

A-Engrossed Senate Bill 45

Ordered by the Senate February 21
Including Senate Amendments dated February 21

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Governor Theodore R. Kulongoski for Department of Environmental Quality)

SUMMARY

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

Allows Department of Environmental Quality **or State Department of Agriculture** to issue individual, general or watershed water pollution discharge permits. [*Allows department to issue permits by order.*] **Specifies that departments may issue permits by order or rule.**

Allows [*department*] **departments** to use fees from water pollution discharge permits to administer any water pollution control program.

Directs Department **of Environmental Quality** to report annually to Environmental Quality Commission and legislature on administration of watershed approach to permits.

Allows commission to increase fees for certain permits based on anticipated cost of program.

A BILL FOR AN ACT

1
2 Relating to water pollution control permits; creating new provisions; and amending ORS 183.310,
3 468.065, 468B.050 and 468B.055.

4 Whereas the Department of Environmental Quality, on behalf of the State of Oregon and its
5 citizens, is authorized to administer the National Pollutant Discharge Elimination System permit
6 program under the Federal Water Pollution Control Act; and

7 Whereas the State of Oregon and its citizens have a substantial interest in implementing a high
8 quality program that ensures that the state retains its authority under the program; and

9 Whereas the State of Oregon also administers a water pollution control facility permit program
10 to control discharges to land and ground water; and

11 Whereas the Department of Environmental Quality convened a blue ribbon committee in De-
12 cember 2002 and charged the committee with the responsibility for recommending improvements to
13 the permit programs and for recommending a stable and sustainable funding source for all program
14 activities; and

15 Whereas the committee issued a final report in August 2004 containing recommendations on
16 program improvements and funding, including issuing permits using a watershed based approach and
17 methods to maximize the programs' efficiency and effectiveness; and

18 Whereas the committee recommends that the department issue permits using a watershed based
19 approach in which permitting and compliance activities within a watershed are coordinated in a
20 manner that facilitates permit development and public involvement; and

21 Whereas the committee finds that the existing method of issuing permits by rule is inefficient
22 and onerous, and unnecessarily diverts program resources; and

23 Whereas the committee recommends that the Legislative Assembly clarify that all general per-

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

mits be issued as departmental orders rather than rules; and

Whereas the committee recommends that the permit programs be funded through a mix of water quality fees and public dollars that covers all of the activities related to the programs; and

Whereas the committee recommends that the department be given authority to raise fees each year if necessary to resolve the permit programs' funding challenges; and

Whereas the department endorses the recommendations of the committee; and

Whereas the committee recommends that the Legislative Assembly embrace the watershed based approach to permitting by calling for the department to prepare a plan describing how the department will implement a watershed based approach to permitting and to report annually on progress toward implementing a watershed based approach; now, therefore,

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

SECTION 1. Section 2 of this 2005 Act is added to and made a part of ORS chapter 468B.

SECTION 2. Not more than once each calendar year, the Environmental Quality Commission may increase the fees established under ORS 468.065 for permits issued under ORS 468B.050. The amount of the annual increase may not exceed the anticipated increase in the cost of administering the permit program or three percent, whichever is lower.

SECTION 3. ORS 468.065 is amended to read:

468.065. Subject to any specific requirements imposed by ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755 and ORS chapters 468, 468A and 468B:

(1) Applications for all permits authorized or required by ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755 and ORS chapters 468, 468A and 468B shall be made in a form prescribed by the Department of Environmental Quality. Any permit issued by the department shall specify its duration, and the conditions for compliance with the rules and standards, if any, adopted by the Environmental Quality Commission pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755 and ORS chapters 468, 468A and 468B.

(2) By rule and after hearing, the commission may establish a schedule of fees for permits issued pursuant to ORS 468A.040, 468A.045, 468A.155 and 468B.050. Except as provided in ORS 468A.315 **and section 2 of this 2005 Act**, the fees contained in the schedule shall be based upon the anticipated cost of filing and investigating the application, of carrying out applicable requirements of Title V, of issuing or denying the requested permit, and of an inspection program to determine compliance or noncompliance with the permit. The fee shall accompany the application for the permit. The fees for a permit issued under ORS 468A.040 or 468B.050 may be imposed on an annual basis.

(3) An applicant for certification of a project under ORS 468B.040 or 468B.045, and any person submitting a notice of intent to seek reauthorization, a preliminary application or an application for reauthorization of a water right for a hydroelectric project under ORS 543A.030, 543A.035, 543A.075, 543A.080 or 543A.095 shall pay as a fee all expenses incurred by the commission and department related to the review and decision of the Director of the Department of Environmental Quality and commission. These expenses may include legal expenses, expenses incurred in evaluating the project, issuing or denying certification and expenses of commissioning an independent study by a contractor of any aspect of the proposed project. These expenses shall not include the costs incurred in defending a decision of either the director or the commission against appeals or legal challenges. The department shall bill applicants for costs incurred on a monthly basis, and shall provide a biennial report describing how the moneys were spent. An applicant may arrange with the department to pay

1 the fee on a quarterly basis. The department shall not charge a fee under the fee authority in this
 2 subsection if the holder is being charged a fee under ORS 543.088 and 543.090 or 543A.405. In no
 3 event shall the department assess fees under this section and under ORS 543A.405 for performance
 4 of the same work.

5 (4) The department may require the submission of plans, specifications and corrections and re-
 6 visions thereto and such other reasonable information as it considers necessary to determine the
 7 eligibility of the applicant for the permit.

8 (5) The department may require periodic reports from persons who hold permits under ORS
 9 448.305, 454.010 to 454.040, 454.205 to 454.225, 454.505 to 454.535, 454.605 to 454.755 and ORS chap-
 10 ters 468, 468A and 468B. The report shall be in a form prescribed by the department and shall
 11 contain such information as to the amount and nature or common description of the pollutant, con-
 12 taminant or waste and such other information as the department may require.

13 (6) Any fee collected under **a schedule of fees established pursuant to** this section or ORS
 14 468A.315 shall be deposited in the State Treasury to the credit of an account of the department.
 15 [*Such*] **The** fees are continuously appropriated to meet the [*administrative*] expenses of the program
 16 for which they are collected[.], **except as follows:**

17 (a) The federal operating permit program shall include a commensurate amount of the fee for
 18 any permit [*issued under*] **specified in** this section for which the department incurs costs associated
 19 with the requirements of Title V and any fees collected under ORS 468A.315. Fees collected for the
 20 federal operating permit program in any biennium that exceed the legislatively approved budget,
 21 including amounts authorized by the Emergency Board for the federal operating permit program for
 22 such biennium, shall be credited toward the federal operating permit program budget for the fol-
 23 lowing biennium.

24 (b) **Fees collected for permits issued under ORS 468B.050 to authorize the discharge of**
 25 **wastes into the waters of the state may be used to pay the expenses of any of the programs**
 26 **associated with the issuance of permits under ORS 468B.050 to authorize the discharge of**
 27 **wastes into the waters of the state.**

28 (c) The fees collected under **a schedule of fees established pursuant to** this section or ORS
 29 468A.315 by a regional air pollution control authority pursuant to a permit program authorized by
 30 the commission shall be retained by and shall be income to the regional authority except as provided
 31 in ORS 468A.155 (2)(c). Such fees shall be accounted for and expended in the same manner as are
 32 other funds of the regional authority. However, if the department finds after hearing that the permit
 33 program administered by the regional authority does not conform to the requirements of the permit
 34 program approved by the commission pursuant to ORS 468A.155, such fees shall be deposited and
 35 expended as are permit fees submitted to the department.

36 (7) As used in this section, "Title V" has the meaning given in ORS 468A.300.

37 **SECTION 4.** ORS 468B.050 is amended to read:

38 468B.050. (1) Except as provided in ORS 468B.053 or 468B.215, without [*first obtaining*] **holding**
 39 a permit from the Director of the Department of Environmental Quality or the State Department
 40 of Agriculture, which permit shall specify applicable effluent limitations, [*no person shall*] **a person**
 41 **may not:**

42 (a) Discharge any wastes into the waters of the state from any industrial or commercial estab-
 43 lishment or activity or any disposal system.

44 (b) Construct, install, modify or operate any disposal system or part thereof or any extension
 45 or addition thereto.

1 (c) Increase in volume or strength any wastes in excess of the permissive discharges specified
2 under an existing permit.

3 (d) Construct, install, operate or conduct any industrial, commercial, confined animal feeding
4 operation or other establishment or activity or any extension or modification thereof or addition
5 thereto, the operation or conduct of which would cause an increase in the discharge of wastes into
6 the waters of the state or which would otherwise alter the physical, chemical or biological proper-
7 ties of any waters of the state in any manner not already lawfully authorized.

8 (e) Construct or use any new outlet for the discharge of any wastes into the waters of the state.

9 **(2) The Department of Environmental Quality or the State Department of Agriculture**
10 **may issue a permit under this section as an individual, general or watershed permit. A per-**
11 **mit may be issued to a class of persons using the procedures for issuance of an order or for**
12 **the adoption of a rule. Notwithstanding the definition of “order” or “rule” provided in ORS**
13 **183.310, in issuing a general or watershed permit by order pursuant to this section, the State**
14 **Department of Agriculture or Department of Environmental Quality:**

15 **(a) Is not required to direct the order to a named person or named persons; and**

16 **(b) May include in the order agency directives, standards, regulations and statements of**
17 **general applicability that implement, interpret or prescribe law or policy.**

18 [(2)] (3) [As used in this section, “confined animal feeding operation” has the meaning given that
19 term in rules adopted by] The State Department of Agriculture or the Department of Environmental
20 Quality may define “confined animal feeding operation” by rule for purposes of implementing
21 this section.

22 **SECTION 5. On or before January 31 of each year, the Department of Environmental**
23 **Quality shall report to the Environmental Quality Commission and to an appropriate com-**
24 **mittee of the Legislative Assembly on the department’s efforts in administering a watershed**
25 **approach toward water pollution control permitting. The report shall include, but need not**
26 **be limited to, information that indicates:**

27 **(1) Whether the department is issuing permits on a watershed basis.**

28 **(2) The level of permit backlog, if any.**

29 **(3) The time frame that the department took to apply general permit coverage to appli-**
30 **cants.**

31 **(4) The timeliness of the review and tracking of discharge monitoring reports.**

32 **(5) The timeliness of the issuance of permit noncompliance notifications.**

33 **SECTION 6. Section 5 of this 2005 Act is repealed on January 2, 2010.**

34 **SECTION 7. ORS 468B.055 is amended to read:**

35 468B.055. (1) [Except as provided in subsection (3) of this section, all] **The Department of En-**
36 **vironmental Quality may require that** plans and specifications for the construction, installation
37 or modification of disposal systems, treatment works and sewerage systems[, shall] be submitted to
38 the department [of Environmental Quality] for its approval or rejection [pursuant to rules of the En-
39 vironmental Quality Commission].

40 **(2) [No] If the department requires that plans and specifications be submitted under**
41 **subsection (1) of this section, construction, installation or modification [of the type described in**
42 **subsection (1) of this section shall] may not** be commenced until the plans and specifications sub-
43 mitted to the department [under subsection (1) of this section] are approved. If the disposal or dis-
44 charge is for a chemical process mine, as defined in ORS 517.953, [such] **departmental** review and
45 approval shall be included as part of the consolidated application process under ORS 517.952 to

1 517.989. Any construction, installation or modification must be in accordance with the plans and
2 specifications approved by the department.

3 *[(3) By rule, the Environmental Quality Commission may exempt from the requirement of subsection*
4 *(1) of this section the class or classes of disposal systems, treatment works and sewerage systems for*
5 *which the commission finds plan submittal and approval unnecessary or impractical.]*

6 **SECTION 8.** ORS 183.310 is amended to read:

7 183.310. As used in this chapter:

8 (1) "Agency" means any state board, commission, department, or division thereof, or officer au-
9 thorized by law to make rules or to issue orders, except those in the legislative and judicial
10 branches.

11 (2)(a) "Contested case" means a proceeding before an agency:

12 (A) In which the individual legal rights, duties or privileges of specific parties are required by
13 statute or Constitution to be determined only after an agency hearing at which such specific parties
14 are entitled to appear and be heard;

15 (B) Where the agency has discretion to suspend or revoke a right or privilege of a person;

16 (C) For the suspension, revocation or refusal to renew or issue a license where the licensee or
17 applicant for a license demands such hearing; or

18 (D) Where the agency by rule or order provides for hearings substantially of the character re-
19 quired by ORS 183.415, 183.425, 183.450, 183.460 and 183.470.

20 (b) "Contested case" does not include proceedings in which an agency decision rests solely on
21 the result of a test.

22 (3) "Economic effect" means the economic impact on affected businesses by and the costs of
23 compliance, if any, with a rule for businesses, including but not limited to the costs of equipment,
24 supplies, labor and administration.

25 (4) "Hearing officer" includes an administrative law judge.

26 (5) "License" includes the whole or part of any agency permit, certificate, approval, registration
27 or similar form of permission required by law to pursue any commercial activity, trade, occupation
28 or profession.

29 (6)(a) "Order" means any agency action expressed orally or in writing directed to a named per-
30 son or named persons, other than employees, officers or members of an agency. "Order" includes
31 any agency determination or decision issued in connection with a contested case proceeding.
32 "Order" includes:

33 (A) Agency action under ORS chapter 657 making determination for purposes of unemployment
34 compensation of employees of the state; *[and]*

35 (B) Agency action under ORS chapter 240 which grants, denies, modifies, suspends or revokes
36 any right or privilege of an employee of the state; **and**

37 **(C) Agency action under ORS 468B.050 to issue a permit.**

38 (b) "Final order" means final agency action expressed in writing. "Final order" does not include
39 any tentative or preliminary agency declaration or statement that:

40 (A) Precedes final agency action; or

41 (B) Does not preclude further agency consideration of the subject matter of the statement or
42 declaration.

43 (7) "Party" means:

44 (a) Each person or agency entitled as of right to a hearing before the agency;

45 (b) Each person or agency named by the agency to be a party; or

1 (c) Any person requesting to participate before the agency as a party or in a limited party status
2 which the agency determines either has an interest in the outcome of the agency's proceeding or
3 represents a public interest in such result. The agency's determination is subject to judicial review
4 in the manner provided by ORS 183.482 after the agency has issued its final order in the pro-
5 ceedings.

6 (8) "Person" means any individual, partnership, corporation, association, governmental subdivi-
7 sion or public or private organization of any character other than an agency.

8 (9) "Rule" means any agency directive, standard, regulation or statement of general applicability
9 that implements, interprets or prescribes law or policy, or describes the procedure or practice re-
10 quirements of any agency. The term includes the amendment or repeal of a prior rule, but does not
11 include:

12 (a) Unless a hearing is required by statute, internal management directives, regulations or
13 statements which do not substantially affect the interests of the public:

14 (A) Between agencies, or their officers or their employees; or

15 (B) Within an agency, between its officers or between employees.

16 (b) Action by agencies directed to other agencies or other units of government which do not
17 substantially affect the interests of the public.

18 (c) Declaratory rulings issued pursuant to ORS 183.410 or 305.105.

19 (d) Intra-agency memoranda.

20 (e) Executive orders of the Governor.

21 (f) Rules of conduct for persons committed to the physical and legal custody of the Department
22 of Corrections, the violation of which will not result in:

23 (A) Placement in segregation or isolation status in excess of seven days.

24 (B) Institutional transfer or other transfer to secure confinement status for disciplinary reasons.

25 (C) Disciplinary procedures adopted pursuant to ORS 421.180.

26 (10) "Small business" means a corporation, partnership, sole proprietorship or other legal entity
27 formed for the purpose of making a profit, which is independently owned and operated from all other
28 businesses and which has 50 or fewer employees.

29