



PERMANENT ADMINISTRATIVE ORDER

DSL 2-2019
CHAPTER 141
DEPARTMENT OF STATE LANDS

FILED
03/28/2019 4:44 PM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Revisions to incorporate changes to compensatory mitigation for unavoidable impacts to waters of this state.

EFFECTIVE DATE: 04/01/2019

AGENCY APPROVED DATE: 03/28/2019

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RULES:

141-085-0510, 141-085-0550, 141-085-0680, 141-085-0685, 141-085-0690, 141-085-0692, 141-085-0694, 141-085-0695, 141-085-0700, 141-085-0705, 141-085-0710, 141-085-0715, 141-085-0720, 141-085-0725, 141-085-0730, 141-085-0735, 141-085-0750, 141-085-0755, 141-085-0765, 141-089-0630, 141-093-0141, 141-093-0145, 141-093-0160, 141-093-0165

AMEND: 141-085-0510

RULE TITLE: Definitions

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Defining Rules

RULE TEXT:

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

- (1) "Applicant" means a landowner, a person authorized by a landowner to conduct a removal or fill activity, or a person that proposes a removal or fill activity for construction or maintenance of a linear facility.
- (2) "Aquatic Life and Habitats" means the aquatic environment including all fish, wildlife, amphibians, plants and other biota dependent upon environments created and supported by the waters of this state. Aquatic life includes communities and species populations that are adapted to aquatic habitats for at least a portion of their life.
- (3) "Aquatic Resources of Special Concern" means waters of this state that provide functions, values and habitats that are limited in quantity because they are naturally rare or have been disproportionately lost due to prior impacts. These include alkali wetlands and lakes, bogs, cold water habitat, fens, hot springs, interdunal wetlands, kelp beds, mature forested wetlands, native eelgrass beds, off-channel habitats (alcoves and side channels), ultramafic soil wetlands, vernal pools, wet prairies, wooded tidal wetlands, and others as determined by the Department.
- (4) "Artificial Means" means the purposeful movement or placement of material by humans and/or their machines.
- (5) "Authorization" means an individual permit, general authorization, general permit or emergency authorization.
- (6) "Bankfull Stage" means the two-year recurrence interval flood elevation.
- (7) "Baseline Conditions" means the ecological conditions, wetland functions and values and the soils and hydrological characteristics present at a site before any change by the applicant is made.

- (8) "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.
- (9) "Beds" means:
- (a) For the purpose of OAR 141-089, the land within the wet perimeter and any adjacent non-vegetated dry gravel bar; and
- (b) For all other purposes, "beds" means that portion of a waterway that carries water when water is present.
- (10) "Beds or Banks" means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays and estuaries by the limits of the highest measured tide. The "bed" is typically the horizontal section and includes non-vegetated gravel bars. The "bank" is typically the vertical portion.
- (11) "Buffer" means an area immediately adjacent to or surrounding a water of this state that is set aside to protect the water of this state from conflicting adjacent land uses and to support ecological functions. The buffer area may include upland, wetland, or other waters.
- (12) "Channel" means a natural (perennial or intermittent stream) or human made (e.g., drainage ditch) waterway that periodically or continuously contains moving water and has a defined bed and bank that serve to confine the water.
- (13) "Channel Relocation" means a change in location of a channel in which a new channel is dug and the flow is diverted from the old channel into the new channel.
- (14) "Coastal Zone" means the area lying between the Washington border on the north to the California border on the south, bounded on the west by the extent of this state's jurisdiction as recognized by federal law, and the east by the crest of the coastal mountain range, excepting:
- (a) The Umpqua River basin, where the coastal zone extends to Scottsburg;
- (b) The Rogue River basin, where the coastal zone extends to Agness; and
- (c) The Columbia River basin, where the coastal zone extends to the downstream end of Puget Island.
- (15) "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.
- (16) "Commercial Operator" means any person undertaking a project having financial profit as a goal.
- (17) "Compensatory Mitigation (CM)" means activities conducted by a permittee or third party to create, restore, enhance or preserve the functions and values of the waters of this state to compensate for the removal-fill related adverse impacts of project development to waters of this state or to resolve violations of ORS 196.800 to 196.905. Compensatory mitigation for removal-fill activities does not affect permit requirements of other state departments.
- (18) "Compensatory Non-Wetland Mitigation (CNWM)" means activities conducted by a permittee or third party to replace non-wetland water functions and values through enhancement, creation, restoration or preservation to compensate for the adverse effects of project development or to resolve violations of ORS 196.600 to 196.905.
- (19) "Compensatory Wetland Mitigation (CWM)" means activities conducted by a permittee or third party to create, restore or enhance wetland and tidal waters functions and values through enhancement, creation, restoration or preservation to compensate for the adverse effects of project development or to resolve violations of ORS 196.600 to 196.905.
- (20) "Comprehensive Plan" means a generalized, coordinated land use map and associated regulations and ordinances of the governing body of a local government.
- (21) "Condition" refers to the state of a water's naturalness or ecological integrity.
- (22) "Converted Wetlands" means agriculturally managed wetlands that, on or before June 30, 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that are managed for commercial agricultural purposes. "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any other waters of this state that are located within or adjacent to a converted wetland area.
- (23) "Cowardin" means Cowardin, L. M., V. Carter, F. C. Golet, E. T. LaRoe. 1979. Classification of wetlands and

- deepwater habitats of the United States, U. S. Department of the Interior, Fish and Wildlife Service, Washington, D.C.
- (24) "Creation" means to convert an upland area that has never been a water of this state to a water of this state.
- (25) "Credit" means the measure of the increase in the functions and values of the water resources of this state achieved at a mitigation site.
- (26) "Day of Violation" means the first day and each day thereafter on which there is a failure to comply with any provision of the Removal-Fill Law, ORS 196.600 through 196.990, or rules adopted by the Department, or any order or authorization issued by the Department.
- (27) "Deep Ripping, Tiling and Moling" refers to certain specific mechanical methods used to promote subsurface drainage of agricultural wetlands.
- (28) "Degraded" refers to a water of this state with diminished functions and values. For a wetland, degradation must include hydrologic manipulation (such as diking, draining, or filling) that demonstrably interferes with the normal functioning of wetland processes.
- (29) "Department" means the Oregon Department of State Lands and the Director or designee.
- (30) "Ditch" means a manmade water conveyance channel. Channels that are manipulated streams are not considered ditches.
- (31) "Dredging" means removal of bed material using other than hand-held tools.
- (32) "Ecologically or Environmentally Preferable" means compensatory mitigation that has a higher likelihood of replacing functions and values or improving water resources of this state.
- (33) "Emergency" means natural or human-caused circumstances that pose an immediate threat to public health, safety or substantial property including crop or farmland.
- (34) "Enhancement" means to improve the condition and increase the functions and values of an existing degraded wetland or other water of this state.
- (35) "Erosion-Flood Repair" means the placement of riprap or any other work necessary to protect existing facilities and land from flood and high stream flows, in accordance with these regulations.
- (36) "Essential Indigenous Anadromous Salmonid Habitat (ESH)" means the streams designated pursuant to ORS 196.810 that are necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing, and any adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface water connection to an ESH stream.
- (37) "Estuary" means:
- (a) For waters other than the Columbia River, the body of water from the ocean to the head of tidewater that is partially enclosed by land and within which salt water is usually diluted by fresh water from the land, including all associated estuarine waters, tidelands, tidal marshes and submerged lands; and
- (b) For the Columbia River, all waters from the mouth of the river up to the western edge of Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged lands.
- (38) "Extreme Low Tide" means the lowest estimated tide.
- (39) "Fill" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state. However, in designated ESH areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) "fill" means any amount of deposit by artificial means.
- (40) "Food and Game Fish" means those species identified under ORS 506.011, 506.036 or 496.009.
- (41) "Forestland" means the same as used in the Forest Practices Act and rules (ORS 527.610 to 527.992); land which is used for the commercial growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied.
- (42) "Functions and Values" are those ecological characteristics or processes associated with a water of this state and the societal benefits derived from those characteristics. The ecological characteristics are "functions," whereas the associated societal benefits are "values."
- (43) "Habitat Restoration" means the return of an ecosystem from a disturbed or altered condition to a close approximation of its ecological condition prior to disturbance.

- (44) "Highest Measured Tide" means the highest tide projected from actual observations within an estuary or tidal bay (see OAR 141-085-0515).
- (45) "Hydrogeomorphic Method (HGM)" means the wetland classification based on a wetland's location in the landscape and the sources and characteristics of water flow defined in Adamus, P.R.2001. Guidebook for hydrogeomorphic (HGM)-based assessment of Oregon wetland and riparian sites: Statewide classification and profiles. Oregon Division of State Lands, Salem, OR.
- (46) "Independent Utility" as used in the definition of "project," means that the project accomplishes its intended purpose without the need for additional phases or other projects requiring further removal-fill activities.
- (47) "In-Lieu Fee Mitigation (ILF)" means a compensatory mitigation program used to compensate for reasonably expected adverse impacts of project development on waters of this state with fees paid by the applicant to an ILF sponsor, as approved by the Department.
- (48) "Interagency Review Team (IRT)" is an advisory committee to the Department on mitigation banks and other compensatory mitigation projects.
- (49) "Intermittent Stream" means any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.
- (50) "Large Woody Debris" means any naturally downed wood that captures gravel, provides stream stability or provides fish habitat, or any wood placed into waters of this state as part of a habitat improvement or conservation project.
- (51) "Legacy Credits" means credits from a mitigation bank, in-lieu fee, advance mitigation project, or outlined for use in advance aquatic resource plan that has been approved, or in process of approval, prior to April 1, 2019. For a mitigation bank or in-lieu fee project to be considered in process of approval, the Department or the United States Army Corps of Engineers must have determined a Mitigation Bank Prospectus to be complete prior to April 1, 2019 and a draft Mitigation Banking Instrument to be complete before April 1, 2020. For an advance mitigation project, the Department must have issued a permit by April 1, 2019 recognizing advance credits. For an advance aquatic resource plan a complete plan must have been submitted to the Department prior to April 1, 2019 and a Final Order issued by April 1, 2020.
- (52) "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.
- (53) "Linear Facility" means any railway, highway, road, pipeline, water or sewer line, communication line, overhead or underground electrical transmission or distribution line, or similar facility.
- (54) "Listed Species" means any species listed as endangered or threatened under the federal Endangered Species Act (ESA) and/or any species listed as endangered or threatened by the State of Oregon.
- (55) "Locally important" means having a high level of both function and value, as determined by the function and value assessment method being applied, or as a result of the Department's review of public comments or the Department's investigations.
- (56) "Location" means the entire area where the project is located.
- (57) "Maintenance" means the periodic repair or upkeep of a structure in order to maintain its original use. "Maintenance" includes a structure being widened by no more than twenty percent of its original footprint at any specific location in waters of this state if necessary to maintain its serviceability. "Maintenance" also includes removal of the minimum amount of sediment either within, on top of or immediately adjacent to a structure that is necessary to restore its serviceability, provided that the spoil is placed on upland.
- (58) "Material" means rock, gravel, sand, silt and other inorganic substances and large woody debris, removed from waters of this state and any materials, organic or inorganic, used to fill waters of this state.
- (59) "Mitigation" means the reduction of adverse effects of a proposed project by considering, in the following order:
- (a) Avoiding the effect altogether by not taking a certain action or parts of an action;
 - (b) Minimizing effects by limiting the degree or magnitude of the action and its implementation;
 - (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment;

- (d) Reducing or eliminating the effect over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures; and
- (e) Compensating for the effect by creating, restoring, enhancing or preserving substitute functions and values for the waters of this state.
- (60) "Mitigation Bank" or "Bank" means a site created, restored, enhanced or preserved in accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts to waters of this state due to activities which otherwise comply with the requirements of ORS 196.600 to 196.905.
- (61) "Mitigation Bank Instrument (MBI)" means the legally binding and enforceable agreement between the Department and a mitigation bank sponsor that formally establishes the mitigation bank and stipulates the terms and conditions of the mitigation bank's construction, operation and long-term management.
- (62) "Mitigation Bank Prospectus" or "Prospectus" means the preliminary proposal prepared by a mitigation bank sponsor describing a proposed bank.
- (63) "Mitigation Bank Sponsor" or "Sponsor" means a person or single legal entity that has the authority and responsibility to fully execute the terms and conditions of a mitigation bank instrument.
- (64) "Navigational Servitude" means activities of the federal government that directly result in the construction or maintenance of congressionally authorized navigation channels.
- (65) "Non-Motorized Methods or Activities" are those removal-fill activities within ESH that are completed by hand and are not powered by internal combustion, hydraulics, pneumatics or electricity. Hand-held tools such as wheelbarrows, shovels, rakes, hammers, pry bars and manually operated cable winches are examples of common non-motorized methods.
- (66) "Non-Water Dependent Uses" means uses that do not require location on or near a waterway to fulfill their basic purpose.
- (67) "Non-Wetland Waters" means waters of this state other than wetlands, including bays, intermittent streams, perennial streams, lakes and all other regulated waters.
- (68) "Ocean Renewable Energy" means electricity that is generated through the conversion of energy contained in the natural properties of the ocean, including but not limited to energy contained in waves and swells, the tides and currents, ocean temperature and salinity gradients; and, ocean offshore wind power.
- (69) "Ocean Renewable Energy Facility" means any energy conversion technology or device that is used as a necessary component of a research project, demonstration project or commercial operation to generate ocean renewable energy, including but not limited to all buoys, anchors, energy collectors, cables, control and transmission lines, and other equipment necessary or useful to the project or operation.
- (70) "Office of Administrative Hearings" means the state agency unit that provides Administrative Law Judges to conduct contested case proceedings.
- (71) "Ordinary High Water Line (OHWL)" means the line on the bank or shore to which the high water ordinarily rises. The OHWL excludes exceptionally high water levels caused by large flood events (e.g., 100-year events).
- (72) "Oregon Rapid Wetland Assessment Protocol (ORWAP)" is a method for rapidly assessing wetland functions and values (as well as other attributes) in all wetland types throughout Oregon.
- (73) "Payment In-Lieu Mitigation" means compensatory mitigation for waters of this state that is fulfilled by using funds paid to the Department. The payment in-lieu program is not approved to compensate for impacts to waters of the United States.
- (74) "Perennial Stream" means a stream that has continuous flow in parts of its bed all year long during years of normal precipitation.
- (75) "Person" means a person or a public body, as defined in ORS 174.109; the federal government, when operating in any capacity other than navigational servitude or any other legal entity.
- (76) "Plowing" means all forms of tillage and similar physical means for the breaking up, cutting, turning over and stirring of soil to prepare it for planting crops. Plowing does not include deep ripping or redistribution of materials in a manner that changes any waters of this state to upland.

- (77) "Practicable" means capable of being accomplished after taking into consideration cost, existing technology and logistics with respect to the overall project purpose.
- (78) "Preservation" means to permanently protect waters of this state having exceptional ecological features.
- (79) "Private Operator" means any person undertaking a project for an exclusively non-income-producing and nonprofit purpose.
- (80) "Project" means the primary development or use, having independent utility, proposed by one person. A project may include more than one removal-fill activity.
- (81) "Project Site" means the geographic area upon which the project is being proposed.
- (82) "Prospecting" means to search or explore for samples of gold, silver or other precious minerals, using non-motorized methods; by filling, removing or moving by artificial means less than one cubic yard of material at any one individual site; and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single ESH stream in a single year.
- (83) "Public Body" as used in the statutes of this state means state government bodies, local government bodies and special government bodies (ORS 174.109).
- (84) "Public Use" means a publicly owned project or a privately owned project that is available for use by the public.
- (85) "Push-Up Dam" means a berm of streambed material that is excavated or bulldozed (i.e., pushed-up) from within the streambed itself and positioned in the stream in such a way as to hold or divert water in an active flowing stream. The push-up dam may extend part way or all the way across the stream. Push-up dams are most frequently used to divert water for irrigation purposes associated with agricultural production including livestock watering. Push-up dams are reconstructed each water-use season; high water usually flattens or breaches them; and equipment is used to breach or flatten them at the close of the water-use season.
- (86) "Reasonably Expected Adverse Effect" and "Adverse Impact" means the direct or indirect, reasonably expected or predictable results of project development upon waters of this state including water resources, navigation, fishing and public recreation uses.
- (87) "Reconstruction" means to rebuild or to replace the existing structure in-kind. "Reconstruction" includes a structure being widened by no more than twenty percent of its original footprint at any specific location in waters of this state.
- (88) "Recreational Placer Mining" means to search or explore for samples of gold, silver or other precious minerals by removing, filling or moving material from or within the bed of a stream, using non-motorized equipment or a motorized surface dredge having an intake nozzle with an inside diameter not exceeding four inches and a muffler meeting or exceeding factory-installed noise reduction standards.
- (89) "Reference Site" means a site or sites that represent the desired future characteristics and condition to be achieved by a compensatory mitigation plan.
- (90) "Removal" means the taking of more than 50 cubic yards of material (or its equivalent weight in tons) in any waters of this state in any calendar year; or the movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation. However, in designated ESH areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.
- (91) "Removal-Fill Site" means the specific point where a person removes material from and/or fills any waters of this state. A project may include more than one removal-fill site.
- (92) "Restoration" means to reestablish a former water of this state.
- (93) "Riprap" means facing a bank with rock or similar substance to control erosion.
- (94) "Serviceable" means capable of being used for its intended purpose.
- (95) "Service Area" means the boundaries set forth in a mitigation bank instrument that include one or more watersheds identified on the United States Geological Survey, Hydrologic Unit Map - 1974, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects from project developments to waters of this state. Service areas for mitigation banks are not mutually exclusive.
- (96) "State Scenic Waterway (SSW)" means a river or segment of river or lake that has been designated as such in

accordance with Oregon Scenic Waterway Law (ORS 390.805 to 390.995).

(97) "Stream Function Assessment Method" is a method for assessing functions and values of waters of this state that flow in channels.

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

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

(100) "Territorial Sea" means the waters and seabed extending three geographical miles seaward from the coastline in conformance with federal law.

(101) "Territorial Sea Plan" means the plan for Oregon's territorial sea.

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

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

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

(105) "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.

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

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

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

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

(110) "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.

STATUTORY/OTHER AUTHORITY: ORS 196.600-196.692, 196.825

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, ORS 196.800-196.990

AMEND: 141-085-0550

RULE TITLE: Application Requirements for Individual Permits

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying application requirements for individual permits, eliminating reference to 0765.

RULE TEXT:

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

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

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

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

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

The application must include all of the following:

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

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

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

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

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

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

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

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

(e) Project information including:

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

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

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

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

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

(f) A description of the project purpose and need for the removal or fill. All projects must have a defined purpose or purposes and the need for removal or fill activity to accomplish the project purpose must be documented. The project purpose statements and need for the removal or fill documentation must be specific enough to allow the Department to determine whether the applicant has considered a reasonable range of alternatives.

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

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

(A) Impeding, restricting or increasing flows;

(B) Relocating or redirecting flow; and

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

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

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

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

(l) Functions and values assessments that meets the requirements in OAR 141-085-0685 when permanent impacts to waters of this state are proposed.

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

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

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

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

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

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

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

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

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

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

- (B) Mailing labels must be provided by the applicant, when there are more than five names and addresses of adjacent landowners listed.
- (r) A signed local government land use affidavit.
- (s) A signed Coastal Zone Certification statement, if the project is in the coastal zone.
- (t) Applicant Signature. Signature of the applicant must be provided. If the application is on behalf of a business entity, a certificate of incumbency must be provided to certify that the individual signing the application is authorized to do so.
- (u) Landowner Signature. If the applicant is not the landowner upon which the removal-fill activity (including mitigation) is to occur and does not hold an easement allowing the activity on that land, a written authorization from the owner of the land consenting to the application must be provided.
- (A) Notwithstanding the requirement set forth under Subsection (u) above, a landowner signature is not required for applications for the construction and maintenance of linear facilities; and
- (B) The condemner may sign as landowner when the requirements of OAR 141-085-0550(5)(b)(B) have been met.
- (v) Mitigation Site Landowner Signature. If the applicant is not the owner of the land upon which the mitigation is to occur and does not hold an easement allowing the activity on that land, a written authorization from the owner of the land consenting to the application must be provided.
- (w) Inventory and Evaluation if Related to Marine Resources or Removal-Fill in Oregon's Territorial Sea. An application for a permit related to marine resources or removal-fill in the territorial sea must include all of the information required by the applicable Part of the Territorial Sea Plan. The resource inventory and effects evaluation must be provided as a stand-alone attachment to the applicant's Joint Permit Application.
- (6) Additional Requirements for Estuarine Fill. If the activity is proposed in an estuary for a non-water-dependent use, a complete application must also include a written statement that describes the following:
 - (a) The public use of the proposed project;
 - (b) The public need for the proposed project; and
 - (c) The availability of alternative, non-estuarine sites for the proposed use.
- (7) Additional Information as Requested. The Department may request additional information as necessary to make an informed decision on whether or not to issue the authorization.
- (8) Waiver of Required Information. At its discretion, the Department may waive any of the information requirements listed in Section (5) of this rule for voluntary habitat restoration projects.
- (9) Permit Application Modifications. A modification to a permit application may be submitted at any time prior to the permit decision. If the modification is received after the public review period, the Department may circulate the revised application again for public review. Modifications proposing significantly different or additional adverse impacts will generally be resubmitted for public review. The Department may set an expedited time frame for public review.
- (10) Pre-Application Conference. An applicant may request the Department to hold a pre-application meeting. In considering whether to grant the request, the Department will consider the complexity of the project and the availability of Department staff.

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600-196.665, 196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, 196.800-196.990

AMEND: 141-085-0680

RULE TITLE: Compensatory Mitigation (CM); Applicability and Principal Objectives

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule title, adding general requirements and moving provisions from 0690, incorporating 0765, and reference to 0692 and 0694.

RULE TEXT:

(1) Applicability. OAR 141-085-0680 through 141-085-0755 applies to removal-fill that occurs within waters of this state and applies to all forms of compensatory mitigation (i.e., mitigation bank, in-lieu fee mitigation, advance mitigation, permittee responsible mitigation, and payment in-lieu mitigation). The Department may establish CM requirements other than those explicitly set forth in OAR 141-085-0680 through 141-085-0755 within areas covered by an approved Wetland Conservation Plan or Advance Aquatic Resource Plan.

(2) Principal Objectives for CM. For projects where impacts to waters of this state cannot be avoided, CM will be required to compensate for the reasonably expected adverse impacts in fulfillment of the following principal objectives.

(a) The principal objectives of CM are to:

(A) Replace functions and values lost at the removal-fill site;

(B) Provide local replacement for locally important functions and values, where appropriate;

(C) Enhance, restore, create or preserve waters of this state that are self-sustaining and minimize long-term maintenance needs;

(D) Ensure the siting of CM in ecologically suitable locations considering: local watershed needs and priorities; appropriate landscape position for the waters types, functions and values sought; connectivity to other habitats and protected resources; and the absence of contaminants or conflicting adjacent land uses or development trends that would compromise functions and values; and

(E) Minimize temporal loss of waters of this state and their functions and values.

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

(3) General Requirements.

(a) Replacement for locally important functions and values may be required.

(b) Projects that involve 0.20 acres or less of permanent wetland impact may use mitigation banks, in-lieu fee, or payment in-lieu mitigation without addressing the principal objectives set forth in Section (2) of this rule, except when impacts are to Aquatic Resources of Special Concern.

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

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

(e) CM involving the conversion of a water of this state to a different type, HGM class or Cowardin class may not be approved when the existing aquatic resource is in good condition, is an Aquatic Resource of Special Concern, provides locally important functions or values, or supports listed species or a rare plant community or communities.

(f) CM projects must not degrade areas with existing high natural resource values (e.g., forested uplands).

(g) CM hydrology must be self-sustaining and must not rely on features or facilities that require frequent and regular long-term maintenance and management. For example, permanent water control structures may be acceptable, whereas pumping from a groundwater well to provide adequate hydrologic support is not acceptable.

(h) Multiple Purpose CM. CM sites may fulfill multiple purposes including storm water retention or detention, provided:

(A) All other CM requirements are met;

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

- (C) The stormwater entering the CM site has been pretreated to the level necessary to assure that state water quality standards and criteria are met in the mitigation area;
- (D) Construction of storm water facilities in existing wetlands meets the criteria for enhancement in OAR 141-085-0694 (1);
- (E) Construction of the CM site will not adversely affect adjacent waters of this state;
- (F) Construction of the CM site will not significantly change pre-development hydrologic conditions, significantly increase peak flows or significantly change the velocity to receiving streams; and
- (G) Stormwater discharges to existing or CM wetlands will not result in hydrologic conditions that impair vegetation or substrate characteristics necessary to support wetland functions.
- (i) CM for Linear Projects. The Department will review and approve CM for linear projects (e.g., roads or utility lines) that cross multiple waters of this state or that may occur in multiple watersheds on a case-by-case basis and may establish other CM requirements than those explicitly set forth in these rules.

STATUTORY/OTHER AUTHORITY: ORS 196.825, ORS 196.600-196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, 196.800-196.990

AMEND: 141-085-0685

RULE TITLE: Functions and Values Assessment

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: incorporating 0765, modifying requirements for function and value assessments

RULE TEXT:

- (1) Purpose. The purpose of the functions and values assessment is to document those functions and values anticipated to be lost as a result of the project and help ensure that the proposed CM will replace those functions and values. Uplands are assumed to have zero functions and values for purposes of these rules.
- (2) Functions and Values Assessment Requirements. More than one assessment may be required to document the following:
- (a) Existing functions and values at the proposed project site;
 - (b) Functions and values reasonably expected after implementation of the proposed project;
 - (c) Existing functions and values at the proposed CM site
 - (d) Functions and values reasonably expected to be provided at the proposed CM site after implementation of the CM project; and
 - (e) The projected net gain or loss of functions and values as a result of the CM project compared to the reasonably expected adverse impacts as a result of the project.
- (3) Exceptions. A functions and values assessment is not required for the proposed CM site if:
- (a) CM is proposed to be fulfilled by purchase of legacy credits, in-lieu fee mitigation credits not associated with a Department-approved project, or payment in-lieu mitigation.
 - (b) The project is limited to 0.20 acres or less of permanent wetland impact and CM is proposed to be fulfilled by purchase of bank credits, or in-lieu fee mitigation credits associated with a Department-approved project.
- (4) Methods. The same functions and values assessment method must be used at the proposed project site and the proposed CM site, and to assess the sites as they currently exist and are predicted to exist if the proposed project is implemented. Functions and values assessment methods and requirements are as follows:(a)
- (a) All applications for tidal waters, or wetland types that are an Aquatic Resources of Special Concern, and applications for other wetland impacts of greater than 0.20 acres, must include a functions and values assessment using the Oregon Rapid Wetland Assessment Protocol (ORWAP) or the Vernal Pool Function Assessment Method for the Agate Desert, if applicable.
 - (b) Applications received after July 1, 2019 for any impact amount in intermittent streams, perennial streams, or Aquatic Resources of Special Concern associated with intermittent streams or perennial streams, must include a functions and values assessment using the Stream Function Assessment Method (SFAM), if applicable.
 - (c) For non-tidal wetland impacts involving impacts of 0.20 acres or less, ORWAP is the preferred method, but best professional judgment may be used to assess wetland functions and values.
 - (d) For impacts to jurisdictional ditches, SFAM is the preferred method, but best professional judgment may be used to assess functions and values.
 - (e) Applications for impacts to waters of the state where ORWAP, the Vernal Pool Function Assessment Method for the Agate Desert, or SFAM are not applicable or not otherwise required may use best professional judgment to assess functions and values.
 - (f) If best professional judgment is used:
 - (A) Group-level functions and values to be assessed must include, but are not limited to, those outlined in ORWAP or SFAM, as appropriate.
 - (B) Conclusions must include a rating (i.e. low, moderate, or higher) for each of the group-level functions and values, and a written discussion of the basis of that rating. For example, if the water quality function is rated "low," a detailed rationale based upon direct measurement or observation of indicators of water quality function must be discussed.
- (e) The Oregon Freshwater Wetland Assessment Methodology will not satisfy the requirements of OAR 141-085-0685.

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600 – 196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-085-0690

RULE TITLE: Eligibility Requirements for CM

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule title, moving provisions from 0680, adding provisions for eligibility, incorporating 0765.

RULE TEXT:

- (1) CM at an off-site location will be located within the 4th field Hydrologic Unit Code (HUC) in which the removal-fill site is located, or within a service area of a bank or in-lieu fee covering the removal-fill site.
- (2) Impacts to tidal waters must be replaced in the same estuary unless the Director determines that it is ecologically or environmentally preferable to exceed this limitation according to OAR 141-085-0690(4).
- (3) Replacement by Type and Functions and Values. The CM project must have the capability to replace:
 - (a) Wetland or tidal water type(s) impacted by the project, as classified per Cowardin system and class (e.g., palustrine forested) and by HGM class/subclass(es) (e.g., riverine impounding);
 - (b) Stream type(s) impacted by the project, meaning having the same:
 - (A) Flow permanence (intermittent or perennial);
 - (B) Stream size class (small, medium, or large), as set forth by Oregon Department of Forestry in OAR 629-635-0200 Sections (13) and (14); and
 - (C) Essential Indigenous Anadromous Salmonid Habitat (ESH) designation, if the impact is to an ESH stream.
 - (c) The group-level functions and values of the impacted water of this state, as outlined in ORWAP or SFAM, as appropriate, unless CM is proposed to be fulfilled by purchase of legacy credits.
- (4) Exceptions. The Department may approve exceptions to replacement by type and functions and values if the alternative CM is ecologically or environmentally preferable.
 - (a) CM for impacts to an Aquatic Resource of Special Concern (ARSC) must involve the ARSC type being impacted. Replacement by type and functions and values is not required.
 - (b) To meet an exception to replacement by type and function and values, the applicant must demonstrate, in writing, that the alternative CM:
 - (A) Addresses a watershed priority, as identified in a planning or assessment document, report, or other data that considers one or more of the following:
 - (i) How specific types and locations of projects will provide identified priority aquatic function for the watershed;
 - (ii) Habitat requirements of important aquatic-resource dependent species;
 - (iii) Loss or conversion trends of aquatic resource habitats;
 - (iv) Sources of watershed impairment;
 - (v) Current development trends that adversely affect aquatic resources or necessitate the presence of aquatic resource functions; or
 - (vi) Requirements of other regulatory and non-regulatory programs that affect the watershed.
 - (B) Provides, or will provide post-construction, a high level of the functions and values that are relevant to the targeted priority.
 - (c) Applications requesting an exception must include:
 - (A) A description of the planning or assessment documents, reports, or data upon which their CM is based. The description will include when, how, and by whom the analysis was completed, the geographic area covered by the analysis, and a summary of any public and private stakeholder involvement in the analysis including any coordination with federal, state, tribal, and local aquatic resource management and regulatory staff;
 - (B) A description of the specific ecologically or environmentally preferable priority listed above that is targeted in the mitigation plan and the reasoning behind it being considered a priority. The description will include a summary of the historic loss, causes for the loss, and ongoing threats; and
 - (C) A description of how the location, type, functions and values provided by the proposed compensatory mitigation site

address the targeted priority. The description will include an appropriate level of field documentation, including a function and value assessment, data collected at the site, mitigation drawings and specifications, and any letters from consultation with local agency representatives (e.g. ODFW, DEQ)

STATUTORY/OTHER AUTHORITY: ORS 196.600-196.692, ORS 196.825

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, ORS 196.795 - 196.990

ADOPT: 141-085-0692

RULE TITLE: Mitigation Accounting

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: moving provisions related to mitigation accounting from 0690 into new rule, eliminating minimum ratios for enhanced cropped wetland, adding provisions to adjust the minimum requirements, incorporating 0765

RULE TEXT:

(1) The purpose of mitigation accounting is to:

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

(b) Replace functions and values, including those that may be size dependent;

(c) Account for temporal loss of habitat types, functions, and values; and

(d) Encourage long-term sustainability of CM projects.

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

(3) Minimum Requirements. Except as otherwise provided in this section, the following minimum ratios must be used in the development of CM plans:

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

(b) One credit from a bank, in-lieu fee, or advance mitigation project for one acre of impacted wetland or tidal waters (1:1);

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

(d) There is no established ratio for CWM using preservation, or for CNWM. Minimum requirements will be determined on a case-by-case basis by the Department.

(4) Adjustments to the Minimum Requirements. The amount of CM will increase based on the following factors but will not reduce the amount of mitigation below the minimum requirements:

(a) Degree of specific function and value replacement. Adjustments will be based on the specific functions and values outlined in ORWAP, SFAM, or the Vernal Pool Function Assessment Method for the Agate Desert, if applicable.

(A) Differences between the specific functions and values that will be lost at the impact site and the functions and values expected to be produced by the CM project will increase the amount of CM required up to fifty percent.

(B) A CM site exceeding, or predicted to exceed, at least eighty percent of the specific functions that will be lost at the proposed impact site will reduce the amount of CM required by twenty percent.

(b) Functional temporal loss. Characteristics (e.g., vegetation or soils) that are expected to take time to develop at the CM project and result in temporal loss of functions or values will increase the amount of CM required. This adjustment will not exceed one hundred percent of the minimum requirements and will be limited to the characteristic that has the longest maturity time (i.e., characteristics are not additive).

(c) Strengthened administrative protection and long-term stewardship. Provisions for the CM site that are above and beyond the minimum requirements of the Department will reduce the amount of CM required up to twenty percent. Strengthened long-term stewardship must include appropriate funding to implement an approved stewardship plan. Minimum administrative requirements are public ownership with a management plan, or a deed restriction.

(d) Impacts to CM Sites. The Department may double the minimum requirements for project development affecting existing CM sites.

(e) Unauthorized Removal-Fill. The Department may increase the minimum requirements when mitigation is proposed to compensate for an unauthorized removal-fill activity.

(f) Non-concurrent CM. The Department may increase the minimum requirements when mitigation will not be implemented in the same construction season as the authorized impact.

(5) Exceptions to Adjustments to the Minimum Requirements.

(a) Permittee-responsible mitigation proposed for projects that involve 0.20 acres or less of permanent wetland impact are not subject to an adjustment based on differences between the specific functions and values lost at the impact site and the specific functions and values expected to be produced by the CM project; all other adjustments may apply.

(b) Projects that involve 0.2 acres or less of permanent wetland impact that use mitigation banks, in-lieu fee mitigation, or payment in-lieu mitigation are not subject to the adjustments in 141-085-0692(4)(a) to 141-085-0692(4)(c).

(c) CM fulfilled using legacy credits are not subject to the adjustments in 141-085-0692(4)(a) to 141-085-0692(4)(c).

(6) Buffer Areas. Credit will be granted for required buffers at an amount determined by the Department. Such buffers will be subject to appropriate administrative site protection pursuant to OAR 141-085-0695.

STATUTORY/OTHER AUTHORITY: ORS 196.600-196.692, 196.825

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, ORS 196.795-196.990

ADOPT: 141-085-0694

RULE TITLE: Special Requirement for CM

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Moving provisions related to special requirements from 0690 into new rule, incorporating 0765.

RULE TEXT:

(1) Special Requirements for Enhancement as CM. CM enhancement must conform to the following additional requirements. Enhancement must:

- (a) Be conducted only on degraded waters of this state;
- (b) Result in a demonstrable net gain in functions and values at the CM site as compared to those functions and values lost or diminished as a result of the project and those functions and values that already exist at the CM site;
- (c) Not replace or diminish existing functions and values with different functions and values unless the applicant justifies, in writing, that it is ecologically preferable to do so;
- (d) Not consist solely of the conversion of one HGM or Cowardin class to another;
- (e) Identify the causes of degradation at the CM site and the means by which the CM 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.

(2) Special Requirements for Preservation as CM. Preservation may be used for meeting the CM requirement when the water of this state proposed for preservation is demonstrated to be under threat of destruction or adverse modification and one of the following applies:

- (a) The preservation site supports a significant population of rare plant or animal species;
- (b) The preservation site is a rare type (S1 or S2);
- (c) The preservation site is an Aquatic Resource of Special Concern; or
- (d) The preservation site, with existing and ongoing management, is in good condition and is highly functioning (as determined using a Department-approved assessment method) and serves a documented watershed need.

(3) Preservation as the Preferred CM Option. Preservation may be accepted as the preferred CM option when the lost or diminished functions and values are exceptionally difficult to replace. Examples of such waters include, but are not limited to, vernal pools, fens, bogs and tidal spruce wetlands.

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

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

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

- (A) Allow for staged CWM or mined land reclamation required under ORS 517.700; or
- (B) Allow the applicant, upon approval by the Department, to pay the entire cost of CWM according to the following criteria:
 - (i) On an annual basis for a period not to exceed 20 years over the life expectancy of the operation, whichever is less; or
 - (ii) On an annual basis over time at a monetary rate per cubic yard or ton of aggregate material removed annually from the site.

STATUTORY/OTHER AUTHORITY: ORS 196.600-196.692, 196.825

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, ORS 196.795-196.990

AMEND: 141-085-0695

RULE TITLE: Administrative Protection of CM Sites

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: modifying the rule title, incorporating 0765

RULE TEXT:

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

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

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

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

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600-196.692

STATUTES/OTHER IMPLEMENTED: 196.600-196.692, 196.795 - 196.990

AMEND: 141-085-0700

RULE TITLE: Financial Security for CM Sites

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule title, incorporating 0765.

RULE TEXT:

- (1) Purpose. Financial security instruments are required for CM sites as a guarantee that the CM will be constructed, monitored and maintained in accordance with removal-fill authorization requirements.
- (2) Exceptions. Financial security Instruments are required for CM projects except in the following circumstances:
 - (a) No financial security instrument is required for projects conducted by government agencies;
 - (b) The Department may waive the requirement for a financial security instrument for wetland impacts 0.20 of an acre or less; and
 - (c) Financial security instruments are not required when CM is satisfied by purchase of credits from a wetland mitigation bank, an in-lieu fee program or payment in-lieu mitigation.
- (3) Types of Financial Security Instruments. The Department may allow the following types of financial security instruments:
 - (a) Surety bonds executed by the permit holder and a corporate surety licensed to do business in Oregon;
 - (b) Assignment of deposit must be issued by a bank licensed to do business in Oregon, assigned to the Department, and upon the books of the bank issuing such certificates;
 - (c) Letters of credit issued by a bank authorized to do business in the State of Oregon that are irrevocable prior to release by the Department; and
 - (d) Such other financial instrument as the Department deems appropriate to secure the financial commitment of the applicant to fulfill the success requirements of the CM.
- (4) Financial Security Form. The applicant must file the financial security instrument or instruments on a form or forms prescribed and furnished by the Department. Financial security instruments must be made payable to the Department and must be submitted to the Department prior to permit issuance or prior to release of credits from a mitigation bank.
- (5) Commencement of the Liability Period. The period of liability will begin at the time of authorization issuance. The liability period must be renewed until the Department deems the CM to be complete and the Department releases the permittee from any further monitoring requirements.
- (6) Determining the Amount. For issuance of an authorization requiring a financial security, the Department will set the amount of the financial security instrument equal to either the current cost of mitigation bank credit(s) within a service area covering the removal-fill site, or the current cost of payment in-lieu mitigation, whichever is greater. For mitigation banks, the amount must be sufficient to ensure a high level of confidence that the mitigation will be successfully completed.
- (7) Financial Security Instrument Replacement. The Department may allow a permit holder to replace an existing financial security instrument with another if the total liability is transferred to the replacement. The Department will not release an existing financial security instrument until the permit holder has submitted and the Department has approved the replacement.
- (8) Financial Security Instrument Release. The Department will authorize release of the financial security instrument when the CM meets the requirements of the CM plan and the conditions of the removal-fill authorization. The permit holder must file a request with the Department for the release of all or part of a financial security instrument. The request must include:
 - (a) The precise location of the CM area;
 - (b) The permit holder's name;
 - (c) The removal-fill authorization number and the date it was approved;
 - (d) The amount of the financial security instrument filed and the portion proposed for release; and
 - (e) A description of the results achieved relative to the permit holder's approved CM plan.

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600-196. 692

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-085-0705

RULE TITLE: Requirements for CM Plans

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule title, incorporating 0765, incorporating provisions from 0550 to 0700 into content of compensatory mitigation plans.

RULE TEXT:

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

(a) CM plan overview, including:

(A) CM ecological goals and objectives;

(B) The CM concept in general terms including a description of how the plan, when implemented, will replace the functions and values of the impacted waters of this state;

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

(D) For CNWM involving a channel, the mitigation site acreage and linear feet of channel by method(s) of mitigation proposed (restoration, creation and enhancement); and

(E) Summary of proposed losses and gains of functions and values. The Department reserves the right to disqualify losses or gains attributable to actions under the applicant's control within seven years prior to the delineation or application submittal date, whichever comes first.

(b) CM site ownership and location information:

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

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

(C) CM site location shown on a USGS or similar map showing the CM site location relative to the impacted site, longitude and latitude, physical address, if any (e.g., 512 Elm Street), road milepost (e.g., mp 25.21), and river mile (e.g., rm 3.2 to 3.3), or the name of the mitigation bank or in-lieu fee.

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

(d) If permittee-responsible mitigation is proposed, CM site existing conditions, including the following, as applicable.

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

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

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

(iii) A general description of the existing and proposed water source, duration and frequency of inundation or saturation, and depth of surface water for wetlands or tidal waters on the CWM site.

(B) If channels exist on the CM site, then the following information must be provided:

(i) Flow permanence (intermittent or perennial);

(ii) Stream size class (small, medium, or large), as set forth by Oregon Department of Forestry in OAR 629-635-0200 Sections (13) and (14); and

(iii) Whether the channel is Essential Indigenous Anadromous Salmonid Habitat (ESH).

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

- (D) Approximate location of all water features (e.g., wetlands, streams, lakes) within 500 feet of the CM site.
- (E) Any known CM site constraints or limitations.
- (F) Plans for CM by means of restoration must include documentation sufficient to demonstrate that the site was formerly, but is not currently, a water of this state.
- (G) Plans that involve enhancement must include identification of the cause(s) of degradation and how the plan will reverse it and sustain the reversal.
- (e) A functions and values replacement assessment. The applicant must demonstrate whether the functions and values that will be lost by the project will be replaced by the functions and values predicted at the CM site. Predicted functions and values should be based on the reasonably envisioned future state of the CM site based on the CM design. A summary of the assessments must be placed in the body of the CM plan, and supporting data sheets or assessment model outputs must be placed in an appendix of the CM Plan. A replacement assessment is not required when CM is proposed to be fulfilled by purchase of legacy credits, in-lieu fee mitigation credits not associated with a Department-approved project, or payment in-lieu mitigation.
- (f) CM drawings and specifications, including:
 - (A) Proposed construction schedule;
 - (B) Scaled site plan(s) showing CM project boundaries, existing and proposed boundaries of waters of this state, restoration, creation and enhancement areas, buffers, existing and proposed contours, cross-section locations, construction access location and staging areas;
 - (C) Scaled cross sections showing existing and proposed contours and proposed water depths;
 - (D) Plant list for each Cowardin and HGM wetland and tidal waters class at the CWM site and buffers at all CM sites (include scientific names and wetland indicator status);
 - (E) Schematic of any proposed water control structures;
 - (F) Identification of any water rights necessary to sustain the intended design and functions. When water rights are required, the applicant must provide documentation that the water right has been secured prior to issuance.
 - (G) For CM sites involving tidal waters, plan views and cross-sections must show relevant tidal elevations relative to mean lower low water (MLLW) using the nearest local tidal datum. The elevation of MLLW must be referenced to the North American Vertical Datum 1988 (NAVD88).
- (g) Proposed CM performance standards. The applicant may propose to use applicable pre-defined performance standards as approved by the Department, or may provide CM site-specific performance standards that:
 - (A) Address the proposed ecological goals and objectives for the CM;
 - (B) Are objective and measurable; and
 - (C) Provide a timeline for achievement of each performance standard.
- (h) A description of the proposed financial security instrument. The Department will determine the amount of security required. A final financial security instrument will be required prior to permit issuance unless otherwise approved by the Department.
- (i) A monitoring plan including specific methods, timing, monitoring plot locations, and photo-documentation locations.
- (j) A long-term maintenance plan describing:
 - (A) How the applicant anticipates providing for maintenance of the CM site beyond the monitoring period to ensure its sustainability (e.g., maintenance of any water control structures, weed management, prescribed burning, and vandalism repair);
 - (B) Expected long-term ownership of the CM site and the anticipated responsible party or parties for long-term maintenance; and
 - (C) How the maintenance activities are anticipated to be funded.
- (k) The CM plan must identify the long-term protection instrument for the CM site in accordance with OAR 141-085-0695.
- (l) If permittee-responsible mitigation is proposed and the application for a permit or authorization is submitted on behalf of a closely held corporation, limited partnership, limited liability company or trust, the Department will require

from each shareholder or stockholder, limited partner, member, trustee, current beneficiary or other principal:

(A) A joint and several personal guarantee securing compliance with mitigation obligations; and
(B) A written agreement to make all reasonable efforts to maintain the business entity in active status until all mitigation obligations have been satisfied.

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

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

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

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

(b) Maps showing the preservation site including all delineated wetlands or tidal waters, and any associated buffers, to be conserved;

(c) Documentation demonstrating that the proposed preservation site meets the requirements of OAR 141-085-0690(2);

(d) The surrounding land uses and an analysis of both the short-term and long-term known and probable effects of those land uses and activities on the preserved waters of this state, including any associated buffers;

(e) Measures that may be necessary to minimize the effects of surrounding land uses and activities on the preserved waters of this state, including the use of buffers;

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

(g) A long-term protection instrument;

(h) A long-term management plan with a funding mechanism that addresses the specific management needs to optimize and maintain functionality and ecological sustainability of the waters of this state and any associated buffers to be preserved; and

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

(3) Authorization Conditions for CM Plans.

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

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

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

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

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

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, ORS 196.600-196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, 196.800-196.990

AMEND: 141-085-0710

RULE TITLE: Monitoring Requirements for CWM

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule title, incorporating 0765.

RULE TEXT:

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

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

(b) Determine whether the CM is replacing wetland and tidal waters area, including any required buffers;

(c) Determine whether the CM site is replacing functions and values; and

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

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

(a) A post construction report demonstrating as built conditions and discussing any variation from the approved plan.

Unless waived by the Department, the post construction report must be submitted within 90 calendar days of completing grading;

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

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

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

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

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600 - 196.692

STATUTES/OTHER IMPLEMENTED: 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-085-0715

RULE TITLE: Mitigation for Temporary Impacts

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Incorporating 0765

RULE TEXT:

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

STATUTORY/OTHER AUTHORITY: ORS 196.600-196.692, ORS 196.825

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, 196.795 - 196.990

AMEND: 141-085-0720

RULE TITLE: Mitigation Banking Purpose, Applicability and Policies

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Incorporating 0765

RULE TEXT:

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

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

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

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

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, ORS 196.600 - 196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-085-0725

RULE TITLE: Process for Establishing Mitigation Banks

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Incorporating 0765, modifying invited representatives to the Inter-agency Review Team.

RULE TEXT:

- (1) Pre-prospectus Meeting with the Department. To initiate a mitigation bank, a prospective bank sponsor must request a meeting with the Department for initial review of the mitigation concept, site suitability, and content of the Prospectus.
- (2) Department Review of Draft Documents, Generally. The process for establishing a mitigation bank involves the development of a Prospectus and Mitigation Bank Instrument (MBI) in consultation with an interagency review team (IRT). In an effort to supply the IRT with complete documents that meet the requirements of these rules, multiple drafts and completeness reviews may be required.
- (3) Submittal of the Prospectus. After discussion of the mitigation concept with the Department, a mitigation bank sponsor must submit a Mitigation Bank Prospectus. A Mitigation Bank Prospectus must include:
 - (a) Site information including location, size, ownership, soil mapping, and recent air photo;
 - (b) The objectives of the proposed mitigation bank;
 - (c) How the mitigation bank will be established and operated, in general terms;
 - (d) The proposed service area;
 - (e) A market or other analysis that demonstrates the general need for the mitigation bank;
 - (f) A description of the technical feasibility of the proposed mitigation bank;
 - (g) The proposed ownership arrangements and long-term management strategy for the mitigation bank;
 - (h) How the mitigation bank addresses each of the principal objectives for CM listed in OAR 141-085-0680; and
 - (i) Names and addresses of all landowners within 500 feet of the bank.
- (4) Prospectus Completeness Review. Within 30 calendar days of the Department's receipt of a Prospectus, the Department will conduct an initial review to determine if the Prospectus is complete and the information contained in the Prospectus adequately addresses the requirements. Following the Prospectus completeness review, the Department will inform the applicant of one of the following findings:
 - (a) The Prospectus is complete and will proceed to the public notice; or
 - (b) The Prospectus is incomplete.
- (5) Incomplete Prospectus. If the Department determines that the Prospectus is incomplete, the Department will notify the sponsor in writing and list the missing or deficient information. The Department will take no action on the incomplete Prospectus until the required information is submitted. The sponsor must resubmit the entire amended Prospectus for reconsideration, unless instructed by the Department to do otherwise. Submission of a new or amended Prospectus starts a new 30 calendar day initial review period.
- (6) Department May Decline to Participate. If a mitigation bank sponsor cannot demonstrate the need for the mitigation credits or the technical feasibility and ecological desirability of the bank, the Department may decline to participate in its development.
- (7) Public Notice of Prospectus. Upon determining that a Prospectus is sufficient, the Department will issue a public notice entitled, "Intent To Create A Mitigation Bank." The Department will:
 - (a) Post the notice on the Department's web site for 30 calendar days;
 - (b) Send the notice to city and county planning departments, affected state and federal natural resource and regulatory agencies, adjacent landowners, conservation organizations and other interested persons requesting such notices;
 - (c) Briefly describe the proposed mitigation bank and reference the Prospectus provided by the bank sponsor; and
 - (d) Solicit comments for 30 calendar days from the date of the public notice.
- (8) Consideration of Comments Received During the Public Notice Period. All comments received will be provided to the bank sponsor and to the IRT. If comments are not received from an interested party within the 30-day comment

period, the Department will assume the entity does not desire to provide comments.

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

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

(A) State natural resource agencies, including Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, and Oregon Department of Land Conservation and Development;

(B) Federal natural resource agencies, including the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and National Oceanic and Atmospheric Administration (NOAA) Fisheries;

(C) Local regulatory and natural resource agencies, including the Soil and Water Conservation District, and the local Government Planner or equivalent.

(b) The Department may invite other members of the IRT based on particular interest in the project by regulatory and resource agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the project, and persons and groups with any specific expertise that may be required by the Department in development of the MBI.

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

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

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

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

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

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

(a) All requirements for CM plans per OAR 141-085-0680 through 141-085-0710; and

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

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

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

(C) A description of the projected losses of waters of this state in the service area by HGM and Cowardin wetland classes or stream type as defined in OAR 141-085-0690;

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

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

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

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

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

(I) Detailed contingency plans describing how project deficiencies or performance failures will be corrected, including

assignment of responsibilities for failures such as floods, vandalism, damage by pests and wildlife, invasion by weedy vegetation, etc.;

(J) Land use affidavit;

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

(L) A draft interagency bank instrument agreement following the current template document provided by the Department. Exceptions to the template must be approved in writing by the Department.

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

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

(b) The draft MBI is incomplete.

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

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

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

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

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

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600-196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, 196.800-196.990

AMEND: 141-085-0730

RULE TITLE: Establishment of Mitigation Credits

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Incorporating 0692, modifying provisions for bonus credits and buffer credits.

RULE TEXT:

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

(a) The minimum mitigation requirements as stated in OAR 141-085-0692 with adjustments, as appropriate; or

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

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

(3) Buffer Area Credits. Credits may be granted for buffers at the discretion of the Department. Such buffers will be subject to appropriate administrative site protection pursuant to OAR 141-085-0695.

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600 – 196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-085-0735

RULE TITLE: Release, Use and Sale of Mitigation Credits

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Incorporating 0765

RULE TEXT:

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

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

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

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

(5) The Department May Purchase Bank Credits. Funds from the Oregon Removal Fill Mitigation Fund may be used to purchase approved bank credits where such purchases will provide appropriate compensatory mitigation.

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600-196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600-196.692, 196.800-196.990

AMEND: 141-085-0750

RULE TITLE: Payments to and Expenditures from the Oregon Removal-Fill Mitigation Fund

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying calculation of payments to the Oregon Removal-Fill Mitigation Fund

RULE TEXT:

The Department will use the Oregon Removal-Fill Mitigation Fund to hold and disperse money collected from the Payment In-Lieu (PIL) and In-Lieu Fee (ILF) Mitigation programs sponsored by the Department.

(1) Payments. The Department will calculate payments for PIL and ILF based on:

(a) Actual costs and expenses of the off-site compensatory mitigation divided by the number of credits anticipated from the mitigation if these are known at the time of the payment, or

(b) Estimated costs and expenses for off-site compensatory mitigation for the region of the state where the Department, to the greatest extent practicable, determines the off-site compensatory mitigation may be conducted.

(c) Estimated costs and expenses for off-site compensatory mitigation will be assessed based on the formula: $\text{Payment} = [A + R + \text{RMV} + \text{LT}] \div \text{mm}$, where:

(A) A = Administrative Costs calculated as 10% of the sum of R, RMV and LT;

(B) R = Restoration Costs calculated as the sum of all anticipated costs per unit area. Anticipated costs include but are not limited to project design and engineering, construction, planting, and seven years of monitoring and maintenance. These costs will be based on a biennial survey of regional project data submitted to the Oregon Watershed Restoration Inventory, The Conservation Registry, projects funded by the Department, and/or surveys of restoration consulting firms and practitioners;

(C) RMV = Real Market Land Value of the proportion of the tax lot acreage to be mitigated for, adjusted based on zoning;

(D) LT = Long-Term Management Costs calculated as 30% of the Restoration Costs (R),

(E) mm = Mitigation Multiplier representing the number of credits typically generated per unit area of mitigation conducted.

(2) Limitations on Oregon Removal-Fill Mitigation Fund Expenditures. The Department will expend funds from the Oregon Removal-Fill Mitigation Fund to:

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

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

(c) Monitor the compensatory mitigation;

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

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

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

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600-196.692

STATUTES/OTHER IMPLEMENTED: 196.600-196.692, 196.800-196.990

AMEND: 141-085-0755

RULE TITLE: Advance Mitigation

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Incorporating 0692 and 0765, changing reference from 0760 to 0720 to 0740.

RULE TEXT:

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

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

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

(b) A table showing how much credit, under suitable mitigation accounting in OAR 141-085-0692, is being claimed at the CM site; and

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

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

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

(5) Conversion of Unused Credits. Unused credits may be converted to mitigation bank credits at the discretion of the Department and in accordance with OAR 141-085-0720 to OAR 141-085-0740.

STATUTORY/OTHER AUTHORITY: ORS 196.825, ORS 196.600 - 196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.800 - 196.990

REPEAL: 141-085-0765

RULE TITLE: Compensatory Non-Wetland Mitigation (CNWM)

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Eliminating Rule

RULE TEXT:

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

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

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

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

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

(a) Hydrologic;

(b) Geomorphic;

(c) Biological; and

(d) Chemical and nutrient.

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

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

(a) Defined performance standards;

(b) Site monitoring and reporting using a method approved by the Department;

(c) Administrative protection of the CNWM site; and

(d) Financial security.

STATUTORY/OTHER AUTHORITY: ORS 196.825, 196.600 - 196.692

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-089-0630

RULE TITLE: Project Applicability

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule description of an aquatic resource of special concern to align with 141-085-0510

RULE TEXT:

(1) Applicability. This rule sets forth conditions under which a person may, without an individual removal-fill permit from the Department, place or remove material within waters of this state, as defined in OAR 141-085 for the purposes set forth in each GA. This rule does not apply to activities proposed within areas designated as:

(a) A State Scenic Waterway; or

(b) An Aquatic Resource of Special Concern, unless the activity is for habitat restoration purposes. Aquatic Resources of Special Concern include alkali wetlands and lakes, bogs, cold water habitat, fens, hot springs, interdunal wetlands, kelp beds, mature forested wetlands, native eelgrass beds, , off-channel habitats (alcoves and side channels), ultramafic soil wetlands, vernal pools, wet prairies, wooded tidal wetlands, and others, as determined by the Department.

(2) Department Determination of Eligibility. To be eligible for a GA, a project must comply with the general conditions described in OAR 141-089-0650 as well as individual GA purpose, eligibility, authorized activities and activity-specific conditions. In the event a dispute arises concerning or about the applicability of a general authorization to any project notification, the Department will make the final determination.

(3) Thresholds and Best Management Practices (BMPs). BMPs necessary to comply with the general conditions are not included in the thresholds under each general authorization.

(4) Project with More Than Minimal Impacts. The Department may require an individual removal-fill permit for a project that would otherwise be authorized by a general authorization, if the Department determines that the activity might cause more than minimal individual or cumulative environmental effects or might result in long-term harm to the water resources of the state. The Department may also require an application for an individual removal-fill permit if requested to do so by the Oregon Department of Fish and Wildlife, the Oregon Department of Environmental Quality or the affected local land use planning department.

(5) Combining Activities. The following General Authorizations may be combined to cover a single project when the combined activities result in no more than minimal impacts:

(a) Waterway Habitat Restoration;

(b) Wetland Ecosystem Restoration;

(c) Waterway Bank Stabilization;

(d) Piling Placement and Removal;

(e) Certain Transportation-Related Activities in ESH; and

(f) Temporary Impacts to Non-Tidal Wetlands.

(6) Entire Project. Projects eligible for GAs must rely solely on GAs for their authorization. GAs may not be combined with either Individual Permits or authorizations under General Permits.

STATUTORY/OTHER AUTHORITY: ORS 196.600 - 196.692, 196.795 - 196.990

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-093-0141

RULE TITLE: Transportation-Related Structures - Eligibility Requirements

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: modifying the rule description of an aquatic resource of special concern to align with 141-085-0510

RULE TEXT:

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

(a) "Entrenchment ratio" is the ratio between the flood prone width and the width at the elevation at which a stream first reaches the top of its natural banks and overflows.

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

(c) "Flood Prone Area" means the area adjacent to the stream that is inundated or saturated when the elevation of the water is at twice the maximum depth at bankfull stage or three times the average bankfull depth.

(d) "Functional floodplain" means the flood prone area up to 2.2 times the width at OHWL for streams with an entrenchment ratio of 2.2 or greater, and the entire width of the flood prone area for streams with an entrenchment ratio less than 2.2. This area may be reduced by the presence of natural constrictions, flow regulation, or encroachment of built infrastructure.

(2) Thresholds. To be eligible a project must be limited to no more than:

(a) In waters of this state, other than wetlands, a total of five thousand (5,000) cubic yards of material filled, removed or altered, for the entire project. Up to one thousand (1,000) cubic yards of the allowable 5,000 cubic yards of material may be used for streambank stabilization; and

(b) One-half (0.5) acre of permanent impact to wetlands is allowed for the entire project.

(3) No impacts to Aquatic Resources of Special Concern. The project must not involve impacts to Aquatic Resources of Special Concern. Aquatic Resources of Special Concern include alkali wetlands and lakes, bogs, cold water habitat, fens, hot springs, interdunal wetlands, kelp beds, mature forested wetlands, native eelgrass beds, off-channel habitats (alcoves and side channels), ultramafic soil wetlands, vernal pools, wet prairies, wooded tidal wetlands, and others, as determined by the Department.

(4) Notwithstanding the requirements of OAR 141-093-0105 through OAR 141-093-0135, the following projects will not require compensatory mitigation, and the applicant may use best professional judgment to assess functions and values if the proposed design meets all of the following requirements:

(a) Widening, replacing, or maintaining an existing culvert or bridge

(A) A clear, unobstructed opening above the expected depth or scour of the streambed within the functional floodplain must be maintained;

(B) A single span bridge or culvert must span 1.5 times the width of the stream at the ordinary high water line (OHWL), or wider;

(C) A multiple span structure must span 2.2 times the width of the stream at the OHWL, or wider, without including the width of interior supports;

(D) Conduits must be installed within road fill, if necessary, to allow water to flow across the floodplain;

(E) All artificial constrictions within the functional floodplain must be removed that are not otherwise a component of the culvert or bridge, unless otherwise approved by the Department;

(F) Streambanks and newly exposed floodplains must be reshaped to either match or be flatter than upstream and downstream contours;

(G) Streambank stabilization methods are limited to techniques in ORS 141-089-0730 through 141-089-0735, plus the minimum amount of rock necessary to protect the integrity of the culvert or bridge. Rock on streambanks above OHWL must incorporate soil and woody vegetation;

(H) Streambanks and newly exposed floodplains must provide or be planted to achieve a density of at least 1 live native shrub or tree per 6 linear feet, except under a bridge or within areas needed for site distance and safety, unless otherwise approved by the Department; and

(I) ODFW fish passage requirements for adult and juvenile fish must be met.

(b) Restoring natural fluvial processes if the proposed design meets all the following requirements:

(A) The activity is integrally related to widening, replacing, maintaining, or removing an existing structure;

(B) Limited to use of materials sized appropriately for the system and that mimic natural substrate found within the system, unless otherwise required for fish passage;

(c) Reestablishing bank slopes adjacent to an existing structure to the previous extent of the toe of the slope.

(A) Reestablishment may expand the toe of pre-existing structure fill for no more than 50 feet of channel when necessary to maintain a 2:1 fill slope or steeper. At least 80% of the previous channel width at OHWL must be retained.

(B) Streambank stabilization methods are limited to techniques in ORS 141-089-0730 through 141-089-0735, plus the minimum amount of rock necessary to protect the integrity of the road and stabilize the toe of the slope. Rock on streambanks above OHWL must incorporate soil and woody vegetation, unless otherwise approved by the Department.

(C) A reestablished streambank must be planted to achieve a density of at least 1 live native shrub or tree per 6 linear feet, unless otherwise approved by the Department.

STATUTORY/OTHER AUTHORITY: ORS 196.600 - 196.692, 196.795 - 196.990

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-093-0145

RULE TITLE: Transportation-Related Structures - GP-Specific Application Requirements for Authorizing Projects

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying provisions for compensatory mitigation; adding design criteria whereby existing culverts and bridges projects will not require compensatory mitigation and the applicant may use best professional judgment to assess functions and values.

RULE TEXT:

(1) Compensatory Mitigation. Unless otherwise approved by the Department, compensatory mitigation options are:

- (a) Mitigation bank credit purchase from a Department-approved mitigation bank with a service area that includes the proposed removal-fill site and that meets the eligibility requirements for CM outlined in ORS 141-085-0690;
- (b) In-lieu fee credit purchase that meets the eligibility requirements for CM outlined in ORS 141-085-0690; and
- (c) Cash payment to the Department's payment in-lieu program.

STATUTORY/OTHER AUTHORITY: ORS 196.600 - 196.692, 196.795 - 196.990

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-093-0160

RULE TITLE: Minor Removal-Fill Impacts - Eligibility Requirements

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the rule description of an aquatic resource of special concern to align with 141-085-0510.

RULE TEXT:

- (1) Threshold. The removal-fill activity in certain non-tidal wetlands must not exceed two-tenths (0.20) of an acre for the entire project.
- (2) No Impact to Tidal Wetlands. The project must not involve impacts to tidal wetlands.
- (3) No Impacts to Waterways. The project must not involve impacts to any non-wetland waters.
- (4) No Impacts to ESH or State Scenic Waterways. The project must not involve impact to Essential Indigenous Anadromous Salmonid Habitat or State Scenic Waterway-designated areas.
- (5) No Impacts to Aquatic Resources of Special Concern. The project must not involve impacts to Aquatic Resources of Special Concern. Aquatic Resources of Special Concern include alkali wetlands and lakes, bogs, cold water habitat, fens, hot springs, interdunal wetlands, kelp beds, mature forested wetlands, native eelgrass beds, off-channel habitats (alcoves and side channels), ultramafic soil wetlands, vernal pools, wet prairies, wooded tidal wetlands, and others, as determined by the Department.

STATUTORY/OTHER AUTHORITY: ORS 196.600 - 196.692, 196.795 - 196.990

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990

AMEND: 141-093-0165

RULE TITLE: Minor Removal-Fill Impacts - Compensatory Wetland Mitigation

NOTICE FILED DATE: 10/29/2018

RULE SUMMARY: Modifying the provisions for compensatory wetland mitigation

RULE TEXT:

Unless otherwise approved by the Department, compensatory mitigation options are:

- (1) Bank credit purchase that meets the eligibility requirements for CM outlined in ORS 141-085-0690;
- (2) In-lieu fee credit purchase that meets the eligibility requirements for CM outlined in ORS 141-085-0690; and
- (3) Payment to the Department's payment in-lieu program

STATUTORY/OTHER AUTHORITY: ORS 196.600 - 196.692, 196.795 - 196.990

STATUTES/OTHER IMPLEMENTED: ORS 196.600 - 196.692, 196.795 - 196.990