

1 DEPARTMENT OF STATE LANDS

2
3 DIVISION 85

4 ADMINISTRATIVE RULES GOVERNING THE ISSUANCE AND ENFORCEMENT
5 OF REMOVAL-FILL AUTHORIZATIONS WITHIN WATERS
6 OF THIS STATE INCLUDING WETLANDS
7

8
9 Final Strikethrough

10
11 September 26, 2012
12

13
14 **141-085-0500**

15
16 **General**

17
18 Where headings, special fonts or double-spacing are used, they are for the convenience
19 of the user only and have no substantive effect.
20

21 Stat. Auth.: ORS 196.825 & 196.600 - 196.~~665692~~

22 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990

23 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
24
25

26
27 **141-085-0506**

28
29 **Policy**

30
31 (1) **General Policy on Removal-Fill.** No authorization to place fill or remove material
32 from the waters of this state may:

33
34 (a) Interfere with the paramount policy of this state to preserve the use of its waters for
35 navigation, fishing and public recreation uses; or
36

37 (b) Be inconsistent with the protection, preservation and best use of the water resources
38 of this state.
39

40 (2) **Department Will Use Fair, Predictable Approach.** To the extent possible, the
41 Department will administer these rules to ensure persons receive timely, fair, consistent
42 and predictable treatment including timely communication and consistent application
43 and interpretation of these rules and the Removal-Fill Law.
44

1 (3) **Department Will Continually Improve the Program.** The Department will actively
2 and continually pursue improvements to the authorization process in order to reduce
3 paperwork, eliminate duplication, increase certainty and timeliness, and enhance
4 protection of water resources.

5
6 (4) **Department Will Recognize Multiple Interests.** The Department will recognize the
7 interests of adjacent landowners; tribal governments; public interest groups; soil and
8 water conservation districts; drainage, irrigation and diking districts; watershed councils;
9 state and federal agencies; and local government land use planning agencies.

10
11 (5) **Department's General Policies on Wetland Regulation.** In regard to the
12 regulation of wetlands, the Department will administer these rules to ensure that:

13
14 (a) The protection, conservation and best use of this state's wetland resources,
15 including their functions and values, are promoted through the integration and
16 coordination of the local comprehensive plans and the Department permitting process;
17 and

18
19 (b) A stable wetland resource base is maintained through avoidance of reasonably
20 expected adverse impacts, and by compensating for unavoidable wetland impacts.

21
22 (6) **Restoration and Conservation Programs.** The Department will encourage and
23 facilitate the restoration of waters of this state through voluntary restoration and
24 conservation programs.

25
26 (7) **Compensatory Mitigation.** Through its permitting and enforcement programs, the
27 Department will seek to offset losses of the functions and values of the water resources
28 of this state.

29
30 (8) **Mitigation Banks.** The Department will allow the use of mitigation banks to offset
31 adverse effects from removal or fill activities to the waters of this state.

32
33 Stat. Auth.: ORS 196.825 & 196.600-196.692665
34 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
35 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

36
37
38 **141-085-0510**

39
40 **Definitions**

41 The following definitions are used in addition to those in ORS 196.600 to 196.990.

42
43 (1) "Applicant" means a landowner, a person authorized by a landowner to conduct a
44 removal or fill activity, or a person that proposes a removal or fill activity for construction
45 or maintenance of a linear facility. ~~"Applicant" means a landowner or person authorized~~

Formatted: Font: Bold

1 | ~~by a landowner to conduct a removal or fill activity and who has authority and~~
2 | ~~responsibility to fully execute the terms and conditions of an authorization as evidenced~~
3 | ~~by their signature on the application.~~

4
5 (2) "**Aquatic Life and Habitats**" means the aquatic environment including all fish,
6 wildlife, amphibians, plants and other biota dependent upon environments created and
7 supported by the waters of this state. Aquatic life includes communities and species
8 populations that are adapted to aquatic habitats for at least a portion of their life.

9
10 (3) "**Artificial Means**" means the purposeful movement or placement of material by
11 humans and/or their machines.

12
13 (4) "**Authorization**" means an individual permit, general authorization, general permit or
14 emergency authorization.

15
16 (5) "**Bankfull Stage**" means the two-year recurrence interval flood elevation.

17
18 (6) "**Baseline Conditions**" means the ecological conditions, wetland functions and
19 values and the soils and hydrological characteristics present at a site before any change
20 by the applicant is made.

21
22 (7) "**Basin**" means one of the eighteen (18) Oregon drainage basins identified by the
23 Oregon Water Resources Department as shown on maps published by that agency.

24
25 (8) "**Beds**" means:

26
27 (a) For the purpose of OAR 141-089, the land within the wet perimeter and any adjacent
28 non-vegetated dry gravel bar; and

29
30 (b) For all other purposes, "beds" means that portion of a waterway that carries water
31 when water is present.

32
33 (9) "**Beds or Banks**" means the physical container of the waters of this state, bounded
34 on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays
35 and estuaries by the limits of the highest measured tide. The "bed" is typically the
36 horizontal section and includes non-vegetated gravel bars. The "bank" is typically the
37 vertical portion.

38
39 (10) "**Buffer**" means an upland or wetland area immediately adjacent to or surrounding
40 a wetland or other water that is set aside to protect the wetland or other waters from
41 conflicting adjacent land uses and to support ecological functions.

42
43 (11) "**Channel**" means a natural (perennial or intermittent stream) or human made (e.g.,
44 drainage ditch) waterway that periodically or continuously contains moving water and
45 has a defined bed and bank that serve to confine the water.

- 1
2 | (12) **“Channel Relocation”** means a change in location of a channel in which a new
3 channel is dug and the flow is diverted from the old channel into the new channel.
4
5 | (13) **“Coastal Zone”** means the area lying between the Washington border on the north
6 to the California border on the south, bounded on the west by the extent of this state’s
7 jurisdiction as recognized by federal law, and the east by the crest of the coastal
8 mountain range, excepting:
9
10 | (a) The Umpqua River basin, where the coastal zone extends to Scottsburg;
11
12 | (b) The Rogue River basin, where the coastal zone extends to Agness; and
13
14 | (c) The Columbia River basin, where the coastal zone extends to the downstream end
15 of Puget Island.
16
17 | (143) **“Coastal Zone Certification Statement”** means a signed statement by the
18 applicant or an authorized agent indicating that the proposed project will be undertaken
19 in a manner consistent with the applicable enforceable policies of the Oregon Coastal
20 Management Program.
21
22 | (154) **“Commercial Operator”** means any person undertaking a project having financial
23 profit as a goal.
24
25 | (165) **“Compensatory Mitigation”** means activities conducted by a permittee or third
26 party to create, restore, enhance or preserve the functions and values of the waters of
27 this state to compensate for the removal-fill related adverse impacts of project
28 development to waters of this state or to resolve violations of ORS 196.600 to 196.905.
29 Compensatory mitigation for removal-fill activities does not affect permit requirements of
30 other state departments.
31
32 | (176) **“Compensatory Non-Wetland Mitigation (CNWM)”** means activities conducted
33 by a permittee or third party to replace non-wetland water functions and values through
34 enhancement, creation, restoration or preservation to compensate for the adverse
35 effects of project development or to resolve violations of ORS 196.600 to 196.905.
36
37 | (187) **“Compensatory Wetland Mitigation (CWM)”** means activities conducted by a
38 permittee or third party to create, restore or enhance wetland and tidal waters functions
39 and values through enhancement, creation, restoration or preservation to compensate
40 for the adverse effects of project development or to resolve violations of ORS 196.600
41 to 196.905.
42
43 | (198) **“Comprehensive Plan”** means a generalized, coordinated land use map and
44 associated regulations and ordinances of the governing body of a local government.
45

- 1 | (2049) “**Condition**” refers to the state of a water's naturalness or ecological integrity.
2
- 3 | ~~(219) **Converted Wetlands.** For the purposes of this rule:~~
4
- 5 | ~~(a) “**Converted wetlands**” means agriculturally managed wetlands that, on or before~~
6 | ~~June 30, 1989, were brought into commercial agricultural production by diking, draining,~~
7 | ~~leveling, filling or any similar hydrologic manipulation and by removal or manipulation of~~
8 | ~~natural vegetation, and that are managed for commercial agricultural purposes.~~
9
- 10 | ~~(b) “**Converted wetlands**” does not include any stream, slough, ditched creek, spring,~~
11 | ~~lake or any other waters of this state that are located within or adjacent to a converted~~
12 | ~~wetland area.~~
13
- 14
- 15 | (22) “**Cowardin**” means Cowardin, L. M., V. Carter, F. C. Golet, E. T. LaRoe. 1979.
16 | Classification of wetlands and deepwater habitats of the United States. U. S.
17 | Department of the Interior, Fish and Wildlife Service, Washington, D.C.
18
- 19 | (234) “**Credit**” means the measure of the increase in the functions and values of the
20 | water resources of this state achieved at a mitigation site.
21
- 22 | (242) “**Day of Violation**” means the first day and each day thereafter on which there is
23 | a failure to comply with any provision of the Removal-Fill Law, ORS 196.600 through
24 | 196.990, or rules adopted by the Department, or any order or authorization issued by
25 | the Department.
26
- 27 | (253) “**Deep Ripping, Tiling and Moling**” refer to certain specific mechanical methods
28 | used to promote subsurface drainage of agricultural wetlands.
29
- 30 | (264) “**Degraded Wetland**” refers to a wetland in poor condition with diminished
31 | functions and values resulting from hydrologic manipulation (such as diking, draining
32 | and filling) and other disturbance factors that demonstrably interfere with the normal
33 | functioning of wetland processes.
34
- 35 | (275) “**Department**” means the Oregon Department of State Lands and the Director or
36 | designee.
37
- 38 | (286) “**Ditch**” means a manmade water conveyance channel. Channels that are
39 | manipulated streams are not considered ditches.
40
- 41 | (297) “**Dredging**” means removal of bed material using other than hand held tools.
42
- 43 | (3028) “**Ecologically or Environmentally Preferable**” means compensatory mitigation
44 | that has a higher likelihood of replacing functions and values or improving water
45 | resources of this state.

1
2 | (3129) "**Emergency**" means natural or human-caused circumstances that pose an
3 immediate threat to public health, safety or substantial property including crop or
4 farmland.
5
6 | (329) "**Enhancement**" means to improve the condition and increase the functions and
7 values of an existing degraded wetland or other water of this state.
8
9 | (334) "**Erosion-Flood Repair**" means the placement of riprap or any other work
10 necessary to protect existing facilities and land from flood and high stream flows, in
11 accordance with these regulations.
12
13 | (342) "**Essential Indigenous Anadromous Salmonid Habitat (ESH)**" means the
14 streams designated pursuant to ORS 196.810 that are necessary to prevent the
15 depletion of indigenous anadromous salmonid species during their life history stages of
16 spawning and rearing, and any adjacent off-channel rearing or high-flow refugia habitat
17 with a permanent or seasonal surface water connection to an ESH stream.
18
19 | (353) "**Estuary**" means:
20
21 (a) For waters other than the Columbia River, the body of water from the ocean to the
22 head of tidewater that is partially enclosed by land and within which salt water is usually
23 diluted by fresh water from the land, including all associated estuarine waters, tidelands,
24 tidal marshes and submerged lands; and
25
26 (b) For the Columbia River, all waters from the mouth of the river up to the western
27 edge of Puget Island, including all associated estuarine waters, tidelands, tidal marshes
28 and submerged lands.
29
30 | (364) "**Extreme Low Tide**" means the lowest estimated tide.
31
32 | (375) "**Fill**" means the total of deposits by artificial means equal to or exceeding 50
33 cubic yards or more of material at one location in any waters of this state. However, in
34 designated ESH areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-
35 100) "fill" means any amount of deposit by artificial means.
36
37 | (386) "**Food and Game Fish**" means those species identified under ORS 506.011,
38 506.036 or 496.009.
39
40 | (397) "**Forestland**" means the same as used in the Forest Practices Act and rules
41 (ORS 527.610 to 527.992); land which is used for the commercial growing and
42 harvesting of forest tree species, regardless of how the land is zoned or taxed or how
43 any state or local statutes, ordinances, rules or regulations are applied.
44

- 1 | (4038) “**Functions and Values**” are those ecological characteristics or processes
2 | associated with a water of this state and the societal benefits derived from those
3 | characteristics. The ecological characteristics are “functions,” whereas the associated
4 | societal benefits are “values.”
5 |
- 6 | (4139) “**Highest Measured Tide**” means the highest tide projected from actual
7 | observations within an estuary or tidal bay (see OAR 141-085-0515).
8 |
- 9 | (420) “**Hydrogeomorphic Method (HGM)**” means the method of wetland classification
10 | and functional assessment based on a wetland’s location in the landscape and the
11 | sources and characteristics of water flow.
12 |
- 13 | (434) “**Independent Utility**” as used in the definition of “project,” means that the project
14 | accomplishes its intended purpose without the need for additional phases or other
15 | projects requiring further removal-fill activities.
16 |
- 17 | (442) “**In-Lieu Fee Mitigation**” means the federally approved compensatory mitigation
18 | program used to compensate for reasonably expected adverse impacts of project
19 | development on waters of the United States and waters of this state with fees paid by
20 | the applicant to the Department or other sponsor, as approved by the Department.
21 |
- 22 | (453) “**Interagency Review Team (IRT)**” is an advisory committee to the Department
23 | on mitigation banks and other compensatory mitigation projects.
24 |
- 25 | (464) “**Intermittent Stream**” means any stream which flows during a portion of every
26 | year and which provides spawning, rearing or food-producing areas for food and game
27 | fish.
28 |
- 29 | (475) “**Legally Protected Interest**” means a claim, right, share or other entitlement that
30 | is protected under state or federal law. A legally protected interest includes, but is not
31 | limited to, an interest in property.
32 |
- 33 | (48) “**Linear Facility**” means any railway, highway, road, pipeline, water or sewer line,
34 | communication line, overhead or underground electrical transmission or distribution line,
35 | or similar facility.
36 |
- 37 | (496) “**Listed Species**” means any species listed as endangered or threatened under
38 | the federal Endangered Species Act (ESA) and/or any species listed as endangered or
39 | threatened by the State of Oregon.
40 |
- 41 | (5047) “**Location**” means the entire area where the project is located.
42 |
- 43 | (5148) “**Material**” means rock, gravel, sand, silt and other inorganic substances
44 | removed from waters of this state and any materials, organic or inorganic, used to fill
45 | waters of this state.

1
2 | (5249) "Maintenance" means the periodic repair or upkeep of a structure in order to
3 maintain its original use. "Maintenance" includes a structure being widened by no more
4 than twenty percent of its original footprint at any specific location in waters of this state
5 if necessary to maintain its serviceability. "Maintenance" also includes removal of the
6 minimum amount of sediment either within, on top of or immediately adjacent to a
7 structure that is necessary to restore its serviceability, provided that the spoil is placed
8 on upland.
9
10 | (530) "Mitigation" means the reduction of adverse effects of a proposed project by
11 considering, in the following order:
12
13 (a) Avoiding the effect altogether by not taking a certain action or parts of an action;
14
15 (b) Minimizing effects by limiting the degree or magnitude of the action and its
16 implementation;
17
18 (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment;
19
20 (d) Reducing or eliminating the effect over time by preservation and maintenance
21 operations during the life of the action by monitoring and taking appropriate corrective
22 measures; and
23
24 (e) Compensating for the effect by creating, restoring, enhancing or preserving
25 substitute functions and values for the waters of this state.
26
27 | (544) "Mitigation Bank" or "Bank" means a site created, restored, enhanced or
28 preserved in accordance with ORS 196.600 to 196.655 to compensate for unavoidable
29 adverse impacts to waters of this state due to activities which otherwise comply with the
30 requirements of ORS 196.600 to 196.905.
31
32 | (552) "Mitigation Bank Instrument (MBI)" means the legally binding and enforceable
33 agreement between the Department and a mitigation bank sponsor that formally
34 establishes the mitigation bank and stipulates the terms and conditions of the mitigation
35 bank's construction, operation and long-term management.
36
37 | (563) "Mitigation Bank Prospectus" or "Prospectus" means the preliminary proposal
38 prepared by a mitigation bank sponsor describing a proposed bank.
39
40 | (574) "Mitigation Bank Sponsor" or "Sponsor" means a person or single legal entity
41 that has the authority and responsibility to fully execute the terms and conditions of a
42 mitigation bank instrument.
43

- 1 | (585) "**Navigational Servitude**" means activities of the federal government that directly
2 result in the construction or maintenance of congressionally authorized navigation
3 channels.
4
- 5 | (596) "**Non-Motorized Methods or Activities**" are those removal-fill activities within
6 ESH that are completed by hand and are not powered by internal combustion,
7 hydraulics, pneumatics ~~or~~ and electricity. Hand-held tools such as wheelbarrows,
8 shovels, rakes, hammers, pry bars and manually operated cable winches are examples
9 of common non-motorized methods.
10
- 11 | (6057) "**Non-Water Dependent Uses**" means uses that do not require location on or
12 near a waterway to fulfill their basic purpose.
13
- 14 | (6158) "**Non-Wetland Waters**" means waters of this state other than wetlands,
15 including bays, intermittent streams, perennial streams, lakes and all other regulated
16 waters.
17
- 18 | (6259) "**Office of Administrative Hearings**" means the state agency unit that provides
19 Administrative Law Judges to conduct contested case proceedings.
20
- 21 | (630) "**Ordinary High Water Line (OHWL)**" means the line on the bank or shore to
22 which the high water ordinarily rises. The OHWL excludes exceptionally high water
23 levels caused by large flood events (e.g., 100-year events).
24
- 25 | (644) "**Oregon Rapid Wetland Assessment Protocol (ORWAP)**" is a method for
26 rapidly assessing wetland functions and values (as well as other attributes) in all
27 wetland types throughout Oregon.
28
- 29 | (652) "**Payment In-Lieu Mitigation**" means compensatory mitigation for waters of this
30 state that is fulfilled by using funds paid to the Department. The payment in-lieu
31 program is not approved to compensate for impacts to waters of the United States.
32
- 33 | (663) "**Perennial Stream**" means a stream that has continuous flow in parts of its bed
34 all year long during years of normal precipitation.
35
- 36 | (674) "**Person**" means a person or a public body, as defined in ORS 174.109; the
37 federal government, when operating in any capacity other than navigational servitude or
38 any other legal entity.
39
- 40 | (685) "**Plowing**" means all forms of tillage and similar physical means for the breaking
41 up, cutting, turning over and stirring of soil to prepare it for planting crops. Plowing does
42 not include deep ripping or redistribution of materials in a manner that changes any
43 waters of this state to upland.
44

- 1 | (~~696~~) "**Practicable**" means capable of being accomplished after taking into
2 | consideration cost, existing technology and logistics with respect to the overall project
3 | purpose.
4 |
- 5 | (~~7067~~) "**Preservation**" means to permanently protect waters of this state having
6 | exceptional ecological features.
7 |
- 8 | (~~7168~~) "**Private Operator**" means any person undertaking a project for an exclusively
9 | non-income-producing and nonprofit purpose.
10 |
- 11 | (~~7269~~) "**Project**" means the primary development or use, having independent utility,
12 | proposed by one person. A project may include more than one removal-fill activity.
13 |
- 14 | (~~730~~) "**Project Site**" means the geographic area upon which the project is being
15 | proposed.
16 |
- 17 | (~~744~~) "**Prospecting**" means to search or explore for samples of gold, silver or other
18 | precious minerals, using non-motorized methods; by filling, removing or moving by
19 | artificial means less than one cubic yard of material at any one individual site; and,
20 | cumulatively, not more than five cubic yards of material from within the bed or wet
21 | perimeter of any single ESH stream in a single year.
22 |
- 23 | (~~752~~) "**Public Body**" as used in the statutes of this state means state government
24 | bodies, local government bodies and special government bodies (ORS 174.109).
25 |
- 26 | (~~763~~) "**Public Use**" means a publicly owned project or a privately owned project that is
27 | available for use by the public.
28 |
- 29 | (~~774~~) "**Push-Up Dam**" means a berm of streambed material that is excavated or
30 | bulldozed (i.e., pushed-up) from within the streambed itself and positioned in the stream
31 | in such a way as to hold or divert water in an active flowing stream. The push-up dam
32 | may extend part way or all the way across the stream. Push-up dams are most
33 | frequently used to divert water for irrigation purposes associated with agricultural
34 | production including livestock watering. Push-up dams are reconstructed each water-
35 | use season; high water usually flattens or breaches them; and equipment is used to
36 | breach or flatten them at the close of the water-use season.
37 |
- 38 | (~~785~~) "**Reasonably Expected Adverse Effect**" and "**Adverse Impact**" means the direct
39 | or indirect, reasonably expected or predictable results of project development upon
40 | waters of this state including water resources, navigation, fishing and public recreation
41 | uses.
42 |
- 43 | (~~796~~) "**Reconstruction**" means to rebuild or to replace the existing structure in-kind.
44 | "Reconstruction" includes a structure being widened by no more than twenty percent of
45 | its original footprint at any specific location in waters of this state.

- 1
2 | (8077) "**Recreational Placer Mining**" means to search or explore for samples of gold,
3 silver or other precious minerals by removing, filling or moving material from or within
4 the bed of a stream, using non-motorized equipment or a motorized surface dredge
5 having an intake nozzle with an inside diameter not exceeding four inches and a muffler
6 | meeting or exceeding factory-installed noise reduction standards.
7
8 | (8178) "**Reference Site**" means a site or sites that represent the desired future
9 characteristics and condition to be achieved by a compensatory mitigation plan.
10
11 | (8279) "**Removal**" means the taking of more than 50 cubic yards of material (or its
12 equivalent weight in tons) in any waters of this state in any calendar year; or the
13 movement by artificial means of an equivalent amount of material on or within the bed of
14 such waters, including channel relocation. However, in designated ESH areas (OAR
15 141-102) and in designated Scenic Waterways (OAR 141-100) the 50-cubic-yard
16 minimum threshold does not apply.
17
18 | (839) "**Removal-Fill Site**" means the specific point where a person removes material
19 from and/or fills any waters of this state. A project may include more than one removal-
20 fill site.
21
22 | (844) "**Riprap**" means facing a bank with rock or similar substance to control erosion.
23
24 | (852) "**Serviceable**" means capable of being used for its intended purpose.
25
26 | (863) "**Service Area**" means the boundaries set forth in a mitigation bank instrument
27 that include one or more watersheds identified on the United States Geological Survey,
28 Hydrologic Unit Map -1974, State of Oregon, for which a mitigation bank provides
29 credits to compensate for adverse effects from project developments to waters of this
30 state. Service areas for mitigation banks are not mutually exclusive.
31
32 | (874) "**State Scenic Waterway (SSW)**" means a river or segment of river or lake that
33 has been designated as such in accordance with Oregon Scenic Waterway Law (ORS
34 390.805 to 390.995).
35
36 | (885) "**Temporary Impacts**" are adverse impacts to waters of this state that are rectified
37 within 24 months from the date of the initiation of the impact ~~occurred~~.
38
39 | (896) "**Temporal Loss**" means the loss of the functions and values of waters of this
40 state that occurs between the time of the impact and the time of their replacement
41 through compensatory mitigation.
42
43 | (9087) "**Tidal Waters**" are the areas in estuaries, tidal bays and tidal rivers located
44 between the highest measured tide and extreme low tide (or to the elevation of any

1 eelgrass beds, whichever is lower), that is flooded with surface water at least annually
2 during most years. Tidal waters include those areas of land such as tidal swamps, tidal
3 marshes, mudflats, algal and eelgrass beds and are included in the Estuarine System
4 and Riverine Tidal Subsystem as classified by Cowardin.
5
6 | ~~(9188)~~ **"Violation"** means removing material from or placing fill in any of the waters of
7 this state in a manner that is inconsistent with any provision of the Removal-Fill Law
8 (ORS 196.600 through 196. 990), rules adopted by the Department, or any order or
9 authorization issued by the Department.
10
11 | ~~(9289)~~ **"Water Quality"** means the measure of physical, chemical and biological
12 characteristics of water as compared to Oregon's water quality standards and criteria
13 set out in rules of the Oregon Department of Environmental Quality and applicable state
14 law.
15
16 | ~~(930)~~ **"Water Resources"** includes not only water itself but also aquatic life and habitats
17 therein and all other natural resources in and under the waters of this state.
18
19 | ~~(944)~~ **"Waters of This State"** means all natural waterways, tidal and non-tidal bays,
20 intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the
21 Pacific Ocean that is in the boundaries of this state, all other navigable and non-
22 navigable bodies of water in this state and those portions of the ocean shore, as defined
23 in ORS 390.605, where removal or fill activities are regulated under a state-assumed
24 permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control
25 Act, as amended.
26
27 | ~~(952)~~ **"Wet Perimeter"**, as used in OAR 141-089, means the area of the stream that is
28 under water, or is exposed as a non-vegetated dry gravel bar island surrounded on all
29 sides by actively moving water at the time a removal-fill activity occurs.
30
31 | ~~(963)~~ **"Wetland Creation"** means to convert an area that has never been a wetland to a
32 wetland.
33
34 | ~~(974)~~ **"Wetland Enhancement"** means to improve the condition and increase the
35 functions and/or values of an existing degraded wetland.
36
37 | ~~(985)~~ **"Wetland Hydrology"** means the permanent or periodic inundation or prolonged
38 saturation sufficient to create anaerobic conditions in the soil and support hydrophytes.
39
40 | ~~(996)~~ **"Wetland Restoration"** means to reestablish a former wetland.
41
42 | ~~(10097)~~ **"Wetlands"** means those areas that are inundated or saturated by surface or
43 ground water at a frequency and duration sufficient to support, and that under normal
44 circumstances do support, a prevalence of vegetation typically adapted for life in
45 saturated soil conditions.

1
2 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
3 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
4 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
5
6

7 **141-085-0515**

8
9 **Removal-Fill Jurisdiction by Type of Water**

10
11 This section describes the types and jurisdictional limits of the waters of this state that
12 are regulated by the Department of State Lands.
13

14 (1) **Pacific Ocean.** The Pacific Ocean is jurisdictional from the line of extreme low tide
15 seaward to the limits of the territorial sea. As defined in ORS 390.605(2), the land lying
16 between extreme low tide and the statutory vegetation line or the line of established
17 upland shore vegetation, whichever is farther inland, is known as the “ocean shore.”
18 “Ocean shore” does not include an estuary as defined in ORS 196.600. The “ocean
19 shore” is regulated by the Oregon Department of Parks and Recreation.
20

21 (2) **Estuaries, Tidal Bays and Tidal Rivers.** Estuaries, tidal bays and rivers below the
22 head of tide are jurisdictional to the elevation of the highest measured tide (excluding
23 storm surge), or to the upper edge of wetland, whichever is higher. The head of tide is
24 the farthest point upstream where a river is affected by tidal fluctuations. The highest
25 measured tide elevation on a parcel may be determined by a land survey referenced to
26 the closest tidal benchmark based upon the most recent tidal epoch and reference to
27 both the tidal datum (MLLW) and the fixed geodetic datum (NAVD88). In lieu of
28 surveyed elevations, subject to approval by the Department, highest measured tide
29 elevation may be based upon actual tide gauge measurements during a wintertime
30 spring tide or observation of the highest of the field indicators listed in subsections (a)
31 through (f) below. These field indicators are often not observable within the upper
32 riverine portion of an estuary, in which case a land survey is required:
33

34 (a) The uppermost drift or wrack (or debris) line containing small driftwood, mats of
35 filamentous algae (algae that form long visible chains, threads, or filaments that
36 intertwine forming a mat), seaweeds, seagrasses, pieces of bulrush or other emergent
37 vascular plants, styrofoam or other buoyant plastic debris, bivalve shells, crab molts, or
38 other aquatic invertebrate remains;
39

40 (b) The uppermost water mark line on an eroding bank;
41

42 (c) The uppermost water mark line (e.g., discoloration; sediment, barnacles, snails, or
43 algae growth) visible on a hard shoreline or bank consisting of bedrock, boulders,
44 cobbles, riprap or a seawall;
45

- 1 (d) The uppermost intertidal zone inhabited by a community of barnacles, limpets, and
2 littorine snails along shorelines composed of bedrock, riprap, boulders, and/or cobble;
3
- 4 (e) The uppermost tidal marsh/upland boundary, as indicated by a dominant plant
5 community characteristic of saltwater, brackish, or freshwater tidal plant communities
6 changing to a dominant plant community typical of uplands; and/or
7
- 8 (f) The intertidal/upland boundary along sandy shores as indicated by the appearance of
9 a distinct dune plant community.
10
- 11 **(3) Waters, Including Rivers, Intermittent and Perennial Streams, Lakes and**
12 **Ponds.** These waters are jurisdictional to the ordinary high water line (OHWL). The
13 OHWL can be determined by direct observation of the annual high water event, using
14 local gauge data to estimate bankfull stage, and/or by using readily identifiable field
15 indicators. Field indicators for OHWL include:
16
- 17 (a) Clear, natural line impressed on the shore;
18
- 19 (b) Change in vegetation from riparian (e.g., willows) to upland (e.g., oak, fir) dominated;
20
- 21 (c) Textural change of depositional sediment or changes in the character of the soil
22 (e.g., from sand, sand and cobble, cobble and gravel to upland soils);
23
- 24 (d) Elevation below which no fine debris (needles, leaves, cones, and seeds) occurs;
25
- 26 (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or
27
- 28 (f) Other appropriate means that consider the characteristics of the surrounding areas.
29
- 30 **(4) Wetlands.** Wetlands are jurisdictional within the wetland boundary.
31
- 32 **(5) Reservoirs.** The Department's jurisdiction over reservoirs extends to the higher of
33 either the normal operating pool level or the upper edge of adjacent wetland.
34
- 35 **(6) Artificially Created Wetlands and Ponds.** These waters are jurisdictional when
36 they are:
37
- 38 (a) Equal to or greater than one acre in size;
39
- 40 (b) Created, in part or in whole, in waters of this state; or
41
- 42 (c) Identified in an authorization as a mitigation site.
43

1 (7) **Exempt Artificially Created Wetlands and Ponds.** Artificially created wetlands and
2 ponds created entirely from upland, regardless of size, are not waters of this state if
3 they are constructed for the purpose of:

- 4
- 5 (a) Wastewater treatment;
- 6
- 7 (b) Settling of sediment;
- 8
- 9 (c) Stormwater detention and/or treatment;
- 10
- 11 (d) Agricultural crop irrigation or stock watering;
- 12
- 13 (e) Fire suppression;
- 14
- 15 (f) Cooling water;
- 16
- 17 (g) Surface mining, even if the site is managed for interim wetlands functions and
18 values;
- 19
- 20 (h) Log storage; or
- 21
- 22 (i) Aesthetic purposes.

23

24 (8) **Jurisdictional Ditches.** Except as provided under section (9) and (10) below,
25 ditches ~~artificially created from upland~~ are jurisdictional if they are:

26

27 (a) Created in wetlands, estuaries, tidal rivers or other waters of this state; or

28

29 (b) Created from upland and meet the following conditions:

30

31 (i) Contain food and game fish; and

32

33 (ii) Have a free and open connection to waters of this state. A “free and open
34 connection” means a connection by any means, including but not limited to culverts, to
35 or between natural waterways and other navigable and non-navigable bodies of water
36 that allows the interchange of surface flow at bankfull stage or ordinary high water, or at
37 or below mean higher high tide between tidal waterways.

38

39 (9) **Non-Jurisdictional Irrigation Ditches.** Existing irrigation ditches that meet the
40 following tests are not jurisdictional:

41

42 (a) Are operated and maintained for the primary purpose of conveying water for
43 irrigation; and

44

1 | (b) Are dewatered ~~forduring~~ the non-irrigation season except for water incidentally
2 retained in isolated low areas of the ditch or are used for stock water runs, provision of
3 water for fire suppression, or to collect storm water runoff.
4

5 | (10) **Non-Jurisdictional Roadside and Railroad Ditches.** Roadside and railroad
6 ditches that meet the following tests are not jurisdictional:
7

- 8 (a) Ten feet wide or less at the ordinary high water line;
- 9
- 10 (b) Artificially created from upland or from wetlands;
- 11
- 12 (c) Not adjacent and connected or contiguous with other wetlands; and
- 13
- 14 (d) Do not contain food or game fish.
- 15

16 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
17 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
18 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
19
20

21 | **141-085-0520**

22 | **Removal-Fill Jurisdiction by Volume of Material**

23
24
25 The following criteria are used to determine jurisdictional volume thresholds that trigger
26 the requirement for an authorization.
27

28 (1) **Oregon State Scenic Waterways (SSWs).** The threshold volume is any amount
29 greater than zero, .
30

31 | (2) ~~Streams Designated as~~ **Essential Indigenous Anadromous Salmonid Habitat**
32 **(ESH).** The threshold volume is any amount greater than zero,.
33

34 (3) **Compensatory Mitigation Sites.** The threshold volume is any amount greater than
35 zero for compensatory mitigation sites referenced in an authorization.
36

37 (4) **All Other Waters of This State.**

38 (a) For fill activities, any combination of either organic or inorganic material deposited by
39 artificial means at any one location in waters of this state equal to or exceeding 50 cubic
40 yards or the equivalent weight in tons; and
41

42 (b) For removal activities, the taking or movement by artificial means of more than 50
43 cubic yards of inorganic material or the equivalent weight in tons in any calendar year.
44
45

1 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
2 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
3 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
4
5

6 | **141-085-0525**

7
8 | **Measuring and Calculating Volume of Removal and Fill**

- 9
10 | (1) **Calculating Removal Volume.** Removal volume for all waters includes the full
11 | extent of the excavation or movement within the jurisdictional areas.
12
13 | (2) **Calculating Fill Volume.** For waters other than wetlands, fill volume is measured to
14 | the ordinary high water line (OHWL) or the highest measured tide (HMT). For wetlands,
15 | fill volume is measured to the height of the fill, excluding buildings.
16
17 | (3) **Calculating Volume for Channel Relocation.** When calculating the volume for
18 | channel relocation, the threshold is met considering either:
19 |
20 | (a) The volume of material removed to construct the new channel up to OHWL; or
21 |
22 | (b) The volume that would be required to completely fill the old channel to the OHWL or
23 | HMT.
24
25 | (4) **Projects that Involve Both Fill and Removal.** For projects that involve both fill and
26 | removal, the combined volumes are used to determine whether a permit is required.
27

28 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
29 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
30 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
31
32

33 | **141-085-0530**

34
35 | **Exemptions for Certain Activities and Structures**

36
37 | These exemptions apply in all waters of this state except State Scenic Waterways.

- 38
39 | (1) **State Forest Management Practices.** Non-federal forest management practices
40 | subject to Oregon's Forest Practices Act conducted in any non-navigable water of this
41 | state are exempt. When these forestlands are being converted to other uses the
42 | exemption does not apply to the activities associated with the new use. Forest
43 | management practices must be directly connected with a forest management practice
44 | conducted in accordance with ORS 527.610 through 527.770, 527.990 and 527.992,
45 | such as:

- 1
2 (a) Reforestation;
3
4 (b) Road construction and maintenance;
5
6 (c) Harvesting of forest tree species; and
7
8 (d) Disposal of slash.
9
- 10 **(2) Fill for Construction, Operation and Maintenance of Certain Dams and Water**
11 **Diversion Structures.** Filling the beds of the waters of this state for the purpose of
12 constructing, operating and maintaining dams or other diversions for which permits or
13 certificates have been or will be issued under ORS Chapters 537 or 539 and for which
14 preliminary permits or licenses have been or will be issued under ORS 543.010 through
15 543.610 is exempt.
16
- 17 **(3) Navigational Servitude.** Activities conducted by or on the behalf of any agency of
18 the federal government acting in the capacity of navigational servitude in connection
19 with a federally authorized navigation channel are exempt. Disposal of dredged material
20 within the ordinary high water line of the same waterway is also exempt.
21
- 22 **(4) Maintenance or Reconstruction of Water Control Structures.** Fill or removal or
23 both for maintenance or reconstruction of water control structures such as culverts,
24 dikes, dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches, and
25 tile drain systems are exempt if:
26
- 27 (a) The project meets the definition of maintenance under OAR 141-085-0510(49);
28
29 **(b) The project meets the definition of reconstruction under OAR 141-085-0510(79);**
30
- 31 **(c)** The structure was serviceable within the past five years; and
32
- 33 **(d)** The maintenance or reconstruction would not significantly adversely affect wetlands
34 or other waters of this state to a greater extent than the wetlands or waters of this state
35 were affected as a result of the original construction of those structures.
36
- 37 **(5) Maintenance and Emergency Reconstruction of Roads and Transportation**
38 **Structures.** Fill or removal for maintenance, including emergency reconstruction of
39 recently damaged parts, of currently serviceable roads or transportation structures, such
40 as groins and riprap protecting roads, causeways, bridge abutments or approaches, and
41 boat ramps is exempt.
42
- 43 **(6) Prospecting and Non-Motorized Activities within Designated Essential**
44 **Indigenous Anadromous Salmonid Habitat (ESH).** A permit is not required for
45 prospecting or other non-motorized activities resulting in removal-fill of less than one

1 cubic yard of material at any one individual site and, cumulatively, not more than five
2 cubic yards of material within a particular stream in a single year. Prospecting or other
3 non-motorized activities may be conducted only within the bed or wet perimeter of the
4 waterway and must not occur at any site where fish eggs are present.

5
6 **(7) Fish Passage and Fish Screening Structures in Essential Indigenous**
7 **Anadromous Salmonid Habitat (ESH).** Less than 50 cubic yards of removal-fill for
8 construction or maintenance of fish passage and fish screening structures that are
9 constructed, operated or maintained under ORS 498.306, 498.316, 498.326 or 509.600
10 to 509.645. This exemption includes removal of material that inhibits fish passage or
11 prevents fish screens from functioning properly.

12
13 (8) Change in Point of Diversion for Surface Water. Fill or removal for a change in
14 the point of diversion to withdraw surface water for beneficial use is exempt if the
15 change in the point of diversion is:

16
17 (a) Necessitated by a change in the location of the surface water; and

18
19 (b) Authorized by the Oregon Water Resources Department.

20
21 Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
22 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
23 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

24
25
26 **141-085-0534**

27 **Exemptions for Certain Voluntary Habitat Restoration Activities**

28
29 (1) **Definitions.** For the purposes of this rule:

30
31 (a) “Habitat Restoration” means the return of an ecosystem from a disturbed or altered
32 condition to a close approximation of its ecological condition prior to disturbance.

33
34 (b) “Voluntary” means activities undertaken by a person of their own free will, and not as
35 a result of any legal requirement of the Removal-fill Law (ORS 196.600–196.990).

36
37 (2) **Conditions of Exemption:** Activities described in Sections (3) through (8) of this
38 rule are exempt from permit requirements under the following conditions:

39
40 (a) Activities are not conducted in areas designated as State Scenic Waterways, unless
41 listed as an exempt activity under ORS 390.835(5);
42
43

1 (b) In-water activities are conducted during the Oregon Department of Fish and Wildlife
2 (ODFW) recommended in-water timing guidelines, unless otherwise approved in writing
3 by ODFW;
4

5 (c) The in-water activities conform to ODFW fish passage requirements (ORS 509.580
6 through 509.910), unless otherwise approved in writing by ODFW;
7

8 (d) The activities will not convert waters of this state to uplands;
9

10 (e) The activities will cause no more than minimal adverse impact on waters of this state
11 including impacts related to navigation, fishing, and public recreation;
12

13 (f) The activities will not cause the water to rise or be redirected in such a manner that it
14 results in flooding or other damage to structures or substantial property off of the project
15 site; and
16

17 (g) All necessary access permits, right of ways and local, state, and federal approvals
18 have been obtained.
19

20 **(3) Research and Fish Management in Essential Indigenous Anadromous**
21 **Salmonid Habitat (ESH) are Exempt.** A permit is not required for the construction and
22 maintenance of scientific and research devices related to population management,
23 watershed and habitat restoration, or species recovery, provided the activity does not
24 exceed 50 cubic yards of removal-fill.
25

26 **(4) Vegetative Planting.** A permit is not required for planting native woody or
27 herbaceous plants by hand or mechanized means. Ground alteration such as grading or
28 contouring prior to planting is not covered by this exemption.
29

30 **(5) Refuge Management.** A permit is not required for habitat management activities
31 located on a National Wildlife Refuge or State Wildlife Area that are consistent with an
32 adopted refuge or wildlife area management plan. Fill or removal in waters of this state
33 for non-habitat management activities such as roads and building is not covered by this
34 exemption.
35

36 **(6) Ditch and Drain Tile Removal.** A permit is not required for the disruption or removal
37 of subsurface drainage structures (e.g., drain tiles) and plugging or filling of drainage
38 ditches in wetlands. Notification must be submitted on a form provided by the
39 Department at least 30 calendar days prior to commencing the activity.
40

41 **(7) Placement of Large Wood, Boulders and Spawning Gravels.** A permit is not
42 required for the placement of large wood, boulders and spawning gravels provided the
43 material is placed consistent with the Guide to Placing Large Wood and Boulders
44 (DSL/ODFW 2010). If the activity will exceed 50 cubic yards of removal-fill in waters of
45 this state, or any amount in Essential Salmonid Habitat, notice of the activity must be

1 provided to the Department. Notification must be submitted on a form provided by the
2 Department at least 30 calendar days prior to commencing the activity.

3
4 **(8) Other Activities Customarily Associated with Habitat Restoration in Essential**
5 **Indigenous Anadromous Salmonid Habitat (ESH).** A permit is not required for
6 voluntary habitat restoration activities resulting in less than 50 cubic yards of removal-fill
7 in waters of this state. This includes the disposal of material resulting from the
8 restoration activities within the project area as long as it assists in accomplishing the
9 objectives of the habitat restoration project. The activities must be consistent with the
10 Oregon Aquatic Habitat Restoration and Enhancement Guide and utilize materials or
11 structures that would naturally and/or historically occur at the project site. Notice of the
12 activity must be provided, submitted on a form provided by the Department, at least 30
13 calendar days prior to commencing the activity.

14
15 **(9) Removal of Trash, Garbage and Rubble.** A permit is not required for the removal
16 of any amount of inorganic trash, garbage and rubble (e.g., tires, metal, broken
17 concrete, asphalt, foam, plastic) from waters of this state. The project must meet the
18 following criteria:

19
20 (a) There are no adverse impacts to waters of this state or woody vegetation as a result
21 of the project;

22
23 (b) There is no stockpiling of collected trash, garbage or rubble in waters of this state;
24 and

25
26 (c) The trash and garbage is disposed of at a licensed Department of Environmental
27 Quality collection facility.

28
29 Stat. Auth.: ORS 196.825 & 196.600-196.692665

30 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

31 Hist.: DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

32
33
34 **141-085-0535**

35
36 **Exemptions Specific to Agricultural Activities**

37 These exemptions apply in all waters of this state except State Scenic Waterways.

38
39 (1) ~~Converted Wetlands. For the purposes of this rule:~~

40
41 ~~(a) "Converted wetlands" means agriculturally managed wetlands that, on or before~~
42 ~~June 30, 1989, were brought into commercial agricultural production by diking, draining,~~
43 ~~levelling, filling or any similar hydrologic manipulation and by removal or manipulation of~~
44 ~~natural vegetation, and that are managed for commercial agricultural purposes.~~

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

4
5 **(2) Exemptions Do Not Apply to Nonfarm Uses.** The exemptions under OAR 141-
6 085-0535(~~23~~) and (~~34~~) do not apply to any fill or removal that involves changing an area
7 of wetlands to a nonfarm use.

8
9 **(23) Normal Farming and Ranching Activities on Converted Wetlands.** "Converted
10 Wetlands" are defined under OAR 141-085-0510. Exempt activities on converted
11 wetlands include:

12
13 (a) Plowing;

14
15 (b) Grazing;

16
17 (c) Seeding;

18
19 (d) Planting;

20
21 (e) Cultivating;

22
23 (f) Conventional crop rotation; and

24
25 (g) Harvesting.

26
27 **(34) Certain Activities Conducted on Exclusive Farm Use (EFU) Zoned Land.** The
28 following activities on lands zoned for exclusive farm use as described in ORS 215.203
29 and designated in the city or county comprehensive plan are exempt:

30
31 (a) Drainage or maintenance of farm or stock ponds;

32
33 (b) Maintenance of existing farm roads in such a manner as to not significantly
34 adversely affect wetlands or any other waters of this state; or

35
36 (c) Subsurface drainage by deep ripping, tiling or moling, limited to converted wetlands.

37
38 **(45) Farm Uses on Certified Prior Converted Cropland.** Any activity defined as a
39 farm use in ORS 215.203 is exempt if the land is zoned for exclusive farm use pursuant
40 to ORS 215.203, if the lands are converted wetlands that are also certified as prior
41 converted cropland by the Natural Resources Conservation Service, as long as
42 commercial agricultural production on the land has not been abandoned for five or more
43 years.
44

1 | **(56) Federal Conservation Reserve Program.** Reestablishment of crops under federal
2 conservation reserve program provisions set forth in 16 U.S.C. 3831.

3
4 | **(67) Activities Customarily Associated with Agriculture in Essential Indigenous
5 Anadromous Salmonid Habitat (ESH).** These are activities, including maintenance
6 activities, that are commonly and usually associated with the raising of livestock or the
7 growing of crops in Oregon. Removal-fill covered by this exemption must not exceed 50
8 cubic yards of material.

9
10 | **(78) Agricultural Drainage Ditch Maintenance.** Exempt maintenance of agricultural
11 drainage ditches under OAR 141-085-0530(4) includes disposal of dredged material in
12 a thin layer on converted wetlands, provided such disposal does not change wetland to
13 upland. For the purposes of this exemption, "ditch" is defined in OAR 141-085-
14 0510(286).

15
16 | **(89) Push-Up Dams.**

17
18 (a) Department-authorized push-up dams equal to or greater than 50 cubic yards can
19 continue to be maintained indefinitely during the irrigation season and reconstructed
20 each successive season provided the work is done in compliance with all original permit
21 conditions and the Oregon Department of Fish and Wildlife fish passage statutes (ORS
22 509.580 through 509.910). In the event of conflicts with the original permit conditions,
23 the most recent fish passage requirements will be controlling.

24
25 (b) Push-up dams that were built prior to September 13, 1967, are exempt from the
26 Removal-Fill Law if they meet the following tests:

27
28 (A) Are reconstructed, serviceable and used within the past five years;

29
30 (B) Have the same effect as when first constructed (i.e., size and location); and

31
32 (C) Are operated in a manner consistent with the water right certificate and ORS
33 540.510(5).

34
35 (c) Push-up dams less than 50 cubic yards used for agricultural purposes in ESH are
36 exempt.

37
38 | Stat. Auth.: ORS 196.825 & 196.600-196.692665

39 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

40 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

41
42
43 **141-085-0540**

44
45 **Types of Authorizations**

1
2 One of the following types of authorizations is required for regulated activities in waters
3 of this state.

4
5 (1) **Individual Permits.** IPs are issued for projects that do not qualify for other types of
6 authorizations.

7
8 (2) **General Authorizations.** GAs are adopted by rule for a category of activities that
9 have minimal impacts to waters of this state (OAR 141-089).

10
11 (3) **General Permits.**

12
13 ~~(a) GPs are issued~~ ~~are adopted~~ by rule ~~or issued by order and apply to a category of~~
14 ~~activities on a~~ statewide or ~~on a~~ geographical basis; ~~or~~

15
16 ~~(b) By order for an applicant or group of applicants to cover activities that are~~
17 ~~substantially similar in nature, are recurring or ongoing, and have predictable effects~~
18 ~~and outcomes. for use by any person, or for use by a specific person for multiple~~
19 ~~activities. The Department may initiate rulemaking or a person may request the~~
20 ~~Department to initiate rulemaking to create a General Permit.~~

21
22 (4) **Emergency Authorizations.** EAs are issued in circumstances that pose an
23 immediate threat to public health, safety or substantial property including crop and
24 farmland.

25
26 Stat. Auth.: ORS 196.825 & 196.600 - 196. ~~692665~~
27 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
28 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

29
30

31 **141-085-0545**

32
33

33 **Fees and Disposition**

34
35

35 (1) **Disposition of Fees.** All applications that require a fee, except for an emergency
36 authorization, must include the fee at the time of application.

37
38

38 (2) **Project Applications that Require a Fee.** Except as provided in Section (3) of this
39 rule, the following types of projects require a fee for a complete application:

40
41

41 (a) Individual Permit and General Permit applications that require a fee. must be
42 accompanied by the applicable base fee and volume fee in accordance with the current
43 fee schedule;

44

- 1 (b) General Authorization notifications which require a fee under OAR 141-089-0635,
2 | must be accompanied by the flat fee when the proposed removal-fill activity is 50 cubic
3 yards or more; and
4
- 5 (c) Emergency Authorization holders, except for erosion or flood repair, must submit the
6 required fee to the Department within 45 calendar days of receiving the authorization.
7
- 8 | (3) **Project Applications that Do Not Require a Fee.** No application fee or renewal
9 fee is required when submitting an application or notification for the following:
10
- 11 (a) An agency determination that the project does not require a permit from the
12 Department;
13
- 14 (b) Erosion-flood repair or stream bank stabilization projects, regardless of the
15 authorization type;
16
- 17 (c) Voluntary habitat restoration projects directed at habitat improvement, regardless of
18 | the authorization type; ~~and~~
19
- 20 (d) A general authorization when the project involves less than 50 cubic yards of
21 | removal-fill activity; ~~and~~
22
- 23 (e) A general permit that does not require a fee when specified in 141-093.
24
- 25 (4) **Calculating Application Fees.** For each application that involves both removal and
26 fill activity, the application fee is calculated separately for each activity using the base
27 and volume fees. The required fee to be submitted with the application is the greater of
28 the two calculated fees.
29
- 30 (5) **Base Fees.** Base fees are based on the following applicant classifications:
31
- 32 (a) Private operator, or a person contracting to perform services for a private operator;
33
- 34 (b) Public body; or
35
- 36 (c) Commercial operator.
37
- 38 (6) **Volume Fees.** In addition to the base fee established under Section (5) of this rule,
39 each applicant may be required to also pay, as part of the application, an additional fee
40 based on the volume of material according to the following schedule:
41
- 42 (a) Less than 500 cubic yards;
43
- 44 (b) 500 to less than 5,000 cubic yards;
45

1 (c) 5,000 to less than or equal to 50,000 cubic yards; or

2

3 (d) Over 50,000 cubic yards.

4

5 (7) **Annual fees.** For individual permits that are renewed or valid for more than one
6 year, an annual fee is assessed for each year that the permit is in effect. The annual fee
7 is equal to the base fee at the time of renewal or annual billing and is due by the
8 anniversary date of issuance of the permit.

9

10 (8) **Multiyear Permits.** For issuance of multiyear permits valid over a period of more
11 than one year and up to five years, the Department may ~~at the request of the applicant,~~
12 assess a one-time fee at the rate in effect at the time of the application or renewal. The
13 one-time fee must include:

14

15 (a) The application fee; and

16

17 (b) Any applicable annual fees for the duration of the term of the permit.

18

19 (9) **Adjusting Fee Amounts.** Fees are adjusted annually, on January 1 of each year.
20 By December 1 of each year the Department will consult the Portland-Salem, OR-WA
21 Consumer Price Index for All Urban Consumers for All Items as published by the
22 Bureau of Labor Statistics of the United States Department of Labor to determine the
23 appropriate annual fee adjustment to become effective on January 1 of the following
24 year. The Department will then revise the fees in accordance with the CPI and post the
25 fee schedule on the Department's website (<http://oregonstatelands.us/>).

26

27 Stat. Auth.: ORS 196.825 & 196.600-196.692 [692665](#)

28 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

29 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

30

31

32 **141-085-0550**

33

34 **Application Requirements for Individual Permits**

35

36 (1) **Written Application Required.** A person who is required to have an individual
37 permit to remove material from the bed or banks, or fill any waters of this state, must file
38 a written application with the Department for each individual project. A permit must be
39 issued by the Department before performing any regulated removal-fill activity.

40

41 (2) **Complete and Accurate Information Required.** Failure to provide complete and
42 accurate information in the application may be grounds for administrative closure of the
43 application file or denial, suspension or revocation of the authorization.

44

1 | (3) **Fee Required for a Complete Application.** ~~A complete application must include~~
2 | ~~the appropriate fee. For an application to be determined complete, the Department must~~
3 | ~~have received the appropriate fee.~~

4 |
5 | (4) **Level of Detail Required May Vary.** The applicant is responsible for providing
6 | sufficient detail in the application to enable the Department to render the necessary
7 | determinations and decisions. The level of documentation may vary depending on the
8 | degree of adverse impacts, the level of public interest and other factors that increase
9 | the complexity of the project.

10 |
11 | (5) **Required Information:** A completed and signed application on current forms
12 | provided by the Department, including any maps, necessary photos and drawings, is
13 | required. The information must be entered in the appropriate blocks on the application
14 | form. The Department may require the applicant to submit any or all application
15 | materials electronically. The application ~~and~~ must include all of the following:

16 |
17 | (a) ~~A~~ The applicant and property owner information including name, mailing address,
18 | phone number and e-mail address. When the applicant is a business entity, the
19 | business must be registered with the Oregon Secretary of State Corporate Division. The
20 | exact name of the business entity, as listed with Secretary of State Corporate Division,
21 | must be entered on the application.

22 |
23 | (b) Landowner information including name and mailing address, phone number and e-
24 | mail address for the land where any removal-fill activity is proposed, and if applicable,
25 | for land where permittee-responsible compensatory mitigation is proposed.

26 |
27 | (A) For the construction of a new linear facility, the applicant must provide a complete
28 | list of landowner names and mailing addresses for all landowners whose land is
29 | identified in the permit application as being within the alignment of for the new linear
30 | facility. Mailing labels must be provided when there are more than five landowners
31 | listed in the application.

32 |
33 | (B) ~~(A) If the applicant is not the owner of the land upon which the removal fill activity~~
34 | ~~(including mitigation) is to occur and does not hold an easement allowing the activity on~~
35 | ~~that land, a written authorization from the owner of the land consenting to the~~
36 | ~~application must be provided.~~ For the purpose of this rule, a condemner is the
37 | landowner when:

38 |
39 | (i) If using state condemnation authority, the condemner has complied with ORS
40 | Chapter 35, filed an eminent domain action in court and deposited the condemner's
41 | estimate of just compensation with the court for the use and benefit of the defendants,
42 | or it has a court's order authorizing its possession of the land; or
43 |

1 (ii) If using federal authority, the condemner has complied with Federal Rules of Civil
2 Procedure 71.1 and, if other than the United States, has a court's order authorizing its
3 possession of the land.

4
5 ~~(B) If the application is on behalf of a business entity, a certificate of incumbency must
6 be provided to certify that the individual signing the application is authorized to do so.~~

7
8 ~~(C) If permittee responsible mitigation is proposed and the application for a permit or
9 authorization is submitted on behalf of a closely held corporation, limited partnership,
10 Limited Liability Company (LLC) or trust, the Department will require from each
11 shareholder or stockholder, limited partner, member, trustee, current beneficiary or
12 other principal:~~

13 ~~(i) A joint and several personal guarantee securing compliance with mitigation
14 obligations; and~~

15 ~~(ii) A written promise to make all reasonable efforts to maintain the business entity in
16 active status until all mitigation obligations have been satisfied.~~

17 ~~(iii) For the purpose of paragraph (C) of this section, a "closely held corporation" is one
18 in which all shares are held by less than five individuals.~~

19 (cb) Project site location information including Township, Range, Quarter/Quarter
20 Section and Tax Lot(s), latitude and longitude, street location if any, and location maps
21 with site location indicated.

22
23 (de) The location of any off-site disposal or borrow sites, if these sites contain waters of
24 this state.

25
26 (ee) Project information including:

27
28 (A) Description of all removal-fill activities associated with the project;

29
30 (B) Demonstration of independent utility to include all phases, projects or elements of
31 the proposed project which will require removal-fill activities;

32
33 (C) Volumes of fill and removal within jurisdictional areas expressed in cubic yards;

34
35 (D) Area of removal and fill within jurisdictional areas expressed in acres to the nearest
36 0.01-acre for impacts greater than 0.01 of an acre or expressed in acres to the nearest
37 0.001-acre for impacts less than 0.01 of an acre; and

38
39 (E) Description of how the project will be accomplished including construction methods,
40 site access and staging areas.

41

- 1 | (fe) A description of the purpose and need for the project. All projects must have a
2 defined purpose or purposes and be based on a documented need or needs. The
3 project purpose and need statement must be specific enough to allow the Department
4 to determine whether the applicant has considered a reasonable range of alternatives.
5
- 6 | (gf) Project plan views and cross-sectional views drawn to scale that clearly identify the
7 jurisdictional boundaries of the waters of this state (e.g., wetland delineation or ordinary
8 high water determination). Project details, such as footprint and impact area must also
9 be included so that the amount and extent of the impact to jurisdictional areas can be
10 readily determined.
11
- 12 | (hg) A written analysis of potential changes that the project may make to the hydrologic
13 characteristics of the waters of this state, and an explanation of measures taken to
14 avoid or minimize any adverse impacts of those changes, such as:
15
- 16 (A) Impeding, restricting or increasing flows;
17
18 (B) Relocating or redirecting flow; and
19
20 (C) Potential flooding or erosion downstream of the project.
21
- 22 | (ih) A description of the existing biological and physical characteristics of the water
23 resources, along with the identification of the adverse impacts that will result from the
24 project.
25
- 26 | (ji) A description of the navigation, fishing and public recreation uses, when the project
27 is proposed on state-owned land.
28
- 29 | (kj) If the proposed activity involves wetland impacts, a wetland determination or
30 delineation report that meets the requirements in OAR 141-090 must be submitted,
31 unless otherwise approved in writing by the Department. A wetland delineation is
32 usually required to determine the precise acreage of wetland impact and compensatory
33 wetland mitigation requirements. Whenever possible, wetland determination and
34 delineation reports should be submitted for review well in advance of the permit
35 application. Although an approved wetland delineation report is not required for
36 application completeness, a jurisdictional determination must be obtained prior to the
37 permit decision.
38
- 39 | (kl) A functions and values assessment that meets the requirements in OAR 141-085-
40 0685 when permanent impacts to wetlands are proposed.
41
- 42 | (mL) Any information known by the applicant concerning the presence of any federal or
43 state listed species.
44

Formatted: Font: Euphemia

1 | (~~nm~~) Any information known by the applicant concerning historical, cultural and
2 | archeological resources. Information may include but is not limited to a statement on the
3 | results of consultation with impacted tribal governments and/or the Oregon State
4 | Historic Preservation Office of the Oregon Parks and Recreation Department.

5 |
6 | (~~oa~~) An analysis of alternatives to derive the practicable alternative that has the least
7 | reasonably expected adverse impacts on waters of this state. The alternatives analysis
8 | must provide the Department all the underlying information to support its considerations
9 | enumerated in OAR 141-085-0565, such as:

10 |
11 | (A) A description of alternative project sites and designs that would avoid impacts to
12 | waters of this state altogether, with an explanation of why each alternative is, or is not
13 | practicable, in light of the project purpose and need;

14 |
15 | (B) A description of alternative project sites and designs that would minimize adverse
16 | impacts to waters of this state with an explanation of why each alternative is, or is not
17 | practicable, in light of the project purpose and need;

18 |
19 | (C) A description of methods to repair, rehabilitate or restore the impact area to rectify
20 | the adverse impacts; and

21 |
22 | (D) A description of methods to further reduce or eliminate the impacts over time
23 | through monitoring and implementation of corrective measures.

24 |
25 | (~~pe~~) If applicable, a complete compensatory mitigation plan that meets the requirements
26 | listed in OAR 141-085-0680 through 141-085-0715 and OAR141-085-0765 to
27 | compensate for unavoidable permanent impacts to waters of this state and a complete
28 | rehabilitation plan if unavoidable temporary impacts to waters of this state are proposed.

29 |
30 | (~~qp~~) For each proposed removal-fill impact site activity and physical mitigation site,
31 | applied for in the application, a list of the names and addresses of the adjacent
32 | landowners/property owners, including those properties located across a street or
33 | stream from the proposed project.

34 |
35 | (~~A~~) For construction of a new linear facility, the applicant must provide a list of the
36 | names and mailing addresses of the adjacent landowners for the new linear facility.

37 |
38 | (~~Bq~~) Mailing labels must be provided by the applicant, when there are more than five
39 | names and addresses of adjacent ~~property owners~~ landowners listed.

40 |
41 | (r) A signed local government land use affidavit.

42 |
43 | (s) A signed Coastal Zone Certification statement, if the project is in the coastal zone.

44 |

Formatted: Font: (Default) Arial

Formatted: Normal (Web)

1 (t) Applicant Signature. Signature of the applicant must be provided. (B) If the
2 application is on behalf of a business entity, a certificate of incumbency must be
3 provided to certify that the individual signing the application is authorized to do so.
4
5 (u) Landowner Signature. If the applicant is not the owner of the land
6 landowner upon which the removal-fill activity (including mitigation) is to occur and does not hold an
7 easement allowing the activity on that land, a written authorization from the owner of the
8 land consenting to the application must be provided. If the landowner is a business
9 entity, a certificate of incumbency must be provided to certify that the individual signing
10 the application is authorized to do so.
11
12 (A) Notwithstanding the requirement set forth under (u) above, a landowner signature
13 is not required for applications for the construction and maintenance of linear facilities;
14 and
15
16 (B) The condemner may sign as landowner when the requirements of OAR 141-085-
17 0550(5)(b)(B) have been met.
18
19 (v) Mitigation Site Landowner Signature. If the applicant is not the owner of the land
20 upon which the mitigation is to occur and does not hold an easement allowing the
21 activity on that land, a written authorization from the owner of the land consenting to the
22 application must be provided.
23
24 **(6) Additional Requirements for Estuarine Fill.** If the activity is proposed in an
25 estuary for a non-water-dependent use, a complete application must also include a
26 written statement that describes the following:
27
28 (a) The public use of the proposed project;
29
30 (b) The public need for the proposed project; and
31
32 (c) The availability of alternative, non-estuarine sites for the proposed use.
33
34 **(7) Additional Information as Requested.** The Department may request additional
35 information as necessary to make an informed decision on whether or not to issue the
36 authorization.
37
38 **(8) Waiver of Required Information.** At its discretion, the Department may waive any
39 of the information requirements listed in section (5) of this rule for voluntary restoration
40 projects.
41
42 **(9) Permit Application Modifications.** A modification to a permit application may be
43 submitted at any time prior to the permit decision. If the modification is received after the
44 public review period, the Department may circulate the revised application again for
45 public review. Modifications proposing significantly different or additional adverse

1 impacts will generally be resubmitted for public review. The Department may set an
2 expedited time frame for public review.

3
4 **(10) Pre-Application Conference.** An applicant may request the Department to hold a
5 pre-application meeting. In considering whether to grant the request, the Department
6 will consider the complexity of the project and the availability of Department staff.

7
8 | Stat. Auth.: ORS 196.825 & 196.600-196.665 & 196. [692905](#)
9 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
10 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
11

12
13 **141-085-0555**

14 15 **Individual Removal-Fill Permit Application Review Process**

16
17 **(1) Completeness Review.** Within 30 calendar days of the receipt of an application, the
18 Department will review the application to determine if it is complete and adequately
19 addresses the application requirements.

20
21 **(2) Notification of Completeness Determination.** Following the completeness review,
22 the Department will inform the applicant of one of the following findings:

23
24 (a) The application is complete and will proceed to the public review process;

25
26 (b) The application is incomplete because of certain deficiencies; or

27
28 (c) The project does not require an authorization from the Department (no state permit
29 required).

30
31 **(3) Incomplete Application.** If the Department determines that the application is
32 incomplete or deficient, the Department will notify the applicant in writing and list the
33 missing or deficient information. The application will be suspended awaiting revision. To
34 initiate a new completeness review, the applicant must resubmit the entire amended
35 application package for consideration, unless instructed by the Department to do
36 otherwise. Submission of a new or amended application package starts a new 30-day
37 initial review period.

38
39 **(4) Timeframe for Resubmittal of Incomplete Applications.** If a revised application is
40 not resubmitted within 120 calendar days of an incompleteness determination, the
41 Department may administratively close the application. If the Department closes the file
42 for failure of the applicant to respond in a timely fashion to the request for additional
43 information, the Department will retain the application fee. A subsequent application for
44 the same or similar project will require submittal of a new application and payment of an
45 application fee.

1
2 Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
3 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
4 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
5
6

7 **141-085-0560**

8
9 **Public Review Process for Individual Removal-Fill Permit Applications**

10
11 (1) **Circulation of the Application for Public Review.** Once the application has been
12 deemed complete and sufficient, the Department will provide notification of the
13 availability of the application for review either by U.S. mail or electronically (e.g.,
14 facsimile, e-mail, posting on the Internet) to adjacent property owners, watershed
15 councils, public interest groups, affected local government land use planning
16 departments, state agencies, federal agencies and tribal governments in the geographic
17 area affected by the permit. For construction and maintenance of linear facilities,
18 landowners identified in the application will be notified by the Department by U.S. mail
19 or electronically that the application is available for review. Upon request the
20 Department may make a copy of the application available at the public library closest to
21 the proposed project.

22
23 (2) **Copies of the Application by Request.** The Department will furnish to any member
24 of the public, upon written request and at the expense of the member of the public, a
25 printed copy of any application.

26
27 (3) **Deadline for Receipt of Submitting Public Comments.** To be considered by the
28 Department and to become part of the permit record, all comments must be sent to the
29 destination specified in the notification or submitted through the Web site. All
30 recommendations and comments regarding the application must be submitted in writing
31 to the Department within the period established by the Department, but not more than
32 30 calendar days from the date of the notice, except as noted under subsection (a),
33 below:

34
35 (a) The Department will grant an extension of up to 75 calendar days to the Department
36 of Environmental Quality if the application requires Section 401 certification under the
37 Federal Water Pollution Control Act (P.L. 92-500) as amended.

38
39 (b) If a commenter fails to comment on the application within the comment period, the
40 Department will assume the commenter has no objection to the project.

41
42 (4) **Department Review of Public Comments and Public Hearing.** The Department
43 will review and consider substantive comments received during the public review period,
44 and may conduct any necessary investigations to develop a factual basis for a permit
45 decision. Necessary investigations may include but are not limited to the following:

1
2 (a) The Department may, as a result of the public review process or the Department's
3 investigations, request that the applicant submit supplemental information and answer
4 additional questions prior to the Department making the permit decision.

5
6 (b) The Department may schedule a permit review coordination meeting with interested
7 agencies or groups and the applicant to provide the applicant an opportunity to explain
8 the project and to resolve issues; and

9
10 (cb) At the Department's discretion, the Department may hold a public hearing to gather
11 necessary information that may not otherwise be available to make a decision.

12
13 **(5) Applicant Response to Comments.**

14
15 (a) Comments resulting from the public review process will be forwarded to the
16 applicant after the comment period deadline.

17
18 (b) The applicant may, at his or her discretion, respond to public and agency comments.
19 The response may be in the form of additional information to support the application
20 and/or revisions to the project that address the comments.

21
22 (c) If no response is received from the applicant by the date specified by the
23 Department, the Department will presume that the applicant does not intend to provide
24 additional supporting information or revisions to the application.

25
26 **(6) Final Review**

27
28 (a) Unless the timeline is extended as provided below in subsection (b), tThe
29 Department will make a final permit decision within 90 calendar days after determining
30 an application is complete; ~~or~~

31
32 ~~(b) The applicant may request additional time to respond to comments or to satisfy other~~
33 ~~requirements. The applicant and the Department may agree to extend the timeline for~~
34 ~~making a final permit decision. The permit decision deadline may be extended~~ beyond
35 90 calendar days ~~when mutually agreed upon the applicant and approved the~~
36 Department agree to an extension.

37
38 ~~(c) If no agreement is reached, the Department does not approve an extension, the~~
39 Department will make a final permit decision based upon the record as it existed within
40 the later of within:

41
42 (A) The original 90-day time period; or

43
44 (B) The extension period approved immediately prior to the applicant's most recent
45 request for an extension.-

1
2 (7) **Application Withdrawal.** An applicant may withdraw an application at any time prior
3 to the permit decision. In the event the applicant fails to respond to the Department's
4 requests for information or otherwise fails to reasonably proceed with the application
5 process, the Department may administratively withdraw the application with at least 30
6 calendar days' notice to the applicant. There will be no refund of the application fee in
7 either case.

8
9 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
10 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
11 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
12

13 **141-085-0565**

14
15 **Department Determinations and Considerations in Evaluating Individual Permit**
16 **Applications**

17
18 (1) **Departmental Final Review.** The Department will evaluate the information provided
19 in the application, conduct its own investigation, and consider the comments submitted
20 during the public review process to determine whether or not to issue an individual
21 removal-fill permit.

22
23 (2) **Effective Date of Review Standards.** The Department may consider only
24 standards and criteria in effect on the date the Department receives the complete
25 application or renewal request.

26
27 (3) **Department Determinations.** The Department will issue a permit if it determines
28 the project described in the application:

29
30 (a) Has independent utility;

31
32 (b) Is consistent with the protection, conservation and best use of the water resources of
33 this state as specified in ORS 196.600 to 196.990; and

34
35 (c) Would not unreasonably interfere with the paramount policy of this state to preserve
36 the use of its waters for navigation, fishing and public recreation, when the project is on
37 state-owned lands.

38
39 (4) **Department Considerations.** In determining whether to issue a permit, the
40 Department will consider all of the following:

41
42 (a) The public need for the proposed fill or removal and the social, economic or other
43 public benefits likely to result from the proposed fill or removal. When the applicant for a
44 permit is a public body, the Department may accept and rely upon the public body's
45 findings as to local public need and local public benefit;

- 1
2 (b) The economic cost to the public if the proposed fill or removal is not accomplished;
3
4 (c) The availability of alternatives to the project for which the fill or removal is proposed;
5
6 (d) The availability of alternative sites for the proposed fill or removal;
7
8 (e) Whether the proposed fill or removal conforms to sound policies of conservation and
9 would not interfere with public health and safety;
10
11 (f) Whether the proposed fill or removal is in conformance with existing public uses of
12 the waters and with uses designated for adjacent land in an acknowledged
13 comprehensive plan and land use regulations;
14
15 (g) Whether the proposed fill or removal is compatible with the acknowledged
16 comprehensive plan and land use regulations for the area where the proposed fill or
17 removal is to take place or can be conditioned on a future local approval to meet this
18 criterion;
19
20 (h) Whether the proposed fill or removal is for stream bank protection; and
21
22 (i) Whether the applicant has provided all practicable mitigation to reduce the adverse
23 effects of the proposed fill or removal in the manner set forth in ORS 196.800.
24
25 (5) **Alternatives Analysis.** The Department will issue a permit only upon the
26 Department's determination that a fill or removal project is consistent with the protection,
27 conservation and best use of the water resources of this state and would not
28 unreasonably interfere with the preservation of the use of the waters of this state for
29 navigation, fishing and public recreation. The Department will analyze a proposed
30 project using the criteria set forth in the determinations and considerations in sections
31 (3) and (4) above (OAR 141-085-0565). The applicant bears the burden of providing the
32 Department with all information necessary to make this determination.
33
34 (6) **Fills in an Estuary for Non-Water Dependent Use.** A "substantial fill" in an estuary
35 is any amount of fill regulated by the Department. No authorizations will be issued for a
36 substantial fill in an estuary for a non-water dependent use unless all of the following
37 apply:
38
39 (a) The fill is for a public use;
40
41 (b) The fill satisfies a public need that outweighs the harm, if any, to navigation, fisheries
42 and recreation; and
43
44 (c) The removal-fill meets all other review standards.
45

1 (7) **Written Findings.** In the following cases, the Department will prepare written
2 findings to document an individual removal-fill permit decision:

3
4 (a) Permit denial;

5
6 (b) Fill of two acres or more in wetlands;

7
8 (c) Fill in estuaries (except cable crossings, pipelines, or bridge construction);

9
10 (d) Removal from estuaries of more than 10,000 cubic yards of material (except for
11 maintenance dredging);

12
13 (e) Placement of greater than 2,500 cubic yards of riprap in coastal streams or
14 estuaries;

15
16 (f) Removal-fill in the Oregon Territorial Sea in accordance with Statewide Planning
17 Goal 19-Ocean Resources; and

18
19 (g) Any permit decision that is contrary to the final decision recommendation of a state
20 agency.

21
22 (8) **Marine Reserves and Marine Protected Areas.** The Department will only authorize
23 a removal-fill activity within an area designated by the State Land Board as a marine
24 reserve or a marine protected area if the removal-fill activity is necessary to study,
25 monitor, evaluate, enforce or protect or otherwise further the studying, monitoring,
26 enforcement and protection of the reserve or marine protected area.

27
28 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)

29 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

30 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

31
32
33 **141-085-0575**

34
35 **Permit Appeals**

36
37 (1) **Applicant Appeal Within 21 Calendar Days.** An applicant may request a contested
38 case hearing if they object to an application incompleteness determination, permit
39 decision or permit condition imposed by the Department. The request must be in writing
40 and must be received within 21 calendar days of the decision. The request must include
41 the reasons for the request for hearing.

42
43 (2) **Other Aggrieved Person Appeal Within 21 Calendar Days.** Any person who is
44 aggrieved or adversely affected by the Department's final decision concerning an
45 individual permit or a condition therein may file a written request for a hearing with the

1 Department within 21 calendar days after the authorization approval date. The request
2 must include the reasons for the request for hearing.

3
4 **(3) Standing in Contested Case Hearings.** For a person other than the applicant to
5 have standing to request a contested case, the person must be either "adversely
6 affected" or "aggrieved":

7
8 (a) To be "adversely affected" by the Department's individual removal-fill permit
9 decision, the person must have a legally protected interest that would be harmed,
10 degraded or destroyed by the authorized project. Eligible parties may include adjacent
11 property owners and other parties; or

12
13 (b) To be "aggrieved" by the Department's individual removal-fill permit decision the
14 person must have participated in the Department's review of the project application by
15 submitting written or verbal comments stating a position on the merits of the proposed
16 removal-fill to the Department.

17
18 **(4) Setting a Contested Case Hearing.** If the written request for hearing is timely and
19 made by an eligible person, the matter will be referred to the Office of Administrative
20 Hearings for hearing, and will be conducted as follows:

21
22 (a) The hearing will be conducted as a contested case;

23
24 (b) The permit holder and any other persons that have filed a written request and have a
25 legally protected interest that may be adversely affected will be parties to the
26 proceeding; and

27
28 (c) Persons that do not have legally protected interests that are adversely affected, but
29 are aggrieved, may nevertheless petition to be included in the contested case hearing
30 as a party.

31
32 **(5) Referral to the Office of Administrative Hearings.** The referral of a request for
33 hearing to the Office of Administrative Hearings by the Department will include the
34 individual removal-fill permit, or denial, and the request for hearing. An administrative
35 law judge will conduct a contested case hearing only on the issues raised in the request
36 for hearing and the referral from the Department.

37
38 **(6) Review of Jurisdictional Determinations.** Jurisdictional determinations of the
39 existence, or boundaries, of the waters of this state on a parcel of property, issued more
40 than 60 calendar days before a request for hearing, are final. Jurisdictional
41 determinations are judicially cognizable facts of which the Department may take official
42 notice under ORS 183.450(3) in removal-fill contested cases. Challenges to
43 jurisdictional determinations are only permitted under the process set out in OAR 141-
44 090.

45

1 (7) **The Proposed Order.** The Administrative Law Judge will issue a proposed order
2 containing findings of fact and conclusions of law within 20 calendar days of the
3 hearing, and as required by ORS 183.460, provide an opportunity to file written
4 exceptions with the Department.

5
6 (8) **The Final Order.** Within 45 calendar days after the hearing the Department will
7 consider the record, any exceptions, and enter an order containing findings of fact and
8 conclusions of law. The final order will rescind, affirm or modify the permit or proposed
9 order.

10
11 (9) **Pre-Hearing Suspension of Permits.** A permit granted by the Department may be
12 suspended by the Department during the pendency of the contested case proceeding.
13 Petitions for suspension must be made to the Department and will be either granted or
14 denied by the Department. The permit will not be suspended unless the person
15 aggrieved or adversely affected by grant of permit makes a showing before the
16 Department by clear and convincing evidence that commencement or continuation of
17 the fill would cause irreparable damage and would be inconsistent with ORS 196.800
18 through 196.990.

19
20 (10) **Issuance or Denial of a Permit.** Interested persons who request notification in
21 writing of the Department's decision on a permit will be notified at the time of issuance
22 or denial. The Department's failure to notify an interested person will not extend the
23 statutory timeframe for hearing requests.

24
25 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
26 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
27 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

28
29
30 **141-085-0580**

31
32 **Discovery in Contested Cases**

33
34 In contested cases conducted on matters relating to these rules, the Department
35 delegates to the hearing officer the authority to rule on any issues relating to discovery,
36 except that depositions will only be awarded if it is likely that a witness will not be
37 available at a hearing.

38
39 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
40 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
41 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

42
43
44 **141-085-0585**

45

1 **Permit Conditions, Permit Expiration Dates and Permit Transfer**

2
3 (1) **Applicable Permit Conditions.** If the Department approves the permit, it will
4 impose applicable conditions to eliminate or reduce the reasonably expected adverse
5 impacts of project development to waters of this state.

6
7 (2) **Applicant Acceptance of Permit Conditions.** Once an authorization holder
8 initiates the removal fill activity authorized by a permit, it is understood that the permit
9 holder accepts the conditions contained within the permit.

10
11 (3) **Enforceability of Permit Conditions.** Authorizations may include conditions,
12 including compensatory mitigation and monitoring conditions that impose obligations
13 beyond the expiration date of the removal/fill activity. All such conditions are
14 enforceable until such obligations are satisfied.

15
16 (4) **Conflicts Between the Application and Permit Conditions.** The application,
17 including all plans and operating specification, becomes an enforceable part of the
18 removal-fill authorization. In the event there is a conflict between information contained
19 in the application and conditions in the removal-fill authorization, the authorization
20 conditions prevail.

21
22 (5) **Permit Expiration Date.** The Department may issue an individual removal-fill
23 authorization for up to five years for removal-fill activities that occur on a continuing
24 basis or will take more than one year to complete.

25
26 (6) **Limits on Terms for Commercial Gravel Operations.** For commercial gravel
27 removal, the Department will only issue a multi-year permit when it determines that:

28
29 (a) There is sufficient aggregate resource or annual recharge to allow the proposed
30 volumes to be removed; and

31
32 (b) The authorization holder has, for at least one year preceding the pending renewal,
33 conducted removal in compliance with permit conditions.

34
35 (7) **Modification of Permit Conditions.** Modifications of permit conditions may be
36 either requested by the authorization holder or initiated by the Department.:

37
38 (a) A modification request from the authorization holder must be submitted in writing.
39 Based on the scope of the modification request, the Department may:

40
41 (A) Upon the written request of the authorization holder, the Department may Mmodify
42 permit conditions to address changes in operating conditions or changes to the project;
43 or

1 ~~(B) Deny the modification request and request an a new application for a. At its~~
2 ~~discretion, the Department may circulate proposed project modifications for public~~
3 ~~review as described in OAR 141-085-0560 new authorization. Situations where public~~
4 ~~review may be necessary include those that would result in an increase in adverse~~
5 ~~impacts or those that involve significant changes in operating conditions; or~~
6

7 (b) ~~At the time of permit renewal, T~~he Department may modify permit conditions to
8 address new standards ~~in effect at the time of the permit renewal request~~ or new
9 information related to water resource impacts in effect at the time of the permit renewal
10 request or on the anniversary date of issuance for multiyear permits issued in
11 accordance with OAR 141-085-0545(8).
12

13 (8) **Transfer of Permit Responsibility.** Authorizations are issued to the applicant and
14 are not automatically transferred through property transactions. The applicant is
15 responsible for complying with the conditions of the permit, unless the permit is officially
16 transferred to a different person or party. A transfer form must be submitted to the
17 Department for review and approval. If the transferee is a business entity, the business
18 must be registered with the Oregon Secretary of State Corporate Division. The exact
19 name of the business entity, as listed with Secretary of State Corporate Division, must
20 be entered on the transfer form. The transfer form must be accompanied by a signed
21 certificate of incumbency. Transfers are approved through one of the following means:
22

23 (a) If the authorization has not expired, the Department will issue a modified permit to
24 the transferee, who will then be responsible for complying with all of the conditions in
25 the permit. If financial security was required for compensatory mitigation, a new financial
26 security instrument, naming the transferee as the obligor must be provided to the
27 Department before the transfer; or
28

29 (b) If the authorization has expired, but there is a pending mitigation obligation, the
30 mitigation obligation will be transferred to the transferee through an acknowledgement
31 letter. If financial security was required for the pending mitigation obligation, a new
32 financial security instrument must be provided, naming the transferee as the obligor
33 prior to the transfer.
34

35 Stat. Auth.: ORS 196.825 & 196.600-196.692 & 196.800-196.990
36 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
37 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
38
39

40 **141-085-0590**

41 **Renewal and Extension of Individual Removal-Fill Permits**
42
43

- 1 (1) **Renewal of Individual Permits.** Individual permits may be renewed if the permit
2 holder anticipates that the project within waters of this state will not be completed by the
3 permit expiration date.
4
- 5 (2) **Renewal Notice.** At least 90 calendar days prior to the expiration of a valid removal-
6 fill permit, the Department will send a renewal notice to the permit holder. The renewal
7 notice will inform the permit holder of the expiration date of the permit and offer an
8 opportunity to renew the permit.
9
- 10 (3) **Request for Renewal.** In order to renew the permit, the permit holder must respond
11 with a request to renew the permit. The request for renewal must:
12
- 13 (a) Include a short statement of the status of the project, including any compensatory
14 mitigation requirements;
15
- 16 (b) Include the base fee;
17
- 18 (c) Be received by the Department at least 45 calendar days prior to the expiration of
19 the permit; and
20
- 21 (d) If requested by the Department, be accompanied by an updated application.
22 Updated applications may be required for permits that have been in effect for five years,
23 and at every five-year increment thereafter. Updated applications must be provided on
24 current forms provided by the Department.
25
- 26 (4) **Processing the Renewal Request.** Upon receipt of a request for renewal, the
27 Department:
28
- 29 (a) Must review the request pursuant to the standards contained in the applicable rules
30 in effect at the time of the request; and
31
- 32 (b) May provide public notice of the renewal in accordance with the provisions in OAR
33 141-085-0560.
34
- 35 (5) **Department's Decision.** Upon review of the renewal request, along with any
36 updated information or public comments, the Department will either:
37
- 38 (a) Renew the permit, with or without modified conditions;
39
- 40 (b) Extend the permit for an additional time period; or
41
- 42 (c) Deny the request for permit renewal.
43
- 44 (6) **Extension of a Permit Expiration Date.** At the discretion of the Department, a
45 permit expiration date may be extended:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

- (a) If more time is needed to resolve issues that arise during the renewal process; or
- (b) If the applicant failed to respond to the renewal request in a timely manner.

Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

141-085-0595

Permit Requirements and Interagency Coordination for Department of Environmental Quality Approved Remedial Action, Corrections Facilities, Solid Waste Land Fills and Energy Facilities

(1) **DEQ Remedial Action Waiver.** Pursuant to ORS 465.315, no removal-fill authorization is required for remedial action conducted on a site selected or approved by the Department of Environmental Quality. The responsible party must notify the Department of its intended action, pay applicable fees, and comply with the substantive requirements ~~provided by that~~ the Department. ~~would otherwise apply~~ Failure to comply with the substantive requirements may result in enforcement action.

(2) **Application Process Requirements for Specific Siting Entities.** Upon submission by the applicant of a complete application and payment of the proper fees, the Department will issue the permits authorized by the authorized siting entity listed below, subject to the conditions set forth by the siting entity (including conditions supplied to the siting authority by the Department). The Department will continue to exercise enforcement authority over a permit issued pursuant to this section. These siting entities are:

- (a) The ~~Department of~~ Corrections Facilities Siting Authority, pursuant to ORS 421.628, relating to siting corrections facilities;
- (b) The Environmental Quality Commission, pursuant to ORS 459.047, relating to siting solid waste land-fills; ~~and~~
- (c) The Energy Facility Siting Council, pursuant to ORS 469.300 et seq. related to siting energy facilities; ~~and~~
- (d) The Economic Recovery Review Council, pursuant to Oregon Laws 2011, chapter 564, related to the siting of industrial development projects of state significance.

1 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
2 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
3 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
4
5

6 | **141-085-0665**

7
8 | **Expedited Process for Industrial or Traded-Sector Sites**

9
10 | (1) **Department Assistance with Industrial Siting.** The Department will participate in
11 | planning and authorizing removal-fill within waters of this state for certain industrial or
12 | traded sector sites identified by the Oregon Business Development Department
13 | (OBDD). The Department will provide assistance to the maximum extent feasible, taking
14 | into account budget and staffing constraints.
15

16 | (2) **Site Designation Process.** The Director may, upon the request of OBDD, designate
17 | a site for expedited planning and processing. The project proponent or sponsor will
18 | have authority to authorize the Department or its agents physical access to the site.
19

20 | (3) **Department-Appointed Project Leader.** The Director will assign a project leader
21 | from the Department to work with the OBDD, other applicable agencies and the project
22 | sponsor. Such work will include, but is not limited to:

23
24 | (a) Expedited jurisdictional determinations by the Department;

25
26 | (b) Technical assistance in the preparation of jurisdictional delineation and functional
27 | assessment reports, impact avoidance and minimization strategies, alternatives
28 | analyses and compensatory mitigation plans;
29

30 | (c) Assistance with other permit application documents necessary to issue an
31 | authorization or to avoid the need to obtain an authorization by planning the project in
32 | such a way so as to avoid impacts to waters of this state;
33

34 | (d) Expedited review of removal-fill applications and prompt permit decision as long as
35 | doing so will not result in the Department missing statutory deadlines for other permits;
36 | and/or
37

38 | (e) Assistance with the early identification and resolution of issues raised by other
39 | agencies and the public.
40

41 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
42 | Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
43 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
44
45 |

1 |
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

141-085-0676
Emergency Authorizations

(1) **Eligibility and Applicability.** The Department may issue, orally or in writing, an emergency authorization to a person for the removal of material from the beds or banks or filling of any waters of this state in an emergency, for the purpose of making repairs or for the purpose of preventing irreparable harm, injury or damage to persons or property. In order to qualify for an emergency authorization the Department must determine that:

- (a) The emergency poses a direct threat to substantial property, including but not limited to a dwelling, transportation structure, farm or cropland;
- (b) Prompt action is required to reduce or eliminate the threat;
- (c) The nature of the threat does not allow the time necessary to obtain some other form of authorization; and
- (d) The proposed project is the minimal amount necessary to reduce or eliminate the threat and minimizes, to the extent practicable, adverse impacts to waters of this state.

(2) **Information Requirements.** Any person requesting an emergency authorization may apply verbally or in writing. Written applications may be sent via facsimile, e-mail or U.S. mail. Applications for an emergency authorization must include:

- (a) The applicant planning and carrying out the activity;
- (b) The location of the project;
- (c) The nature of the emergency (specifically, the nature of the threat to public health, public safety or property and the immediacy of the threat and need to act promptly);
- (d) A description of the proposed work, including the approximate volume of material to be removed and/or filled, how the work will be accomplished and the schedule for doing the work;
- (e) The date and approximate time when the event that caused the emergency took place;
- (f) A statement as to whether the emergency action is intended as a temporary or permanent response measure; and
- (g) Additional information, as requested from the Department.

1
2 (3) **Authorized Representative.** The Department may authorize a person, including
3 personnel from public agencies, to act as a representative of the Department to conduct
4 an on-site evaluation of the planned activity and make recommendations as to whether
5 or not the application should be approved as requested, approved with conditions,
6 denied or processed as an individual removal-fill authorization application.

7
8 (4) **Department Decision.** Based on review of all the available information, the
9 Department may take the following action(s):

10
11 (a) Approve the emergency authorization, either verbally or in writing; or

12
13 (b) Deny issuance of the emergency authorization. If a request for an emergency
14 authorization is denied, the applicant may ~~resubmit~~ anthe application ~~for~~as an individual
15 removal-fill ~~permit~~authorization, general permit or general authorization, as appropriate
16 for the scope of the project.

17
18 (5) **Written Authorization Needed to Confirm Verbal Authorization.** If an emergency
19 authorization is issued verbally, the authorization will be confirmed in writing by the
20 Department within five calendar days confirming the issuance and setting forth the
21 conditions of operation.

22
23 (6) **Term.** The term of the emergency authorization will be limited to the time necessary
24 to complete the planned project and will be specifically stated in the authorization.

25
26 (7) **Conditions of Emergency Authorizations.** An emergency authorization may
27 contain conditions to minimize the reasonably expected adverse impacts of the activity
28 to waters of this state. Conditions may include:

29
30 (a) Compensatory mitigation or compensatory wetland mitigation;

31
32 (b) A requirement to revise the project and apply for a removal-fill permit after the
33 emergency situation has subsided;

34
35 (c) A requirement to submit a report on the outcome of the project or monitor the project
36 removal-fill sites; and

37
38 (d) Any other condition necessary to minimize reasonably expected adverse impacts on
39 waters of this state.

40
41 Stat. Auth.: ORS 196.825 & 196.600-196.692 [692665](#)

42 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

43 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; Renumbered from 141-085-0570 by DSL
44 8-2009, f. 12-15-09 cert. ef. 1-1-10

45

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44

141-085-0680

**Compensatory Wetland and Tidal Waters Mitigation (CWM);
Applicability and Principal Objectives**

(1) **Applicability.** OAR 141-085-0680 through 0760 applies to removal-fill that occurs within wetlands and tidal waters and applies to all forms of compensatory mitigation (i.e., mitigation bank, in-lieu fee mitigation, advance mitigation, permittee responsible mitigation, and payment in-lieu mitigation). OAR 141-085-0680 through 141-085-0760 does not apply to removal-fill within areas covered by an approved Wetland Conservation Plan.

(2) **Principal Objectives for CWM.** For projects where impacts to wetlands or tidal waters cannot be avoided, CWM will be required to compensate for the reasonably expected adverse impacts in fulfillment of the following principal objectives.

(a) The principal objectives of CWM are to:

- (A) Replace functions and values lost at the removal-fill site;
- (B) Provide local replacement for locally important functions and values, where appropriate;
- (C) Enhance, restore, create or preserve wetlands or tidal areas that are self-sustaining and minimize long-term maintenance needs;
- (D) Ensure the siting of CWM in ecologically suitable locations considering: local watershed needs and priorities; appropriate landscape position for the wetland types, functions and values sought; connectivity to other habitats and protected resources; and the absence of contaminants or conflicting adjacent land uses that would compromise wetland functions; and
- (E) Minimize temporal loss of wetlands and tidal waters and their functions and values.

(b) Applicants must demonstrate how the selected method of CWM (i.e., mitigation bank, in-lieu fee mitigation, advance mitigation, permittee-responsible mitigation and payment in-lieu mitigation) addresses the principal objectives.

(3) General Requirements.

(a) Permittee-responsible CWM at an off-site location will be located within the 4th field Hydrologic Unit Code (HUC) in which the removal-fill site is located.

1 (b) Impacts to tidal waters must be replaced in the same estuary unless the Director
2 determines that it is environmentally preferable to exceed this limitation.

3
4 (c) Projects that involve 0.20 acres or less of permanent wetland impact may use
5 mitigation banks, in-lieu fee, or payment in-lieu mitigation without addressing the
6 principle objectives set forth in Section (2) of this rule.

7
8 (d) Payment in-lieu ~~fee mitigation~~ or in-lieu fee credits may not be used if appropriate
9 mitigation bank credits ~~or in-lieu fee credits~~ are available on the day that the public
10 review period closes at the time of the permit decision.

11
12 Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)

13 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

14 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

15
16
17 **141-085-0685**

18 19 **Functions and Values Assessment**

20
21 (1) **Purpose.** The purpose of the functions and values assessment is to document those
22 wetland or tidal waters functions and values anticipated to be lost as a result of the
23 project and help ensure that the proposed CWM will replace those functions and values.

24
25 (2) **Assessment Requirements.** Elements of a functions and values assessment must
26 include the following:

27
28 (a) Existing functions and values at the proposed project site;

29
30 (b) Functions and values reasonably expected to be adversely impacted by the
31 proposed project;

32
33 (c) Existing functions and values at the proposed CWM site, if the site is currently
34 wetland or tidal waters; and

35
36 (d) The projected net gain or loss of specific functions and values as a result of the
37 CWM project compared to the reasonably expected adverse impacts as a result of the
38 project.

39
40 (3) **Methods.** Wetland functions and values assessment methods and requirements are
41 as follows:

42
43 (a) All applications for tidal waters impacts or for wetland impacts of greater than 0.20
44 acres must include a functions and values assessment using the reference-based
45 method in the appropriate Hydrogeomorphic Method (HGM) guidebook for Oregon

1 wetlands, if available. If not available, the Oregon Rapid Wetland Assessment Protocol
2 (ORWAP) is the required method.

3
4 (A) The same functions and values assessment method must be used on the impact
5 site and the proposed CWM site.

6
7 (B) A functions and values assessment is not required for the CWM site if CWM is
8 proposed to be fulfilled by purchase of bank credits, advance mitigation credits, or fee
9 in-lieu program credits.

10
11 (C) If the same reference-based HGM is not available for both the impact site and the
12 CWM site, then ORWAP must be used for both the impact site and the CWM site.

13
14 (D) If a reference-based HGM is not available for all wetland subclasses on the impact
15 site, then ORWAP must be used for all wetlands on the impact site.

16
17 (b) For non-tidal wetland impacts involving impacts of 0.20 acres or less, ORWAP is the
18 preferred method, but best professional judgment may be used to assess wetland
19 functions and values. A written discussion of the basis of the conclusions based on best
20 professional judgment must be provided. For example, if the water quality function is
21 determined to be "low," a detailed rationale based upon direct measurement or
22 observation of indicators of water quality function must be discussed.

23
24 (c) If best professional judgment is used, wetland functions and values to be assessed
25 must include, but are not limited to:

26
27 (A) Water quality and quantity;

28
29 (B) Fish and wildlife habitat;

30
31 (C) Native plant communities and species diversity; and

32
33 (D) Recreation and education.

34
35 (d) The Oregon Freshwater Wetland Assessment Methodology will not satisfy the
36 requirements of OAR 141-085-0685.

37
38 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)

39 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

40 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

41
42
43 **141-085-0690**

44
45 **Additional Requirements for CWM**

- 1
2 (1) **Replacement by Class and Functions and Values.** The CWM project must have
3 the capability to replace:
4
5 (a) Wetland or tidal water type(s) impacted by the project, as classified per Cowardin
6 system and class (e.g., palustrine forested) and by HGM class/subclass(es) impacted
7 by the project (e.g., riverine impounding), using the Oregon HGM Statewide
8 Classification (Oregon Department of State Lands, 2001); and
9
10 (b) The functions and values of the impacted wetland or tidal waters.
11
12 (2) **Exceptions.** The Department may approve exceptions to replacement by class and
13 function if the applicant demonstrates, in writing, that the alternative CWM:
14
15 (a) Replaces functions and values that address problems (such as flooding) that are
16 identified in a watershed management plan or water quality management plan;
17
18 (b) Replaces important wetland or tidal waters types (Cowardin/HGM) and functions and
19 values disproportionately lost in the region;
20
21 (c) Replaces rare or uncommon plant communities appropriate to the region, as
22 identified in the most recent Oregon Natural Heritage Program plant community
23 classification; or
24
25 (d) Is for the replacement of a non-tidal wetland or tidal water type that is technically
26 impracticable to replace. Upon demonstration of such to the satisfaction of the
27 Department, the Department may require re-consideration of alternatives to ensure that
28 all practicable opportunities to avoid and minimize impacts have been reasonably
29 incorporated into the project.
30
31 (3) **Conversion of Wetland to Tidal Waters.** CWM involving the conversion of wetland
32 to tidal waters ~~may~~ not be approved where the wetland proposed for conversion
33 provides a high level of functionality, provides locally important functions or values, or
34 supports listed species or rare plant community or communities.
35
36 (4) **CWM Ratios.**
37
38 (a) The purpose of a CWM ratio is to:
39
40 (A) Ensure that the total area of the state's wetland and tidal waters resource base is
41 maintained; and
42
43 (B) Replace wetland and tidal waters functions that may be size dependent.
44
45 (b) Ratios will not be used as the sole basis for demonstrating functional replacement.

- 1
2 (c) Except as otherwise provided in this section, the following minimum ratios must be
3 used in the development of CWM plans:
4
- 5 | (A) One acre of restored wetland or tidal waters for one acre of impacted wetland or
6 tidal waters (1:1);
7
 - 8 (B) One and one-half acres of created wetland or tidal waters for one acre of impacted
9 wetland or tidal waters (1.5:1);
10
 - 11 (C) Three acres of enhanced wetland or tidal waters for one acre of impacted wetland or
12 tidal waters (3:1);
13
 - 14 (D) Two acres of enhanced cropped wetland for one acre of impacted wetland (2:1).
15 Cropped wetland is converted wetland that is regularly plowed, seeded and harvested in
16 order to produce a crop for market. Pasture, including lands determined by the Natural
17 Resources and Conservation Service to be "farmed wetland pasture," is not cropped
18 wetland; and
19
 - 20 (E) There is no established ratio for CWM using preservation. The acreage needed
21 under preservation will be determined on a case-by-case basis by the Department.
22
- 23 (d) The Department may double the minimum ratio requirements for project
24 development affecting existing CWM sites.
25
- 26 (e) The Department may increase the ratios when:
27
- 28 (A) Mitigation is proposed to compensate for an unauthorized removal-fill activity; or
29
 - 30 (B) Mitigation will not be implemented in the same construction season as the
31 authorized impact.
32
- 33 (f) At the option of the applicant, CWM may consist of any one or a combination of the
34 following CWM ratios for commercial aggregate mining operations where both the
35 mining operation and the CWM are conducted on converted wetlands (not including
36 pasture):
37
- 38 (A) One acre of wetland and open water habitat, with depths less than 35 feet, for one
39 acre of wetland impacted;
40
 - 41 (B) Three acres of wetland and open water habitat, with depths greater than 35 feet, for
42 one acre of wetland impacted; and
43
 - 44 (C) One acre of a combination of restored, created or enhanced wetland and upland,
45 comprising at least 50 percent wetland, for one acre of wetland impacted.

- 1
2 (g) The Department may also apply the following CWM measures for commercial
3 aggregate mining operations on converted wetland (not including pasture):
4
5 (A) Allow for staged CWM or mined land reclamation required under ORS 517.700; or
6
7 (B) Allow the applicant, upon approval by the Department, to pay the entire cost of
8 CWM according to the following criteria:
9
10 (i) On an annual basis for a period not to exceed 20 years over the life expectancy of
11 the operation, whichever is less; or
12
13 (ii) On an annual basis over time at a monetary rate per cubic yard or ton of aggregate
14 material removed annually from the site.
15
16 (h) Alternative methods may be used for mitigation crediting and/or impact debiting by
17 applying a wetland function-based accounting method approved by the Department.
18
19 (5) **Timing of CWM Implementation.** CWM earthwork must be completed within the
20 same construction season as the authorized removal-fill project. The Department may
21 approve non-concurrent CWM if the applicant clearly demonstrates, in writing, the
22 reason for the delay or that there is benefit to the water resources in doing so.
23
24 (6) **CWM in Areas with High Natural Resource Value.** CWM projects must not
25 degrade areas with existing high natural resource values (e.g., forested uplands).
26
27 (7) **CWM Hydrology Must Be Self-Sustaining.** CWM must not rely on features or
28 facilities that require frequent and regular long-term maintenance and management. For
29 example, permanent water control structures may be acceptable, whereas pumping
30 from a groundwater well to provide adequate hydrologic support is not acceptable.
31
32 (8) **Multiple Purpose CWM.** CWM sites may fulfill multiple purposes including storm
33 water retention or detention, provided:
34
35 (a) All other CWM requirements are met;
36
37 (b) No alteration or management is required to maintain the functionality of the
38 stormwater facility that would degrade the wetland functions and values;
39
40 (c) The ~~stormwater runoff water~~ entering the CWM site has been pretreated to the level
41 necessary to assure that state water quality standards and criteria are met in the
42 mitigation area;
43
44 (d) Construction of storm water facilities in existing wetlands meets the criteria for
45 enhancement;

- 1
2 (e) Construction of the CWM site will not adversely affect adjacent wetlands or tidal
3 waters;
- 4
5 (f) Construction of the CWM site will not significantly change pre-development
6 hydrologic conditions, ~~or significantly~~ increase peak flows or ~~significantly change the~~
7 velocity to receiving streams; and
- 8
9 (g) Stormwater discharges to existing or CWM wetlands will not result in hydrologic
10 conditions that impair vegetation or substrate characteristics necessary to support
11 wetland functions.
- 12
13 (9) **Special Requirements for Enhancement as CWM.** CWM enhancement must
14 conform to the following additional requirements. Enhancement must:
- 15
16 (a) Be conducted only on degraded wetlands or tidal waters;
- 17
18 (b) Result in a demonstrable net gain in functions and values at the CWM site as
19 compared to those functions and values lost or diminished as a result of the project and
20 those functions and values that already exist at the CWM site;
- 21
22 (c) Not replace or diminish existing wetland or tidal waters functions and values with
23 different functions and values unless the applicant justifies, in writing, that it is
24 ecologically preferable to do so;
- 25
26 (d) Not consist solely of the conversion of one HGM or Cowardin class to another;
- 27
28 (e) Identify the causes of wetland or tidal waters degradation at the CWM site and the
29 means by which the CWM plan will reverse, minimize or control those causes of
30 degradation in order to ensure self-sustaining success; and
- 31
32 (f) Not consist solely of removal of non-native, invasive vegetation and replanting or
33 seeding of native plant species.
- 34
35 (10) **Preservation as CWM.** Preservation of wetlands or tidal waters may be used for
36 meeting the CWM requirement when the wetland or tidal waters site proposed for
37 preservation is demonstrated to be under threat of ~~destruction or adverse~~
38 ~~modification/development (e.g., zoned for a development use),~~ and one of the following
39 applies:
- 40
41 (a) The preservation site supports a significant population of rare plant or animal
42 species;
- 43
44 (b) The preservation site is a rare wetland or tidal waters type (S1 or S2 according to
45 the Oregon Natural Heritage Program);

- 1
2 (c) The preservation site is a native, mature forested wetland; or
3
4 (d) The preservation site, with existing and ongoing management, is in good condition
5 and is highly functioning (as determined using a Department-approved assessment
6 method). Preservation must also accomplish one or more of the following:
7
8 (A) Serves a documented watershed need; or
9
10 (B) Preserves wetland types disproportionately lost in the watershed.
11
12 **(11) Preservation as the Preferred CWM Option.** Preservation may be accepted as
13 the preferred CWM option when the lost or diminished functions and values are
14 exceptionally difficult to replace. Examples of such waters include, but are not limited to,
15 vernal pools, fens, bogs and tidal spruce wetlands, as defined by the Oregon Natural
16 Heritage Program.
17
18 **(12) Special Case; CWM for Linear Projects in Multiple Watersheds.** The
19 Department will review and approve CWM for linear projects in multiple watersheds
20 (e.g., roads or utility lines with wetland or tidal waters impacts) on a case-by-case basis
21 and may establish other CWM requirements than those explicitly set forth in these rules.
22
23 | Stat. Auth.: ORS 196.825 & 196.600-196.692665
24 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
25 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
26
27

28 **141-085-0695**

29 **Administrative Protection of CWM Sites**

- 30
31
32 **(1) Administrative Protection Instruments.** All CWM sites must be protected from
33 adverse impacts in perpetuity with appropriate protection instruments.
34
35 **(2) Protection Instrument Standards.** Protection instruments must meet the following
36 standards:
37
38 (a) The permanent protection instrument must prohibit any uses of the CWM site that
39 would violate conditions of the removal-fill authorization or otherwise adversely affect
40 functions and values provided by the CWM site;
41
42 (b) Any proposed revisions to the protection instrument require prior approval from the
43 Department;
44

1 (c) A conservation easement may only be granted to qualifying parties set forth in ORS
2 271;

3
4 (d) Conservation easements must provide the Department a third party right-of-
5 enforcement; and

6
7 (e) ~~Must include a Right of Entry or a~~ An access easement, conveyed to the Department,
8 ~~must be- and~~ recorded on the deed for all CWM sites on non-public lands, using a
9 template provided by the Department.

10
11 (3) **Publicly Owned CWM Sites.** For publicly owned CWM sites, administrative
12 protection may be provided through an adopted management plan. Such plan will
13 provide for appropriate protection of the CWM site as determined by the Department.

14
15 Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
16 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
17 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
18
19

20 **141-085-0700**

21
22 **Financial Security for CWM Sites**

23
24 (1) **Purpose.** Financial security instruments are required for CWM sites as a guarantee
25 that the CWM will be constructed, monitored and maintained in accordance with
26 removal-fill authorization requirements.

27
28 (2) **Exceptions.** Financial security Instruments are required for CWM projects except in
29 the following circumstances:

30
31 (a) No financial security instrument is required for projects conducted by government
32 agencies;

33
34 (b) The Department may waive the requirement for a financial security instrument for
35 impacts (0.20) of an acre or less; and

36
37 (c) Financial security instruments are not required when CWM is satisfied by purchase
38 of credits from a wetland mitigation bank, an in-lieu fee program, ~~advance mitigation~~ or
39 payment in-lieu mitigation.

40
41 (3) **Types of Financial Security Instruments.** The Department may allow the following
42 types of financial security instruments:

43
44 (a) Surety bonds ~~must be-~~executed by the permit holder and a corporate surety licensed
45 to do business in Oregon;

- 1
2 | (b) ~~Assignment Certificates~~ of deposit must be issued by a bank licensed to do business
3 in Oregon, assigned to the Department, and upon the books of the bank issuing such
4 certificates;
- 5
6 (c) Letters of credit issued by a bank authorized to do business in the State of Oregon
7 | that are irrevocable prior to release by the Department; and
- 8
9 (d) Such other financial instrument as the Department deems appropriate to secure the
10 | financial commitment of the applicant to fulfill the success requirements of the CWM.
- 11
12 (4) **Financial Security Form.** The applicant must file the financial security instrument or
13 instruments on a form or forms prescribed and furnished by the Department. Financial
14 security instruments must be made payable to the Department and must be submitted
15 to the Department prior to permit issuance or prior to release of credits from a mitigation
16 bank.
- 17
18 (5) **Commencement of the Liability Period.** The period of liability will begin at the time
19 of authorization issuance. The liability period must be renewed until the Department
20 deems the CWM to be complete and the Department releases the permittee from any
21 further monitoring requirements.
- 22
23 (6) **Determining the Amount.** For issuance of an authorization requiring a financial
24 security, ~~t~~The Department will ~~annually~~ set the amount of the financial security
25 | instrument equal to either the current cost of mitigation bank credit(s) within a service
26 area covering the removal-fill site, or the current cost of payment in-lieu mitigation,
27 whichever is greater. For mitigation banks, the amount must be sufficient to ensure a
28 high level of confidence that the mitigation will be successfully completed.
- 29
30 (7) **Financial Security Instrument Replacement.** The Department may allow a permit
31 holder to replace an existing financial security instrument with another if the total liability
32 is transferred to the replacement. The Department will not release an existing financial
33 security instrument until the permit holder has submitted and the Department has
34 approved the replacement.
- 35
36 (8) **Financial Security Instrument Release.** The Department will authorize release of
37 the financial security instrument when the CWM meets the requirements of the CWM
38 plan and the conditions of the removal-fill authorization. The permit holder must file a
39 request with the Department for the release of all or part of a financial security
40 instrument. The request must include:
- 41
42 (a) The precise location of the CWM area;
- 43
44 (b) The permit holder's name;
- 45

- 1 (c) The removal-fill authorization number and the date it was approved;
2
3 (d) The amount of the financial security instrument filed and the portion proposed for
4 release; and
5
6 (e) A description of the results achieved relative to the permit holder's approved CWM
7 plan.
8
9 (9) **Forfeiture.** The Department may declare forfeiture of all or part of a financial
10 security instrument for any project area or an increment of a project area if CWM
11 activities fail to meet success criteria, the permittee fails to provide monitoring reports,
12 or fails to follow other permit conditions related to mitigation. The Department will
13 identify, in writing, the reasons for the declaration.
14
15 (10) **Determination of Forfeiture Amount and Use of Funds.** The permit holder must
16 forfeit the amount of the outstanding liability in the financial security instrument. The
17 Department will either use the funds collected from the security forfeiture to complete
18 the CWM or deposit the proceeds in the Oregon Removal-Fill Mitigation Fund.

19
20 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
21 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
22 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
23
24

25 **141-085-0705**

26 **Requirements for All CWM Plans**

- 27
28
29 (1) **CWM Plan Content.** CWM Plan detail must be commensurate with the size and
30 complexity of the proposed mitigation. A CWM Plan is not required for proposed CWM
31 by means of using credits from an approved bank, advance mitigation site, in-lieu fee
32 mitigation or payment in-lieu mitigation. A CWM plan for permittee responsible CWM
33 must include the sections listed below.
34
35 (a) CWM plan overview, including:
36
37 (A) CWM ecological goals and objectives;
38
39 (B) The CWM concept in general terms including a description of how the plan, when
40 implemented, will replace the functions and values of the impacted non-tidal wetland or
41 tidal waters;
42
43 (C) Mitigation site acreage by method(s) of mitigation proposed (restoration, creation
44 and enhancement) and by proposed HGM and Cowardin classification for each method;
45 and

- 1
2 (D) Summary of proposed net losses and gains of wetland or tidal waters functions and
3 values.
4
- 5 (b) CWM site ownership and location information:
6
- 7 (A) CWM site ownership information (name, address, phone). If this is different from the
8 applicant, copies of legal agreements ~~granting~~ demonstrating permission to conduct the
9 CWM and willingness of the property owner to provide long-term protection are
10 required;
11
- 12 (B) Legal description (Township, Range, Quarter and Quarter-quarter Section and tax
13 lot or lots); and
14
- 15 (C) CWM site location shown on a USGS or similar map showing the CWM site location
16 relative to the impacted site, longitude and latitude, physical address, if any (e.g., 512
17 Elm Street), and road milepost (e.g., mp 25.21).
18
- 19 (c) A description of how the proposed CWM addresses each of the principal objectives
20 for CWM as defined in OAR 141-085-0680.
21
- 22 (d) CWM site existing conditions, including the following, as applicable.
23
- 24 (A) If wetlands or tidal waters exist on the CWM site, then the following information must
25 be provided:
26
- 27 (i) A wetland determination/delineation report pursuant to OAR 141-090 for existing
28 wetlands on the CWM site (or for tidal waters, any wetlands above highest measured
29 tide elevation), as necessary to confirm acreage of proposed CWM;
30
- 31 (ii) Identification of HGM and Cowardin class(es) and subclass(es) of all wetlands and
32 tidal waters present within the CWM site;
33
- 34 (iii) A general description of the existing and proposed water source, duration and
35 frequency of inundation or saturation, and depth of surface water for wetlands or tidal
36 waters on the CWM site. This information must include identification of any water rights
37 necessary to sustain the intended functions. When water rights are required, the
38 applicant must provide documentation Evidence that the water right has ~~either~~ been
39 secured prior to issuance ~~or is not required must be documented in the first year~~
40 mitigation monitoring report; and
41
- 42 (iv) Plans that involve enhancement must include identification of the cause(s) of
43 degradation and how the plan will reverse it and sustain the reversal.
44

- 1 (B) A description of the major plant communities and their relative distribution, including
2 the abundance of exotic species within the CWM site and associated buffers.
3
- 4 (C) Approximate location of all water features (e.g., wetlands, streams, lakes) within 500
5 feet of the CWM site.
6
- 7 (D) Any known CWM site constraints or limitations.
8
- 9 (E) Plans for CWM by means of restoration must include documentation sufficient to
10 demonstrate that the site was formerly, but is not currently, a wetland or tidal water.
11
- 12 (e) A functions and values assessment. A summary of the assessment must be placed
13 in the body of the CWM plan, and supporting data sheets or assessment model outputs
14 must be placed in an appendix of the CWM Plan.
15
- 16 (f) CWM drawings and specifications, including:
17
- 18 (A) Proposed construction schedule;
19
- 20 (B) Scaled site plan(s) showing CWM project boundaries, existing and proposed
21 wetland or tidal waters boundaries, restoration, creation and enhancement areas,
22 buffers, existing and proposed contours, cross-section locations, construction access
23 location and staging areas;
24
- 25 (C) Scaled cross sections showing existing and proposed contours and proposed water
26 depths;
27
- 28 (D) Plant list for each Cowardin and HGM class at the CWM site (include scientific
29 names and wetland indicator status);
30
- 31 (E) Schematic of any proposed water control structures; and
32
- 33 (F) For CWM sites involving tidal waters, plan views and cross sections must show
34 relevant tidal elevations relative to mean lower low water (MLLW) using the nearest
35 local tidal datum. The elevation of MLLW must be referenced to the North American
36 Vertical Datum 1988 (NAVD88).
37
- 38 (g) Proposed CWM performance standards. The applicant may propose to use
39 applicable pre-defined performance standards as approved by the Department, or may
40 provide CWM site-specific performance standards that:
41
- 42 (A) Address the proposed ecological goals and objectives for the CWM;
43
- 44 (B) Are objective and measurable; and
45

- 1 (C) Provide a timeline for achievement of each performance standard.
2
3 (h) A description of the proposed financial security instrument. The Department will
4 determine the amount of security required. A final financial security instrument will be
5 required prior to permit issuance unless otherwise approved by the Department.
6
7 (i) A monitoring plan including specific methods, timing, monitoring plot locations, and
8 photo-documentation locations.
9
10 (j) A long-term maintenance plan describing:
11
12 (A) How the applicant anticipates providing for maintenance of the CWM site beyond
13 the monitoring period to ensure its sustainability (e.g., maintenance of any water control
14 structures, weed management, prescribed burning, and vandalism repair);
15
16 (B) Expected long-term ownership of the CWM site and the anticipated responsible
17 party or parties for long-term maintenance; and
18
19 (C) How the maintenance activities are anticipated to be funded.
20
21 (k) The CWM plan must identify the long-term protection instrument for the CWM site in
22 accordance with OAR 141-085-0695.
23
24 (l) If permittee-responsible mitigation is proposed and the application for a permit or
25 authorization is submitted on behalf of a closely held corporation, limited partnership,
26 limited liability company (LLC) or trust, the Department will require from each
27 shareholder or stockholder, limited partner, member, trustee, current beneficiary or
28 other principal:
29
30 (i) A joint and several personal guarantee securing compliance with mitigation
31 obligations; and
32
33 (ii) A written promise agreement to make all reasonable efforts to maintain the business
34 entity in active status until all mitigation obligations have been satisfied.
35
36 (iii) For the purpose of subsection (L) paragraph (C) of this section, a "closely held
37 corporation" is one in which all shares are held by less than five individuals.
38
39 (m) The Department may require additional information as necessary to determine the
40 appropriateness, feasibility and sustainability of the proposed CWM and at any time
41 prior to the permit decision may make recommendations for improvements to CWM
42 plans.
43

- 1 (2) **CWM Plans Using Preservation.** A CWM plan using preservation must include:
2
3 (a) Functions and values assessment of the removal-fill site and site proposed for
4 preservation;
5
6 (b) Maps showing the preservation site including all delineated wetlands or tidal waters
7 to be conserved;
8
9 (c) Documentation demonstrating that the proposed preservation site meets the
10 requirements of OAR 141-085-0690(10);
11
12 (d) The surrounding land uses and an analysis of both the short-term and long-term
13 known and probable effects of those land uses and activities on the preserved wetlands
14 or tidal waters;
15
16 (e) Measures that may be necessary to minimize the effects of surrounding land uses
17 and activities on the preserved wetlands or tidal waters;
18
19 (f) Identification of the party or parties responsible for long-term protection of the
20 preservation site;
21
22 (g) A long-term protection instrument;
23
24 (h) A long-term management plan with a funding mechanism that addresses the specific
25 management needs to optimize and maintain functionality and ecological sustainability
26 of the wetlands or tidal waters to be preserved; and
27
28 (i) The protection instrument, management plan and funding mechanism must be in
29 place prior to issuance of the authorization.
30
31 (3) **Authorization Conditions for CWM Plans.**
32
33 (a) The Department will review the CWM plan for sufficiency. In approving the final
34 CWM plan, the Department may impose authorization conditions necessary to ensure
35 compliance.
36
37 (b) The approved CWM plan becomes an enforceable part of the removal-fill
38 authorization. In the event of conflict between CWM Plan provisions and removal-fill
39 authorization conditions, the authorization conditions prevail.
40
41 (c) Regardless of the expiration date of the authorization, all compensatory mitigation
42 conditions remain enforceable until the Department declares that the CWM has been
43 successful.
44

- 1 (d) The permit holder cannot delegate responsibility for CWM requirements, unless the
2 Department has officially transferred the mitigation obligation.
3
- 4 (e) If applicable, the Department will approve necessary draft administrative protection
5 instrument(s) prior to permit issuance. A copy or copies of the recorded administrative
6 protection instrument(s) must be submitted to the Department with the post construction
7 report unless the Department approves another schedule.
8
- 9 (f) For authorizations involving payment in-lieu mitigation as CWM:
10
- 11 (A) The individual removal-fill permit or letter of authorization for an activity will not be
12 issued until payment has been made as approved by the Department; and
13
- 14 (B) Once an ~~authorized~~approved removal-fill permit activity has begun ~~as proposed~~, the
15 payment is non-refundable.
16
- 17 (g) For authorizations involving a mitigation bank ~~or in-lieu fee~~ credit purchase, proof of
18 the purchase ~~of the~~is required ~~number of mitigation bank credits must be received by~~
19 ~~the Department~~ prior to issuance of the authorization.
20
- 21 Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
22 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
23 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
24
25

26 **141-085-0710**

27
28 **Monitoring Requirements for CWM**

- 29
30 (1) **Purpose.** The purpose of the CWM monitoring requirement is to provide information
31 for the Department to:
32
- 33 (a) Determine whether the CWM complies with the conditions of the authorization and
34 whether the CWM has achieved its stated goals, objectives and performance standards;
35
- 36 (b) Determine whether the CWM is replacing wetland and tidal waters area and
37 functions and values; and
38
- 39 (c) Provide information for removal-fill program monitoring.
40
- 41 (2) **Monitoring Reports.** The permit holder must monitor the CWM site and provide to
42 the Department monitoring reports commensurate with CWM site size and complexity.
43 Those reports must include at minimum:
44

- 1 (a) A post construction report demonstrating as built conditions and discussing any
- 2 variation from the approved plan. Unless waived by the Department, the post
- 3 construction report must be submitted within 90 calendar days of completing grading;
- 4
- 5 (b) An annual written monitoring report that includes all data necessary to document
- 6 compliance with CWM conditions and performance standards; and
- 7
- 8 (c) A sufficient number of permanent monitoring points to provide a representative
- 9 sampling of the CWM site and buffers.
- 10
- 11 (3) **Duration.** Monitoring must be conducted for a minimum period of five growing
- 12 seasons after the completion of all the initial plantings, years unless otherwise specified
- 13 by the Department.
- 14
- 15 (4) **Final Monitoring Report Requirements.** To determine whether the CWM project
- 16 will meet acreage and functional replacement requirements, the Department must
- 17 receive by not later than the fifth year of the monitoring program the following additional
- 18 documentation:
- 19
- 20 (a) Mapping of the CWM site boundary and verification of quantities of actual
- 21 restoration, creation and enhancement acreages achieved by HGM and Cowardin
- 22 class; and
- 23
- 24 (b) Comparison of actual functions and values attained at the CWM site compared to
- 25 the predicted functions and values for the CWM site identified in the CWM Plan.
- 26
- 27 (5) **Additional Monitoring.** The Department may require modifications to the CWM
- 28 plan, as well as require additional monitoring, if the Department determines that the
- 29 CWM fails to meet performance standards, replacement acreage requirements, or
- 30 replace functions and values.
- 31
- 32 (6) **Release From Monitoring Obligations.** When the Department determines that the
- 33 CWM complies with the conditions of the removal-fill authorization, the Department will
- 34 notify the permit holder in writing that additional monitoring is not required.
- 35
- 36 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
- 37 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
- 38 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
- 39
- 40

41 **141-085-0715**

42 **Mitigation for Temporary Impacts**

43

44

1 Applicants for projects that involve temporary impacts to waters of this state must
2 provide a rehabilitation plan for rectification of temporary impacts. Rectification must
3 include re-establishment of pre-existing contours and ~~replacement of~~ pre-existing
4 vegetation. A monitoring plan to confirm the reestablishment of wetland or tidal waters,
5 or reestablishment of vegetation may be required.

6
7 Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
8 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
9 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

10
11
12 **141-085-0720**

13 14 **Mitigation Banking Purpose, Applicability and Policies**

15
16 (1) **Purpose and Applicability.** These rules describe the requirements to establish and
17 operate mitigation banks, which can be used to compensate for impacts to waters of
18 this state. These rules pertain to mitigation banks that compensate for impacts to all
19 types of waters of this state.

20
21 (2) **Coordination with the Corps of Engineers.** The Department will coordinate with
22 and participate on the Interagency Review Team as a co-chair agency with the Corps of
23 Engineers to establish mitigation banks that also meet the federal regulatory
24 requirements, as appropriate.

25
26 (3) **Development of Mitigation Banks is Encouraged.** The Department encourages
27 the development and will facilitate the expeditious approval of mitigation banks.

28
29 (4) **Compensation for Expected or Historical Losses to Aquatic Resources.**
30 Mitigation banks must be located and designed to compensate for expected or historical
31 losses to aquatic resources by:

- 32
33 (a) Maintaining regional functions and values of aquatic resources in their service area;
34
35 (b) Matching the demand for credits with losses to the water resources of this state; and
36
37 (c) Meeting other ecological or watershed needs as determined by the Department.

38
39 (5) **Banks Must Meet Principal Objectives for CWM:** Mitigation banks established and
40 operated under these rules specifically for wetlands must meet the principal objectives
41 of compensatory wetland mitigation in OAR 141-085-0680.

42
43 (6) **Subject to All CM Rules.** Mitigation banks are subject to all rules governing CWM
44 and CNWM, as applicable.

45

1 **(7) Collaboration with Public Resource Protection and Restoration Programs.** The
2 Department encourages collaboration with voluntary watershed enhancement projects
3 in conjunction with, but supplemental to, the generation of compensatory mitigation
4 credit, when greater ecological gains can be recognized. Except where public funding is
5 specifically authorized to provide compensatory mitigation, or the Department otherwise
6 approves the use or accounting of such funds, funds dedicated to non-compensatory
7 aquatic resource restoration or preservation projects will not generate transferable
8 mitigation credit.

9
10 Stat. Auth.: ORS 196.825 & 196.600-196.692665
11 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
12 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
13
14

15 **141-085-0725**

16 17 **Process for Establishing Mitigation Banks**

18
19 **(1) Pre-prospectus Meeting with the Department.** To initiate a mitigation bank, a
20 prospective bank sponsor must request a meeting with the Department for initial review
21 of the mitigation concept, site suitability, and content of the Prospectus.
22

23 **(2) Department Review of Draft Documents, Generally.** The process for establishing
24 a mitigation bank involves the development of a Prospectus and Mitigation Bank
25 Instrument (MBI) in consultation with an interagency review team (IRT). In an effort to
26 supply the IRT with complete documents that meet the requirements of these rules,
27 multiple drafts and completeness reviews may be required.
28

29 **(3) Submittal of the Prospectus.** After discussion of the mitigation concept with the
30 Department, a mitigation bank sponsor must submit a Mitigation Bank Prospectus. A
31 Mitigation Bank Prospectus must include:
32

33 (a) Site information including location, size, ownership, soil mapping, and recent air
34 photo;
35

36 (b) The objectives of the proposed mitigation bank;
37

38 (c) How the mitigation bank will be established and operated, in general terms;
39

40 (d) The proposed service area;
41

42 (e) A market or other analysis that demonstrates the general need for the mitigation
43 bank;
44

45 (f) A description of the technical feasibility of the proposed mitigation bank;

- 1
2 (g) The proposed ownership arrangements and long-term management strategy for the
3 mitigation bank;
4
5 (h) How the mitigation bank addresses each of the principal objectives for CWM listed in
6 OAR 141-085-0680; and
7
8 (i) Names and addresses of all landowners within 500 feet of the bank.
9
10 (4) **Prospectus Completeness Review.** Within 30 calendar days of the Department's
11 receipt of a Prospectus, the Department will conduct an initial review to determine if the
12 Prospectus is complete and the information contained in the Prospectus adequately
13 addresses the requirements. Following the Prospectus completeness review, the
14 Department will inform the applicant of one of the following findings:
15
16 (a) The Prospectus is complete and will proceed to the public notice; or
17
18 (b) The Prospectus is incomplete.
19
20 (5) **Incomplete Prospectus.** If the Department determines that the Prospectus is
21 incomplete, the Department will notify the sponsor in writing and list the missing or
22 deficient information. The Department will take no action on the incomplete Prospectus
23 until the required information is submitted. The sponsor must resubmit the entire
24 amended Prospectus for reconsideration, unless instructed by the Department to do
25 otherwise. Submission of a new or amended Prospectus starts a new 30 calendar day
26 initial review period.
27
28 (6) **Department May Decline to Participate.** If a mitigation bank sponsor cannot
29 demonstrate the need for the mitigation credits or the technical feasibility and ecological
30 desirability of the bank, the Department may decline to participate in its development.
31
32 (7) **Public Notice of Prospectus.** Upon determining that a Prospectus is sufficient, the
33 Department will issue a public notice entitled, "Intent To Create A Mitigation Bank." The
34 Department will:
35
36 (a) Post the notice on the Department's web site for 30 calendar days;
37
38 (b) Send the notice to city and county planning departments, affected state and federal
39 natural resource and regulatory agencies, adjacent landowners, conservation
40 organizations and other interested persons requesting such notices;
41
42 (c) Briefly describe the proposed mitigation bank and reference the Prospectus provided
43 by the bank sponsor; and
44
45 (d) Solicit comments for 30 calendar days from the date of the public notice.

1
2 **(8) Consideration of Comments Received During the Public Notice Period.** All
3 comments received will be provided to the bank sponsor and to the IRT. If comments
4 are not received from an interested party within the 30-day comment period, the
5 Department will assume the entity does not desire to provide comments.
6
7 **(9) Establishment of an Interagency Review Team (IRT) and the Role of the IRT.**
8 The Department will invite participants to serve on an IRT within 30 calendar days of the
9 date of the public notice. The Department will serve as chair (or co-chair) of the IRT.
10
11 (a) The Department will invite each of the following agencies to nominate a
12 representative for an IRT:
13
14 (A) Oregon Department of Environmental Quality;
15
16 (B) Oregon Department of Fish and Wildlife;
17
18 (C) Oregon Department of Land Conservation and Development;
19
20 (D) U.S. Fish and Wildlife Service;
21
22 (E) U.S. Environmental Protection Agency;
23
24 (F) Soil and Water Conservation District; and
25
26 (G) Local Government Planner, or equivalent.
27
28 (b) The Department may appoint other members of the IRT based on the nature and
29 location of the project, particular interest in the project by persons or groups, and/or any
30 specific expertise that may be required by the Department in development of the MBI.
31
32 (c) The IRT acts in an advisory capacity to the Department in the establishment and
33 operation of mitigation banks. ~~The IRT member agencies may elect to be signatories on~~
34 ~~the MBI. By participating as signatories, IRT member agencies confirm that the~~
35 ~~approved bank supports the regulatory authorities and/or missions of the IRT agency.~~
36 The IRT may:
37
38 (A) Review and provide input to the Department on the Prospectus and the comments
39 received during the public notice for use in the development of the MBI;
40
41 (B) Review and provide input on the draft MBI;
42
43 (C) Review the performance of the bank to assist the Department in determining
44 compliance with the MBI; and
45

- 1 (D) Provide input on adaptive management of the mitigation bank, as necessary, to
2 achieve the ecological goals and objectives.
3
- 4 **(10) Mitigation Bank Instrument (MBI).** After consideration of the public comments
5 and input from the IRT, the bank sponsor must develop a Draft Mitigation Bank
6 Instrument (MBI) for submittal to the Department. If the sponsor intends that the MBI
7 serve as the permit application, the sponsor must notify the Department of this intention
8 at the time of submittal of the first draft MBI. If an MBI is used in place of a permit
9 application, in addition to all requirements below, it must meet the requirements for fees,
10 content, and review procedures as specified in OAR 141-085-0545 through 141-085-
11 0565. The draft MBI must contain:
12
- 13 (a) If the proposed bank is for wetland mitigation, all requirements for CWM plans per
14 OAR 141-085-0680 through 141-085-0710; and
15
- 16 (b) The applicant must also provide the following information:
17
- 18 (A) The proposed service area for the bank, including a map clearly showing
19 recognizable geographic place names and watershed boundaries;
20
- 21 (B) Demonstration of the need for the bank as shown by past removal-fill activities,
22 projected demographics for the proposed service area, statements of expected activities
23 from the local planning agency, and like documentation;
24
- 25 (C) A description of the projected wetland losses in the service area by HGM and
26 Cowardin wetland classes;
27
- 28 (D) Proof of ownership including a title report and disclosure of any and all liens or
29 easements on the bank site. If the sponsor does not own the land, the MBI must contain
30 explicit legal and recordable permission granted by the landowner to perpetually
31 dedicate the land upon which the proposed bank and any associated buffer is located;
32
- 33 (E) A description of the methods and results of the evaluation of ecological stressors,
34 such as contaminants, present at the bank site that could compromise the wetland
35 functions;
36
- 37 (F) Description of the location and plant community composition of reference site(s),
38 unless an HGM reference data set is used;
39
- 40 (G) Description of the method(s) used to determine the number of credits to be created
41 at the proposed bank, as well as those that will be used to account for and report credit
42 and debit transactions;
43
- 44 (H) The proposed credit release schedule linked to achievement of specific performance
45 standards;

- 1
2 (I) Detailed contingency plans describing how project deficiencies or performance
3 failures will be corrected, including assignment of responsibilities for failures such as
4 floods, vandalism, damage by pests and wildlife, invasion by weedy vegetation, etc.;
- 5
6 (J) Land use affidavit; and
- 7
8 (K) A statement indicating when each of the conditions of the MBI will terminate, unless
9 they are perpetual in nature.
- 10
11 **(11) Review of the Draft MBI.** Within 30 calendar days of the Department's receipt of a
12 draft MBI, the Department will conduct an initial review to determine if the MBI is
13 complete and the information contained in the MBI adequately addresses the
14 requirements. Following the review, the Department will inform the sponsor of its
15 findings, either:
- 16
17 (a) The draft MBI is complete and will proceed to the IRT review process; or
18
19 (b) The draft MBI is incomplete.
- 20
21 **(12) Incomplete Draft MBI.** If the Department determines that the draft MBI is
22 incomplete or deficient, the Department will notify the sponsor in writing and list the
23 missing or deficient information. The Department will take no action on the incomplete
24 draft MBI until the required information is submitted. The applicant must resubmit the
25 entire draft MBI for reconsideration, unless instructed by the Department to do
26 otherwise. Submission of a new or amended draft MBI starts a new 30 day review
27 period.
- 28
29 **(13) IRT Review of the Draft MBI.** Upon notification that the draft MBI is complete, the
30 sponsor must provide copies to the IRT for review. At the next available IRT meeting,
31 the IRT will review and discuss the draft MBI and identify any issues that need to be
32 resolved prior to finalizing the MBI. IRT meetings will be held as necessary to resolve
33 issues identified by the co-chairs.
- 34
35 **(14) Preparation of the Final MBI.** When revisions have been completed and issues
36 identified through the IRT process have been resolved, the sponsor must submit a final
37 MBI to the Department and IRT members.
- 38
39 **(15) Final Approval of the MBI.** Within 30 calendar days of receipt of the final MBI, the
40 Department will notify the sponsor and the IRT whether the agency will approve the
41 MBI.
- 42
43 **(16) Appeal of Department Decision.** Appeals of the Department decision to affirm or
44 deny mitigation bank approval will be administered according to OAR 141-085-0575.
45

1 (17) **Construction Timing.** At their own risk, a sponsor may begin construction of a
2 bank before approval of the final MBI if the sponsor:

3
4 (a) Provides the Department with detailed documentation of the baseline conditions
5 existing at the proposed site(s) of the bank; and

6
7 (b) Receives written consent from the Department before undertaking any construction.
8 However, such consent from the Department does not exempt the sponsor from having
9 to apply for, and obtain a removal-fill permit, if required. Written consent from the
10 Department recognizes the sponsor's intent to create a bank but does not guarantee
11 subsequent approval of the MBI by the Department. The Department assumes no
12 liability for the sponsor's actions.

13
14 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)

15 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

16 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

17
18
19 **141-085-0730**

20
21 **Establishment of Mitigation Credits**

22
23 (1) **Credit Options.** Credits can be established by using:

24
25 (a) The minimum mitigation ratios as stated in OAR 141-085-0690(4); or

26
27 (b) By applying a function based credit accounting method approved by the Department.
28 Credits within a bank are determined by the difference between the baseline conditions
29 of the bank prior to restoration, enhancement or creation activities, and the increased
30 functions and values of the water resources of this state that result, or are expected to
31 result, from those activities.

32
33 (2) **Bonus Credits.** Additional credits beyond those established in an approved MBI
34 may be released after five consecutive years in which the mitigation wetland meets all
35 performance standards:

36
37 (a) For those bank credits using the 1.5:1 ratio for wetland creation, or a function based
38 credit accounting method approved by the Department, additional credits may be
39 recognized by the Department when the total number for wetland credits for such area,
40 including the initial release and these additional credits, does not exceed a 1:1 ratio by
41 acreage; or

42
43 (b) Bonus credits may be recognized, at the discretion of the Department in consultation
44 with the IRT, to cover the reasonable costs of the addition of long-term stewardship
45 provisions to existing banks that were approved without such measures.

1
2 (3) **Buffer Area Credits.** Credits may be granted on an area basis for upland buffers at
3 the discretion of the Department. Such buffers may be essential to protect the functions
4 of a bank from potentially adverse effects of adjacent land uses, and will be subject to
5 the same site protections as the bank.

6
7 (4) **Credits for Non-Wetland Areas.** The Department may recognize wetland credits
8 for improvement of non-wetlands such as in-stream channel habitat, riparian
9 floodplains, non-wetland inclusions in wetland/upland mosaics, and other ecosystem
10 components that provide ecological benefits to the larger wetland bank.

11
12 Stat. Auth.: ORS 196.825 & 196.600 - 196. ~~692665~~
13 Stats. Implemented: ORS 196.600-196.692 & 196.800 - 196.990
14 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
15
16 **141-085-0735**

17
18 **Release, Use and Sale of Mitigation Credits**

19
20 (1) **Initial Release of Credits Must Be Specified in the MBI.** The maximum number of
21 credits that may be released for sale in advance of ~~bank certification~~ achieving
22 performance standards will be clearly specified in the MBI. In no case may this amount
23 exceed 30 percent of the total credits anticipated for each phase of bank construction.
24 Advance releases require a commensurate financial security per OAR 141-085-0700.

25
26 (2) **Release of Credits Must Be in Compliance with MBI.** The Department will not
27 allow the sale or exchange of credits by a mitigation bank that is not in compliance with
28 the terms of the MBI, the Removal-Fill Law, and in the case of a wetland mitigation
29 bank, all applicable rules governing CWM. The Department may consult with the IRT in
30 order to determine noncompliance and appropriate remedies, including enforcement
31 action. The Department may, in consultation with the IRT, modify the credit release
32 schedule, including reducing the number of credits or suspending credit transfers, when
33 necessary to ensure that all credit transfers are backed by mitigation projects with a
34 high probability of meeting performance standards.

35
36 (3) **Sales to Permit Applicants.** After credits have been released to the bank sponsor,
37 they may be sold to permit applicants upon approval by the Department that such
38 credits will satisfy the mitigation obligation of a specific permit, or to resolve an
39 enforcement case. Each credit sale transfers the mitigation obligation from the permit
40 applicant to the sponsor.

41
42 (4) **Sales to Public Benefit Corporations or Public Bodies.** At the request of a
43 mitigation bank sponsor, the Department may authorize the withdrawal of mitigation
44 bank credits by a public benefit corporation as defined in ORS 65.001 or a public body.
45 Such entities will be designated by the Director for the purpose of reserving credits for

1 future use in accordance with this subsection. The Director will manage such
2 transactions to ensure that each credit is used no more than once to satisfy a use in
3 accordance with this section. Mitigation Banks must report every credit sale to the
4 Department and will provide an annual credit ledger.

5
6 **(5) The Department May Purchase Bank Credits.** Funds from the wetland mitigation
7 bank revolving fund may be used to purchase approved bank credits where such
8 purchases will provide appropriate CWM.

9
10 **(6) Records and Reporting.** The Department will maintain a record of credit releases
11 and withdrawals for each active wetland mitigation bank.

12
13 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
14 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
15 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
16

17
18 **141-085-0740**

19
20 **Authorization for Mitigation Banks**

21
22 **(1) Authorization Requirement.** Bank sponsors must obtain a removal-fill permit for
23 any removal-fill necessary to create a proposed bank in jurisdictional areas. At the
24 discretion of the Department, the MBI may serve as the application if complete pursuant
25 to OAR 141-085-0550, and may also serve as the Department's authorization. If the
26 Department accepts the MBI as the application for a removal-fill permit, the bank
27 sponsor must pay the applicable fee for a removal-fill application.

28
29 **(2) Baseline Conditions Must Be Approved Prior to Construction.** When removal-fill
30 permits are not required to establish a mitigation bank, the Department will approve
31 baseline conditions prior to construction.

32
33 **(3) MBI Constitutes a Department Order.** If a removal-fill permit is not required to
34 construct a mitigation bank, the Department will consider the fully executed MBI an
35 enforceable order.

36
37 **(4) Draft MBI May be Circulated for Public Notice.** For mitigation banks that do not
38 require a permit for construction, or for such banks that the Department elects to allow
39 the MBI to serve as the permit application, a 15-calendar day public notice will be
40 provided to the public of the Department's intent to approve the bank. The Department
41 may elect to circulate a public notice of the MBI according to OAR 141-085-0560. If an
42 MBI is used in place of a removal-fill permit application, it must meet the requirements
43 for fees, content, and review procedures as specified in OAR 141-085-0545 through
44 141-085-0565.

45

1 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
2 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
3 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
4
5

6 | **141-085-0745**

7
8 | **In-Lieu Fee Mitigation**
9

10 | The Department may approve the use of in-lieu fee mitigation as a category of the
11 | mitigation banking program (OAR 141-085-0720 through 141-085-0740).
12

13 | (1) **Applicability.** In-lieu fee mitigation involves the payment of funds to an approved
14 | sponsor to satisfy compensatory mitigation requirements for impacts to waters of this
15 | state. In-lieu fee mitigation differs from other forms of mitigation in that advanced credits
16 | can be released upon approval of a program Instrument, before Department approval of
17 | the mitigation site.
18

19 | (2) **Policies.** In-lieu fee mitigation is subject to all rules governing mitigation banking
20 | (OAR 141-085-0720 through 141-085-0745), as applicable.
21

22 | (3) **Implementation.** The Department will establish a method for implementing in-lieu
23 | fee mitigation, including, but not limited to the following elements:
24

25 | (a) Additional information required for a program instrument outlining the operation and
26 | use of an in-lieu fee program, including, but not limited to a planning framework for
27 | identifying and securing mitigation sites within the defined service area, proposed
28 | advance credit release and justification, and accounting procedures;
29

30 | (b) Timelines to implement compensatory mitigation projects to satisfy advance credit
31 | sales, and
32

33 | (c) Department approval of compensatory mitigation projects proposed by the in-lieu fee
34 | sponsor.
35

36 | (4) **Qualifying Sponsors May Be Limited.** The Department may limit the number and
37 | type of in-lieu fee sponsors.
38

39 | Stat. Auth.: ORS 196.825 & 196.600-196. [692665](#)
40 | Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990
41 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10
42
43

44 | **141-085-0750**
45

1 **Payments; Expenditure of Funds for Payment In-Lieu (PIL) Mitigation**

2 The Department will use the Oregon Removal-Fill Mitigation Fund to hold and disperse
3 money collected from the program.

4
5 (1) **Limitations on PIL Fund Expenditures.** The Department will expend funds
6 collected under the PIL mitigation option to:

7
8 (a) Restore, enhance, create or preserve water resources of this state (including
9 acquisition of land or easements as necessary to conduct restoration, enhancement,
10 creation or preservation projects) as compensatory mitigation to compensate, replace or
11 preserve functions and values lost or diminished as result of an approved project;

12
13 (b) Purchase credits from an approved mitigation bank for the purpose of fulfilling the
14 mitigation requirements of an approved project;

15
16 (c) Monitor the compensatory mitigation;

17
18 (d) Conduct site management for the compensatory mitigation project as necessary to
19 assure that the mitigation is successful; and

20
21 (e) Administer the program and fund a staff position.

22
23 (2) **Geographic Limitations of Funds Expenditures.** The Department will expend
24 funds collected under the PIL option within the basin where the removal-fill site occurs,
25 unless the Department determines that this option is not feasible.

26
27 | Stat. Auth.: ORS 196.825 & 196.600-196.692665

28 Stats. Implemented: ORS 196.600-196.692 & 196.800-196.990

29 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09; DSL 8-2009, f. 12-15-09 cert. ef. 1-1-10

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

141-085-0755

Advance Mitigation; Standard Path

(1) **Set-Aside Excess Credits.** As part of the existing, active individual removal-fill permit application process, an applicant may request that the Department consider that the proposed permittee-responsible CWM (as documented in a CWM Plan prepared in accordance with OAR 141-085-0705) could produce mitigation credits in excess of those needed to satisfy project requirements.

(2) **Additional Information Required.** If the applicant desires to preserve the option of receiving additional mitigation credit from the excess credits for future projects by the same applicant and by up to one additional party, then the following additional information must be submitted as a part of the applicant's CWM plan:

1
2 (a) The specific area(s) of the CWM site that compensates for the specific permitted
3 effect, and identification of the specific areas of the CWM site that are proposed for
4 credit in future projects;

5
6 (b) A table showing how much credit, in acres under suitable mitigation ratios, is being
7 claimed at the CWM site; and

8
9 (c) The name of any additional person who would use the advance credits.

10
11 (3) **Applicant Assumes All Risk.** If the applicant elects to pursue this option, he/she
12 does so completely at his/her own risk. CWM in advance does not create the
13 presumption that a proposed future wetland impact will be authorized, or that the CWM
14 will be considered suitable CWM. A separate alternatives analysis will be required for
15 each and every separate individual removal-fill permit application.

16
17 (4) **Monitoring Requirements.** Monitoring to determine if success criteria are met must
18 continue for five years or until the success criteria are achieved, whichever is longer.
19 Such monitoring requirements will apply to each designated mitigation area, or for the
20 entire mitigation site if constructed at one time.

21
22 (5) **Conversion of Unused Credits.** Unused credits created by standard path advance
23 mitigation may be converted to alternate path mitigation credits at the discretion of the
24 ~~applicant-Department~~ and in accordance with OAR 141-085-0760.

25
26 Stat. Auth.: ORS 196.825 & 196.600 - 196.692665
27 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
28 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

141-085-0760

Pilot Program for Advance Mitigation; Alternate Path

(1) **Objective.** The objective of advance mitigation is to provide compensatory wetland mitigation that replaces wetland functions and values before authorized wetland impacts. Currently, the Department has an advance mitigation option available through the mitigation banking program (OAR 141-085-0720 through 0745.) and standard path advance mitigation program (OAR 141-085-0755). The current methods of advance mitigation remain in effect and are not modified by this alternate path approach. The purpose for creating alternate path advance mitigation is to:

(a) Reduce or eliminate the temporal loss of wetland functions and values associated with permittee responsible CWM;

- 1 (b) Reduce the risk of mitigation site failure by demonstrating mitigation site success
2 prior to credit release;
3
4 (c) Reduce entry requirements associated with wetland mitigation banking by reducing
5 initial administrative requirements and performance security requirements; and
6
7 (d) Reduce the Department's administrative burden for authorizing advance mitigation.
8

9 (2) **Implementation.** The Department will establish a method for implementing the
10 alternate path advance mitigation program, including, but not limited to the following
11 elements:
12

13 (a) Requirements for baseline condition documentation, including but not limited to:
14 wetland delineation, wetland functions and values assessment, site selection criteria,
15 proposed success criteria, and monitoring plan;
16

17 (b) Department approval of baseline documentation;
18

19 (c) Advance mitigation site development including removal-fill authorization, as
20 necessary;
21

22 (d) Mitigation site monitoring by the advance mitigation proponent; and
23

24 (e) Petition to the Department for credit ~~certification-release~~ including, but not limited to,
25 final wetland delineation and functions and values assessment, monitoring results,
26 credit ledger management, and long-term management and site protection plan.
27

28 (3) **Term of Pilot Program.** The Department ~~may~~will evaluate the pilot program in
29 2013~~no later than five years after implementation~~ and may continue, modify or suspend
30 the program depending on evaluation outcome. The Department's evaluation will
31 consider the extent to which the program:
32

33 (a) Accomplishes the program purposes described in Section (1) of this rule;
34

35 (b) Provides CWM of quality at least commensurate with wetland mitigation banking;
36 and
37

38 (c) Influences the viability of the existing wetland mitigation banking program.
39

40 (4) **Applications May Be Limited.** The Department may limit the number of applicants
41 for the alternate path advance mitigation pilot program.
42

43 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)

44 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990

45 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

141-085-0765

Compensatory Non-Wetland Mitigation (CNWM)

(1) Compensatory Non-Wetland Mitigation (CNWM) for Waters Other Than Wetlands or Tidal Waters. The Department will also require CNWM for unavoidable impacts to waters of this state for waters other than wetlands or tidal waters. Such conditions may impose obligations on the permit holder beyond the expiration of the authorization.

(2) Scope of CNWM. CNWM will be commensurate with removal-fill impacts and may include, but is not limited to:

(a) Offsite or onsite enhancement, creation, restoration and preservation of water resources of this state such as rivers, intermittent and perennial streams, lakes, ponds and springs; and

(b) Offsite and onsite improvements to enhance navigation, fishing and public recreation uses of waters of this state.

(3) CNWM Functional Assessment. When no other Department-approved functional assessment method is available, best professional judgment may be used to assess waterway functions and values. A written discussion of the basis of the conclusions must be provided. The written discussion must provide a detailed rationale based upon direct measurement or observation of the indicators for the following functions and values:

(a) Hydrologic;

(b) Geomorphic;

(c) Biological; and

(d) Chemical and nutrient.

(4) CNWM Approval Standard. In order for the Department to approve compensatory mitigation for impacts to waters of this state other than wetlands or tidal waters, the applicant must demonstrate in writing, using a method approved by the Department, that the compensatory mitigation plan will replace or provide comparable substitute water resources of this state.

(5) CNWM Conditions of Approval. The Department may require that the CNWM include:

- 1
- 2 (a) Defined performance standards;
- 3
- 4 (b) Site monitoring and reporting using a method approved by the Department;
- 5
- 6 (c) Administrative protection of the CNWM site; and
- 7
- 8 (d) Financial security.
- 9

10 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
11 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
12 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
13

14
15 **141-085-0770**

16 17 **Complaints and Investigations**

18
19 (1) **Violations.** A violation is:

- 20
- 21 (a) Removal-fill without a valid authorization;
- 22
- 23 (b) Non-compliance with any condition of an authorization;
- 24
- 25 (c) Obtaining an authorization or reporting on conditions of an authorization by
- 26 misrepresentation or by failure to fully disclose known material facts;
- 27
- 28 | (d) Failing to comply with any terms of an enforcement agreement or enforcement
- 29 order;
- 30
- 31 (e) Failing to comply with the requirements of the Removal-Fill Law or these rules; or
- 32
- 33 | (f) Non-compliance with~~Violation of~~ any condition of an approved wetlands conservation
- 34 plan.
- 35

36 (2) **Reporting Suspected Violations; Complaints.** Alleged or suspected violations
37 may be reported as complaints to the Department in person, by e-mail, facsimile,
38 telephone or in writing. When reports of alleged or suspected violations are submitted to
39 the Department in confidence, as expressly requested by the complainant, and the
40 information is not otherwise required by law to be submitted, the Department may keep
41 the name of the person making the report confidential if the criteria set forth in ORS
42 192.501 or 192.502 are met.
43

1 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
2 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
3 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
4
5

6 | **141-085-0775**

7
8 | **Enforcement Actions and Procedures; Appeals**

9
10 | (1) **Enforcement Powers.** The Department is authorized to take or recommend such
11 | civil, criminal or administrative actions as are necessary to enforce the Removal-Fill Law
12 | and these rules.

13
14 | (2) **Administrative Remedies.** The Department may take appropriate action to remedy
15 | violations or alleged violations or to enforce these rules, a permit or authorization, or a
16 | final order or agreement.

17
18 | (a) Appropriate enforcement action depends upon the nature of the violation and may
19 | include, but is not limited to, requiring the violator to:

20
21 | (A) Comply with conditions of a permit, authorization or order;

22
23 | (B) Remove an unpermitted fill;

24
25 | (C) Restore the site of an unpermitted removal;

26
27 | (D) Pay a civil penalty;

28
29 | (E) Provide compensatory mitigation for unauthorized impacts or mitigation shortfalls. At
30 | the discretion of the Department and in accordance with these rules, mitigation may
31 | include payment in-lieu of mitigation, purchase of mitigation bank credits or purchase of
32 | in-lieu fee credits; and

33
34 | (F) Forfeit their right to apply for new removal-fill permits or authorizations (debarment).

35
36 | (b) The following administrative remedies may be used to implement appropriate
37 | enforcement actions:

38
39 | (A) Cease and desist orders may be issued to prevent damage. The Department may
40 | issue an order requiring any person to cease and desist from any project if the
41 | Department determines that such violation or threatened violation presents an imminent
42 | and substantial risk of injury, loss or damage to water resources.

43
44 | (i) A cease and desist order may be entered without prior notice or hearing and will be
45 | served upon the person by personal service or by registered or certified mail.

1
2 (ii) A cease and desist order will state that a hearing will be held on the order if a written
3 request for hearing is filed by the person subject to the order within 10 calendar days
4 after receipt of the order.
5
6 (iii) If a person subject to a cease and desist order files a timely request for a hearing,
7 the Department will hold a contested case hearing before the Office of Administrative
8 Hearings pursuant to the applicable provisions of ORS 183.310 through 183.550.
9
10 (iv) Cease and desist orders will not be stayed during the pendency of a hearing
11 conducted under this section.
12
13 (v) Neither the Department nor any duly authorized representative of the Department
14 will be liable for any damages a person may sustain as a result of a cease and desist
15 order issued under this section.
16
17 (B) Consent agreements and consent orders are cooperative in nature and are used
18 when an agreement can be reached to resolve the violation. In signing a consent
19 agreement, the violator waives his or her right to appeal;
20
21 | (C) Restoration orders may be issued when a cooperative agreement ~~is not~~ ~~cannot be~~
22 reached to resolve the violation. Restoration orders are appealable;
23
24 (D) Revocation or suspension of an authorization, as per OAR 141-085-0780; and
25
26 (E) Consent agreements, consent orders and restoration orders may include a civil
27 penalty and corrective action necessary to resolve the violation.
28
29 **(3) Notice and Due Process.** The Department will give notice of any proposed
30 restoration order relating to a violation by personal service or by mailing the notice by
31 registered or certified mail to the person or public body affected. Any proposed
32 restoration order will include a notice of violation and will describe the nature and extent
33 of the violation.
34
35 **(4) Request for Hearing.** If a person subject to a restoration order under this section
36 files a timely request for hearing, the Department will hold a contested case hearing
37 before the Office of Administrative Hearings according to the applicable provisions of
38 ORS 183.310 through 183.550. If the person fails to request a hearing, a final order will
39 be issued upon a prima facie case made on the record of the agency.
40
41 **(5) Restoration Orders Must be Appealed Within 20 Calendar Days.** Any person
42 aggrieved by a proposed restoration order may request a hearing within 20 calendar
43 days of the date of personal service or mailing of the notice.
44

1 (6) **Written Requests for Hearings.** Any written request for a hearing concerning a
2 cease and desist or proposed restoration order shall admit or deny all factual matters
3 stated in the proposed restoration order and shall state any and all claims or defenses
4 regarding the alleged violation. Any factual matters not denied shall be presumed
5 admitted, and failure to raise a claim or defense shall be presumed to be a waiver of
6 such claim or defense. Evidence shall not be taken at the hearing on any issue not
7 raised in the written request for hearing.

8
9 (7) **Civil Remedies.** Any violation of ORS 196.600 to 196.990 or of any rule or final
10 order of the Department under ORS 196.600 to 196.990 may be enjoined in civil
11 abatement proceedings brought in the name of the State of Oregon; and in any such
12 proceedings the Department may seek and the court may award a sum of money
13 sufficient to compensate the public for any destruction or infringement of any public right
14 of navigation, fishery or recreation resulting from such violation. Civil remedies sought
15 under this section may also include property liens. Proceedings thus brought by the
16 Department will set forth, if applicable, the dates of notice and hearing and the specific
17 rule or order of the Department, together with the facts of noncompliance, the facts
18 giving rise to the public nuisance, and a statement of the damages to any public right of
19 navigation, fishery or recreation, if any, resulting from such violation.

20
21 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
22 | Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
23 | Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

24
25
26 **141-085-0780**

27
28 **Revoking or Suspending an Authorization; Allowing Corrective Action**

29
30 (1) **Revocation or Suspension if Out of Compliance.** The Department may revoke or
31 suspend an authorization if an alleged violator is not in compliance with any conditions
32 of an authorization, or if the applicant failed to provide complete and accurate
33 information in the permit application.

34
35 | (2) **Suspension for Delinquency of Payment.** Any authorization ~~shall~~may be
36 suspended during any period of delinquency of payment of the renewal fee and will be
37 treated as though no authorization had been issued.

38
39 (3) **Procedures to Revoke or Suspend Authorization.** The Department may initiate
40 the following proceedings to revoke an authorization:

41
42 (a) The Department will issue a Notice of Intent to Revoke or Suspend to the alleged
43 violator stating the intent to revoke or suspend the authorization; and

44
45 (b) The Notice will include the following information:

- 1
2 (A) A statement of the alleged violator's right to a contested case hearing within 20
3 calendar days of receiving the notice;
4
5 (B) A statement of the authority and jurisdiction under which the contested case hearing
6 is to be held;
7
8 (C) Citations for the relevant sections of law and rule;
9
10 (D) A short and plain statement of the matters asserted or charged as constituting the
11 violation(s); and
12
13 (E) A statement of any action that is necessary by the alleged violator to correct or
14 offset the effects of the violation including, but not limited to, removal of filled material or
15 replacement of removed material.
16
17 (c) Any action specified in the notice will include a reasonable time period in which to
18 complete the corrective action.
19
20 (A) If the alleged violator completes such action within the specified time period, the
21 revocation or suspension procedure will be terminated; and
22
23 (B) If the authorization holder fails to request a contested case hearing, the Department
24 may issue a final order revoking or suspending the authorization after presenting a
25 prima facie case demonstrating that a violation has occurred.
26
27 (4) **Revocation or Suspension of Multi-Year Authorizations.** If a person fails to
28 comply with reporting requirements or any other condition of a multi-year authorization
29 the Department may revoke the multi-year status and require annual renewal, suspend
30 the permit pending correction, or take any other enforcement action available to the
31 Department.
32
33 (5) **Appeals Procedures.** Procedures for requesting an appeal on a revocation or
34 suspension are as set forth in OAR 141-085-0775(4) and (6).
35
36 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
37 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
38 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
39
40
41 **141-085-0785**
42
43 **Civil Penalties; Appeals**
44

1 (1) **Civil Penalties May Be Assessed.** In addition to any other remedy allowed by law
2 or these rules, the Department may assess a civil penalty for any violation of the
3 Removal-Fill Law, these rules, an authorization or an order issued pursuant to OAR
4 141-085.

5
6 (2) **Each Day is a Separate Offense.** Each day a violation continues constitutes a
7 separate offense for which the Department may assess a separate penalty.

8
9 (3) **Multiple Penalties May Be Assessed.** A civil penalty assessed on an initial
10 violation may be followed by one or more separate civil penalties for failure to comply
11 with a restoration order issued on the same violation.

12
13 (4) **Required Notice; Right to Appeal Within 20 Calendar Days.** The Department will
14 give written notice of intent to assess a civil penalty by personal service or by registered
15 or certified mail to the permit holder or person (hereinafter referred to as "party")
16 incurring the civil penalty. The notice will include the following:

17
18 (a) The particular section of the statute, rule, order or authorization involved;

19
20 (b) A short and plain statement of the matter asserted or charged;

21
22 (c) A statement of the party's right to request a hearing within 20 calendar days of
23 receiving the notice;

24
25 (d) A statement of the amount of civil penalty assessed and terms and conditions of
26 payment; and

27
28 (e) Notification that the party may request a contested case hearing.

29
30 (5) **Appeals Procedures.** Procedures for requesting an appeal on a civil penalty are as
31 set forth in OAR 141-085-0775(4) and (6).

32
33 (6) **Calculating the Civil Penalty.**

34
35 ~~(a)~~ The amount of civil penalty (F), as expressed in U.S. currency dollars, will be
36 determined by the Department using the following formula: $F = BPCI$:

37
38 ~~(aA)~~ B is the base fine factor of \$1,000;

39
40 ~~(bB)~~ "P" is the prior knowledge factor to be determined as follows:

41
42 ~~(Ai)~~ A value of 1 will be applied if the alleged violator was unaware of the Removal-Fill
43 Law at the time of the alleged violation;

44

- 1 | (~~B~~) A value of 2 will be applied if the alleged violator was aware of the Removal-Fill
2 | Law at the time of the alleged violation and in cases of permit non-compliance; or
3 |
- 4 | (~~C~~) A value of 5 will be applied if the alleged violator had a previous violation. A
5 | previous violation exists, if there was an adjudication (either in court or administrative
6 | hearing), or the violator failed to appeal an enforcement order (and a final order was
7 | issued), or the violator signed a consent agreement. This value will not be imposed if
8 | the previous violation occurred more than five years prior to the current incident.
9 |
- 10 | (~~C~~) The cooperation value (C) will be determined by the Department after reviewing
11 | the past history of the person in taking all feasible steps or procedures necessary or
12 | appropriate to correct the violation for which the penalty is being assessed. The value
13 | will be assessed as follows:
14 |
- 15 | (~~A~~) A value of 1 will be applied when the person responds to communications from the
16 | Department, supplies information requested by the Department, permits access to the
17 | site to conduct site investigations and/or complies with restoration as requested by the
18 | Department; or
19 |
- 20 | (~~B~~) A value of 3 will be applied when the person:
21 |
- 22 | ~~(i) Has ceased to be is not~~ responsive to communications from the Department;
23 |
- 24 | ~~(ii) Has ceased to be not~~ cooperative in providing information as requested by the
25 | Department; ~~and/or~~
26 |
- 27 | ~~(iii) the person does Does not; cease the activity alleged to constitute a violation or~~
28 | ~~threatened violation~~ after receiving verbal or written notification from the Department;
29 | ~~cease the activity alleged to constitute a violation or threatened violation.~~
30 |
- 31 | (~~D~~) "I" is the water resource adverse effect factor to be determined as follows:
32 |
- 33 | (~~A~~) A value of 1 will be applied if the damage to the resource is minimal and/or the
34 | resource is expected to naturally self-restore within one year; or
35 |
- 36 | (~~B~~) A value of 3 will be applied if the adverse impacts are significant and/or not
37 | expected to naturally self-restore within one year. In the case of permit non-compliance,
38 | a value of 3 will be applied if failure to correct the deficiency could result in reasonably
39 | expected adverse impacts to waters of this state or a deficiency in the obligation to
40 | provide mitigation.
41 |
- 42 | (~~e~~) In cases where the prior knowledge (P) factor is greater than one (1) and the
43 | cooperation (C) factor is greater than one (1), the total amount of the civil penalty (F), in
44 | dollars U.S. currency, will be doubled, not to exceed \$10,000 per day.
45 |

1 | (f) In determining whether to assess a separate penalty for each day a violation
2 continues, the Department may consider the number of days during which the activity
3 alleged to constitute a violation occurred, as well as the number of days the adverse
4 effect of this activity continues unabated.

5
6 (7) **Failure to Pay Civil Penalty.** Once the final adjudication of any civil penalty has
7 been calculated and noticed, the amount of the civil penalty will increase by the amount
8 of the original civil penalty for every 20 calendar days that pass without the alleged
9 violator remitting payment to the Department for the full amount of the civil penalty and
10 the Department taking receipt of the payment. In no case will the amount of the civil
11 penalty be increased by more than ten times the original civil penalty amount. If a civil
12 penalty or any portion of the civil penalty is not paid, interest will accrue at the rate of
13 nine percent per annum on the unpaid balance (pursuant to ORS 82.010).

14
15 (8) **Civil Penalty Relief.** The alleged violator may request from the Department a
16 reduction or waiver of the civil penalty by showing evidence of financial hardship. The
17 request must be received within 20 calendar days from the date of personal service or
18 mailing of the notice of civil penalty. Evidence provided as to the alleged violator's
19 economic and financial condition may be presented without prejudice to any claim by
20 the person that no violation has occurred or that the person is not responsible for the
21 violation. The Department will reduce or waive a civil penalty upon request if the
22 Department determines that the imposition of the full civil penalty would result in
23 extreme financial hardship for the violator, and that the public interest in avoiding
24 extreme financial hardship outweighs the public interest in deterring future violations.

25
26 (9) **Settlement.** The Department may settle violations and penalties in the exercise of
27 its discretion taking into account the cooperation of the violator in addressing the
28 violation.

29
30 | Stat. Auth.: ORS 196.825 & 196.600 - 196. [692665](#)
31 Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
32 Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09
33