

DEPARTMENT OF STATE LANDS

DIVISION 141-085

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

141-085-0005

Purpose/Applicability

These rules:

- (1) Apply to removal, fill and/or alteration of material within the waters of this state as expressed in ORS 196.668 to 196.692, ORS 196.800 to 196.990, and 390.835.
- (2) Establish procedures for applying for an individual removal-fill permit, a general authorization or an emergency authorization (referred to in these rules as either “permits” or “authorizations”) and the Department’s process for reviewing applications for any of these permits and authorizations.
- (3) Establish standards and criteria that an applicant must meet to obtain a permit or an authorization.
- (4) Establish general conditions and mitigation requirements to be applied to each approved authorization.
- (5) Establish the procedures for enforcing ORS 196.800 to 196.990, 390.825 and 390.835.
- (6) Define the “waters of the state” of Oregon that are subject to removal-fill permit requirements.
- (7) Define the activities that are subject to (refer to OAR 141-085-0015) or exempt from (refer to OAR 141-085-0020) these rules. Generally, the following activities are subject to removal-fill authorization requirements if conducted in waters of the state. However, this is not an inclusive list and it does not address exemptions from permit requirements. Consult the rules to determine whether a particular activity is subject to authorization requirements. This list is solely for the purpose of giving general examples:
 - (a) Streambank stabilization;
 - (b) Wetland restoration;
 - (c) Road, bridge or transportation structure construction (including culverts, road fills);
 - (d) Utility line construction including pipelines and overhead lines;
 - (e) Sand and gravel removal (commercial and non-commercial);
 - (f) Water diversion works/structures (permanent and temporary) including water intakes, weirs and push-up dams;
 - (g) Fish habitat enhancement (e.g. large rock placement; pool and pond construction; gravel placement; side channel construction; barrier removal; placement of large wood material; and streambank rehabilitation).
 - (h) Temporary construction works (e.g., cofferdams);
 - (i) Dredge material disposal;
 - (j) Stream gauging station construction;
 - (k) Waterfront structure construction (e.g. bulkheads, sheet piling, backfilling, filling);

- (l) Boat ramp construction and improvement;
 - (m) Fill placement for the purpose of land development for institutional, public facilities, residential, commercial or industrial uses;
 - (n) Piling, dolphins;
 - (o) Access channel dredging including maintenance dredging;
 - (p) Underwater blasting;
 - (q) Streambank excavation (e.g., bank sloping, reshaping);
 - (r) Stormwater, wastewater, or sewer outfall construction;
 - (s) Channel or streambed relocation;
 - (t) Tidegate or other water control structure (e.g. levees, dikes, canals or irrigation ditches or drainage ditches) construction;
 - (u) Mining (e.g. placer mining); and
 - (v) Water storage improvement construction (e.g. ponds, reservoirs)
- (8) Govern the basics of the removal-fill program. They must be used in conjunction with other Department rules, which address specific subjects relating to removal and fill, including but not limited to:
- (a) Wetland Delineation Report Requirements and Jurisdictional Determinations for the Purpose of Regulating Fill and Removal within Waters of the State (OAR 141-090-0005 to 141-090-0055).
 - (b) Wetland Conservation Plans (OAR 141-086-0005 to 141-086-0100 and OAR 141-120-0000 to 141-120-0230).
 - (c) The 1992 Lower Willamette River Management Plan as promulgated by the State Land Board and the Department and adopted by reference (OAR 141-080-0105).
 - (d) Essential Indigenous Anadromous Salmonid Habitat (OAR 141-102-0000 to 141-102-0045).
 - (e) Oregon Scenic Waterways (OAR 141-100-0000 to 141-100-0090).
- (f) General Authorizations (OAR 141-089).

Stat. Auth.: ORS 196.600- 196.692; ORS 196.800- 196.990; ORS 390.805- 390.925
 Stats. Implemented: ORS 196.600- 196.692; ORS 196.800- 196.990; ORS 390.805- 390.925

141-085-0006

Policy

- (1) No authorization to place fill or remove material from the waters of the state shall:
- (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, conservation and best use of the water resources of this state.
- (2) To the extent possible, the Department shall 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) The Department shall 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) The Department shall recognize the interests of adjacent landowners, Tribal governments, public interest groups, watershed councils, state and federal agencies, and local government land use planning agencies, and shall provide

notice to such interests prior to issuance of an individual removal-fill permit or adoption of a general authorization.

(5) In regard to the regulation of wetlands, the Department shall administer these rules to ensure that:

(a) The protection, conservation and best use of the state's wetland resources, including their functional attributes, are promoted through the integration and coordination of the local comprehensive land use plans and the Department permitting process.

(b) A stable wetland resource base is maintained through impact avoidance and compensation for unavoidable wetland losses.

(6) The restoration of wetlands and other waters through voluntary restoration and conservation programs is encouraged and facilitated.

(7) The Department shall administer the removal-fill program in a manner consistent with and in support of:

(a) The Oregon Plan as described in ORS 541.405;

(b) The applicable Oregon Wetlands Benchmark; and

(c) The Oregon Coastal Management Program.

(8) The Department shall carry out its responsibilities under these rules in compliance with the coordination procedures established in its State Agency Coordination Program (OAR 141-095-0000).

(9) The Department shall coordinate administration of the Scenic Waterway Act (ORS 390.805) under OAR 141-0100 with these rules.

Stat. Auth.: ORS 196.600- 196.692; ORS 196.800- 196.990

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

141-085-0010

Definitions

The following definitions will be used in addition to those in ORS 196.600, 196.800, 196.815, 196.830, 196.860 and 196.905

(1) "Activities Customarily Associated with Agriculture" (ORS 196.810(1)(b)) applies only to fill or removal of less than 50 cubic yards in essential indigenous anadromous salmonid habitat (see OAR 141-102-0020(1)). "Activities customarily associated with agriculture" include maintenance of an existing irrigation structure at an existing point of diversion (as defined in OAR 690-015-0005) to maintain previously constructed agricultural drainage or irrigation channels, or to maintain or replace any associated and necessary pumps, tide gates, levees, groins and/or other drainage or irrigation-related devices. Exempt activities also include maintaining existing culverts under farm or ranch roads by removing debris.

(2) "Adverse Effect" means the same as "reasonably expected adverse impacts".

(3) "Applicant" means a landowner or person authorized by a landowner seeking a permit or authorization to conduct a removal-fill under ORS 196.800 to 196.990 and who has authority to fully execute the terms and conditions of the authorization as evidenced by their signature on the application.

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

(5) "Aquatic Life and Habitats" means the aquatic environment including fish, wildlife and plant-species 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.

- (6) "Artificially Created" means constructed by artificial means.
- (7) "Artificial Means" means the purposeful movement or placement of material by humans and/or their machines.
- (8) "Authorization" means an individual permit, letter of authorization issued under a General Authorization, or emergency authorization as required by these rules and ORS 196.810 and ORS 196.850.
- (9) "Authorization Holder" or "permittee" means the person holding a valid authorization from the Department.
- (10) "Bank" means: (a) for perennial streams, that portion of a waterway that is exposed at low water and lies below the ordinary high water line or bankfull stage; and (b) for intermittent streams, the bank extends to the ordinary high water line; the line between the bed and bank may be indistinguishable during dry months.
- (11) "Bankfull Stage" means the two-year recurrence interval flood elevation.
- (12) "Baseline Conditions" means the ecological conditions, wetland functional attributes, and the vegetative, soils, and hydrological characteristics present at a site before any change by the applicant is made.
- (13) "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.
- (14) "Beds" means: (a) for the purpose of OAR 141-089-0245 to OAR 141-089-0275, the land within the wet perimeter and any adjacent nonvegetated dry gravel bar; (b) for all other purposes, "beds" means that portion of a waterway that is always covered by water; or, on intermittent streams, the area that carries water when water is present.
- (15) "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 on bays and estuaries by the limits of the highest measured tide.
- (16) "Bio-Engineering" means construction methods which use live woody material or a combination of live vegetation material (usually woody) and rock to stabilize a stream bank.
- (17) "Borrowed Material" means excavated earth or rock that is removed from one location (e.g. streambed) and used at another location.
- (18) "Buffer" means an upland area immediately adjacent to or surrounding a wetland or other water that protects the functioning of that wetland or water.
- (19) "Bulkhead" means a vertical or nearly vertical bank protection structure placed parallel to the shoreline consisting of concrete, timber, steel, rock, or other permanent material not readily subject to erosion.
- (20) "Cease and Desist Order" means a legally binding order compelling a party to cease removal or fill activities in waters of the state.
- (21) "Certified Credit" as used in compensatory wetland mitigation banking, results when the wetland mitigation bank has met or exceeded the performance standards established in its Mitigation Bank Instrument. Once credits are certified, they are available for sale or exchange.
- (22) "Channel" means a natural (perennial or intermittent stream) or human made (e.g., drainage ditch) waterway of perceptible extent that periodically or continuously contains moving water and has a definite bed and banks that serve to confine the water.
- (23) "Channel Relocation" means a type of removal in which a new channel is dug and the flow of the stream is diverted from the old channel into the new channel.

- (24) "Channelized or Relocated Stream" means a natural stream that has been diverted, dredged, straightened or diked. Channelized or relocated streams can be characterized by the following:
- (a) Have headwaters and may transport water from a spring or natural drainage;
 - (b) Is an integral part of a natural drainage;
 - (c) Have straight channels which may show signs of natural channel processes (e.g. meandering, pool and riffle development) if left undisturbed for a number of years;
 - (d) Typically flow along property or field boundaries; and
 - (e) May be perennial or intermittent.
- (25) "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 the 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.
- (26) "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.
- (27) "Cofferdam" means a temporary enclosure used to keep water from a work area.
- (28) "Commercial Aggregate Removal" means excavating sand, gravel or rock for the purposes of exchanging or reselling as a marketable commodity.
- (29) "Commercial Operator" means any person undertaking a project having financial profit as a goal.
- (30) "Compensatory Mitigation" means replacement of water resources that are damaged or destroyed by an authorized activity.
- (31) "Compensatory Mitigation Goal" means a broad statement(s) that describes the intent or purpose of the compensatory mitigation proposal. An example of a mitigation goal is "to establish a 10-acre diverse wetland habitat with four Cowardin wetland classes."
- (32) "Compensatory Mitigation Objective" means the specific direct actions necessary to achieve the compensatory mitigation goals. Mitigation objectives are performance based and measurable; they describe water regimes, vegetation structure, soil morphology, and/or habitat features that will be restored, enhanced, or created as a part of the compensatory mitigation plan. An example of an objective is "the vegetated areas will have 3 (three) acres each of emergent, scrub-shrub and forested wetland."
- (33) "Compensatory Wetland Mitigation" means activities conducted by an authorization holder, permittee or third party to create, restore or enhance wetland functional attributes to compensate for the adverse effects of project development or to resolve violations of ORS 196.800 to 196.905 or these rules.
- (34) "Compensatory Wetland Mitigation (CWM) Plan" means a document that describes in detail proposed compensatory wetland mitigation.

(35) "Comprehensive Plan" means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs and as further defined under ORS 197.015(5).

(36) "Completed Application" means a signed application form that contains all necessary information as described in OAR 141-085-0025 and as determined to be complete under OAR 141-085-0027.

(37) "Concentrator" means a device used to physically or mechanically separate and enrich the valuable mineral content of aggregate. Pans, sluice boxes and mini-rocker boxes are examples of concentrators.

(38) "Consent Agreement" means an informal **legally binding** agreement between the Department and the violator that is signed by both parties, where the violator voluntarily agrees to resolve a removal-fill violation.

(39) "Consent Order" means a formal, legally binding agreement between the Department and the violator that is signed by both parties, where the violator voluntarily agrees to resolve a removal-fill violation.

(40) "Converted Wetland" means, for the purposes of OAR 141-085-0020(4),
(a) Wetlands that on or before June 30, 1989, have been diked, drained, dredged, filled, leveled or otherwise manipulated to impair or reduce the flow, circulation or reach of water for the purpose of enabling production of an agricultural commodity and are managed for that purpose; and
(b) Includes land that the Natural Resources Conservation Service of the United States Department of Agriculture, or its successor agency, certifies as prior converted cropland or farmed wetland, so long as agricultural management of the land has not been abandoned for five or more years.

(41) "Cowardin Classification" means the comprehensive classification system of wetlands and deepwater habitats that was developed by the U.S. Fish and Wildlife Service (Cowardin et al. 1979).

(42) "Creation" means to convert an area that has never been a wetland to a jurisdictional wetland.

(43) "Creation of an Estuarine Area" means to convert an upland area into a shallow subtidal or an intertidal or tidal marsh area by land surface alteration. The area to be converted must be an upland area lying above the line of nonaquatic vegetation when alteration work begins.

(45) "Culvert" means a conduit designed and functioning to convey stream flows under an obstacle, such as, a corrugated metal pipe used to pass stream flow under a road.

(47) "Dam" means a structure or barrier constructed across a waterway to control the flow of the water.

(48) "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, these rules (OAR 141-085), any rule adopted pursuant to these rules (OAR 141-085), any **proposed or final** order adopted in accordance with these rules (OAR 141-085) or any authorization issued in accordance with these rules (OAR 141-085).

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

(50) "Degraded Wetland" refers to a wetland with diminished functional attributes resulting from hydrologic manipulation (such as diking, draining and filling) or

other human caused actions or events that demonstrably interfere with the normal functioning of wetland processes.

(51) "Dewatering" is the removal of water from a defined area (e.g., from within a cofferdam) using gravity or mechanical means (e.g. pumping).

(52) "Dike" means any embankment, usually earthen, constructed to control or confine water.

(53) "Directly Connected" as used in connection with exempt forest management practices means conducted as part of a commercial activity relating to the establishment, management or harvest of forest tree species. These activities include reforestation; road construction and maintenance; harvesting of forest tree species; application of chemicals; disposal of slash; site preparation; pre-commercial thinning; pruning; development of rock pits for forest road use; collecting cones and seeds; tree protection such as bud capping; and harvesting of minor forest products. These activities also include riparian and aquatic habitat restoration done as part of a forest management practice. Directly connected does not include fill and removal activities conducted as part of a land use change, even though commercial harvesting of forest tree species may be part of the land use change process.

(54) "Drainage Ditch" means channels excavated from the surface of the ground designed to remove surface or shallow ground waters. Drainage ditches can be characterized by the following:

- (a) Typically have no headwaters;
- (b) Carry water from local surface areas or subsurface drains;
- (c) May be permanently or intermittently wet;
- (d) Primarily constructed to remove excess water
- (e) Dry ditches are typically dry in summer or early fall and are constructed primarily to carry away water during winter storm events;
- (f) Wet ditches are wet all year round and carry water for drainage or irrigation purposes.

(55) "Dolphin" is a cluster of piles or piling which is bound together.

(56) "Drained" means a condition in which ground or surface water has been reduced or eliminated by artificial means.

(57) "Dredge Material Disposal Sites" or "DMD" means geographic locations identified as pre-approved by local government for the stockpiling or disposal of materials dredged from a waterway.

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

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

(60) "Emergency Letter of Authorization" is an expedited authorization that the Department may issue for the removal of material from the beds or banks or filling of any waters of the 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 (ORS 196.810(4)).

(61) "Emergency Wetlands Resources Act of 1986" means the federal legislation adopted as Public Law 99-645.

(62) "Enhancement" refers to a human activity that increases the function of an existing degraded wetland.

(63) "Enhancement of an Estuarine Area" means a long-term improvement of existing estuarine functional characteristics and processes that is not the result of a creation or restoration action.

- (64) “Environmentally Preferable” means having a higher likelihood of replacing wetland functional attributes or of improving water resources of the state.
- (65) “Erosion-Flood Repair” means the placement of riprap or any other work necessary to preserve existing structures, facilities and land from flood and high stream flows.
- (66) “Estuarine Resource Replacement” means the creation, the restoration or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary, such as its natural biological productivity, habitats and diversity of native species, unique features, and water quality.
- (67) “Estuary” means a body of water semi-enclosed by land and connected with the open ocean within which salt water is usually diluted by fresh water derived from the land. “Estuary” includes all estuarine waters, tidelands, tidal marshes and submerged lands extending upstream to the head of tidewater. However, for the purposes of these rules, the Columbia River Estuary extends to the western edge of Puget Island.
- (68) “Expiration Date” means the date the authorization to conduct the removal-fill specified in the authorization has ended. The authorization holder’s obligation to comply with the Department’s rules and authorization conditions continues indefinitely. For example, compensatory wetland mitigation requirements, including monitoring, extend until such requirements are fully satisfied according to the general and specific conditions attached to the authorization.
- (69) “Extreme Low Tide” means the lowest estimated tide that can occur. The elevation of Extreme Low Tide under these rules is established at -3.5 feet Mean Lower Low Water.
- (70) “Farm or Stock Pond” means a confined water body located on a working farm or ranch, created by human activity and used predominately for agricultural purposes.
- (71) “Farm Road” means a road on a working farm and that is used predominantly for agricultural purposes.
- (72) “Farm Use” means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the production of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. “Farm Use” includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. “Farm Use” also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. “Farm Use” also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the Oregon Fish and Wildlife Commission. “Farm Use” includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. “Farm Use” does not include the use of land subject to the provisions of ORS Chapter 321, except land used exclusively for growing cultured Christmas trees.
- (73) “Farmed Wetland” means land that the Natural Resources Conservation Service of the United States Department of Agriculture certifies as farmed wetland.
- (74) “Federal Endangered Species Act” or “ESA” means 16 U.S.C. 1531 et seq., administered by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS).

(75) "Fen" means a type of wetland that accumulates peat, receives some drainage from surrounding mineral soil and supports a wide range of vegetation types including sedge and moss-dominated communities and coniferous forests.

(76) "Fill" means the total of deposits of material, including pilings, by artificial means equal to or greater than 50 cubic yards at one location in any waters of this state. However, in designated Essential Indigenous Anadromous Salmonid Habitat (ESH) areas (OAR 141-102-0000 to OAR 141-102-0045) and in designated Scenic Waterways (OAR 141-100-0000 to OAR 141-100-0090) "fill" means any deposit by artificial means.

(77) "Financial Assurance(s)" means the money or other form of financial instrument (for example, surety bonds, trust funds, escrow accounts, proof of stable revenue sources for public agencies) required of the sponsor to ensure that the functions of the subject bank are achieved and maintained over the long-term pursuant to the terms and conditions of the Mitigation Bank Instrument.

(78) "Financial Security Instrument" means a Surety Bond, Certificate of Deposit, irrevocable letter of credit or other instrument to guarantee performance.

(79) "Fish Habitat Enhancement" means a project with the sole purpose of improving habitat conditions for fish.

(80) "Fish Passage/Fish Screening Structures" mean devices specifically designed to manage/direct the movement of fish.

(81) "Fishway" means any structure, facility or device that is designed to enable fish to effectively pass around or through an obstruction.

(82) "Floodplain" is that portion of a river valley, adjacent to the channel, which is built of sediments, deposited during the present regimen of the stream and is covered with water when the waterway overflows its banks at flood stage.

(83) "Food and Game Fish" means those species listed under either ORS 506.011 or 496.009.

(84) "Food-Producing Areas for Food and Game Fish" (as used in ORS 196.800 and these rules) are those **intermittent** stream reaches that flow during a portion of every year, that contain food and game fish and **include all tributaries one tributary upstream to the nearest confluence with another intermittent stream stream order classification upstream**. For example, if food and game fish are present in a second order stream, then all its first order tributaries would be classified under this definition.

(85) "Forest Management Practices" means commercial activity conducted on forestlands connected with growing and harvesting forest tree species, including but not limited to:

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

(86) "Forestland" means the same as used in the Forest Practices Act and rules (ORS 527.610 to 527.992 and OAR 629-024-0101 (26)) as 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.

(87) "Free and Open Connection" as used in OAR 141-085-0015 (2) means a connection by any means, including, but not limited to, culverts, to or between natural waterways and other bodies of water that allows the interchange of

surface flow at bankful stage or ordinary high water, or at or below mean higher high tide between tidal waterways.

(88) "Functional Attributes" are those ecological characteristics or processes associated with a wetland and the societal benefits derived from those characteristics. These ecological characteristics are widely known as "functions," whereas the associated societal benefits are widely known as "values." For example, wetland functions include, but are not limited to the following: providing habitat areas for fish and wildlife; nutrient breakdown, retention and/or assimilation; stormwater retention and controlled release. Values associated with those functions, respectively, might include: protecting listed species; water quality improvement; and flood attenuation and floodwater storage.

(89) "General Authorization" means a rule adopted by the Department authorizing, without an individual removal-fill permit, a category of activities involving removal or fill, or both, on a statewide or other geographic basis. (OAR 141-085-0070).

(90) "Geographic Region" for the purposes of the payment to provide option of a compensatory wetland mitigation plan, means one of the eighteen (18) Oregon drainage basins identified by the Oregon Water Resources Department (WRD) as shown on maps published by WRD.

(91) "Governmental Body" includes the federal government when operating in any capacity other than navigational servitude, the State of Oregon and every political subdivision therein.

(92) "Gravel" is loose rounded rock, particle size between 2 and 64 mm in diameter.

(93) "Groins" is a general category of structures that are designed to directly influence stream hydraulics, and may include barbs and vanes. The primary function of a groin is to provide roughness, dissipate energy, and reduce velocities near the bank. They may be oriented downstream, perpendicular, or upstream to the flow.

(94) "Habitat Enhancement" means to improve habitat areas through habitat manipulation and management.

(95) "Harvesting" means, for the purposes of OAR 141-085-0020(4), physically removing farm or ranch crops.

(96) "Hatchery" means any water impoundment or facility used for the captive spawning, hatching, or rearing of fish and shellfish.

(97) "Headwater" means the source of a stream or river (e.g. a spring).

(98) "Hearing Officer Panel" means the group established within the Employment Department, pursuant to the provisions of Sections 2 to 21, Chapter 849, Oregon Laws, 1999 (later codified within ORS 183.310 to 183.550), to provide hearing officers to conduct contested case proceedings.

(99) "Herbaceous Plants" are non-woody vegetation including forbs, grasses, rushes and sedges.

(100) "Highbanker" means a stationary concentrator capable of being operated outside the wetted perimeter of the water body from which water is removed, and which is used to separate gold and other minerals from aggregate with the use of water supplied by hand or pumping, and consisting of a sluice box, hopper, and water supply. Aggregate is supplied to the highbanker by means other than suction dredging. This definition excludes mini-rocker boxes.

(101) "Highbanking" means the use of a highbanker for the recovery of minerals.

(102) "Highest Measured Tide" means the highest tide projected from actual observations of a tide staff within an estuary or tidal bay.

- (103) "Hydraulicizing" means the use of water spray or water under pressure to dislodge minerals and other material from placer deposits.
- (104) "Hydric Soil" is a soil that is formed under conditions of saturation, flooding or ponding long enough during the growing season to develop anaerobic conditions in the upper part.
- (105) "Hydrophytic Vegetation" means macrophytic plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content.
- (106) "Hydrogeomorphic Method" or "HGM" is a method of wetland classification and functional assessment based on a wetland's location in the landscape and the sources and duration of water flow. The HGM approach identifies the wetland classes present in each region, defines the functions that each class of wetlands performs, and establishes reference sites to define the range of functioning of each wetland class.
- (107) "Impact" or "Effect" means the actual, expected or predictable results of an activity upon waters of the state including water resources, navigation, fishing and public recreation uses.
- (108) "Impounded Waters," means waters behind dams, weirs or other structures as measured to the maximum pool or top of the spillway, whichever is lower.
- (109) "Individual Removal-Fill Permit" is a permit issued to a person for a specific removal and/or fill activity that is not subject to a General Authorization or Emergency Authorization as defined in these rules.
- (110) "Intergovernmental Agreement" means a memorandum of agreement (MOA), memorandum of understanding (MOU), intergovernmental agreement (IGA), or other forms of agreement between government entities.
- (111) "Intermittent Stream" means any stream that flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.
- (112) "Intertidal or Tidal Marsh Area of an Estuary" means those lands lying between extreme low tide and the line of nonaquatic vegetation (Figure 1, *Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 8).
- (113) "Invasive Plants" mean non-native plants that aggressively compete with native species. For example, invasive plants include English ivy, reed canary grass and Himalayan blackberry.
- (114) "Irrigation Ditches" are channels excavated on the surface of the ground designed to convey water for the purpose of irrigating crops or pasture.
- (115) "Jetty or Jetties" means a pier or other structure projecting into a body of water to influence the current or tide or protect a harbor or shoreline.
- (116) "Land and Water Conservation Fund Act" means the federal legislation adopted as Public Law 88-578, as amended. (16 U.S.C. Section 460-L et seq.)
- (117) "Large Woody Material" means trees or tree parts larger than ten inches in diameter at the smallest end and longer than six feet, including rootwads.
- (118) "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.
- (119) "Letter of Authorization" is issued to a person confirming that the activity described in an application meets the requirements of a specific General Authorization adopted in accordance with these rules.
- (120) "Levee" means a human-made feature that restricts movement of water into or through an area.

(121) "Line of Nonaquatic Vegetation" means the upper limit of wetland vegetation, or, the point at which characteristic upland species become established in the vegetation, or, if not discernible, the line of Highest Measured Tide which is a projection from the highest tide actually observed on a tide staff within the estuary.

(122) "Listed Species" means any species listed as endangered or threatened under the federal Endangered Species Act (ESA) and/or any species listed as endangered, threatened or sensitive under the Oregon Endangered Species Act (OESA).

(123) "Location" as used in OAR 141-084-0010(76) means a physical place where a project is proposed, authorized or conducted.

(124) "Maintenance" means the periodic repair or upkeep of a structure in order to maintain its original function. Maintenance does not include any modification that changes the use of the structure. Maintenance includes expansion of a structure by not more than (20) twenty percent of its original footprint **within the waters of the state**.

(125) "Maintenance Dredging" means dredging to maintain the serviceability of an existing dredged channel to the previously authorized depths and areas for a previously defined project.

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

(127) "Maximum Pool Elevation" means the highest operating level of a reservoir.

(128) "Mining Access Road" means a road constructed for the sole purpose of serving a commercial gravel, placer or lode operation.

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

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

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

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

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures; and

(e) Compensating for the impact by replacing or providing comparable substitute wetlands or other waters.

(130) "Mitigation Bank" or "Bank" means wetland(s) and any associated buffer(s) restored, enhanced, created, or protected, whose credits may be sold or exchanged to compensate for unavoidable future wetland losses due to removal, fill, or alteration activities. ORS 196.600(2) further defines this term.

(131) "Mitigation Bank Credit" or "Credit" means the measure of the increase in wetland functional attributes achieved at a mitigation bank site. Wetland credits are the unit of exchange for compensatory wetland mitigation. ORS 196.600 (2) further defines this term.

(132) "Mitigation Bank Instrument" or "Instrument" means the legally binding and enforceable agreement between the Director and a mitigation bank sponsor that formally establishes the wetland mitigation bank and stipulates the terms and conditions of its construction, operation, and long-term management. The Instrument is usually in the form of a memorandum of agreement signed by

members of the Mitigation Bank Review Team (MBRT), but an order from the Department makes the Instrument legally binding and enforceable if a removal-fill permit is not required to construct the bank.

(133) "Mitigation Bank Prospectus" or "Prospectus" is a preliminary document prepared by a mitigation bank sponsor describing a proposed bank in detail sufficient to enable initial review by the Department. The Department uses the Prospectus to initially determine whether the proposed bank would be technically feasible, whether the bank is likely to be needed, and whether the bank can meet the policies stated in these rules.

(134) "Mitigation Bank Review Team" or "MBRT" is an advisory committee to the Department and the Corps on wetland mitigation bank projects.

(135) "Mitigation Bank Sponsor" or "Sponsor" is a person who is proposing, or has established and/or is maintaining a mitigation bank. The sponsor is the entity that assumes all legal responsibilities for carrying out the terms of the Instrument unless specified otherwise explicitly in the Instrument.

(136) "Movement by Artificial Means," means to excavate, alter or otherwise displace material such as, but not limited to: mechanically moving gravel within a streambed, suction dredging for recreational or placer mining, blasting, plowing, and land clearing activities such as grading, scraping and displacing of inorganic material associated with stump removal (except as otherwise allowed by OAR 141-085-0020 for normal farming and ranching activities and other exempted actions).

(137) "Native Vegetation" means plant species that occurred or are documented to have occurred within the State of Oregon prior to Euro-American settlement.

(138) "Natural Biological Productivity" means the sum of all biomass production in an estuary including biological production at all trophic levels under, on, and above the land surface.

(139) "Natural Resources In and Under the Waters of this State" means aquatic life and habitats and includes resources such as shellfish beds, spawning and rearing areas for anadromous fish, gravel and minerals, and other sites and avenues for public recreation, navigation and public commerce within the waters of this state.

(140) "Natural Waterways," as used in ORS 196.800(14), means waterways created naturally by geological and hydrological processes, waterways that would be natural but for human-caused disturbances (e.g., channelized or culverted streams, impounded waters, partially drained wetlands or ponds created in wetlands) and that otherwise meet the definition of waters of the state, and certain artificially created waterways as described in "Other Bodies of Water" (OAR 141-085-0015 (2)(e)).

(141) "Navigational Servitude" means activities of the Federal Government that directly result in the construction or maintenance of Congressionally authorized navigation channels.

(142) "Normal Farming and Ranching Activities" for the purpose of the exemption on converted wetlands (OAR 141-085-0020) are activities that directly adapt or use the land for the growing of crops or the raising of livestock and are unique to agriculture.

(143) "Non-Motorized Methods or Activities" are those removal-fill activities within Essential Indigenous Anadromous Salmonid Habitat 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 cable winches are examples of common non-motorized methods.

(144) "Non-Navigable" means a waterway that is not navigable for title purposes or where title navigability has not been determined by the State Land Board in accordance with ORS 274. Contact the Department for the latest listing of navigable waterways.

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

(146) "Non-Wetland" means an area that does not meet the wetland definition and criteria.

(147) "Ocean Shore" means the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is farther inland.

"Ocean shore" does not include an estuary as defined in ORS 196.800. The "Ocean shore" is regulated by the Oregon Department of Parks and Recreation.

(148) "Off-site compensatory wetland mitigation" or "off-site CWM" means activities conducted away from the project site to restore, create or enhance wetland function attributes in order to compensate for the adverse impacts to wetlands from project development.

(149) "On-site compensatory wetland mitigation" or "on-site CWM" means activities conducted at the project site to restore, create or enhance wetland functional attributes in order to compensate for the adverse impacts to wetlands from project development.

(150) "Ordinary High Water Line" (OHWL) means the line on the bank or shore to which the high water ordinarily rises annually in season (ORS 274.005). The OHWL excludes exceptionally high water levels caused by large flood events (e.g. 100 year events). OHWL is indicated in the field by the following physical characteristics:

(a) Clear, natural line impressed on the shore;

(b) Change in vegetation (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, 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.

(151) "Oregon Endangered Species Act" or "OESA" means ORS 496.171 to ORS 496.192, administered by ODFW, and ORS 564.010 to ORS 564.994 administered by the Oregon Department of Agriculture (ODA).

(152) "Oregon Scenic Waterway" means a river or segment of river or lake that has been designated as such in accordance with ORS 390.805 to 390.925.

(153) "Oregon Wetlands Priority Plan" or "Plan" means a plan developed pursuant to these rules and approved by the State Land Board that establishes a procedure for setting priorities and creates a list of wetlands and interests therein for possible acquisition in accordance with the federal Emergency Wetlands Resources Act of 1986 (Public Law 99-645).

(154) "Other Waters" means waters of the state other than wetlands.

(155) "Passive Revegetation" means a strategy allowing the re-establishment of non-invasive vegetation without planting or seeding.

- (156) "Payment to Provide Mitigation" means compensatory wetland mitigation performed using cash paid to the Department or by agreement of the Department to an approved third party.
- (157) "Perennial Stream" means a stream with flow that lasts throughout the year.
- (158) "Person" is an individual, a political subdivision or government agency, or any corporation, association, firm, partnership, joint stock company, limited liability company, limited liability partnership, or quasi-public corporation registered to do business in the State of Oregon.
- (159) "Piles/Piling" is a wood, steel or concrete beam placed, driven or jetted into the beds or banks of a water of the state.
- (160) "Placer" includes a glacial or alluvial deposit of gravel or sand containing eroded particles of minerals, eroded hard rock vein material (residual placer) and clay.
- (161) "Plan View" means a drawing of the project site drawn as if the viewer were seeing the area from overhead.
- (162) "Plant Community" is an assemblage of plants that repeat across the landscape in a similar environment. Plant communities are named according to the dominant plant in each of the layers that are present, either shrub, tree or forb.
- (163) "Plowing" means, for the purposes of OAR 141-085-0020(4), all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surface materials in a manner that changes any areas of the water of the state to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetlands areas is not plowing. Plowing, as described above, will never involve filling.
- (164) "Pond" means an artificially confined body of water.
- (165) "Pool" means a portion of the stream with reduced current velocity, often with water deeper than the surrounding areas.
- (166) "Practicable" means capable of being accomplished after taking into consideration cost, existing technology, and logistics with respect to the overall project purpose.
- (167) "Prior Converted Cropland" means land that the Natural Resource Conservation Service of the United States Department of Agriculture, or its successor agency, certifies as prior converted cropland.
- (168) "Private Operator" means any person undertaking a project for exclusively a nonincome-producing and nonprofit purpose;
- (169) "Project" means the primary development or use intended to be accomplished (e.g. retail shopping complex, residential development) .
- (170) "Project Area" means the physical space in which the removal-fill takes place including any on site or off-site mitigation site. "Project Area" includes the entire area of ground disturbance, even though not within waters of the state, including all staging areas and access ways, both temporary and permanent.
- (171) "Proposed Enforcement Order" means a notice of civil penalty, proposed restoration order or any other proposed order issued by the Department to enforce the requirements of the Removal-Fill Law. The proposed order contains provisions allowing the alleged violator to request a contest case hearing. If the alleged violator does not elect this option, then a final order is issued.

- (172) "Prospecting" means searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods from among small quantities of aggregate.
- (173) "Protection" means to prevent human activities from destroying or degrading functions of waters of state.
- (174) "Public Body" means federal, state, and local governmental bodies, unless specifically exempted by law, engaged in projects for the purpose of providing free public services (ORS 196.815(3)(d)(B));
- (175) "Public Use" means a publicly owned project or a privately owned project that is available for use by the public.
- (176) "Push-up Dam" is 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 (i.e. a 'removal'). 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 re-constructed each water use season; high water usually flattens or breaches them or equipment is used to breach or flatten them at the close of the water use season.
- (177) "Rare Plant Communities" means plant community types ranked by the Oregon Natural Heritage program as either S1 or S2. Rare plant communities are threatened by either natural or human-made causes.
- (178) "Reasonably Expected Adverse Impacts" means the direct or indirect damaging or injurious impacts or effects of an activity that is likely to occur to waters of the state including water resources and navigation, fishing and public recreation uses.
- (179) "Recreational and Small Scale Placer Mining" includes, but is not limited to, the use of non-motorized equipment and motorized surface dredges having an intake nozzle with an inside diameter not exceeding four (4) inches, and a muffler meeting or exceeding factory-installed noise reduction standards. This phrase does not include "prospecting" as defined by OAR 141-085-0010 above, which does not require a permit or letter authorization from the Department.
- (180) "Reconstruction" means to rebuild; to construct again.
- (181) "Reference Site" means a site or sites that have similar characteristics as those proposed for direct compensatory wetland mitigation. A reference site represents the desired future successful condition of a particular compensatory wetland mitigation plan.
- (182) "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 Essential Indigenous Anadromous Salmonid Habitat (ESH) areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.
- (183) "Removal-Fill Law" means the Oregon Revised Statutes (ORS) 196.800 to 196.990 and 196.600 to 196.692 relating to the filling and/or the removal of material in the waters of this state including wetlands.
- (184) "Restoration" means to reestablish wetland hydrology to a former wetland sufficient to support wetland characteristics.
- (185) "Restoration of an Estuarine Area" means to revitalize or re-establish functional characteristics and processes of the estuary diminished or lost by past

alterations, activities, or catastrophic events. A restored area must be a shallow subtidal or an intertidal or tidal marsh area after alteration work is performed, and may not have been a functioning part of the estuarine system when alteration work begins. NOTE: Mitigation credit may be given for enhancement of areas that are already a functioning part of the estuarine system.

(186) "Restoration Order" means a legally binding order **that requires** *requiring* a violator to restore **water resources** *waters* of the state, **provide compensatory mitigation or** *and may require remittance* of a civil penalty to the Common School Fund.

(187) "Revetment" is a blanket of hard material placed to form a structure designed to protect a bank from erosion. It is normally composed of rock riprap, but can be constructed of poured concrete or preformed concrete blocks.

(188) "Riparian" means a zone of transition from an aquatic ecosystem to a terrestrial ecosystem, as defined in ORS 541.351(10).

(189) "Riprap" means facing a streambank with rock or similar substance to control erosion in accordance with these regulations.

(190) "Road Prism" means the excavation and embankment areas of roadbed **within the waters of the state.**

(191) "Scenic Waterway" 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 390.925.

(192) "Sediment" is material that originated from the weathering of rocks and decomposition of organic material that is transported by, suspended in, and eventually deposited by water, air or is accumulated in beds by other natural phenomena (e.g. sand, silt).

(193) "Seeding" means, for the purpose of OAR 141-085-0020(4), the sowing of seed and placement of seedlings to produce farm or ranch crops.

(194) "Serviceable" means capable of being used for its intended purpose. For example, a serviceable road is one upon which vehicles can be safely driven.

(195) "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, 1794, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects from project development. Service areas for mitigation banks are not mutually exclusive.

(196) "Shellfish" are saltwater and freshwater invertebrates with a shell, including but not limited to clams, crabs, mussels, oysters, piddocks, scallops and shrimp.

(197) "Showing Before the Department" means to prove, make apparent, or make clear by presenting evidence to the Director of the Department of State Lands or designee.

(198) "Siltation/Deposition" means the settlement or accumulation of material out of the water column and into the streambed of the waterway. It occurs when the energy of flowing water is unable to support the load of the suspended sediment.

(199) "Sluice Box" means a trough equipped with riffles across its bottom, used to recover gold and other minerals with the use of water.

(200) "Sluicing" means the use of a sluice box for the recovery of gold and other minerals.

(201) "Statewide Comprehensive Outdoor Recreation Plan" means the plan created by the State Parks and Recreation Department pursuant to the federal Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C.460-L et seq.) ORS 196.635.

- (202) "Stormwater" means storm water runoff, snow melt runoff, and surface runoff and drainage.
- (203) "Stream" means a body of running water moving over the surface of the land in a channel or bed including stream types classified as perennial, intermittent and channelized or relocated streams.
- (204) "Stream Order Classification" means a system to categorize streams. A small unbranched headwater tributary is a first order stream. Two first order streams join to make a second order stream. A third order stream has only first and second order tributaries and so forth.
- (205) (204) "Streambank Stabilization" means those projects which prevent or limit erosion, slippage, and mass wasting; including, but not limited to bank re-sloping, planting of woody vegetation, bank protection (physical armoring of banks using rock or woody material, or placement of jetties or groins), or erosion control.
- (206) (205) "Structure" means an object, device (e.g., piling, culvert), excavation or alteration (e.g., irrigation ditch or push-up dam) that is constructed, installed or erected, and is designed to accomplish a specific purpose. Structures require a location in waters of the state (e.g., push-up dams), or are attached to and/or interconnected with waters of the state (e.g., irrigation or drainage ditch).
- (207) "Subbasin" is a drainage area described by the United States Geologic Survey fifth field hydrologic unit.
- (208) "Substrate" means the mineral and/or organic material that forms the bed of a waterway.
- (209) "Success Criteria" means the measurable threshold that establishes when compensatory mitigation, **compensatory wetland mitigation or permit conditions** objectives have been met (e.g. The cover of native emergent species will be at least 80% as measured by belt transects). Also called "performance standards" or "success targets."
- (210) "Suction Dredge" means a machine equipped with an internal combustion engine or electric motor powering a water pump that is used to move submerged bed materials by means of hydraulic suction. These bed materials are processed through an attached sluice box for the recovery of gold and other minerals.
- (211) "Suction Dredging" means the use of a suction dredge for the recovery of gold and other minerals.
- (212) "Surety Bond" means an indemnity agreement in a sum certain executed by the permittee as principal that is supported by the performance guarantee of a corporation licensed to do business as a surety in the state of Oregon.
- (213) "Temporary Impacts" means those impacts that do not result in the permanent loss of function and/or area and are rectified within twelve (12) months of project completion.
- (214) "Tidal Bay" means estuaries, ocean coves, inlets and similar semi-enclosed bodies containing water influenced by the tide.
- (215) "Tidegate" means a structure placed in an estuarine channel designed to regulate water levels.
- (216) "Tile Drain System" means a subsurface conveyance system used to drain soils for agricultural production or other purposes.
- (217) "Toe of the Bank" means the distinct break in slope between the stream bank or shoreline and the stream bottom or marine beach or bed, excluding areas of sloughing. For steep banks that extend into the water, the toe may be submerged below the ordinary high water line. For artificial structures, such as jetties or

bulkheads, the toe refers to the base of the structure, where it meets the streambed or marine beach or bed.

(218) "Uplands" are any land form that does not qualify as waters of the state.

(219) "Unique Features" means those physical, biological, chemical, and esthetic characteristics and attributes of an estuary that are uncommon, extraordinary, rare, threatened, or endangered.

(220) "U.S. Army Corps of Engineers" or "Corps" means the United States Army Corps of Engineers.

(221) "Vernal Pools" are types of wet meadow habitat areas with specific, diagnostic plant assemblages that are intermittently flooded with shallow water for extended periods during the cool season, but dry for most of the summer.

(222) "Violation" means removing material from or placing fill in any waters of this state without a permit an authorization (authorization) or in a manner contrary to the conditions set out in a permit an authorization issued under the Removal-Fill law or these rules.

(223) "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.

(224) "Water Resources" includes not only water itself but also aquatic life and habitats and all other natural resources in and under the waters of this state.

(225) "Waters of this State" means natural waterways including all tidal and nontidal bays, intermittent and perennial streams (i.e., streams), lakes, wetlands and other bodies of water in this state, navigable and nonnavigable, including that portion of the Pacific Ocean, which is in the boundaries of this state. "Waters of this state" does not include the ocean shore, as defined in ORS 390.605.

(226) "Watershed" means the entire land area drained by a stream or system of connected streams such that all stream flow originating in the area is discharged through a single outlet.

(227) "Weir" means a levee, dam or embankment or other barrier placed across or bordering a waterway to:

(a) Measure or regulate the flow of water;

(b) Divert fish into a trap; or

(c) Raise the level of the waterway or divert stream flow into a water distribution system.

(227) "Wet Perimeter", as used in OAR 141-089-0245 thru 0275, means the area of the stream that is under water, or is exposed as a nonvegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

(228) "Wetland Hydrology" means the permanent or periodic inundation or prolonged saturation sufficient to create anaerobic conditions in the soil and support hydrophytic vegetation.

(229) "Wetland Maintenance" means the process of supporting or preserving the condition or functions of a wetland as a management component of a compensatory wetland mitigation plan.

(230) "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.

(231) "Woody Plants" means trees and shrubs.

141-085-0015

Removal-Fill Jurisdiction by Volume of Material and Location of Activity

(1) The Department's determination as to whether a removal-fill authorization is required depends primarily upon a project's position relative to waters of the state and the volume of the fill and/or removal and the project purpose. Uplands are generally not subject to these rules except when they are used for compensatory wetland mitigation or compensatory mitigation sites.

(2) To be subject to the requirements of the removal-fill law, the removal or fill must be within "waters of the state." The types of waters of the state and the physical limits of removal-fill jurisdiction are as follows:

- (a) Estuaries and tidal bays, to the elevation of highest measured tide;
- (b) The Pacific Ocean, from the line of extreme low tide seaward to the limits of the territorial sea,
- (c) Rivers, intermittent and perennial streams, lakes, ponds and all other bodies of water (except wetlands) subject to these rules, to the ordinary high water line, or absent readily identifiable field indicators, the bankfull stage;
- (d) Wetlands (defined in OAR 141-085-0010), within the wetland boundary delineated in accordance with OAR 141-090-0005 to 0055.
- (e) "Other Bodies of Water," as used in ORS 196.800(14) are the following artificially created waters which are considered "waters of the state":
 - (A) Wetlands and ponds artificially created from uplands, unless specified in OAR 141-085-0015(4) or (5) that are:
 - (i) Equal to or greater than (1) one acre in size; or
 - (ii) Identified in a removal-fill authorization as a compensatory mitigation site.
 - (B) Except as described in OAR 141-085-0015(3) and (6), channels or ditches that are artificially created from upland that:
 - (i) Contain food and game fish; and
 - (ii) Have free and open connection to waters of the state.

(3) "Other Bodies of Water" do not include existing irrigation canals and ditches that meet the following requirements:

- (a) Are operated and maintained for the primary purpose of conveying water for irrigation; and
- (b) Are dewatered during the non-irrigation season except for water incidentally retained in isolated low areas of the canal/ditch or for stock water runs, provision of water for fire services or storm water runoff.

(4) "Other Bodies of Water" do not include wetlands artificially created from uplands of up to one acre in size for the purpose of controlling, storing or maintaining stormwater (ORS 196.687).

(5) "Other Bodies of Water" do not include channels, wetlands or ponds of any size artificially created from uplands for the purpose of:

- (a) Wastewater treatment;
- (b) Farm or stock watering (including crop irrigation);
- (c) Settling of sediment;
- (d) Fire suppression;
- (e) Cooling water;

- (f) Surface mining, where the site is managed for interim wetlands use or not protected as a significant wetland in the comprehensive plan (pursuant to ORS 196.672(10));
 - (g) Log storage; or
 - (h) Aesthetic purposes, including golf course features.
- (6) “Other Bodies of Water” do not include drainage ditches alongside roads and railroads where the ditch is:
- (a) Ten (10) feet wide or less at the ordinary high water line;
 - (b) Artificially created from upland or from wetlands (e.g. in mapped hydric soils);
 - (c) Not adjacent and connected or contiguous with other wetlands; and
 - (d) Do not contain food or game fish.
- (7) Even if located within an area described in OAR 141-085-0015(2), to be subject to the removal-fill law and these rules the removal-fill must also be of a volume that meets one of the following thresholds and must not be exempt from removal fill authorization as described in OAR 141-085-0020:
- (a) Oregon Scenic Waterways, the threshold volume is any amount greater than (0) zero, except for recreational prospecting, as defined in ORS 390.835(18)(c) and OAR 141-0100, and any non-motorized activities;
 - (b) Streams designated as Essential Indigenous Salmonid Habitat (ESH) (see OAR 141-102, the threshold volume is one cubic yard at any one site (for prospecting and non-motorized activities), and cumulatively no more than five cubic yards (for prospecting and non-motorized activities), or an authorization is required (unless exempted under OAR 141-085-0020);
 - (c) All other waters of the state subject to these rules, the threshold amount is no more than 50 cubic yards (or the equivalent weight in tons) of material removed or filled, or an authorization is required (unless exempted under OAR 141-085-0020).
- (8) Fill volume is measured to the elevation of jurisdiction for all waters of the state; removal volume for all waters includes the full extent of the excavation within the jurisdictional area. For wetlands, fill volume is measured to the height of the fill excluding buildings.
- (9) When calculating the volume for channel relocation the threshold is met if more than 50 cubic yards of material is removed in constructing the new channel or if it would require more than 50 cubic yards of material to completely fill the old channel.
- (10) Removal-fill activities that are exempt under state law may nonetheless be regulated under applicable federal laws, including the federal Endangered Species Act (16 U.S.C. 1531 *et seq.*), section 404 of the federal Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), as amended.

Stat. Auth.: ORS 196.800; ORS 196.810; ORS 390.835

Stats. Implemented: ORS 196.800- 196.990; ORS 390.805- 390.925

141-085-0018

Required Authorizations; Permits and Authorizations Generally

- (1) Unless exempt as provided in OAR 141-085-0020, no person may conduct any removal-fill in waters of the state and within the thresholds (OAR 141-085-

0015) without first being authorized by the Department by one of the following authorization types as appropriate:

- (a) An individual removal-fill permit; or
- (b) A letter of authorization issued under a General Authorization as defined in OAR 141-085-0070; or
- (c) An emergency letter of authorization issued in accordance with OAR 141-085-0066.

(2) The Department shall prescribe the type of authorization to be issued.

(3) Each type of authorization, when issued, shall include, but not be limited to, the following:

- (a) Project description.
- (b) Expiration date. The date of expiration shall be no more than five years from the date of issue, unless authorized by the Department in accordance with OAR 141-085-0031 or OAR 141-089.
- (c) Permit or authorization holder information. Name, address and telephone number of the authorization holder and the person responsible for complying with the permit conditions;
- (d) Authorization conditions. A comprehensive, specific listing of all performance requirements to be met by the authorization holder in order to complete the removal-fill activity in a manner that complies with these rules or any general authorization; and
- (e) Compensatory mitigation plan. Compensatory freshwater or estuarine mitigation plans for all wetlands and compensatory mitigation plans for other waters as applicable.

Stat. Auth.: ORS 196.800; ORS 196.810; ORS 196.825; ORS 196.850

Stats. Implemented: ORS 196.800- 196.990

141-085-0020

Activities Exempt From Removal-Fill Authorization Requirements

The following activities, uses or structures are exempt and not subject to the removal-fill law or these rules. These exemptions do not apply to removal-fill activities in Oregon Scenic Waterways. The Department shall determine if a project is exempt from the requirements of OAR 141-085-0018 by applying the standards described in this section.

(1) Exempt forest management practices. These rules do not apply to removal-fill directly connected (as defined in OAR 141-085-0010) with a forest management practice when conducted within the beds and banks of non-navigable waterways on forestlands and in accordance with the Oregon Forest Practices Act (ORS Chapter 527). Contact the Department for the latest list of state-owned navigable waterways.

(2) Exempt fills for certain dams and water diversion structures. These rules do not apply to fills within waters of the state for the construction, operation and maintenance of dams or other water diversions for which authorizations or certificates have been or shall be issued by the Oregon Water Resources Department (WRD) under ORS Chapters 537 or 539 (water appropriation) and for which preliminary authorizations or licenses have been or shall be issued under ORS 543 or 543A (hydropower). These rules also do not apply to annual work required to activate, operate and maintain flashboard type dams within waters of the state as specifically permitted by WRD. These exemptions apply only when the dam or diversion is referenced in the water permit or certificate. A

removal-fill authorization is required for construction of certain structures associated with a dam or water diversion facility (such as but not limited to: fishways, streambank enhancement, fish habitat enhancement, access roads and erosion protection) and for removal activities for projects authorized by ORS 537, 539, or 543.010 to 543.620.

(3) Navigational Servitude. These rules do not apply to removal fill within waters of the state conducted by any agency of the Federal Government acting in the capacity of navigational servitude in connection with a federally authorized navigation channel (i.e., channel dredging). **Disposal of dredged material within the ordinary high water of the waterway containing the federally authorized navigation channel is considered to be an activity covered by this exemption for navigational servitude.**

(4) These rules do not apply to “normal farming and ranching activities” on converted wetlands, as defined in OAR 141-085-010. Such activities include the following:

- (a) Plowing,
- (b) Grazing,
- (c) Seeding,
- (d) Cultivating,
- (e) Conventional crop rotation,
- (f) Harvesting for the production of food and fiber; and
- (g) Upland soil and water conservation practices or reestablishment of crops under federal conservation reserve program provisions.

(5) These rules do not apply to the following activities conducted on exclusive farm use zoned land as designated in the city or county comprehensive plan and zoning ordinance.

- (a) Drainage or maintenance of farm or stock ponds;
- (b) Maintenance of farm roads where such roads are maintained in accordance with construction practices that avoid significant adverse affect to wetlands. Up to fifty (50) cubic yards of borrowed material for exempt road maintenance annually may come from waters of the state. Maintenance activities shall be confined to the same limits of the originally approved structure(s).
- (c) Subsurface drainage, by deep ripping, tiling or moling on converted wetlands;
- (d) Any activity described as a farm use in OAR 141-085-0010, including farm road construction and maintenance, that is conducted on prior converted cropland as defined in OAR 141-085-0010, so long as agricultural management of the land has not been abandoned for five or more years.

(6) Exemptions do not apply to non-farm uses. The exemptions in subsections (4) and (5) of this section (OAR 141-085-0020) shall not apply to any fill or removal which involves changing any wetlands to a non-farm use.

(7) Exempt “activities customarily associated with agriculture”. Fill or removal activities involving less than 50 cubic yards of material as defined in OAR 141-102 and OAR 141-085-0010 for activities customarily associated with agriculture within Essential Indigenous Anadromous Salmonid Habitat streams (as designated under OAR 141-102-0030) are exempt from these rules.

(8) Exempt maintenance or reconstruction of certain structures. Maintenance, or reconstruction of certain structures within waters of the state such as dikes, dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches,

irrigation structures and tile drain systems are exempt from the requirements of these rules, provided that:

- (a) The structure was serviceable within the past five (5) years; and
- (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the wetlands or waters of this state were affected as a result of the original construction of those structures.

(9) Exempt maintenance, repair, replacement or removal of culverts. These rules do not apply to removal-fill activities within waters of the state for the maintenance, reconstruction or removal of culverts as defined in OAR 141-085-0010. This exemption includes culvert replacement (without regard to the size of the replacement culvert) when all of the following apply:

- (a) The removal fill is limited to the extent of the existing road prism (as defined in OAR 141-085-0010) and may, consistent with OAR 141-085-0010 (124), expand the original footprint of the structure by up to 20 percent if fish passage design requires removal or fill outside the road prism in order to successfully pass fish, the removal/fill volume and area of impact is limited to the minimum necessary to restore the function of the structure and provide fish passage but not more than 20 percent of the original footprint;
- (b) The culvert was serviceable within the past five (5) years;
- (c) The removal-fill does 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 and placement of the culvert.
- (d) The culvert is replaced in a manner that assures fish passage and complies with the design guidelines of the Oregon Department of Fish and Wildlife (e.g. counter sinking the new culvert to accommodate the natural bank full width and replicating the stream's natural streambed configuration).

(10) Exempt push-up dams. A push-up dam, as defined in OAR 141-085-0010, within waters of the state, that was first built prior to the effective date of the Removal-Fill Law in 1967 (September 13, 1967) is exempt from the authorization requirements under these rules if:

- (a) It has been reconstructed and used within the past five (5) years; and
- (b) It has the same impact as when it was first constructed (i.e., size, extent and location); and
- (c) It is operated in a manner consistent with the water right certificate and ORS 540.510 (5).

(11) On-going maintenance of push-up dams allowed. Once authorized by the Department, a post-1967 push-up dam within waters of the state may be maintained during the irrigation season and reconstructed each successive season provided the work is done in compliance with all original permit conditions and the push-up dam's impact to the stream is no more than when it was first authorized (i.e., it still has to allow for fish passage). A push-up dam involving less than fifty (50) cubic yards, located within a stream designated as Essential Indigenous Anadromous Salmonid Habitat (see OAR 141-102) and used for "activities customarily associated with agriculture" as defined in OAR 141-102 and OAR 141-085 is exempt from authorization requirements.

(12) Exempt maintenance including emergency reconstruction of roads and transportation structures. These rules do not apply to removal-fill for maintenance, including emergency reconstruction of recently damaged parts, of currently

serviceable roads or transportation structures such as groins and riprap protecting roads, causeways and bridge abutments or approaches. Volumes and area of impact should be limited to the minimum necessary to restore the serviceability and function of the structure.

(13) Exempt small-scale prospecting and non-motorized activities within Essential Indigenous Anadromous Salmonid Habitat. Prospecting or other non-motorized activities within waters of the state resulting in the removal, fill or alteration of less than one (1) cubic yard of material at any one site and, cumulatively not more than five (5) cubic yards of material, from within an Essential Indigenous Anadromous Salmonid Habitat stream segment (as designated in OAR 141-102) in a single calendar year do not require authorization under these rules. Such exempt prospecting or non-motorized activity must remain within the bed or wet perimeter of the waterway. This exemption does not allow removal or fill within waters of the state at any site where fish eggs are present.

(14) Exempt fish passage and fish screening in Essential Indigenous Anadromous Salmonid Habitat only. The construction and maintenance, involving less than fifty (50) cubic yards of fill or removal, of fish passage and fish screening structures built, operated and maintained in Essential Indigenous Anadromous Salmonid Habitat under ORS 498.311, 498.316, 498.326, or ORS 509.580 to ORS 509.645 do not require authorization under these rules. This exemption includes removal of material or gravel bars that inhibit passage or prevent screens from functioning properly.

(15) Any removal-fill not exempt under this section (OAR 141-085-0020) is subject to authorization requirements.

Stat. Auth.: ORS 196.810; ORS 196.805
Stats. Implemented: ORS 196.800- 196.990

141-085-0021

Administration of the State Programmatic General Permit

(1) The State Programmatic General Permit (SPGP) authorizes work in waters of the United States within the State of Oregon for activities that would cause no more than minimal adverse environmental effects, individually and cumulatively, subject to the terms, conditions and limitations contained in the SPGP.

(2) An SPGP has been issued by the Portland District of the US Army Corps of Engineers as provided by 33 CFR 325.5 (c)(3), pursuant to Section 404 of the Clean Water Act (P.L. 95-217) and Section 10 of the River and Harbor Act of 1899, as amended.

(3) The purpose of the SPGP is to reduce duplicative state and federal regulatory processes, simplify the application process for applicants and make better use of limited government resources while enhancing protection and conservation of the water resources of the state.

(4) The SPGP is a type of general permit, issued by the Corps that authorizes certain activities that also are regulated by the Department. This SPGP is based on the existing state Removal-Fill Law and the administrative rules promulgated to administer the law.

(5) The SPGP will be the only vehicle where removal fill applicants can simultaneously obtain approvals under all of these state and federal mandates in one, integrated package. To be eligible for the SPGP removal

fill activities must up to 0.5 acre of wetland fill and/or up to 1,000 cubic yards of fill or removal and be one of the following types:

- a. Bank reshaping and slope grading**
- b. Placement of engineered log jams for fish habitat**
- c. Construction of barbs placed below bank full elevation**
- d. Improvement to fish screens or diversions for fish hatcheries**
- e. Installation of outfall and intake structures to support existing service**
- f. Utility line installation, including pipelines, cable or wire transmission lines**
- g. Road shoulder repair, sign installation, bridge maintenance or ditch cleaning**
- h. Construction, repair or expansion of residential, commercial and/or institutional building foundations or pads and attendant features such as roads, parking lots, garages and utility lines**
- i. Stream and wetland restoration techniques such as road decommissioning, setback levees, dikes and berms, removal of levees, dikes or berms and removal of other fish passage barriers**
- j. Boat ramp cleaning and repair**
- k. Survey activities including core sampling and seismic exploratory operations**
- l. Repair, upgrade and/or replacement of existing piling**

(5) The Department will advise applicants as to how to design a project to qualify for the SPGP. A project that is approved by the Department under the SPGP will be in compliance with the federal Endangered Species Act.

141-085-0022

Removal-Fill Permits Authorized in Site Selection or Site Certificate Proceedings; Hazardous Substances

(1) Upon submission by the applicant of proper applications and payment of the proper fees, the Department shall issue the permits authorized by the authorized siting entity, 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. This section applies to:

- (a) The decisions of the Corrections Facility Siting Authority, pursuant to ORS 421.628, relating to siting corrections facilities;
- (b) The decisions of the Environmental Quality Commission, pursuant to ORS 459.047, relating to siting solid waste land fills; and
- (c) The decisions of the Energy Facility Siting Council, pursuant to ORS 469.300 et seq. related to siting energy facilities.

(2) The standards contained in these removal-fill program rules do not govern complete applications received by any of the agencies listed above before the effective date of these removal-fill program rules. For all such applications, the standards in effect as of the date of receipt apply to consideration of whether the applicable agency shall approve or deny the application.

(3) Under ORS 465.315, no removal-fill authorization is required for the portion of any removal or remedial action conducted on-site where such removal or

remedial action has been selected or approved by the Department of Environmental Quality. The responsible party must notify the Department of its intended action, pay applicable fees in accordance with OAR 141-085-0064, and must comply with protective measures that the Department would otherwise apply.

Stat. Auth.: ORS 421.628; ORS 459.047; ORS 469.300
Stats. Implemented: ORS 421.628; ORS 459.047; ORS 469.300

141-085-0023

Expedited Process for Industrial or Traded Sector Sites

(1) The Department shall offer an expedited process of planning and authorizing removal-fill within waters of the state for certain industrial or traded sector sites identified by the Governor's Office of Economic Revitalization (GERT) or having the potential to be certified by the Oregon Economic and Community Development Department.

(2) The Director shall, upon the request of GERT or the Oregon Economic and Community Development Department, designate a site for expedited planning and processing as described in OAR 141-085-0023 of this rule. GERT or the OECDD shall provide the contact information for the project proponent or sponsor. The proponent or sponsor shall have authority to authorize the Department or its agents physical access to the site.

(3) The Director shall assign a project leader from the Department to work with the sponsor and the other applicable regulatory and natural resource agencies. Such work includes assistance and guidance in the preparation of reports, plans and permits application documents necessary to expedite issuance of an authorization under these rules or to avoid the need to obtain an authorization by planning the project in such a way so as to not be within the jurisdiction of these rules.

(4) The project sponsor, the Department and any other parties, public or private, deemed appropriate by the primary partners (i.e. the Department and the project sponsor(s)) will enter into a partnership agreement for the project that outlines the roles and responsibilities of each party and the performance requirements of all involved including a projected schedule for completion and approval of all work.

(5) The work to be accomplished by the Department through the partnership could include, but is not limited to, the following:

(a) Coordination and direction of contracts for:

- (A) The determination and delineation of waters of the state within the project site or mitigation site, if needed;
- (B) The completion of functional assessments for the waters of the state within the project site or mitigation site if needed; and/or
- (C) The completion of removal-fill authorization application materials (including but not limited to: alternatives analysis; compensatory mitigation plans)

(b) Review and concurrence with jurisdictional determinations in accordance with OAR 141-090;

(c) Technical assistance and guidance in the development of the site master plan with an emphasis on the mitigation (as defined in OAR 141-0850115) of project impacts to waters of the state;

- (d) Technical assistance in the preparation of removal-fill authorization application materials including guidance on the most appropriate and expedient removal-fill authorization to seek from the Department;
 - (e) Assistance with the early identification and resolution of issues raised by other agencies and the public; and/or
 - (f) Expedited review of removal-fill authorization application and prompt permit decision in accordance with these rules.
- (6) The Department will endeavor to provide the assistance as described in OAR 141-085-0023 to the maximum extent possible taking into account budget constraints and limitations.
- (7) The Department recognizes that time is of the essence in fulfilling the requirements of any partnership agreement and will carry out its responsibilities as expeditiously as possible.

141-085-0024

Pre-Application Conference

- (1) A person contemplating conducting an activity subject to removal-fill authorization requirements may request a pre-application conference with the Department.
- (2) At a pre-application conference, the Department will address pertinent factors based upon the information presented by the applicant, including:
- (a) Whether the proposed project will require an authorization;
 - (b) The application requirements and type of authorization needed;
 - (c) Ways to avoid and minimize adverse impacts to the water resources and navigation, fishing and public recreation uses;
 - (d) The authorization review standards that will be applied to the proposed project;
 - (e) The proposed compensatory mitigation plan;
 - (f) The need to provide additional information with the application; and/or
 - (g) The need to coordinate with certain agencies or public interests.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0025

Application for Individual Removal-Fill Permits

- (1) Any person planning a project subject to the Removal-Fill Law or these rules must obtain an individual permit or other authorization from the Department before conducting the removal fill. Persons may submit an application in order for the Department to determine if a removal fill is subject to these rules and requires an authorization.
- (2) To obtain an individual permit, a complete application is required in order for the Department to process the application and issue the permit. The applicant is responsible for providing sufficient detail in the application to enable the Department to render the determinations and decisions required by these rules. The same level of documentation and analysis will not be required for all types of projects. The intensity of the analysis and therefore the amount and quality of information needed, will vary depending upon the size of the project and related severity of the expected adverse impacts. For example, projects with minimal impacts on small areas of waters of the state and not involving any listed species will require less

documentation than will projects with major impacts on large areas of waters of the state that involve listed species.

(3) A completed and signed application on forms provided by the Department along with any maps, photos and drawings, as required, that includes the following information:

(a) Applicant and property owner information including name, address and phone number;

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

(c) Location of any off-site disposal or borrow sites if these sites contain waters of the state;

(d) Project information including proposed activity, specific project description, project plan and section views, fill and/or removal volumes expressed in cubic yards (total in waters of the state), and, for wetlands, also the size in acres (to the nearest 0.01 acre);

(e) Description of the purpose and need for the project;

(f) Identification of the limits (area) of the waters of the state (e.g. wetland delineation or determination) and the proposed impact to waters of the state associated with the project;

(g) A written description of any changes that the project may make to the hydraulic and hydrologic characteristics (e.g., general direction of stream and surface water flow, estimated winter and summer stream flow volumes.) of the waters of the state, and an explanation of measures taken to avoid or minimize any adverse effects of those changes. Adverse effects to be considered include but are not limited to:

(A) Impeding or restricting the passage of normal or expected high flows (unless the project purpose is for fill to impound water);

(B) Increasing water flows from the project;

(C) Relocating water or redirecting water flow;

(D) Causing flooding or erosion downstream of the project.

(h) A description of the existing biological and physical characteristics and condition of the water resource and identification of the adverse effects of project development;

(i) A description of the navigation, fishing and public recreation uses, if any, at the project site;

(j) A written analysis of alternatives that were evaluated to determine the practicable alternative to avoid and minimize impacts to waters of this state, including water resources and navigation, fishing and public recreation uses. A practicable alternative is one that is capable of being done (i.e., feasible) and proposed on a site that is available to the applicant for the project purpose. Sites that are not presently owned or controlled by the applicant, but could be reasonably obtained, utilized, expanded, or managed to fulfill the project purpose may be considered if otherwise feasible. The analysis must explain why the applicant chose the option identified in the application. Unless specified otherwise by the Department, an alternatives analysis is not required for projects involving up to 250 (two hundred fifty) cubic yards in non-essential salmon habitat areas (as designated in OAR 141-102) or for projects involving permanent wetland impacts equal to or less than 0.2 (two-tenths) acre. An alternative analysis is needed for estuarine fills. Circumstances when an alternatives

analysis may be required in the application include but are not limited to projects involving conversion to upland of rare wetland types (such as forested bogs and vernal pools). An application for a removal-fill that meets the following criteria need not include an elaborate explanation of the applicant's process to determine the practicable alternative:

(A) Those located in waters of the state with limited aquatic life and habitats and limited navigation, fishing and public recreation uses.

(B) Small in size; in relationship to the affected waters of the state.

(C) Those that cause only temporary impacts.

(k) Names and addresses of adjoining property owners (including those across a stream or street from the project as required by the Department);

(l) Local government land use information (as shown on the application form);

(m) Coastal zone certification statement, if project is in the coastal zone (as shown on the application form);

(n) Any information, known by the applicant, concerning the presence of any listed species. Information may include but is not limited to:

(A) A site survey;

(B) A database query completed by the Oregon Natural Heritage Program; or

(C) A project-specific or programmatic Biological Assessment and/or approved Biological Opinion and/or a letter from the pertinent state or federal agency;

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

(4) If reasonably expected adverse impacts to the water resources cannot be avoided, minimized, rectified or reduced, a complete application must also include a compensatory wetland mitigation plan as defined in OAR 141-085-0010 that will meet the requirements in OAR 141-085-0121 thru -0176, or a compensatory mitigation plan, as required in 141-085-0115, or a rehabilitation plan for temporary impacts to waters of the state, as required in OAR 141-085-0171.

(5) If the proposed removal fill involves a wetland, a wetland determination or delineation report that meets the requirements in OAR 141-090-005 thru -0055 shall be submitted by the applicant or required by the Department:

(a) A wetland delineation is generally needed to determine precise wetland boundaries and to accurately identify proposed impacts (fill and/or excavation) and determine Compensatory Wetland Mitigation ratio requirements. In some circumstances, the Department may conclude that a wetland determination is sufficient to identify wetland impacts or to establish the extent, if any, of wetland impacts.

(b) Whenever possible, wetland determination or delineation reports should be submitted to the Department for a jurisdictional determination well in advance of a permit application (i.e., within 90 days of submitting an application) to ensure that the project design is based upon approved wetland boundaries and to ensure that the application will not need to be revised and resubmitted if, during the evaluation process, the wetland delineation report is found to be inaccurate.

- (6) If the proposed removal fill involves a wetland, the application shall include a functional attribute assessment of the wetland as described in OAR 141-085-0121.
- (7) If the proposed removal fill will directly affect an estuary as defined in OAR 141-085-0010, a complete application must include:
- (a) An estuarine resource replacement plan that meets the requirements in OAR 141-085-0240 to 0266 (rather than the compensatory mitigation plan requirements cited in (4)); and
 - (b) For any project involving the placement of fill for a non-water dependent use as defined in OAR 141-085-0010, a written statement that analyzes the following criteria:
 - (A) The public use of the proposed project;
 - (B) The public need for the proposed project;
 - (C) The availability of alternative, non-estuarine sites for the proposed use; and
 - (D) The proposed project's identified adverse effects on public navigation, fishery and recreation.
- (8) An applicant for fill and removal of material at locations not more than one mile apart may combine them into one application. Applicants for linear transportation or utility corridor projects may apply on a single application if the projects:
- (a) Consist of integrally-related activities; and
 - (b) Are planned, phased, designed and budgeted as a discrete construction unit.
- (9) The Department may require additional information necessary to make an informed decision on whether or not the application and project complies with these rules and ORS 196.800 to 196.990.
- (10) **A complete** *The* application **shall may** include the fee as described in OAR 141-085-0064.

Stat. Auth.: ORS 196.815; ORS 196.825; ORS 196.830
Stats. Implemented: ORS 196.800- 196.990

141-085-0027

Determination of Complete Application for Individual Removal-Fill Permit

(1) Within 30 days of Department's receipt of an application, the Department shall finish the completeness initial review and provide written results of the review to the applicant. The Department shall review the application materials to determine whether all the forms, plans, maps and other information required in OAR 141-085-0025 are present. During the review, the Department will determine:

- a. If the project, as described in the application, is exempt from these rules as described in OAR `141-085-0015 or 141-085-0020. If the Department determines that the application is for an activity that is not subject to these rules, it shall notify the applicant in writing and state the reasons for the determination. If there is insufficient information to make this determination, the Department will provide a list of the information deficiencies to the applicant as part of the results of the initial completeness review.**

- b. If the project, as described in the application, is eligible for approval under the General Authorization (GA) as described in OAR 141-089. If the project is eligible for a GA, the Department will continue to process the application as a General Authorization.
- c. If the application is complete in accordance with OAR 141-085-0025
- d. If the application is incomplete.

(1) Upon receipt of an individual removal-fill permit application, the Department shall review the application materials to determine whether all the forms, plans, maps and other information required in OAR 141-085-0025 are present.

(2) The Department shall determine no later than thirty (30) calendar days from the date the Department receives the application whether the application is complete (including the payment of fees in accordance with OAR 141-085-0064).

If the Department fails to make such the a completeness determination within the thirty 30 calendar day time period and fails to so notify the applicant, the application shall be deemed a complete application **and shall proceed to the public review process as described in OAR 141-085-0028.**

(3) The Department will determine if the project, as described in the application, is an exempt activity or is otherwise not within the jurisdiction of these rules as described in OAR 141-085-0015 or OAR 141-085-0020. If the Department determines that the application is for a project that is not subject to these rules, it shall notify the applicant in writing and state the reasons for the determination.

(4) The Department will determine if the project, as described in the application, may be eligible for approval under a general authorization as described in OAR 141-089. The Department will notify the applicant of this determination and offer the opportunity for the application to be processed under the applicable general authorization.

(5) (3) The Department will accept a **preliminary** wetland delineation or **preliminary** wetland determination report along with the application in accordance with OAR 141-085-0025(5). A jurisdictional determination in accordance with OAR 141-090 will be completed prior to or at the time of the permit decision. **The Department shall not deem an application incomplete because it lacks a Department-approved wetland delineation or wetland declaration report.**

(6) (4) When Once the Department deems the application complete, the Department shall commence, without unnecessary delay, to process the application in accordance with OAR 141-085-0028(6).

(8) (5) If the Department determines that the application does not meet the requirements of OAR 141-085-0025 and is therefore deficient and incomplete, the Department shall, within a reasonable time, but no later than thirty (30) days after the initial receipt of the application, notify the applicant in writing and list the missing information. **The Department will take no action on the incomplete application until the required information is resubmitted.** The applicant must resubmit the entire amended package for reconsideration, unless instructed by the Department to do otherwise. **Submission of a new application package starts a new 30-day completeness review period.**

(6) Examples of information that may be cause for rejection of the application include, but are not limited to, the following:

- (a) Major errors, omissions or inconsistencies in the application;
- (b) Major errors, omissions or inconsistencies in the wetland delineation or determination report, if one is required.

- (c) Lack of a wetland delineation or wetland determination where wetlands are affected by the project.
- (d) Unclear, illegible maps and drawings;
- (e) Lack of a compensatory wetland mitigation plan;
- (f) Lack of an analysis of the adverse effects of the project on the water resources or the navigation, fishing and public recreation uses; or
- (g) Lack of payment of fees.

(8) (7) Minor errors, omissions or inconsistencies, as determined by the Department, will not be cause for rejection.

(9) *Submission of a new application package commences a new 30-day review period.*

Stat. Auth.: ORS 196.815; ORS 196.825; ORS 196.845
 Stats. Implemented: ORS 196.800- 196.990

141-085-0028

Individual Removal-Fill Permit Review Process including the Public Review and Notice Process

- (1) General Description. The Department shall make a permit decision within ninety (90) calendar days after determining that the application is complete and the fee has been received. Within the ninety (90) day time period, the Department will do one of the following:
- (a) Approve the application and issue an individual removal-fill permit with conditions; or
 - (b) Approve the application with modifications and issue an individual removal-fill permit with special conditions; or
 - (c) Request of the applicant an extension of the permit decision deadline to a time certain. No extension shall be made without the applicant's written approval; or
 - (d) If the project is inconsistent with these rules (e.g. OAR 141-085-0029), deny the application; or
 - (e) Determine the project is an exempt activity or is otherwise not within the jurisdiction of these rules as described in OAR 141-085-0015 or OAR 141-085-0020; or
 - (f) Determine that the project is eligible for approval under a general authorization as described in OAR 141-089 and process the application in accordance with the applicable general authorization, if requested to do so by the applicant.
- (2) If the Department determines that the project is not subject to these rules, it shall notify the applicant, in writing, and state the reasons for the determination.
- (3) In the event that the applicant and the Department agree to postpone and extend the removal-fill permit issuance decision, the applicant and the Department shall agree on a new permit decision deadline. The new schedule must be in writing and agreed upon before the expiration of the ninety (90) day period described in OR 141-085-0028(1). If no agreement is reached, the Department shall take any action described in OAR 141-085-0028(1)(a) (b) or (d) deemed appropriate.
- (4) Modifications to permit applications may be accepted by the Department at any time prior to the permit decision. If the modification is determined by the

Department to be substantially different in nature or effect from the original application (e.g. large increase in area of development, or large increase of volume of fill/removal), the Department shall treat the modified application as a new application and process it in accordance with these rules. The Department shall make a decision on the treatment of the modified application based on the information provided by the applicant, within the ninety (90) day time requirement established in OAR 141-085-0028(1). It is a normal and acceptable practice to modify an application in order to address concerns and comments offered during the public review process or at the applicant's own initiative. The Department will give consideration to this fact as it determines whether or not to treat the modified application as a new application.

(5) An applicant may withdraw an application at any time prior to the permit decision. The notice of withdrawal must be in writing to the Department.

(6) Public Review Notice Process. Once the application has been deemed complete in accordance with OAR 141-085-0027 and the fee has been received, the Department shall provide notification of the availability of the application for review to:

(a) Adjacent property owners;

(b) Watershed Councils and public interest groups who have indicated a desire to receive such notices;

(c) Affected local government land use planning and zoning departments;

(d) Local and State agencies, including but not limited to: irrigation, diking and drainage districts, Soil and Water Conservation Districts, Oregon Department of Fish and Wildlife, Oregon Department of Environmental Quality, Oregon Department of Land Conservation and Development, Oregon Department of Agriculture, Oregon Water Resources Department, Oregon Department of Economic Development, Oregon State Parks and Recreation Department, Oregon State Historic Preservation Office, Oregon Natural Heritage Program and the Oregon Department of Geology and Mineral Industries;

(e) Federal agencies, including but not limited to: U.S. Army Corps of Engineers (Portland District), Environmental Protection Agency Department, U.S. Fish and Wildlife Service, National Marine Fisheries Service, NOAA-Fisheries, any affected unit of the U.S. Forest Service or Bureau of Land Management; and

(f) Affected Tribal governments.

(7) The notification of the availability of the application for review may be provided by U.S. mail or electronically (e.g. facsimile, e-mail, posting on the Internet).

(8) The Department shall furnish to any member of the public (persons not listed in OAR 141-085-0028(8)) upon written request and at the expense of the member of the public a printed copy of any application. The application will also be available for review at the Department office nearest the project location.

(9) The Department will review and consider substantive comments of local, state, and federal agencies, adjacent property owners, public interest groups, Tribal governments and individuals as well as conduct any necessary investigations to develop a factual basis for a permit decision. The Department may schedule a permit review coordination meeting with interested agencies/groups and the applicant to: clarify the review standards and process requirements; provide the applicant an opportunity to explain the project; and to identify issues. At the Department's discretion, the Department may hold a

public hearing when necessary to gather information necessary to make a decision.

(10) All recommendations and comments regarding the application shall be submitted in writing to the Department within the period established by the Department, but not more than thirty (30) calendar days from the date of the notice. However, the Department of Environmental Quality shall comment within seventy-five (75) calendar days from the date of notice to comment if the application requires certification under the Federal Water Pollution Control Act (P.L. 92-500) as amended (i.e. 401 certification), unless the Department, based on a written request from the Director of the Department of Environmental Quality, grants an extension of time or as otherwise agreed to in an intergovernmental agreement between Department of Environmental Quality and the Department. In no case shall the extension granted be in excess of one year. If an agency or unit of government fails to comment on the application within the comment period, the Department shall assume the agency or other unit of government has no objection to the project.

(11) Applicant Response to Comments

(a) Comments resulting from the public review process shall be forwarded to the applicant within seven (7) calendar days of the conclusion of the comment period.

(b) The applicant may, at his or her discretion, respond to public and agency comments. The response may be in the form of:

(A) Additional information to support the application; and/or

(B) Revisions to the project that address the comments and become part of the application.

(c) If no response is received from the applicant the Department will presume that the applicant intends to provide no additional supporting information or revisions to the application.

(d) The applicant may make a request, either orally or in writing, for additional time to respond to comments, and the Department shall agree to any extension of the time allowed to make a permit decision as described in OAR 141-085-0028(1).

(12) Supplemental Information. The Department may, as a result of the public review process and/or the Department's investigations, request that the applicant voluntarily submit supplemental information prior to the Department making the permit decision. The Department shall state the reason for requesting the additional information and why it is relevant to the permit decision.

(13) All documents in the applicant's permit file kept by the Department, unless otherwise restricted by law, shall be available for review by the applicant upon request and at reasonable times and location.

Stat. Auth.: ORS 196.815; ORS 196.825; ORS 196.845

Stats. Implemented: ORS 196.800- 196.990

141-085-0029

Review Standards and Permit Conditions for Individual Removal-Fill Authorizations

(1) In order to meet the requirements of OAR 141-085-0006(1), ORS 196.805 and ORS 196.825 the Department shall evaluate the information provided in the application; conduct its own investigation; and review and consider the

comments submitted during the public review process in order to apply the following standards to determine whether or not to issue an individual removal-fill authorization.

(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 (OAR 141-085-0036).

(3) Considerations for Approval

To issue an individual removal-fill permit the Department must determine that the proposed removal-fill activity will not be inconsistent with the protection, conservation and best use of the water resources of this state and would not unreasonably interfere with the paramount public policy of this state to preserve the use of its waters for navigation, fishing and public recreation, by:

- (a) Considering the public need for the project including the social, economic or other public benefits likely to result from the project. If the applicant is a public body, the Department may rely on the public body's findings as to local public need and benefit;
- (b) Considering the economic cost to the public if the project is not accomplished;
- (c) Considering whether the project would interfere with public health and safety;
- (d) Considering whether the project is compatible with the local comprehensive land use plan. The Department will not issue an individual removal-fill permit for a project that is not consistent or compatible with the local comprehensive land use plan and/or zoning ordinance. The Department may issue an individual removal-fill permit requiring the applicant to obtain local land use approval prior to beginning the authorized activity;
- (e) Determining the degree to which, if at all, the project, will unreasonably interfere with navigation, fishing and public recreation uses of the waters of the state;
- (f) Considering the degree to which, if at all, the project will increase erosion or flooding upstream and downstream of the project or redirect water from the project site onto adjacent nearby lands.
- (g) Considering the practicable alternatives for the project in accordance with (4) as presented in the application; and
- (h) Considering practicable mitigation (including compensatory mitigation) for all reasonably expected adverse impacts of project development, as required by subsection (5).

(4) Alternatives Analysis

The Department will issue an individual removal-fill permit only upon the Department's determination that a fill or removal project represents the practicable alternative that would have the least adverse effects on the water resources and navigation, fishing and public recreation uses. Unless otherwise specified by the Department, and except in essential salmon habitat, no alternative analysis will be required for projects involving less than 250 (two hundred fifty) cubic yards of fill or removal or projects involving permanent wetland impacts equal to or less than 0.2 (two-tenths) acre. *An alternative analysis is required for all estuarine fills.*

(5) In determining whether or not an alternative might be the practicable alternative with the least adverse effects, the Department will consider the type,

size and relative cost of the project, the condition of the water resources, and navigation, fishing and public recreation uses as depicted in the application. The financial capabilities of the applicant are not the primary consideration. The basic project purpose, logistics, use of available technology and what constitutes a reasonable project expense are the most relevant factors in determining the most practicable alternative. The applicant bears the burden of providing the Department with all information necessary to make this determination.

(6) An alternative analysis is required for all estuarine fills. No authorizations may be issued for a substantial fill in an estuary for a non-water dependent use unless 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, fishery and recreation; and
- (c) The project meets all other review standards of these rules.

(5) (7) Mitigation

The Department will only issue an individual removal-fill permit for the practicable alternative with the least adverse effects to the water resources upon the Department's determination that the project includes appropriate and practicable steps to reduce (mitigate) reasonably expected adverse impacts of the project to the water resources and navigation, fishing and public recreation uses.

Mitigation shall be considered in the following sequence:

- (a) Avoidance. The Department shall first consider whether the project can be accomplished by avoiding removing material or placing fill material in or on waters of the state altogether (e.g., by moving the location of a proposed structure, either on-site or off-site, to avoid filling wetlands);
- (b) Minimization. If the Department determines that the project cannot be accomplished without adverse impacts to water resources and/or navigation, fishing and public recreation uses, the Department shall then consider whether limiting the degree or magnitude of the removal fill and its implementation can minimize adverse impacts (e.g., bio-engineered and non-structural streambank stabilization techniques, such as bank sloping and revegetation, shall be installed instead of solutions relying primarily on concrete and riprap, whenever technically feasible, suitable and environmentally preferable);
- (c) Rectification. If the Department determines that project impacts to the waters of the state cannot be further minimized, the Department shall then consider whether repairing, rehabilitating or restoring (e.g., restoring site conditions along a pipeline corridor after installation is complete) the removal fill impact area can rectify the impact;
- (d) Reduction or elimination. When removal fill impacts have been minimized and rectified to the maximum extent practicable, the Department will consider whether the impacts can be further reduced or eliminated over time by monitoring and taking appropriate corrective measures (e.g., assure that site restoration methods have effectively revegetated the site); and
- (e) Compensation. The Department shall then consider how the applicant's project would compensate for reasonably expected adverse impacts of project development by replacing or providing comparable substitute wetland or water resources and/or navigation, fishing and public recreation uses. Compensatory mitigation may not be used as a method

to reduce environmental impacts in the evaluation of practicable alternatives.

(6) (8) Direct and Indirect Effects

The Department shall impose conditions that mitigate the direct effects of project development and conditions that mitigate the indirect effects that reach beyond the immediate project area (e.g., a condition requiring that equipment must be washed down away from any wetland) when necessary to mitigate the reasonably expected adverse impacts of project development to waters of the state.

(7) (9) Permit Conditions

If the project meets the requirements of this section, the Department shall impose applicable general conditions in order to reduce or eliminate the reasonably expected adverse impacts of project development to waters of the state.. The Department may also require additional, site-specific and/or project-specific conditions, or may modify these general conditions, as listed below, as appropriate:

- (a) Conditions to assure compliance with state water quality and toxic effluent standards may be required in order mitigate for the reasonably expected adverse impacts of project development to waters of the state. Such conditions will be based on standards and/or comments of the Department of Environmental Quality.
- (b) The removal fill shall be carried out in compliance with ORS 509.580 to ORS 509.645 and related rules of the Oregon Department of Fish and Wildlife, concerning upstream and downstream passage at all artificial obstructions in which migratory native fish are currently or have historically been present.
- (c) All in-water work, (i.e. removal fill conducted within the beds and banks of a water of the state) including temporary fills or structures, shall be conducted to avoid or minimize impacts to fish and wildlife resources. Such work will be authorized to occur within the Oregon Department of Fish and Wildlife recommended periods for in-water work as specified in Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife. Exceptions to recommended in-water work periods may be authorized by the Department based on the applicant's request and documentation of consultation with the Oregon Department of Fish and Wildlife that the reasonably expected adverse impacts to fish and wildlife resources will be avoided or minimized.
- (d) When previously unknown occurrences of listed species are discovered during construction, the permit holder shall immediately cease work and contact the Department.
- (e) The removal fill shall not disturb or destroy known archeological sites unless authorized under a permit issued by the State Historic Preservation Office. When previously unknown occurrences of archeological sites are discovered during construction to waters of the state, the permit holder shall immediately cease work at the discovery site and contact the Department and the State Historic Preservation Office.
- (f) Equipment shall be fitted with fish screens if water is pumped from a fish-bearing stream during project work. Contact ODFW Screening and Passage staff for screen specifications. The Department, based on ODFW advice, may require gravity flow bypasses to provide fish passage if active migration is occurring. Sediment control shall be provided during

dewatering, and culverts shall be installed only at dewatered sites. If endangered fish are likely to be present, fish salvage operation shall be conducted by qualified personnel prior to construction. The Department may require an ODFW District biologist or designee to be present during salvage operations.

(g) The project shall not use as fill in waters of the state any material defined as solid waste in ORS 459.005(24) unless the Department of Environmental Quality has authorized prior approval to do so. This includes tires, concrete rubble, and asphalt.

(h) The project shall not use in waters of the state any fill material such as chassis, body or shell of a motor vehicle as defined by ORS 801.590.

(i) Vegetated buffers may be required at compensatory mitigation sites in order to protect the mitigation from loss.

(j) The restoration or replacement of destroyed or damaged riparian or wetland vegetation may be required at compensatory mitigation and/or project sites in order to mitigate for the reasonably expected adverse impacts of project development. Priority will be given to the replacement of damaged or destroyed vegetation with native plants that will form a wetland or riparian community dominated by native plants within the project area. Conditions may include planting survival success standards (e.g. eighty percent (80%) of each plant species planted, after five (5) years). Protection (e.g. fencing) for replanted areas and control of invasive plants may also be required. Grass seed mixes or exotics certified weed seed free that will hold soil and not persist will be allowed.

(k) The project shall minimize: erosion upstream and downstream of the site; redirecting or relocating water flow beyond pre-project conditions; impoundment of water upstream of the project (unless approved by affected property owners); or additional water flow from the project site beyond pre-project conditions (unless part of the project purpose).

(8) Long Term Protection of Mitigation Sites

(a) The individual removal-fill permit along with site access control (e.g. fencing, signing) is usually sufficient legal means to achieve maintenance and long-term protection of mitigation sites. However, in some instances compensatory mitigation sites and compensatory wetland mitigation sites will need to be permanently protected from destruction with appropriate real estate instruments or agreements (e.g. conservation easements, deed restrictions, long-term management agreements with land trusts or public ownership). Situations where such protection will be required include but are not limited to:

(A) When the permit holder is likely to sell the mitigation site within five (5) years of project completion;

(B) When the permit holder is an absentee owner of the mitigation site;

(C) When the permit holder is not likely to actively participate in managing and maintaining the mitigation site; or

(D) When the permit holder is not the owner of the mitigation site.

(b) The applicant shall offer a preferred method and justification.

(c) The Department will make the final determination for the need and type of long-term protection based upon the risk of loss of the compensatory mitigation site taking into account 8(a)(A)(B)(C) and (D) above.

141-085-0031

Documentation of Individual Removal-Fill Permit Decision; Term of Certain Individual Removal-Fill Permits

- (1) The Department shall prepare written findings documenting and supporting any decision to deny an individual removal-fill permit. In addition, the Department shall prepare written findings to support any decision to issue an individual removal-fill permit for the following:
- (a) Projects involving fill of two acres or more in freshwater wetlands.
 - (b) Projects involving fill in estuaries (except cable crossings, pipelines, or bridge construction).
 - (c) Projects involving the removal from estuaries of more than 10,000 cubic yards of material (except for maintenance dredging).
 - (d) Projects involving placement of greater than 2,500 cubic yards riprap in coastal streams and estuaries.
 - (e) Projects in the Oregon territorial sea in accordance with Statewide Planning Goal 19-Ocean Resources.
- (2) The Department shall prepare written findings documenting and supporting a permit decision that is contrary to the recommendation of a state agency.
- (3) Terms of Permits
- (a) The Department may issue an individual removal-fill authorization for up to five (5) years for projects that occur on a continuing basis or will take more than one year to complete as follows:
 - (A) For commercial aggregate removal including dredging and bar scalping when the Department determines that:
 - (i) There is sufficient aggregate resource or annual recharge to allow the proposed volumes to be removed; and
 - (ii) The applicant has conducted removal in compliance with any individual removal-fill authorization conditions for the same site for at least one year preceding the pending application.
 - (B) For projects associated with flood event recovery (e.g. streambank stabilization) when the Department determines that the project(s) are part of a comprehensive multidisciplinary flood recovery plan that specifically addresses and supports the type of treatment that is proposed in the removal-fill authorization application.
 - (C) For projects that are for the purpose of watershed restoration that are developed from a watershed assessment and identified as a priority in a watershed action plan.
 - (D) For other types of projects, when the Department determines that:
 - (i) The project is expected to require more than one year to complete; or
 - (ii) The project purpose requires annual activity or reconstruction (e.g. irrigation diversions); and
 - (iii) The project purpose, location or methods of construction or operation described in the application are not expected to change during the course of the project.
 - (E) Fees for a multi-year period permit, in accordance with ORS 196.9159(5), shall be paid annually on the anniversary date of the permit as established by the Department.

(F) The Department may modify conditions of a multi-year authorization based upon new information or project monitoring that indicate a need for different operating conditions.

(G) Before modifying any condition that significantly affects the scope and extent of the removal fill (e.g. amount of material to be filled/removed) of any individual removal-fill authorization authorized for more than one year, the Department shall give notice as described in OAR 141-085-0028(4) and treat the proposed notification in the same manner as described in OAR 141-085-0028(6) thru (12).

(H) 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 under the Removal-Fill Law and these rules.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0034

Transfer of Authorization/Waiver or Modification of Authorization Conditions

(1) The person or party listed on the authorization is responsible for complying with the conditions of the authorization, unless the authorization is transferred in writing by the Department to a different person or party through the following process:

(a) A transfer form shall be submitted by the authorization holder.

(b) If the original authorization has not expired, the authorization may be transferred by issuing a modification to the original authorization.

(c) If the authorized activity has been completed and/or the authorization expired, but mitigation monitoring is still required as a condition of the original authorization, that obligation shall be transferred to the new authorization holder.

(d) If a bond was required for the mitigation, a new bond must be provided prior to the transfer.

(2) Upon the written request of the authorization holder, the Department may grant a waiver or modification of any condition. The authorization holder shall have the burden to prove, to the satisfaction of the Department, that the waiver or modification will not result in adverse impacts on the water resources or otherwise be contrary to the policies in OAR 141-085-0006. Significant modifications of individual removal-fill permit conditions may require public review as specified in OAR 141-085-0028(6) thru (12).

(3) Exceptions to a permit condition regarding the in-water work period shall be authorized by the Department as described in OAR 141-085-0029(7)(C).

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0036

Renewal and Extension of Individual Removal-Fill Permits

Permits may be renewed or extended by the Department under the following conditions:

- (1) At least ninety (90) calendar days prior to the expiration of a valid removal or fill permit, the Department shall notify the permit holder of the expiration date and request that the applicant report to the Department in writing the status of project completion and the permit holder's desire to renew the permit.
- (2) If the applicant submits a request in writing for renewal with the appropriate fee at least forty-five (45) calendar days prior to the permit expiration date, the Department may:
 - (a) Renew the permit, with or without modified conditions (consistent with OAR 141-085-0029); or
 - (b) Extend the permit for up to an **additional time period but less than the original term *one-hundred and twenty (120) calendar days, one time only***, without modified conditions; or
 - (c) Extend the term of the permit with new or modified conditions for up to an additional one-hundred and twenty (120) calendar days, one time only; or
 - (d) Deny the request for permit renewal.
- (3) In the event a permit holder does not respond forty-five (45) days prior to the date of permit expiration, the Department may extend the expiration date of the permit for not more than 120 days, one time only, if:
 - (a) The permit holder makes a written request to the Department prior to the expiration date of the permit;
 - (b) There is a reasonable likelihood that the project can be completed prior to the new expiration date; and
 - (c) All other conditions of the original permit are met or can be fulfilled.
- (4) The Department may require a new permit application or additional information if:
 - (a) There is a proposed change in the project that may increase the reasonably expected adverse impacts of the project on the water resources;
 - (b) There is a change in the method of operation of the project that may increase the reasonably expected adverse impacts of the activity on the water resources of the state;
 - (c) There is a change in natural conditions at the project site that may increase the reasonably expected adverse impacts than previously identified in the application review process;
 - (d) New information becomes available indicating that additional adverse impacts may accrue as a result of the project; or
 - (e) Substantial adverse comments or comments requesting a change in substantive conditions are received.
- (5) Requests for renewals shall be reviewed pursuant to the standards contained in the applicable rules in effect at the time of the request.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.825

141-085-0064

Removal-Fill Authorization Fees; Disposition of Fees

- (1) Any application for an individual removal-fill authorization submitted as described in OAR 141-085-0025 of these rules must be accompanied by a base fee in accordance with the following schedule:
 - (a) For a removal by a private operator, or a person contracting to perform services for a private operator, \$50.
 - (b) For a removal by a public body: \$150.
 - (c) For a removal by a commercial operator: \$150.
 - (d) For a fill by a private operator, or a person contracting to perform services for a private operator: \$150.
 - (e) For a fill by a public body: \$375.
 - (f) For a fill by a commercial operator: \$375.
 - (g) For erosion-flood repair, including riprap, by a private landowner or public body, or a person contracting to perform services for such persons: no fee.
- (2) In addition to the base fee for removal established under OAR 141-085-0064 (1)(a) of these rules each applicant shall also pay as part of the application fee the following fee based on the volume of removal material:
 - (a) For activities involving less than 500 cubic yards: no volume fee.
 - (b) For activities involving 500 to 4,999 cubic yards: \$75 for private operator; \$75 for public body; and \$75 for commercial operator.
 - (c) For activities involving 5,000 to 50,000 cubic yards: \$150 for private operator; \$150 for public body; and \$150 for commercial operator.
 - (d) For activities over 50,000 cubic yards: \$225 for private operator; \$225 for public body; and \$225 for commercial operator.
- (3) In addition to the base fee for fill established under OAR 141-085-0064(1)(a) of these rules each applicant shall also pay as part of the application fee the following fee based on the volume of fill material:
 - (a) For activities involving less than 500 cubic yards: no volume fee.
 - (b) For activities of 500 to 2,999 cubic yards: \$75 for private operator; \$75 for public body; and \$75 for commercial operator.
 - (c) For activities involving 3,000 to 10,000 cubic yards: \$150 for private operator; \$150 for public body; and \$150 for commercial operator.
 - (d) For activities of over 10,000 cubic yards: \$225 for private operator; \$225 for public body; and \$225 for commercial operator.
- (4) For each application that involves both removal and filling, the application fee assessed shall be either for removal or filling, whichever is higher, per ORS 196.815(4), according to the fee schedule described in section (1) to (3) of this rule.
- (5) The annual fee for an individual removal-fill authorization is equivalent to the base fee according to the schedule set forth in section (1) of this rule. Fees for a multi-year period permit, in accordance with ORS 196.815(5), shall be paid annually on the anniversary date of the permit. Any authorization may be suspended during any period of delinquency of payment and shall be treated as though no authorization had been issued.
- (6) There shall be no application fee for the issuance of an Emergency Authorization (OAR 141-085-0010(59)) or Letter of Authorization (OAR 141-085-0010(118)).
- (7) Fees received under this section shall be credited to the Common School Fund for use by the Department in administration of these rules and ORS 196.600 to 196.905, 196.990 and 541.990 and as otherwise required by law.

141-085-0066

Emergency Authorization for Removal-Fill

- (1) In the event an emergency exists, as described in OAR 141-085-0010, the Department may issue an emergency authorization. Activities covered by OAR 141-085-0020 are exempt from this section.
- (2) Any person requesting an emergency authorization may apply orally or in writing. Written applications may be submitted in the same manner as described in OAR 141-085-0025 and sent via facsimile, e-mail or via U.S. mail. Any request submitted orally must be documented, in writing, by the Department and provided to the applicant.
- (3) The application and review requirements described in OAR 141-085-0025, -0027, and -0028 do not apply to emergency authorizations. An application for an emergency authorization shall be reviewed pursuant to the standards in the applicable rules in effect at the time of the request.
- (4) Applications for an emergency authorization shall contain enough information for the Department to determine:
 - (a) The applicant and responsible party planning and carrying out the activity;
 - (b) The physical area 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) The approximate volume of material to be removed and/or filled;
 - (e) The schedule for doing the work;
 - (f) The date and approximate time when the event that caused the emergency took place;
 - (g) The area of impact of the emergency and the proposed emergency action;
 - (h) A statement as to whether the emergency action is intended as a temporary or permanent response measure; and
 - (i) A description of how the work will be accomplished.
- (5) In order to make a timely and legally defensible determination, the Department may request additional information from the applicant. The Department may authorize a Department employee or other person 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.
- (6) In determining whether or not to approve the application, the Department shall determine, as quickly as is reasonable and feasible, whether:
 - (a) An emergency, as defined in OAR 141-085-0010 exists, and the factual circumstances indicate:
 - (A) The emergency poses a direct threat to substantial property, including but not limited to a dwelling, farm or cropland;
 - (B) Some prompt removal-fill is required to reduce or eliminate the threat; and
 - (C) The nature of the threat does not allow the time necessary to obtain some other form of authorization as described in these rules.

(b) The removal-fill is planned for waters of the state, including wetlands and is an activity subject to these rules; and

(c) The planned minimizes, to the extent practicable, adverse impacts to aquatic life, water quality and navigation, fishing and public recreation uses of the waters of the state; and

(7) Based upon the review of the application as described in OAR 141-085-0066(6) the Department may:

(a) Approve the emergency authorization as requested;

(b) Approve the emergency authorization with conditions;

(c) Request additional information from the applicant and make a decision to reject, approve with conditions or approve the application without conditions; or

(d) Deny issuance of the emergency application.

(8) An emergency authorization shall contain conditions designed to minimize the reasonably expected adverse impacts of the activity to aquatic life, water quality and navigation, fishing and public recreation uses of the waters of the state while taking into account the impact of the emergency on persons and property. The Department may also require compensatory mitigation **or compensatory wetland mitigation** in some cases where significant loss of water resources and/or navigation, fishing and public recreation uses has resulted directly from the authorized removal fill.

(9) All conditions of an emergency authorization are enforceable on the permit holder beyond the expiration date of authorization.

(9) **(10)** If a request for an emergency authorization is denied, the applicant may resubmit the application as an individual removal-fill authorization or general authorization in accordance with the procedures set out in these rules.

(10) **(11)** If an emergency authorization is issued orally, the written form of the emergency authorization shall be sent to the applicant within five (5) calendar days confirming the issuance and setting forth the conditions of operation.

(11) **(12)** The term of the emergency authorization shall be limited to the time necessary to complete the planned removal-fill activity and be specifically stated in the authorization. In no case shall the term exceed 60 days. A permit holder may request issuance of a new emergency authorization for the same activity upon expiration of the original emergency authorization.

Stat. Auth.: ORS 196.810

Stats. Implemented: ORS 196.800- 196.990

141-085-0070

General Authorizations; Standards and Criteria; Process for Establishing General Authorizations (see OAR 141-089)

(1) A person may be exempt from the requirement to obtain an individual removal-fill permit through the use of an applicable general authorization. Any person proposing to conduct a removal-fill under a general authorization shall first notify the Department in writing in accordance with the requirements of the specific general authorizations being sought.

(2) General authorizations, are adopted, amended and repealed as administrative rules in accordance with the Administrative Procedure Act (ORS 183.310 to 183.550).

(3) The Department may propose to adopt a general authorization upon a finding that the category of removal-fill, as described in the proposed general authorization (including the applicable conditions):

- (a) Are substantially similar in nature;
- (b) Would cause only minimal individual and cumulative environmental impact;
- (c) Will not result in long-term harm to the water resources of the state; and
- (d) Are consistent with the policies of these rules as described in OAR 141-085-0006.

(4) The Department may amend or rescind any general authorization, through rulemaking, upon a determination that the removal-fill conducted under the general authorization has resulted in or would result in more than minimal environmental impact or long-term harm to the water resources of this state. Any person may request the Department invoke this provision. Such a request must include the specific general authorization to be rescinded or amended and clearly and convincingly state the reasons for the request. The Department may process the request in the same manner as described in OAR 141-085-0070(2).

(5) No general authorization is valid where the removal-fill is prohibited by the local comprehensive land use plan or implementing regulations or other applicable ordinance.

(6) The rule promulgating the general authorization shall be effective for up to a five-year term and shall be reviewed, every five years. Upon review, the general authorization shall be reissued in a similar or amended form or repealed.

(7) Failure of a person to adhere to the terms of any general authorization adopted under this section will be considered a violation of the removal-fill law and subject to appropriate enforcement in accordance with these rules.

Stat. Auth.: ORS 196.850

Stats. Implemented: ORS 196.800- 196.990

141-085-0075

Appeals/Contested Case Hearings Regarding Issuance or Denial of an Individual Removal-Fill Permit

(1) Alternative Dispute Resolution Process. An applicant or any other person aggrieved or adversely affected by an individual removal-fill permit decision by the Department may request the Department enter into an alternative dispute resolution process. The Department and all involved parties shall select a trained facilitator/mediator from a list of pre-qualified individuals and share the costs of the facilitator/mediator. The appellant may retain the right of formal appeal as described in these rules.

(2) Appeal by Applicant. Any applicant whose application for an individual removal-fill permit has been deemed incomplete, denied, or who objects to any of the conditions imposed by the Department under OAR 141-085-0029(6), may, within twenty-one (21) calendar days of the denial of the permit or the imposition of any condition, request a hearing from the Department. **The request shall include the reasons for the appeal hearing.**

(3) Appeals by Others. Any person who is aggrieved or adversely affected by the grant of an individual removal-fill permit by the Department may file a written request for a hearing with the Department within twenty-one (21) calendar days

after the date the authorization was granted. **The request shall include the reasons for the appeal hearing.**

(4) Standing in Contested Case Hearings. For a person, other than the applicant/permit holder to have standing to request a contested case as described in OAR 141-085-0075(2), the person must be either “adversely affected” or “aggrieved” as described as follows:

(a) To be “adversely affected” by the individual removal-fill permit the person must have a legally protected interest as defined in OAR 141-085-0010 that would be harmed, degraded or destroyed by the authorized removal-fill activity. This may include, but is not limited to, adjacent property owners.

(b) To be “aggrieved” by the individual removal-fill permit the person must have participated in the Department’s review of the removal-fill activity application by submitting written or oral comments stating a position on the merits of the proposed removal-fill to the Department.

(5) Setting a Contested Case Hearing.

(a) If the written request for hearing is timely (in accordance with OAR 141-085-0075(2) or (3)), and made by a person who has a legally protected interest which is adversely affected by the grant of the permit, the matter shall be referred to the Hearing Officer Panel for hearing within thirty (30) calendar days after receipt of the request.

(b) The hearing shall be conducted as a contested case.

(c) The permit holder and any persons that have filed a written request and have a legally protected interest that may be adversely affected shall be parties to the proceeding.

(d) 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 under OAR 137-003-0535.

(6) Referral to the Hearing Officer Panel (Panel).

(a) The referral of a request for hearing to the Hearing Officer Panel by the Department shall include the individual removal-fill permit, or denial, and the request for hearing. The Hearing Officer Panel shall conduct a contested case hearing only on the issues raised in the request for hearing and the referral from the Department.

(b) Jurisdictional determinations of the existence, or boundaries, of the waters of the state on a parcel of property, as defined in OAR 141-090-0020, issued more than sixty (60) calendar days before a request for hearing are final.

(c) 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 141-090-0050.

(7) 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 (i.e. production of information), except that depositions will not be awarded unless it is likely that a witness will not be available at a hearing.

(8) The Proposed Order. The hearing officer who conducts the hearing shall issue a proposed order containing findings of fact and conclusions of law within

twenty (20) calendar days of the hearing, and as required by ORS 183.460, provide an opportunity to file written exceptions with the Department.

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

(10) Pre-Hearing Suspension of Permits. A permit to fill granted by the Department may be suspended by the Department during the pendency of the contested case proceeding. Petitions for suspension shall be made to the Department and will be either granted or denied by the Department. The permit shall 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 196.000 to 196.905.

(11) 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 sixty (60) calendar days timeframe for hearing requests. Contested case hearings concerning the issuance or denial of a permit will normally be held at the Department offices in Salem, Oregon, unless extraordinary circumstances require the hearing to be held in the vicinity of the project.

Stat. Auth.: ORS 196.835

Stats. Implemented: ORS 196.800- 196.990

141-085-0079

Revoking or Suspending an Authorization; Allowing Corrective Action

(1) The Department may revoke or suspend an authorization if an alleged violator is not in compliance with any conditions of an authorization.

(2) The Department shall give notice of suspension to the permit holder and advise them as to the reasons and terms of the suspension.

(3) The Department may initiate the following proceedings to revoke an authorization:

(a) The Department shall issue a preliminary order to the alleged violator indicating the intent to revoke the authorization;

(b) The preliminary order shall include, but not be limited to, the following information:

(A) A statement of the alleged violator's right to a contested case hearing, as provided in ORS 196.865 before a hearing officer before the authorization may be revoked, and the time period in which such a request may be made;

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

(C) A reference to the particular portions of the removal-fill law and these rules involved; and

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

(c) The preliminary order may include a statement of the action, if any, that may be taken by the alleged violator to correct or offset the effects of the violation including, but not limited to, removal of filled material:

(A) If such action is specified in the preliminary order, the order shall include a reasonable time period of not less than twenty (20) calendar days in which to complete the corrective action;

(B) If the alleged violator completes such action within the specified time period, the revocation procedure shall be terminated.

(d) If the authorization holder fails to request a contested case hearing as allowed under ORS 196.865, the Department may issue a final order revoking the authorization after presenting a prima facie case demonstrating that a violation has occurred.

Stat. Auth.: ORS 196.865

Stats. Implemented: ORS 196.800- 196.990

141-085-0080

Violations and Investigations

(1) In its discretion, the Department shall conduct appropriate investigations of reported violations and make compliance inspections to determine whether violations of the removal-fill law, these rules (OAR 141-085) or the terms and conditions of any authorization have occurred.

(2) The Department shall make a reasonable effort to obtain permission from the landowner or agent, or a duly authorized representative of the landowner or agent, for the Department or its authorized representative to conduct a site visit. The Department shall document its efforts to obtain permission to conduct a site visit.

(3) As described in OAR 141-085-0080(1) a violation includes, but is not limited to:

(a) Fill, removal, or channel relocation 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 terms of an enforcement order; or

(e) Violation of any condition of an approved wetlands conservation plan.

(4) Alleged or suspected violations may be reported to the Department by e-mail, facsimile, telephone or in writing.

(5) When reports of alleged or suspected violations are submitted to the Department in confidence 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 196.860

Stats. Implemented: ORS 196.800- 196.990

141-085-0085

Enforcement Actions and Procedures

(1) The Department is authorized to take such civil, criminal or administrative actions as are necessary to enforce the removal-fill law and these rules (OAR 141-085) including, but not limited to the following (ORS 196.870 and ORS 196.890):

- (a) Consent orders;
- (b) Consent agreements (used for violations that do not require compensatory mitigation or compensatory wetland mitigation and are easily resolved);
- (c) Cease and desist orders;
- (d) Restoration orders;
- (e) Civil penalties; and
- (f) Liens;

(2) The Department shall give notice of any proposed order (**except Consent Agreements or Consent Orders**) relating to a violation by personal service or by mailing the notice by registered or certified mail to the person or governmental body affected. Any person aggrieved by a proposed order of the Department may request a hearing within 20 days of the date of personal service or mailing of the notice. Hearings shall be conducted under the provisions of ORS 183.310 to 183.550 applicable to contested cases, and judicial review of final orders shall be conducted in the Court of Appeals according to ORS 183.482. If no hearing is requested or if the party fails to appear, a final order shall be issued upon a prima facie case on the record of the agency.

(3) Any notice of violation shall describe the nature and extent of the violation.

(4) The Department may take appropriate action for the enforcement of any rules or final orders. Any violation of ORS 196.600 to 196.905 or of any rule or final order of the Department under ORS 196.600 to 196.905 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. Proceedings thus brought by the Department shall 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.

(5) In addition to the actions described in OAR 141-085-0085(4) and OAR 141-085-0090 the Department may enter an order requiring any person to cease and desist from any violation if the Department determines that such violation presents an imminent and substantial risk of injury, loss or damage to water resources.

(a) An order under this subsection:

- (A) May be entered without prior notice or hearing.
- (B) Shall be served upon the person by personal service or by registered or certified mail.
- (C) Shall state that a hearing will be held on the order if a written request for hearing is filed by the person subject to the order within 10 days after receipt of the order.
- (D) Shall not be stayed during the pendency of a hearing conducted under paragraph (b) of this subsection.

(b) If a person subject to an order under this subsection files a timely demand for hearing, the Department shall hold a contested case hearing before a hearings officer according to the applicable provisions of ORS 183.310 to 183.550. If the person fails to request a hearing, the order shall be entered as a final order upon prima facie case made on the record of the agency.

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

(d) The state and local police shall cooperate in the enforcement of any order issued under this subsection and shall require no further authority or warrant in executing or enforcing such order. If any person fails to comply with an order issued under this subsection, the circuit court of the county in which the violation occurred or is threatened shall compel compliance with the Department's order in the same manner as with an order of that court.

(6) Proposed Order to Restore, Cease and Desist Order and/or Civil Penalties. Any written request for a hearing concerning a proposed enforcement order shall admit or deny all factual matters stated in the proposed enforcement 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.

Stat. Auth.: ORS 196.860; ORS 196.870; ORS 196.875
Stats. Implemented: ORS 196.800- 196.990

141-085-0090

Civil Penalties

(1) In addition to any other remedy allowed by law or these rules (OAR 141-085), the Department may assess a civil penalty for any violation of the removal-fill law or these rules (OAR 141-085).

(2) More than one civil penalty may be assessed for an unauthorized removal or fill activity. Example: A civil penalty assessed on an initial violation may be followed by a separate civil penalty for failure to comply with a restoration order issued on the same violation.

(3) Required notice; contents of notice. The Department shall give written notice of Intent to Assess a civil penalty by personal service or by registered or certified mail to the permitholder or person (hereinafter referred to as 'party') incurring the civil penalty. The notice shall include, but not be limited to, 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 twenty (20) calendar days of receiving the notice; and

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

(e) The party may request a contested case hearing in accordance with procedures described in OAR 141-085-0075.

(4) Calculating the civil penalty.

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

(A) B is the *base fine* factor of \$600;

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

(i) A value of 1 shall be applied if the alleged violator was unaware of the removal-fill law at the time of the alleged violation; or

(ii) A value of 2 shall be applied if the alleged violator was aware of the removal-fill law at the time of the alleged violation (e.g., permit non-compliance, prior penalties or other exposure to the Removal-Fill Law);

(iii) A value of 5 shall be applied if the alleged violator had a previous violation. A previous violation exists, for example, 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 order or consent agreement. This value shall not be imposed if the previous violation occurred more than (5) five years prior to the current incident.

(C) The cooperation value (C) shall 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 shall be assessed as follows:

(i) A value of 1 shall be applied where the person complies with restoration as requested by the Department without the need for an enforcement order or court action by the Department, or where the Department determines that restoration efforts would be unlikely to benefit the resource;

(ii) A value of 3 shall be applied where the person is not cooperative in complying with restoration as requested by the Department and the Department must issue an enforcement order or obtain a court order to restore.

(D) (C) "I" is water resource impact factor to be determined as follows:

(i) A value of 1 shall be applied if the damaged resource is expected to naturally self-restore within one year; or

(ii) A value of 3 shall be applied if the adverse effects are not expected to naturally self-restore within one year.

(b) 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, as determined by applying the calculation methods described in OAR 141-085-0090(4) shall be doubled, not to exceed \$10,000 per day.

(5) Failure to pay civil penalty. Once the final adjudication of any civil penalty calculated in the manner described in OAR 141-085-0090(4) has been completed in accordance with OAR 141-085-0090(3), the amount of the civil penalty shall increase by the amount of the original civil penalty for every twenty (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 shall 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 as required by OAR 141-085-0090(5), interest shall accrue at the rate of nine percent per annum pursuant to ORS 82.010 on the unpaid balance.

(6) Civil penalty relief. The Department may, upon written request of the alleged violator assess a civil penalty as described in OAR 141-085-0090 and including evidence of financial hardship, remit or mitigate the amount of any civil penalty. The request shall be received within twenty (20) calendar days from the date of personal service or mailing of the notice of civil penalty as described in OAR 141-085-0090(3). 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.

Stat. Auth.: ORS 196.890

Stats. Implemented: ORS 196.800- 196.990

141-085-0095

Request to Close Specified Waters of the State to the Issuance of Removal-Fill Authorizations

(1) The Department may request the Oregon Water Resources Commission (OWRC) to close, by administrative rule, specified waters of the state to the issuance of removal-fill authorizations (ORS 196.840).

(2) Any state resource agency listed in ORS 196.825 may make such a request of the Department. In determining whether or not to submit a request to the OWRC the Department shall consider:

- (a) The reasons for requesting a closure;
- (b) The specific waters of the state to be affected;
- (c) The effect, including economic effects, of the proposed closure on potential future applicants;
- (d) The effect, including benefits, of the proposed closure on aquatic life, water quality and public use of the waters; and
- (e) The time period the closure should be recommended to be in effect.

(3) Prior to submitting a closure request to the OWRC, the Department shall hold at least one public hearing within the affected watershed. Interested and affected parties, including local government and watershed councils are to be notified at least thirty (30) calendar days prior to the hearing date. Public comment on the proposal shall be accepted at least fourteen (14) calendar days following the last hearing. The Department shall issue a report explaining the proposal and outlining the reasons for considering a closure. Notice of the Department's final decision shall be provided all participating parties and parties of interest as identified by the Department.

Stat. Auth.: ORS 196.840

Stats. Implemented: ORS 196.800- 196.990

141-085-0096

Monitoring; Annual Report; Public Information and Education

(1) Program Monitoring. Pursuant to ORS 196.910, the Department will monitor removal and fill authorized under these rules to determine:

- (a) Compliance with permit conditions;
 - (b) The effectiveness of permit conditions in achieving the policies of these rules; and
 - (c) The adverse impacts of authorized activities on salmonid spawning and rearing habitat and wetland functional attributes.
- (2) Annual Reporting. Pursuant to ORS 196.885, commencing with fiscal year 2002-2003 and continuing each fiscal year thereafter, the Department shall submit an annual report to the State Land Board on the activities conducted under these rules. The report shall be delivered to the State Land Board and posted on the Department's website no later than 120 days after the end of the fiscal year. The report shall also be provided to the appropriate legislative committee(s). The annual report shall include the following:
- (a) The number of removal-fill authorizations applied for, denied and authorized. For all authorizations granted or outstanding during the prior year, a separate summary shall be included for fills and removals, organized by river or other water body that shows:
 - (A) The total number of authorizations, the number of new authorizations and the number of renewal authorizations.
 - (B) The volume and/or wetland acreage of removals and fills authorized during the past year, and to the extent possible, the volume and/or wetland acreage of fills and removals completed during the past year.
 - (C) The areal extent of wetlands lost, by habitat type, and the areal extent of wetlands gained, by habitat type, through compensatory wetland mitigation.
 - (b) A summary of compensatory mitigation measures, including a description of each compensatory mitigation project approved during the past year including the location and size of each compensatory mitigation project, whether creation, enhancement or restoration, and a report on the status of all compensatory mitigation projects pending or completed during the past year.
 - (c) A summary of enforcement activities, including:
 - (A) The number of complaints reported.
 - (B) The number of compliance investigations conducted.
 - (C) The results of compliance actions, including:
 - (i) The number of cases resolved by either voluntary compliance, administrative hearings or judicial enforcement proceedings;
 - (ii) The penalties assessed; and
 - (iii) The penalties recovered.
 - (d) A description of staffing, including the number of full-time equivalent positions devoted to the permit program and, for each position, the qualifications and job description.
 - (e) The report on the Oregon Wetlands Mitigation Bank Revolving Fund Account as required under ORS 196.640 and 196.655.
 - (f) The number of and average time for responding to notices received by local governments and the number of responses that took more than thirty (30) calendar days.
 - (g) The number of wetland conservation plans approved by the Department and a description of each, including the issues raised during the approval process.

(3) Public Information. The Department shall develop and maintain a public information program to educate permit applicants and the general public about:

- (a) Wetland functions and values;
- (b) The status and trends of Oregon's wetlands;
- (c) The Statewide Wetlands Inventory; and
- (d) Wetland identification, regulations and permit requirements.

(4) Technical Assistance and Cooperation. Upon request, within the limits of staffing ability and available resources, the Department shall provide technical assistance to other state agencies, local governments and the public in identifying wetlands.

Stat. Auth.: ORS 196.885; ORS 196.910; ORS 196.688

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

141-085-0115

Compensatory Mitigation

(1) The Department may require compensatory mitigation as a condition of an authorization to compensate for reasonably expected adverse impacts to water resources of the state and navigation, fishing and public recreation uses on waters of the state other than freshwater wetlands or estuarine areas. **Such conditions impose obligations on the permitholder beyond the expiration of the authorization.**

(2) Such compensatory mitigation may include, but is not limited to:

- (a) Offsite or onsite enhancement (e.g., planting or seeding riparian vegetation or exposing enclosed culverted systems) of water resources of the state;
- (b) Offsite or onsite improvements to enhance navigation, fishing or public recreation uses of waters of the state; or
- (c) Compensation to a third party, as approved by the Department, for the purpose of watershed health or to improve the navigation, fishing or public recreation uses of waters of the state. A permit holder, with the approval of the Department, may contract with a third party to construct, monitor or maintain the compensatory mitigation site. **The permitholder remains responsible for compliance with the compensatory mitigation conditions unless the authorization is transferred to another entity in accordance with these rules.**

(3) The Department may approve of compensatory mitigation for impacts to waters of the state other than freshwater wetlands or estuarine areas, when the applicant demonstrates in writing that the compensatory mitigation plan will replace or provide comparable substitute for water resources of the state and/or navigation, fishing and public recreation uses lost by project development.

(4) The Department may require some form of long term protection for the compensatory mitigation site.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0121

Freshwater Compensatory Wetland Mitigation (CWM) Applicability, General Requirements; Functional Assessments

(1) The following rule sections, OAR-141-085-0121 to OAR-141-085-0151, apply to removal-fill that occur within freshwater wetlands and do not apply to removal-fill:

(a) Within estuarine wetlands covered by ORS 196.830 and OAR-141-085-0240 thru OAR 141-085-0266, except as specifically noted in the estuarine mitigation rules or where estuarine wetland restoration or enhancement is proposed to compensate for impacts to freshwater wetlands; or

(b) Within areas covered by an approved Wetland Conservation Plan (WCP) authorized under ORS 196.668 to 196.692.

(2) For projects where reasonably expected adverse impacts to the water resources including wetland functions cannot otherwise be avoided, or minimized, a CWM plan will be required to compensate for the reasonably expected adverse impacts of the project by replacing the functional attributes of the wetland impacted by project development. Compensatory wetland mitigation shall be limited to replacement of the functional attributes of the lost wetland.

The requirements to provide CWM impose obligations on the permit holder that extend beyond the expiration date of the authorization.

(3) For projects described in (2) requiring CWM and involving project development on 0.2 (two-tenths) of an acre or less of wetlands, there is a rebuttable presumption that on-site CWM is impracticable. The applicant may propose to fulfill CWM requirements through off-site CWM without first considering on-site CWM.

(4) For projects described in (2) requiring CWM involving project development impacts greater than 0.2 (two-tenths) of an acre, the applicant shall first consider on-site CWM to provide the replacement of the functional attributes of the lost wetland. If on-site CWM is impracticable as documented by the applicant, off-site CWM shall be utilized. In considering off-site CWM, the applicant may create, restore or enhance a wetland or if the project development occurs within the service area of an established wetland mitigation bank, the applicant may purchase credits, if available, from the bank to fulfill CWM requirements so long as the functional attributes of the lost wetland are replaced. If no mitigation bank is available, CWM may be fulfilled through payment to provide as described in OAR 141-085-0131.

(5) The Department will review the CWM plan for sufficiency and compliance with these rules. The Department may make recommendations for improvements to CWM plans, at any time prior to the permit decision, based on the demonstrated success of existing CWM projects. The Department will approve the final CWM plan as a part of the individual removal-fill permit. In approving the final CWM plan, the Department may, after consulting with the applicant, require conditions necessary to ensure success of the CWM plan and to ensure the requirements in these rules are met.

(6) To the extent possible, the Department shall develop and make available to the public a listing of known compensatory wetland mitigation sites (e.g., wetland mitigation banks).

(7) The applicant shall complete and include in the application an assessment of wetland functional attributes. The assessment shall assess:

(a) Existing functional attributes at the proposed project impact site;

(b) Functional attributes reasonably expected to be adversely impacted, including those functional attributes decreased or lost due to the proposed project;

- (c) Existing functional attributes at the proposed CWM site, if the site is currently wetland; and
 - (d) The net gain or loss of specific functional attributes at the direct CWM site as a result of the proposed CWM project.
- (8) Wetland functional attributes to be assessed include, but are not limited to:
- (a) Water quality and quantity functions;
 - (b) Fish and wildlife habitat functions;
 - (c) Native plant communities and species diversity functions; and
 - (d) Recreational and educational values.
- (9) A functional assessment of the impact site is not needed if the proposed CWM plan utilizes payment to provide or the purchase of credits from a wetland mitigation bank to satisfy all the compensatory wetland mitigation requirements.
- (10) The Oregon Freshwater Wetland Assessment Method shall not be used to satisfy the requirements of OAR 141-085-0121(7).
- (11) HGM is the preferred, but not required, functional assessment method. When HGM is used, the Willamette Valley HGM guidebook should be used for appropriate HGM classes in the Willamette Valley; until additional guidebooks are developed by the Department, the “Judgmental Method” in the Willamette Valley Guidebook may be used to assess wetland functions in other regions. The judgmental method provides a consistent framework to consider the basic functional attributes of wetlands as described in OAR 141-085-0121(8)(a) thru (c). It also offers a list of observable field indicators of the conditions and processes that contribute to these functional attributes and guidance on making qualitative rating of these functional attributes without reference to the data set or numeric scoring models.
- (12) If best professional judgment is used to evaluate any or all wetland functional attributes, a discussion of the basis of the conclusions is required. 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.
- (13) Additional assessments or data may be required by the Department if the functional assessment results, public/agency review comments, or the Department’s review indicate that there may be reasonably expected adverse impacts to rare or listed plant or animal species, adjoining property owners, or if the project’s effects are not readily apparent.

Stat. Auth.: ORS 196.825
Stats. Implemented: ORS 196.800- 196.990

141-085-0126

Requirements for All CWM

(1) CWM shall replace:

- (a) Wetland habitat type(s) impacted by the project, as classified per Cowardin system (e.g., palustrine forested); and
- (b) 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
- (c) The functional attributes of the lost wetland (impact wetland).

(2) The Department may approve exceptions to the requirements of OAR 141-085-0126(1) if the applicant demonstrates, in writing, that the alternative CWM:

- (a) Is environmentally preferable;
- (b) Replaces wetland functions that address problems (such as flooding) that are identified in a watershed management plan or water quality management plan approved by a watershed council or public agency;
- (c) Replaces wetland types (Cowardin/HGM) and functions historically lost in the region; or
- (d) Replaces rare or uncommon plant communities appropriate to the region, as identified in the most recent ONHP plant community classification.

(3) A permit holder, with the approval of the Department, may at any time contract with a third party to construct, monitor or maintain the CWM site. The permit holder cannot delegate responsibility for compliance with the CWM requirements unless the authorization has been transferred in accordance with OAR 141-085-0034.

(4) For linear projects (e.g., roads or utility lines with wetland impacts in several watersheds), the applicant may compensate for all wetland impacts at a single CWM site.

(5) CWM:

- (a) Shall be completed prior to or concurrent with 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. The ratio of CWM required for delayed projects may be increased according to the provisions of OAR-141-085-0136.
- (b) Shall include native vegetation plantings aimed at re-establishment of a dominance of native plants.
- (c) Shall 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 hydrology is not.

(6) CWM sites may fulfill multiple purposes including stormwater retention or detention provided:

- (a) The requirements of OAR 141-085-0126(1) and (2) are met;
- (b) No alteration is required to maintain the stormwater functions that would degrade the functional attributes; and
- (c) The runoff water 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.

(7) CWM using wetland enhancement must conform to the following additional requirements. The CWM shall:

- (a) Be conducted only on degraded wetlands as defined in OAR 141-085-0010;
- (b) Result in a demonstrable net gain in wetland functions at the CWM site as compared to those functions lost or diminished at the wetland conversion site and those functional attributes previously existing at the CWM site;
- (c) Not replace existing wetland functional attributes with different wetland functional attributes unless the applicant justifies, in writing, that it is environmentally preferable to do so;
- (d) Not **consist solely of the conversion of *convert*** one HGM or Cowardin class of wetland to another unless the applicant can demonstrate that it is environmentally preferable to do so;
- (e) Identify the causes of wetland 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.

(8) A conservation easement, deed restriction or similar legally binding instrument shall be part of a CWM plan, as specified in OAR 141-085-0029(8).

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0131

Requirements for CWM Involving Wetland Mitigation Banks, Payment-to-Provide or Conservation

(1) The requirements in this section are in addition to the general requirements in OAR 141-084-0121.

(2) Mitigation Bank Credits. Purchase of mitigation bank credits from an appropriate and approved mitigation bank is preferable to payment to provide mitigation. The Department will approve the bank option only after on-site mitigation has been examined and found to be impracticable. **Documentation of the purchase of the required number of mitigation bank credits must be received by the Department prior to issuance of the authorization.**

(3) Payment to provide mitigation:

(a) The removal-fill permit **(or general authorization letter of authorization)** for an authorized activity shall not be issued until payment has been made in the amount identified in the CWM plan as approved by the Department. Once an approved removal-fill permit activity has begun as proposed, the payment to provide mitigation payment shall be considered as non-refundable.

(b) The amount to pay to the Department to provide CWM shall be the average cost of credits available from all active mitigation banks in the state as compiled annually by the Department.

(4) Conservation in lieu:

(a) Conservation of wetlands may be used for meeting the CWM requirement when the wetland proposed for conservation:

- (A) Supports a significant population of rare plant or animal species; and/or

- (B) Is a rare wetland type (S1 or S2 according to the Oregon Natural Heritage Program); or
- (C) Is a vernal pool, fen or bog.
- (b) Conservation in lieu should be encouraged as the preferred CWM option when the impact site is a wetland type that is exceptionally difficult to replace, such as vernal pools, fens and bogs.
- (c) There is no established ratio for indirect CWM using conservation in lieu. The acreage needed under conservation in lieu will be determined on a case-by-case basis through negotiation between the applicant and the Department.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0136

Ratio Requirements for CWM

- (1) The purpose of CWM ratios is to:
 - (a) Ensure that the state's wetland resource base is maintained as required in ORS 196.672;
 - (b) Offset the temporal loss of wetland functions as compensatory mitigation sites mature (i.e., become fully functional replacement of the lost, impacted wetland);
 - (c) Replace wetland functions that may be size dependent; and
 - (d) Compensate for the likelihood of success in the different CWM methods (creation, restoration, enhancement). The methods are techniques used to achieve the replacement of functional attributes lost from the impacted wetland.
- (2) Except as provided in Sections (3) through (6) of this section, the following minimum ratios shall be used in the development of CWM plans:
 - (a) Restoration: One (1) acre of restored wetland for one (1) acre of impacted wetland.
 - (b) Creation: One and one-half (1.5) acres of created wetland for one (1) acre of impacted wetland.
 - (c) Enhancement: Three (3) acres of enhanced wetland for one (1) acre of impacted wetland.
 - (d) Enhancement of cropped wetland as determined by the Department: Two (2) acres of enhanced cropped wetland for one (1) acre of impacted wetland. **Cropped wetland is any wetland that has been regularly plowed and seeded in order to produce a crop for market. Land defined by NRCS as 'wet pasture' does not qualify as cropped wetland.**
 - (e) Conservation in Lieu: Variable: See OAR 141-085-0131(4).
- (3) The Department shall double the minimum ratio requirements for project development impacting existing CWM sites; for example, using enhancement to compensate for impacts to an existing CWM site will require a ratio of six (6) acres enhanced for every one (1) acre impacted.
- (4) The Department may increase the ratios when:
 - (a) Mitigation is proposed to compensate for an unauthorized removal or fill activity; and/or
 - (b) Mitigation is not proposed for implementation concurrently with the authorized impact.

(5) 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 (1) acre of wetland and open water habitat, with depths less than thirty-five (35) feet, for one (1) acre of wetland impacted;
- (b) Three (3) acres of wetland and open water habitat, with depths greater than thirty-five (35) feet, for one (1) acre of wetland impacted;
- (c) One (1) acre of a combination of restored, created or enhanced wetland and upland, comprising at least fifty percent (50%) wetland, for one (1) acre of wetland impacted.

(6) 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) Based on the value the Department determines under OAR 141-085-0131(3), allow the applicant, upon approval by the Department, to pay the entire cost of CWM:
 - (A) On an annual basis for a period not to exceed twenty (20) years over the life expectancy of the operation, whichever is less; or
 - (B) On an annual basis over time at a monetary rate per cubic yard or ton of aggregate material removed annually from the site.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0141

Requirements for All CWM Plans/Application Requirements

(1) On-site or off-site CWM involving the creation, restoration and /or enhancement of wetlands by the applicant. A CWM plan shall, at a minimum, include:

- (a) CWM site information including:
 - (A) Area (size) of the CWM wetland proposed for impact relative to the total area of the wetland.
 - (B) CWM site ownership information (name, address, phone). If this is different from the applicant, copies of legal agreements granting permission to conduct the CWM and willingness of the property owner to provide long-term protection are required;
 - (C) Physical Location (Township, Range, Quarter Quarter Section and tax lot(s)) and a USGS or similar map showing the CWM site location relative to the impact site.
- (b) Existing physical and biological baseline information of CWM site including:
 - (A) A wetland determination/delineation report (OAR 141-090).
 - (B) A functional assessment, except when PTP or purchase of credits from a wetland mitigation bank is proposed, of any existing wetlands at the CWM site, proposed for enhancement or other alteration, including a description of the factors leading to the degraded condition of the site (OAR 141-085-0121).

- (C) A description of the major plant communities and their relative distribution, including the abundance of exotic species.
 - (D) A general description of water source, duration, frequency of inundation or saturation, depth of surface or subsurface water and approximate location of all water features (wetlands, streams, lakes) within 500 feet of the CWM site.
 - (E) HGM and Cowardin classification of any wetlands present within the CWM site.
- (c) CWM plan description including:
- (A) CWM plan goals, objectives and success criteria.
 - (B) The CWM concept in general terms including a description of how the plan, when implemented, will restore, reverse, minimize or control the causes of wetland degradation and ensure that the wetland functions of the impacted wetland are replaced.
 - (C) A description of the rationale for the CWM site selection.
 - (D) Proposed water source, duration, frequency of inundation or saturation of the CWM project.
 - (E) Any known CWM site constraints or limitations.
 - (F) Proposed HGM and Cowardin classification.
 - (G) Proposed net losses and gains of wetland functions.
 - (H) A description of how the applicant will maintain and protect the direct CWM site beyond the monitoring period.
 - (I) CWM construction plans including:
 - (i) Scaled site plan showing CWM project boundaries, existing wetlands, restoration, creation and enhancement areas.
 - (ii) Scaled grading plan with existing and proposed contours and cross section locations.
 - (iii) Description of construction methods (access, equipment).
 - (iv) Schematic of any proposed hydrological structures.
 - (v) Scaled cross sections showing elevations, distance.
 - (vi) Planting plan (with species, size, number, spacing and installation methods).
 - (vii) Monitoring plan (schedule, timetable, methods).
 - (viii) Contingency plan for CWM failures.
 - (ix) Implementation schedule and construction sequence.
 - (J) A reference site, combination of reference sites, or reference data of the same HGM class or subclass (e.g. from the Willamette Valley HGM Guidebook) and representing a less functionally-altered condition than the CWM site. Compare and relate the sites and/or data to the CWM goal.
 - (K) Provisions for a financial security instrument (OAR-141-085-0176), if the impact is greater than .2 (two-tenths) of an acre. The financial security instrument is not required for the application but will be required prior to permit issuance.
 - (L) Plans for restoration projects shall include data substantiating that the site was formerly, but is not currently, a wetland (e.g. a wetland delineation report).
 - (M) Plans for vegetated buffers, if needed, to protect the viability and functions of the CWM site.**
 - (N) Plans for the long term protection of the CWM site**
 - (i) The individual removal-fill permit along with site access control (e.g. fencing, signing) is usually sufficient legal means to achieve**

maintenance and long-term protection of mitigation sites. However, in some instances compensatory mitigation sites and compensatory wetland mitigation sites will need to be permanently protected from destruction with appropriate real estate instruments or agreements (e.g. conservation easements, deed restrictions, long-term management agreements with land trusts or public ownership). Situations where such protection will be required include but are not limited to:

- (A)When the permit holder is likely to sell the mitigation site within five (5) years of project completion;**
 - (B)When the permit holder is an absentee owner of the mitigation site;**
 - (C)When the permit holder is not likely to actively participate in managing and maintaining the mitigation site; or**
 - (D)When the permit holder is not the owner of the mitigation site.**
- (ii) The applicant shall offer a preferred method and justification.**
- (iii) The Department will make the final determination for the need and type of long-term protection.**

- (2) Other CWM. A CWM plan using conservation in lieu must include:
- (a) Written documentation that the requirements in OAR141-085-0131 (4) are met.
 - (b) A conservation plan that shall include:
 - (A) Maps showing the wetland conservation area including all delineated wetlands to be conserved;
 - (B) The surrounding land uses and an analysis of the probable effects of those land uses and activities on the conserved wetlands;
 - (C) Measures that may be necessary to minimize the effects of surrounding land uses and activities on the conserved wetlands;
 - (D) Identification of the party(ies) responsible for long term protection of the conserved wetlands;
 - (E) A draft legally binding long term protection instrument (e.g. conservation easement);
 - (F) A draft long-term management plan that addresses the specific requirements of the wetlands to be conserved.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0146

Removal-Fill Authorization Conditions for CWM Plans

- (1) For permits involving CWM:
- (a) The approved CWM plan shall become part of the removal fill authorization and, by reference, all portions of the CWM plan shall become conditions of the authorization.
 - (b) Additional compensatory mitigation conditions may be included in the authorization.
 - (c) All compensatory mitigation conditions shall be enforceable until the CWM is deemed successful by the Department in accordance with OAR 141-085-0151, regardless of the authorization expiration date.
- (2) Conditions for authorizations shall also state:

- (a) If applicable, the amount of the payment to provide mitigation made by the applicant and how it was calculated; and
- (b) If applicable, the mitigation bank utilized; and
- (c) The loss of wetland by area, Cowardin and HGM class(es), and function(s) of wetland(s) expected to be lost or impaired; and
- (d) The applicant's remaining responsibility after payment to provide mitigation payment was made, if any, and;
- (e) No removal or fill of any amount of material shall be permitted within compensatory wetland mitigation sites without prior authorization of the Department.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0151

Monitoring Requirements for CWM Plans Involving On-site or Off-site Creation, Restoration or Enhancement of Wetlands

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

- (a) Determine if the CWM complies with the conditions of the authorization;
- (b) Evaluate whether the CWM meets the goals, objectives and success criteria of the CWM plan; and
- (c) Provide information for removal/fill program monitoring.

(2) The permit holder shall monitor the CWM site and provide to the Department:

- (a) A post construction report demonstrating "as-built" conditions including grading and discussing any variation from the approved plan. Unless waived by the Department, the post construction report shall be submitted within ninety (90) calendar days of completing grading;
- (b) An annual written monitoring report that includes all data necessary to document compliance with CWM conditions and success in meeting the CWM goals. These data may include photographs, topographic surveys, plant survival data, hydrologic data and other information as required to demonstrate compliance. The report shall include the following sections:
 - (A) Introduction
 - (B) Goals, objectives and success criteria
 - (C) Methods
 - (D) Results,
 - (E) Summary and recommendations
 - (F) Figures
 - (G) Appendices with data and photographs

(3) Monitoring shall be conducted for 5 years unless otherwise specified by the Department.

(4) The Department may require modifications to the CWM plan as well as require additional monitoring any time the CWM is failing to meet the CWM goals.

(5) At the end of the five (5) year monitoring period, the Department shall determine if the mitigation project meets the CWM success criteria. If it fails to meet the success criteria, the Department may require modifications to the CWM site as well as additional site monitoring.

(6) When the CWM complies with the compensatory mitigation success criteria, as described in the approved removal-fill authorization, the Department shall notify the permit holder in writing of compliance with the authorization's conditions and that additional monitoring is not required. If the Department fails to notify the permit holder within ninety (90) calendar days of the Department's receipt of the final monitoring report, the permit shall be deemed in compliance and no further monitoring required.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0156

Payments; Expenditure of Funds for Compensatory Wetland Mitigation Payment to Provide; Agency Department Accounting of Payment to Provide Funds and Expenditures

(1) The Department shall utilize the Oregon Wetlands Mitigation Bank Revolving Fund Account authorized pursuant to ORS 196.640 et seq. to hold and disperse money collected from the program.

(a) The Department shall expend funds collected under the payment to provide option of compensatory wetland mitigation only to:

(A) Restore, enhance, or create wetlands (including acquisition of land or easements as necessary to conduct restoration, enhancement or creation projects) as compensatory mitigation to compensate or replace wetland functional attributes lost or diminished as result of an approved removal-fill authorization activity;

(B) Purchase credits from an approved wetland mitigation bank for the purpose of fulfilling the CWM requirements of an approved removal-fill authorization activity.

(C) Monitor the compensatory wetland mitigation; or

(D) Conduct site management for the compensatory mitigation project as necessary to assure that the mitigation is successful.

(2) The Department shall expend funds collected under the payment to provide option of compensatory wetland mitigation only within the geographic region, as defined by OAR-141-085-0010 of these rules, in which the wetland functional attributes occur, unless the Department determines, in writing that expending the funds is not feasible or appropriate within a respective region.

(3) The Department shall expend funds collected from specific approved removal-fill activities within two (2) years from the authorization issuance date unless the Department determines, in writing, that meeting the two year time limit is not feasible.

(4) Third party recipients of funds collected under the payment to provide option of a compensatory wetland mitigation plan shall sign a written agreement provided by the Department that requires the recipient(s) to utilize the funds for specific wetland compensatory mitigation that has been reviewed and approved by the Department. Such review and approval will also be contingent on the submission of a specific monitoring program that is acceptable to the Department.

(5) All payment to provide monies collected and expended, as well as the success of the compensatory wetland mitigation, authorized by the Department

in accordance with these rules, shall be recorded by the Department and shall include:

- (a) A description of the compensatory wetland mitigation funded and including an evaluation of the success of these projects in meeting project goals.
- (b) A description of the wetland functional attributes lost or diminished from approved removal-fill activities summarized individually and cumulatively by basin;
- (c) A summary of the amount of payments collected and expended on individual compensatory wetland mitigation projects as well as cumulatively by basin.
- (d) A description of the wetland functions expected to accrue as a result of compensatory wetland mitigation projects funded in accordance with these rules and summarized by basin and statewide.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0161

Department Responsibilities Under Payment to Provide Option

- (1) The Department, by eliminating the applicant's responsibility for compensatory wetland mitigation by approving a removal-fill authorization including a payment to provide option, assumes the following responsibilities to:
 - (a) Defend the sufficiency of the compensatory wetland mitigation plan to compensate or replace the wetland functional attributes lost or diminished; and
 - (b) Monitor, manage, and otherwise assure the success of the compensatory wetland mitigation project performed by the Agency Department or designated third party(ies) under these rules.
- (2) The Department, as part of an intergovernmental agreement, may transfer or extend the Department's responsibility for the compensatory wetland mitigation plan to another person or governmental agency.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0166

Advance Mitigation

- (1) As part of an existing, active individual removal-fill permit application process, an applicant may request that the Department consider the possibility that the applicant's proposed CWM project, if successful, could result in producing potential mitigation credits in excess of those needed to satisfy the requirements of OAR 141-085-0029(5).
- (2) If the applicant desires to preserve the option of possibly receiving additional mitigation credit for future projects from the excess credits identified under subsection (1) above, then the following additional information shall be submitted as a part of the applicant's Compensatory Wetland Mitigation Plan:
 - (a) Identify the specific area(s) of the CWM site that compensates for the specific permitted impact, and identify the specific areas of the CWM site that are proposed for credit in future projects;

- (b) Include separate protection instruments for each area of the CWM site (existing and proposed);
 - (c) Provide a separate monitoring program for each section of the CWM site (existing and proposed);
 - (d) Provide a table showing how much credit, in acres under suitable mitigation ratios, is being claimed at the CWM site.
- (3) 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 the proposed future wetland impact is a permissible action, or that the CWM will be authorized as suitable CWM for any application. A separate alternatives analysis conducted under OAR 141-085-0029(4) shall be required for each and every separate individual removal-fill permit application.
- (4) Monitoring to determine if success criteria are met shall continue for five (5) years or until the success criteria is achieved, whichever is longer. Such success criteria monitoring requirements shall apply to each designated mitigation area or the entire mitigation site, if constructed at one time.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0171

Mitigation for Temporary Impacts

Projects that do not result in the permanent loss of wetland functions and values, must, as part of the application, provide a rehabilitation plan for temporary impacts, including:

- (1) Plans and specifications for rehabilitating the area of temporary impacts, including grading plans and planting plans, timeline and location of fill disposal areas; and
- (2) Planting plans shall specify species, number and spacing. Such plans shall be designed to re-establish the pre-impact conditions of the site as rapidly as is reasonably possible.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

141-085-0176

Security Bonding and Instruments

(1) Financial Security Instruments are required for CWM projects for impacts greater than (two-tenths) of an acre. Financial security instruments are not required when CWM is satisfied by purchase of credits from wetland mitigation bank or payment to provide mitigation is utilized. To ensure compliance with CWM requirements, the Department may allow for any of the following types of financial security instruments:

- (a) Surety bond;
 - (b) Certificate of Deposit;
 - (c) Irrevocable letter of Credit; or
 - (d) such other financial instrument as the Department deems appropriate to secure the financial commitment of the applicant to fulfill the success of the CWM.
- (2) No financial security instrument is required for projects conducted by government agencies.

- (3) Financial Security Form: The applicant shall file the financial security instrument (s) on a form prescribed and furnished by the Department. The financial security instruments(s) shall be made payable to the Oregon Department of State Lands.
- (4) Commencement of the liability period. The period of liability shall begin at the time of authorization issuance. The liability period shall be established by the Department and be clearly stated in the removal-fill authorization.
- (5) Determining the financial security instrument amount. The Department shall set the amount of the financial security instrument based on the estimated cost of implementing, maintaining and monitoring the CWM if the Department were to carry out the CWM plan as authorized by the removal-fill authorization. The applicant may submit cost estimates for the construction, maintenance and monitoring of the proposed CWM for consideration by the Department.
- (6) General terms and conditions of financial security instruments.
- (a) The shall be in an amount determined by the Department as provided in OAR 141-085-0176(5) of these rules and be made payable to the "Oregon Department of State Lands".
 - (b) The financial security instrument shall be conditioned upon faithful performance of all of the requirements of these rules as well as the conditions of the removal-fill authorization.
 - (c) Liability period. The permitholder's liability under the financial security instrument shall be for the duration of responsibility for the CWM as set out in the approved removal-fill authorization and these rules. Except as approved by the Department, a financial security instrument shall be posted to guarantee specific phases of the required CWM provided the sum of the bonds authorized for the phases equals or exceeds the total amount required to complete the CWM. The scope of work to be guaranteed and the liability assumed under each phase of the instrument shall be specified in detail in the authorization and financial security instrument form.
- (7) Surety bonds: Surety bonds shall be executed by the permitholder and a corporate surety licensed to do business in Oregon. Such surety bonds shall be not be cancelable during their term.
- (8) Certificates of Deposit; certificates of deposit shall be assigned to the Department, in writing, and upon the books of the bank issuing such certificates.
- (9) Letters of credit shall be subject to the following conditions:
- (a) The letter may only be issued by a bank organized or authorized to do business in the state of Oregon.
 - (b) The letter must be irrevocable prior to release by the Department.
 - (c) The letter must be payable to the "Department of State Lands" in part or in full upon demand by and receipt from the Department of a notice of forfeiture issued in accordance with OAR 141-085-0176 of this rule.
- (10) Financial Security Instrument Replacement. The Department may allow a permitholder to replace an existing financial security instrument with another if the total liability is transferred to the replacement. The Department shall not release an existing financial security instrument until the permit holder has submitted and the Department has approved the replacement. Replacement of a financial security instrument shall not constitute a release under OAR 141-085-0176 of these rules.

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

- (a) The precise location of the CWM area.
- (b) The permitholder'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 sought to be released.
- (e) The type and appropriate dates of CWM work performed.
- (f) A description of the results achieved relative to the permitholder's approved CWM plan.

(12) Forfeiture of financial security instruments. The Department shall declare forfeiture of all or part of a financial security instrument for any removal-fill authorization project area or an increment of a project area if CWM activities are not conducted in accordance with the approved CWM plan or the permitholder defaults on the conditions under which the financial security instrument was posted. The Department shall identify, in writing, the reasons for the declaration.

(13) Determination of Forfeiture Amount and Utilization of Funds. The permitholder shall forfeit the amount of the financial security instrument for which liability is outstanding and either utilize funds collected from bond forfeiture to complete the CWM on which bond coverage applies or deposit the proceeds thereof in the Oregon Wetlands Mitigation Revolving Fund Account for use in the payment of costs associated with wetland mitigation activities.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800- 196.990

Estuarine Mitigation

Estuarine Mitigation in Oregon Estuaries

141-085-0240

Purpose

(1) The purpose of these rules is to set out the policy of the Department relating to estuarine mitigation. Mitigation is required as a condition of any permit for filling or removal of material from an intertidal or tidal marsh area of an estuary.

(2) The purpose of mitigation is to maintain the functional characteristics and processes of an estuary -- such as its natural biological productivity, habitats and diversity of native species, unique features and water quality -- when intertidal or tidal marsh resources are destroyed by removal or fill activities.

Stat. Auth.: ORS 196.825; ORS 196.830

Stats. Implemented: ORS 196.800- 196.990

141-085-0244

Application and Review Procedure

(1) Whenever any person submits an application for permit for filling or removal of material from an intertidal or tidal marsh area, the Department shall advise the

applicant that mitigation will be required as a condition of any permit for such activity as may be issued.

(2) The Department shall notify the applicant that the application for permit is not complete until a written proposal for mitigation has been received.

(3) The Department shall review any application for intertidal removal or fill permit in conjunction with a written mitigation proposal. The Department's review shall consider the statutory criteria set out in ORS 196.830 to determine whether a permit shall be issued. When a permit is to be issued, the Department shall consider the mitigation proposal and determine its adequacy in accordance with these rules.

(4) The Department shall review and process the application in the same manner as described in OAR 141-085-0027, -0028, and -0029.

(5) Each application for a removal or fill permit involving mitigation shall provide the following information relating to mitigation in addition to such other information as may be required:

(a) A map and site plan of the area that will be affected by intertidal removal and fill. The development site plan must show water depths and land surface elevations relative to Mean Lower Low Water datum. The development site plan shall also show the boundaries and area of each estuarine habitat type present at the site. (OAR 141-085-0246 thru OAR 141-085-0254 for a description of estuarine habitats found in Oregon estuaries);

(b) A written mitigation proposal for the intertidal removal or fill activity described in the application. The mitigation proposal shall comply with and supply information as required under OAR 141-085-0136, -0141 and -0146. The mitigation site plan must show water depths and land surface elevations relative to Mean Lower Low Water datum. The mitigation site plan shall also show the boundaries and area of each estuarine habitat type present at the site;

(c) Any provisions of the comprehensive land use plan for the area as those provisions relate to the proposed intertidal removal-fill site and the proposed mitigation site.

(6) In reviewing an application for a removal-fill permit involving mitigation, the Department shall determine:

(a) The adverse effects of the proposed project, i.e., the type and areas extent of habitats destroyed or adversely affected; the nature and magnitude of associated water quality degradation; unique features destroyed or adversely affected;

(b) The extent of compensating activity inherent in the proposed activity, e.g., uplands converted to intertidal or shallow subtidal areas; water quality enhancement caused by improved circulation or flushing. Creation of a subtidal area by removing material from an intertidal area is not a compensating activity under these rules;

(c) The availability of areas in which mitigation activities could be performed. The Department may rely on local comprehensive land use plans and local, state, and federal planning and resource agency staff to develop this information;

(d) How and to what extent an estuarine area will be created, restored or enhanced;

(e) How the proposed mitigation will maintain the functional characteristics and processes of an estuary such as its natural biological productivity, habitats and diversity of native species, unique features and water quality.

Stat. Auth.: ORS 196.825; ORS 196.830
Stats. Implemented: ORS 196.800- 196.990

141-085-0246

Estuarine Systems Described

(1) Oregon estuaries have three general aquatic subsystems -- marine, brackish, and fresh -- which are generally described in terms of the salinity range produced by the interaction between sea water and fresh water runoff. OAR 141-085-0264 shows each major Oregon estuary and the location of various salinity subsystems.

(2) The *marine subsystem* is frequently a high-energy zone located near the estuary mouth. Strong currents influence the bottom, and the substrate is primarily coarse marine sand, cobble and rock. Salinities are generally high (15 o/oo - 35 o/oo) due to the dominance of ocean water, but may be greatly reduced during high river flows in winter. Kelp and other algal species often cover the rock substrates and form microhabitats for many species. Benthic invertebrates in this zone may include marine and estuarine species. Most fish utilizing this subsystem are marine species.

(3) The *brackish subsystem* is a relatively protected environment, often characterized by a broad embayment between the estuary mouth and narrow, upriver reaches of tidewater. Normally the bay subsystem has a large percentage of intertidal land. Because it is a transition zone between marine and fresh-water environments, sediments of the subsystem are primarily a mixture of coarse marine sand and fine river-borne silts and clays. Salinities (0.5 o/oo - 15 o/oo) during summer are moderate to high depending on the size of the drainage, but may vary considerably with tidal state and fresh-water flow. Most bays have a wide diversity of habitats with extensive intertidal flats, eelgrass beds, algal beds, and marshes.

(4) Sloughs are narrow, isolated arms of an estuary. Fresh-water drainage into the slough subsystem is usually low and may be from a number of small creeks. The current flowing through a slough channel is usually slow. The salinity is frequently in the brackish range and is influenced by the proximity of the slough to the estuary mouth. Sloughs usually have fine organic sediments and high percentages of intertidal land, consisting of extensive flats, eelgrass beds and marshes.

(5) The *fresh-water subsystem* includes the upper tidewater portions of the larger tributaries that enter the estuary. A large percentage of the subsystem is narrow, subtidal river channel. Current velocities exhibit dramatic seasonal changes, which influence benthic communities. Salinities are low most of the year (0.0 o/oo - 0.5 o/oo) and portions of the subsystems may be entirely fresh water. Sediments range from fine silts and clays to cobble and gravel. Small fringing marshes occur on the narrow, intertidal portions of the riverbank.

Stat. Auth.: ORS 196.825; ORS 196.830
Stats. Implemented: ORS 196.800- 196.990

141-085-0248

Estuarine Land Described

- (1) Intertidal and tidal marsh areas of an estuary can be described in terms of substrate material, vegetative cover and salinity regime.
- (2) Lower elevation intertidal landforms having a gradual slope and normally occurring in areas sheltered from strong currents are called Beds and Flats, Figure 1 (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 8). Beds and flats may be vegetated or unvegetated depending on current and wave conditions. Locations of beds and flats vary, but most occur in the bay and slough subsystems. Beds and flats are broader, more gradual in slope, and subject to slower current than adjacent shores.
- (3) Community structure is influenced by sediment characteristics, currents, wave action, temperature, and salinity. Regularly flooded beds and flats support diverse populations of tube-dwelling and burrowing invertebrates including worms, clams, and crustaceans.
- (4) These invertebrates are primarily detritus feeders. Macroalgae, diatoms, and seagrasses also commonly colonize beds and flats. Animals and plants have adapted to the wide ranges of temperature and salinity characteristics of flats. A flat may be relatively stable, or may increase in total area, elevation, or percentage of vegetative cover. Beds and flats seldom decrease in elevation or size under normal conditions.
- (5) Higher intertidal landforms that are more than 30 percent covered by erect, rooted herbaceous hydrophytes are called *Tidal Marshes*. The tidal marsh generally occurs from slightly below mean high water (MHW) inland to the line of nonaquatic vegetation. Community composition varies primarily with tidal elevation but is also influenced by sediment type and salinity.
- (6) Plant producers in salt marshes include not only marsh grasses but also macroalgae entwined among the vascular plant stems, microalgae on the mud surface, and phytoplankton in the water column. Organic material and nutrients stored by marsh producers are consumed directly or transported to other portions of the estuary as detritus. Marshes provide habitat for fish, invertebrates, waterfowl, and small terrestrial mammals. A diversity of insects lives among and grazes on marsh plants.

Stat. Auth.: ORS 196.825; ORS 196.830
Stats. Implemented: ORS 196.800- 196.990

141-085-0250

Substrate Types Described

Substrate material, i.e., grain size, organic content, are very important descriptors for flats because they reflect current and wave conditions as well as the nature of plant and animal productivity in the area:

- (1) Rocky-bedrock subclass. The rocky-boulder substrate consists primarily of rock fragments larger than 256 mm in diameter (about one foot). Often finer material is mixed with the larger fragments. The bedrock substrate consists primarily of bedrock surfaces. Unconsolidated sediments may seasonally cover portions of the rock surfaces.
- (2) Cobble/gravel subclass. This substrate consists primarily of cobble or gravel (fragments less than 256 mm but greater than 1 mm in diameter), often with shell fragments or finer sediments intermixed.

(3) Sand subclass. The substrate is composed primarily of sand (75 percent or more of the sediment is 0.0625 mm to 1 mm in diameter) often with particles of other sizes intermixed.

(4) Sand-mud mixed subclass. The substrate is a mixture of sand and mud. Sand-mud flats are typically higher in organic content than sand flats and are firmer and more aerated than mud flats.

(5) Mud subclass. This substrate is primarily silt and clay (75 percent or more of the sediment is less than 0.625 mm in diameter) and is often anaerobic below the surface. Organic content is generally higher than in the other subclasses of flats (except wood debris/organic).

Stat. Auth.: ORS 196.825; ORS 196.835

Stats. Implemented: ORS 196.800- 196.990

141-085-0252

Vegetative Covers Described

Estuarine lands typically have different types of vegetative cover depending on substrate, salinity, elevation, and exposure to currents and waves:

(1) Unvegetated. These areas are typically found in high energy zones where heavy wave and current action prevent growth of significant vegetation.

(2) Algal. Intertidal algal beds consist of macroalgae attached to rock and unconsolidated substrates. Genera common in Oregon estuaries include *Enteromorpha*, *Ulva*, and *Fucus* spp.

(3) Seagrass subclass. Intertidal seagrass beds are composed primarily of aquatic vascular plants and algae, such as eelgrass (*Zostera marina*, *Z. nana*), growing on lower intertidal habitats with at least a 30 percent vegetative cover during the majority of the growing season.

(4) Low salt marsh subclass. Low salt marshes are entirely flooded by most high tides, and, therefore, contribute to the estuarine food supply on a daily basis. Tidal runoff is generally diffuse rather than contained by deep ditches. The marsh surface is generally flat but slopes slightly upward toward land. Depending on the substrate a colonizing marsh community near mean high water is comprised of pickleweed (*Salicornia virginica*), seaside arrow grass (*Triglochin maritima*), Seacoast bullrush (*Scirpus maritimus*), or Lyngbyei's sedge (*Carex lynbyei*) (Frenkel and Eilers 1976). This lower intertidal marsh frequently shows high species dominance and low diversity (Eilers 1975).

(5) Low fresh marsh subclass. Fresh marshes occur inland of salt marshes where soil salinity is low or in the upstream portion of the estuary where fresh water under tidal influence periodically inundates the marsh. Vegetation is herbaceous with sedge (*Carex* sp.), Bullrush (*Scirpus* sp.), and cattails (*Typha* sp.) usually dominant (Akins and Jefferson 1973).

(6) High salt marsh subclass. High salt marshes usually rise abruptly 0.3 to 1.0 m above the adjacent flat, shore, or low marsh (Jefferson 1975). The marsh surface is irregular with generally continuous plant cover interspersed with pot holes, salt pans, and channels. The marsh surface is covered by most higher high tides and tidal runoff follows well-defined channels with natural levees. Diversity is usually greater in high marsh and transition zone species are described by Frenkel, et al (1978).

(7) Scrub/shrub subclass. Shrub wetlands may occur at the inland boundary of the estuary. In Oregon, willow (*Salix* sp.) is the primary semi-aquatic woody plant that is likely to occur. Willow, however, has a low salinity tolerance, and,

therefore, is more often found in fresh-water subsystems and the Columbia River Estuary.

(8) Forested wetland subclass. Forested wetlands define the inland boundary of the estuarine zone. In Oregon, Sitka spruce and red alder are typical plants that are likely to occur. This subclass is essentially a fresh water community. Forested wetlands are not a part of the estuarine system for mitigation unless the land surface is inundated at the Highest Measured Tide.

Stat. Auth.: ORS 196.825; ORS 196.835
Stats. Implemented: ORS 196.800- 196.990

141-085-0254

Habitat Classification

(1) The ODFW under contract to the Department of Land Conservation and Development (DLCD) has developed an estuarine habitat classification system (Bottom et al., 1979, *Habitat Classification and Inventory Methods Management of Oregon Estuaries*) based on an existing U. S. Fish and Wildlife Service habitat classification system (Cowardin et al., 1979, *Classification of Wetlands and Deep Water Habitats of the United States*, Fish and Wildlife Service, U. S. Department of the Interior).

(2) In addition, ODFW has mapped habitat types in all major Oregon estuaries except the Columbia River and prepared resource inventories for selected inventories for selected estuaries. These reports provide the information base for implementation of mitigation policy. Figure 2 (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 12) shows the Estuarine Mitigation Intertidal Habitat Classification System.

Stat. Auth.: ORS 196.825; ORS 196.835
Stats. Implemented: ORS 196.800- 196.990

141-085-0256

Mitigation Policy Generally

Mitigation means the creation, restoration or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary, such as its natural biological productivity, habitats and diversity of native species, unique features, and water quality:

(1) No mitigation proposal may be inconsistent with an acknowledged comprehensive land use plan and implementing ordinances for the area where the removal-fill activity will occur or where the mitigative action is located.

(2) Mitigation must occur in the same estuary as the intertidal removal or fill activity except when the alternative is a partial waiver of mitigation under ORS 541.626(4)(a).

(3) Mitigation shall restore or enhance estuarine lands and resources in an area proportionate to the *area affected* by the intertidal removal or fill activity. The *area affected* shall include the actual area where material is removed or filled and any surrounding intertidal or tidal marsh area adversely affected by the activity. At minimum, the mitigation action shall offset the adverse affects of the intertidal or tidal marsh removal-fill activity.

(4) Mitigation shall "maintain" (replace) the natural biological productivity and diversity of native species of the intertidal removal-fill site by creation, restoration or enhancement of an appropriate area of another estuarine habitat. Any shallow

subtidal or intertidal or tidal marsh estuarine habitat may be used to "replace" the habitat lost to intertidal removal-fill, but the area will be proportionate to the Relative Value of the habitats involved. The surface area of a mitigation site may not be smaller than the surface area of the development site.

NOTE: The purpose of this policy statement is to ensure conservation of estuarine surface area. However, a mitigation proposal shall not fail because the mitigation surface area is slightly less than the intertidal removal-fill area and no other mitigation area is available or the next alternative would be far more expensive.

(5) Habitat types found in Oregon estuaries have been evaluated and compared in terms of natural biological productivity and diversity of native species by trained scientists and natural resource managers knowledgeable and familiar with the physical, biological, and chemical processes of estuaries. The result of this evaluation is a set of Relative Values that can be used to determine how much area of one habitat is needed to mitigate each acre of another habitat lost to intertidal removal-fill. Figures 3 and 3A (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 16) are a matrix of habitat characteristics and Relative Values for habitats found in Oregon estuaries:

(a) The base Relative Values for estuarine habitats shall range from 1.0 to 6.0;

(b) The Department may adjust the Relative Value of any habitat type (except for relative values already established in a mitigation bank agreement) if site conditions and characteristics such as very low or exceptionally high resource values warrant such adjustment to carry out the provisions of the Removal-Fill Law. Such adjustment may not exceed 25 percent of base Relative Value in either direction.

(6) The equation for determining how much intertidal or tidal marsh area is required for mitigation shall be:

$AM = (RVd/RVm) (AD)$ where

AM = Area of mitigation site

RVd = Adjusted Relative Value of the development site

RVm = Adjusted Relative Value of the mitigation site

AD = Area of development site

(7) The equation for determining how much shallow subtidal area is required for mitigation shall be:

$AM = 2.0(RVd/RVm) (AD)$

(8) Note that if shallow subtidal habitats are offered as mitigation, the required surface area is twice the size of the surface area required if an intertidal or tidal marsh area of equal Relative Value is offered. The surface area of the mitigation site (AM) may not be smaller than the surface area of the development site (AD).

(9) Figure 4 (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 17) shows the relationship between the adjusted Relative Values of the development and mitigation sites and the ratio of the Mitigation Area to the Development Area (AM/AD) when the habitat replacement occurs under OAR 141-085-0256(4) of this rule.

(10) The Mitigation Credits attributable to any created or restored habitat may be obtained by multiplying the adjusted Relative Value of the created or restored habitat by the number of acres affected.

(11) The Mitigation Credits attributable to any *enhanced* habitat may be obtained as follows:

- (a) Obtain the base Relative Value of the existing habitat from Figures 3 or 3A (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 16) and adjust appropriately;
 - (b) Estimate or otherwise determine what the adjusted Relative Value of the affected habitat will be after mitigation occurs;
 - (c) Subtract (a) from (b) to obtain enhancement Relative Value;
 - (d) Multiply the enhancement Relative Value (c) times the number of acres enhanced.
- (12) Mitigation shall "maintain" the unique features of estuaries that may be affected by intertidal removal-fill projects. The term "unique features" is defined in OAR 141-085-0010;
- (a) The Department intends to rely upon acknowledged comprehensive land use plans for guidance in identifying "unique features" for mitigation purposes. Proposed intertidal removal-fill activities involving unique features shall be scrutinized carefully to determine whether or not a permit should be issued. If a permit is issued, mitigation shall be in-kind to the maximum extent possible and shall include the habitat replacement required under OAR 141-085-0256(4) of this rule;
 - (b) The objective of mitigation involving unique features shall be to replace lost habitat by substituting and, additionally, to replace or relocate as much of the unique feature as possible.
- (13) Mitigation shall "maintain" habitats and diversity of native species. The law does not mandate that every habitat and species affected by intertidal removal and fill be replicated in the mitigation proposal. However, the law does require consideration of whether or not habitat or diversity of native species of an estuary generally will be adversely affected by an intertidal removal or fill, and if so, what mitigation will offset the impact. The Department will maintain habitats and diversity of native species through habitat replacement required under OAR 141-085-0256(4) of this rule;
- (a) "In-kind" or "like-kind" mitigation will be encouraged whenever possible by approving mitigation proposals and mitigation banks that involve a diversity of resource-habitat types. The Department will maintain a record, by estuary, of the amounts and types of habitats involved in intertidal removal-fill sites and mitigation sites. No additional mitigation is required under this subsection unless the Department determines that a mitigation proposal under OAR 141-085-0256(4) of this rule would reduce or impair habitats and diversity of native species.
- (14) Mitigation shall maintain "water quality" through enhancement of physical, chemical, and biological characteristics of the waters at and near the site;
- (a) Oregon has stringent water quality standards that the Department routinely incorporates into removal-fill permits. The Department will not approve a development activity that reduces water quality to a persistent level below state water quality standards, nor will the Department approve a *mitigation proposal* that would degrade water quality. The Department will rely on state and federal resource agencies, primarily DEQ for guidance on water quality issues;
 - (b) A mitigation proposal that produces an identifiable enhancement in estuarine water quality may be used to offset a portion of the resource losses of an intertidal removal-fill activity provided that the mitigation proposal also includes habitat replacement under OAR 141-085-0256(4)

of this rule in an amount at least equal to the area affected by the intertidal removal and fill;

(c) A mitigation proposal claiming water quality enhancement as a mitigative action shall describe the action in detail and explain why and how the project will enhance water quality. The proposal shall identify the nature and areas extent of habitats affected by the water quality enhancements. A water quality enhancement activity mandated by a state or federal agency to raise water quality to state or federal standards is not mitigation under this section;

(d) If the Department determines that the water quality enhancement proposal will significantly enhance water quality, mitigation credits may be determined as provided in OAR 141-085-0256(9) of this rule.

NOTE: An acceptable mitigation must include creation, restoration, or enhancement of an estuarine area approximately equal to the intertidal removal-fill area. Mitigation that enhances water quality may serve as mitigation once sufficient estuarine area has been created, restored, or enhanced to meet the conservation of surface area requirement.

(15) Activities that do not require mitigation even though they may involve intertidal removal include:

(a) Maintenance dredging -- Provided that the applicant can show that the site has been dredged before and is part of a regularly used project. First time dredging activities that remove intertidal lands to obtain water depth will require mitigation;

(b) Aggregate mining -- Provided that the site has been used historically for aggregate removal on a periodic basis.

(16) Examples of activities that are not considered mitigation within the meaning of ORS 196.830 except when mitigation would otherwise be waived in part under ORS 196.830:

(a) The transfer of private intertidal estuarine lands to public ownership (Att. Gen. Op. 3774, 1976);

(b) The dedication of intertidal estuarine lands for natural uses;

(c) Large scale piling and dolphin removal unless associated habitats would be enhanced by the removal through increased circulation;

(d) Creation of subtidal lands except when the area was originally upland. In general, creation, restoration, and enhancement of subtidal lands produce less mitigation credit than similar actions relating to intertidal lands. Less credit is given because habitat replacement is not "in-kind," i.e., not intertidal as are the lands affected by the removal-fill activity. For purposes of these rules, the creation, restoration, or enhancement of a subtidal habitat will produce one-half the mitigation credits produced by an intertidal area of the Relative Value.

NOTE: The Relative Values for subtidal habitats may be adjusted up to 25 percent up or down in the same manner as intertidal habitats.

(17) Examples of areas and activities considered suitable for restoration and enhancement activities include:

(a) Areas where poor water quality, or similar degradation, limits fish and shellfish production and harvest or public recreation;

(b) "Dredge spoil islands" which could be lowered to create or restore intertidal surface area;

(c) Tide flat or tidal marsh areas suitable for restoration;

(d) Areas where circulation or flushing can be restored or enhanced by breaching dikes or roadfills or removing pile groups or structures.

(18) Mitigation sites and activities need not be fully developed biologically at the time of acceptance, but there must be a high probability of success associated with the proposed action. There is no penalty assessed for a mitigative action that takes time to produce the anticipated resources and habitats;

(a) The Department may require bonding in an amount sufficient to cover the costs of site acquisition, any necessary physical alterations, monitoring and contingencies. The need for bonding will be considered especially carefully in cases where mitigation actions will be taken after the development project, or in cases where the results of the mitigation action will not occur for several years.

NOTE: Late maturing projects are not as acceptable as those where good results may be anticipated in one or two years.

(19) The Department will require monitoring of a mitigative action to determine performance over time in the same manner as described in OAR 141-085-0151.

(20) The Department may require funding for research in cases where the ramifications of a given mitigation action are uncertain. Such requirement shall be set out in detail in the authorization.

(21) The procedures described in this section are suitable for estimating the mitigation liabilities and credits of a proposed intertidal or tidal marsh removal-fill project and the attendant mitigative action. In most cases, these guidelines will produce a mitigation proposal acceptable to the Department and interested parties;

(a) However, estuarine habitats are diverse and dynamic, and the circumstances of any given application may require the Department to amend or adjust mitigation proposals to carry out the provisions of the Removal-Fill Law. Such right is reserved to the Department.

(22) The Department shall require security bonding for estuarine mitigation in the same manner as described in OAR 141-085-0176.

Stat. Auth.: ORS 196.825; ORS 196.835

Stats. Implemented: ORS 196.800- 196.990

141-085-0257

Estuarine Resource Replacement

(1) As used in this section, “estuarine resource replacement” means the creation, restoration or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary, such as its natural biological productivity, habitats and diversity of native species, unique features and water quality.

(2) Except as provided in OAR 141-085-0257(4) of this section, the Department shall require estuarine resource replacement as a condition of any permit for filling or removal of material from an intertidal or tidal marsh area of an estuary.

(3) If the Department requires estuarine resource replacement, the Department shall consider:

(a) The identified adverse affects of the proposed activity;

(b) The availability of areas in which replacement activities could be performed;

(c) The provisions of land use plans for the area adjacent to or surrounding the area of the proposed activity;

- (d) The recommendations of any interested or affected state or local agencies; and
 - (e) The extent of compensating activity inherent in the proposed activity.
- (4) Notwithstanding any provisions of this chapter and ORS Chapter 195, 197 or the statewide planning goals adopted there under to the contrary, the Department may:
- (a) Waive estuarine resource replacement in part for an activity for which replacement would otherwise be required if, after consultation with appropriate state and local agencies the Department determines that:
 - (A) There is no alternative manner in which to accomplish the purpose of the project;
 - (B) There is no feasible manner in which estuarine resource replacement could be accomplished;
 - (C) The economic and public need for the project and the economic and public benefits resulting from the project clearly outweigh the potential degradation of the estuary;
 - (D) The project is for a public use; and
 - (E) The project is water dependent or the project is publicly owned and water related; or
 - (b) Waive estuarine resource replacement wholly or in part for an activity for which replacement would otherwise be required if the activity is:
 - (A) Filling for repair and maintenance of existing functional dikes and negligible physical or biological damage to the tidal marsh or intertidal areas of the estuary will result;
 - (B) Riprap to allow protection of an existing bankline with clean, durable erosion resistant material when a need for riprap protection is demonstrated that cannot be met with natural vegetation and no appreciable increase in existing upland will occur;
 - (C) Filling for repair and maintenance of existing roads and negligible physical or biological damage to the tidal marsh or intertidal areas of the estuary will result;
 - (D) Dredging for authorized navigation channels, jetty or navigational aid installation, repair or maintenance conducted by or under contract with the Army Corps of Engineers;
 - (E) Dredging or filling required as part of an estuarine resource restoration or enhancement project agreed to by local, state and federal agencies; or
 - (F) A proposed alteration that would have negligible adverse physical or biological impact on estuarine resources.
- (5) Nothing in this section is intended to limit the authority of the Department to impose conditions on a permit under ORS 196.825 (4).

Stat. Auth.: ORS 196.825; ORS 196.830
Stats. Implemented: ORS 196.800- 196.990

Mitigation Trust Fund

141-085-0262

Mitigation Trust Fund

- (1) The Department may establish an Oregon Mitigation Trust Fund to provide loans for approved mitigation banks.
- (2) Funds for the Oregon Mitigation Trust Fund may be provided by gift, bequest, donation, grant, or other similar source.
- (3) Funds shall be loaned for a period not to exceed ten years. Repayment of the principal shall require no more than ten annual installments.
- (4) Funds shall be loaned at not more than the prime rate with interest on the unpaid balance payable annually on the anniversary of the loan.
- (5) The highest priority for loans will be given to mitigation banks in deep draft development estuaries. The next highest priority shall be given to mitigation banks in shallow draft estuaries.

Stat. Auth.: ORS 196.640; ORS 196.645; ORS 196.650
Stats. Implemented: ORS 196.600- 196.692

Estuarine Mitigation Banks

141-085-0263

Estuarine Mitigation Banks

- (1) Credits from an estuarine mitigation bank may be used only as a condition imposed on an authorization or to resolve a violation of ORS 196.800 to 196.905 or these rules approved within the same estuarine ecological system.
- (2) The mitigation needs of an intertidal removal-fill can be met using mitigation "credits" stored in a "mitigation bank." Mitigation credits result from a mitigative action accomplished under agreement with the Department. Such credits can be used to offset the mitigation needs of projects that occur at some time after the mitigation bank is created.
- (3) A "Mitigation Credit," the currency of a mitigation bank, is the product of the adjusted or enhancement Relative Value of a habitat type and the number of acres affected by the mitigation action(s). For example, a mitigation action might involve a large diked former brackish marsh that could be restored to the estuarine system by breaching dikes. The site might yield acreage of high brackish marsh (Relative Value 4.0), low brackish marsh (Relative Value 5.0), and unvegetated brackish sand flats (Relative Value 3.0) that could be used for mitigation. Based on five acres of each habitat type, the bank would have some 60 mitigation credits available to offset mitigation liabilities of future projects.
- (4) The following rules are established for the creation and use of mitigation banks and are to be used in conjunction with OAR141-085-0421.
 - (a) A mitigation bank may be created in any estuary to provide mitigation for one or more development projects in that estuary. More than one bank may be created in any estuary. Any legal entity may create a bank;

(b) Mitigation banks shall be created by written agreement with the Department and may be administered by the Department. Such agreements shall provide the basis for creation and operation of the bank and shall specifically provide for the following:

- (A) The exact physical location of affected real property;
- (B) Proof of ownership or control, i.e., deed, title report;
- (C) The nature and extent of the mitigative action. This analysis will require information about site salinity, elevation, wave and current actions, substrate, and other physical and biological characteristics;
- (D) How and when the mitigative action will be performed;
- (E) A statement of informed opinion as to what habitat types will result from the action and a statement as to Relative Value of each anticipated type;
- (F) How the resulting habitat changes will be monitored and evaluated;
- (G) How the mitigation site will be protected, i.e., dedication, conservation easement, deed;
- (H) How funding for necessary construction or alteration work will be guaranteed, i.e., bonding;

(5) The Department may authorize creation of mitigation banks making use of restoration of estuarine lands caused by a naturally occurring or human activity that occurred after July 21, 1979, even though mitigation through restoration was not the intent of the action;

(a) Such mitigation banks shall be created under the procedures set out in OAR 141 -085-0263(2) of this rule.

(6) Applicants for removal and fill permits requiring mitigation are not obligated, or automatically entitled, to use an existing mitigation bank to meet the mitigation needs of any project. Permit applicants must negotiate directly with the owner of a bank to secure the right to use the bank. Agreements between the owner of a bank and a permit applicant are subject to the Department 's approval as to the number of mitigation credits charged against the bank.

Stat. Auth.: ORS 196.600- 196.665; ORS 196.825
Stats. Implemented: ORS 196.600- 196.692; ORS 196.800- 196.990

Estuarine Maps and Charts

141-085-0264 Maps and Charts

The following maps and charts are adopted by reference and are available from the Department (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 25).

- (1) Salinity map, Columbia River.
- (2) Salinity map, Necanicum River.
- (3) Salinity measuring stations, Nehalem River.
- (4) Mean quarterly salinities, Nehalem Bay.
- (5) Salinity Measuring Stations, Tillamook Bay (Two maps).
- (6) Mean quarterly salinities, Tillamook Bay (Two charts).
- (7) Salinity Measuring Stations, Netarts Bay.
- (8) Mean quarterly salinities, Netarts Bay.
- (9) Salinity Measuring Stations, Nestucca River.
- (10) Mean quarterly salinities, Nestucca River.
- (11) Salinity Measuring Stations, Salmon River.

- (12) Mean quarterly salinities, Salmon River.
- (13) Salinity Measuring Stations, Siletz Bay.
- (14) Mean quarterly salinities, Siletz Bay.
- (15) Salinity Measuring Stations, Yaquina Bay.
- (16) Mean quarterly salinities, Yaquina Bay.
- (17) Salinity Measuring Stations, Alsea Bay.
- (18) Mean quarterly salinities, Alsea Bay.
- (19) Salinity Measuring Stations, Siuslaw River.
- (20) Mean quarterly salinities, Siuslaw River.
- (21) Salinity Measuring Stations, Umpqua River.
- (22) Mean quarterly salinities, Umpqua River.
- (23) Salinity Measuring Stations, Coos Bay (South Slough).
- (24) Mean quarterly salinities, Coos Bay (South Slough).
- (25) Salinity Measuring Stations, Coos Bay.
- (26) Mean quarterly salinities, Coos Bay.
- (27) Salinity Measuring Stations, Coos Bay (Isthmus Slough).
- (28) Mean quarterly salinities, Coos Bay (Isthmus Slough).
- (29) Salinity Measuring Stations, Coquille River.
- (30) Mean quarterly salinities, Coquille River.
- (31) Salinity Map, Rogue River.
- (32) Salinity Map, Chetco River.

Stat. Auth.: ORS 196.825; ORS 196.835
 Stats. Implemented: ORS 196.800- 196.990

141-085-0266

Tidal Elevations in Oregon Estuaries

The figures and tables in Exhibit 1 (*Estuarine Mitigation The Oregon Process*, Department of State Lands, April 1984, p 47) illustrate the elevations of specified tidal datum for each Oregon estuary. The tables will assist in locating areas subject to the mitigation requirement.

Stat. Auth.: ORS 196.825; ORS 196.835
 Stats. Implemented: ORS 196.800- 196.990

Freshwater Wetland Mitigation Banks

Freshwater Wetland Mitigation Banking

141-085-0400

Purpose

These rules describe when, and under what conditions, the Department will allow mitigation banking as a means of wetland compensation when fill or removal of material is proposed in wetlands regulated by the State of Oregon. Mitigation banking is used to provide larger scale compensatory wetland mitigation in advance of anticipated smaller wetland losses. These rules also specify the requirements to obtain authorization to develop a wetland mitigation bank.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665
 Stats. Implemented: ORS 196.600- 196.692; ORS 196.800- 196.990

141-085-0406

Applicability

- (1) These rules shall apply to:
 - (a) All wetland mitigation banks proposed after rule adoption; and
 - (b) Existing mitigation banks that are substantially modified after rule adoption.
- (2) The sponsor of a mitigation bank that has been proposed, is under construction, or was established prior to the adoption of these rules, may request that the Department apply the provisions of these rules to the proposed, under construction, or established bank.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0410

Policies

- (1) The Department shall encourage the development of and the expeditious approval of mitigation banks and other types of compensatory wetland mitigation.
- (2) Mitigation banks can only be used to provide compensatory wetland mitigation for anticipated losses in wetland functional attributes when on-site CWM is impracticable.
- (3) The availability or use of mitigation banks shall not:
 - (a) Create a presumption that the Department will be more willing to allow wetland losses under the Removal-Fill Law (ORS 196.800 through 196.990); or
 - (b) Eliminate the requirement to fully demonstrate that the applicant for a Removal-Fill Permit has considered alternatives that avoid and/or minimize losses to jurisdictional wetlands; and
 - (c) Eliminate the requirement to comply with these rules.
- (4) Both freshwater and estuarine mitigation banks shall only be debited for a condition imposed in an authorization or to resolve a violation of these rules.
- (5) Mitigation banks shall be designed to compensate for expected or historic wetland losses to:
 - (a) Ensure maintenance of regional wetland function in their service area;
 - (b) More closely match the demand for wetland credits with wetland losses; and
 - (c) Meet other ecological or watershed needs as determined by the Department.
- (6) The long-term goal of mitigation banks is to provide compensatory wetland mitigation in advance of wetland losses.
- (7) Mitigation banks shall be subject to all rules governing freshwater and estuarine resource replacement in OAR 141-085-0102 thru OAR 141-085-0266.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0421

Requirements to Establish a Mitigation Bank

- (1) All persons proposing to establish a mitigation bank shall:

- (a) Meet with the Department to discuss their proposed bank and the content of their Mitigation Bank Prospectus.
 - (b) Prepare and submit a Mitigation Bank Prospectus to the Department.
- (2) The Mitigation Bank Instrument shall contain the following elements, as applicable:
- (a) The physical location of the proposed bank and identification of service area (indicated through the use of maps or aerial photographs clearly showing recognizable geographic place names, features, and/or watershed boundaries).
 - (b) Demonstration of 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) List of adjacent property owners within five hundred (500) feet of any boundary of the proposed bank.
 - (d) Proof of ownership of, or explicit legal and recordable permission granted by the landowner to perpetually dedicate the land upon which the bank and any associated buffer is proposed.
 - (e) Site plan for the mitigation area indicating the location of hydrogeomorphic and Cowardin wetland classes to be produced at the site, areas where grading will be required, location of buffers, vegetation planting plan, etc.
 - (f) Description of former or current uses of the proposed bank site which may have resulted in contamination by toxic materials.
 - (g) Description of the ecological goals and objectives of the bank.
 - (h) Description of the degree to which the bank potentially will provide wetland functions such as flood storage and shoreline protection, wildlife and fisheries habitat, wildlife corridors, and/or filtration of nutrients and pollution reduction.
 - (i) Description of the effects of adjacent existing, potential, and proposed land uses on the proposed bank.
 - (j) Description of the wetland losses by hydrogeomorphic and Cowardin wetland classes for which the bank will be designed to offer credits.
 - (k) Description of the specific and measurable performance standards against which the development of the credits in the bank will be judged.
 - (l) Description of reference site(s), if proposed, and their relationship to OAR 141-085-0421(2)(j) of these rules.
 - (m) A site assessment of the proposed bank area providing information on the:
 - (A) Hydrogeomorphic and Cowardin wetland classes;
 - (B) Ecological baseline characterizing the level of each function (if the site is currently a wetland), as well as vegetation, soils, hydrology, and wildlife habitat and usage; and
 - (C) Results of a wetland determination or delineation.
 - (n) Description of the method(s) used to determine the availability of credits at the proposed bank, as well as those that will be used to account for and report credit and debit transactions.
 - (o) Total estimated project cost itemized by major cost elements (for example, land acquisition, bank design and construction, consulting and legal fees, maintenance and monitoring over the long-term, and contingency fund).

- (p) Proof that the sponsor has the financial resources to undertake, operate, and maintain the proposed bank over the long-term, as well as the ability to correct project deficiencies or performance failures.
- (q) Description of the sampling protocols (including sampling frequency and seasonal schedule) used to monitor bank elements, and the name(s) and qualifications of the person(s) who will conduct such monitoring.
- (r) Detailed contingency plan describing how project deficiencies or performance failures will be corrected, including assignment of responsibilities for failures such as earthquakes, floods, vandalism, damage by pests and wildlife, invasion by undesirable vegetation, etc.
- (s) Proof in the form of written approval from the local government and in zone designations for the mitigation bank site and surrounding lands, applicable overlay zones, permitted and conditional uses in base and overlay zones, applicable local policies, and identification of necessary local permits and other approvals that the wetland bank is consistent with the requirements of all applicable comprehensive plans and land use regulations, watershed management plans, and/or other applicable land use plans.
- (t) All items required in Compensatory Mitigation Plans provided in OAR 141-085 -0141.
- (u) Drafts of proposed long-term protection measures (such as conservation easements, deed restrictions, donation to non-profit environmental groups, etc.), and management plans, and mechanisms for funding. Prior to approval of the Instrument, these documents shall be signed and recorded with the appropriate government agency.
- (v) Statement indicating when each of the conditions of the Instrument will terminate, unless they are perpetual in nature.

(3) The Department will review the Prospectus for sufficiency, and shall notify the sponsor in writing of the sufficiency of the document within thirty (30) calendar days of receipt. Each submittal containing substantial revisions shall restart the time clock.

(4) Any Prospectus received by the Department that does not provide sufficient information for review, or that appears to present a proposal in which the Department will not participate, will be returned to the sponsor with a written explanation.

(5) The Department reserves the right to decline to participate in the development of a Mitigation Bank Instrument and may, instead, suggest other options to the sponsor including the standard Removal-Fill Permit process, or participation in other wetland stewardship options if the sponsor cannot demonstrate:

- (a) Need for the mitigation credits; or that
- (b) The bank is technically feasible and ecologically desirable.

(6) Upon determining that the Prospectus is sufficient, the Department shall give public notice of the Prospectus. This notice shall be called "Intent To Create A Mitigation Bank" and shall:

- (a) Be published not less than once each week for three (3) successive weeks in a statewide newspaper and in a newspaper of general circulation in the area where the mitigation bank will be located.
- (b) Be sent to city and county planning departments, and state agencies having jurisdiction over the mitigation bank site(s), federal natural

resources 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.

(d) Indicate that comments must be received for thirty (30) calendar days from the date of the public notice.

(7) The Department shall consider but is not bound by comments received during the public notice period in (6). If comments are not received from a state agency or from an affected local government or special district within the 30 day comment period, the Department shall assume the entity does not desire to provide comments.

(8) A Mitigation Bank Review Team (MBRT) shall be formed within thirty (30) calendar days of the date of the public notice. An MBRT shall not have more than ten (10) members, and shall be chaired jointly by a representative of the Department and, if applicable, the Corps. When the Corps does not participate in a mitigation bank proposal, the Department may, but is not obligated to, invite other federal involvement.

(a) The members of a MBRT shall be selected jointly by the Department and the Corps. Each of the following agencies will be asked to nominate a representative to participate in each MBRT:

(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) Other members of the MBRT shall be selected based on the nature and location of the project, particular interest in the project by persons or groups, and/or any specific expertise which may be required by the Department and the Corps in development of the Instrument.

(9) The MBRT shall:

(a) Review and comment upon the Prospectus, and provide input to the Department concerning deficiencies noted, and additional information required.

(b) Consider the comments received in response to the notice of "Intent To Create A Mitigation Bank."

(c) Assist with the drafting of the Instrument.

(d) Determine an appropriate level of financial assurance to ensure project development, construction, long-term maintenance and monitoring, and the ability of the sponsor to correct project deficiencies or performance failures.

(e) Review the performance of the bank annually, or more frequently as set by the MBRT, to determine whether it is in compliance with the ecological goals and objectives established in the Instrument, and continues to hold adequate financial resources and assurances to ensure continued long-term operation pursuant to those goals and objectives. This review may include site visits and audits of bank documents at irregular time periods.

(f) The consensus of the MBRT shall be fully considered by the Department throughout the life of the bank.

(10) A sponsor may begin construction of a bank prior to developing an Instrument by:

- (a) Providing detailed documentation of the baseline conditions existing at the proposed site(s) of the bank; and
- (b) Receiving written consent from the Department prior to 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 only, but does not guarantee subsequent approval of the Mitigation Banking Instrument by the Department, which assumes no liability for the sponsor's actions.

(11) The Instrument shall:

- (a) Contain all information listed in OAR 141-085-0421(2) of these rules, as well as any other data required by the Department.
- (b) Be approved and signed by the Department and the sponsor, at the discretion of the Department.
- (c) Be subject to revision over time as mutually agreed to by the signers of the Instrument.

(12) Upon approval of the Instrument, the Department shall **notify city and county planning departments where the bank is located and affected state agencies, adjacent landowners, and persons who have requested to be notified.** give public notice of the approval of the Mitigation Bank Instrument. This notice shall be called "Notice Of Mitigation Bank Instrument Approval" and shall:

- (a) Be published not less than once each week for three (3) successive weeks in a statewide newspaper and in a newspaper of general circulation in the area where the mitigation bank will be located.
- (b) Be sent to affected city and county planning departments, affected state agencies, adjacent landowners, and persons requesting such notices.
- (c) Briefly describe the proposed mitigation bank and reference the Mitigation Bank Instrument.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0425

Establishment of Mitigation Credits

(1) Credits can be established by using:

- (a) The ratios stipulated in OAR 141-085-0136; or
- (b) Any other wetland and habitat functional assessment and evaluation methodology approved by the Department, which provides that 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 wetland functional attributes that result, or are expected to result, from those activities.

(2) Additional credits within the bank may be realized contingent on achievement of the performance standards contained in the Instrument over time and subject to the discretion of the Department. These credits are derived from the increased wetland functions that accrue as wetlands in the bank improve over time. Wetlands that are enhanced should exhibit a measurable increase in wetland function more readily than those that are created. Credits created by restoration

may be subject to certification at an earlier date. Adjustments in credits shall be calculated based on superior performance as follows:

(a) For banks utilizing ratios provided in OAR 141-085-0136(2) or OAR 141-085-0256:

(A) After five (5) years, the remaining enhanced wetland credits within the bank may be increased by no more than one-third and after ten (10) years, remaining enhanced wetland credits may be increased by no more than two-thirds;

(B) After ten (10) years or more, the remaining created wetland credits within the bank may be increased by no more than one-half.

(C) For the purpose of calculating available credits by these rules, the new number of credits is determined by multiplying the relative proportion of restored, enhanced, created, and/or protected wetlands and buffers present at the time of bank establishment by the total number of credits remaining.

(b) For banks using wetland assessment methods other than the ratios provided in OAR 141-085-0136(2) or OAR 141-085-0256, remaining credits within the bank may be reevaluated at five (5), and ten (10) year intervals at the discretion of the Department. A new number of available credits may be realized using the same assessment method as originally employed to determine credits expected to be produced from the bank. OAR 141-085-0425(4) of these rules does not apply when the chosen assessment method evaluates the included upland buffers along with the wetlands because credits for inclusion of upland buffers in the bank shall not be counted twice.

(3) Credits may be granted on an area basis for upland buffers at the discretion of the Department. The calculation provided here is only for banks using ratios provided in OAR 141-085-0136(2) or OAR 141-085-0256 and wetland functional assessment methods that do not evaluate buffers. However, such credits can only be established if the buffers are included as an integral part of the bank, a majority of credits are produced by the bank are from wetland restoration, enhancement, or creation, and all performance standards required in the Instrument are met. Credits for buffers will be determined as follows:

(a) Five (5) years after construction, credits for buffers may be granted. Depending on the quality of the buffer, between 10 to 20 acres of buffer will produce one (1) acre of wetland credit.

(b) Ten (10) years after construction, credits for buffers may again be calculated. Depending on the quality of the buffer, between 5 to 10 acres of buffer will produce one (1) acre of wetland credit.

(4) Credit for the protection of existing wetlands shall be considered only if:

(a) The area(s) to be preserved exhibit(s) healthy wetland functional attributes that are not likely to be increased appreciably by restoration or enhancement. The existence of "healthy wetland functional attributes" may be evaluated partly through comparison of the level of each function in the wetlands with the levels of the same functions in wetlands (of the same hydrogeomorphic class) identified as being among the least altered in the region or basin;

(b) The functional attributes of the wetlands proposed for protection are clearly threatened by human activities outside of the control of the bank sponsor;

- (c) Additional protections such as upland buffers, fencing, and removal of contaminated soils, in addition to appropriate long-term protection measures that will substantially reduce the threat are proposed; and
- (d) The applicant provides proof of ownership of, or explicit legal and recordable permission granted by the landowner, to perpetually dedicate the protection of wetland(s) and buffer(s) through any mechanism that unequivocally preserves the functional attributes of the wetland(s);
- (e) The applicant provides documentation of the signed and recorded perpetual protection mechanisms.

(5) Mitigation bank credits for conservation in lieu may be granted on an area basis at no less than a 10:1 ratio for wetland(s) protected to wetland(s) lost in compliance with the criteria in OAR 141-085-0131(4).

(6) All adjustments in credits shall be applied only to those credits remaining in, or newly added to, the bank.

(7) The Department reserves the right to allow a bank sponsor to create credits by improving nonwetland ecological resources such as in-stream channel habitat, riparian floodplains, non-wetland inclusions in wetland/upland mosaics, and other ecosystem components provided that a bank producing credits in such a manner has produced a majority of its credits by wetland restoration, enhancement, or creation. Sponsors seeking to derive credits for nonwetland ecological resources shall develop a method to quantify and compare the derived credits. The method proposed must be acceptable to the Department, the Federal action agency, and the MBRT.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0430

Use and Sale of Mitigation Credits

(1) Mitigation credits may only be purchased from a sponsor to offset permitted wetland losses or to resolve violations under the removal-fill law. Credit sales and purchases for future anticipated adverse affects not part of removal-fill permit applications are prohibited.

(2) The Department may purchase credits from an approved bank with funds received from payment to provide mitigation payments where such purchases will provide off-site CWM.

(3) The maximum number of credits that may be sold in advance of certification of the bank credits by the Department shall be clearly specified in the Instrument. In no case shall more than thirty (30) percent of the total credits expected to be produced initially by the bank be sold prior to their certification.

(4) The Department shall not allow the sale or exchange of credits by a mitigation bank that is not in compliance with the terms of the Instrument, the Removal-Fill Law, and all rules governing freshwater and estuarine resource replacement in OAR 141-085-0121 through 141-085-0266. The Department may consult with the MBRT for the bank in order to determine noncompliance and appropriate remedies, including enforcement action.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0436

Siting of Mitigation Banks

- (1) Banks shall be sited in locations where they will conflict to the least extent possible with other existing and potential land uses, while yielding the most functional benefits.
- (2) Ecological criteria to be considered in the siting of banks include:
 - (a) Maintenance and enhancement of wildlife/fish habitat and corridors.
 - (b) Reliability of hydrological sources.
 - (c) Ability to provide stormwater storage/flood attenuation.
 - (d) Ability to enhance the water quality of the watershed.
 - (e) Ability to provide buffers for the site(s).
 - (f) Ability to provide a diversity of wetlands.
 - (g) Proximity to large undisturbed uplands, wetlands or other riverine or aquatic systems.
 - (h) Absence of disturbance by human (airports, dumping, vehicular intrusion, nearby presence of exotic species, etc.)
 - (i) Presence of rare plants or animals and the ability of the bank to accommodate them.
- (3) Banks on public lands shall be allowed provided that the public agency owning or having authority over the subject land(s) grants its approval and perpetually dedicates the land upon which the bank, and any associated buffer, is proposed.
- (4) To the extent possible, the Department shall require that bank site locations and/or bank construction activities will not result in any adverse affects to state or federally listed species, and that the bank is in compliance with the state and federal endangered species acts.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0440

Removal-Fill Permits for Mitigation Banks

- (1) Bank sponsors shall be required to obtain removal-fill permits if any of the actions necessary to create the proposed bank are subject to the requirements of the removal-fill law (ORS 196.800 through 196.990).
- (2) When removal-fill permits are not required to establish a mitigation bank, the Instrument shall be accompanied by an order from the Department.
- (3) If a removal-fill law is required for a bank, the Instrument shall become a part of that permit and an order will not then be required from the Department.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

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

141-085-0445

Appeals

Appeals shall be processed in the manner described in OAR 141-085-0075.

Stat. Auth.: ORS 196.825; ORS 196.600- 196.665

141-085-0450

Records; Reporting

- (1) The Department shall maintain a record of credit withdrawals for each active wetland mitigation bank.
- (2) The Department shall report annually to the Land Board on funds expended from the Oregon Wetlands Mitigation Bank Revolving Fund for each wetland mitigation bank.

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| Wetlands Priority Plan |
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Development of Oregon Wetlands Priority Plan

141-085-0610

Purpose

The purpose of these rules is to implement the requirements of ORS 196.635 regarding development of an Oregon Wetlands Priority Plan for inclusion in the Statewide Comprehensive Outdoor Recreation Plan.

Stat. Auth.: ORS 196.635

Stats. Implemented: ORS 196.600- 196.692

141-085-0620

Definitions

- (1) "Statewide Comprehensive Outdoor Recreation Plan" means the plan created by State Parks and Recreation Department pursuant to the federal Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C.460-L et seq.) ORS 196.635.
- (2) "Oregon Wetlands Priority Plan" or "Plan" means a plan developed pursuant to these rules and approved by the State Land Board that establishes a procedure for setting priorities and creates a list of wetlands and interests therein for possible acquisition in accordance with the federal Emergency Wetlands Resources Act of 1986 (Public Law 99-645).
- (3) "Emergency Wetlands Resources Act of 1986" means the federal legislation adopted as Public Law 99-645.
- (4) "Land and Water Conservation Fund Act" means the federal legislation adopted as Public Law 88-578, as amended. (16 U.S.C. Section 460-L et seq.)

Stat. Auth.: ORS 196.635

Stats. Implemented: ORS 196.600- 196.692

141-085-0630

Policy

- (1) The purpose of the Oregon Wetlands Priority Plan is to promote the protection and effective management of wetlands in the state of Oregon.

(2) The Oregon Wetlands Priority Plan will establish criteria and provide guidance and direction in determining the locations and types of wetlands and interests therein that should receive priority consideration for state acquisition utilizing state dedicated funds from the Oregon Wetlands Mitigation Bank Revolving Fund account or federal monies granted under authority of the Land and Water Conservation Fund Act (Public Law 88-578).

Stat. Auth.: ORS 196.635

Stats. Implemented: ORS 196.600- 196.692

141-085-0640

Plan Development Process

- (1) The Department shall prepare a draft Oregon Wetlands Priority Plan, consistent with requirements of the Emergency Wetlands Resources Act, for inclusion in the Statewide Comprehensive Outdoor Recreation Plan.
- (2) In preparing the draft plan, the Department shall consult with the Oregon Departments of Fish and Wildlife, Land Conservation and Development, Environmental Quality, Economic and Community Development, and State Parks and Recreation Department and a representative of Oregon's local governments.
- (3) Upon completion, the draft plan shall be submitted for comment to:
 - (a) The state agencies in OAR 141-085-0640(2) of this rule;
 - (b) Other state agencies including, but not limited to those on the Department mailing list;
 - (c) Federal natural resource and regulatory agencies including but not limited to: the Corps of Engineers, National Park Service, U.S. Fish and Wildlife Service, National Marine Fisheries Services, Environmental Protection Agency, Forest Service, Bureau of Land Management, Natural Resources Conservation Service, Bureau of Reclamation and Federal Emergency Management Administration;
 - (d) Local governments and special districts including but not limited to port districts, and soil and water conservation districts;
 - (e) Conservation organizations and interested parties who have requested to be placed on a mailing list maintained by the Department for such purposes.
- (4) The Department shall hold one or more public hearings to provide opportunity for clarifications, recommendations and other public input on the draft plan.
- (5) The Department shall review and evaluate comments received to determine appropriate revisions to the draft plan.
- (6) After consideration of comments received, the Department shall present to the State Land Board a recommended Oregon Wetlands Priority Plan. The presentation shall include a summary of comments made on the draft plan and an explanation of how the comments were accommodated in the recommended Plan or otherwise addressed.
- (7) The Department shall submit the Oregon Wetlands Priority Plan, as approved by the Land Board, to the State Parks and Recreation Department for inclusion in the Statewide Comprehensive Outdoor Recreation Plan.

Stat. Auth.: ORS 196.635

Stats. Implemented: ORS 196.600- 196.692

141-085-0650**Receipt and Application of Funds**

(1) Funds made available to the State of Oregon from the federal Land and Water Conservation Fund to achieve the purposes of the Oregon Wetlands Priority Plan shall be transferred by the State Parks and Recreation Department into the Oregon Wetlands Mitigation Bank Revolving Fund Account pursuant to ORS 196.650.

(2) As provided in ORS 196.650 funds received pursuant to OAR 141-085-0650(1) of this rule shall be reserved for disbursement by the Department for acquisition of wetland parcels or interests therein identified by the Oregon Wetlands Priority Plan.

Stat. Auth.: ORS 196.635

Stats. Implemented: ORS 196.600- 196.692

141-085-0660**Plan Update**

(1) The Department shall review the Oregon Wetlands Priority Plan annually and update the plan at least every five years under the process set out in OAR 141-085-0640.

(2) The Department shall report to the State Land Board annually on the status of wetland acquisitions taken under the plan.

Stat. Auth.: ORS 196.635

Stats. Implemented: ORS 196.600- 196.692