

Division 85

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

141-085-0510

Definitions

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

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

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

(3) **"Aquatic Resources of Special Concern"** means waters of this state that provide functions, values and habitats that are ~~irreplaceable, difficult to replace, or~~ limited in quantity because they are naturally rare or have been disproportionately lost due to prior impacts. These include ~~alkali wetlands and lakes~~, bogs, ~~fens~~, 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, ~~certain alkaline wetlands and lakes~~, 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

Commented [MR1]: The order of types of ARSCs was changed to match the definition in OAR 141-090

Commented [MR2]: The department considers natural rarity, degree of degradation, and replacement difficulty for each type. So, we thought irreplaceable should be added to the definition this definition, in addition to limited.

Commented [RAC23]: "as defined by DEQ"

Commented [MR4]: Updated to apply to more that just wetlands

Commented [MR5]: the alternative definition of "beds" was for division 89 and not needed in division 85

the highest measured tide. The “bed” is typically the horizontal section and includes non-vegetated gravel bars. The “bank” is typically the vertical portion.

~~(1410)~~ **"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/or~~ to support ecological functions. The buffer area may include upland, wetland, or other waters.

Commented [MR6]: Definition updated for clarity and because buffers can generate mitigation credit when supporting ecological functions.

~~(1411)~~ **"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.

~~(1412)~~ **"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.

~~(1413)~~ **"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.

~~(1514)~~ **"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.~~

Commented [MR7]: Definition being removed during fee rule making, deleting here to make numbering match

~~(17(15))~~ **"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 ~~impactseffects~~ of project development to waters of this state or to resolve violations of ORS 196.800 to 196.905~~921~~. Compensatory mitigation for removal-fill activities does not affect permit requirements of other state departments.

Commented [MR8]: Updated definition to match statute.

~~(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.~~

Commented [MR9]: Definition removed as term no longer used in rule

~~(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.~~

Commented [MR10]: See simplified definition below.

~~(20(16))~~ **"Compensatory Stream Mitigation (CSM)"** means compensatory mitigation involving rivers or streams.

Commented [MR11]: added to clarify when we mean stream mitigation rather than non-wetland. Because CM is defined in statute and rule this definition can point to the CM definition and define resource type.

~~(17)~~ **"Compensatory Wetland Mitigation (CWM)"** means compensatory mitigation involving wetlands.

Commented [MR12]: simplified to remove extra detail not needed (see deleted definition above). Because CM is defined in statute and rule this definition can point to the CM definition and define resource type.

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

(2119) "**Condition**" refers to the state of a water's naturalness or ecological integrity.

(2220) "**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.

(2321) "**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.

(2422) "**Creation**" means to convert an upland area that has never been a water of this state to a water of this state.

(2523) "**Credit**" means the measure of the increase in the functions and values of the water resources of this state achieved at a mitigation site.

(2624) "**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.

(2725) "**Deep Ripping, Tiling, and Moling**" refers to certain specific mechanical methods used to promote subsurface drainage of agricultural wetlands.

(2826) "**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.

(2927) "**Department**" means the Oregon Department of State Lands and the Director or their designee.

(3028) "**Ditch**" means a manmade water conveyance channel. Channels that are manipulated streams are not considered ditches.

(3129) "**Dredging**" means removal of bed material using anything other than hand-held tools.

(3230) "**Ecologically or Environmentally Preferable**" means compensatory mitigation that has a higher likelihood of replacing functions and values or improving water resources of this state.

(3331) "**Emergency**" means natural or human-caused circumstances that pose an immediate threat to public health, or safety or substantial property including crop or farmland.

(3432) "**Enhancement**" means to improve the condition and increase the functions and values of an existing degraded wetland or other water of this state.

(3533) "Erosion-Flood Repair" means ~~the placement of riprap or any other work necessary to protect~~ preserve existing facilities and land from flood and high ~~stream flows~~ streamflows, in accordance with these regulations.

Commented [MR13]: Updated to match statute

(3634) "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.

(3735) "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.

(3836) "Extreme Low Tide" means the lowest estimated tide.

(3937) "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 State Scenic Waterways (OAR 141-100) "fill" means any amount of deposit by artificial means.

(4038) "Food and Game Fish" means those species identified under ORS 506.011, 506.036, or 496.009.

(4139) "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.

(4240) "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."

(4341) "Habitat Restoration" means ~~a project that would improve the return of an ecosystem from a disturbed or altered condition to a close approximation of its ecological condition prior to disturbance of a water of the state.~~

(4442) "Highest Measured Tide" means the highest tide projected from actual observations within an estuary, ~~including, but not limited to tidal bay, or tidal bay river~~ (see OAR 141-085-0515).

(4543) "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.

Commented [RAC214]: Add "or Habitat Enhancement"

"would reestablish a water of this state or improve"

Commented [RAC215R14]: Clarify/qualify "improve"

Commented [RAC216R14]: Language about what the definition is for (application requirements—reference - 0550(8))?

Commented [RAC217R14]: "Habitat Improvement"? (applicable throughout rule division?) Clarifying that habitat restoration is not the same as wetland restoration.

Commented [MR18]: Habitat restoration definition changed to reflect that the purpose of habitat restoration isn't to turn back time to a past condition but rather intended to improve conditions right now. This change also makes use of the term consistent throughout rule.

Commented [MR19]: updated to include tidal river for consistency with DSL statute 196.600-196.990

Commented [ED20R19]: Tidal Waters definition OAR 85-0015 (102) includes Estuaries, tidal bays, and tidal rivers. The HMT definition is aligning with this definition for consistency.

Commented [RAC221]: Saline/fresh water difference? Clarify. Could be more precise. Some larger rivers, the ohwm may be higher than hmt.

Commented [RAC222R21]: Suggestion: "portion of the saltwater river"

Definition of "tidal river"

Integrate estuary or estuarine into this.

Commented [RAC223]: Or remove and leave just estuary since tidal bay and tidal river are included in definition of estuary.

Commented [RAC224R23]: Could the 'highest measured tide' definition just refer to Tidal Waters as defined by this Rule? Could say... "within a Tidal Water, including estuaries, tidal bays or tidal rivers"?

Commented [RAC225R23]: Alignment with federal/NOAA definition of estuary? Terms different among agency which is why precision is needed.

And -0515(2).

(4644) **"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.

(4745) **"In-Lieu Fee (ILF) Program" or "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 bank in which the applicant to an ILF sponsor, as approved by the is a governmental or non-profit natural resources management entity and where advanced credits can be released upon approval of an in-lieu fee instrument, before Department approval of a mitigation site. In ILF mitigation, a single ILF instrument may provide for future authorization of additional mitigation sites.

Commented [MR26]: added additional term "In-Lieu Fee (ILF) Program" and added a description how these are a type of mitigation bank. Added a statement that future sites may be authorized under one instrument

(4846) **"Interagency Review Team (IRT)"** is an advisory committee to the Department on mitigation banks and other compensatory mitigation projects.

(4947) **"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.

(5048) **"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.

(5149) **"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.

(5250) **"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.

(5351) **"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.

(5452) **"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.

(5553) **"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.

(5654) **"Location"** means the entire area where the project is located.

~~(5755)~~ **"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~~20 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.

~~(5856)~~ **"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.

~~(5957)~~ **"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.

~~(6058)~~ **"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 196.905921. A mitigation bank is used to compensate for reasonably expected adverse impacts of project development on waters of this state with fees paid by the applicant to a sponsor.

Commented [RAC527]: Recommend removing "reasonably expected". Unnecessary.

~~(6159)~~ **"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. An MBI may be specific to an individual site, an umbrella mitigation bank, or an in-lieu fee mitigation program.

Commented [MR28]: updated statute reference and added statement about how a bank is used

~~(62)~~ **"Mitigation Bank Prospectus" or "Prospectus"** means the preliminary proposal prepared by a mitigation bank sponsor describing a proposed bank.

Commented [MR29]: added that an MBI may be specific to different types of mitigation banks.

~~(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.

Commented [MR30]: Deleted "Mitigation Bank Prospectus" definition and added "Prospectus" so that is covers mitigation banks, umbrella banks, and ILF programs. Which kind of prospectus can be inferred by context in the rules.

~~(64)~~~~(60)~~ **"Navigational Servitude"** means activities of the federal government that directly result in the construction or maintenance of congressionally authorized navigation channels.

Commented [MR31]: Deleted "Mitigation Bank Sponsor" definition and added "Sponsor" so that is covers mitigation banks, umbrella banks, and ILF programs. Which kind of sponsor can be inferred by context in the rules.

~~(6561)~~ **"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.

~~(6662)~~ **"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.~~

Commented [MR32]: removed since the term is not used in Div 85

~~(68(63))~~ **"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.

~~(6964)~~ **"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.

~~(7065)~~ **"Office of Administrative Hearings"** means the state agency unit that provides Administrative Law Judges to conduct contested case proceedings.

~~(7166)~~ **"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).

~~(7267)~~ **"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.

~~(7368)~~ **"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.

~~(7469)~~ **"Perennial Stream"** means a stream that has continuous flow in parts of its bed all year long during years of normal precipitation.

~~(7570)~~ **"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.

~~(7671)~~ **"Plowing"** means all forms of primary tillage and, including moldboard, chisel or wide-blade plowing, discing, harrowing, or similar physical means for the breaking up, cutting, turning over, and stirring of soil to prepare it for planting crops or other agricultural products. Plowing does not include deep ripping or the redistribution of soil, rock, or other surface materials in a manner that changes any waters of this state to upland, or rock crushing activities that result in the loss of natural drainage characteristics, the reduction of water storage and recharge capability, or the overburdening of natural water filtration capacity.

Commented [MR33]: updated to match the definition of "Plowing" in statute

~~(7772)~~ **"Practicable"** means capable of being accomplished after taking into consideration cost, existing technology and logistics with respect to the overall project purpose.

~~(7873)~~ **"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.~~

Commented [MR34]: Definition being removed during fee rule making, deleting here to make numbering match

~~(8074)~~ **"Project"** means the primary development or use, having independent utility, proposed by one person. A project may include more than one removal-fill activity.

~~(8175)~~ **"Project Site"** means the geographic area upon which the project is being proposed.

~~(8276)~~ **"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.~~

Commented [MR35]: updated to match statute

~~(77) "Prospectus" 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 preliminary proposal prepared by a mitigation bank, umbrella mitigation bank, or in-lieu fee program sponsor describing a proposed bank, umbrella mitigation bank, or wet perimeter of any single ESH stream in a single year in-lieu fee program.~~

Commented [MR36]: "Prospectus" was previously "mitigation bank prospectus" and we made this change so that it covers mitigation banks, umbrella banks, and ILF programs. Which kind of prospectus can be inferred by context in the rules.

~~(8378)~~ **"Public Body"** ~~as used in the statutes of this state~~ means state government bodies, local government bodies, and special government bodies ~~(as used in ORS 174.109).~~

~~(8479)~~ **"Public Use"** means a publicly owned project or a privately owned project that is available for use by the public.

~~(8580)~~ **"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.

~~(8681)~~ **"Reasonably Expected Adverse Effect"** and **"Adverse Impact"** means the direct or indirect, reasonably expected or predictable ~~adverse~~ results of project development upon waters of this state including water resources, navigation, fishing, and public recreation uses.

Commented [MR37]: added to clarify the definition specific to negative effects/impacts from project

~~(8782)~~ **"Reconstruction"** means to rebuild or to replace the existing structure in-kind. "Reconstruction" includes a structure being widened by no more than ~~twenty~~20 percent of its original footprint at any specific location in waters of this state.

~~(8883)~~ **"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.

~~(8984)~~ **"Reference Site"** means a site or sites that represent the desired future characteristics and condition to be achieved by a compensatory mitigation plan.

~~(90)(85)~~ **"Related Adjacent Land"** means all land within 1/4 of one mile of the bank of Waldo Lake or a river or segment of river within a State Scenic Waterway, except land that, in the Oregon Parks and Recreation Department's (OPRD) judgment, does not affect the view from the waters within a State Scenic Waterway (ORS 390.805).

Commented [MR38]: adding definition for Related Adjacent Land to clarify the term used elsewhere and to match statute (ORS 390.805) & OAR 141-100

~~(86)~~ **"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 State Scenic Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.

~~(91)(87)~~ **"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)(88)~~ **"Restoration"** means to reestablish a former water of this state.

~~(93)(89)~~ **"Riprap"** means facing a bank with rock or similar substance to control erosion.

~~(94)(90)~~ **"River"** means a natural body of water flowing during some portion of the year on the earth's surface or in a channel. Includes natural bodies of running water that have been altered by humans.

Commented [MR39]: adding definition for river and stream to clarify the terms use throughout rule. Terms used interchangeably in rule and do not have regulatory difference.

~~(91)~~ **"Serviceable"** means capable of being used for its intended purpose.

~~(95)(92)~~ **"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)(93)~~ **"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, umbrella mitigation bank, or in-lieu fee program.

Commented [MR40]: "Sponsor" was previously "Mitigation Bank Sponsor" and we made this change so that can be used generally to apply to mitigation banks, umbrella banks, and ILF programs. Which kind of sponsor can be inferred by context in the rules.

~~(94)~~ **"State Scenic Waterway (SSW)"** means Waldo Lake, or a river or a segment of a river or lake that has been designated ~~as such in accordance with Oregon Scenic Waterway Law (under~~ ORS 390.805 ~~to through~~ 390.995)-925 or any subsequent act and includes related adjacent lands.

Commented [MR41]: "State Scenic Waterway" definition updated to match statute (ORS 390.826) and OAR 141-100

~~(97)(95)~~ **"Stream"** has the same meaning as "river" in section ~~(901)~~.

Commented [MR42]: adding definition for river and stream to clarify the terms use throughout rule. Terms used interchangeably in rule and do not have regulatory difference.

~~(96)~~ **"Stream Function Assessment Method"** is a method for assessing functions and values of waters of this state that flow in channels.

~~(98)(97)~~ **"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)(98)~~ **"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)(99)~~ **"Territorial Sea"** means the waters and seabed extending three geographical miles seaward from the coastline in conformance with federal law.

~~(101)(100)~~ **"Territorial Sea Plan"** means the plan for Oregon's territorial sea.

(101) **"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 depth 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.

Commented [MR43]: depth is a more accurate way to describe this boundary location

(102) **"Umbrella Mitigation Bank (UMB)"** is a type of mitigation bank where a single mitigation bank instrument may provide for future authorization of additional mitigation bank sites.

Commented [MR44]: added a definition for Umbrella bank since this term is now used in the banking rules and is different from an individual mitigation bank in that additional mitigation sites can be added to the MBI.

(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 ~~through~~ 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.

Commented [MR45]: deleted reference to division 89 because term is used in div 85

(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 196.600-615, 196.630, 196.640, 196.692-8, 196.825-810, 196.900, 196.921

Statutes/Other Implemented: ORS 196.600-196.692 & ORS 196.800-196.990 605-196.620, 196.635-196.643, 196.668-196.672, 196.678-196.687, 196.805, 196.810, 196.825-196.845, 196.855-196.880, 196.900, 196.921

History:

DSL 3-2019, minor correction filed 04/08/2019, effective 04/08/2019

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0515

Removal-Fill Jurisdiction by Type of Water

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

(1) Pacific Ocean. The Pacific Ocean is jurisdictional from the line of extreme low tide seaward to the limits of the territorial sea. As defined in ORS 390.605(2), the land lying between extreme low tide and the statutory vegetation line or the line of established upland shore vegetation, whichever is farther inland, is known as the "ocean shore." "Ocean shore" does not include an estuary as defined in ORS 196.600800. The "ocean shore" is regulated by the Oregon Department of Parks and Recreation.

Commented [MR46]: updated statute reference for accuracy

(2) Estuaries, Tidal Bays, and Tidal Rivers. Estuaries, tidal bays, and tidal rivers below the head of tide are jurisdictional to the elevation of the highest measured tide (excluding storm surge), or to the upper edge of wetland, whichever is higher. The head of tide is the farthest point upstream where a river is affected by tidal fluctuations. The highest measured tide elevation on a parcel may be determined by a land survey referenced to the closest tidal benchmark based upon the most recent tidal epoch and reference to both the tidal datum (MLLW) and the fixed geodetic datum (NAVD88). In lieu of surveyed elevations, subject to approval by the Department, highest measured tide elevation may be based upon actual tide gauge measurements during a wintertime spring tide, an elevation-based estuary extent model, or observation of the highest of the field indicators listed in subsections (a) through (f) below.

Commented [RAC247]: DSL to review and consider clarification.

These field indicators are often not observable within the upper riverine portion of an estuary, in which case a land survey is required:

Commented [MR48]: Expanding the options for how to determine where tidal jurisdiction boundaries are to allow for increased accuracy in these determinations

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

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

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

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

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

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

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

- (a) Clear, natural line impressed on the shore;
- (b) Change in vegetation from riparian (e.g., willows) to upland (e.g., oak, fir) dominated;
- (c) Textural change of depositional sediment or changes in the character of the soil (e.g., from sand, sand and cobble, cobble and gravel to upland soils);
- (d) Elevation below which no fine debris (needles, leaves, cones, and seeds) occurs;
- (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or
- (f) Other appropriate means that consider the characteristics of the surrounding areas.

(4) Wetlands. Wetlands are jurisdictional within the wetland boundary.

(5) Reservoirs. The Department's jurisdiction over reservoirs extends to the higher of either the normal operating pool level or the upper edge of adjacent wetland.

(6) Artificially Created Wetlands and Ponds. These waters are jurisdictional when they are:

- (a) Equal to or greater than one acre in size;
- (b) Created, in part or in whole, in waters of this state; or
- (c) Identified in an authorization as a mitigation site.

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

- (a) Wastewater treatment;
- (b) Settling of sediment;
- (c) Stormwater detention and/or treatment;
- (d) Agricultural crop irrigation or stock watering;
- (e) Fire suppression;
- (f) Cooling water;
- (g) Surface mining, even if the site is managed for interim wetlands functions and values;
- (h) Log storage; or
- (i) Aesthetic purposes.

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

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

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

(A) Contain food and game fish; and

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

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

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

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

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

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

(b) Artificially created from upland or from wetlands;

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

(d) Do not contain food or game fish.

Statutory/Other Authority: ORS 196.~~825 & 692~~, 196.~~600-196.692~~810

Statutes/Other Implemented: ORS 196.~~600-805~~, 196.810, 196.~~692 & 196.800-196.990~~825

History:

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0520

Removal-Fill Jurisdiction by Volume of Material

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

(1) **Oregon State Scenic Waterways (SSWs).** The threshold volume for waters of this state within Oregon State Scenic Waterways, including related adjacent lands, is any amount greater than zero.

Commented [MR49]: Added the zero threshold includes waters within “related adjacent lands” to match SSW statutes

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

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

(4) **Ocean Renewable Energy Facilities.** The threshold volume for removal-fill in Oregon's territorial sea that is related to an ocean renewable energy facility is any amount greater than zero.

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

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

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

Statutory/Other Authority: ORS 196.825 & ORS 196.600 - 196.692

Statutes/Other Implemented: ORS 196.600 - 196.692 & ORS 196.800 - 196.990

History:

DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0530

Exemptions for Certain Activities and Structures

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

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

(a) Reforestation;

(b) Road construction and maintenance;

(c) Harvesting of forest tree species; and

(d) Disposal of slash.

(2) **Fill for Construction, Operation, and Maintenance of Certain Dams and Water Diversion Structures.** Filling the beds of the waters of this state for the purpose of constructing, operating, and maintaining legally constructed dams or other diversions for which permits or certificates have been or will be issued

Commented [MR50]: Changes to this rule to indicate that the exemption apply to legally constructed structures.

under ORS Chapters 537 or 539 and for which preliminary permits or licenses have been or will be issued under ORS 543.010 through 543.610 is exempt.

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

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

(a) The project meets the definition of maintenance under OAR 141-085-0510(~~5756~~); or

(b) The project meets the definition of reconstruction under OAR 141-085-0510(~~8783~~);

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

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

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

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

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

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

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

(b) Authorized by the Oregon Water Resources Department.

(9) Removal of Large Wood. Removal of large woody debris is exempt if:

(a) It poses a direct and demonstrable danger to livestock, human life, or real property; or

(b) It poses a risk of harm to transportation facilities including, but not limited to, culverts, bridges, and roads located near or within the beds or banks of any waters of this state; or

(c) It prevents or obstructs navigation within the beds or banks of any waters of this state ; and

(d) The removal is no more than the amount necessary to reduce or eliminate the threat.

Statutory/Other Authority: ORS 196.825 & 196.600-196.692

Statutes/Other Implemented: ORS 196.600-196.692 & 196.800-196.990

History:

DSL 13-2019, minor correction filed 07/10/2019, effective 07/10/2019

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0534

Exemptions for Certain Voluntary Habitat Restoration Activities

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

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

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

~~(2)~~ (1) Conditions of Exemption: Activities described in ~~Sections (3)~~ sections (2) through (8) of this rule may be combined and are exempt from permit requirements under the following conditions:

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

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

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

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

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

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

Commented [MR51]: These definitions were moved to 0510 because they are used in other parts of rule (-0550)

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

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

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

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

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

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

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

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

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

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

(c) The trash and garbage ~~is~~are disposed of at a licensed Department of Environmental Quality collection facility.

Statutory/Other Authority: ORS 196.825 & 196.600-196. 692

Statutes/Other Implemented: ORS 196.600-196.692 & 196.800-196.990

History:

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0535

Exemptions Specific to Agricultural Activities

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

(1) Exemptions Do Not Apply to Nonfarm Uses. The exemptions under OAR 141-085-0535(2) ~~and (3) through (5)~~ do not apply to any fill or removal that involves changing an area of wetlands to a nonfarm use.

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

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

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

- (a) Drainage or maintenance of farm or stock ponds;
- (b) Maintenance of existing farm roads in such a manner as to not significantly adversely affect wetlands or any other waters of this state; or
- (c) Subsurface drainage by deep ripping, tiling, or moling, limited to converted wetlands.

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

Commented [MR52]: removed for consistency with removal of definitions from exemptions rules (they are in definitions rule) and also unnecessary

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

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

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

Commented [MR53]: updating reference, definitions numbering changed

(8) Push-Up Dams.

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

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

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

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

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

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

Statutory/Other Authority: ORS 196.600 - 196.692 & 196.795 - 196.990

Statutes/Other Implemented: ORS 196.600 - 196.692 & 196.795 - 196.990

History:

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0550

Application Requirements for Individual Permits

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

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

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

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

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

(a) Applicant information including name, mailing address, phone number, and e-mail address. When the applicant is a business entity, the business must be registered with the Oregon Secretary of State Corporate Division. The exact name of the business entity, as listed with Secretary of State Corporate Division, must be entered on the application. The business entity cannot be one that is registered as an Assumed Business Name, or other similar type, with the Oregon Secretary of State Corporate Division.

(b) Landowner information including name ~~and~~, mailing address, and email 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 entire 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;

Commented [MR54]: added the clarification that "exact name of business entity" means it can't be the assumed name or the like.

Commented [MR55]: added email address because most communication is done electronically.

Commented [MR56]: added to clarify the requirement is for the entire project corridor as required by statute

(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 entire 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.

Commented [MR57]: added to clarify the requirement is for the entire project corridor as required by statute

(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~~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~~section (5) of this rule **for voluntary habitat restoration projects.**

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(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

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0560

Public Review Process for Individual Removal - Fill Permit Applications

(1) **Circulation of the Application for Public Review.** Once the application has been deemed complete and sufficient, the Department will provide notification of the availability of the application for review either by U.S. mail or electronically (e.g., facsimile, ~~e-mail~~email, posting on the Internet) to adjacent property owners, watershed councils, public interest groups, affected local government land use planning departments, state agencies, federal agencies, and ~~tribal~~Tribal governments in the geographic area affected by the permit. ~~For construction and maintenance of~~For linear facilities, the director shall notify by first-class mail, email or electronic facsimile transmission all landowners whose land is identified in the permit application will be notified by U.S. mail or electronically that the and all landowners whose land is adjacent to the property of a landowner whose land is identified in the permit application is available for review. Upon request the Department may make a copy of the application available at the public library closest to the proposed project.

Commented [MR58]: Updated to match statute

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

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

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

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

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

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

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

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

(5) Applicant Response to Comments.

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

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

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

(6) Final Review.

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

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

(c) The permit decision deadline may be extended beyond 90 calendar days when the director determines that an extension is necessary to coordinate the issuance of a proprietary authorization decision for an ocean renewable energy facility and a removal-fill permit decision.

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

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

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

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

Statutory/Other Authority: ORS 196.825 & ORS 196.600 - 196. 692

Statutes/Other Implemented: ORS 196.600 - 196.692 & ORS 196.800 - 196.990

History:

DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0575

Permit Appeals

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

(2) Other Person Appeal Within 21 Calendar Days. Any person who is aggrieved or adversely affected by the Department's final decision concerning an individual permit or a condition therein may request a contested case proceeding. The request must be in writing and must be received by the Department within 21 calendar days of the decision.

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

(a) To be "adversely affected" by the Department's individual removal-fill permit decision, the person must have a legally protected interest that would be harmed, degraded, or destroyed by the authorized project.

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

(4) Contents of the Request. The Department has determined that due to the complexity of removal-fill permitting, a general denial of the matters alleged in the request for a contested case proceeding does not provide sufficient information for a fair and efficient contested case and a more specific request is warranted. All requests for a contested case proceeding under this section shall include a specific list of issues for the contested case proceeding. The requester may amend their request to include additional issues or clarify existing issues within 15 days of the date that the case is referred to the Office of Administrative Hearings.

(5) Contested Case Proceeding. If the written request for a contested case proceeding is timely, clearly identifies at least one specific issue, and was made by an eligible person, the matter will be referred to the Office of Administrative Hearings. The contested case will be conducted as follows:

(a) The hearing will be conducted as a contested case pursuant to OAR 137-003-0501 through 137-003-0690 and this rule;

(b) The permit holder and any other persons that are adversely affected or aggrieved that have filed a timely written request for a contested case proceeding will be parties to the proceeding; and

(c) An Administrative Law Judge will conduct a contested case proceeding only on the specific issues clearly identified in the request for contested case proceeding as provided in ~~subsection~~section (4) of this ~~section~~rule or in the referral from the Department.

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

(7) The Proposed Order. The Administrative Law Judge will issue a proposed order containing findings of fact and conclusions of law. If the request for a contested case proceeding was filed by a person other than the applicant, with a legally protected interest that is adversely affected by the issuance of the permit, the Administrative Law Judge shall issue a proposed order within 20 business days of the evidentiary hearing. Other proposed orders should be issued within 90 calendar days of a ruling that resolves all issues of the evidentiary hearing. As required by ORS 183.460, the proposed order shall provide an opportunity to file written exceptions with the Department.

(8) Amended Proposed Order. The Department may issue an amended proposed order. Any amended proposed order shall provide an opportunity to file written exceptions with the Department.

(9) The Final Order. The Department will consider the record, any exceptions, and enter a final order containing findings of fact and conclusions of law. The final order will rescind, affirm or modify the permit or proposed order. If the request for a contested case proceeding was filed by a person other than the applicant, with a legally protected interest that is adversely affected by the issuance of the permit, the Department shall issue the final order within 45 business days after the evidentiary hearing, if any. All other final orders should be issued within 90 calendar days of the proposed order or amended proposed order.

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

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

Statutory/Other Authority: ORS 196.825 & 196.600 – 196.692

Statutes/Other Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990

History:

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0585

Permit Conditions, Permit Expiration Dates and Permit Transfer

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) If the Department determines that the proposed modification is significant, the Department may provide public notice in accordance with the provisions in OAR 141-085-0560.

Commented [MR59]: added to declare the Department may provide PRP for a significant modification

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

Commented [MR60]: Added "Department approved" to require Department's transfer form. Noted assumed business names are not allowed. Also added "updated personal guarantee" since it is also necessary for a transfer.

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

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

Statutory/Other Authority: ORS 196.825 & 196.600-196. 692

Statutes/Other Implemented: ORS 196.600 - 196.692 & 196.795 - 196.990

History:

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0676

Emergency Authorizations

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

(a) The emergency poses a direct threat to substantial property, including but not limited to a dwelling, transportation structure, farm, or cropland;

(b) Prompt action is required to reduce or eliminate the threat;

(c) The nature of the threat does not allow the time necessary to obtain some other form of authorization; and

(d) The proposed project is the minimal amount necessary to reduce or eliminate the threat and minimizes, to the extent practicable, adverse impacts to waters of this state.

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

(a) The applicant planning and carrying out the activity;

(b) The location of the project;

(c) The nature of the emergency (specifically, the nature of the threat to public health, public safety, or property and the immediacy of the threat and need to act promptly);

(d) A description of the proposed work, including the approximate volume of material to be removed and/or filled, how the work will be accomplished, and the schedule for doing the work;

(e) The date and approximate time when the event that caused the emergency took place;

(f) A statement as to whether the emergency action is intended as a temporary or permanent response measure; and

(g) Additional information, as requested from the Department.

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

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

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

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

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

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

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

(a) Compensatory mitigation ~~or compensatory wetland mitigation;~~

Commented [MR61]: specifying wetland mitigation is redundant since CM definition is inclusive of wetlands

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

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

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

Statutory/Other Authority: ORS 196.825 & 196.600 -196. 692

Statutes/Other Implemented: ORS 196.600 - 196.692 & 196.795 - 196.990

History:

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

Renumbered from 141-085-0570 by DSL 8-2009, f. 12-15-09, cert. ef. 1-1-10

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

141-085-0680

Compensatory Mitigation (CM); Applicability and Principal Objectives

(1) Applicability. OAR 141-085-0680 through 141-085-0755 apply~~ies~~ 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; and

(F) Increase wetland resources through restoration and creation, where appropriate.

Commented [RAC562]: Temporary vs permanent impacts (clarify).

Commented [RAC563R62]: CWS: (2) there may be value in adding clarification of applicability for specific impact type (i.e. permanent impact) to align with the definitions of CM and mitigation given CM is only required where mitigation is proposed through substitution. Recommend department revise text to: "For projects where adverse impacts to Waters of this State can only be mitigated through CM, CM will be required."

Commented [RAC564]: Clarify how much is necessary (reference to (F) but (A) through (E) may also need to be clarified.

Commented [MR65]: added for consistency with statute which directs us to "Establish the opportunity to increase wetland resources by encouraging wetland restoration and creation where appropriate" – 196.672(5)

(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~~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.

(j) CM will be required for projects adding new material to the bed or banks of streams for the purpose of stabilization by hardening of bed or banks, such as placement of riprap, unless otherwise determined by the department. This does not include ballast rock for the purpose of anchoring large wood structures. Absence of discernible changes in functions and values assessment will not preclude mitigation for waterway bed or bank hardening.

Statutory/Other Authority: ORS 196.~~825 & ORS~~630 & 196.~~600-196~~692

Statutes/Other Implemented: ORS 196.~~600-605, 196.620, 196.692 & 672, 196.800-805, & 196.990~~825

History:

DSL 4-2019, minor correction filed 04/10/2019, effective 04/10/2019

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0685

Functions and Values Assessment

(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:

Commented [MR66]: hardening of streams changes functions, usually negatively. Hardening components like riprap or coarse material are often buried beneath more natural materials, making it difficult to assess function changes with SFAM which relies on measurable surface characteristics. We need to require mitigation for these impacts per statute but can't solely rely on our function-based accounting method.

Commented [RAC467]: Could de-incentivize bank stabilization in certain areas based on existing material.

Commented [RAC468R67]: Proposed definition for hardening (CWS): Hardening means removal or fill actions within Waters of this State not resulting in stream function enhancement and designed to restrict stream channel migration (lateral or vertical) in perpetuity at the action location.

Commented [RAC469R67]: Variability in migration; natural lateral or vertical; "restrict natural stream channel migration".

Commented [MR70]: The department may determine that a particular project will not result in significant loss in function then CM would not be required.

Commented [MR71]: General Authorizations do not allow for riprap or armoring but do allow ballast rock for anchoring large wood so we included this exception.

(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.

(c) The project meets the criteria in OAR 141-085-0692(3)(g).

(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 (b) For impacts in intermittent streams, perennial streams, or Aquatic Resources of Special Concern associated with intermittent streams or perennial streams, applications 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~~ this 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~~, 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.

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

Statutory/Other Authority: ORS 196.~~825 & ORS 196.600–630~~ & 196.692

Statutes/Other Implemented: ORS 196.~~600–605, 196.620, 196.692 & ORS~~805, 196.~~795–825, & 196.990~~830

Commented [MR72]: applications meeting the function-based accounting exception don't need to complete a SFAM or BPJ assessment

Commented [MR73]: Updating rule to remove the grace period language for requiring SFAM w/applications since we're 5 years out and it no longer applies.

History:

DSL 5-2019, minor correction filed 04/10/2019, effective 04/10/2019

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0690

Eligibility Requirements for CM

(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) ESH designation, if the impact is to an ESH stream;

(C) Stream size/average flow class (small, medium, or large);. The assignment of size categories for streams is based on average annual flow as set forth by Oregon Department of Forestry in OAR 629-635-0200 Sections (13).

(i) Small streams have an average annual flow of two cubic feet per second or less or a drainage area less than 200 acres.

(ii) Medium streams have an average annual flow greater than two and (14); and less than 10 cubic feet per second.

(C) Essential Indigenous Anadromous Salmonid Habitat (ESH) designation, if the impact is to an ESH stream.

(iii) Large streams have an average annual flow of 10 cubic feet or greater per second.

(iv) Actual measurements of average annual flow may substitute for the calculated flows.

(c) The group-level functions and values of the impacted water of this state, wetland(s), as outlined in ORWAP or SFAM, as appropriate, unless CMCWM 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.

Commented [MR74]: the requirements haven't changed but changed wording and added details to make it clear that the categories of stream type "small", "medium", and "large" are actually based on average annual flow (this was always the case it just wasn't clear previously since rule just referenced ODF rules)

Commented [MR75]: the group level matching isn't needed for the stream eligibility step because the accounting protocol is specific enough to require mitigation only for lost functions. If we were to leave this requirement then some mitigation options wouldn't be eligible because of a group function rating even if the impact project has no effect on that function. Also, ORS196.825(5) states CM is limited to replacement of functions and values impacted.

(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.

Commented [MR76]: removing word “type” from second sentence since it conflicts with statement in first sentence.

(b) To meet an exception to replacement by type and function and values, the applicant must demonstrate, in writing and to the satisfaction of the Department, that the alternative CM:

Commented [MR77]: adding clarity that the department will review and approve of out-of-kind mitigation proposals

(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~~ 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~~ 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.~~600-630~~, 196.692 & ~~ORS 196.825~~

Statutes/Other Implemented: ORS 196.~~600-605~~, 196.825, 196.692 & ~~ORS 196.795 – 196.990~~830

History:

DSL 6-2019, minor correction filed 04/10/2019, effective 04/10/2019

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0692

Mitigation Accounting

(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 of waters of this state, 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/requirements 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); and

(d) There Replacement equal to the sum of SFAM value-weighted function scores multiplied by the impacted channel length, when SFAM is no established ratio for CWM using preservation, or for CNWM. Minimum applicable;

(e) Replacement of specific function loss when that function is highly valued, as determined by the functions and values assessment;

(f) For impacts not covered in subsections (a) through (e) above, minimum requirements will be determined on a case-by-case basis by the Department;

(g) Notwithstanding subsections (a) through (f), one linear foot of CSM for one linear foot of impacted channel (1:1), or other unit of measure approved by the Department, when the following apply to the project:

(A) No stabilization of the bed or banks will occur;

(B) The bed at the project site is dominated by coarse material (2.5-inch diameter or larger) or bedrock, or smaller material with no active bed or bank erosion;

(C) Permanent impacts are no more than 10 percent of the channel width measured at the OHWL;

Commented [MR78]: added for clarity and to be consistent with mitigation statute

Commented [MR79]: updating because the minimum for stream isn't based on a ratio

Commented [RAC480]: Thresholds for accounting calculations?

Commented [RAC481R80]: For example: Projects in eastern Oregon may have smaller impacts.

Commented [RAC482]: "Equal to or greater than"?

Commented [RAC483R82]: Add in watershed priority?

Commented [MR84]: our protocol sets the minimum at the functional loss and that can be increased by how valued a function is. This is a fair approach for streams since impacts are typically partial, and because statute requires mitigation for loss of functions and values and SFAM can provide that information. Ratios based on stream area/length/etc. would not be fair or meet statutory requirements.

Commented [RAC485]: Add "determined on a case-by-case basis by the department."

Commented [MR86]: trade-offs in function gains are allowed in most cases but when a function is highly valued it needs to be replaced in kind rather than through gains in another function.

Commented [MR87]: if there are not minimum requirements defined, they will be determined but the department case-by-case.

Commented [MR88]: projects that meet these criteria do not require a functional assessment, are not subject to the CSM accounting protocol, and CM will be 1:1 by linear foot of channel.

Commented [RAC489]: Recommend replacing with hardening if definition of hardening is incorporated into 0510.

(D) Length of permanent impacts are no more than one channel width, measured at OHWL, long; and

(E) CM is equivalent in structure and function to the impact, i.e. removing a structure that is similar to what will be installed.

(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 replacement of the specific functions and values outlined using methods described in ORWAP, SFAM, or the Vernal Pool Function Assessment Method for the Agate Desert, if applicable, OAR 141-085-0685.

Commented [MR90]: simplifying language

(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 ~~forty~~50 percent.

(B) A CM site exceeding, or predicted to exceed, at least ~~eighty~~80 percent of the specific functions that will be lost at the proposed impact site will reduce the amount of CM required by ~~twenty~~20 percent.

(C) A project using SFAM is not subject to an adjustment for specific function and value replacement beyond the minimum requirements.

Commented [MR91]: the CSM accounting protocol already incorporates function and value replacement

(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~~100 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~~20 percent. Strengthened long-term stewardship must include appropriate funding to implement an approved stewardship plan. Minimum administrative protection requirements for CWM are ~~public ownership by a public entity or one of Oregon's federally recognized Tribes with a management plan, or a deed restriction.~~ There are no minimum administrative protection requirements for other types of CM so any provisions will be considered by the Department for this adjustment.

Commented [MR92]: changed to reflect edits to the administrative protection rules (0695(3))

Commented [MR93]: clarifying that since there are no minimum requirements other than for wetlands, any provisions will be considered

Commented [RAC594]: ODOT: Not in alignment with federal regulation.

Commented [RAC595R94]: DSL: Not a new requirement; located in other portions of rule but added here for clarification.

(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 0.220 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 OAR 141-085-0692(4)(a) to 141-085-0692(4)(c).

(c) CM fulfilled using legacy credits or according to OAR 141-085-0692(3)(g) are not subject to the adjustments in OAR 141-085-0692(4)(a) to 141-085-0692(4)(c).

Commented [MR96]: adding reference to the rule that allows for 1:1/no adjustments mitigation for certain stream projects

(4)(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 196.600-630 & 196.692 & ~~ORS 196.825~~

Statutes/Other Implemented: ORS 196.600-605 & 196.692 & ~~ORS 196.795-196.990825~~

History:

DSL 7-2019, minor correction filed 04/10/2019, effective 04/10/2019

DSL 2-2019, adopt filed 03/28/2019, effective 04/01/2019

141-085-0694

Special Requirement for CM

(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; ~~and~~

(g) Not reduce Oregon's resource base of wetlands in locations with disproportionate wetland loss.

Commented [RAC597]: Clarify?

Commented [RAC598R97]: Simplify by removing this language? Or replace with language indicating statewide?

Commented [RAC599R97]: Areas of greatest conservation values?

(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:

Commented [MR100]: to meet the statutory obligation to not have net loss of wetland acres and to promote wetland creation and restoration, DSL needs to consider the history of wetland losses in an area when reviewing/approving enhancement. Enhancement results in loss of wetland area.

- (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 & ORS 196.825

Statutes/Other Implemented: ORS 196.600-196.692 & ORS 196.795-196.990

History:

DSL 8-2019, minor correction filed 04/10/2019, effective 04/10/2019

DSL 2-2019, adopt filed 03/28/2019, effective 04/01/2019

141-085-0695

Administrative Protection of CM Sites

(1) Administrative Protection ~~Instruments~~. All CWM sites must be protected from adverse impacts in perpetuity with appropriate protection ~~instruments~~ mechanisms. Administrative protection for ~~CNWM~~CM sites involving other waters of this state may be required.

Commented [MR101]: Deleted "instrument" to help distinguish the requirements under (2) versus (3). Additionally, we are no longer using the term compensatory-non-wetland-mitigation in Division 85

(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~~ (3) CM Sites Owned by a ~~Public Entity or One of Oregon's Federally Recognized Tribes. 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. A site protection instrument may be used but is not required.

Commented [MR102]: Updating this section to specify that CM sites owned by Oregon's federally recognized tribes may be administratively protected through an adopted management plan.

Statutory/Other Authority: ORS 196.825 & 196.600-196.692

Statutes/Other Implemented: 196.600-196.692 & 196.795 - 196.990

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0700

Financial Security for CM Sites

(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 or tidal water impacts 0.20 of an acre or less; or CSM that meet criteria in OAR 141-085-0692(3)(g); and

Commented [MR103]: clarifying that the option to waive financial security for small impacts includes tidal waters and adding waiver for stream impacts meeting the criteria in 141-085-0692(3)(g)

(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.

Commented [MR104]: exception applies to all types of mitigation credits, not just wetland.

(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...~~

Commented [MR105]: And "prior to permit issuance was not needed since timing is covered in section (5) of the rule

(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 the permittee fails to follow other permit conditions related to mitigation. The Department will identify, in writing, the reasons for the declaration.

Commented [MR106]: added for clarity since not all three actions in the list are related to the permittee

(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~~615~~ & 196.600~~196.692~~~~630~~

Statutes/Other Implemented: ORS 196.600~~600~~, 196.615, & 196.692~~196.795~~ 196.990~~825~~

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0705

Requirements for CM Plans

(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 class(es) and subclass(es) and Cowardin classification system(s) and class(es) for each method;

Commented [MR107]: correcting terminology

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

Commented [MR108]: we are no longer using the term compensatory non-wetland-mitigation.

(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) ~~and Cowardin system(s) and class(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~~average flow class (small, medium, or large), ~~as set forth by Oregon Department of Forestry in~~accordance to OAR ~~629-635-0200 Sections (13) and (14)~~141-085-0690(3)(b)(C); 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.

Commented [MR109]: correcting terminology.

Commented [MR110]: updating terms for accuracy and changing reference to our rule where we describe the classes

(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. Future state should be based on predicted conditions 10 years after completed impacts or mitigation project construction unless otherwise determined by the department. 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.

Commented [MR111]: for consistency across all projects, we needed a set predictive period and 10 years was recommended through discussions with a technical advisory committee.

Commented [MR112]: Removed sentence about not requiring a replacement assessment in the mitigation plan since it's redundant of -0705(1) and 141-085-0685(3)(a)

(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, and preservation areas; buffers; existing and proposed contours; cross-section locations; construction access location; and staging areas;

Commented [MR113]: preservation is also a mitigation method that should be mapped on site plan. Fixed list formatting.

(C) Scaled cross sections showing existing and proposed contours and proposed water depths, existing and proposed wetland boundaries, existing and proposed OHWL;

Commented [MR114]: adding information that is also needed for permit decision.

(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;~~ 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 (4) 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);0694~~

Commented [MR115]: updated to correct rule reference

(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~~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 630 & 196.~~600-196~~.692

Statutes/Other Implemented: ORS 196.~~600-605~~, 196.620, 196.~~692 & 805~~, 196.~~800-825~~, & 196.990830

History:

DSL 9-2019, minor correction filed 04/16/2019, effective 04/16/2019

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0710

Monitoring Requirements for ~~CWMC~~CM

(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~~A 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 class and subclass and Cowardin system and 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 or if the CM site is not self-sustaining.

(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.

Commented [MR116]: adding flexibility in monitoring frequency to allow for non-sequential monitoring when appropriate

Commented [MR117]: correcting terminology

Commented [RAC5118]: Clarify? In what aspect is it self-sustaining?

Commented [RAC5119R118]: Possibly include a definition of what self-sustaining means. "ecological positive trajectory"?

Put in permit conditions instead and remove from rule?

Commented [MR120]: mitigation can meet all the performance standards but only because of on-going maintenance. DSL extends monitoring for a site not being self-sustaining.

Statutory/Other Authority: ORS 196.825 & ORS 196.600 - 196.692

Statutes/Other Implemented: ORS 196.600 - 196.692 & ORS 196.795 - 196.990

History:

DSL 10-2019, minor correction filed 04/16/2019, effective 04/16/2019

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0715

Mitigation for Temporary Impacts

Applicants for projects that involve temporary impacts to waters of this state must provide a rehabilitation plan for rectification of temporary impacts. Rectification must include re-establishment of pre-existing contours and pre-existing vegetation, or similar to pre-existing vegetation structure if site was dominated by non-native or invasive species. A monitoring plan to confirm the ~~reestablishment~~ establishment of waters of this state, ~~or reestablishment~~ re-establishment of vegetation may be required.

Commented [MR121]: we don't want folks planting back non-native, invasive species.

Statutory/Other Authority: ORS 196.600-196.692 & ORS 196.825

Statutes/Other Implemented: ORS 196.600-196.692 & 196.795 - 196.990

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0720

Mitigation Banking Purpose, Applicability and Policies

(1) Purpose and Applicability. Mitigation banking involves the payment of funds to an approved sponsor to satisfy compensatory mitigation requirements for impacts to waters of this state. 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 include individual~~ mitigation banks ~~that compensate for impacts to all types of waters, umbrella mitigation banks, and in-lieu fee programs. The Department may limit the number and type of this state in-lieu fee sponsors.~~

Commented [MR122]: updated language throughout this rule to make clear we are providing rules for all types of banking/credit programs.

Integrated statement explaining what banking is from the ILF rules (-0745)

Commented [MR123]: Simplified the statement about waters of this state.

Commented [MR124]: moved from rule -0745 because we are integrating the ILF specific rules into the rules that cover each step in the process rather than needing to look in two places to understand the rules for ILF banking

(2) Coordination with the US Army 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 of 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) Increasing wetland resources, where appropriate, through restoration and creation in areas where cumulative loss of wetlands has occurred; and~~

~~(d) 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 CNWCM~~, 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

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0725

Process for Establishing Mitigation Banks

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

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

(3) Submittal of the Prospectus ~~for Individual Mitigation Banks~~. 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;

Commented [MR125]: added for consistency with statute which directs us to "Establish the opportunity to increase wetland resources by encouraging wetland restoration and creation where appropriate" – 196.672(5). We interpret "as appropriate" to mean where there have been cumulative wetland losses so restoration and creation become more appropriate as CM for additional wetland impacts.

Commented [MR126]: modified language to make section specific to principal objectives

Commented [MR127]: using CM is inclusive of all bank credit types. We are no longer using CNWM.

Commented [RAC5128]: Wetlands Conservancy: I still continue to think the State rule for ILF or PIL should have a timeframe for starting a project in the rule. Especially since DSL is often operating the sites with a fund in deficit.

Commented [MR129]: This rule was generally restructured to make clear the different requirements for the three types of credit generation programs we review and approve; individual mitigation banks, umbrella mitigation banks, and ILF programs. This was necessary because the rule previously just addressed individual banks and when we processed our first umbrella bank it was clear sponsors needed more clarity on what information they needed to supply in the case of an umbrella bank. We also needed specific requirements for ILF programs.

Commented [MR130]: Specifying that this list of requirements is for a prospectus for individual mitigation bank

- (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) Submittal of the Prospectus for Umbrella Mitigation Banks. After discussion of the umbrella banking concept with the Department, a sponsor must submit an umbrella mitigation bank prospectus. An umbrella mitigation prospectus must include:

- (a) The objectives of the proposed umbrella bank;
- (b) How the umbrella bank will be established and operated, in general terms;
- (c) The overview of the service area planning framework and site selection criteria for future bank sites under the umbrella;
- (d) A market or other analysis that demonstrates the general need for the umbrella bank;
- (e) The proposed ownership arrangements and long-term management strategy for the umbrella bank;
- (f) How the umbrella bank addresses the principal objectives for CM listed in OAR 141-085-0680; and
- (g) For any bank sites proposed to be included in the initial approval of the umbrella bank, all site-specific information requirements in subsections (3)(a) through (i) of this rule, must be provided in the umbrella bank prospectus.

(5) Submittal of the Prospectus for In-Lieu-Fee Program. After discussion of the In-lieu fee program concept with the Department, a sponsor must submit an in-lieu-fee program Prospectus. An in-lieu-fee program prospectus must include:

- (a) The objectives of the proposed ILF program;
- (b) How the ILF program will be established and operated, in general terms;
- (c) The proposed service area(s) for advance credit sales along with an overview of the planning framework for identifying and securing future mitigation sites within the service area(s);
- (d) A market or other analysis that demonstrates the general need for the ILF program;
- (e) The proposed ownership arrangements and long-term management strategy for the ILF program;
- (f) How the ILF program addresses the principal objectives for CM listed in OAR 141-085-0680; and

Commented [MR131]: This section is a list of requirements for a prospectus for an umbrella mitigation bank. Umbrellas include approval for the concept of more services areas and sites and specific information wouldn't be able to be provided for those projects since they aren't planned yet and would be brought into the bank via future amendments

Commented [MR132]: this rule now explains the types of information we need in a ILF program prospectus. ILFs include approval for the concept of more services areas and sites and specific information wouldn't be able to be provided for those projects since they aren't planned yet and would be brought into the bank via future amendments. Unique to ILF is the advance credit service area so information on selection process sites to fulfill those credits is needed. This information was previously explained in rule -0745 which we are eliminating

(g) For any sites proposed to be included in the initial approval of the ILF program, all site-specific information requirements in subsections (3)(a) through (i) of this rule, must be provided in the ILF program prospectus.

(6) 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.

(57) 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.

(68) Department May Decline to Participate. ~~If a mitigation bank or in-lieu fee project, the Department may decline to participate in its development if a sponsor cannot demonstrate the any of the following to the satisfaction of the Department.~~

(a) The need for the mitigation credits ~~or the~~

(b) The technical feasibility ~~and~~

(c) The ecological desirability of the mitigation bank, ~~the Department may decline to participate in its development, site or mitigation banking or ILF program.~~

(79) 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~~ website 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.

(810) 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.

Commented [MR133]: When the department can decline to participate needed to be clarified. The standards for **why** the department can decline to participate remains the same.

Also added language to make this rule inclusive of all banking/crediting types.

Commented [MR134]: this level of detail in the rule is unnecessary.

(911) 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.~~

Commented [MR135]: repetitive of -0720(3) and there may be times that DSL is the sole IRT chair.

(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 ~~thea mitigation~~ 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.

(1012) 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 sponsor must develop a draft MBI for submittal to the Department. All draft MBIs~~ must contain:

Commented [MR136]: the option to use MBI as application has not been used by mitigation bankers and would likely lengthen the bank establishment timeline. Keeping the permitting process separate from the mitigation bank review process allows for a more seamless, transparent and expedited wholistic bank permitting and evaluation process.

(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(s)~~, including a map clearly showing recognizable geographic place names and watershed boundaries;

(B) Demonstration of the need for the mitigation 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 (s) 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~~ Document(s) that disclose any and all liens or easements on the bank site. ~~If(s) and demonstrates proof of ownership, such as a title report.; 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 and values;

(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 these methods 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)~~ (M) An MBI specific to an ILF program must also include:

(i) A planning framework for identifying and securing mitigation sites within the defined service area;

(ii) Proposed advance credit release and justification; and

(iii) Timelines to implement compensatory mitigation projects to satisfy advance credit sales.

(c) Future mitigation sites can be added to the MBI for an umbrella mitigation bank or ILF program through an instrument amendment process. A site-specific mitigation plan (and other site-specific information) is required to be submitted at the time of amendment to the instrument.

(13) 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

Commented [MR137]: We need greater flexibility in what documents can be used to disclose all liens and easements because title companies have stopped providing a title report if it's not part of a land transaction. A recent title report may be available if the land was recently purchased by bank sponsor(s) but if the ownership hasn't changed a title report likely won't be available.

Commented [MR138]: making inclusive of all waters of this state

Commented [MR139]: adding values since values may be affected by ecological stressors.

Commented [MR140]: Added for clarity

Commented [MR141]: Moving from rule -0745

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.

~~(1214)~~ 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.

~~(1315)~~ 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.~~

Commented [MR142]: this level of detail on IRT process not needed in rule

~~(1416)~~ 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.

~~(1517)~~ 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.

~~(1618)~~ 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.

~~(1719)~~ Construction Timing. At their own risk, a sponsor may begin construction of a ~~bank mitigation site~~ before approval of the final MBI if the sponsor:

Commented [MR143]: Some banks and ILF have multiple sites so this change helps the language apply to all credit programs.

(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 ~~mitigation~~ 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 & 615~~, 196.600-630, & 196.692

Statutes/Other Implemented: ORS ~~196.600-615~~, 196.692-635, & 196.800-196.990-825

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0730

Establishment of Mitigation Credits

(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)~~ (2) 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 & 615~~, 196.600–630, & 196.692

Statutes/Other Implemented: ORS ~~196.600–620 & 196.692 & 196.795–196.990~~ 825

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0735

Release, Use and Sale of Mitigation Credits

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

(2) Release of Credits Must Be in Compliance with the MBI. The Department will not allow the sale or exchange of credits by a mitigation bank sponsor that is not in compliance with the terms of the MBI, the

Commented [RAC5144]: Wetlands Conservancy: I still continue to think the State rule for ILF or PIL should have a timeframe for starting a project in the rule. Especially since DSL is often operating the sites with a fund in deficit.

Commented [MR145]: This rule is now out of date since banks are now required to have these provisions before approval.

Commented [RAC5146]: Do these need to stay in relation to buffer credits? (riparian floodplains and upland mosaics)

Commented [MR147]: removing from banking rule as we are proposing a more robust stream crediting system including buffer crediting

Commented [MR148]: change to general term "sponsor."

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~~ success.

Commented [MR149]: Remove language that is not needed.

(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.

Commented [MR150]: Clarify that meeting performance standards is not the only reason a credit release schedule may be modified.

(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~~ Sponsors must report every credit sale to the Department and will provide an annual credit ledger.

Commented [MR151]: Sponsor more accurately refers to who is reporting to DSL.

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

Commented [MR152]: Make option to purchase credits with PIL funds applicable to all credit programs.

~~(6) Sponsors of ILF programs must establish a program account at a financial institution that is a member of the Federal Deposit Insurance Corporation (FDIC), or equivalent. All interest and earnings accruing to the program account must remain in the account for use by the ILF program and may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee projects, except for a small percentage as approved in the MBI that may be used for administrative costs.~~

Commented [MR153]: adding requirement for establishing a program account for ILF programs. This is consistent with federal rule.

(7) 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

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12

DSL 1-2011, f. & cert. ef. 3-1-11

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

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

141-085-0740

Authorization for Mitigation Banks

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

Commented [MR154]: remove option for MBI as application (see annotation for -0725(12) above)

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

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

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

Commented [MR155]: remove option for MBI as application (see annotation for -0725(12) above)

Commented [MR156]: removed the option to use MBI as permit application so we don't need sentence about putting permit detail requirements in the MBI.

Statutory/Other Authority: ORS 196.825 & 196.600 – 196.692

Statutes/Other Implemented: ORS 196.600 - 196.692 & 196.795 - 196.990

History:

DSL 1-2011, f. & cert. ef. 3-1-11

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

141-085-0745

In-Lieu Fee Mitigation

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

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

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

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

Commented [MR157]: These rules have been integrated into rules 0-720 through -0740. and also -0510

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

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

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

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

~~Statutory/Other Authority: ORS 196.825 & 196.600 – 196.692~~

~~Statutes/Other Implemented: ORS 196.600 – 196.692 & 196.795 – 196.990~~

~~History:~~

~~DSL 1-2011, f. 8 cert. ef. 3-1-11~~

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

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

141-085-0750

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

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: $\text{Payment} = [A + R + \text{RMV} + \text{LT}] \div x \text{ mm}$, where:

(A) A = Administrative Costs calculated as ~~10%~~ a percentage 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% ~~percent~~ of the Restoration Costs (R),

Commented [RAC5158]: Identify what is included in this.

(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

History:

DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019

DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

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

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

Commented [MR159]: (c) through (E): Change to the formula is to simplify formulas in the public facing calculator. We want "mm" to be a multiplier of the sum of the variable in the bracket so we removed the division symbols. Changes in (B) and (E) that eliminate 'unit' related language, allow for a more intuitive work flow for public facing calculator. Changes to how A is calculated, allows us to review and improve our estimates for cost of 'A'

Commented [MR160]: Updated to say we can use the fund to administer the program. This is what is allowed in statute and the number of positions may change over time as granted through our agency budget process, so saying we will fund a (singular) staff position is unnecessary.