Enrolled
Senate Bill 172

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CHAPTER .....

AN ACT

Relating to Division of State Lands permitting authority; creating new provisions; amending ORS 196.800, 196.810, 196.825, 196.850, 196.895, 196.905, 196.990, 390.835, 421.628 and 459.047; repealing section 2, chapter 45, Oregon Laws 1989; and declaring an emergency.

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

SECTION 1. ORS 196.800 is amended to read:

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

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

(2) "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*] **deposit** 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 statewide 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;

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(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. "Waters of this state" does not include the ocean shore, as defined in ORS 390.605, with the exception of those areas where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.

(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.

SECTION 2. ORS 196.810 is amended to read:

196.810. (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, [*no*] **a** person or governmental body [*shall*] **may not** 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.

[*(b) Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (5) and (12), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required. "Essential indigenous anadromous salmonid habitat" as defined under this section shall be further defined and designated by rule by the Division of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.*]

[*(c)*] **(b)** [*No person shall be required to obtain a permit under paragraph (b) of this subsection for*] **A permit is not required under paragraph (a) of this subsection for** prospecting **or other nonmotorized activities** resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within [*a designated essential indigenous anadromous salmonid habitat segment*] **a particular stream segment** in a single year. Prospecting shall be conducted only within the bed or wet perimeter of the waterway and shall not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining shall require a permit under paragraph [*(b)*] **(a)** of this subsection.

[*(d)*] **(c)** [*No permit shall be*] **A permit is not** required under paragraph [*(b)*] **(a)** of this subsection for construction or maintenance of fish passage and fish screening structures **associated with irrigation ditches or the maintenance of drainage ditches** that are constructed, operated or maintained under ORS 498.311, 498.316, 498.326, 498.351 or 509.600 to 509.645.

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[*(e)*] **(d)** Nothing in this section shall limit or otherwise change the exemptions under ORS 196.905.

[*(f)*] **(e)** As used in this section:

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

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

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

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

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

(2) [*No governmental body shall*] **A governmental body may not** issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.905.

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

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

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

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

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

SECTION 3. ORS 196.825 is amended to read:

196.825. (1) The Director of the Division of State Lands 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*] **is consistent** with the protection, conservation and best use of the water resources of this state as specified in ORS [*196.805*] **196.600 to 196.905**.

(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**:**

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

(b) Is consistent with ORS 196.600 to 196.905.

(3) In determining whether [*or not a permit shall be issued*] **to issue a permit under subsection (1) or (2) of this section**, the director shall consider all of 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.

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(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 196.905.

(5) If the director issues a permit, the director may impose such conditions as the director considers necessary to carry out the purposes of ORS 196.805, 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 Soil and Water Conservation Commission, the Director of Agriculture, the State Parks and Recreation Director, the State Marine Director, the Director of Transportation, the Director of the Economic and Community Development Department, the Water 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*] **may 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. Compensatory wetland mitigation shall be limited to replacement of the functional attributes of the lost wetland.

(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) Except for a permit issued under the process set forth in ORS 517.952 to 517.989, if a decision on issuance of a permit by the director is delayed for a period exceeding 90 days from the date of application, 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, 468B.005 to 468B.030 and 468B.048 to 468B.085, 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, 468B.005 to 468B.030 and 468B.048 to 468B.085 to the extent they affect water quality.

(9)(a) 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 government has no objection and shall approve or deny the application.

(b) Notwithstanding paragraph (a) of this subsection, the Department of Environmental Quality shall comment to the director within 75 days after receiving notice required under subsection (5) of this section unless the director has granted an extension of time. In no case shall the director grant an extension of time in excess of one year.

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(c) The Department of Environmental Quality [*shall not*] **may not** subsequently make comments under the Federal Water Pollution Control Act that differ from those comments made under paragraph (b) of this subsection without good cause and without providing the director of the division with notice before providing those comments.

SECTION 4. ORS 196.850 is amended to read:

196.850. (1) Notwithstanding ORS 196.810, the Division of State Lands 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*] **the** action. **The person may not commence the action until the person receives a letter of authorization from the division.**

(4) The requirements of subsection (3) of this section shall be waived if the Director of the Division of State Lands issues a general authorization and the authorized activity:

(a) Involves less than 50 cubic yards of material;

(b) Will be conducted during periods that minimize adverse effects to fish and wildlife in accordance with guidance provided by the State Department of Fish and Wildlife;

(c) Will not dam or divert a waterway in a manner that obstructs fish passage or vessel navigation; and

(d) Will not violate water quality standards as established by the Department of Environmental Quality.

[*(4)*] **(5)** 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)*] **(6)** 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)*] **(7)** 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.

SECTION 5. ORS 196.895 is amended to read:

196.895. (1) **Except as provided in subsection (4) of this section,** civil penalties under ORS 196.890 shall be imposed as provided in ORS 183.090.

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

(3) Any civil penalty recovered under this section shall be deposited in the Common School Fund for use by the Division of State Lands in administration of ORS 196.600 to 196.905, 196.990 and 541.990 and as otherwise required by law.

(4) Notwithstanding any provision of ORS 183.090, any person having an interest that is adversely affected or aggrieved by an alleged violation for which civil penalties are imposed under ORS 196.890 may intervene in a contested case proceeding pertaining to the imposition of civil penalties under this section.

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SECTION 6. ORS 196.905 is amended to read:

196.905. (1) [*Nothing in ORS 196.600 to 196.905 applies to filling the beds of the waters of this state for the purpose of constructing, operating and maintaining dams or other diversions for which permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.610.*] **Notwithstanding the exemptions in subsections (3) to (8) of this section, a permit under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters of this state when:**

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

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

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

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

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

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

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

(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;

[*(b) Maintenance of farm roads in such a manner as to not significantly adversely affect wetlands;*]

[*(c)*] **(b)** Subsurface drainage, by deep ripping, tiling or moling, on converted wetlands; [*and*]

(c) Maintenance of farm roads, provided that:

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

(B) Borrow material for farm road maintenance does not come from waters of this state unless authorized by the division; and

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

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

(5) The exemption in subsections (3) and (4) of this section [*shall not*] **may not** apply to any fill or removal which involves changing an area of wetlands **or converted 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 or other waters of this state to a greater extent than the wetlands or waters of this state were affected as a result of the original construction of those structures.

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

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

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

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

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

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

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

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

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

(a) **"Converted wetland"** means:

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

[*(b)*] **(B)** [*Includes land*] **Those areas** that the Natural Resources Conservation Service of the United States Department of Agriculture, or its successor agency, certifies as prior converted cropland or farmed wetlands, so long as agricultural management of the land has not been abandoned for five or more years.

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

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

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

(B) Rock crushing activities that result in the loss of natural drainage characteristics, the reduction of water storage and recharge capability, or the overburdening of natural water filtration capacity.

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

SECTION 7. ORS 196.990 is amended to read:

196.990. [*Violation of ORS 196.810 is a misdemeanor.*] **(1) A person commits the offense of unlawful removal from or filling of waters of this state if the person knowingly violates ORS 196.810 or an order issued thereunder, or any rule or condition of a permit issued under ORS 196.600 to 196.905.**

(2) Notwithstanding ORS 161.515, unlawful removal from or filling of waters of this state is an offense punishable by a fine of up to $10,000 per day of violation.

SECTION 8. ORS 390.835 is amended to read:

390.835. (1) It is declared that the highest and best uses of the waters within scenic waterways are recreation, fish and wildlife uses. The free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses. [*No*] **A** dam, [*or*] reservoir[,] or other water impoundment facility [*shall*] **may not** be constructed on waters within scenic waterways.

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[*No*] **A** water diversion facility [*shall*] **may not** be constructed or used except by right previously established or as permitted by the Water Resources Commission, upon a finding that such diversion is necessary to uses designated in ORS 536.310 (12), and in a manner consistent with the policies set forth under ORS 390.805 to 390.925. The Water Resources Commission shall administer and enforce the provisions of this subsection.

(2) Filling of the beds or removal of material from or other alteration of the beds or banks of scenic waterways for purposes other than recreational prospecting not requiring a permit shall be prohibited, except as permitted by the Director of the Division of State Lands upon a finding that such activity would be consistent with the policies set forth under ORS 390.805 to 390.925 for scenic waterways and in a manner consistent with the policies set forth under ORS 196.800 to 196.825 and 196.840 to 196.870 for removal of material from the beds and banks and filling of any waters of this state. The Director of the Division of State Lands shall administer and enforce the provisions of this subsection.

(3)(a) Upon a finding of emergency circumstances, the Director of the Division of State Lands may issue a temporary permit for the removal, filling or alteration of the beds or banks within a scenic waterway. The temporary permit shall include conditions developed after consultation with the State Department of Fish and Wildlife and the State Parks and Recreation Department.

(b) As used in this subsection, "emergency circumstances" exist if prompt action is necessary to prevent irreparable harm, injury or damage to persons or property.

(4) Any person adversely affected or aggrieved by the grant or denial of a permit under subsection (2) or (3) of this section may appeal in accordance with the procedure set forth in ORS 196.835.

(5) Nothing in ORS 390.805 to 390.925 affects the authority of the State Fish and Wildlife Commission to construct facilities or make improvements to facilitate the passage or propagation of fish or to exercise other responsibilities in managing fish and wildlife resources. Nothing in ORS 390.805 to 390.925 affects the authority of the Water Resources Commission to construct and maintain stream gauge stations and other facilities related to the commission's duties in administration of the water laws.

(6) Upon a finding of necessity under subsection (1) of this section, the Water Resources Commission may issue a water right for human consumption not to exceed .005 cubic feet per second per household, or livestock consumption uses not to exceed one-tenth of one cubic foot per second per 1,000 head of livestock, as designated in ORS 536.310 (12) within or above a scenic waterway if the Water Resources Commission makes the following findings:

(a) That issuing the water right does not significantly impair the free-flowing character of these waters in quantities necessary for recreation, fish and wildlife.

(b) That issuing the water right is consistent with provisions pertaining to water appropriation and water rights under ORS chapters 536 and 537 and rules adopted thereunder.

(c) That construction, operation and maintenance of the diversion system will be carried out in a manner consistent with the purposes set forth in ORS 390.805 to 390.925.

(d) If the water right is for human consumption, an additional finding that:

(A) The applicant cannot reasonably obtain water from any other source;

(B) Denial of the water right would result in loss of reasonable expectations for use of the property; and

(C) The system installed to divert water shall include monitoring equipment to permit water use measurement and reporting.

(e) If the water right is for livestock consumption, an additional finding that:

(A) The right is necessary to prevent the livestock from watering in or along the stream bed;

(B) The applicant cannot reasonably obtain water from any other source; and

(C) The applicant has excluded livestock from the stream and its adjacent riparian zone.

(7) In making the findings required under subsection (6) of this section, the Water Resources Commission shall consider the existing or potential cumulative impacts of issuing the water right.

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(8) The Water Resources Commission may not allow human consumption and livestock uses authorized under subsection (6) of this section in excess of a combined cumulative total of one percent of the average daily flow or one cubic foot per second, whichever is less, unless:

(a) The Water Resources Commission, the State Parks and Recreation Department, the State Department of Fish and Wildlife, the Department of Environmental Quality and the Division of State Lands unanimously agree to exceed that amount; and

(b) Exceeding that amount will not significantly impair the free-flowing character of these waters in quantities necessary for recreation, fish and wildlife.

(9)(a) The provisions of this section [*shall not*] **do not** apply to a water right application for the use of ground water as defined in ORS 537.515, except upon a finding by the Water Resources Director based on a preponderance of evidence that the use of ground water will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife.

(b) The Water Resources Department shall review every application for the use of ground water to determine whether to make the finding specified in paragraph (a) of this subsection. The finding shall be based upon the application of generally accepted hydrogeologic methods using relevant and available field information concerning the proposed use.

(c) In making the determination required by paragraph (a) of this subsection, the Water Resources Department shall consider the timing of projected impacts of the proposed use in relation to other factors, including but not limited to: Changing climate, recharge, incidental precipitation, out-of-stream appropriations and return flows.

(d) If the Water Resources Director makes the finding specified in paragraph (a) of this subsection, the Water Resources Director shall issue an order denying the application unless:

(A) Mitigation is provided in accordance with subsection (10) of this section; or

(B) The applicant submits evidence to overcome the finding under paragraph (a) of this subsection.

(e) Except as provided under subsection (13) of this section, if the Water Resources Director does not make the finding specified in paragraph (a) of this subsection, the Water Resources Director shall issue an order approving the application if the application otherwise meets the requirements of ORS 537.505 to 537.795.

(f) A protest of any order issued under this subsection may be filed in the same manner as a protest on any application for a right to appropriate ground water.

(g) Each water right permit and certificate for appropriation of ground water issued after July 19, 1995, for which a source of appropriation is within or above a scenic waterway shall be conditioned to allow the regulation of the use if analysis of data available after the permit or certificate is issued discloses that the appropriation will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife in effect as of the priority date of the right or as those quantities may be subsequently reduced.

(h) [*Nothing in this subsection shall*] **This subsection does not** limit the use of ground water for a use exempted under ORS 537.545.

(10) The Water Resources Commission or Water Resources Director shall consider mitigation measures and may include mitigation measures as conditions in any water right permit or certificate to ensure the maintenance of the free-flowing character of the scenic waterway in quantities necessary for recreation, fish and wildlife.

(11) The Water Resources Commission and the Water Resources Director shall carry out their responsibilities under ORS 536.220 to 536.590 with respect to the waters within scenic waterways in conformity with the provisions of this section.

(12) As used in this section, "measurably reduce" means that the use authorized under subsection (9) of this section will individually or cumulatively reduce surface water flows within the scenic waterway in excess of a combined cumulative total of one percent of the average daily flow or one cubic foot per second, whichever is less, unless:

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(a) The Water Resources Department, the State Parks and Recreation Department, the State Department of Fish and Wildlife, the Department of Environmental Quality and the Division of State Lands unanimously agree to exceed that amount; and

(b) Exceeding that amount will not significantly impair the free-flowing character of these waters in quantities necessary for recreation, fish and wildlife.

(13) Before authorizing an appropriation that will reduce streamflows within a scenic waterway in amounts up to but not exceeding the amounts described in subsection (12) of this section, the Water Resources Director shall find:

(a) That the appropriation will not significantly impair the free-flowing character of these waters in quantities necessary for recreation, fish and wildlife.

(b) That the appropriation is consistent with provisions pertaining to water appropriations and water rights under ORS chapters 536 and 537 and the rules adopted thereunder.

(c) That construction, operation and maintenance of the appropriation will be carried out in a manner consistent with the purposes set forth in ORS 390.805 to 390.925.

(14) [*No placer mining shall be*] **Placer mining is not** permitted on waters within scenic waterways, other than recreational placer mining.

(15) [*No person shall*] **A person may not** be required to obtain a permit for recreational prospecting **or other nonmotorized recreational activity** resulting in the fill, removal or other alteration of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single scenic waterway in a single year. Recreational prospecting shall not occur at any site where fish eggs are present.

(16) [*No provision of this section shall be construed to*] **This section does not** exempt recreational placer mining on a scenic waterway, other than recreational prospecting not requiring a permit, from compliance with the provisions of ORS 196.800 to 196.825 and 196.840 to 196.870 or rules adopted pursuant to ORS 196.800 to 196.825 and 196.840 to 196.870.

(17) Recreational placer mining[, *other than recreational prospecting not requiring a permit, shall not*] **may not**:

(a) Dam or divert a waterway or obstruct fish passage;

(b) Include nozzling, sluicing or digging outside the wet perimeter of the stream, nor extend the wet perimeter;

(c) Include movement of boulders, logs, stumps or other woody material from the wet perimeter other than movement by hand and nonmotorized equipment;

(d) Involve the disturbance of rooted or embedded woody plants, including trees and shrubs, regardless of their location;

(e) Include excavation from the streambank;

(f) Fail to level pits, piles, furrows or potholes outside the main channel of the waterway upon leaving the site;

(g) Include operation of a suction dredge without a suction dredge waste discharge permit from the Department of Environmental Quality including, but not limited to, a prohibition against dredging during periods when fish eggs could be in the dredging site gravel;

(h) Be conducted on federal lands except as allowed by agencies of the federal government;

(i) Impede boating;

(j) Include operation of a dredge between the hours of 6 p.m. and 8 a.m. within 500 feet of a residence or within 500 feet of a campground except within a federally designated recreational mining site; or

(k) Include operation of a dredge within the marked or posted swimming area of a designated campground or day use area except within a federally designated recreational mining site.

(18) As used in this section:

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

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(b) "Prospecting" means to search or explore for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate.

(c) "Recreational placer mining" includes, but is not limited to, the use of nonmotorized equipment and motorized surface dredges having an intake nozzle with an inside diameter not exceeding four inches, a motor no larger than 16 horsepower and a muffler meeting or exceeding factory-installed noise reduction standards. "Recreational placer mining" does not include recreational prospecting that does not require a permit.

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

[*(19) Notwithstanding any other provision of this section, no permit or temporary permit for dredging issued by the Division of State Lands for the purpose of recreational placer mining within a scenic waterway shall be in effect after December 31, 1999, if the review described in section 3, chapter 478, Oregon Laws 1997, has been completed and reported to the Seventieth Legislative Assembly or, if the review has not been completed and reported to the Seventieth Legislative Assembly, after December 31, 2001.*]

SECTION 9. ORS 421.628 is amended to read:

421.628. (1) Notwithstanding ORS 169.690, 195.025, 197.180, 215.130 (4) and 227.286 or any other provision of law, including but not limited to statutes, ordinances, regulations and charter provisions, **and except for permit decisions delegated by the federal government to the Division of State Lands,** the decisions of the Corrections Facilities Siting Authority, if approved by the Governor, shall bind the state and all counties, cities and political subdivisions in this state as to the approval of the sites and the construction and operation of the proposed corrections facilities. **Except for those statutes and rules for which permit decisions have been delegated by the federal government to the Division of State Lands, all** affected state agencies, counties, cities and political subdivisions shall issue the appropriate permits, licenses and certificates and enter into any intergovernmental agreements as necessary for construction and operation of the facilities, subject only to the conditions of the siting decisions.

(2) Each state or local governmental agency that issues a permit, license or certificate shall continue to exercise enforcement authority over the permit, license or certificate.

(3) Except as provided in subsections (4) to (16) of this section, nothing in ORS 421.611 to 421.630 expands or alters the obligations of cities, counties and political subdivisions to pay for infrastructure improvements for the proposed corrections facilities.

(4) The Department of Corrections shall seek to obtain public services necessary for the construction and operation of corrections facilities from a public body providing such services. The department [*shall not*] **may not** acquire or develop and furnish its own public services under this section that could be provided by a public body unless the department concludes that the state can achieve significant cost savings by doing so.

(5) Upon request of the Department of Corrections, a public body furnishing public services shall make public services available to the department that are either necessary for the construction and operation of a corrections facility or required by additions to or remodeling of a corrections facility sited or constructed under ORS 421.611 to 421.630 or any other law. All rates, terms and conditions of furnishing public services shall be just, fair and reasonable. A just, fair and reasonable rate shall assure the public body the recovery of the additional costs of providing and maintaining the requested service to the corrections facility, including, but not limited to, feasibility and design engineering costs, and reasonable capacity replacement, but [*shall not*] **may not** exceed the public body's actual capital and operating expenses, including reasonable reserves charged to all ratepayers, for such service. The public body's rates, terms and conditions shall be conclusively deemed to be just, fair and reasonable if the department and public body so agree in writing.

(6) If the Department of Corrections and the public body cannot agree on the rates, terms and conditions of furnishing necessary public services to a corrections facility, either the department or the public body may deliver to the other a notice of request to mediate any disputed issues, in-

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cluding, but not limited to, whether the department can achieve significant cost savings to the state by acquiring or developing and furnishing its own public services. If either the department or the public body requests mediation, the other shall participate in good faith in such mediation. Unless otherwise agreed by the department and the public body, the mediation shall be concluded within 30 days of delivery of the notice of request to mediate.

(7) If the mediation fails to resolve the issues in dispute, or if mediation is not requested by either the Department of Corrections or the public body, the department and the public body may agree to submit any disputed matters to arbitration. The arbitration may be either binding or nonbinding. If the department and the public body cannot agree on the selection of the arbitrator and the arbitration rules and procedure, upon motion directed to the Court of Appeals, the Chief Judge of the Court of Appeals shall select the arbitrator and decide the rules and procedure. The arbitrator's decision and award shall be guided by the standards set forth in this section. The decision and award of the arbitrator shall be final and binding on the department and the public body only if they agree to enter into binding arbitration prior to the initiation of the arbitration. If the department and public body have agreed to binding arbitration of disputed issues, either the department or the public body, if dissatisfied with the arbitrator's decision and award, may file exceptions in the Court of Appeals within 21 days of the issuance of the decision and award. Exceptions shall be limited to the causes set forth in ORS 36.355 (1). If any of the exceptions requires consideration of facts that do not appear on the face of the arbitrator's decision and award or is not stipulated to by the parties, the court may appoint a master to take evidence and make the necessary factual findings. The Court of Appeals' decision shall be final and not subject to further review.

(8) If the Department of Corrections and the public body have submitted disputed matters to nonbinding arbitration or if the department and public body have chosen not to submit disputed matters to arbitration, the department shall issue a preliminary order to the public body that either concludes that the state can achieve significant costs savings by acquiring or developing and furnishing its own public services, or establishes the rates, terms and conditions upon which the public body shall make necessary public services available to the department for the corrections facility. The public body, no later than 15 days following the department's issuance of its preliminary order, may contest the preliminary order by filing a written notice to that effect with the department. The preliminary order shall become final, binding and conclusive if the public body fails to request a hearing within the time permitted in this section.

(9) If a hearing is requested, the department shall provide the public body with an opportunity to be heard and shall issue its final order upon conclusion of the hearing. The department shall establish procedures to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to afford the public body a reasonable opportunity for a fair hearing. The procedures shall ensure that the public body has a reasonable opportunity to place in the record the information upon which the public body relies as a basis for its position. The department's order shall be guided by the standards set forth in this section.

(10) Proceedings for review of the department's final order shall be instituted when the affected public body files a petition with the Court of Appeals that meets the following requirements:

(a) The petition shall be filed within 21 days of issuance of the final order on which the petition is based.

(b) The petitioner shall serve a copy of the petition by registered or certified mail upon the Department of Corrections and the Attorney General.

(11) Within 30 days after service of the petition, the department shall transmit to the Court of Appeals the original or a certified copy of the entire record and any findings that may have been made.

(12) The Court of Appeals shall review the final order of the Department of Corrections de novo on the record created before the department. The Court of Appeals' decision shall be final and not subject to further review.

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(13) Proceedings for review in the Court of Appeals under this section shall be given priority over all other matters before the Court of Appeals.

(14) The Department of Corrections or other state agency [*shall not be*] **is not** required to make payments to the public body for necessary public services to a corrections facility in excess of funds that are legally available for such purposes.

(15) [*Nothing in this section shall*] **This section does not** require a public body to furnish public services to the Department of Corrections for a corrections facility in the event that the Legislative Assembly fails to make funds available in an amount sufficient to pay the state's share of costs of such services as determined under this section.

(16) As used in this section, "public services" means off-site infrastructure, including, but not limited to, sewer and water systems and service, and road improvements.

SECTION 10. ORS 459.047 is amended to read:

459.047. Upon request by a city or county responsible for implementing a department approved solid waste management plan which identifies a need for a landfill, and subject to policy direction by the Environmental Quality Commission, the Department of Environmental Quality shall:

(1) Assist the local government unit in the establishment of the landfill including assisting in planning, location, acquisition, development and operation of the site.

(2) Locate a site and issue a solid waste disposal permit under ORS 459.205 to 459.385 for a landfill within the boundaries of the requesting local government unit. Subject to the conditions set forth in the permit **and except for permit decisions delegated by the federal government to the Division of State Lands**, any permit for a landfill authorized by the Environmental Quality Commission under this subsection shall bind the state and all counties and cities and political subdivisions in this state as to the approval of the site and the construction and operation of the proposed facility. **Except for those statutes and rules for which compliance decisions have been delegated by the federal government to the Division of State Lands, all** affected state agencies, counties, cities and political subdivisions shall issue the appropriate permits, licenses and certificates necessary to construction and operation of the landfill, subject only to condition of the site certificate. Each state or local government agency that issues a permit, license or certificate shall continue to exercise enforcement authority over such permit, license or certificate.

SECTION 11. The amendments to ORS 196.800, 196.810, 196.825, 196.850, 196.895, 196.905, 196.990, 390.835, 421.628 and 459.047 by sections 1 to 10 of this 2001 Act and the repeal of section 2, chapter 45, Oregon Laws 1989, by section 13 of this 2001 Act become operative on January 2 of the even-numbered year following the date the United States Environmental Protection Agency grants authority by letter to the Division of State Lands to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended) and the Legislative Assembly approves the grant of authority.

SECTION 12. (1) The Division of State Lands may take any action necessary to prepare to fully implement the provisions of this 2001 Act prior to the operative date of this 2001 Act.

(2) The division shall periodically report to the appropriate committee of the Legislative Assembly on the status of its effort to assume authority to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended).

(3) After the Legislative Assembly approves the grant of authority, the division shall notify the Legislative Assembly prior to the transfer of authority from the United States Environmental Protection Agency.

SECTION 13. Section 2, chapter 45, Oregon Laws 1989, is repealed.

SECTION 14. If, after assuming authority to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended), the Division of State Lands seeks to relinquish the authority granted to the division by the federal government, the division shall, in compliance with ORS 171.130 and at least two years prior to the anticipated date for relinquishing the authority, submit

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to the Legislative Assembly a proposed legislative measure designed to implement a state permitting program for the dredging and filling of materials in the waters of this state.

SECTION 15. This 2001 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2001 Act takes effect on its passage.

Passed by Senate May 1, 2001

Repassed by Senate June 6, 2001

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Secretary of Senate

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President of Senate

Passed by House May 29, 2001

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Speaker of House

Received by Governor:

.....M.,....., 2001

Approved:

.....M.,....., 2001

.....
Governor

Filed in Office of Secretary of State:

.....M.,....., 2001

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Secretary of State

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