

DEPARTMENT OF STATE LANDS

DIVISION 85

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

141-085-0500

General

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

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Policy

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

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

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

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

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

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

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

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

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

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

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

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

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Definitions

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

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

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

- (3) “**Artificial Means**” means the purposeful movement or placement of material by humans and/or their machines.
- (4) “**Authorization**” means an individual permit, general authorization, general permit or emergency authorization.
- (5) “**Bankfull Stage**” means the two-year recurrence interval flood elevation.
- (6) “**Baseline Conditions**” means the ecological conditions, wetland functions and values and the soils and hydrological characteristics present at a site before any change by the applicant is made.
- (7) “**Basin**” means one of the eighteen (18) Oregon drainage basins identified by the Oregon Water Resources Department as shown on maps published by that agency.
- (8) “**Beds**” means:
- (a) For the purpose of OAR 141-089, the land within the wet perimeter and any adjacent non-vegetated dry gravel bar; and
- (b) For all other purposes, “beds” means that portion of a waterway that carries water when water is present.
- (9) “**Beds or Banks**” means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays and estuaries by the limits of the highest measured tide. The “bed” is typically the horizontal section and includes non-vegetated gravel bars. The “bank” is typically the vertical portion.
- (10) “**Buffer**” means an upland or wetland area immediately adjacent to or surrounding a wetland or other water that is set aside to protect the wetland or other waters from conflicting adjacent land uses and to support ecological functions.
- (11) “**Channel**” means a natural (perennial or intermittent stream) or human made (e.g., drainage ditch) waterway that periodically or continuously contains moving water and has a defined bed and bank that serve to confine the water.
- (12) “**Channel Relocation**” means a change in location of a channel in which a new channel is dug and the flow is diverted from the old channel into the new channel.
- (13) “**Coastal Zone**” means the area lying between the Washington border on the north to the California border on the south, bounded on the west by the extent of this state’s jurisdiction as recognized by federal law, and the east by the crest of the coastal mountain range, excepting:

- (a) The Umpqua River basin, where the coastal zone extends to Scottsburg;
- (b) The Rogue River basin, where the coastal zone extends to Agness; and
- (c) The Columbia River basin, where the coastal zone extends to the downstream end of Puget Island.

(14) "**Coastal Zone Certification Statement**" means a signed statement by the applicant or an authorized agent indicating that the proposed project will be undertaken in a manner consistent with the applicable enforceable policies of the Oregon Coastal Management Program.

(15) "**Commercial Operator**" means any person undertaking a project having financial profit as a goal.

(16) "**Compensatory Mitigation**" means activities conducted by a permittee or third party to create, restore, enhance or preserve the functions and values of the waters of this state to compensate for the removal-fill related adverse impacts of project development to waters of this state or to resolve violations of ORS 196.600 to 196.905. Compensatory mitigation for removal-fill activities does not affect permit requirements of other state departments.

(17) "**Compensatory Non-Wetland Mitigation (CNWM)**" means activities conducted by a permittee or third party to replace non-wetland water functions and values through enhancement, creation, restoration or preservation to compensate for the adverse effects of project development or to resolve violations of ORS 196.600 to 196.905.

(18) "**Compensatory Wetland Mitigation (CWM)**" means activities conducted by a permittee or third party to create, restore or enhance wetland and tidal waters functions and values through enhancement, creation, restoration or preservation to compensate for the adverse effects of project development or to resolve violations of ORS 196.600 to 196.905.

(19) "**Comprehensive Plan**" means a generalized, coordinated land use map and associated regulations and ordinances of the governing body of a local government.

(20) "**Condition**" refers to the state of a water's naturalness or ecological integrity.

(21) "**Converted wetlands**" means agriculturally managed wetlands that, on or before June 30, 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that are managed for commercial agricultural purposes. "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any other waters of this state that are located within or adjacent to a converted wetland area.

(22) "**Cowardin**" means Cowardin, L. M., V. Carter, F. C. Golet, E. T. LaRoe. 1979. Classification of wetlands and deepwater habitats of the United States. U. S. Department of the Interior, Fish and Wildlife Service, Washington, D.C.

(23) "**Credit**" means the measure of the increase in the functions and values of the water resources of this state achieved at a mitigation site.

(24) "**Day of Violation**" means the first day and each day thereafter on which there is a failure to comply with any provision of the Removal-Fill Law, ORS 196.600 through 196.990, or rules adopted by the Department, or any order or authorization issued by the Department.

(25) "**Deep Ripping, Tiling and Moling**" refer to certain specific mechanical methods used to promote subsurface drainage of agricultural wetlands.

(26) "**Degraded Wetland**" refers to a wetland in poor condition with diminished functions and values resulting from hydrologic manipulation (such as diking, draining and filling) and other disturbance factors that demonstrably interfere with the normal functioning of wetland processes.

(27) "**Department**" means the Oregon Department of State Lands and the Director or designee.

(28) "**Ditch**" means a manmade water conveyance channel. Channels that are manipulated streams are not considered ditches.

(29) "**Dredging**" means removal of bed material using other than hand held tools.

(30) "**Ecologically or Environmentally Preferable**" means compensatory mitigation that has a higher likelihood of replacing functions and values or improving water resources of this state.

(31) "**Emergency**" means natural or human-caused circumstances that pose an immediate threat to public health, safety or substantial property including crop or farmland.

(32) "**Enhancement**" means to improve the condition and increase the functions and values of an existing degraded wetland or other water of this state.

(33) "**Erosion-Flood Repair**" means the placement of riprap or any other work necessary to protect existing facilities and land from flood and high stream flows, in accordance with these regulations.

(34) "**Essential Indigenous Anadromous Salmonid Habitat (ESH)**" means the streams designated pursuant to ORS 196.810 that are necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing, and any adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface water connection to an ESH stream.

(35) "**Estuary**" means:

(a) For waters other than the Columbia River, the body of water from the ocean to the head of tidewater that is partially enclosed by land and within which salt water is usually diluted by fresh water from the land, including all associated estuarine waters, tidelands, tidal marshes and submerged lands; and

(b) For the Columbia River, all waters from the mouth of the river up to the western edge of Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged lands.

(36) "**Extreme Low Tide**" means the lowest estimated tide.

(37) "**Fill**" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state. However, in designated ESH areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) "fill" means any amount of deposit by artificial means.

(38) "**Food and Game Fish**" means those species identified under ORS 506.011, 506.036 or 496.009.

(39) "**Forestland**" means the same as used in the Forest Practices Act and rules (ORS 527.610 to 527.992); land which is used for the commercial growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied.

(40) "**Functions and Values**" are those ecological characteristics or processes associated with a water of this state and the societal benefits derived from those characteristics. The ecological characteristics are "functions," whereas the associated societal benefits are "values."

(41) "**Highest Measured Tide**" means the highest tide projected from actual observations within an estuary or tidal bay (see OAR 141-085-0515).

(42) "**Hydrogeomorphic Method (HGM)**" means the method of wetland classification and functional assessment based on a wetland's location in the landscape and the sources and characteristics of water flow.

(43) **"Independent Utility"** as used in the definition of "project," means that the project accomplishes its intended purpose without the need for additional phases or other projects requiring further removal-fill activities.

(44) **"In-Lieu Fee Mitigation"** means the federally approved compensatory mitigation program used to compensate for reasonably expected adverse impacts of project development on waters of the United States and waters of this state with fees paid by the applicant to the Department or other sponsor, as approved by the Department.

(45) **"Interagency Review Team (IRT)"** is an advisory committee to the Department on mitigation banks and other compensatory mitigation projects.

(46) **"Intermittent Stream"** means any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.

(47) **"Legally Protected Interest"** means a claim, right, share or other entitlement that is protected under state or federal law. A legally protected interest includes, but is not limited to, an interest in property.

(48) **"Linear Facility"** means any railway, highway, road, pipeline, water or sewer line, communication line, overhead or underground electrical transmission or distribution line, or similar facility.

(49) **"Listed Species"** means any species listed as endangered or threatened under the federal Endangered Species Act (ESA) and/or any species listed as endangered or threatened by the State of Oregon.

(50) **"Location"** means the entire area where the project is located.

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

(52) **"Maintenance"** means the periodic repair or upkeep of a structure in order to maintain its original use. "Maintenance" includes a structure being widened by no more than twenty percent of its original footprint at any specific location in waters of this state if necessary to maintain its serviceability. "Maintenance" also includes removal of the minimum amount of sediment either within, on top of or immediately adjacent to a structure that is necessary to restore its serviceability, provided that the spoil is placed on upland.

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

- (a) Avoiding the effect altogether by not taking a certain action or parts of an action;
- (b) Minimizing effects by limiting the degree or magnitude of the action and its implementation;
- (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment;
- (d) Reducing or eliminating the effect over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures; and
- (e) Compensating for the effect by creating, restoring, enhancing or preserving substitute functions and values for the waters of this state.

(54) "**Mitigation Bank**" or "**Bank**" means a site created, restored, enhanced or preserved in accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts to waters of this state due to activities which otherwise comply with the requirements of ORS 196.600 to 196.905.

(55) "**Mitigation Bank Instrument (MBI)**" means the legally binding and enforceable agreement between the Department and a mitigation bank sponsor that formally establishes the mitigation bank and stipulates the terms and conditions of the mitigation bank's construction, operation and long-term management.

(56) "**Mitigation Bank Prospectus**" or "**Prospectus**" means the preliminary proposal prepared by a mitigation bank sponsor describing a proposed bank.

(57) "**Mitigation Bank Sponsor**" or "**Sponsor**" means a person or single legal entity that has the authority and responsibility to fully execute the terms and conditions of a mitigation bank instrument.

(58) "**Navigational Servitude**" means activities of the federal government that directly result in the construction or maintenance of congressionally authorized navigation channels.

(59) "**Non-Motorized Methods or Activities**" are those removal-fill activities within ESH that are completed by hand and are not powered by internal combustion, hydraulics, pneumatics or electricity. Hand-held tools such as wheelbarrows, shovels, rakes, hammers, pry bars and manually operated cable winches are examples of common non-motorized methods.

(60) "**Non-Water Dependent Uses**" means uses that do not require location on or near a waterway to fulfill their basic purpose.

(61) “**Non-Wetland Waters**” means waters of this state other than wetlands, including bays, intermittent streams, perennial streams, lakes and all other regulated waters.

(62) “**Office of Administrative Hearings**” means the state agency unit that provides Administrative Law Judges to conduct contested case proceedings.

(63) “**Ordinary High Water Line (OHWL)**” means the line on the bank or shore to which the high water ordinarily rises. The OHWL excludes exceptionally high water levels caused by large flood events (e.g., 100-year events).

(64) “**Oregon Rapid Wetland Assessment Protocol (ORWAP)**” is a method for rapidly assessing wetland functions and values (as well as other attributes) in all wetland types throughout Oregon.

(65) “**Payment In-Lieu Mitigation**” means compensatory mitigation for waters of this state that is fulfilled by using funds paid to the Department. The payment in-lieu program is not approved to compensate for impacts to waters of the United States.

(66) “**Perennial Stream**” means a stream that has continuous flow in parts of its bed all year long during years of normal precipitation.

(67) “**Person**” means a person or a public body, as defined in ORS 174.109; the federal government, when operating in any capacity other than navigational servitude or any other legal entity.

(68) “**Plowing**” means all forms of tillage and similar physical means for the breaking up, cutting, turning over and stirring of soil to prepare it for planting crops. Plowing does not include deep ripping or redistribution of materials in a manner that changes any waters of this state to upland.

(69) “**Practicable**” means capable of being accomplished after taking into consideration cost, existing technology and logistics with respect to the overall project purpose.

(70) “**Preservation**” means to permanently protect waters of this state having exceptional ecological features.

(71) “**Private Operator**” means any person undertaking a project for an exclusively non-income-producing and nonprofit purpose.

(72) “**Project**” means the primary development or use, having independent utility, proposed by one person. A project may include more than one removal-fill activity.

(73) “**Project Site**” means the geographic area upon which the project is being proposed.

(74) "**Prospecting**" means to search or explore for samples of gold, silver or other precious minerals, using non-motorized methods; by filling, removing or moving by artificial means less than one cubic yard of material at any one individual site; and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single ESH stream in a single year.

(75) "**Public Body**" as used in the statutes of this state means state government bodies, local government bodies and special government bodies (ORS 174.109).

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

(77) "**Push-Up Dam**" means a berm of streambed material that is excavated or bulldozed (i.e., pushed-up) from within the streambed itself and positioned in the stream in such a way as to hold or divert water in an active flowing stream. The push-up dam may extend part way or all the way across the stream. Push-up dams are most frequently used to divert water for irrigation purposes associated with agricultural production including livestock watering. Push-up dams are reconstructed each water-use season; high water usually flattens or breaches them; and equipment is used to breach or flatten them at the close of the water-use season.

(78) "**Reasonably Expected Adverse Effect**" and "**Adverse Impact**" means the direct or indirect, reasonably expected or predictable results of project development upon waters of this state including water resources, navigation, fishing and public recreation uses.

(79) "**Reconstruction**" means to rebuild or to replace the existing structure in-kind. "Reconstruction" includes a structure being widened by no more than twenty percent of its original footprint at any specific location in waters of this state.

(80) "**Recreational Placer Mining**" means to search or explore for samples of gold, silver or other precious minerals by removing, filling or moving material from or within the bed of a stream, using non-motorized equipment or a motorized surface dredge having an intake nozzle with an inside diameter not exceeding four inches and a muffler meeting or exceeding factory-installed noise reduction standards.

(81) "**Reference Site**" means a site or sites that represent the desired future characteristics and condition to be achieved by a compensatory mitigation plan.

(82) "**Removal**" means the taking of more than 50 cubic yards of material (or its equivalent weight in tons) in any waters of this state in any calendar year; or the movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation. However, in designated ESH areas (OAR

141-102) and in designated Scenic Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.

(83) "**Removal-Fill Site**" means the specific point where a person removes material from and/or fills any waters of this state. A project may include more than one removal-fill site.

(84) "**Riprap**" means facing a bank with rock or similar substance to control erosion.

(85) "**Serviceable**" means capable of being used for its intended purpose.

(86) "**Service Area**" means the boundaries set forth in a mitigation bank instrument that include one or more watersheds identified on the United States Geological Survey, Hydrologic Unit Map -1974, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects from project developments to waters of this state. Service areas for mitigation banks are not mutually exclusive.

(87) "**State Scenic Waterway (SSW)**" means a river or segment of river or lake that has been designated as such in accordance with Oregon Scenic Waterway Law (ORS 390.805 to 390.995).

(88) "**Temporary Impacts**" are adverse impacts to waters of this state that are rectified within 24 months from the date of the initiation of the impact.

(89) "**Temporal Loss**" means the loss of the functions and values of waters of this state that occurs between the time of the impact and the time of their replacement through compensatory mitigation.

(90) "**Tidal Waters**" are the areas in estuaries, tidal bays and tidal rivers located between the highest measured tide and extreme low tide (or to the elevation of any eelgrass beds, whichever is lower), that is flooded with surface water at least annually during most years. Tidal waters include those areas of land such as tidal swamps, tidal marshes, mudflats, algal and eelgrass beds and are included in the Estuarine System and Riverine Tidal Subsystem as classified by Cowardin.

(91) "**Violation**" means removing material from or placing fill in any of the waters of this state in a manner that is inconsistent with any provision of the Removal-Fill Law (ORS 196.600 through 196.990), rules adopted by the Department, or any order or authorization issued by the Department.

(92) "**Water Quality**" means the measure of physical, chemical and biological characteristics of water as compared to Oregon's water quality standards and criteria set out in rules of the Oregon Department of Environmental Quality and applicable state law.

(93) **“Water Resources”** includes not only water itself but also aquatic life and habitats therein and all other natural resources in and under the waters of this state.

(94) **“Waters of This State”** means all natural waterways, tidal and non-tidal bays, intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the boundaries of this state, all other navigable and non-navigable bodies of water in this state and those portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.

(95) **“Wet Perimeter”**, as used in OAR 141-089, means the area of the stream that is under water, or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively moving water at the time a removal-fill activity occurs.

(96) **“Wetland Creation”** means to convert an area that has never been a wetland to a wetland.

(97) **“Wetland Enhancement”** means to improve the condition and increase the functions and/or values of an existing degraded wetland.

(98) **“Wetland Hydrology”** means the permanent or periodic inundation or prolonged saturation sufficient to create anaerobic conditions in the soil and support hydrophytes.

(99) **“Wetland Restoration”** means to reestablish a former wetland.

(100) **“Wetlands”** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

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Removal-Fill Jurisdiction by Type of Water

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

(1) **Pacific Ocean.** The Pacific Ocean is jurisdictional from the line of extreme low tide seaward to the limits of the territorial sea. As defined in ORS 390.605(2), the land lying

between extreme low tide and the statutory vegetation line or the line of established upland shore vegetation, whichever is farther inland, is known as the “ocean shore.” “Ocean shore” does not include an estuary as defined in ORS 196.600. The “ocean shore” is regulated by the Oregon Department of Parks and Recreation.

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

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

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

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

(d) The uppermost intertidal zone inhabited by a community of barnacles, limpets, and littorine snails along shorelines composed of bedrock, riprap, boulders, and/or cobble;

(e) The uppermost tidal marsh/upland boundary, as indicated by a dominant plant community characteristic of saltwater, brackish, or freshwater tidal plant communities changing to a dominant plant community typical of uplands; and/or

(f) The intertidal/upland boundary along sandy shores as indicated by the appearance of a distinct dune plant community.

(3) Waters, Including Rivers, Intermittent and Perennial Streams, Lakes and Ponds. These waters are jurisdictional to the ordinary high water line (OHWL). The OHWL can be determined by direct observation of the annual high water event, using local gauge data to estimate bankfull stage, and/or by using readily identifiable field indicators. Field indicators for OHWL include:

- (a) Clear, natural line impressed on the shore;
 - (b) Change in vegetation from riparian (e.g., willows) to upland (e.g., oak, fir) dominated;
 - (c) Textural change of depositional sediment or changes in the character of the soil (e.g., from sand, sand and cobble, cobble and gravel to upland soils);
 - (d) Elevation below which no fine debris (needles, leaves, cones, and seeds) occurs;
 - (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or
 - (f) Other appropriate means that consider the characteristics of the surrounding areas.
- (4) **Wetlands.** Wetlands are jurisdictional within the wetland boundary.
- (5) **Reservoirs.** The Department's jurisdiction over reservoirs extends to the higher of either the normal operating pool level or the upper edge of adjacent wetland.
- (6) **Artificially Created Wetlands and Ponds.** These waters are jurisdictional when they are:
- (a) Equal to or greater than one acre in size;
 - (b) Created, in part or in whole, in waters of this state; or
 - (c) Identified in an authorization as a mitigation site.
- (7) **Exempt Artificially Created Wetlands and Ponds.** Artificially created wetlands and ponds created entirely from upland, regardless of size, are not waters of this state if they are constructed for the purpose of:
- (a) Wastewater treatment;
 - (b) Settling of sediment;
 - (c) Stormwater detention and/or treatment;
 - (d) Agricultural crop irrigation or stock watering;
 - (e) Fire suppression;
 - (f) Cooling water;

(g) Surface mining, even if the site is managed for interim wetlands functions and values;

(h) Log storage; or

(i) Aesthetic purposes.

(8) **Jurisdictional Ditches.** Except as provided under section (9) and (10) below, ditches are jurisdictional if they are:

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

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

(i) Contain food and game fish; and

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

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

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

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

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

(a) Ten feet wide or less at the ordinary high water line;

(b) Artificially created from upland or from wetlands;

(c) Not adjacent and connected or contiguous with other wetlands; and

(d) Do not contain food or game fish.

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Removal-Fill Jurisdiction by Volume of Material

The following criteria are used to determine jurisdictional volume thresholds that trigger the requirement for an authorization.

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

(2) **Essential Indigenous Anadromous Salmonid Habitat (ESH)**. The threshold volume is any amount greater than zero,.

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

141-085-0525

Measuring and Calculating Volume of Removal and Fill

(1) **Calculating Removal Volume**. Removal volume for all waters includes the full extent of the excavation or movement within the jurisdictional areas.

(2) **Calculating Fill Volume**. For waters other than wetlands, fill volume is measured to the ordinary high water line (OHWL) or the highest measured tide (HMT). For wetlands, fill volume is measured to the height of the fill, excluding buildings.

(3) **Calculating Volume for Channel Relocation.** When calculating the volume for channel relocation, the threshold is met considering either:

- (a) The volume of material removed to construct the new channel up to OHWL; or
- (b) The volume that would be required to completely fill the old channel to the OHWL or HMT.

(4) **Projects that Involve Both Fill and Removal.** For projects that involve both fill and removal, the combined volumes are used to determine whether a permit is required.

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0530

Exemptions for Certain Activities and Structures

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

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

- (a) Reforestation;
- (b) Road construction and maintenance;
- (c) Harvesting of forest tree species; and
- (d) Disposal of slash.

(2) **Fill for Construction, Operation and Maintenance of Certain Dams and Water Diversion Structures.** Filling the beds of the waters of this state for the purpose of constructing, operating and maintaining dams or other diversions for which permits or certificates have been or will be issued under ORS Chapters 537 or 539 and for which preliminary permits or licenses have been or will be issued under ORS 543.010 through 543.610 is exempt.

(3) **Navigational Servitude.** Activities conducted by or on the behalf of any agency of the federal government acting in the capacity of navigational servitude in connection with a federally authorized navigation channel are exempt. Disposal of dredged material within the ordinary high water line of the same waterway is also exempt.

(4) **Maintenance or Reconstruction of Water Control Structures.** Fill or removal or both for maintenance or reconstruction of water control structures such as culverts, dikes, dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches, and tile drain systems are exempt if:

(a) The project meets the definition of maintenance under OAR 141-085-0510(49);

(b) The project meets the definition of reconstruction under OAR 141-085-0510(79);

(c) The structure was serviceable within the past five years; and

(d) The maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the wetlands or waters of this state were affected as a result of the original construction of those structures.

(5) **Maintenance and Emergency Reconstruction of Roads and Transportation Structures.** Fill or removal for maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable roads or transportation structures, such as groins and riprap protecting roads, causeways, bridge abutments or approaches, and boat ramps is exempt.

(6) **Prospecting and Non-Motorized Activities within Designated Essential Indigenous Anadromous Salmonid Habitat (ESH).** A permit is not required for prospecting or other non-motorized activities resulting in removal-fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a particular stream in a single year. Prospecting or other non-motorized activities may be conducted only within the bed or wet perimeter of the waterway and must not occur at any site where fish eggs are present.

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

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

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

(b) Authorized by the Oregon Water Resources Department.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0534

Exemptions for Certain Voluntary Habitat Restoration Activities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) Placement of Large Wood, Boulders and Spawning Gravels. A permit is not required for the placement of large wood, boulders and spawning gravels provided the material is placed consistent with the Guide to Placing Large Wood and Boulders (DSL/ODFW 2010). If the activity will exceed 50 cubic yards of removal-fill in waters of this state, or any amount in Essential Salmonid Habitat, notice of the activity must be provided to the Department. Notification must be submitted on a form provided by the Department at least 30 calendar days prior to commencing the activity.

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

(9) Removal of Trash, Garbage and Rubble. A permit is not required for the removal of any amount of inorganic trash, garbage and rubble (e.g., tires, metal, broken

concrete, asphalt, foam, plastic) from waters of this state. The project must meet the following criteria:

- (a) There are no adverse impacts to waters of this state or woody vegetation as a result of the project;
- (b) There is no stockpiling of collected trash, garbage or rubble in waters of this state; and
- (c) The trash and garbage is disposed of at a licensed Department of Environmental Quality collection facility.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

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

141-085-0535

Exemptions Specific to Agricultural Activities

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

(1) **Exemptions Do Not Apply to Nonfarm Uses.** The exemptions under OAR 141-085-0535(2) and (3) do not apply to any fill or removal that involves changing an area of wetlands to a nonfarm use.

(2) **Normal Farming and Ranching Activities on Converted Wetlands.** “Converted Wetlands” are defined under OAR 141-085-0510. Exempt activities on converted wetlands include:

- (a) Plowing;
- (b) Grazing;
- (c) Seeding;
- (d) Planting;
- (e) Cultivating;
- (f) Conventional crop rotation; and
- (g) Harvesting.

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

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

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

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

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

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

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

(7) **Agricultural Drainage Ditch Maintenance.** Exempt maintenance of agricultural drainage ditches under OAR 141-085-0530(4) includes disposal of dredged material in a thin layer on converted wetlands, provided such disposal does not change wetland to upland. For the purposes of this exemption, "ditch" is defined in OAR 141-085-0510(28).

(8) **Push-Up Dams.**

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

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

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692
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

141-085-0540

Types of Authorizations

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

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

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

(3) **General Permits.**

(a) GPs are issued by rule on a statewide or geographic basis; or

(b) By order for an applicant or group of applicants to cover activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes.

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

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0545

Fees and Disposition

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

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

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

(b) General Authorization notifications which require a fee under OAR 141-089-0635, must be accompanied by the flat fee when the proposed removal-fill activity is 50 cubic yards or more; and

(c) Emergency Authorization holders, except for erosion or flood repair, must submit the required fee to the Department within 45 calendar days of receiving the authorization.

(3) **Project Applications that Do Not Require a Fee.** No application fee or renewal fee is required when submitting an application or notification for the following:

(a) An agency determination that the project does not require a permit from the Department;

(b) Erosion-flood repair or stream bank stabilization projects, regardless of the authorization type;

(c) Voluntary habitat restoration projects directed at habitat improvement, regardless of the authorization type;

(d) A general authorization when the project involves less than 50 cubic yards of removal-fill activity; and

(e) A general permit that does not require a fee when specified in 141-093.

(4) **Calculating Application Fees.** For each application that involves both removal and fill activity, the application fee is calculated separately for each activity using the base and volume fees. The required fee to be submitted with the application is the greater of the two calculated fees.

(5) **Base Fees.** Base fees are based on the following applicant classifications:

(a) Private operator, or a person contracting to perform services for a private operator;

(b) Public body; or

(c) Commercial operator.

(6) **Volume Fees.** In addition to the base fee established under Section (5) of this rule, each applicant may be required to also pay, as part of the application, an additional fee based on the volume of material according to the following schedule:

(a) Less than 500 cubic yards;

(b) 500 to less than 5,000 cubic yards;

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

(d) Over 50,000 cubic yards.

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

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

(a) The application fee; and

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0550

Application Requirements for Individual Permits

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

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

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

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

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

(a) Applicant information including name, mailing address, phone number and e-mail address. When the applicant is a business entity, the business must be registered with the Oregon Secretary of State Corporate Division. The exact name of the business entity, as listed with Secretary of State Corporate Division, must be entered on the application.

(b) Landowner information including name and mailing address where any removal-fill activity is proposed, and if applicable, where permittee-responsible compensatory mitigation is proposed.

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

(B) For the purpose of this rule, a condemner is the landowner when:

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

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

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

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

(e) Project information including:

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

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

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

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

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

(f) A description of the purpose and need for the project. All projects must have a defined purpose or purposes and be based on a documented need or needs. The project purpose and need statement must be specific enough to allow the Department to determine whether the applicant has considered a reasonable range of alternatives.

(g) Project plan views and cross-sectional views drawn to scale that clearly identify the jurisdictional boundaries of the waters of this state (e.g., wetland delineation or ordinary high water determination). Project details, such as footprint and impact area must also be included so that the amount and extent of the impact to jurisdictional areas can be readily determined.

(h) A written analysis of potential changes that the project may make to the hydrologic characteristics of the waters of this state, and an explanation of measures taken to avoid or minimize any adverse impacts of those changes, such as:

(A) Impeding, restricting or increasing flows;

(B) Relocating or redirecting flow; and

(C) Potential flooding or erosion downstream of the project.

(i) A description of the existing biological and physical characteristics of the water resources, along with the identification of the adverse impacts that will result from the project.

(j) A description of the navigation, fishing and public recreation uses, when the project is proposed on state-owned land.

(k) If the proposed activity involves wetland impacts, a wetland determination or delineation report that meets the requirements in OAR 141-090 must be submitted, unless otherwise approved in writing by the Department. A wetland delineation is usually required to determine the precise acreage of wetland impact and compensatory wetland mitigation requirements. Whenever possible, wetland determination and delineation reports should be submitted for review well in advance of the permit application. Although an approved wetland delineation report is not required for application completeness, a jurisdictional determination must be obtained prior to the permit decision.

(l) A functions and values assessment that meets the requirements in OAR 141-085-0685 when permanent impacts to wetlands are proposed.

(m) Any information known by the applicant concerning the presence of any federal or state listed species.

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

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

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

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

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

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

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

(q) For each proposed removal-fill activity and physical mitigation site applied for in the application, a list of the names and addresses of the adjacent landowners, including those properties located across a street or stream from the proposed project.

(A) For a new linear facility, the applicant must provide a list of the names and mailing addresses of the adjacent landowners for the new linear facility.

(B) Mailing labels must be provided by the applicant, when there are more than five names and addresses of adjacent landowners listed.

(r) A signed local government land use affidavit.

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

(t) Applicant Signature. Signature of the applicant must be provided. If the application is on behalf of a business entity, a certificate of incumbency must be provided to certify that the individual signing the application is authorized to do so.

(u) Landowner Signature. If the applicant is not the landowner upon which the removal-fill activity (including mitigation) is to occur and does not hold an easement allowing the activity on that land, a written authorization from the owner of the land consenting to the application must be provided.

(A) Notwithstanding the requirement set forth under (u) above, a landowner signature is not required for applications for the construction and maintenance of linear facilities; and

(B) The condemner may sign as landowner when the requirements of OAR 141-085-0550(5)(b)(B) have been met.

(v) Mitigation Site Landowner Signature. If the applicant is not the owner of the land upon which the mitigation is to occur and does not hold an easement allowing the activity on that land, a written authorization from the owner of the land consenting to the application must be provided.

(6) **Additional Requirements for Estuarine Fill.** If the activity is proposed in an estuary for a non-water-dependent use, a complete application must also include a written statement that describes the following:

(a) The public use of the proposed project;

(b) The public need for the proposed project; and

(c) The availability of alternative, non-estuarine sites for the proposed use.

(7) **Additional Information as Requested.** The Department may request additional information as necessary to make an informed decision on whether or not to issue the authorization.

(8) **Waiver of Required Information.** At its discretion, the Department may waive any of the information requirements listed in section (5) of this rule for voluntary restoration projects.

(9) **Permit Application Modifications.** A modification to a permit application may be submitted at any time prior to the permit decision. If the modification is received after the public review period, the Department may circulate the revised application again for public review. Modifications proposing significantly different or additional adverse impacts will generally be resubmitted for public review. The Department may set an expedited time frame for public review.

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

Stat. Auth.: ORS 196.825 & 196.600-196.665 & 196. 692

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

141-085-0555

Individual Removal-Fill Permit Application Review Process

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

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

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

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0560

Public Review Process for Individual Removal-Fill Permit Applications

(1) **Circulation of the Application for Public Review.** Once the application has been deemed complete and sufficient, the Department will provide notification of the availability of the application for review either by U.S. mail or electronically (e.g., facsimile, e-mail, posting on the Internet) to adjacent property owners, watershed councils, public interest groups, affected local government land use planning

departments, state agencies, federal agencies and tribal governments in the geographic area affected by the permit. For construction and maintenance of linear facilities, landowners identified in the application will be notified by the Department by U.S. mail or electronically that the application is available for review. Upon request the Department may make a copy of the application available at the public library closest to the proposed project.

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

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

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

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

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

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

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

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

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

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

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

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

(6) Final Review

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

(b) The permit decision deadline may be extended beyond 90 calendar days when the applicant and the Department agree to an extension.

(c) If the Department does not approve an extension, the Department will make a final permit decision based upon the record as it existed within:

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

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

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

141-085-0565

Department Determinations and Considerations in Evaluating Individual Permit Applications

(1) Departmental Final Review. The Department will evaluate the information provided in the application, conduct its own investigation, and consider the comments submitted

during the public review process to determine whether or not to issue an individual removal-fill permit.

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

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

(a) Has independent utility;

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

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

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

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

(b) The economic cost to the public if the proposed fill or removal is not accomplished;

(c) The availability of alternatives to the project for which the fill or removal is proposed;

(d) The availability of alternative sites for the proposed fill or removal;

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

(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations;

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion;

(h) Whether the proposed fill or removal is for stream bank protection; and

(i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800.

(5) **Alternatives Analysis.** The Department will issue a permit only upon the Department's determination that a fill or removal project is consistent with the protection, conservation and best use of the water resources of this state and would not unreasonably interfere with the preservation of the use of the waters of this state for navigation, fishing and public recreation. The Department will analyze a proposed project using the criteria set forth in the determinations and considerations in sections (3) and (4) above (OAR 141-085-0565). The applicant bears the burden of providing the Department with all information necessary to make this determination.

(6) **Fills in an Estuary for Non-Water Dependent Use.** A "substantial fill" in an estuary is any amount of fill regulated by the Department. No authorizations will be issued for a substantial fill in an estuary for a non-water dependent use unless all of the following apply:

(a) The fill is for a public use;

(b) The fill satisfies a public need that outweighs the harm, if any, to navigation, fisheries and recreation; and

(c) The removal-fill meets all other review standards.

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

(a) Permit denial;

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

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

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

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0575

Permit Appeals

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

(2) Other Aggrieved Person Appeal Within 21 Calendar Days. Any person who is aggrieved or adversely affected by the Department's final decision concerning an individual permit or a condition therein may file a written request for a hearing with the Department within 21 calendar days after the authorization approval date. The request must include the reasons for the request for hearing.

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

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

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

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

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

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

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

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

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

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

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

(9) **Pre-Hearing Suspension of Permits.** A permit granted by the Department may be suspended by the Department during the pendency of the contested case proceeding. Petitions for suspension must be made to the Department and will be either granted or denied by the Department. The permit will not be suspended unless the person aggrieved or adversely affected by grant of permit makes a showing before the Department by clear and convincing evidence that commencement or continuation of

the fill would cause irreparable damage and would be inconsistent with ORS 196.800 through 196.990.

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

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

141-085-0580

Discovery in Contested Cases

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

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

141-085-0585

Permit Conditions, Permit Expiration Dates and Permit Transfer

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

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

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

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

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

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

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

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

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

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

(A) Modify permit conditions to address changes in operating conditions or changes to the project; or

(B) Deny the modification request and request a new application.

(b) The Department may modify permit conditions to address new standards or new information related to water resource impacts in effect at the time of the permit renewal request or on the anniversary date of issuance for multiyear permits issued in accordance with OAR 141-085-0545(8).

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0590

Renewal and Extension of Individual Removal-Fill Permits

(1) **Renewal of Individual Permits.** Individual permits may be renewed if the permit holder anticipates that the project within waters of this state will not be completed by the permit expiration date.

(2) **Renewal Notice.** At least 90 calendar days prior to the expiration of a valid removal-fill permit, the Department will send a renewal notice to the permit holder. The renewal notice will inform the permit holder of the expiration date of the permit and offer an opportunity to renew the permit.

(3) **Request for Renewal.** In order to renew the permit, the permit holder must respond with a request to renew the permit. The request for renewal must:

(a) Include a short statement of the status of the project, including any compensatory mitigation requirements;

(b) Include the base fee;

(c) Be received by the Department at least 45 calendar days prior to the expiration of the permit; and

(d) If requested by the Department, be accompanied by an updated application. Updated applications may be required for permits that have been in effect for five years, and at every five-year increment thereafter. Updated applications must be provided on current forms provided by the Department.

(4) **Processing the Renewal Request.** Upon receipt of a request for renewal, the Department:

(a) Must review the request pursuant to the standards contained in the applicable rules in effect at the time of the request; and

(b) May provide public notice of the renewal in accordance with the provisions in OAR 141-085-0560.

(5) **Department's Decision.** Upon review of the renewal request, along with any updated information or public comments, the Department will either:

(a) Renew the permit, with or without modified conditions;

(b) Extend the permit for an additional time period; or

(c) Deny the request for permit renewal.

(6) **Extension of a Permit Expiration Date.** At the discretion of the Department, a permit expiration date may be extended:

(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 & 196.600-196.692 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 the Department. 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 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 landfills;

(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.

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

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

141-085-0665

Expedited Process for Industrial or Traded-Sector Sites

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

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

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

(a) Expedited jurisdictional determinations by the Department;

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

141-085-0676

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.

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

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

- (a) Approve the emergency authorization, either verbally or in writing; or
- (b) Deny issuance of the emergency authorization. If a request for an emergency authorization is denied, the applicant may submit an application for an individual removal-fill permit, general permit or general authorization, as appropriate for the scope of the project.

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

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

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

- (a) Compensatory mitigation or compensatory wetland mitigation;
- (b) A requirement to revise the project and apply for a removal-fill permit after the emergency situation has subsided;
- (c) A requirement to submit a report on the outcome of the project or monitor the project removal-fill sites; and
- (d) Any other condition necessary to minimize reasonably expected adverse impacts on waters of this state.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

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

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.

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

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

(d) Payment in-lieu mitigation or in-lieu fee credits may not be used if appropriate mitigation bank credits are available on the day that the public review period closes.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0685

Functions and Values Assessment

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

(2) **Assessment Requirements.** Elements of a 0720 functions and values assessment must include the following:

- (a) Existing functions and values at the proposed project site;
- (b) Functions and values reasonably expected to be adversely impacted by the proposed project;
- (c) Existing functions and values at the proposed CWM site, if the site is currently wetland or tidal waters; and
- (d) The projected net gain or loss of specific functions and values as a result of the CWM project compared to the reasonably expected adverse impacts as a result of the project.

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

(a) All applications for tidal waters impacts or for wetland impacts of greater than 0.20 acres must include a functions and values assessment using the reference-based method in the appropriate Hydrogeomorphic Method (HGM) guidebook for Oregon wetlands, if available. If not available, the Oregon Rapid Wetland Assessment Protocol (ORWAP) is the required method.

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

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

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

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

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

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

- (A) Water quality and quantity;
 - (B) Fish and wildlife habitat;
 - (C) Native plant communities and species diversity; and
 - (D) Recreation and education.
- (d) The Oregon Freshwater Wetland Assessment Methodology will not satisfy the requirements of OAR 141-085-0685.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0690

Additional Requirements for CWM

(1) **Replacement by Class and Functions and Values.** The CWM project must have the capability to replace:

(a) Wetland or tidal water type(s) impacted by the project, as classified per Cowardin system and class (e.g., palustrine forested) and by HGM class/subclass(es) impacted by the project (e.g., riverine impounding), using the Oregon HGM Statewide Classification (Oregon Department of State Lands, 2001); and

(b) The functions and values of the impacted wetland or tidal waters.

(2) **Exceptions.** The Department may approve exceptions to replacement by class and function if the applicant demonstrates, in writing, that the alternative CWM:

(a) Replaces functions and values that address problems (such as flooding) that are identified in a watershed management plan or water quality management plan;

(b) Replaces important wetland or tidal waters types (Cowardin/HGM) and functions and values disproportionately lost in the region;

(c) Replaces rare or uncommon plant communities appropriate to the region, as identified in the most recent Oregon Natural Heritage Program plant community classification; or

(d) Is for the replacement of a non-tidal wetland or tidal water type that is technically impracticable to replace. Upon demonstration of such to the satisfaction of the

Department, the Department may require re-consideration of alternatives to ensure that all practicable opportunities to avoid and minimize impacts have been reasonably incorporated into the project.

(3) **Conversion of Wetland to Tidal Waters.** CWM involving the conversion of wetland to tidal waters may not be approved where the wetland proposed for conversion provides a high level of functionality, provides locally important functions or values, or supports listed species or rare plant community or communities.

(4) **CWM Ratios.**

(a) The purpose of a CWM ratio is to:

(A) Ensure that the total area of the state's wetland and tidal waters resource base is maintained; and

(B) Replace wetland and tidal waters functions that may be size dependent.

(b) Ratios will not be used as the sole basis for demonstrating functional replacement.

(c) Except as otherwise provided in this section, the following minimum ratios must be used in the development of CWM plans:

(A) One acre of restored wetland or tidal waters for one acre of impacted wetland or tidal waters (1:1);

(B) One and one-half acres of created wetland or tidal waters for one acre of impacted wetland or tidal waters (1.5:1);

(C) Three acres of enhanced wetland or tidal waters for one acre of impacted wetland or tidal waters (3:1);

(D) Two acres of enhanced cropped wetland for one acre of impacted wetland (2:1). Cropped wetland is converted wetland that is regularly plowed, seeded and harvested in order to produce a crop for market. Pasture, including lands determined by the Natural Resources and Conservation Service to be "farmed wetland pasture," is not cropped wetland; and

(E) There is no established ratio for CWM using preservation. The acreage needed under preservation will be determined on a case-by-case basis by the Department.

(d) The Department may double the minimum ratio requirements for project development affecting existing CWM sites.

(e) The Department may increase the ratios when:

(A) Mitigation is proposed to compensate for an unauthorized removal-fill activity; or

(B) Mitigation will not be implemented in the same construction season as the authorized impact.

(f) At the option of the applicant, CWM may consist of any one or a combination of the following CWM ratios for commercial aggregate mining operations where both the mining operation and the CWM are conducted on converted wetlands (not including pasture):

(A) One acre of wetland and open water habitat, with depths less than 35 feet, for one acre of wetland impacted;

(B) Three acres of wetland and open water habitat, with depths greater than 35 feet, for one acre of wetland impacted; and

(C) One acre of a combination of restored, created or enhanced wetland and upland, comprising at least 50 percent wetland, for one acre of wetland impacted.

(g) The Department may also apply the following CWM measures for commercial aggregate mining operations on converted wetland (not including pasture):

(A) Allow for staged CWM or mined land reclamation required under ORS 517.700; or

(B) Allow the applicant, upon approval by the Department, to pay the entire cost of CWM according to the following criteria:

(i) On an annual basis for a period not to exceed 20 years over the life expectancy of the operation, whichever is less; or

(ii) On an annual basis over time at a monetary rate per cubic yard or ton of aggregate material removed annually from the site.

(h) Alternative methods may be used for mitigation crediting and/or impact debiting by applying a wetland function-based accounting method approved by the Department.

(5) Timing of CWM Implementation. CWM earthwork must be completed within the same construction season as the authorized removal-fill project. The Department may approve non-concurrent CWM if the applicant clearly demonstrates, in writing, the reason for the delay or that there is benefit to the water resources in doing so.

(6) CWM in Areas with High Natural Resource Value. CWM projects must not degrade areas with existing high natural resource values (e.g., forested uplands).

(7) **CWM Hydrology Must Be Self-Sustaining.** CWM must not rely on features or facilities that require frequent and regular long-term maintenance and management. For example, permanent water control structures may be acceptable, whereas pumping from a groundwater well to provide adequate hydrologic support is not acceptable.

(8) **Multiple Purpose CWM.** CWM sites may fulfill multiple purposes including storm water retention or detention, provided:

(a) All other CWM requirements are met;

(b) No alteration or management is required to maintain the functionality of the stormwater facility that would degrade the wetland functions and values;

(c) The stormwater entering the CWM site has been pretreated to the level necessary to assure that state water quality standards and criteria are met in the mitigation area;

(d) Construction of storm water facilities in existing wetlands meets the criteria for enhancement;

(e) Construction of the CWM site will not adversely affect adjacent wetlands or tidal waters;

(f) Construction of the CWM site will not significantly change pre-development hydrologic conditions, significantly increase peak flows or significantly change the velocity to receiving streams; and

(g) Stormwater discharges to existing or CWM wetlands will not result in hydrologic conditions that impair vegetation or substrate characteristics necessary to support wetland functions.

(9) **Special Requirements for Enhancement as CWM.** CWM enhancement must conform to the following additional requirements. Enhancement must:

(a) Be conducted only on degraded wetlands or tidal waters;

(b) Result in a demonstrable net gain in functions and values at the CWM site as compared to those functions and values lost or diminished as a result of the project and those functions and values that already exist at the CWM site;

(c) Not replace or diminish existing wetland or tidal waters functions and values with different functions and values unless the applicant justifies, in writing, that it is ecologically preferable to do so;

(d) Not consist solely of the conversion of one HGM or Cowardin class to another;

(e) Identify the causes of wetland or tidal waters degradation at the CWM site and the means by which the CWM plan will reverse, minimize or control those causes of degradation in order to ensure self-sustaining success; and

(f) Not consist solely of removal of non-native, invasive vegetation and replanting or seeding of native plant species.

(10) **Preservation as CWM.** Preservation of wetlands or tidal waters may be used for meeting the CWM requirement when the wetland or tidal waters site proposed for preservation is demonstrated to be under threat of destruction or adverse modification and one of the following applies:

(a) The preservation site supports a significant population of rare plant or animal species;

(b) The preservation site is a rare wetland or tidal waters type (S1 or S2 according to the Oregon Natural Heritage Program);

(c) The preservation site is a native, mature forested wetland; or

(d) The preservation site, with existing and ongoing management, is in good condition and is highly functioning (as determined using a Department-approved assessment method). Preservation must also accomplish one or more of the following:

(A) Serves a documented watershed need; or

(B) Preserves wetland types disproportionately lost in the watershed.

(11) **Preservation as the Preferred CWM Option.** Preservation may be accepted as the preferred CWM option when the lost or diminished functions and values are exceptionally difficult to replace. Examples of such waters include, but are not limited to, vernal pools, fens, bogs and tidal spruce wetlands, as defined by the Oregon Natural Heritage Program.

(12) **Special Case; CWM for Linear Projects in Multiple Watersheds.** The Department will review and approve CWM for linear projects in multiple watersheds (e.g., roads or utility lines with wetland or tidal waters impacts) on a case-by-case basis and may establish other CWM requirements than those explicitly set forth in these rules.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0695

Administrative Protection of CWM Sites

(1) **Administrative Protection Instruments.** All CWM sites must be protected from adverse impacts in perpetuity with appropriate protection instruments.

(2) **Protection Instrument Standards.** Protection instruments must meet the following standards:

(a) The permanent protection instrument must prohibit any uses of the CWM site that would violate conditions of the removal-fill authorization or otherwise adversely affect functions and values provided by the CWM site;

(b) Any proposed revisions to the protection instrument require prior approval from the Department;

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

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

(e) Must include a Right of Entry or an access easement, conveyed to the Department, and recorded on the deed for all CWM sites on non-public lands, using a template provided by the Department.

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

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0700

Financial Security for CWM Sites

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

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

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

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

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

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

(a) Surety bonds executed by the permit holder and a corporate surety licensed to do business in Oregon;

(b) Assignment of deposit must be issued by a bank licensed to do business in Oregon, assigned to the Department, and upon the books of the bank issuing such certificates;

(c) Letters of credit issued by a bank authorized to do business in the State of Oregon that are irrevocable prior to release by the Department; and

(d) Such other financial instrument as the Department deems appropriate to secure the financial commitment of the applicant to fulfill the success requirements of the CWM.

(4) Financial Security Form. The applicant must file the financial security instrument or instruments on a form or forms prescribed and furnished by the Department. Financial security instruments must be made payable to the Department and must be submitted to the Department prior to permit issuance or prior to release of credits from a mitigation bank.

(5) Commencement of the Liability Period. The period of liability will begin at the time of authorization issuance. The liability period must be renewed until the Department deems the CWM to be complete and the Department releases the permittee from any further monitoring requirements.

(6) Determining the Amount. For issuance of an authorization requiring a financial security, the Department will set the amount of the financial security instrument equal to either the current cost of mitigation bank credit(s) within a service area covering the removal-fill site, or the current cost of payment in-lieu mitigation, whichever is greater. For mitigation banks, the amount must be sufficient to ensure a high level of confidence that the mitigation will be successfully completed.

(7) **Financial Security Instrument Replacement.** The Department may allow a permit holder to replace an existing financial security instrument with another if the total liability is transferred to the replacement. The Department will not release an existing financial security instrument until the permit holder has submitted and the Department has approved the replacement.

(8) **Financial Security Instrument Release.** The Department will authorize release of the financial security instrument when the CWM meets the requirements of the CWM plan and the conditions of the removal-fill authorization. The permit holder must file a request with the Department for the release of all or part of a financial security instrument. The request must include:

(a) The precise location of the CWM area;

(b) The permit holder's name;

(c) The removal-fill authorization number and the date it was approved;

(d) The amount of the financial security instrument filed and the portion proposed for release; and

(e) A description of the results achieved relative to the permit holder's approved CWM plan.

(9) **Forfeiture.** The Department may declare forfeiture of all or part of a financial security instrument for any project area or an increment of a project area if CWM activities fail to meet success criteria, the permittee fails to provide monitoring reports, or fails to follow other permit conditions related to mitigation. The Department will identify, in writing, the reasons for the declaration.

(10) **Determination of Forfeiture Amount and Use of Funds.** The permit holder must forfeit the amount of the outstanding liability in the financial security instrument. The Department will either use the funds collected from the security forfeiture to complete the CWM or deposit the proceeds in the Oregon Removal-Fill Mitigation Fund.

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0705

Requirements for All CWM Plans

(1) **CWM Plan Content.** CWM Plan detail must be commensurate with the size and complexity of the proposed mitigation. A CWM Plan is not required for proposed CWM by means of using credits from an approved bank, advance mitigation site, in-lieu fee mitigation or payment in-lieu mitigation. A CWM plan for permittee responsible CWM must include the sections listed below.

(a) CWM plan overview, including:

(A) CWM ecological goals and objectives;

(B) The CWM concept in general terms including a description of how the plan, when implemented, will replace the functions and values of the impacted non-tidal wetland or tidal waters;

(C) Mitigation site acreage by method(s) of mitigation proposed (restoration, creation and enhancement) and by proposed HGM and Cowardin classification for each method; and

(D) Summary of proposed net losses and gains of wetland or tidal waters functions and values.

(b) CWM site ownership and location information:

(A) CWM site ownership information (name, address, phone). If this is different from the applicant, copies of legal agreements demonstrating permission to conduct the CWM and willingness of the property owner to provide long-term protection are required;

(B) Legal description (Township, Range, Quarter and Quarter-quarter Section and tax lot or lots); and

(C) CWM site location shown on a USGS or similar map showing the CWM site location relative to the impacted site, longitude and latitude, physical address, if any (e.g., 512 Elm Street), and road milepost (e.g., mp 25.21).

(c) A description of how the proposed CWM addresses each of the principal objectives for CWM as defined in OAR 141-085-0680.

(d) CWM site existing conditions, including the following, as applicable.

(A) If wetlands or tidal waters exist on the CWM site, then the following information must be provided:

(i) A wetland determination/delineation report pursuant to OAR 141-090 for existing wetlands on the CWM site (or for tidal waters, any wetlands above highest measured tide elevation), as necessary to confirm acreage of proposed CWM;

(ii) Identification of HGM and Cowardin class(es) and subclass(es) of all wetlands and tidal waters present within the CWM site;

(iii) A general description of the existing and proposed water source, duration and frequency of inundation or saturation, and depth of surface water for wetlands or tidal waters on the CWM site. This information must include identification of any water rights necessary to sustain the intended functions. When water rights are required, the applicant must provide documentation that the water right has been secured prior to issuance; and

(iv) Plans that involve enhancement must include identification of the cause(s) of degradation and how the plan will reverse it and sustain the reversal.

(B) A description of the major plant communities and their relative distribution, including the abundance of exotic species within the CWM site and associated buffers.

(C) Approximate location of all water features (e.g., wetlands, streams, lakes) within 500 feet of the CWM site.

(D) Any known CWM site constraints or limitations.

(E) Plans for CWM by means of restoration must include documentation sufficient to demonstrate that the site was formerly, but is not currently, a wetland or tidal water.

(e) A functions and values assessment. A summary of the assessment must be placed in the body of the CWM plan, and supporting data sheets or assessment model outputs must be placed in an appendix of the CWM Plan.

(f) CWM drawings and specifications, including:

(A) Proposed construction schedule;

(B) Scaled site plan(s) showing CWM project boundaries, existing and proposed wetland or tidal waters boundaries, restoration, creation and enhancement areas, buffers, existing and proposed contours, cross-section locations, construction access location and staging areas;

(C) Scaled cross sections showing existing and proposed contours and proposed water depths;

(D) Plant list for each Cowardin and HGM class at the CWM site (include scientific names and wetland indicator status);

(E) Schematic of any proposed water control structures; and

(F) For CWM sites involving tidal waters, plan views and cross sections must show relevant tidal elevations relative to mean lower low water (MLLW) using the nearest local tidal datum. The elevation of MLLW must be referenced to the North American Vertical Datum 1988 (NAVD88).

(g) Proposed CWM performance standards. The applicant may propose to use applicable pre-defined performance standards as approved by the Department, or may provide CWM site-specific performance standards that:

(A) Address the proposed ecological goals and objectives for the CWM;

(B) Are objective and measurable; and

(C) Provide a timeline for achievement of each performance standard.

(h) A description of the proposed financial security instrument. The Department will determine the amount of security required. A final financial security instrument will be required prior to permit issuance unless otherwise approved by the Department.

(i) A monitoring plan including specific methods, timing, monitoring plot locations, and photo-documentation locations.

(j) A long-term maintenance plan describing:

(A) How the applicant anticipates providing for maintenance of the CWM site beyond the monitoring period to ensure its sustainability (e.g., maintenance of any water control structures, weed management, prescribed burning, and vandalism repair);

(B) Expected long-term ownership of the CWM site and the anticipated responsible party or parties for long-term maintenance; and

(C) How the maintenance activities are anticipated to be funded.

(k) The CWM plan must identify the long-term protection instrument for the CWM site in accordance with OAR 141-085-0695.

(l) If permittee-responsible mitigation is proposed and the application for a permit or authorization is submitted on behalf of a closely held corporation, limited partnership, limited liability company or trust, the Department will require from each shareholder or stockholder, limited partner, member, trustee, current beneficiary or other principal:

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

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

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

(m) The Department may require additional information as necessary to determine the appropriateness, feasibility and sustainability of the proposed CWM and at any time prior to the permit decision may make recommendations for improvements to CWM plans.

(2) CWM Plans Using Preservation. A CWM plan using preservation must include:

(a) Functions and values assessment of the removal-fill site and site proposed for preservation;

(b) Maps showing the preservation site including all delineated wetlands or tidal waters to be conserved;

(c) Documentation demonstrating that the proposed preservation site meets the requirements of OAR 141-085-0690(10);

(d) The surrounding land uses and an analysis of both the short-term and long-term known and probable effects of those land uses and activities on the preserved wetlands or tidal waters;

(e) Measures that may be necessary to minimize the effects of surrounding land uses and activities on the preserved wetlands or tidal waters;

(f) Identification of the party or parties responsible for long-term protection of the preservation site;

(g) A long-term protection instrument;

(h) A long-term management plan with a funding mechanism that addresses the specific management needs to optimize and maintain functionality and ecological sustainability of the wetlands or tidal waters to be preserved; and

(i) The protection instrument, management plan and funding mechanism must be in place prior to issuance of the authorization.

(3) Authorization Conditions for CWM Plans.

(a) The Department will review the CWM plan for sufficiency. In approving the final CWM plan, the Department may impose authorization conditions necessary to ensure compliance.

(b) The approved CWM plan becomes an enforceable part of the removal-fill authorization. In the event of conflict between CWM Plan provisions and removal-fill authorization conditions, the authorization conditions prevail.

(c) Regardless of the expiration date of the authorization, all compensatory mitigation conditions remain enforceable until the Department declares that the CWM has been successful.

(d) The permit holder cannot delegate responsibility for CWM requirements, unless the Department has officially transferred the mitigation obligation.

(e) If applicable, the Department will approve necessary draft administrative protection instrument(s) prior to permit issuance. A copy or copies of the recorded administrative protection instrument(s) must be submitted to the Department with the post construction report unless the Department approves another schedule.

(f) For authorizations involving payment in-lieu mitigation as CWM:

(A) The individual removal-fill permit or letter of authorization for an activity will not be issued until payment has been made as approved by the Department; and

(B) Once an authorized removal-fill permit activity has begun , the payment is non-refundable.

(g) For authorizations involving a mitigation bank or in-lieu fee credit purchase, proof of the purchase is required prior to issuance of the authorization.

Stat. Auth.: ORS 196.825 & 196.600-196. 692

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

141-085-0710

Monitoring Requirements for CWM

(1) **Purpose.** The purpose of the CWM monitoring requirement is to provide information for the Department to:

(a) Determine whether the CWM complies with the conditions of the authorization and whether the CWM has achieved its stated goals, objectives and performance standards;

(b) Determine whether the CWM is replacing wetland and tidal waters area and functions and values; and

(c) Provide information for removal-fill program monitoring.

(2) **Monitoring Reports.** The permit holder must monitor the CWM site and provide to the Department monitoring reports commensurate with CWM site size and complexity. Those reports must include at minimum:

(a) A post construction report demonstrating as built conditions and discussing any variation from the approved plan. Unless waived by the Department, the post construction report must be submitted within 90 calendar days of completing grading;

(b) An annual written monitoring report that includes all data necessary to document compliance with CWM conditions and performance standards; and

(c) A sufficient number of permanent monitoring points to provide a representative sampling of the CWM site and buffers.

(3) **Duration.** Monitoring must be conducted for a minimum period of five growing seasons after the completion of all the initial plantings, unless otherwise specified by the Department.

(4) **Final Monitoring Report Requirements.** To determine whether the CWM project will meet acreage and functional replacement requirements, the Department must receive by not later than the fifth year of the monitoring program the following additional documentation:

(a) Mapping of the CWM site boundary and verification of quantities of actual restoration, creation and enhancement acreages achieved by HGM and Cowardin class; and

(b) Comparison of actual functions and values attained at the CWM site compared to the predicted functions and values for the CWM site identified in the CWM Plan.

(5) **Additional Monitoring.** The Department may require modifications to the CWM plan, as well as require additional monitoring, if the Department determines that the CWM fails to meet performance standards, replacement acreage requirements, or replace functions and values.

(6) **Release From Monitoring Obligations.** When the Department determines that the CWM complies with the conditions of the removal-fill authorization, the Department will notify the permit holder in writing that additional monitoring is not required.

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692
Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

141-085-0715

Mitigation for Temporary Impacts

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692
Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
Hist.: DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

141-085-0720

Mitigation Banking Purpose, Applicability and Policies

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

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

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

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

- (a) Maintaining regional functions and values of aquatic resources in their service area;
- (b) Matching the demand for credits with losses to the water resources of this state; and

(c) Meeting other ecological or watershed needs as determined by the Department.

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0725

Process for Establishing Mitigation Banks

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

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

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

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

(b) The objectives of the proposed mitigation bank;

- (c) How the mitigation bank will be established and operated, in general terms;
- (d) The proposed service area;
- (e) A market or other analysis that demonstrates the general need for the mitigation bank;
- (f) A description of the technical feasibility of the proposed mitigation bank;
- (g) The proposed ownership arrangements and long-term management strategy for the mitigation bank;
- (h) How the mitigation bank addresses each of the principal objectives for CWM listed in OAR 141-085-0680; and
- (i) Names and addresses of all landowners within 500 feet of the bank.

(4) **Prospectus Completeness Review.** Within 30 calendar days of the Department's receipt of a Prospectus, the Department will conduct an initial review to determine if the Prospectus is complete and the information contained in the Prospectus adequately addresses the requirements. Following the Prospectus completeness review, the Department will inform the applicant of one of the following findings:

- (a) The Prospectus is complete and will proceed to the public notice; or
- (b) The Prospectus is incomplete.

(5) **Incomplete Prospectus.** If the Department determines that the Prospectus is incomplete, the Department will notify the sponsor in writing and list the missing or deficient information. The Department will take no action on the incomplete Prospectus until the required information is submitted. The sponsor must resubmit the entire amended Prospectus for reconsideration, unless instructed by the Department to do otherwise. Submission of a new or amended Prospectus starts a new 30 calendar day initial review period.

(6) **Department May Decline to Participate.** If a mitigation bank sponsor cannot demonstrate the need for the mitigation credits or the technical feasibility and ecological desirability of the bank, the Department may decline to participate in its development.

(7) **Public Notice of Prospectus.** Upon determining that a Prospectus is sufficient, the Department will issue a public notice entitled, "Intent To Create A Mitigation Bank." The Department will:

- (a) Post the notice on the Department's web site for 30 calendar days;

(b) Send the notice to city and county planning departments, affected state and federal natural resource and regulatory agencies, adjacent landowners, conservation organizations and other interested persons requesting such notices;

(c) Briefly describe the proposed mitigation bank and reference the Prospectus provided by the bank sponsor; and

(d) Solicit comments for 30 calendar days from the date of the public notice.

(8) Consideration of Comments Received During the Public Notice Period. All comments received will be provided to the bank sponsor and to the IRT. If comments are not received from an interested party within the 30-day comment period, the Department will assume the entity does not desire to provide comments.

(9) Establishment of an Interagency Review Team (IRT) and the Role of the IRT. The Department will invite participants to serve on an IRT within 30 calendar days of the date of the public notice. The Department will serve as chair (or co-chair) of the IRT.

(a) The Department will invite each of the following agencies to nominate a representative for an IRT:

(A) Oregon Department of Environmental Quality;

(B) Oregon Department of Fish and Wildlife;

(C) Oregon Department of Land Conservation and Development;

(D) U.S. Fish and Wildlife Service;

(E) U.S. Environmental Protection Agency;

(F) Soil and Water Conservation District; and

(G) Local Government Planner, or equivalent.

(b) The Department may appoint other members of the IRT based on the nature and location of the project, particular interest in the project by persons or groups, and/or any specific expertise that may be required by the Department in development of the MBI.

(c) The IRT acts in an advisory capacity to the Department in the establishment and operation of mitigation banks. The IRT may:

(A) Review and provide input to the Department on the Prospectus and the comments received during the public notice for use in the development of the MBI;

(B) Review and provide input on the draft MBI;

(C) Review the performance of the bank to assist the Department in determining compliance with the MBI; and

(D) Provide input on adaptive management of the mitigation bank, as necessary, to achieve the ecological goals and objectives.

(10) **Mitigation Bank Instrument (MBI).** After consideration of the public comments and input from the IRT, the bank sponsor must develop a Draft Mitigation Bank Instrument (MBI) for submittal to the Department. If the sponsor intends that the MBI serve as the permit application, the sponsor must notify the Department of this intention at the time of submittal of the first draft MBI. If an MBI is used in place of a permit application, in addition to all requirements below, it must meet the requirements for fees, content, and review procedures as specified in OAR 141-085-0545 through 141-085-0565. The draft MBI must contain:

(a) If the proposed bank is for wetland mitigation, all requirements for CWM plans per OAR 141-085-0680 through 141-085-0710; and

(b) The applicant must also provide the following information:

(A) The proposed service area for the bank, including a map clearly showing recognizable geographic place names and watershed boundaries;

(B) Demonstration of the need for the bank as shown by past removal-fill activities, projected demographics for the proposed service area, statements of expected activities from the local planning agency, and like documentation;

(C) A description of the projected wetland losses in the service area by HGM and Cowardin wetland classes;

(D) Proof of ownership including a title report and disclosure of any and all liens or easements on the bank site. If the sponsor does not own the land, the MBI must contain explicit legal and recordable permission granted by the landowner to perpetually dedicate the land upon which the proposed bank and any associated buffer is located;

(E) A description of the methods and results of the evaluation of ecological stressors, such as contaminants, present at the bank site that could compromise the wetland functions;

(F) Description of the location and plant community composition of reference site(s), unless an HGM reference data set is used;

(G) Description of the method(s) used to determine the number of credits to be created at the proposed bank, as well as those that will be used to account for and report credit and debit transactions;

(H) The proposed credit release schedule linked to achievement of specific performance standards;

(I) Detailed contingency plans describing how project deficiencies or performance failures will be corrected, including assignment of responsibilities for failures such as floods, vandalism, damage by pests and wildlife, invasion by weedy vegetation, etc.;

(J) Land use affidavit; and

(K) A statement indicating when each of the conditions of the MBI will terminate, unless they are perpetual in nature.

(11) **Review of the Draft MBI.** Within 30 calendar days of the Department's receipt of a draft MBI, the Department will conduct an initial review to determine if the MBI is complete and the information contained in the MBI adequately addresses the requirements. Following the review, the Department will inform the sponsor of its findings, either:

(a) The draft MBI is complete and will proceed to the IRT review process; or

(b) The draft MBI is incomplete.

(12) **Incomplete Draft MBI.** If the Department determines that the draft MBI is incomplete or deficient, the Department will notify the sponsor in writing and list the missing or deficient information. The Department will take no action on the incomplete draft MBI until the required information is submitted. The applicant must resubmit the entire draft MBI for reconsideration, unless instructed by the Department to do otherwise. Submission of a new or amended draft MBI starts a new 30 day review period.

(13) **IRT Review of the Draft MBI.** Upon notification that the draft MBI is complete, the sponsor must provide copies to the IRT for review. At the next available IRT meeting, the IRT will review and discuss the draft MBI and identify any issues that need to be resolved prior to finalizing the MBI. IRT meetings will be held as necessary to resolve issues identified by the co-chairs.

(14) **Preparation of the Final MBI.** When revisions have been completed and issues identified through the IRT process have been resolved, the sponsor must submit a final MBI to the Department and IRT members.

(15) **Final Approval of the MBI.** Within 30 calendar days of receipt of the final MBI, the Department will notify the sponsor and the IRT whether the agency will approve the MBI.

(16) **Appeal of Department Decision.** Appeals of the Department decision to affirm or deny mitigation bank approval will be administered according to OAR 141-085-0575.

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0730

Establishment of Mitigation Credits

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

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

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

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

(a) For those bank credits using the 1.5:1 ratio for wetland creation, or a function based credit accounting method approved by the Department, additional credits may be

recognized by the Department when the total number for wetland credits for such area, including the initial release and these additional credits, does not exceed a 1:1 ratio by acreage; or

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

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196.692 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

141-085-0735

Release, Use and Sale of Mitigation Credits

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

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

(3) **Sales to Permit Applicants.** After credits have been released to the bank sponsor, they may be sold to permit applicants upon approval by the Department that such credits will satisfy the mitigation obligation of a specific permit, or to resolve an

enforcement case. Each credit sale transfers the mitigation obligation from the permit applicant to the sponsor.

(4) Sales to Public Benefit Corporations or Public Bodies. At the request of a mitigation bank sponsor, the Department may authorize the withdrawal of mitigation bank credits by a public benefit corporation as defined in ORS 65.001 or a public body. Such entities will be designated by the Director for the purpose of reserving credits for future use in accordance with this subsection. The Director will manage such transactions to ensure that each credit is used no more than once to satisfy a use in accordance with this section. Mitigation Banks must report every credit sale to the Department and will provide an annual credit ledger.

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692

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

141-085-0740

Authorization for Mitigation Banks

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

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

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

(4) Draft MBI May be Circulated for Public Notice. For mitigation banks that do not require a permit for construction, or for such banks that the Department elects to allow

the MBI to serve as the permit application, a 15-calendar day public notice will be provided to the public of the Department's intent to approve the bank. The Department may elect to circulate a public notice of the MBI according to OAR 141-085-0560. If an MBI is used in place of a removal-fill permit application, it must meet the requirements for fees, content, and review procedures as specified in OAR 141-085-0545 through 141-085-0565.

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0745

In-Lieu Fee Mitigation

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

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

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

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

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

(b) Timelines to implement compensatory mitigation projects to satisfy advance credit sales, and

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692
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

141-085-0750

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

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

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

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

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

(c) Monitor the compensatory mitigation;

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

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

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

Stat. Auth.: ORS 196.825 & 196.600-196.692
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

141-085-0755

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:

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

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

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

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

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

- (a) Requirements for baseline condition documentation, including but not limited to: wetland delineation, wetland functions and values assessment, site selection criteria, proposed success criteria, and monitoring plan;
- (b) Department approval of baseline documentation;
- (c) Advance mitigation site development including removal-fill authorization, as necessary;
- (d) Mitigation site monitoring by the advance mitigation proponent; and
- (e) Petition to the Department for credit release including, but not limited to, final wetland delineation and functions and values assessment, monitoring results, credit ledger management, and long-term management and site protection plan.

(3) **Term of Pilot Program.** The Department may evaluate the pilot program in 2013 and may continue, modify or suspend the program depending on evaluation outcome. The Department's evaluation will consider the extent to which the program:

- (a) Accomplishes the program purposes described in Section (1) of this rule;
- (b) Provides CWM of quality at least commensurate with wetland mitigation banking; and
- (c) Influences the viability of the existing wetland mitigation banking program.

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

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

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:

- (a) Defined performance standards;
- (b) Site monitoring and reporting using a method approved by the Department;
- (c) Administrative protection of the CNWM site; and
- (d) Financial security.

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0770

Complaints and Investigations

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

- (a) Removal-fill without a valid authorization;
- (b) Non-compliance with any condition of an authorization;
- (c) Obtaining an authorization or reporting on conditions of an authorization by misrepresentation or by failure to fully disclose known material facts;
- (d) Failing to comply with any term of an enforcement agreement or order;
- (e) Failing to comply with the requirements of the Removal-Fill Law or these rules; or
- (f) Non-compliance with any condition of an approved wetlands conservation plan.

(2) **Reporting Suspected Violations; Complaints.** Alleged or suspected violations may be reported as complaints to the Department in person, by e-mail, facsimile, telephone or in writing. When reports of alleged or suspected violations are submitted to the Department in confidence, as expressly requested by the complainant, and the information is not otherwise required by law to be submitted, the Department may keep

the name of the person making the report confidential if the criteria set forth in ORS 192.501 or 192.502 are met.

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0775

Enforcement Actions and Procedures; Appeals

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

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

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

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

(B) Remove an unpermitted fill;

(C) Restore the site of an unpermitted removal;

(D) Pay a civil penalty;

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

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

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

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

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

(ii) A cease and desist order will state that a hearing will be held on the order if a written request for hearing is filed by the person subject to the order within 10 calendar days after receipt of the order.

(iii) If a person subject to a cease and desist order files a timely request for a hearing, the Department will hold a contested case hearing before the Office of Administrative Hearings pursuant to the applicable provisions of ORS 183.310 through 183.550.

(iv) Cease and desist orders will not be stayed during the pendency of a hearing conducted under this section.

(v) Neither the Department nor any duly authorized representative of the Department will be liable for any damages a person may sustain as a result of a cease and desist order issued under this section.

(B) Consent agreements and consent orders are cooperative in nature and are used when an agreement can be reached to resolve the violation. In signing a consent agreement, the violator waives his or her right to appeal;

(C) Restoration orders may be issued when a cooperative agreement is not reached to resolve the violation. Restoration orders are appealable;

(D) Revocation or suspension of an authorization, as per OAR 141-085-0780; and

(E) Consent agreements, consent orders and restoration orders may include a civil penalty and corrective action necessary to resolve the violation.

(3) **Notice and Due Process.** The Department will give notice of any proposed restoration order relating to a violation by personal service or by mailing the notice by registered or certified mail to the person or public body affected. Any proposed restoration order will include a notice of violation and will describe the nature and extent of the violation.

(4) **Request for Hearing.** If a person subject to a restoration order under this section files a timely request for hearing, the Department will hold a contested case hearing before the Office of Administrative Hearings according to the applicable provisions of ORS 183.310 through 183.550. If the person fails to request a hearing, a final order will be issued upon a prima facie case made on the record of the agency.

(5) **Restoration Orders Must be Appealed Within 20 Calendar Days.** Any person aggrieved by a proposed restoration order may request a hearing within 20 calendar days of the date of personal service or mailing of the notice.

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

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

141-085-0780

Revoking or Suspending an Authorization; Allowing Corrective Action

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

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

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

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

(b) The Notice will include the following information:

(A) A statement of the alleged violator's right to a contested case hearing within 20 calendar days of receiving the notice;

(B) A statement of the authority and jurisdiction under which the contested case hearing is to be held;

(C) Citations for the relevant sections of law and rule;

(D) A short and plain statement of the matters asserted or charged as constituting the violation(s); and

(E) A statement of any action that is necessary by the alleged violator to correct or offset the effects of the violation including, but not limited to, removal of filled material or replacement of removed material.

(c) Any action specified in the notice will include a reasonable time period in which to complete the corrective action.

(A) If the alleged violator completes such action within the specified time period, the revocation or suspension procedure will be terminated; and

(B) If the authorization holder fails to request a contested case hearing, the Department may issue a final order revoking or suspending the authorization after presenting a prima facie case demonstrating that a violation has occurred.

(4) Revocation or Suspension of Multi-Year Authorizations. If a person fails to comply with reporting requirements or any other condition of a multi-year authorization the Department may revoke the multi-year status and require annual renewal, suspend the permit pending correction, or take any other enforcement action available to the Department.

(5) Appeals Procedures. Procedures for requesting an appeal on a revocation or suspension are as set forth in OAR 141-085-0775(4) and (6).

Stat. Auth.: ORS 196.825 & 196.600 - 196.692

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

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

141-085-0785

Civil Penalties; Appeals

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

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

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

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

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

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

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

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

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

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

(6) **Calculating the Civil Penalty.** The amount of civil penalty (F), as expressed in U.S. currency dollars, will be determined by the Department using the following formula: $F = BPCI$:

(a) B is the base fine factor of \$1,000;

(b) "P" is the prior knowledge factor to be determined as follows:

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

(B) A value of 2 will be applied if the alleged violator was aware of the Removal-Fill Law at the time of the alleged violation and in cases of permit non-compliance; or

(C) A value of 5 will be applied if the alleged violator had a previous violation. A previous violation exists, if there was an adjudication (either in court or administrative hearing), or the violator failed to appeal an enforcement order (and a final order was issued), or the violator signed a consent agreement. This value will not be imposed if the previous violation occurred more than five years prior to the current incident.

(c) The cooperation value (C) will be determined by the Department after reviewing the past history of the person in taking all feasible steps or procedures necessary or appropriate to correct the violation for which the penalty is being assessed. The value will be assessed as follows:

(A) A value of 1 will be applied when the person responds to communications from the Department, supplies information requested by the Department, permits access to the site to conduct site investigations and/or complies with restoration as requested by the Department; or

(B) A value of 3 will be applied when the person:

(i) Has ceased to be responsive to communications from the Department;

(ii) Has ceased to be cooperative in providing information as requested by the Department; or

(iii) Does not cease the activity alleged to constitute a violation or threatened violation after receiving verbal or written notification from the Department.

(d) "I" is the water resource adverse effect factor to be determined as follows:

(A) A value of 1 will be applied if the damage to the resource is minimal and/or the resource is expected to naturally self-restore within one year; or

(B) A value of 3 will be applied if the adverse impacts are significant and/or not expected to naturally self-restore within one year. In the case of permit non-compliance, a value of 3 will be applied if failure to correct the deficiency could result in reasonably expected adverse impacts to waters of this state or a deficiency in the obligation to provide mitigation.

(e) In cases where the prior knowledge (P) factor is greater than one (1) and the cooperation (C) factor is greater than one (1), the total amount of the civil penalty (F), in dollars U.S. currency, will be doubled, not to exceed \$10,000 per day.

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

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

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

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

Stat. Auth.: ORS 196.825 & 196.600 - 196. 692

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

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