columbia River Gorge Commission.** (1) Each member of the Columbia River Gorge Commission appointed by the Governor under ORS 196.150 shall be subject to Senate confirmation pursuant to section 4, Article III of the Oregon Constitution and shall serve at the pleasure of the Governor until the member's term expires or until a disqualifying change in residence.

(2) A member shall serve a period of four years.

(3) Members of the commission appointed from Oregon are entitled to compensation and expenses as provided in ORS 292.495. [Formerly 390.510]

**196.165 Status of commission employees for purposes of certain benefits.** (1) The Columbia River Gorge Commission established under ORS 196.150 may designate its employees as employees and the commis-

sion as an employer subject to the Oregon Public Employees' Retirement System under ORS 237.003 to 237.315 or as an employer and employees subject to a retirement system provided by the State of Washington under the laws of the State of Washington.

(2) The commission may designate its employees as employees eligible under benefit plans provided under ORS 243.105 to 243.205 or 243.230 to 243.300 or under benefit plans provided under the laws of the State of Washington. [Formerly 390 515]

**Note:** Section 7, chapter 14, Oregon Laws 1987, as amended by section 46, chapter 171, Oregon Laws 1989, provides.

**Sec. 7.** Of those members initially appointed to the Columbia River Gorge Commission under the compact executed under ORS 196.150 by the governing bodies of the counties of Hood River, Multnomah and Wasco Counties, the Governor shall designate one member to serve for a term of five years and one to serve for six years. Of those members initially appointed directly by the Governor under the compact executed under ORS 196.150, the Governor shall designate one to serve a term of five years and one to serve a term of six years [1987 c.14 §7; 1989 c.171 §46]

## OREGON OCEAN RESOURCES MANAGEMENT

**196.405 Definitions for ORS 196.405 to 196.515.** As used in ORS 196.405 to 196.515, unless the context requires otherwise:

(1) "Exclusive Economic Zone" has the meaning set forth in Proc. 5030 whereby the United States proclaimed jurisdiction over the resources of the ocean within 200 miles of the coastline.

(2) "Plan" means the Oregon Ocean Resources Management Plan adopted as set forth in ORS 196.495 and section 14, chapter 576, Oregon Laws 1987.

(3) "Task force" means the Oregon Ocean Resources Management Task Force as described in ORS 196.445 (1).

(4) "Territorial sea" means the waters and seabed extending three geographical miles seaward from the coastline in conformance with federal law. [1987 c.576 §6]

**196.407 Policy for ORS 196.408.** It is the policy of this state to:

(1) Work with the States of Washington and California to explore the possibility of development of communication information systems including a computerized system of coastal and marine resource information.

(2) Work with the States of Washington and California to develop compatible programs of ocean oil spill response, damage assessment and compensation.

(3) Work with the States of Washington and California and federal agencies to develop programs to complement federal pro-

grams which protect marine birds and marine mammals.

(4) Cooperate and coordinate with adjacent states to develop a regional approach to obtaining fisheries information. [1989 c.895 §2]

**196.408 Duties of state agencies.** (1) State agencies shall, to the maximum extent practicable, coordinate development of coastal and ocean information systems with those in adjacent states.

(2) State agencies with responsibility for oil spill and hazardous material response, damage assessment and compensation in the marine environment shall, to the maximum extent practicable, coordinate Oregon's plans, programs, policies and techniques with those of adjacent states.

(3) State agencies which have jurisdiction over water areas, the seabed and resources adjacent to offshore rocks and islands shall coordinate with adjacent states and federal agencies to develop programs and regulations to manage uses and activities of ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System.

(4) State agencies with responsibility for marine fishery resource management shall coordinate with fishery managers in adjacent states to develop a uniform fish catch and monitoring system. [1989 c.895 §3]

**196.410 Legislative findings for offshore oil and gas leasing.** The Legislative Assembly finds:

(1) Oregon's territorial sea encompasses all the rocks and islands of the Oregon National Wildlife Refuge, borders all beaches, headlands and rocky intertidal areas and includes areas heavily used for commercial and recreational fishing. Navigation lanes for barges and vessels pass through the area.

(2) Oregon's territorial sea is rich in marine life. Its renewable resources support significant portions of the coastal economy. It is a dynamic, hazardous marine environment within which oil spills cannot be contained.

(3) Oregon's nearshore zone is extremely high in biological productivity, reflected by the variety and value of commercial and sport ocean fisheries catch. The Oregon coast provides a significant habitat for migrating seabirds and mammals. Oregon is unwilling to risk damaging sensitive marine environments or to sacrifice environmental quality to develop offshore oil and gas resources. [1989 c.895 §4]

**Note:** Sections 5 and 6, chapter 895, Oregon Laws 1989, provide:

**Sec. 5.** (1) Notwithstanding the provisions of ORS 274.710 to 274.860, 520.240 or any other provision of law,

any form of leasing for purposes of exploration, development or production of oil, gas or sulfur is prohibited in the territorial sea.

(2) The provisions of subsection (1) of this section do not apply to exploration for academic research purposes or geologic survey activities of the State Department of Geology and Mineral Industries.

(3) Any exploration for oil, gas or sulfur in the territorial sea allowed under ORS 274.705 to 274.895 by the State Land Board or the Division of State Lands shall conform to any standards of the Oregon Ocean Resources Management Program established under ORS 196.405 to 196.515 [1989 c 895 §5]

Sec. 6. The provisions of section 5 of this Act are repealed on June 30, 1995. [1989 c 895 §6]

**196.415 Legislative findings for ocean resources management.** The Legislative Assembly finds that:

(1) The Pacific Ocean and its many resources are of environmental, economic, aesthetic, recreational, social and historic importance to the people of this state.

(2) Exploration, development and production of ocean resources likely to result from both federal agency programs in federal waters of the outer continental shelf and initiatives of private companies within state waters will increase the chance of conflicting demands on ocean resources for food, energy and minerals, as well as waste disposal and assimilation, and may jeopardize ocean resources and values of importance to this state.

(3) There are many state agencies with particular regulatory or program interests in the ocean, its resources and uses but no comprehensive management plan or process to insure that state interests are protected and promoted both within state waters and beyond.

(4) The fluid, dynamic nature of the ocean and the migration of many of its living resources beyond state boundaries extend the ocean management interests of this state beyond the three geographic mile territorial sea currently managed by the state pursuant to the federal Submerged Lands Act.

(5) Existing federal laws, the Coastal Zone Management Act of 1972, the Magnuson Fisheries Management and Conservation Act of 1976, and the Outer Continental Shelf Lands Act of 1978, recognize the interests of coastal states in management of ocean resources in federal waters and provide for state participation in ocean resources management decisions.

(6) The 1983 Proclamation of the 200-mile United States Exclusive Economic Zone has created an opportunity for all coastal states to more fully exercise and assert their responsibilities pertaining to the protection, conservation and development of ocean resources under United States jurisdiction.

(7) It is important that the State of Oregon develop and maintain a program of ocean resources management to promote and insure coordinated management of living and nonliving marine resources within state jurisdiction and with adjacent states, to insure effective participation in federal agency planning and management of ocean resources and uses which may affect this state, and to coordinate state agency management of ocean resources with local government management of coastal shorelands and resources.

(8) While much is known about the ocean, its composition, characteristics and resources, additional study and research is required to gain information and understanding necessary for sound ocean planning and management.

(9) New and innovative technologies are needed to insure future development of ocean resources in an environmentally responsible manner. [1987 c.576 §3]

**196.420 Policy.** It is the policy of the State of Oregon to:

(1) Conserve the long-term values, benefits and natural resources of the ocean both within the state and beyond by giving clear priority to the proper management and protection of renewable resources over nonrenewable resources;

(2) Encourage ocean resources development which is environmentally sound and economically beneficial;

(3) Provide for efficient and coordinated ocean resources management through improvement of the state's coastal management program and state-wide land use program;

(4) Assert the interests of this state as a partner with federal agencies in the sound management of the ocean resources within the United States Exclusive Economic Zone and on the continental shelf;

(5) Promote research, study and understanding of ocean processes, marine life and other ocean resources to acquire the scientific inventory information necessary to understand the impacts and relationship of ocean development activities to ocean and coastal resources; and

(6) Encourage research and development of new, innovative marine technologies for exploration and utilization of ocean resources. [1987 c.576 §4]

**196.425 Oregon Ocean Resources Management Program.** To assure the conservation and development of ocean resources affecting Oregon consistent with the purposes of ORS 196.405 to 196.515 and 201.370, a coordinated program of ocean resource planning and management is established. This program shall be known as the

Oregon Ocean Resources Management Program and is an improvement of Oregon's coastal management program. The Oregon Ocean Resources Management Program consists of:

(1) Applicable elements of the Oregon Coastal Management Program approved by the U.S. Secretary of Commerce on July 7, 1977, and as subsequently amended pursuant to the Coastal Zone Management Act of 1972, including statutes, programs and policies of state agencies which apply to coastal and ocean resources, those elements of acknowledged local comprehensive plans of jurisdictions within Oregon's coastal zone as defined in the Oregon Coastal Management Program which may be affected by activities or use of resources within the ocean, and those state-wide planning goals which relate to the conservation and development of ocean and coastal resources and the planning and management of land use activities which may result from or be affected by activities or use of resources within the ocean;

(2) The task force as set forth in ORS 196.445, any successor to the task force and any cooperative agreements entered into by the task force or its successor;

(3) The Oregon Ocean Resources Management Plan as prepared and adopted pursuant to ORS 196.405 to 196.515 and 201.370; and

(4) State agency coordination requirements of ORS 197.180 as provided in ORS 196.485. [1987 c.576 §5]

**196.435 Primary agency for certain federal purposes; rules; restrictions.** (1) The Department of Land Conservation and Development is designated the primary agency for coordination of ocean resources planning activities and the State Coastal Management Agency for purposes of carrying out and responding to the Coastal Zone Management Act of 1972. The department shall assist the Governor with the Governor's duties and opportunities to respond to federal agency programs and activities affecting coastal and ocean resources.

(2) After consultation with the task force, the commission shall adopt rules that implement any ocean resources goal within six months of the adoption of the plan required under section 14, chapter 576, Oregon Laws 1987.

(3) The provisions of ORS 196.405 to 196.515 and 201.370 do not change statutorily and constitutionally mandated responsibilities of other state agencies.

(4) ORS 196.405 to 196.515 and 201.370 do not provide the commission with authority to

adopt specific regulation of ocean resources or ocean uses. [1987 c.576 §7; 1989 c.325 §1]

**196.445 Task force; members; duties.** (1) An Oregon Ocean Resources Management Task Force is established and shall be composed of the Governor or the Governor's designee as chair:

(a) The director or the director's designee of the following agencies:

(A) Department of Energy;

(B) Department of Environmental Quality;

(C) State Department of Fish and Wildlife;

(D) State Department of Geology and Mineral Industries;

(E) Department of Land Conservation and Development;

(F) Division of State Lands;

(G) State Parks and Recreation Department;

(H) Economic Development Department; and

(I) State Department of Agriculture;

(b) A county commissioner of a county bordering the territorial sea to be appointed by the Governor;

(c) The director or the director's designee of the Oregon Coastal Zone Management Association, Inc.;

(d) A representative of each of the following ocean interests, to be appointed by the Governor:

(A) Commercial ocean fisheries;

(B) Charter, sport or recreational ocean fisheries;

(C) Marine navigation and transportation;

(D) Nonenergy mineral development;

(E) Oil and gas development; and

(F) Oregon Indian tribes appointed after consultation with the Commission on Indian Services; and

(e) Three representatives of the public to be appointed by the Governor.

(2) The task force members shall consult and coordinate, on a regular basis, with their respective commission, board or governing body.

(3) The task force shall develop procedures to conduct its business to carry out the purposes of ORS 196.405 to 196.515 and 201.370. [1987 c.576 §8; 1989 c.154 §1; 1989 c.904 §52]

**196.450 Advisory committee; members; duties.** (1) A scientific and technical advisory committee to the task force is established and is composed of:

(a) The dean or director or the designee of the dean or director of the following academic programs related to ocean resources:

(A) Oregon State University, Sea Grant College;

(B) Oregon State University, College of Oceanography;

(C) University of Oregon, Ocean and Coastal Law Center; and

(D) University of Oregon, Oregon Institute of Marine Biology;

(b) Such members with expertise in marine science, law or technology appointed by the task force chairman;

(c) State agency technical staff designated by the directors of the agencies represented on the task force; and

(d) The planning director of a county bordering the territorial sea to be appointed by the chairman of the task force.

(2) The scientific and technical advisory committee shall provide advice to the task force and the department on scientific and technical research related to all programs and activities in the Exclusive Economic Zone.

(3) The chairman of the advisory committee shall be appointed by the chairman of the task force. [1987 c 576 §9]

**196.455 Coordination with federal programs.** To insure that the Oregon Ocean Resources Management Plan is coordinated with federal agency programs for coastal and ocean resources, the task force shall invite federal agencies with responsibility for the study and management of ocean resources or regulation of ocean activities to designate a liaison to the task force to attend task force meetings, respond to task force requests for technical and policy information and review draft plan materials prepared by the task force. [1987 c 576 §10]

**196.465 Compatibility of acknowledged comprehensive plans.** (1) The plan shall be compatible with acknowledged comprehensive plans of adjacent coastal counties.

(2) To insure that the plan is compatible with the comprehensive plans of adjacent coastal counties, the task force shall work with the department and the Oregon Coastal Zone Management Association, Inc. to meet and consult with local government officials, distribute draft materials and working papers for review and solicit comment on task force materials. [1987 c.576 §11]

**196.470 Citizen involvement; public workshops; information distribution; public hearing.** The task force shall involve citizens and interested groups and organiza-

tions in development of the plan. The task force shall:

(1) Provide citizens, coastal and ocean interest groups, organizations, and ocean resource users:

(a) The task force planning schedule;

(b) Opportunities for involvement; and

(c) Opportunities for comment on issues and topics which should be addressed;

(2) Conduct at least three public workshops, including two in coastal locations, to solicit ideas, opinions and facts to be considered in developing the proposed plan;

(3) Distribute the proposed plan to all public libraries state wide, upon request to interested individuals and groups and all coastal cities, counties, port districts and the Oregon Coastal Zone Management Association, Inc.; and

(4) Conduct at least one public hearing on the draft proposed plan prior to submittal to the committee. [1987 c.576 §12]

**196.475 Consultation with state and interstate organizations.** The task force shall consult with appropriate agencies and programs in Washington, California, British Columbia and Alaska and with appropriate interstate organizations. [1987 c 576 §13]

**Note:** Sections 14 and 15, chapter 576, Oregon Laws 1987, provide:

**Sec. 14.** (1) The task force shall prepare a proposed Oregon Ocean Resources Management Plan as set forth in section 19 of this 1987 Act [196.495].

(2)(a) The proposed plan shall be submitted to the Joint Legislative Committee on Land Use and the Speaker of the House of Representatives and the President of the Senate by June 1, 1990.

(b) The task force shall send the proposed plan for review and comment to the board or commission of the agencies and groups represented on the task force and all coastal cities, counties and port districts.

(3) The task force shall present the proposed plan and the comments received under subsection (2) of this section to the commission by August 1, 1990. The commission shall conduct three public hearings in counties which are adjacent to the territorial sea and one public hearing in another location in this state in a manner consistent with the requirements of ORS 197.240.

(4) The commission shall consider the recommendations and comments received from the public hearings conducted pursuant to subsection (3) of this section and the agency and program comments received under paragraph (b) of subsection (2) of this section.

(5) The commission shall review the plan and make findings that the plan:

(a) Carries out the policies of this 1987 Act [196 405 to 196.515 and 201.370];

(b) Is consistent with applicable state-wide planning goals; and

(c) Is compatible with adjacent county local comprehensive plans.

(6) If the commission does not make the findings required by subsection (5) of this section, the commission shall return the plan to the task force for revision.

(7) After making the findings required by subsection (5) of this section, the commission shall adopt the proposed plan as part of the Oregon Coastal Management Program.

(8) The commission shall present the plan to the committee and the Speaker of the House of Representatives and the President of the Senate by December 1, 1990.

(9) The committee, in its sole discretion, may alter the dates set in this section. [1987 c.576 §14]

**Sec. 15.** (1) By July 1, 1991, the State Land Board shall adopt a plan for management of the resources and uses of the submerged and submersible lands of the state territorial sea consistent with the purposes of this 1987 Act [196.405 to 196.515 and 201.370] and the policies and recommendations of the Oregon Ocean Resources Management Plan.

(2) The State Land Board shall submit the territorial sea plan to the commission for certification of consistency with the state-wide planning goals.

(3) This plan shall be the basis for rules to be adopted by the Division of State Lands for administering activities and uses within the territorial sea. [1987 c.576 §15]

**196.485 State agency coordination requirements; incorporation of plan.** (1) If a state agency incorporates the Oregon Ocean Resources Management Plan by reference in its coordination program and, upon a finding by the commission that the agency has amended its rules, procedures and standards to conform with the objectives and requirements of the plan, the state agency shall satisfy the requirements of state agency planning and coordination required by ORS 197.180 for ocean planning.

(2) If a state agency does not incorporate the plan in its coordination program, the agency shall be subject to the state agency coordination requirements of ORS chapters 196 and 197 for state agency programs, procedures and standards that in any way affect ocean resources. State agency programs or rules for management of ocean resources or ocean uses shall be consistent with the Oregon Ocean Resources Management Plan. [1987 c.576 §17]

**196.490 Support services.** The department shall provide technical, clerical and other necessary support services for the task force. [1987 c.576 §18]

**196.495 Plan; contents.** The Oregon Ocean Resources Management Plan shall include:

(1) An inventory of the existing state laws and agency rules, authorities and programs which pertain to ocean resources.

(2) An inventory of federal laws, regulations and agency programs which pertain to ocean resources management within or directly affecting Oregon's territorial sea.

(3) An analysis of state laws, rules, authorities or programs which conflict with one another, that need to be modified or eliminated, as well as laws, rules or programs

which may need to be enacted in order to provide for coordinated, comprehensive management of ocean resources.

(4) An inventory of existing and potential uses and activities in the ocean off the coast of Oregon, an analysis of potential impacts to ocean and coastal resources and coastal communities from these activities and an evaluation of state agency ability to manage those uses consistent with ORS 196.405 to 196.515 and 201.370.

(5) Maps of existing ocean conditions, uses and resources of the coastline, territorial sea, continental shelf and Exclusive Economic Zone. These maps shall be compiled from the best available information, entered into a computer format to allow ease of data analysis and shall be accompanied, where possible, by computerized information about the mapped resources or features. The maps shall allow integration with existing computer maps of coastal and estuarine features and shall be organized to enable both broad and detailed views of coastal and ocean areas.

(6)(a) Specific recommendations to develop or improve state agency programs to manage ocean resources and activities consistent with ORS 196.405 to 196.515 and 201.370. These recommendations shall be the basis for agency or legislative action and shall contain:

(A) A brief statement of the issues or need requiring the recommended action;

(B) A description how the recommendation will address the issues or meet the identified need;

(C) Policies and objectives;

(D) A brief work program describing the actions necessary to carry out the recommendation;

(E) A list of state agencies or programs to be affected by the recommendation;

(F) An estimate of the time and costs required to carry out the recommendation; and

(G) Any change in state law which may be needed.

(b) The recommendations of paragraph (a) of this subsection shall address the following:

(A) Coastal oil spill response, cleanup, damage assessment and compensation;

(B) Siting of pipelines or onshore facilities resulting from mineral mining or offshore oil and gas operations, including coordination with local government comprehensive plans;

(C) Marine water quality, including ocean outfalls from municipal and industrial wastes, toxic and hazardous chemicals, water quality standards and monitoring and re-

search programs to insure marine water quality;

(D) Air quality related to offshore industrial activities and impacts on onshore communities and resources;

(E) Areas within the territorial sea and the Exclusive Economic Zone which should be excluded from oil and gas or nonenergy mineral development, or for which special precautions must be taken;

(F) Environmental or other scientific research required to make management decisions about ocean resources with emphasis on the information requirements of the state-wide planning goals for ocean and coastal resources in relation to the oil, gas and mineral development activities of the Federal Government in the Exclusive Economic Zone off Oregon;

(G) Programs to encourage and facilitate research and development into technologies for the exploration and development of ocean resources;

(H) Strategies to promote private investment in Oregon into responsible research, exploration and development of ocean resources; and

(I) Recommendations for alternative dispute resolution techniques to resolve conflicts among competing interests.

(7) Recommendations for a permanent ocean resources planning and management process, including:

(a) Options for an advisory coordinating body to succeed the task force;

(b) Advisory committees;

(c) The role of the Governor, state agencies, federal agencies, local governments, citizens, interest groups and ocean users; and

(d) A process for plan update and amendment including integration of new information, adoption and incorporation of plan amendments.

(8) A summary of state-federal issues of ocean resource management and jurisdiction, including recommendations to the Oregon Congressional Delegation for changes in federal law or agency programs and to adjacent states for coordinated program development and action.

(9) Identification of issues which affect local government planning programs and an analysis of additional work which may be needed to fully address those issues in the local plans. [1987 c.576 §19]

**196.500 Plan preparation; public workshops and programs.** (1) In preparation of the plan, the task force shall hold at least three public workshops, including two in

coastal locations, to solicit ideas, opinions and facts to be considered in developing the proposed plan.

(2) The department, in conjunction with educational institutions, shall conduct public information programs including workshops and symposia and prepare and disseminate publications. [1987 c.576 §20]

**196.505 Distribution of copies of plan.** The department shall supply copies of the proposed plan to public libraries state wide and shall make copies available by request. The department may charge a small fee to recover the costs of mailing. The department shall supply copies, without charge, to the Governor, the Legislative Assembly, all affected state agencies, the Land Conservation and Development Commission and local governments in the coastal zone. [1987 c.576 §21]

**196.515 Short title.** ORS 196.415 to 196.515 shall be known as the Oregon Ocean Resources Management Act. [1987 c.576 §2]

## WETLANDS

### (Definitions)

**196.600. Definitions for ORS 196.600 to 196.655.** As used in ORS 196.600 to 196.655:

(1) "Credit" means a numerical value that represents the wetland resource functions and values of a site.

(2) "Mitigation bank" means a publicly owned and operated wetland site, created, restored or enhanced by the division in accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts due to activities which otherwise comply with the requirements of ORS 196.600 to 196.665 and 196.800 to 196.900 and 33 U.S.C. sections 1251 through 1376.

(3) "Onsite mitigation methods" means all measures that may be taken to reduce, offset or eliminate damage or destruction to the functional characteristics and processes of a wetland, including but not limited to re-locating, reducing the size or scope, or changing the operational characteristics of the proposed activity, or creating or enhancing wetland functions or values at the project site.

(4) "Permit action" means activity under a specific removal or fill permit requested or issued under ORS 196.600 to 196.665 and 196.800 to 196.900.

(5) "Statewide Comprehensive Outdoor Recreation Plan" means the plan created by the State Parks and Recreation Department pursuant to the federal Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 460-L et seq.). [Formerly 541.550]

**(Wetlands Mitigation Banks)**

**196.605 Policy.** It is the purpose of ORS 196.600 to 196.655 to:

(1) Promote, in concert with other federal and state programs as well as interested parties, the maintenance and conservation of wetlands;

(2) Improve cooperative efforts among private, nonprofit and public entities for the management and protection of wetlands;

(3) Offset losses of wetland values caused by activities which otherwise comply with state and federal law in order to create, restore or enhance wetland values and functions;

(4) Maintain and encourage a predictable, efficient regulatory framework for environmentally acceptable development; and

(5) Provide an option for accomplishing off-site mitigation when such mitigation is required under a removal or fill permit. [Formerly 541.555]

**196.610 Wetlands; acquisition and protection; powers of Director of Division of State Lands.** Subject to approval by the State Land Board, the director, as defined in ORS 536.007, may:

(1) Charge a fee for purchase of credits in the mitigation bank as provided by ORS 196.600 to 196.655.

(2) Acquire or accept title to lands suitable for use in mitigation banks or actions, or to protect sensitive or unique wetlands habitat.

(3) Pay costs incurred for alterations needed to create, restore or enhance wetland areas for purposes of carrying out the provisions of ORS 196.600 to 196.655.

(4) Authorize payment of administrative, research or scientific monitoring expenses of the division in carrying out the provisions of ORS 196.600 to 196.655.

(5) Disperse funds received under the Federal Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.), for such purposes as specifically stipulated in a grant award.

(6) Receive funds under the Federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, for the voluntary acquisition of wetlands and interests therein according to the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan. Funds received under the Federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, shall be used for nonmitigation complementary purposes and programs of ORS 196.600 to 196.655. [Formerly 541.557]

**196.615 Program for wetlands mitigation banks; program criteria.** (1) In accordance with the provisions of ORS 196.600 to 196.655, upon the approval of the State Land Board, the director shall initiate and implement a program for wetlands mitigation banks. Not more than four pilot mitigation banks shall be funded under ORS 196.600 to 196.655 before July 1, 1991.

(2) Subject to the approval of the State Land Board, the division, as defined in ORS 536.007, shall adopt, by rule, standards and criteria for the site selection process, operation and evaluation of mitigation banks. Criteria to be considered shall include but need not be limited to:

(a) Historical wetland trends, including the estimated rate of current and future losses of the respective types of wetlands.

(b) The contributions of the wetlands to:

(A) Wildlife, migratory birds and resident species;

(B) Commercial and sport fisheries;

(C) Surface and ground water quality and quantity, and flood moderation;

(D) Outdoor recreation including enhancement of scenic waterways; and

(E) Scientific and research values.

(c) Regional economic needs.

(3) For each mitigation bank, the division shall establish a well-defined plan, including preliminary objectives, inventory of resource values and an evaluation and monitoring program. [Formerly 541.560]

**196.620 Resource values and credits for mitigation banks; use and withdrawal of credits; annual evaluation of system by director.** (1) For each mitigation bank, the division shall establish a system of resource values and credits.

(2) A credit from a mitigation bank may be withdrawn only for a permit action after all onsite mitigation methods have been examined and found to be impracticable.

(3) Credits from a mitigation bank shall be used only for mitigation of a permit action that occurs within 40 miles of that bank.

(4) Credits from a freshwater mitigation bank shall be used only for mitigation of permit actions that occur within the same tributary, reach or subbasin as the mitigation bank.

(5) Credits from an estuarine mitigation bank shall be used only for mitigation of permit actions that occur within the same estuarine ecological system.

(6) The director shall not withdraw any credits from any mitigation bank until the director:

(a) Has taken actions sufficient to establish hydrological function of the mitigation bank site;

(b) Has conducted other creation, restoration and enhancement actions to establish other wetland functions and values at the mitigation bank site; and

(c) Evaluated the results of the actions and determined that a high probability exists that the wetland functions and values of the mitigation bank site are equal to or greater than the functions and the values of the wetland area to be damaged or destroyed.

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

(8) No mitigation bank credits may be withdrawn for any permit action where the wetland area to be adversely affected by a removal or fill activity exceeds five acres. The "area affected" shall include the area where material is removed or filled and any surrounding area adversely affected by the activity.

(9) The director shall not consider the availability or nonavailability of mitigation bank credits in deciding whether to grant or deny any removal or fill permit under ORS 196.600 to 196.665 and 196.800 to 196.900.

(10) The director annually shall:

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

(b) Compare the current functions and values with the functions and values that the director anticipated the site would provide. If the director finds any significant disparity between the actual and anticipated functions and values, the director shall:

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

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

(11) The director shall not withdraw credits from the mitigation bank for specific permit actions if the director determines that:

(a) The credits for that specific permit action would not adequately maintain habitat or species diversity; or

(b) The mitigation bank site for which credits are proposed to be withdrawn is not sufficiently similar in wetland functions and values to the wetland area to be damaged or destroyed. [Formerly 541.565]

**196.625 Fill and removal activities in mitigation banks; reports.** (1) The director shall maintain a record of fill and removal activities and actions for each mitigation bank and pilot program implemented and conduct monitoring of banks with moneys from the Oregon Wetlands Mitigation Bank Revolving Fund Account.

(2) The director shall provide quarterly reports to the State Land Board on moneys spent and received for each wetland mitigation bank. [Formerly 541.567]

**196.630 Rules.** Subject to the approval of the State Land Board, the director shall adopt rules according to the provisions of ORS 183.310 to 183.550 to carry out the provisions of ORS 196.600 to 196.655. [Formerly 541.570]

**196.635 Director to consult and cooperate with other agencies and interested parties.** (1) The provisions of ORS 196.600 to 196.655 shall be carried out by the director in consultation with the State Department of Fish and Wildlife, Department of Transportation, Department of Land Conservation and Development, Department of Environmental Quality, Economic Development Department, federal natural resources and regulatory agencies, affected local governments and special districts, conservation organizations and other interested parties.

(2) In cooperation with the parties in subsection (1) of this section, the director, in consultation with the State Land Board, shall:

(a) Review opportunities for inclusion of appropriate wetlands in the Statewide Comprehensive Outdoor Recreation Plan.

(b) Develop and recommend a wetlands priority plan for inclusion in the Statewide Comprehensive Outdoor Recreation Plan. The wetlands priority plan shall be complementary to the purposes and programs under ORS 196.600 to 196.655. [Formerly 541.575]

**196.640 Oregon Wetlands Mitigation Bank Revolving Fund Account.** (1) The Oregon Wetlands Mitigation Bank Revolving Fund Account is established, separate and distinct from the General Fund. All moneys received under ORS 196.645 shall be paid into the State Treasury and credited to the account. All moneys in the account are appropriated continuously to the Division of State Lands to be used by the division as set forth in ORS 196.650. The moneys in the account may be invested and reinvested as provided in ORS 293.701 to 293.776. Interest earned by the account shall be credited to the account.

(2) The division shall keep a record of all moneys deposited in the account. The record shall indicate by separate cumulative ac-

counts the source from which the moneys are derived and the individual activity or program against which each withdrawal is charged. [Formerly 541.577]

**196.645 Sources of account.** The following moneys shall be paid into the Oregon Wetlands Mitigation Bank Revolving Fund Account:

(1) Any moneys appropriated for that purpose by the Legislative Assembly;

(2) Moneys awarded for such purposes as specifically stipulated under grants through the Federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, or the Federal Coastal Zone Management Act of 1972, 15 U.S.C. 1451 et seq., as amended;

(3) Moneys obtained by gift, bequest, donation or grant from any other public or private source for the purposes of ORS 196.600 to 196.665 and 196.885;

(4) Repayment of moneys from the account, including interest on such moneys; and

(5) Moneys obtained from interest or other earnings from investments of moneys in the account. [Formerly 541.580]

**196.650 Use of account.** The division may use the moneys in the Oregon Wetlands Mitigation Bank Revolving Fund Account for the following purposes:

(1) For the voluntary acquisition of land suitable for use in mitigation banks.

(2) To pay for costs incurred for alterations needed to create, restore or enhance wetland areas for purposes of carrying out the provisions of ORS 196.600 to 196.655.

(3) For payment of administrative, research or scientific monitoring expenses of the division in carrying out the provisions of ORS 196.600 to 196.655.

(4) For the dispersal of funds received under the Federal Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.), for such purposes as specifically stipulated in a grant award.

(5) For the dispersal of funds received under the Federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, for the voluntary acquisition of wetlands and interests therein as identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan. [Formerly 541.585]

**196.655 Report on Oregon Wetlands Mitigation Bank Revolving Fund; contents.** As part of the report to the State Land Board required under ORS 196.885, the director shall prepare an annual report on the Oregon Wetlands Mitigation Bank Revolving Fund Account. The report shall include, but need not be limited to:

(1) The financial status of the account;

(2) Creation, restoration or enhancement activities and credits sold, granted or otherwise disposed of or remaining in mitigation banks established under ORS 196.600 to 196.655;

(3) Wetlands acquired with moneys in the account; and

(4) For each mitigation bank, a summary of activities, including but not limited to:

(a) A description of the location, size, number of potential credits and credits withdrawn for each specific permit action; and

(b) The status of all mitigation bank activities pending or completed during the past year. [Formerly 541.587]

**196.660 Effect of ORS 196.600 to 196.665 and 196.885.** ORS 196.600 to 196.665 and 196.885 are intended to be supplementary to, and are not intended to abrogate, any state or federal law relating to wetlands. [Formerly 541.590]

**Note:** Sections 14 and 15, chapter 855, Oregon Laws 1987, provide:

**Sec. 14.** The State Land Board shall appoint a technical scientific committee, including public, nonprofit, industry and other private sector members, to assist the director in the review and evaluation of mitigation bank proposals and operations. [1987 c.855 §14]

**Sec. 15.** Section 14 of this Act is repealed on July 1, 1991. [1987 c.855 §15]

**196.665 Short title.** ORS 196.600 to 196.655 may be cited as the "Oregon Wetlands Mitigation Bank Act of 1987." [Formerly 541.595]

**Note:** 196.665 [formerly 541.595] was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 196 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation

#### (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 state wide in scope. [1989 c.837 §2]

196.670 [Formerly 541.605; renumbered 196.800 in 1989]

**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 state-wide 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 state-wide planning goals and a single, uniform methodology of delineating wetland boundaries.

(3) Develop a state-wide 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 State-wide Wetlands Inventory.** (1) The division shall compile and maintain a comprehensive State-wide Wetlands Inventory.

(2) In compiling the State-wide Wetlands Inventory, the division 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 division shall consult with the public, local governments and affected state and federal agencies concerning the accuracy of the inventory.

(3) The division shall revise the inventory maps as new or more complete information becomes available.

(4) The division shall provide each city and county planning office with copies of the State-wide Wetlands Inventory covering the local jurisdiction.

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

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

(7) A wetland inventory developed by another party may be utilized by the division 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 division 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 division under ORS 196.800 to 196.905.

(9) In compiling and updating the State-wide Wetlands Inventory, the division shall identify opportunities for wetland creation, restoration and enhancement when the information is available. [1989 c.837 §6]

196.675 [Formerly 541.610, renumbered 196.805 in 1989]

**196.676 Response to notices from local governments.** The division 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 division 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 division 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]

196.680 [Formerly 541.615; renumbered 196.810 in 1989]

**196.681 Duties of division; standards for approval of plan; conditions for approval; order.** (1) In accordance with rules adopted pursuant to this chapter, the division 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 Land Conservation and Development Commission.

(2) The director 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 insure 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 paragraph (b) of subsection (7) 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 insure that adverse impacts are minimal. Such revision shall not be subject to ORS 196.684. [1989 c.837 §11]

**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, then application

fees and review procedures shall be in accordance with ORS 196.815, 196.825 (5) and (6) and 196.835. In lieu of the substantive standards for permit issuance in ORS 196.815 (1) and 196.825 (1), (2) and (3), the division 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 division shall condition any such permit as necessary to insure that the project:

(a) Is properly designed or configured to minimize the need for alterations to waters of the 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 insure wetland creation, restoration or enhancement measures are implemented to fully replace impacted resources.

(2) In any order approving a plan which 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 insure 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]

**196.684 Amendment of plans; review of plans by division; review of orders by Land Use Board of Appeals.** (1) Local governments shall provide notice to the division 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 division 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 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, 215.418 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, 215.418 and 227.350.

(6) The division 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, state-wide 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 Division of State Lands pursuant to ORS 196.668 to 196.692 shall be deemed to comply with the requirements of any state-wide 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, 215.418 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]

196.685 [Formerly 541 620, renumbered 196 815 in 1989]

**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 state-wide 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 division 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 division 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 division 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 division 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 division 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 division shall conduct a preliminary review of the acknowledged estuary management plan. The division 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 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 (5) and (6), 196.830 and 196.835. In lieu of the substantive standards for permit issuance in ORS 196.815 (1) and 196.825 (1), (2) and (3), the division 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 division shall condition any such permit as necessary to insure that the project:

(a) Is designed or configured to minimize alterations to waters of the 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 or enhancement 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]

#### 196.688 Public information program.

(1) The division 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 State-wide Wetlands Inventory.

(d) Wetland regulation.

(2) Upon request, the division 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]

196.690 [Formerly 541.622; renumbered 196.820 in 1989]

**196.692 Rules.** The division shall adopt rules to carry out the provisions 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, 215.418 and 227.350. [1989 c.837 §32]

196.695 [Formerly 541.625, renumbered 196.825 in 1989]

196.700 [Formerly 541.626; renumbered 196.830 in 1989]

196.705 [Formerly 541.627; renumbered 196.835 in 1989]

196.710 [Formerly 541.630; renumbered 196.840 in 1989]

196.715 [Formerly 541.635; renumbered 196.845 in 1989]

196.718 [Enacted in lieu of 541.640; renumbered 196.850 in 1989]

196.720 [Formerly 541.645; renumbered 196.855 in 1989]

196.725 [Formerly 541.650; renumbered 196.860 in 1989]

196.730 [Formerly 541.655; renumbered 196.865 in 1989]

196.735 [Formerly 541.660, renumbered 196.870 in 1989]

196.740 [Formerly 541.662, renumbered 196.875 in 1989]

196.745 [Formerly 541.665, renumbered 196.880 in 1989]

196.750 [Formerly 541.670; renumbered 196.885 in 1989]

196.755 [Formerly 541.675, renumbered 196.890 in 1989]

196.760 [Formerly 541.680, renumbered 196.895 in 1989]

196.765 [Formerly 541.685; renumbered 196.900 in 1989]

196.770 [Formerly 541.695; renumbered 196.905 in 1989]

#### REMOVAL OF MATERIAL; FILLING

**Note:** Section 2, chapter 45, Oregon Laws 1989, provides:

**Sec. 2.** (1) Notwithstanding any other provision of ORS 541.605 to 541.685 [renumbered 196.800 to 196.900 in 1989]:

(a) As used in ORS 541.605 to 541.685 [renumbered 196.800 to 196.900 in 1989], "fill" means the deposit by artificial means of material in any waters of this state.

(b) In the manner provided by ORS 541.640 [196.850], the director may provide a general exception from the application of ORS 541.605 to 541.685 [renumbered 196.800 to 196.900 in 1989] for fills that involve less than 50 cubic yards of material and will not result in substantial harm to the water resources of this state.

(2) This section does not become operative until the federal Environmental Protection Agency grants authority to the Division of State Lands to administer permits for the discharge of dredged or fill material under Section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended). [1989 c.45 §2]

**196.800 Definitions for ORS 196.600 to 196.665 and 196.800 to 196.900.** As used in ORS 196.600 to 196.665 and 196.800 to 196.900, 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) "Director" means the Director of the Division of State Lands.

(3) "Division" means the Division of State Lands.

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

(5) "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.

(6) "General authorization" means 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.

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

(8) "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.

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

(10) "Mitigation" means the reduction of adverse effects of a proposed project by considering, in the following order:

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

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

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

(d) Reducing or eliminating the impact 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 impact by replacing or providing comparable substitute wetland or water resources.

(11) "Public use" means a publicly owned project or a privately owned project that is available for use by the public.

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

(13) "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.

(14) "Waters of this state" means natural waterways including all tidal and nontidal bays, intermittent streams, constantly flowing streams, lakes, wetlands and other bodies of water in this state, navigable and nonnavigable, including that portion of the Pacific Ocean which is in the boundaries of this state.

(15) "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.

(16) "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]

**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 Division 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 of the Division of State Lands 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 196.665 and 196.800 to 196.900 without due process of law. [Formerly 541.610 and then 196.675]

**196.810 Permit required to remove material from bed or banks of waters; exceptions.** (1) Except as otherwise specifically permitted under ORS 196.600 to 196.665 and 196.800 to 196.900, no person or governmental body shall remove any material from the beds or banks or fill any waters of this state without a permit issued under authority of the Director of the Division 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 wetlands conservation plan.

(2) No governmental body shall issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.665 and 196.800 to 196.900.

(3) Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any governmental body 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 196.665 and 196.800 to 196.900.

(4) Subsection (1) of this section does not apply to 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, when notice of such emergency removal or filling is given to the Division of State Lands within 24 hours following the start of such activity. The division, not later than 24 hours following notice, shall inspect the emergency activity, and deny or approve; provided, however, that in emergency actions involving highways, the appropriate highway authority having jurisdiction over the highway in which the work is being performed, shall notify the division within 72 hours following the start of such activity. [Formerly 541.615 and then 196.680]

**196.815 Application for permit; fees; disposition of fees.** (1) Each applicant for a permit to remove material from the bed or banks or fill any waters of this state, first shall file a written application with the Director of the Division of State Lands, specifying the nature and amount of material to be removed or the amount of fill, the waters and the specific location from which it is to be removed or where the fill will be placed, the method of removal or filling and the times during which removal or filling is to be conducted. The director may require additional information as is necessary to enable the director to determine whether the granting of the permit applied for is consistent with the protection, conservation and best use of the water resources of this state. For the purposes of this subsection, fills or removals of material at locations not more than one mile apart may be combined in one application.

(2) The Director of the Division of State Lands shall furnish to any member of the public upon written request and at the expense of the member of the public a copy of any application for a permit pursuant to subsection (1) of this section.

(3)(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, \$50.

(B) For a removal by a public body, \$150.

(C) For a removal by a commercial operator, \$150.

(D) For a fill by a private operator, or a person contracting to perform services for a private operator, \$150.

(E) For a fill by a public body, \$375.

(F) For a fill by a commercial operator, \$375.

(G) For erosion—flood repair, including riprap, by a private landowner or public body, or a person contracting to perform services for such persons, 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 4,999 cubic yards, \$75 for private operator, \$75 for public body and \$75 for commercial operator.

(C) 5,000 to 50,000 cubic yards, \$150 for private operator, \$150 for public body and \$150 for commercial operator.

(D) Over 50,000 cubic yards, \$225 for private operator, \$225 for public body and \$225 for commercial operator.

(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 2,999 cubic yards, \$75 for private operator, \$75 for public body and \$75 for commercial operator.

(C) 3,000 to 10,000 cubic yards, \$150 for private operator, \$150 for public body and \$150 for commercial operator.

(D) Over 10,000 cubic yards, \$225 for private operator, \$225 for public body and \$225 for commercial operator.

(d) For the purposes of this subsection, the following terms shall have the following meanings:

(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 regulations promulgated by the division; and

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

(4) 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 (3) of this section.

(5) Annually on the anniversary date of the permit, 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 (3) of this section, except that the applicant shall pay only the base fee. 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 any extension 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.

(6) Fees received under this section shall be credited to the Common School Fund for use by the division in administration of ORS 196.600 to 196.665, 196.800 to 196.900, 196.990 and 541.990 and as otherwise required by law. [Formerly 541.620 and then 196.685]

**196.820 Prohibition against issuance of permits to fill Smith Lake or Bybee Lake; exception.** (1) Notwithstanding any provision of ORS 196.600 to 196.665 and 196.800 to 196.900 to the contrary, except as provided in subsection (2) of this section, the Director of the Division 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 Division 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 Conditions of permit; consultation with other agencies; hearing; appeal.** (1) The director shall issue a permit to remove material from the beds or banks of any waters of this state applied for under ORS 196.815 if the director determines that the removal described in the application will not be inconsistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.805.

(2) The director shall issue a permit applied for under ORS 196.815 for filling waters of this state if the director determines that the proposed fill would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.

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

(a) The public need for the proposed fill and the social, economic or other public benefits likely to result from the proposed fill. When the applicant for a fill 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 is not accomplished.

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

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

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

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

(g) Whether the proposed fill is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill is to take place.

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

(4) The director may issue a permit for a substantial fill in an estuary for a nonwater dependent use only if the fill 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 196.665 and 196.800 to 196.900.

(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, 196.830 and subsections (1) and (2) of this section. In formulating such conditions the director may consult with the State Geologist, the State Fish and Wildlife Director, the State Forester, the Director of the Department of Environmental Quality, the administrative officer of the State Soil and Water Conservation Commission, the Director of Agriculture, the State Parks and Recreation Director, the State Marine Director, the State Highway Engineer, the Director of the Economic Development Department, the Wa-

ter Resources Director and affected local governmental units. Each permit is valid only for the time specified therein. Obtaining a lease from the Division of State Lands shall not be one of the conditions to be considered in granting a permit under ORS 196.815. The director shall impose, as conditions to any permit, general authorization or wetland conservation plan, measures to provide mitigation for the reasonably expected adverse impacts from project development.

(6) Any applicant whose application for a permit has been denied, or who objects to any of the conditions imposed under subsections (1), (2) and (5) of this section by the director, may, within 10 days of the denial of the permit 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.

(7) In the event that a decision on issuance of a permit by the Director of the Division of State Lands is delayed for a period exceeding 45 days from the date of application in the case of a removal, or 90 days from the date of application in the case of a fill, a temporary permit shall be issued pending such final decision.

(8) Permits issued under this section shall be in lieu of any permit that might be required for the same operation under ORS 164.775, 164.785, 468.010, 468.030 to 468.045, 468.055, 468.060, 468.075, 468.110, 468.120, 468.700 to 468.725 and 468.735 to 468.775, so long as:

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

(b) The standards for granting such permits are substantially the same as those established pursuant to ORS 164.775, 164.785, 468.010, 468.035, 468.040, 468.055, 468.110, 468.120, 468.700 to 468.725 and 468.735 to 468.775 to the extent they affect water quality.

(9) Any agency or other unit of government requested by the director to comment on an application for a permit under this section must submit its comments to the director within 45 days after receiving the request for comment. If an agency or other unit of government fails to comment on the application within 45 days, the director shall assume the agency or other unit of govern-

ment has no objection and shall approve or deny the application. [Formerly 541.625 and then 196.695]

**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 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 chapter 197 or the state-wide 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 (4). [Formerly 541.626 and then 196.700]

**196.835 Hearing regarding issuance of permit; procedure; appeals; suspension of permit pending appeal.** Any person aggrieved or adversely affected by the director's grant of a permit may file a written request for hearing with the director within 60 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 af-

fectured 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 196.665 and 196.800 to 196.900. [Formerly 541.627 and then 196.705]

**196.840 Closure of specified waters to removal or filling.** Any agency listed in ORS 196.825 (5) may request the Water Resources Commission by rule to close one or more specified waters of this state to the issuance of permits. After a public hearing held in conformity with ORS 183.310 to 183.550, if the Water Resources Commission finds that issuance of permits with respect to such water resources would be inconsistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.805, the Water Resources Commission may by rule close such waters to the issuance of permits and to any other removals or fills under ORS 196.850 for an indefinite period or during such other times as are stated in the rule. [Formerly 541.630 and then 196.710]

**196.845 Investigations and surveys.** In considering applications for permits, the Director of the Division 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; notice; review.** (1) Notwithstanding ORS 196.810, the division may, by rule, grant general authorization for removal of material from the bed or banks or the filling of any waters of the state without a permit from the division if the division finds that those activities subject to the general authorization are substantially similar in nature and would cause only minimal individual and cumulative environmental impacts, and would not result in long-term harm to water resources of the state. The division shall condition any such general authorization upon actions necessary to minimize environmental impacts.

(2) The division shall provide notice of any proposed general authorization to affected federal and state agencies, local 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 subsection (1) of this section.

(3) Any person proposing to conduct an action under a general authorization shall

notify the division in writing prior to conducting such action.

(4) The division 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.

(5) The division 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 such review, the division may either modify, reissue or rescind the general authorization.

(6) 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 whether the requirement of subsection (1) of this section has been met. [1989 c.837 §9 (enacted in lieu of 541.640), renumbered 196.850 in 1989]

**196.855 Noncomplying removal of material or filling constitutes 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 wetlands conservation plan, is a public nuisance. [Formerly 541.645 and then 196.720]

**196.860 Enforcement powers of director.** (1) If the director 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 wetlands conservation plan, the director may:

(a) Investigate, hold hearings, make orders and take action, as provided in ORS 196.600 to 196.665 and 196.800 to 196.900, as soon as possible.

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

(c) Conduct public hearings in accordance with ORS 183.310 to 183.550.

(d) Publish findings and recommendations as they are developed relative to public policies and procedures necessary for the cor-

rection of conditions or violations of ORS 196.600 to 196.665 and 196.800 to 196.900.

(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 or governmental body 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 183.310 to 183.550 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 196.665 and 196.800 to 196.900 or of any rule or final order of the director under ORS 196.600 to 196.665 and 196.800 to 196.900 may be enjoined in civil abatement proceedings brought in the name of the State of Oregon; and 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 such 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 such violation.

(2) 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 such violation presents an imminent and substantial risk of injury, loss or damage to water resources.

(a) 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) Shall not be stayed during the pendency of a hearing conducted under paragraph (b) of this subsection.

(b) 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 183.310 to 183.550. 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.

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

(d) 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 such 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]

**196.865 Revocation, suspension or refusal to renew permit.** If the director finds that a person or governmental body 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]

**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 Division 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 Division of State Lands and the employees or duly authorized representatives of the division 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 or governmental body, through negligence, violates ORS 196.810, the director, 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 or governmental body 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]

**Note:** 196.875 [formerly 541.662 and 196.740] was enacted by two identical provisions, section 10 of chapter 330 and section 13 of chapter 674, Oregon Laws 1973. Both are compiled as a single section.

**196.880 Fill under permit presumed not to affect public rights; public rights extinguished.** If the director issues a permit to fill pursuant to ORS 196.600 to 196.665 and 196.800 to 196.900, 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 shall submit an annual report to the State Land Board on the activities conducted under ORS 196.600 to 196.665 and 196.800 to 196.900. 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 Wetlands Mitigation Bank Revolving Fund Account 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]

**196.890 Civil penalties.** Any person who violates any provision of ORS 196.600 to 196.665 and 196.800 to 196.900 or any rule, order or permit adopted or issued under ORS 196.600 to 196.665 and 196.800 to 196.900 shall be subject to a civil penalty in an amount to be determined by the director of not more than \$10,000 per day of violation. [Formerly 541.675 and then 196.755]

**196.895 Procedures for civil penalties.**

(1) Any civil penalty imposed under ORS 196.890 shall become due and payable when the person incurring the penalty receives a notice in writing from the director. The notice referred to in this section shall be sent by registered or certified mail and shall include:

(a) A reference to the particular sections of the statute, rule, order or permit involved;

(b) A short and plain statement of the matters asserted or charged;

(c) A statement of the amount of the penalty imposed; and

(d) A statement of the party's right to request a hearing within 20 days of receiving the notice.

(2) The person to whom the notice is addressed shall have 20 days from the date of personal service or mailing of the notice in which to make a written request for a hearing.

(3) Hearings shall be conducted under the provisions of ORS 183.310 to 183.550 ap-

plicable to contested cases. If no hearing is requested or if the party requesting a hearing fails to appear, a final order shall be entered upon a prima facie case made on the record of the agency.

(4) Unless the amount of penalty is paid within 10 days after the order becomes final, the order shall constitute a judgment and may be recorded with the county clerk in any county of this state. The clerk shall record the name of the person incurring the penalty and the amount of the penalty in the County Clerk Lien Record. The penalty provided in the order so recorded becomes a lien upon the title to any interest in real property situated in the county and owned by the person against whom the order is entered. Execution may be issued upon the order in the same manner as execution upon a judgment of a court of record.

(5) 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 under this section may be joined by the director with any other action taken against the same person under ORS 196.860 (1)(f).

(6) Any civil penalty recovered under this section shall be deposited in the Common School Fund for use by the division in administration of ORS 196.600 to 196.665, 196.800 to 196.900, 196.990 and 541.990 and as otherwise required by law. [Formerly 541.680 and then 196.760]

**196.900 Schedule of civil penalties; factors to be considered in imposing civil penalties.** (1) The director 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 Application of ORS 196.600 to 196.665 and 196.800 to 196.900.** (1) Nothing in ORS 196.600 to 196.665 and 196.800 to 196.900 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 543.620.

(2) Nothing in ORS 196.600 to 196.665 and 196.800 to 196.900 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 forest land; and

(b) Such removal or filling is directly connected with a forest management practice conducted in accordance with ORS 527.610 to 527.735, 527.990 and 527.992.

(3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the following activities on converted wetlands:

(a) Normal farming and ranching activities such as plowing, grazing, seeding, cultivating, conventional crop rotation, harvesting for the production of food and fiber, upland soil and water conservation practices or reestablishment of crops under federal conservation reserve program provisions; or

(b) Minor drainage within an established farm operation as defined by rule.

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

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

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

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

(6) 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 that existed at the time that the structure was in good repair other than those wetlands that were significantly adversely affected as a result of the original construction of those structures.

(7) Notwithstanding the provisions of subsection (6) of this section, any dike, dam, levee, groin, riprap, tidegate, drainage ditch, irrigation ditch or tile drainage system that was serviceable on or after January 1, 1980, shall be permitted to be reconstructed without permit, provided that:

(a) Such reconstruction is completed prior to December 31, 1991; and

(b) Such maintenance or reconstruction would not significantly adversely affect wetlands that existed at the time that the structure was in good repair.

(8) 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.

(9) For the purposes of this section, "converted wetland" means:

(a) Wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled or leveled and are capable of producing an agricultural commodity where such production would not have been possible but for such action; or

(b) Wetlands that have been otherwise manipulated by any activity that results in impairing or reducing the flow, circulation or reach of water that has the effect of significantly adversely affecting wetland values and is capable of producing an agricultural commodity where such production would not have been possible but for such action. [Formerly 541.695 and then 196.770]

## PENALTIES

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

MISCELLANEOUS MATTERS

---