

1 [Department of State Lands](#)

2 [Chapter 141](#)

3 Division 85

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

6 [141-085-0500](#)

7 **General**

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

10 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

12 **History:**

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

14 [141-085-0506](#)

15 **Policy**

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

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

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

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

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

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

- 1 (5) Department’s General Policies on Wetland Regulation. In regard to the regulation of
 2 wetlands, the Department will administer these rules to ensure that:
- 3 (a) The protection, conservation and best use of this state’s wetland resources, including their
 4 functions and values, are promoted through the integration and coordination of the local
 5 comprehensive plans and the Department permitting process; and
- 6 (b) A stable wetland resource base is maintained through avoidance of reasonably expected
 7 adverse impacts, and by compensating for unavoidable wetland impacts.
- 8 (6) Restoration and Conservation Programs. The Department will encourage and facilitate the
 9 restoration of waters of this state through voluntary restoration and conservation programs.
- 10 (7) Compensatory Mitigation. Through its permitting and enforcement programs, the
 11 Department will seek to offset losses of the functions and values of the water resources of this
 12 state.
- 13 (8) Mitigation Banks. The Department will allow the use of mitigation banks to offset adverse
 14 effects from removal or fill activities to the waters of this state.

15 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

17 **History:**

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

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

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

21 [141-085-0510](#)

22 **Definitions**

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

- 24 (1) “**Applicant**” means a landowner, a person authorized by a landowner to conduct a removal
 25 or fill activity, or a person that proposes a removal or fill activity for construction or
 26 maintenance of a linear facility.
- 27 (2) “**Aquatic Life and Habitats**” means the aquatic environment including all fish, wildlife,
 28 amphibians, plants and other biota dependent upon environments created and supported by
 29 the waters of this state. Aquatic life includes communities and species populations that are
 30 adapted to aquatic habitats for at least a portion of their life.
- 31 (3) “**Artificial Means**” means the purposeful movement or placement of material by humans
 32 and/or their machines.
- 33 (4) “**Authorization**” means an individual permit, general authorization, general permit or
 34 emergency authorization.

- 1 (5) "**Bankfull Stage**" means the two-year recurrence interval flood elevation.
- 2 (6) "**Baseline Conditions**" means the ecological conditions, wetland functions and values and
3 the soils and hydrological characteristics present at a site before any change by the applicant is
4 made.
- 5 (7) "**Basin**" means one of the eighteen (18) Oregon drainage basins identified by the Oregon
6 Water Resources Department as shown on maps published by that agency.
- 7 (8) "**Beds**" means:
- 8 (a) For the purpose of OAR 141-089, the land within the wet perimeter and any adjacent non-
9 vegetated dry gravel bar; and
- 10 (b) For all other purposes, "beds" means that portion of a waterway that carries water when
11 water is present.
- 12 (9) "**Beds or Banks**" means the physical container of the waters of this state, bounded on
13 freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays and
14 estuaries by the limits of the highest measured tide. The "bed" is typically the horizontal section
15 and includes non-vegetated gravel bars. The "bank" is typically the vertical portion.
- 16 (10) "**Buffer**" means an upland or wetland area immediately adjacent to or surrounding a
17 wetland or other water that is set aside to protect the wetland or other waters from conflicting
18 adjacent land uses and to support ecological functions.
- 19 (11) "**Channel**" means a natural (perennial or intermittent stream) or human made (e.g.,
20 drainage ditch) waterway that periodically or continuously contains moving water and has a
21 defined bed and bank that serve to confine the water.
- 22 (12) "**Channel Relocation**" means a change in location of a channel in which a new channel is
23 dug and the flow is diverted from the old channel into the new channel.
- 24 (13) "**Coastal Zone**" means the area lying between the Washington border on the north to the
25 California border on the south, bounded on the west by the extent of this state's jurisdiction as
26 recognized by federal law, and the east by the crest of the coastal mountain range, excepting:
- 27 (a) The Umpqua River basin, where the coastal zone extends to Scottsburg;
- 28 (b) The Rogue River basin, where the coastal zone extends to Agness; and
- 29 (c) The Columbia River basin, where the coastal zone extends to the downstream end of Puget
30 Island.
- 31 (14) "**Coastal Zone Certification Statement**" means a signed statement by the applicant or an
32 authorized agent indicating that the proposed project will be undertaken in a manner

1 consistent with the applicable enforceable policies of the Oregon Coastal Management
2 Program.

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

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

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

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

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

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

21 (21) "**Converted Wetlands**" means agriculturally managed wetlands that, on or before June 30,
22 1989, were brought into commercial agricultural production by diking, draining, leveling, filling
23 or any similar hydrologic manipulation and by removal or manipulation of natural vegetation,
24 and that are managed for commercial agricultural purposes. "Converted wetlands" does not
25 include any stream, slough, ditched creek, spring, lake or any other waters of this state that are
26 located within or adjacent to a converted wetland area.

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

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

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

- 1 (25) **“Deep Ripping, Tiling and Moling”** refers to certain specific mechanical methods used to
2 promote subsurface drainage of agricultural wetlands.
- 3 (26) **“Degraded Wetland”** refers to a wetland in poor condition with diminished functions and
4 values resulting from hydrologic manipulation (such as diking, draining and filling) and other
5 disturbance factors that demonstrably interfere with the normal functioning of wetland
6 processes.
- 7 (27) **“Department”** means the Oregon Department of State Lands and the Director or designee.
- 8 (28) **“Ditch”** means a manmade water conveyance channel. Channels that are manipulated
9 streams are not considered ditches.
- 10 (29) **“Dredging”** means removal of bed material using other than hand-held tools.
- 11 (30) **“Ecologically or Environmentally Preferable”** means compensatory mitigation that has a
12 higher likelihood of replacing functions and values or improving water resources of this state.
- 13 (31) **“Emergency”** means natural or human-caused circumstances that pose an immediate
14 threat to public health, safety or substantial property including crop or farmland.
- 15 (32) **“Enhancement”** means to improve the condition and increase the functions and values of
16 an existing degraded wetland or other water of this state.
- 17 (33) **“Erosion-Flood Repair”** means the placement of riprap or any other work necessary to
18 protect existing facilities and land from flood and high stream flows, in accordance with these
19 regulations.
- 20 (34) **“Essential Indigenous Anadromous Salmonid Habitat (ESH)”** means the streams
21 designated pursuant to ORS 196.810 that are necessary to prevent the depletion of indigenous
22 anadromous salmonid species during their life history stages of spawning and rearing, and any
23 adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface
24 water connection to an ESH stream.
- 25 (35) **“Estuary”** means:
- 26 (a) For waters other than the Columbia River, the body of water from the ocean to the head of
27 tidewater that is partially enclosed by land and within which salt water is usually diluted by
28 fresh water from the land, including all associated estuarine waters, tidelands, tidal marshes
29 and submerged lands; and
- 30 (b) For the Columbia River, all waters from the mouth of the river up to the western edge of
31 Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged
32 lands.
- 33 (36) **“Extreme Low Tide”** means the lowest estimated tide.

- 1 (37) "**Fill**" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or
2 more of material at one location in any waters of this state. However, in designated ESH areas
3 (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) "fill" means any amount of
4 deposit by artificial means.
- 5 (38) "**Food and Game Fish**" means those species identified under ORS 506.011, 506.036 or
6 496.009.
- 7 (39) "**Forestland**" means the same as used in the Forest Practices Act and rules (ORS 527.610 to
8 527.992); land which is used for the commercial growing and harvesting of forest tree species,
9 regardless of how the land is zoned or taxed or how any state or local statutes, ordinances,
10 rules or regulations are applied.
- 11 (40) "**Functions and Values**" are those ecological characteristics or processes associated with a
12 water of this state and the societal benefits derived from those characteristics. The ecological
13 characteristics are "functions," whereas the associated societal benefits are "values."
- 14 (41) "**Highest Measured Tide**" means the highest tide projected from actual observations
15 within an estuary or tidal bay (see OAR 141-085-0515).
- 16 (42) "**Hydrogeomorphic Method (HGM)**" means the method of wetland classification and
17 functional assessment based on a wetland's location in the landscape and the sources and
18 characteristics of water flow.
- 19 (43) "**Independent Utility**" as used in the definition of "project," means that the
20 project accomplishes its intended purpose without the need for additional phases or other
21 projects requiring further removal-fill activities.
- 22 (44) "**In-Lieu Fee Mitigation**" means the federally approved compensatory mitigation program
23 used to compensate for reasonably expected adverse impacts of project development on
24 waters of the United States and waters of this state with fees paid by the applicant to the
25 Department or other sponsor, as approved by the Department.
- 26 (45) "**Interagency Review Team (IRT)**" is an advisory committee to the Department on
27 mitigation banks and other compensatory mitigation projects.
- 28 (46) "**Intermittent Stream**" means any stream which flows during a portion of every year and
29 which provides spawning, rearing or food-producing areas for food and game fish.
- 30 (47) "**Large Woody Debris**" means any naturally downed wood that captures gravel, provides
31 stream stability or provides fish habitat, or any wood placed into waters of this state as part of
32 a habitat improvement or conservation project.
- 33 (48) "**Legally Protected Interest**" means a claim, right, share or other entitlement that is
34 protected under state or federal law. A legally protected interest includes, but is not limited to,
35 an interest in property.

- 1 (49) "**Linear Facility**" means any railway, highway, road, pipeline, water or sewer line,
2 communication line, overhead or underground electrical transmission or distribution line, or
3 similar facility.
- 4 (50) "**Listed Species**" means any species listed as endangered or threatened under the federal
5 Endangered Species Act (ESA) and/or any species listed as endangered or threatened by the
6 State of Oregon.
- 7 (51) "**Location**" means the entire area where the project is located.
- 8 (52) "**Maintenance**" means the periodic repair or upkeep of a structure in order to maintain its
9 original use. "Maintenance" includes a structure being widened by no more than twenty
10 percent of its original footprint at any specific location in waters of this state if necessary to
11 maintain its serviceability. "Maintenance" also includes removal of the minimum amount of
12 sediment either within, on top of or immediately adjacent to a structure that is necessary to
13 restore its serviceability, provided that the spoil is placed on upland.
- 14 (53) "**Material**" means rock, gravel, sand, silt and other inorganic substances and large woody
15 debris, removed from waters of this state and any materials, organic or inorganic, used to fill
16 waters of this state.
- 17 (54) "**Mitigation**" means the reduction of adverse effects of a proposed project by considering,
18 in the following order:
- 19 (a) Avoiding the effect altogether by not taking a certain action or parts of an action;
- 20 (b) Minimizing effects by limiting the degree or magnitude of the action and its
21 implementation;
- 22 (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment;
- 23 (d) Reducing or eliminating the effect over time by preservation and maintenance operations
24 during the life of the action by monitoring and taking appropriate corrective measures; and
- 25 (e) Compensating for the effect by creating, restoring, enhancing or preserving substitute
26 functions and values for the waters of this state.
- 27 (55) "**Mitigation Bank**" or "**Bank**" means a site created, restored, enhanced or preserved in
28 accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts to
29 waters of this state due to activities which otherwise comply with the requirements of ORS
30 196.600 to 196.905.
- 31 (56) "**Mitigation Bank Instrument (MBI)**" means the legally binding and enforceable agreement
32 between the Department and a mitigation bank sponsor that formally establishes the
33 mitigation bank and stipulates the terms and conditions of the mitigation bank's construction,
34 operation and long-term management.

- 1 (57) "**Mitigation Bank Prospectus**" or "**Prospectus**" means the preliminary proposal prepared
2 by a mitigation bank sponsor describing a proposed bank.
- 3 (58) "**Mitigation Bank Sponsor**" or "**Sponsor**" means a person or single legal entity that has the
4 authority and responsibility to fully execute the terms and conditions of a mitigation bank
5 instrument.
- 6 (59) "**Navigational Servitude**" means activities of the federal government that directly result in
7 the construction or maintenance of congressionally authorized navigation channels.
- 8 (60) "**Non-Motorized Methods or Activities**" are those removal-fill activities within ESH that are
9 completed by hand and are not powered by internal combustion, hydraulics, pneumatics or
10 electricity. Hand-held tools such as wheelbarrows, shovels, rakes, hammers, pry bars and
11 manually operated cable winches are examples of common non-motorized methods.
- 12 (61) "**Non-Water Dependent Uses**" means uses that do not require location on or near a
13 waterway to fulfill their basic purpose.
- 14 (62) "**Non-Wetland Waters**" means waters of this state other than wetlands, including bays,
15 intermittent streams, perennial streams, lakes and all other regulated waters.
- 16 (63) "**Ocean Renewable Energy**" means electricity that is generated through the conversion of
17 energy contained in the natural properties of the ocean, including but not limited to energy
18 contained in waves and swells, the tides and currents, ocean temperature and salinity
19 gradients; and, ocean offshore wind power.
- 20 (64) "**Ocean Renewable Energy Facility**" means any energy conversion technology or device
21 that is used as a necessary component of a research project, demonstration project or
22 commercial operation to generate ocean renewable energy, including but not limited to all
23 buoys, anchors, energy collectors, cables, control and transmission lines, and other equipment
24 necessary or useful to the project or operation.
- 25 (65) "**Office of Administrative Hearings**" means the state agency unit that provides
26 Administrative Law Judges to conduct contested case proceedings.
- 27 (66) "**Ordinary High Water Line (OHWL)**" means the line on the bank or shore to which the high
28 water ordinarily rises. The OHWL excludes exceptionally high water levels caused by large flood
29 events (e.g., 100-year events).
- 30 (67) "**Oregon Rapid Wetland Assessment Protocol (ORWAP)**" is a method for rapidly assessing
31 wetland functions and values (as well as other attributes) in all wetland types throughout
32 Oregon.
- 33 (68) "**Payment In-Lieu Mitigation**" means compensatory mitigation for waters of this state that
34 is fulfilled by using funds paid to the Department. The payment in-lieu program is not approved
35 to compensate for impacts to waters of the United States.

- 1 (69) "**Perennial Stream**" means a stream that has continuous flow in parts of its bed all year
2 long during years of normal precipitation.
- 3 (70) "**Person**" means a person or a public body, as defined in ORS 174.109; the federal
4 government, when operating in any capacity other than navigational servitude or any other
5 legal entity.
- 6 (71) "**Plowing**" means all forms of tillage and similar physical means for the breaking up,
7 cutting, turning over and stirring of soil to prepare it for planting crops. Plowing does not
8 include deep ripping or redistribution of materials in a manner that changes any waters of this
9 state to upland.
- 10 (72) "**Practicable**" means capable of being accomplished after taking into consideration cost,
11 existing technology and logistics with respect to the overall project purpose.
- 12 (73) "**Preservation**" means to permanently protect waters of this state having exceptional
13 ecological features.
- 14 (74) "**Private Operator**" means any person undertaking a project for an exclusively non-income-
15 producing and nonprofit purpose.
- 16 (75) "**Project**" means the primary development or use, having independent utility, proposed by
17 one person. A project may include more than one removal-fill activity.
- 18 (76) "**Project Site**" means the geographic area upon which the project is being proposed.
- 19 (77) "**Prospecting**" means to search or explore for samples of gold, silver or other precious
20 minerals, using non-motorized methods; by filling, removing or moving by artificial means less
21 than one cubic yard of material at any one individual site; and, cumulatively, not more than five
22 cubic yards of material from within the bed or wet perimeter of any single ESH stream in a
23 single year.
- 24 (78) "**Public Body**" as used in the statutes of this state means state government bodies, local
25 government bodies and special government bodies (ORS 174.109).
- 26 (79) "**Public Use**" means a publicly owned project or a privately owned project that is available
27 for use by the public.
- 28 (80) "**Push-Up Dam**" means a berm of streambed material that is excavated or bulldozed (i.e.,
29 pushed-up) from within the streambed itself and positioned in the stream in such a way as to
30 hold or divert water in an active flowing stream. The push-up dam may extend part way or all
31 the way across the stream. Push-up dams are most frequently used to divert water for
32 irrigation purposes associated with agricultural production including livestock watering. Push-
33 up dams are reconstructed each water-use season; high water usually flattens or breaches
34 them; and equipment is used to breach or flatten them at the close of the water-use season.

- 1 (81) “**Reasonably Expected Adverse Effect**” and “**Adverse Impact**” means the direct or indirect,
2 reasonably expected or predictable results of project development upon waters of this state
3 including water resources, navigation, fishing and public recreation uses.
- 4 (82) “**Reconstruction**” means to rebuild or to replace the existing structure in-kind.
5 “Reconstruction” includes a structure being widened by no more than twenty percent of its
6 original footprint at any specific location in waters of this state.
- 7 (83) “**Recreational Placer Mining**” means to search or explore for samples of gold, silver or
8 other precious minerals by removing, filling or moving material from or within the bed of a
9 stream, using non-motorized equipment or a motorized surface dredge having an intake nozzle
10 with an inside diameter not exceeding four inches and a muffler meeting or exceeding factory-
11 installed noise reduction standards.
- 12 (84) “**Reference Site**” means a site or sites that represent the desired future characteristics and
13 condition to be achieved by a compensatory mitigation plan.
- 14 (85) “**Removal**” means the taking of more than 50 cubic yards of material (or its equivalent
15 weight in tons) in any waters of this state in any calendar year; or the movement by artificial
16 means of an equivalent amount of material on or within the bed of such waters, including
17 channel relocation. However, in designated ESH areas (OAR 141-102) and in designated Scenic
18 Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.
- 19 (86) “**Removal-Fill Site**” means the specific point where a person removes material from and/or
20 fills any waters of this state. A project may include more than one removal-fill site.
- 21 (87) “**Riprap**” means facing a bank with rock or similar substance to control erosion.
- 22 (88) “**Serviceable**” means capable of being used for its intended purpose.
- 23 (89) “**Service Area**” means the boundaries set forth in a mitigation bank instrument that include
24 one or more watersheds identified on the United States Geological Survey, Hydrologic Unit Map
25 -1974, State of Oregon, for which a mitigation bank provides credits to compensate for adverse
26 effects from project developments to waters of this state. Service areas for mitigation banks are
27 not mutually exclusive.
- 28 (90) “**State Scenic Waterway (SSW)**” means a river or segment of river or lake that has been
29 designated as such in accordance with Oregon Scenic Waterway Law (ORS 390.805 to 390.995).
- 30 (91) “**Temporal Loss**” means the loss of the functions and values of waters of this state that
31 occurs between the time of the impact and the time of their replacement through
32 compensatory mitigation.
- 33 (92) “**Temporary Impacts**” are adverse impacts to waters of this state that are rectified within
34 24 months from the date of the initiation of the impact.

- 1 (93) "**Territorial Sea**" means the waters and seabed extending three geographical miles
2 seaward from the coastline in conformance with federal law.
- 3 (94) "**Territorial Sea Plan**" means the plan for Oregon's territorial sea.
- 4 (95) "**Tidal Waters**" are the areas in estuaries, tidal bays and tidal rivers located between the
5 highest measured tide and extreme low tide (or to the elevation of any eelgrass beds,
6 whichever is lower), that is flooded with surface water at least annually during most years. Tidal
7 waters include those areas of land such as tidal swamps, tidal marshes, mudflats, algal and
8 eelgrass beds and are included in the Estuarine System and Riverine Tidal Subsystem as
9 classified by Cowardin.
- 10 (96) "**Violation**" means removing material from or placing fill in any of the waters of this state
11 in a manner that is inconsistent with any provision of the Removal-Fill Law (ORS 196.600
12 through 196. 990), rules adopted by the Department, or any order or authorization issued by
13 the Department.
- 14 (97) "**Water Quality**" means the measure of physical, chemical and biological characteristics of
15 water as compared to Oregon's water quality standards and criteria set out in rules of the
16 Oregon Department of Environmental Quality and applicable state law.
- 17 (98) "**Water Resources**" includes not only water itself but also aquatic life and habitats therein
18 and all other natural resources in and under the waters of this state.
- 19 (99) "**Waters of This State**" means all natural waterways, tidal and non-tidal bays, intermittent
20 streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in
21 the boundaries of this state, all other navigable and non-navigable bodies of water in this state
22 and those portions of the ocean shore, as defined in ORS 390.605, where removal or fill
23 activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g)
24 of the Federal Water Pollution Control Act, as amended.
- 25 (100) "**Wet Perimeter**", as used in OAR 141-089, means the area of the stream that is under
26 water, or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively
27 moving water at the time a removal-fill activity occurs.
- 28 (101) "**Wetland Creation**" means to convert an area that has never been a wetland to a
29 wetland.
- 30 (102) "**Wetland Enhancement**" means to improve the condition and increase the functions
31 and/or values of an existing degraded wetland.
- 32 (103) "**Wetland Hydrology**" means the permanent or periodic inundation or prolonged
33 saturation sufficient to create anaerobic conditions in the soil and support hydrophytes.
- 34 (104) "**Wetland Restoration**" means to reestablish a former wetland.

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

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

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

8 **History:**

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

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

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

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

15 [141-085-0515](#)

16 **Removal-Fill Jurisdiction by Type of Water**

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

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

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

- 1 (a) The uppermost drift or wrack (or debris) line containing small driftwood, mats of
2 filamentous algae (algae that form long visible chains, threads, or filaments that intertwine
3 forming a mat), seaweeds, seagrasses, pieces of bulrush or other emergent vascular plants,
4 styrofoam or other buoyant plastic debris, bivalve shells, crab molts, or other aquatic
5 invertebrate remains;
- 6 (b) The uppermost water mark line on an eroding bank;
- 7 (c) The uppermost water mark line (e.g., discoloration; sediment, barnacles, snails, or algae
8 growth) visible on a hard shoreline or bank consisting of bedrock, boulders, cobbles, riprap or a
9 seawall;
- 10 (d) The uppermost intertidal zone inhabited by a community of barnacles, limpets, and littorine
11 snails along shorelines composed of bedrock, riprap, boulders, and/or cobble;
- 12 (e) The uppermost tidal marsh/upland boundary, as indicated by a dominant plant community
13 characteristic of saltwater, brackish, or freshwater tidal plant communities changing to a
14 dominant plant community typical of uplands; and/or
- 15 (f) The intertidal/upland boundary along sandy shores as indicated by the appearance of a
16 distinct dune plant community.
- 17 (3) Waters, Including Rivers, Intermittent and Perennial Streams, Lakes and Ponds. These
18 waters are jurisdictional to the ordinary high water line (OHWL). The OHWL can be determined
19 by direct observation of the annual high water event, using local gauge data to estimate
20 bankfull stage, and/or by using readily identifiable field indicators. Field indicators for OHWL
21 include:
 - 22 (a) Clear, natural line impressed on the shore;
 - 23 (b) Change in vegetation from riparian (e.g., willows) to upland (e.g., oak, fir) dominated;
 - 24 (c) Textural change of depositional sediment or changes in the character of the soil (e.g., from
25 sand, sand and cobble, cobble and gravel to upland soils);
 - 26 (d) Elevation below which no fine debris (needles, leaves, cones, and seeds) occurs;
 - 27 (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or
 - 28 (f) Other appropriate means that consider the characteristics of the surrounding areas.
- 29 (4) Wetlands. Wetlands are jurisdictional within the wetland boundary.
- 30 (5) Reservoirs. The Department's jurisdiction over reservoirs extends to the higher of either the
31 normal operating pool level or the upper edge of adjacent wetland.
- 32 (6) Artificially Created Wetlands and Ponds. These waters are jurisdictional when they are:

- 1 (a) Equal to or greater than one acre in size;
- 2 (b) Created, in part or in whole, in waters of this state; or
- 3 (c) Identified in an authorization as a mitigation site.
- 4 (7) Exempt Artificially Created Wetlands and Ponds. Artificially created wetlands and ponds
- 5 created entirely from upland, regardless of size, are not waters of this state if they are
- 6 constructed for the purpose of:
 - 7 (a) Wastewater treatment;
 - 8 (b) Settling of sediment;
 - 9 (c) Stormwater detention and/or treatment;
 - 10 (d) Agricultural crop irrigation or stock watering;
 - 11 (e) Fire suppression;
 - 12 (f) Cooling water;
 - 13 (g) Surface mining, even if the site is managed for interim wetlands functions and values;
 - 14 (h) Log storage; or
 - 15 (i) Aesthetic purposes.
- 16 (8) Jurisdictional Ditches. Except as provided under section (9) and (10) below, ditches are
- 17 jurisdictional if they are:
 - 18 (a) Created in wetlands, estuaries, tidal rivers or other waters of this state; or
 - 19 (b) Created from upland and meet the following conditions:
 - 20 (A) Contain food and game fish; and
 - 21 (B) Have a free and open connection to waters of this state. A “free and open connection”
 - 22 means a connection by any means, including but not limited to culverts, to or between natural
 - 23 waterways and other navigable and non-navigable bodies of water that allows the interchange
 - 24 of surface flow at bankfull stage or ordinary high water, or at or below mean higher high tide
 - 25 between tidal waterways.
 - 26 (9) Non-Jurisdictional Irrigation Ditches. Existing irrigation ditches that meet the following tests
 - 27 are not jurisdictional:
 - 28 (a) Are operated and maintained for the primary purpose of conveying water for irrigation; and

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

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

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

7 (b) Artificially created from upland or from wetlands;

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

9 (d) Do not contain food or game fish.

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

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

12 **History:**

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

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

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

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

17 [141-085-0520](#)

18 **Removal-Fill Jurisdiction by Volume of Material**

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

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

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

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

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

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

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

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

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

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

6 **History:**

7 [DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018](#)

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

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

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

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

12 [141-085-0525](#)

13 **Measuring and Calculating Volume of Removal and Fill**

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

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

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

21 (a) The volume of material removed to construct the new channel up to OHWL; or

22 (b) The volume that would be required to completely fill the old channel to the OHWL or HMT.

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

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

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

27 **History:**

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

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

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

31 [141-085-0530](#)

32 **Exemptions for Certain Activities and Structures**

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

- 1 (1) State Forest Management Practices. Non-federal forest management practices subject to
2 Oregon's Forest Practices Act conducted in any non-navigable water of this state are exempt.
3 When these forestlands are being converted to other uses the exemption does not apply to the
4 activities associated with the new use. Forest management practices must be directly
5 connected with a forest management practice conducted in accordance with ORS 527.610
6 through 527.770, 527.990 and 527.992, such as:
- 7 (a) Reforestation;
 - 8 (b) Road construction and maintenance;
 - 9 (c) Harvesting of forest tree species; and
 - 10 (d) Disposal of slash.
- 11 (2) Fill for Construction, Operation and Maintenance of Certain Dams and Water Diversion
12 Structures. Filling the beds of the waters of this state for the purpose of constructing, operating
13 and maintaining dams or other diversions for which permits or certificates have been or will be
14 issued under ORS Chapters 537 or 539 and for which preliminary permits or licenses have been
15 or will be issued under ORS 543.010 through 543.610 is exempt.
- 16 (3) Navigational Servitude. Activities conducted by or on the behalf of any agency of the federal
17 government acting in the capacity of navigational servitude in connection with a federally
18 authorized navigation channel are exempt. Disposal of dredged material within the ordinary
19 high water line of the same waterway is also exempt.
- 20 (4) Maintenance or Reconstruction of Water Control Structures. Fill or removal or both for
21 maintenance or reconstruction of water control structures such as culverts, dikes, dams, levees,
22 groins, riprap, tidegates, drainage ditches, irrigation ditches, and tile drain systems are exempt
23 if:
- 24 (a) The project meets the definition of maintenance under OAR 141-085-0510(51); or
 - 25 (b) The project meets the definition of reconstruction under OAR 141-085-0510(79);
 - 26 (c) The structure was serviceable within the past five years; and
 - 27 (d) The maintenance or reconstruction would not significantly adversely affect wetlands or
28 other waters of this state to a greater extent than the wetlands or waters of this state were
29 affected as a result of the original construction of those structures.
- 30 (5) Maintenance and Emergency Reconstruction of Roads and Transportation Structures. Fill or
31 removal for maintenance, including emergency reconstruction of recently damaged parts, of
32 currently serviceable roads or transportation structures, such as groins and riprap protecting
33 roads, causeways, bridge abutments or approaches, and boat ramps is exempt.

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

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

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

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

17 (b) Authorized by the Oregon Water Resources Department.

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

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

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

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

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

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

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

26 **History:**

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

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

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

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

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

32 [141-085-0534](#)

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

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

- 1 (a) “Habitat Restoration” means the return of an ecosystem from a disturbed or altered
2 condition to a close approximation of its ecological condition prior to disturbance.
- 3 (b) “Voluntary” means activities undertaken by a person of their own free will, and not as a
4 result of any legal requirement of the Removal-fill Law (ORS 196.600–196.990).
- 5 (2) Conditions of Exemption: Activities described in Sections (3) through (8) of this rule are
6 exempt from permit requirements under the following conditions:
- 7 (a) Activities are not conducted in areas designated as State Scenic Waterways, unless listed as
8 an exempt activity under ORS 390.835(5);
- 9 (b) In-water activities are conducted during the Oregon Department of Fish and Wildlife
10 (ODFW) recommended in-water timing guidelines, unless otherwise approved in writing by
11 ODFW;
- 12 (c) The in-water activities conform to ODFW fish passage requirements (ORS 509.580 through
13 509.910), unless otherwise approved in writing by ODFW;
- 14 (d) The activities will not convert waters of this state to uplands;
- 15 (e) The activities will cause no more than minimal adverse impact on waters of this state
16 including impacts related to navigation, fishing, and public recreation;
- 17 (f) The activities will not cause the water to rise or be redirected in such a manner that it results
18 in flooding or other damage to structures or substantial property off of the project site; and
- 19 (g) All necessary access permits, right of ways and local, state, and federal approvals have been
20 obtained.
- 21 (3) Research and Fish Management in Essential Indigenous Anadromous Salmonid Habitat (ESH)
22 is Exempt. A permit is not required for the construction and maintenance of scientific and
23 research devices related to population management, watershed and habitat restoration, or
24 species recovery, provided the activity does not exceed 50 cubic yards of removal-fill.
- 25 (4) Vegetative Planting. A permit is not required for planting native woody or herbaceous plants
26 by hand or mechanized means. Ground alteration such as grading or contouring prior to
27 planting is not covered by this exemption.
- 28 (5) Refuge Management. A permit is not required for habitat management activities located on
29 a National Wildlife Refuge or State Wildlife Area that are consistent with an adopted refuge or
30 wildlife area management plan. Fill or removal in waters of this state for non-habitat
31 management activities such as roads and building is not covered by this exemption.
- 32 (6) Ditch and Drain Tile Removal. A permit is not required for the disruption or removal of
33 subsurface drainage structures (e.g., drain tiles) and plugging or filling of drainage ditches in

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

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

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

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

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

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

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

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

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

29 **History:**

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

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

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

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

34 [141-085-0535](#)

35 **Exemptions Specific to Agricultural Activities**

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

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

- 4 (2) Normal Farming and Ranching Activities on Converted Wetlands. “Converted Wetlands” are
- 5 defined under OAR 141-085-0510. Exempt activities on converted wetlands include:
- 6 (a) Plowing;
- 7 (b) Grazing;
- 8 (c) Seeding;
- 9 (d) Planting;
- 10 (e) Cultivating;
- 11 (f) Conventional crop rotation; and
- 12 (g) Harvesting.

- 13 (3) Certain Activities Conducted on Exclusive Farm Use (EFU) Zoned Land. The following
- 14 activities on lands zoned for exclusive farm use as described in ORS 215.203 and designated in
- 15 the city or county comprehensive plan are exempt:
- 16 (a) Drainage or maintenance of farm or stock ponds;
- 17 (b) Maintenance of existing farm roads in such a manner as to not significantly adversely affect
- 18 wetlands or any other waters of this state; or
- 19 (c) Subsurface drainage by deep ripping, tiling or moling, limited to converted wetlands.

- 20 (4) Farm Uses on Certified Prior Converted Cropland. Any activity defined as a farm use in ORS
- 21 215.203 is exempt if the land is zoned for exclusive farm use pursuant to ORS 215.203, if the
- 22 lands are converted wetlands that are also certified as prior converted cropland by the Natural
- 23 Resources Conservation Service, as long as commercial agricultural production on the land has
- 24 not been abandoned for five or more years.

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

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

- 31 (7) Agricultural Drainage Ditch Maintenance. Exempt maintenance of agricultural drainage
- 32 ditches under OAR 141-085-0530(4) includes disposal of dredged material in a thin layer on

1 converted wetlands, provided such disposal does not change wetland to upland. For the
 2 purposes of this exemption, “ditch” is defined in 141-085-0510(28).

3 (8) Push-Up Dams.

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

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

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

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

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

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

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

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

18 **History:**

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

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

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

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

23 [141-085-0540](#)

24 **Types of Authorizations**

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

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

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

31 (3) General Permits.

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

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

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

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

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

7 **History:**

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

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

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

11 [141-085-0545](#)

12 **Fees; Amounts and Disposition**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 (b) Public body; or

7 (c) Commercial operator.

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

11 (a) Less than 500 cubic yards;

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

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

14 (d) Over 50,000 cubic yards.

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

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

22 (a) The application fee; and

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

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

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

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

33 **History:**

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

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

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

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

5 [141-085-0550](#)

6 **Application Requirements for Individual Permits**

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

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

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

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

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

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

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

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

- 1 (B) For the purpose of this rule, a condemner is the landowner when:
- 2 (i) If using state condemnation authority, the condemner has complied with ORS Chapter 35,
3 filed an eminent domain action in court and deposited the condemner's estimate of just
4 compensation with the court for the use and benefit of the defendants, or it has a court's order
5 authorizing its possession of the land; or
- 6 (ii) If using federal authority, the condemner has complied with Federal Rules of Civil Procedure
7 71.1 and, if other than the United States, has a court's order authorizing its possession of the
8 land.
- 9 (c) Project site location information including Township, Range, Quarter-quarter Section and
10 Tax Lot(s), latitude and longitude, street location if any, and location maps with site location
11 indicated.
- 12 (d) The location of any off-site disposal or borrow sites, if these sites contain waters of this
13 state.
- 14 (e) Project information including:
- 15 (A) Description of all removal-fill activities associated with the project;
- 16 (B) Demonstration of independent utility to include all phases, projects or elements of the
17 proposed project which will require removal-fill activities;
- 18 (C) Volumes of fill and removal within jurisdictional areas expressed in cubic yards;
- 19 (D) Area of removal and fill within jurisdictional areas expressed in acres to the nearest 0.01-
20 acre for impacts greater than 0.01 of an acre or expressed in acres to the nearest 0.001-acre for
21 impacts less than 0.01 of an acre; and
- 22 (E) Description of how the project will be accomplished including construction methods, site
23 access and staging areas.
- 24 (f) A description of the project purpose and need for the removal or fill. All projects must have a
25 defined purpose or purposes and the need for removal or fill activity to accomplish the project
26 purpose must be documented. The project purpose statements and need for the removal or fill
27 documentation must be specific enough to allow the Department to determine whether the
28 applicant has considered a reasonable range of alternatives.
- 29 (g) Project plan views and cross-sectional views drawn to scale that clearly identify the
30 jurisdictional boundaries of the waters of this state (e.g., wetland delineation or ordinary high
31 water determination). Project details, such as work area footprint, impact area and
32 approximate property boundaries must also be included so that the amount and extent of the
33 impact to jurisdictional areas can be readily determined.

- 1 (h) A written analysis of potential changes that the project may make to the hydrologic
2 characteristics of the waters of this state, and an explanation of measures taken to avoid or
3 minimize any adverse impacts of those changes, such as:
- 4 (A) Impeding, restricting or increasing flows;
- 5 (B) Relocating or redirecting flow; and
- 6 (C) Potential flooding or erosion downstream of the project.
- 7 (i) A description of the existing biological and physical characteristics of the water resources,
8 along with the identification of the adverse impacts that will result from the project.
- 9 (j) A description of the navigation, fishing and public recreation uses, when the project is
10 proposed on state-owned land.
- 11 (k) If the proposed activity involves wetland impacts, a wetland determination or delineation
12 report that meets the requirements in OAR 141-090 must be submitted, unless otherwise
13 approved in writing by the Department. A wetland delineation is usually required to determine
14 the precise acreage of wetland impact and compensatory wetland mitigation requirements.
15 Whenever possible, wetland determination and delineation reports should be submitted for
16 review well in advance of the permit application. Although an approved wetland delineation
17 report is not required for application completeness, a jurisdictional determination must be
18 obtained prior to the permit decision.
- 19 (l) A functions and values assessment that meets the requirements in OAR 141-085-0685 when
20 permanent impacts to wetlands are proposed.
- 21 (m) Any information known by the applicant concerning the presence of any federal or state
22 listed species.
- 23 (n) Any information known by the applicant concerning historical, cultural and archeological
24 resources. Information may include but is not limited to a statement on the results of
25 consultation with impacted tribal governments and/or the Oregon State Historic Preservation
26 Office of the Oregon Parks and Recreation Department.
- 27 (o) An analysis of alternatives to derive the practicable alternative that has the least reasonably
28 expected adverse impacts on waters of this state. The alternatives analysis must provide the
29 Department all the underlying information to support its considerations enumerated in OAR
30 141-085-0565, such as:
- 31 (A) A description of alternative project sites and designs that would avoid impacts to waters of
32 this state altogether, with an explanation of why each alternative is, or is not practicable, in
33 light of the project purpose and need for the fill or removal;

- 1 (B) A description of alternative project sites and designs that would minimize adverse impacts
 2 to waters of this state with an explanation of why each alternative is, or is not practicable, in
 3 light of the project purpose and need;
- 4 (C) A description of methods to repair, rehabilitate or restore the impact area to rectify the
 5 adverse impacts; and
- 6 (D) A description of methods to further reduce or eliminate the impacts over time through
 7 monitoring and implementation of corrective measures.
- 8 (p) If applicable, a complete compensatory mitigation plan that meets the requirements listed
 9 in OAR 141-085-0680 through 141-085-0715 and OAR141-085-0765 to compensate for
 10 unavoidable permanent impacts to waters of this state and a complete rehabilitation plan if
 11 unavoidable temporary impacts to waters of this state are proposed.
- 12 (q) For each proposed removal-fill activity and physical mitigation site applied for in the
 13 application, a list of the names and addresses of the adjacent landowners, including those
 14 properties located across a street or stream from the proposed project.
- 15 (A) For a new linear facility, the applicant must provide a list of the names and mailing
 16 addresses of the adjacent landowners for the new linear facility.
- 17 (B) Mailing labels must be provided by the applicant, when there are more than five names and
 18 addresses of adjacent landowners listed.
- 19 (r) A signed local government land use affidavit.
- 20 (s) A signed Coastal Zone Certification statement, if the project is in the coastal zone.
- 21 (t) Applicant Signature. Signature of the applicant must be provided. If the application is on
 22 behalf of a business entity, a certificate of incumbency must be provided to certify that the
 23 individual signing the application is authorized to do so.
- 24 (u) Landowner Signature. If the applicant is not the landowner upon which the removal-fill
 25 activity (including mitigation) is to occur and does not hold an easement allowing the activity on
 26 that land, a written authorization from the owner of the land consenting to the application
 27 must be provided.
- 28 (A) Notwithstanding the requirement set forth under Subsection (u) above, a landowner
 29 signature is not required for applications for the construction and maintenance of linear
 30 facilities; and
- 31 (B) The condemner may sign as landowner when the requirements of OAR 141-085-
 32 0550(5)(b)(B) have been met.
- 33 (v) Mitigation Site Landowner Signature. If the applicant is not the owner of the land upon
 34 which the mitigation is to occur and does not hold an easement allowing the activity on that

1 land, a written authorization from the owner of the land consenting to the application must be
 2 provided.

3 (w) Inventory and Evaluation if Related to Marine Resources or Removal-Fill in Oregon’s
 4 Territorial Sea. An application for a permit related to marine resources or removal-fill in the
 5 territorial sea must include all of the information required by the applicable Part of the
 6 Territorial Sea Plan. The resource inventory and effects evaluation must be provided as a stand-
 7 alone attachment to the applicant’s Joint Permit Application.

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

11 (a) The public use of the proposed project;

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

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

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

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

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

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

27 **Statutory/Other Authority:** ORS 196.825, ORS 196.600-196.665 & ORS 196.692

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

29 **History:**

30 [DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018](#)

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

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

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

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

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

1 [141-085-0555](#)2 **Individual Removal-Fill Permit Application Review Process**

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

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

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

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

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

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

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

24 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

26 **History:**

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

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

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

30 [141-085-0560](#)31 **Public Review Process for Individual Removal - Fill Permit Applications**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **(6) Final Review**

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

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

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

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

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

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

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

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

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

28 **History:**

29 [DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018](#)

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

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

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

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

34 [141-085-0565](#)

35 **Department Determinations and Considerations in Evaluating Individual Permit Applications**

- 1 (1) **Departmental Final Review.** The Department will evaluate the information provided in the
2 application, conduct its own investigation, and consider the comments submitted during the
3 public review process to determine whether or not to issue an individual removal-fill permit.
- 4 (2) **Effective Date of Review Standards.** The Department may consider only standards and
5 criteria in effect on the date the Department receives the complete application or renewal
6 request.
- 7 (3) **Department Determinations.** The Department will issue a permit if it determines the project
8 described in the application:
- 9 (a) Has independent utility;
- 10 (b) Is consistent with the protection, conservation and best use of the water resources of this
11 state as specified in ORS 196.600 to 196.990; and
- 12 (c) Would not unreasonably interfere with the paramount policy of this state to preserve the
13 use of its waters for navigation, fishing and public recreation, when the project is on state-
14 owned lands.
- 15 (4) **Department Considerations.** In determining whether to issue a permit, the Department will
16 consider all of the following:
- 17 (a) The public need for the proposed fill or removal and the social, economic or other public
18 benefits likely to result from the proposed fill or removal. When the applicant for a permit is a
19 public body, the Department may accept and rely upon the public body's findings as to local
20 public need and local public benefit;
- 21 (b) The economic cost to the public if the proposed fill or removal is not accomplished;
- 22 (c) The availability of alternatives to the project for which the fill or removal is proposed;
- 23 (d) The availability of alternative sites for the proposed fill or removal;
- 24 (e) Whether the proposed fill or removal conforms to sound policies of conservation and would
25 not interfere with public health and safety;
- 26 (f) Whether the proposed fill or removal is in conformance with existing public uses of the
27 waters and with uses designated for adjacent land in an acknowledged comprehensive plan and
28 land use regulations;
- 29 (g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive
30 plan and land use regulations for the area where the proposed fill or removal is to take place or
31 can be conditioned on a future local approval to meet this criterion;
- 32 (h) Whether the proposed fill or removal is for stream bank protection; and

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

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

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

14 (a) The fill is for a public use;

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

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

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

20 (a) Permit denial;

21 (b) Permanent fill of two acres or more in wetlands;

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

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

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

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

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

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

1 (9) **Ocean Renewable Energy Facilities.** The Department will only authorize a removal-fill
 2 activity for an ocean renewable energy facility that complies with the criteria described in
 3 applicable parts of the Territorial Sea Plan.

4 **Statutory/Other Authority:** ORS 196.825 & ORS 196.600 – 196.692

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

6 **History:**

7 [DSL 5-2017, amend filed 12/28/2017, effective 01/01/2018](#)

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

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

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

11 [141-085-0575](#)

12 **Permit Appeals**

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

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

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

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

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

30 (4) Contents of the Request. The Department has determined that due to the complexity of
 31 removal-fill permitting, a general denial of the matters alleged in the request for a contested
 32 case proceeding does not provide sufficient information for a fair and efficient contested case
 33 and a more specific request is warranted. All requests for a contested case proceeding under
 34 this section shall include a specific list of issues for the contested case proceeding. The
 35 requester may amend their request to include additional issues or clarify existing issues within
 36 15 days of the date that the case is referred to the Office of Administrative Hearings.

- 1 (5) Contested Case Proceeding. If the written request for a contested case proceeding is timely,
2 clearly identifies at least one specific issue, and was made by an eligible person, the matter will
3 be referred to the Office of Administrative Hearings. The contested case will be conducted as
4 follows:
- 5 (a) The hearing will be conducted as a contested case pursuant to OAR 137-003-0501 through
6 137-003-0690 and this rule;
- 7 (b) The permit holder and any other persons that are adversely affected or aggrieved that have
8 filed a timely written request for a contested case proceeding will be parties to the proceeding;
9 and
- 10 (c) An Administrative Law Judge will conduct a contested case proceeding only on the specific
11 issues clearly identified in the request for contested case proceeding as provided in subsection
12 (4) of this section or in the referral from the Department.
- 13 (6) Review of Jurisdictional Determinations. Jurisdictional determinations of the existence, or
14 boundaries, of the waters of this state on a parcel of property, issued more than 60 calendar
15 days before a request for a contested case proceeding are final. Jurisdictional determinations
16 are judicially cognizable facts of which the Department may take official notice under ORS
17 183.450(3) in removal-fill contested cases. Challenges to jurisdictional determinations are only
18 permitted under the process set out in OAR 141-090.
- 19 (7) The Proposed Order. The Administrative Law Judge will issue a proposed order containing
20 findings of fact and conclusions of law. If the request for a contested case proceeding was filed
21 by a person other than the applicant, with a legally protected interest that is adversely affected
22 by the issuance of the permit, the Administrative Law Judge shall issue a proposed order within
23 20 business days of the evidentiary hearing. Other proposed orders should be issued within 90
24 calendar days of a ruling that resolves all issues of the evidentiary hearing. As required by ORS
25 183.460, the proposed order shall provide an opportunity to file written exceptions with the
26 Department.
- 27 (8) Amended Proposed Order. The Department may issue an amended proposed order. Any
28 amended proposed order shall provide an opportunity to file written exceptions with the
29 Department.
- 30 (9) The Final Order. The Department will consider the record, any exceptions, and enter a final
31 order containing findings of fact and conclusions of law. The final order will rescind, affirm or
32 modify the permit or proposed order. If the request for a contested case proceeding was filed
33 by a person other than the applicant, with a legally protected interest that is adversely affected
34 by the issuance of the permit, the Department shall issue the final order within 45 business
35 days after the evidentiary hearing, if any. All other final orders should be issued within 90
36 calendar days of the proposed order or amended proposed order.

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

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

12 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

14 **History:**

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

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

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

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

19 [141-085-0580](#)

20 **Discovery in Contested Cases**

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

24 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

26 **History:**

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

28 [141-085-0585](#)

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

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

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

- 1 (3) Enforceability of Permit Conditions. Authorizations may include conditions, including
2 compensatory mitigation and monitoring conditions that impose obligations beyond the
3 expiration date of the removal/fill activity. All such conditions are enforceable until such
4 obligations are satisfied.
- 5 (4) Conflicts Between the Application and Permit Conditions. The application, including all plans
6 and operating specification, becomes an enforceable part of the removal-fill authorization. In
7 the event there is a conflict between information contained in the application and conditions in
8 the removal-fill authorization, the authorization conditions prevail.
- 9 (5) Permit Expiration Date. The Department may issue an individual removal-fill authorization
10 for up to five years for removal-fill activities that occur on a continuing basis or will take more
11 than one year to complete.
- 12 (6) Limits on Terms for Commercial Gravel Operations. For commercial gravel removal, the
13 Department will only issue a multi-year permit when it determines that:
- 14 (a) There is sufficient aggregate resource or annual recharge to allow the proposed volumes to
15 be removed; and
- 16 (b) The authorization holder has, for at least one year preceding the pending renewal,
17 conducted removal in compliance with permit conditions.
- 18 (7) Modification of Permit Conditions. Modifications of permit conditions may be either
19 requested by the authorization holder or initiated by the Department.
- 20 (a) A modification request from the authorization holder must be submitted in writing. Based
21 on the scope of the modification request, the Department may:
- 22 (A) Modify permit conditions to address changes in operating conditions or changes to the
23 project; or
- 24 (B) Deny the modification request and request a new application.
- 25 (b) The Department may modify permit conditions to address new standards or new
26 information related to water resource impacts in effect at the time of the permit renewal
27 request or on the anniversary date of issuance for multiyear permits issued in accordance with
28 OAR 141-085-0545(8).
- 29 (8) Transfer of Permit Responsibility. Authorizations are issued to the applicant and are not
30 automatically transferred through property transactions. The applicant is responsible for
31 complying with the conditions of the permit, unless the permit is officially transferred to a
32 different person or party. A transfer form must be submitted to the Department for review and
33 approval. If the transferee is a business entity, the business must be registered with the Oregon
34 Secretary of State Corporate Division. The exact name of the business entity, as listed with
35 Secretary of State Corporate Division, must be entered on the transfer form. The transfer form

1 must be accompanied by a signed certificate of incumbency. Transfers are approved through
2 one of the following means:

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

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

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

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

14 **History:**

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

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

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

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

19 [141-085-0590](#)

20 **Renewal and Extension of Individual Removal-Fill Permits**

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

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

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

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

32 (b) Include the base fee;

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

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

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

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

8 (b) May provide public notice of the renewal in accordance with the provisions in OAR 141-085-
 9 0560.

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

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

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

14 (c) Deny the request for permit renewal.

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

17 (a) If more time is needed to resolve issues that arise during the renewal process; or

18 (b) If the applicant failed to respond to the renewal request in a timely manner.

19 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

21 **History:**

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

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

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

25 [141-085-0595](#)

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

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

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

7 (a) The Corrections Facilities Siting Authority, pursuant to ORS 421.628, relating to siting
 8 corrections facilities;

9 (b) The Environmental Quality Commission, pursuant to ORS 459.047, relating to siting solid
 10 waste landfills;

11 (c) The Energy Facility Siting Council, pursuant to ORS 469.300 et seq. related to siting energy
 12 facilities; and

13 (d) The Economic Recovery Review Council, pursuant to Oregon Laws 2011, chapter 564,
 14 related to the siting of industrial development projects of state significance.

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

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

17 **History:**

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

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

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

21 [141-085-0665](#)

22 **Expedited Process for Industrial or Traded Sector Sites**

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

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

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

34 (a) Expedited jurisdictional determinations by the Department;

- 1 (b) Technical assistance in the preparation of jurisdictional delineation and functional
- 2 assessment reports, impact avoidance and minimization strategies, alternatives analyses and
- 3 compensatory mitigation plans;
- 4 (c) Assistance with other permit application documents necessary to issue an authorization or
- 5 to avoid the need to obtain an authorization by planning the project in such a way so as to
- 6 avoid impacts to waters of this state;
- 7 (d) Expedited review of removal-fill applications and prompt permit decision as long as doing so
- 8 will not result in the Department missing statutory deadlines for other permits; and/or
- 9 (e) Assistance with the early identification and resolution of issues raised by other agencies and
- 10 the public.

11 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

13 **History:**

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

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

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

17 [141-085-0676](#)

18 **Emergency Authorizations**

19 (1) Eligibility and Applicability. The Department may issue, orally or in writing, an emergency

20 authorization to a person for the removal of material from the beds or banks or filling of any

21 waters of this state in an emergency, for the purpose of making repairs or for the purpose of

22 preventing irreparable harm, injury or damage to persons or property. In order to qualify for an

23 emergency authorization the Department must determine that:

24 (a) The emergency poses a direct threat to substantial property, including but not limited to a

25 dwelling, transportation structure, farm or cropland;

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

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

28 authorization; and

29 (d) The proposed project is the minimal amount necessary to reduce or eliminate the threat

30 and minimizes, to the extent practicable, adverse impacts to waters of this state.

31 (2) Information Requirements. Any person requesting an emergency authorization may apply

32 verbally or in writing. Written applications may be sent via facsimile, e-mail or U.S. mail.

33 Applications for an emergency authorization must include:

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

- 1 (b) The location of the project;
- 2 (c) The nature of the emergency (specifically, the nature of the threat to public health, public
3 safety or property and the immediacy of the threat and need to act promptly);
- 4 (d) A description of the proposed work, including the approximate volume of material to be
5 removed and/or filled, how the work will be accomplished and the schedule for doing the work;
- 6 (e) The date and approximate time when the event that caused the emergency took place;
- 7 (f) A statement as to whether the emergency action is intended as a temporary or permanent
8 response measure; and
- 9 (g) Additional information, as requested from the Department.
- 10 (3) Authorized Representative. The Department may authorize a person, including personnel
11 from public agencies, to act as a representative of the Department to conduct an on-site
12 evaluation of the planned activity and make recommendations as to whether or not the
13 application should be approved as requested, approved with conditions, denied or processed as
14 an individual removal-fill authorization application.
- 15 (4) Department Decision. Based on review of all the available information, the Department may
16 take the following action(s):
- 17 (a) Approve the emergency authorization, either verbally or in writing; or
- 18 (b) Deny issuance of the emergency authorization. If a request for an emergency authorization
19 is denied, the applicant may submit an application for an individual removal-fill permit, general
20 permit or general authorization, as appropriate for the scope of the project.
- 21 (5) Written Authorization Needed to Confirm Verbal Authorization. If an emergency
22 authorization is issued verbally, the authorization will be confirmed in writing by the
23 Department within five calendar days confirming the issuance and setting forth the conditions
24 of operation.
- 25 (6) Term. The term of the emergency authorization will be limited to the time necessary to
26 complete the planned project and will be specifically stated in the authorization.
- 27 (7) Conditions of Emergency Authorizations. An emergency authorization may contain
28 conditions to minimize the reasonably expected adverse impacts of the activity to waters of this
29 state. Conditions may include:
- 30 (a) Compensatory mitigation or compensatory wetland mitigation;
- 31 (b) A requirement to revise the project and apply for a removal-fill permit after the emergency
32 situation has subsided;

- 1 (c) A requirement to submit a report on the outcome of the project or monitor the project
- 2 removal-fill sites; and
- 3 (d) Any other condition necessary to minimize reasonably expected adverse impacts on waters
- 4 of this state.

5 **Statutory/Other Authority:** ORS 196.825 & 196.600 -196. 692
 6 **Statutes/Other Implemented:** ORS 196.600 - 196.692 & 196.795 - 196.990

7 **History:**
 8 DSL 3-2012, f. 9-28-12, cert. ef. 9-29-12
 9 DSL 1-2011, f. & cert. ef. 3-1-11
 10 Renumbered from 141-085-0570 by DSL 8-2009, f. 12-15-09, cert. ef. 1-1-10
 11 DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

12 [141-085-0680](#)

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

- 15 (1) Applicability. OAR 141-085-0680 through 141-085-0760 applies to removal-fill that occurs
- 16 within wetlands and tidal waters and applies to all forms of compensatory mitigation (i.e.,
- 17 mitigation bank, in-lieu fee mitigation, advance mitigation, permittee responsible mitigation,
- 18 and payment in-lieu mitigation). OAR 141-085-0680 through 141-085-0760 does not apply to
- 19 removal-fill within areas covered by an approved Wetland Conservation Plan.
- 20 (2) Principal Objectives for CWM. For projects where impacts to wetlands or tidal waters cannot
- 21 be avoided, CWM will be required to compensate for the reasonably expected adverse impacts
- 22 in fulfillment of the following principal objectives. The principal objectives of CWM are to:
- 23 (a) Replace functions and values lost at the removal-fill site;
- 24 (b) Provide local replacement for locally important functions and values, where appropriate;
- 25 (c) Enhance, restore, create or preserve wetlands or tidal areas that are self-sustaining and
- 26 minimize long-term maintenance needs;
- 27 (d) Ensure the siting of CWM in ecologically suitable locations considering: local watershed
- 28 needs and priorities; appropriate landscape position for the wetland types, functions and values
- 29 sought; connectivity to other habitats and protected resources; and the absence of
- 30 contaminants or conflicting adjacent land uses that would compromise wetland functions; and
- 31 (e) Minimize temporal loss of wetlands and tidal waters and their functions and values. (b)
- 32 Applicants must demonstrate how the selected method of CWM (i.e., mitigation bank, in-lieu
- 33 fee mitigation, advance mitigation, permittee-responsible mitigation and payment in-lieu
- 34 mitigation) addresses the principal objectives.
- 35 (3) General Requirements.

- 1 (a) Permittee-responsible CWM at an off-site location will be located within the 4th field
2 Hydrologic Unit Code (HUC) in which the removal-fill site is located.
- 3 (b) Impacts to tidal waters must be replaced in the same estuary unless the Director determines
4 that it is environmentally preferable to exceed this limitation.
- 5 (c) Projects that involve 0.20 acres or less of permanent wetland impact may use mitigation
6 banks, in-lieu fee, or payment in-lieu mitigation without addressing the principal objectives set
7 forth in Section (2) of this rule.
- 8 (d) Payment in-lieu mitigation or in-lieu fee credits for which the Department is the sponsor
9 may not be used if appropriate mitigation bank credits are available on the day that the public
10 review period closes.

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

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

13 **History:**

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

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

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

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

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

19 [141-085-0685](#)

20 **Functions and Values Assessment**

- 21 (1) Purpose. The purpose of the functions and values assessment is to document those wetland
22 or tidal waters functions and values anticipated to be lost as a result of the project and help
23 ensure that the proposed CWM will replace those functions and values.
- 24 (2) Assessment Requirements. Elements of a functions and values assessment must include the
25 following:
- 26 (a) Existing functions and values at the proposed project site;
- 27 (b) Functions and values reasonably expected to be adversely impacted by the proposed
28 project;
- 29 (c) Existing functions and values at the proposed CWM site, if the site is currently wetland or
30 tidal waters; and
- 31 (d) The projected net gain or loss of specific functions and values as a result of the CWM project
32 compared to the reasonably expected adverse impacts as a result of the project.
- 33 (3) Methods. Wetland functions and values assessment methods and requirements are as
34 follows:

- 1 (a) All applications for tidal waters impacts or for wetland impacts of greater than 0.20 acres
 2 must include a functions and values assessment using the reference-based method in the
 3 appropriate Hydrogeomorphic Method (HGM) guidebook for Oregon wetlands, if available. If
 4 not available, the Oregon Rapid Wetland Assessment Protocol (ORWAP) is the required
 5 method.
- 6 (A) The same functions and values assessment method must be used on the impact site and the
 7 proposed CWM site.
- 8 (B) A functions and values assessment is not required for the CWM site if CWM is proposed to
 9 be fulfilled by purchase of bank credits, advance mitigation credits, or fee in-lieu program
 10 credits.
- 11 (C) If the same reference-based HGM is not available for both the impact site and the CWM
 12 site, then ORWAP must be used for both the impact site and the CWM site.
- 13 (D) If a reference-based HGM is not available for all wetland subclasses on the impact site, then
 14 ORWAP must be used for all wetlands on the impact site.
- 15 (b) For non-tidal wetland impacts involving impacts of 0.20 acres or less, ORWAP is the
 16 preferred method, but best professional judgment may be used to assess wetland functions
 17 and values. A written discussion of the basis of the conclusions based on best professional
 18 judgment must be provided. For example, if the water quality function is determined to be
 19 "low," a detailed rationale based upon direct measurement or observation of indicators of
 20 water quality function must be discussed.
- 21 (c) If best professional judgment is used, wetland functions and values to be assessed must
 22 include, but are not limited to:
- 23 (A) Water quality and quantity;
 24 (B) Fish and wildlife habitat;
 25 (C) Native plant communities and species diversity; and
 26 (D) Recreation and education.
- 27 (d) The Oregon Freshwater Wetland Assessment Methodology will not satisfy the requirements
 28 of OAR 141-085-0685.

29 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

31 **History:**

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

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

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

1 [141-085-0690](#)

2 **Additional Requirements for CWM**

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

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

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

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

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

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

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

18 (d) Is for the replacement of a non-tidal wetland or tidal water type that is technically
19 impracticable to replace. Upon demonstration of such to the satisfaction of the Department,
20 the Department may require re-consideration of alternatives to ensure that all practicable
21 opportunities to avoid and minimize impacts have been reasonably incorporated into the
22 project.

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

27 (4) CWM Ratios.

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

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

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

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

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

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

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

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

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

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

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

17 (e) The Department may increase the ratios when:

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

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

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

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

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

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

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

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

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

- 1 (9) Special Requirements for Enhancement as CWM. CWM enhancement must conform to the
 2 following additional requirements. Enhancement must:
- 3 (a) Be conducted only on degraded wetlands or tidal waters;
- 4 (b) Result in a demonstrable net gain in functions and values at the CWM site as compared to
 5 those functions and values lost or diminished as a result of the project and those functions and
 6 values that already exist at the CWM site;
- 7 (c) Not replace or diminish existing wetland or tidal waters functions and values with different
 8 functions and values unless the applicant justifies, in writing, that it is ecologically preferable to
 9 do so;
- 10 (d) Not consist solely of the conversion of one HGM or Cowardin class to another;
- 11 (e) Identify the causes of wetland or tidal waters degradation at the CWM site and the means
 12 by which the CWM plan will reverse, minimize or control those causes of degradation in order
 13 to ensure self-sustaining success; and
- 14 (f) Not consist solely of removal of non-native, invasive vegetation and replanting or seeding of
 15 native plant species.
- 16 (10) Preservation as CWM. Preservation of wetlands or tidal waters may be used for meeting
 17 the CWM requirement when the wetland or tidal waters site proposed for preservation is
 18 demonstrated to be under threat of destruction or adverse modification and one of the
 19 following applies:
- 20 (a) The preservation site supports a significant population of rare plant or animal species;
- 21 (b) The preservation site is a rare wetland or tidal waters type (S1 or S2 according to the Oregon
 22 Natural Heritage Program);
- 23 (c) The preservation site is a native, mature forested wetland; or
- 24 (d) The preservation site, with existing and ongoing management, is in good condition and is
 25 highly functioning (as determined using a Department-approved assessment method).
 26 Preservation must also accomplish one or more of the following:
- 27 (A) Serves a documented watershed need; or
- 28 (B) Preserves wetland types disproportionately lost in the watershed.
- 29 (11) Preservation as the Preferred CWM Option. Preservation may be accepted as the preferred
 30 CWM option when the lost or diminished functions and values are exceptionally difficult to
 31 replace. Examples of such waters include, but are not limited to, vernal pools, fens, bogs and
 32 tidal spruce wetlands, as defined by the Oregon Natural Heritage Program.

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

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

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

7 **History:**

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

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

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

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

12 [141-085-0695](#)

13 **Administrative Protection of CWM Sites**

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

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

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

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

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

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

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

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

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

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

34 **History:**

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

1 DSL 1-2011, f. & cert. ef. 3-1-11
 2 DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

3 [141-085-0700](#)

4 **Financial Security for CWM Sites**

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

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

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

11 (b) The Department may waive the requirement for a financial security instrument for impacts
 12 0.20 of an acre or less; and

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

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

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

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

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

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

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

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

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

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

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

16 (a) The precise location of the CWM area;

17 (b) The permit holder's name;

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

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

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

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

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

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

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

33 **History:**

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

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

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

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

3 [141-085-0705](#)

4 **Requirements for All CWM Plans**

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

10 (a) CWM plan overview, including:

11 (A) CWM ecological goals and objectives;

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

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

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

18 (b) CWM site ownership and location information:

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

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

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

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

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

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

- 1 (i) A wetland determination/delineation report pursuant to OAR 141-090 for existing wetlands
- 2 on the CWM site (or for tidal waters, any wetlands above highest measured tide elevation), as
- 3 necessary to confirm acreage of proposed CWM;
- 4 (ii) Identification of HGM and Cowardin class(es) and subclass(es) of all wetlands and tidal
- 5 waters present within the CWM site;
- 6 (iii) A general description of the existing and proposed water source, duration and frequency of
- 7 inundation or saturation, and depth of surface water for wetlands or tidal waters on the CWM
- 8 site. This information must include identification of any water rights necessary to sustain the
- 9 intended functions. When water rights are required, the applicant must provide documentation
- 10 that the water right has been secured prior to issuance; and
- 11 (iv) Plans that involve enhancement must include identification of the cause(s) of degradation
- 12 and how the plan will reverse it and sustain the reversal.
- 13 (B) A description of the major plant communities and their relative distribution, including the
- 14 abundance of exotic species within the CWM site and associated buffers.
- 15 (C) Approximate location of all water features (e.g., wetlands, streams, lakes) within 500 feet of
- 16 the CWM site.
- 17 (D) Any known CWM site constraints or limitations.
- 18 (E) Plans for CWM by means of restoration must include documentation sufficient to
- 19 demonstrate that the site was formerly, but is not currently, a wetland or tidal water.
- 20 (e) A functions and values assessment. A summary of the assessment must be placed in the
- 21 body of the CWM plan, and supporting data sheets or assessment model outputs must be
- 22 placed in an appendix of the CWM Plan.
- 23 (f) CWM drawings and specifications, including:
- 24 (A) Proposed construction schedule;
- 25 (B) Scaled site plan(s) showing CWM project boundaries, existing and proposed wetland or tidal
- 26 waters boundaries, restoration, creation and enhancement areas, buffers, existing and
- 27 proposed contours, cross-section locations, construction access location and staging areas;
- 28 (C) Scaled cross sections showing existing and proposed contours and proposed water depths;
- 29 (D) Plant list for each Cowardin and HGM class at the CWM site (include scientific names and
- 30 wetland indicator status);
- 31 (E) Schematic of any proposed water control structures; and

- 1 (F) For CWM sites involving tidal waters, plan views and cross-sections must show relevant tidal
2 elevations relative to mean lower low water (MLLW) using the nearest local tidal datum. The
3 elevation of MLLW must be referenced to the North American Vertical Datum 1988 (NAVD88).
- 4 (g) Proposed CWM performance standards. The applicant may propose to use applicable pre-
5 defined performance standards as approved by the Department, or may provide CWM site-
6 specific performance standards that:
- 7 (A) Address the proposed ecological goals and objectives for the CWM;
8 (B) Are objective and measurable; and
9 (C) Provide a timeline for achievement of each performance standard.
- 10 (h) A description of the proposed financial security instrument. The Department will determine
11 the amount of security required. A final financial security instrument will be required prior to
12 permit issuance unless otherwise approved by the Department.
- 13 (i) A monitoring plan including specific methods, timing, monitoring plot locations, and photo-
14 documentation locations.
- 15 (j) A long-term maintenance plan describing:
- 16 (A) How the applicant anticipates providing for maintenance of the CWM site beyond the
17 monitoring period to ensure its sustainability (e.g., maintenance of any water control
18 structures, weed management, prescribed burning, and vandalism repair);
- 19 (B) Expected long-term ownership of the CWM site and the anticipated responsible party or
20 parties for long-term maintenance; and
- 21 (C) How the maintenance activities are anticipated to be funded.
- 22 (k) The CWM plan must identify the long-term protection instrument for the CWM site in
23 accordance with OAR 141-085-0695.
- 24 (l) If permittee-responsible mitigation is proposed and the application for a permit or
25 authorization is submitted on behalf of a closely held corporation, limited partnership, limited
26 liability company or trust, the Department will require from each shareholder or stockholder,
27 limited partner, member, trustee, current beneficiary or other principal:
- 28 (A) A joint and several personal guarantee securing compliance with mitigation obligations; and
29 (B) A written agreement to make all reasonable efforts to maintain the business entity in active
30 status until all mitigation obligations have been satisfied.
- 31 (C) For the purpose of subsection (L) of this section, a "closely held corporation" is one in which
32 all shares are held by less than five individuals.

- 1 (m) The Department may require additional information as necessary to determine the
 2 appropriateness, feasibility and sustainability of the proposed CWM and at any time prior to
 3 the permit decision may make recommendations for improvements to CWM plans.
- 4 (2) CWM Plans Using Preservation. A CWM plan using preservation must include:
- 5 (a) Functions and values assessment of the removal-fill site and site proposed for preservation;
 6 (b) Maps showing the preservation site including all delineated wetlands or tidal waters to be
 7 conserved;
- 8 (c) Documentation demonstrating that the proposed preservation site meets the requirements
 9 of OAR 141-085-0690(10);
- 10 (d) The surrounding land uses and an analysis of both the short-term and long-term known and
 11 probable effects of those land uses and activities on the preserved wetlands or tidal waters;
- 12 (e) Measures that may be necessary to minimize the effects of surrounding land uses and
 13 activities on the preserved wetlands or tidal waters;
- 14 (f) Identification of the party or parties responsible for long-term protection of the preservation
 15 site;
- 16 (g) A long-term protection instrument;
- 17 (h) A long-term management plan with a funding mechanism that addresses the specific
 18 management needs to optimize and maintain functionality and ecological sustainability of the
 19 wetlands or tidal waters to be preserved; and
- 20 (i) The protection instrument, management plan and funding mechanism must be in place prior
 21 to issuance of the authorization.
- 22 (3) Authorization Conditions for CWM Plans.
- 23 (a) The Department will review the CWM plan for sufficiency. In approving the final CWM plan,
 24 the Department may impose authorization conditions necessary to ensure compliance.
- 25 (b) The approved CWM plan becomes an enforceable part of the removal-fill authorization. In
 26 the event of conflict between CWM Plan provisions and removal-fill authorization conditions,
 27 the authorization conditions prevail.
- 28 (c) Regardless of the expiration date of the authorization, all compensatory mitigation
 29 conditions remain enforceable until the Department declares that the CWM has been
 30 successful.
- 31 (d) The permit holder cannot delegate responsibility for CWM requirements, unless the
 32 Department has officially transferred the mitigation obligation.

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

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

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

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

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

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

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

13 **History:**

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

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

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

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

18 [141-085-0710](#)

19 **Monitoring Requirements for CWM**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 **History:**

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

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

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

24 [141-085-0715](#)

25 **Mitigation for Temporary Impacts**

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

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

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

33 **History:**

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

1 DSL 1-2011, f. & cert. ef. 3-1-11
 2 DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

3 [141-085-0720](#)

4 **Mitigation Banking Purpose, Applicability and Policies**

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

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

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

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

17 (a) Maintaining regional functions and values of aquatic resources in their service area;

18 (b) Matching the demand for credits with losses to the water resources of this state; and

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

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

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

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

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

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

34 **History:**

- 1 DSL 1-2011, f. & cert. ef. 3-1-11
2 DSL 8-2009, f. 12-15-09, cert. ef. 1-1-10
3 DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

4 [141-085-0725](#)

5 **Process for Establishing Mitigation Banks**

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

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

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

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

18 (b) The objectives of the proposed mitigation bank;

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

20 (d) The proposed service area;

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

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

23 (g) The proposed ownership arrangements and long-term management strategy for the
24 mitigation bank;

25 (h) How the mitigation bank addresses each of the principal objectives for CWM listed in OAR
26 141-085-0680; and

27 (i) Names and addresses of all landowners within 500 feet of the bank.

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

33 (a) The Prospectus is complete and will proceed to the public notice; or

- 1 (b) The Prospectus is incomplete.
- 2 (5) Incomplete Prospectus. If the Department determines that the Prospectus is incomplete,
 3 the Department will notify the sponsor in writing and list the missing or deficient information.
 4 The Department will take no action on the incomplete Prospectus until the required
 5 information is submitted. The sponsor must resubmit the entire amended Prospectus for
 6 reconsideration, unless instructed by the Department to do otherwise. Submission of a new or
 7 amended Prospectus starts a new 30 calendar day initial review period.
- 8 (6) Department May Decline to Participate. If a mitigation bank sponsor cannot demonstrate
 9 the need for the mitigation credits or the technical feasibility and ecological desirability of the
 10 bank, the Department may decline to participate in its development.
- 11 (7) Public Notice of Prospectus. Upon determining that a Prospectus is sufficient, the
 12 Department will issue a public notice entitled, "Intent To Create A Mitigation Bank." The
 13 Department will:
- 14 (a) Post the notice on the Department's web site for 30 calendar days;
- 15 (b) Send the notice to city and county planning departments, affected state and federal natural
 16 resource and regulatory agencies, adjacent landowners, conservation organizations and other
 17 interested persons requesting such notices;
- 18 (c) Briefly describe the proposed mitigation bank and reference the Prospectus provided by the
 19 bank sponsor; and
- 20 (d) Solicit comments for 30 calendar days from the date of the public notice.
- 21 (8) Consideration of Comments Received During the Public Notice Period. All comments
 22 received will be provided to the bank sponsor and to the IRT. If comments are not received
 23 from an interested party within the 30-day comment period, the Department will assume the
 24 entity does not desire to provide comments.
- 25 (9) Establishment of an Interagency Review Team (IRT) and the Role of the IRT. The Department
 26 will invite participants to serve on an IRT within 30 calendar days of the date of the public
 27 notice. The Department will serve as chair (or co-chair) of the IRT.
- 28 (a) The Department will invite each of the following agencies to nominate a representative for
 29 an IRT:
- 30 (A) Oregon Department of Environmental Quality;
- 31 (B) Oregon Department of Fish and Wildlife;
- 32 (C) Oregon Department of Land Conservation and Development;
- 33 (D) U.S. Fish and Wildlife Service;

- 1 (E) U.S. Environmental Protection Agency;
- 2 (F) Soil and Water Conservation District; and
- 3 (G) Local Government Planner, or equivalent.
- 4 (b) The Department may appoint other members of the IRT based on the nature and location of
- 5 the project, particular interest in the project by persons or groups, and/or any specific expertise
- 6 that may be required by the Department in development of the MBI.
- 7 (c) The IRT acts in an advisory capacity to the Department in the establishment and operation of
- 8 mitigation banks. The IRT may:
 - 9 (A) Review and provide input to the Department on the Prospectus and the comments received
 - 10 during the public notice for use in the development of the MBI;
 - 11 (B) Review and provide input on the draft MBI;
 - 12 (C) Review the performance of the bank to assist the Department in determining compliance
 - 13 with the MBI; and
 - 14 (D) Provide input on adaptive management of the mitigation bank, as necessary, to achieve the
 - 15 ecological goals and objectives.
- 16 (10) Mitigation Bank Instrument (MBI). After consideration of the public comments and input
- 17 from the IRT, the bank sponsor must develop a Draft Mitigation Bank Instrument (MBI) for
- 18 submittal to the Department. If the sponsor intends that the MBI serve as the permit
- 19 application, the sponsor must notify the Department of this intention at the time of submittal
- 20 of the first draft MBI. If an MBI is used in place of a permit application, in addition to all
- 21 requirements below, it must meet the requirements for fees, content, and review procedures
- 22 as specified in OAR 141-085-0545 through 141-085-0565. The draft MBI must contain:
 - 23 (a) If the proposed bank is for wetland mitigation, all requirements for CWM plans per OAR
 - 24 141-085-0680 through 141-085-0710; and
 - 25 (b) The applicant must also provide the following information:
 - 26 (A) The proposed service area for the bank, including a map clearly showing recognizable
 - 27 geographic place names and watershed boundaries;
 - 28 (B) Demonstration of the need for the bank as shown by past removal-fill activities, projected
 - 29 demographics for the proposed service area, statements of expected activities from the local
 - 30 planning agency, and like documentation;
 - 31 (C) A description of the projected wetland losses in the service area by HGM and Cowardin
 - 32 wetland classes;

- 1 (D) Proof of ownership including a title report and disclosure of any and all liens or easements
2 on the bank site. If the sponsor does not own the land, the MBI must contain explicit legal and
3 recordable permission granted by the landowner to perpetually dedicate the land upon which
4 the proposed bank and any associated buffer is located;
- 5 (E) A description of the methods and results of the evaluation of ecological stressors, such as
6 contaminants, present at the bank site that could compromise the wetland functions;
- 7 (F) Description of the location and plant community composition of reference site(s), unless an
8 HGM reference data set is used;
- 9 (G) Description of the method(s) used to determine the number of credits to be created at the
10 proposed bank, as well as those that will be used to account for and report credit and debit
11 transactions;
- 12 (H) The proposed credit release schedule linked to achievement of specific performance
13 standards;
- 14 (I) Detailed contingency plans describing how project deficiencies or performance failures will
15 be corrected, including assignment of responsibilities for failures such as floods, vandalism,
16 damage by pests and wildlife, invasion by weedy vegetation, etc.;
- 17 (J) Land use affidavit;
- 18 (K) A statement indicating when each of the conditions of the MBI will terminate, unless they
19 are perpetual in nature; and
- 20 (L) A draft interagency bank instrument agreement following the current template document
21 provided by the Department. Exceptions to the template must be approved in writing by the
22 Department.
- 23 (11) Review of the Draft MBI. Within 30 calendar days of the Department's receipt of a draft
24 MBI, the Department will conduct an initial review to determine if the MBI is complete and the
25 information contained in the MBI adequately addresses the requirements. Following the
26 review, the Department will inform the sponsor of its findings, either:
- 27 (a) The draft MBI is complete and will proceed to the IRT review process; or
28 (b) The draft MBI is incomplete.
- 29 (12) Incomplete Draft MBI. If the Department determines that the draft MBI is incomplete or
30 deficient, the Department will notify the sponsor in writing and list the missing or deficient
31 information. The Department will take no action on the incomplete draft MBI until the required
32 information is submitted. The applicant must resubmit the entire draft MBI for reconsideration,
33 unless instructed by the Department to do otherwise. Submission of a new or amended draft
34 MBI starts a new 30 day review period.

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

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

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

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

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

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

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

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

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

23 **History:**

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

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

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

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

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

29 [141-085-0730](#)

30 **Establishment of Mitigation Credits**

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

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

33 (b) By applying a function based credit accounting method approved by the Department.
 34 Credits within a bank are determined by the difference between the baseline conditions of the
 35 bank prior to restoration, enhancement or creation activities, and the increased functions and

1 values of the water resources of this state that result, or are expected to result, from those
2 activities.

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

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

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

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

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

21 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

23 **History:**

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

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

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

27 [141-085-0735](#)

28 **Release, Use and Sale of Mitigation Credits**

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

34 (2) Release of Credits Must Be in Compliance with MBI. The Department will not allow the sale
35 or exchange of credits by a mitigation bank that is not in compliance with the terms of the MBI,
36 the Removal-Fill Law, and in the case of a wetland mitigation bank, all applicable rules

1 governing CWM. The Department may consult with the IRT in order to determine
 2 noncompliance and appropriate remedies, including enforcement action. The Department may,
 3 in consultation with the IRT, modify the credit release schedule, including reducing the number
 4 of credits or suspending credit transfers, when necessary to ensure that all credit transfers are
 5 backed by mitigation projects with a high probability of meeting performance standards.

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

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

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

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

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

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

24 **History:**

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

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

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

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

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

30 [141-085-0740](#)

31 **Authorization for Mitigation Banks**

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

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

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

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

13 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

15 **History:**

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

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

18 [141-085-0745](#)

19 **In-Lieu Fee Mitigation**

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

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

26 (2) Policies. In-lieu fee mitigation is subject to all rules governing mitigation banking (OAR 141-
 27 085-0720 through 141-085-0745), as applicable.

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

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

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

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

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

5 **Statutory/Other Authority:** ORS 196.825 & 196.600 – 196.692

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

7 **History:**

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

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

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

11 [141-085-0750](#)

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

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

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

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

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

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

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

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

31 RMV = Real Market Value per acre of the unimproved land for which a permit is being issued as
32 determined by the county assessor's office;

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

1 mm = Mitigation Multiplier representing the number of credits typically generated per unit area
 2 of mitigation conducted. The default will be 0.33 based on the Department's minimum ratios
 3 for compensatory wetland mitigation.

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

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

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

12 (c) Monitor the compensatory mitigation;

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

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

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

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

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

21 **History:**

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

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

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

25 [141-085-0755](#)

26 **Advance Mitigation**

27 (1) Set-Aside Excess Credits. As part of the existing, active individual removal-fill permit
 28 application process, an applicant may request that the Department consider that the proposed
 29 permittee-responsible CWM (as documented in a CWM Plan prepared in accordance with OAR
 30 141-085-0705) could produce mitigation credits in excess of those needed to satisfy project
 31 requirements.

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

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

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

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

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

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

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

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

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

21 **History:**

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

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

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

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

26 [141-085-0765](#)

27 **Compensatory Non-Wetland Mitigation (CNWM)**

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

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

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

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

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

8 (a) Hydrologic;

9 (b) Geomorphic;

10 (c) Biological; and

11 (d) Chemical and nutrient.

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

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

18 (a) Defined performance standards;

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

20 (c) Administrative protection of the CNWM site; and

21 (d) Financial security.

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

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

24 **History:**

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

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

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

28 [141-085-0768](#)

29 **Advance Aquatic Resource Plans**

30 (1) Purpose. The purpose of an Advance Aquatic Resource Plan is to create a flexible framework
31 for persons to voluntarily plan for anticipated future water resource; development conflicts
32 within a defined planning area; identify and characterize water resources; make necessary
33 decisions now to avoid and minimize those conflicts to the extent practicable; and develop a

1 compensatory mitigation strategy to offset the anticipated unavoidable impacts to water
2 resources. An approved Advance Aquatic Resource Plan is intended to inform and streamline
3 future removal-fill permit application processes for projects within a defined planning area. The
4 Advance Aquatic Resource Plan is not intended to replace the Wetland Conservation Plan (ORS
5 196.668 et seq.) as a wetland conservation planning tool where binding local land use decisions
6 are sought.

7 (2) Outcomes.

8 (a) The Department's approval of an Advance Aquatic Resource Plan pursuant to this section
9 may provide regulatory outcomes which include, but are not limited to:

10 (A) Jurisdictional determinations pursuant to OAR 141-090.

11 (B) Reduction in removal-fill permit application processing timelines otherwise established by
12 OAR 141-085 for projects within the Advance Aquatic Resource Plan area.

13 (C) Modification of the application completeness requirements otherwise established by OAR
14 141-085 for projects within the Advance Aquatic Resource Plan area.

15 (D) Consideration of the approved Advance Aquatic Resource Plan when applying criteria for
16 issuance of a permit pursuant to ORS 196.825 for projects within the Advance Aquatic Resource
17 Plan area.

18 (b) Approval of an Advance Aquatic Resource Plan will not authorize removal-fill activity within
19 the Plan area.

20 (3) Standards for Establishing Advance Aquatic Resource Plans.

21 (a) Required Minimum Content. The level of analysis required for each content element is only
22 broadly defined by this administrative rule. It is the Department's intent that Advance Aquatic
23 Resource Plans will be a flexible tool with the level of analysis customized to meet the specific
24 planning goals, purpose, and needs for the defined area, and considering the outcomes sought
25 from the Department. An Advance Aquatic Resource Plan will include the following minimum
26 content unless otherwise approved in writing by the Department:

27 (A) Advance Aquatic Resource Plan Sponsor. The Advance Aquatic Resource Plan will identify
28 the person acting as the Plan sponsor. The sponsor will: coordinate land owners and local
29 government participation in Plan development; coordinate with the Department and other
30 affected local, state and federal agencies through Plan development process; administer the
31 Technical Advisory Committee created pursuant to this section; and be responsible for Advance
32 Aquatic Resource Plan content, execution, reporting, amendments, and renewals as may be
33 required.

34 (B) Advance Aquatic Resource Plan Goals, Purpose and Need. The Advance Aquatic Resource
35 Plan will: establish a comprehensive set of goals for the effort including both conservation and

1 development objectives; describe the purpose for developing an Advance Aquatic Resource
2 Plan for the defined area; identify what public need(s) the Plan seeks to fulfill; and, describe
3 outcomes sought from the Department by approval of the Plan.

4 (C) Coverage Area. The Advance Aquatic Resource Plan will define, in text and map form, the
5 geographic boundaries of the Advance Aquatic Resource Plan coverage area. An Advance
6 Aquatic Resource Plan will not include lands planned or designated for farm or forest uses, or
7 mixed farm and forest uses, pursuant to goals adopted by the Land Conservation and
8 Development Commission under ORS 197.225.

9 (D) Activity Types. The Advance Aquatic Resource Plan will describe the types of removal-fill
10 activities or projects intended to be addressed by the Advance Aquatic Resource Plan.

11 (E) Identification of Waters of This State. Unless otherwise approved by the Department, waters
12 of this State within the coverage area will be identified, at a minimum, to the standards defined
13 in a subset of the local wetlands inventory standards and guidelines that are described in (OAR
14 141-086-0180 through OAR 141-086-0240) as designated by the Department. At the discretion
15 of the Advance Aquatic Resource Plan sponsor and with input from the Department,
16 boundaries may be defined by a complete delineation pursuant to OAR 141-090, and therefore
17 meet requirements for future removal-fill authorizations pursuant to (4)(c)(D) of this section.

18 (F) Characterization of Waters of This State. Wetland functions and values will be evaluated
19 using the Oregon Rapid Wetland Assessment Protocol. Other methods may be allowed at the
20 discretion of the Department. Non-wetland waters of this State will be functionally assessed
21 using methods approved by the Department. Other ecological evaluation parameters will be
22 defined in consultation with the Department and Technical Advisory Committee created
23 pursuant to this section, depending on natural resource characteristics of the Plan area and the
24 defined goals, purpose and need for the Advance Aquatic Resource Plan.

25 (G) Avoidance and Minimization Strategy. The Advance Aquatic Resource Plan will:

26 (i) Describe the methodology and results for identifying protection or development of wetlands
27 and other Waters of This State considering, at least, the characterization results from (3)(a)(F)
28 of this section and anticipated development needs for the coverage area. Protection and
29 development identifications may be further refined at the Plan sponsor's discretion and with
30 input from the Technical Advisory Committee created pursuant to this section.

31 (ii) Include text and maps illustrating designation results and the rationale for each protection
32 and development identification.

33 (iii) Identify buffers as necessary to maintain, protect or restore the functions and values of
34 waters of this State around identified protection areas, and describe proposed uses to be
35 allowed in the buffer areas.

- 1 (iv) Include demonstration that practicable, less damaging alternatives, including alternative
2 locations for development, are not available for any waters of this State that are proposed for a
3 development identification.
- 4 (v) Include a description of proposed best management practices that will ensure that the
5 adverse effects to waters of this State, where not avoidable, will be minimized.
- 6 (vi) Include description of proposed allowed, conditional and disallowed uses for protection and
7 development identification categories.
- 8 (H) Compensatory Mitigation Plan. The Advance Aquatic Resource Plan will describe how
9 anticipated future adverse impacts to Waters of this State within the coverage area will be
10 mitigated. This portion of the Plan may be conceptual in nature or it may have sufficient detail
11 so that it satisfies all of the requirements that are specified in OAR 141-085 for compensatory
12 mitigation plans. The level of mitigation planning will be determined at the discretion of the
13 Advance Aquatic Resource Plan sponsor and with input from the Department considering the
14 goals, purpose and need for the Advance Aquatic Resource Plan and the desired outcome(s)
15 sought from the Department. The compensatory mitigation plan must, at a minimum, address
16 the principal objectives for compensatory mitigation specified in OAR 141-085-0680(2).
- 17 (I) Public Involvement Plan. The Advance Aquatic Resource Plan will describe a plan for
18 engagement with affected local, state and federal government agencies, affected tribal
19 governments and the public through the planning process.
- 20 (J) Other Advance Aquatic Resource Plan Elements. Other elements may include, but are not
21 limited to: cultural resources evaluations, storm water management planning as may be
22 required for future Clean Water Act Section 401 water quality certifications, biological
23 assessments for Endangered Species Act compliance, and environmental contamination
24 assessments.
- 25 (b) Department Approval Prior to Initiating Planning Work. A person intending to develop an
26 Advance Aquatic Resource Plan shall consult with the Department before initiating the planning
27 work. The purpose of this consultation is to ensure that an Advance Aquatic Resource Plan is
28 the appropriate planning tool; that the scope and scale of the Plan is commensurate with the
29 goals, purpose, need and desired outcomes; and that sufficient Department resources are
30 available. The Department may, in its discretion, decline to participate in developing an
31 Advance Aquatic Resource Plan for any reason, including for example, that the Department
32 determines that there are not adequate staff resources available or that an Advance Aquatic
33 Resource Plan is not a suitable tool for the identified need. The decision to participate or
34 decline to participate will be made in writing by the Department within 30 days of receiving a
35 written request. The Department's decision whether to participate is a final order in other than
36 a contested case and may be appealed as provided in ORS Chapter 183. An Advance Aquatic
37 Resource Plan will only proceed with an affirmative statement of Department participation.

1 (c) Technical Advisory Committee Participation. The Advance Aquatic Resource Plan sponsor
2 will establish and convene an advisory body to provide input on Advance Aquatic Resource Plan
3 content and development. At a minimum, advisory committee membership will include (to the
4 extent these agencies desire involvement or unless otherwise approved by the Department):
5 Department of State Lands, Department of Fish and Wildlife, Department of Environmental
6 Quality, Department of Land Conservation and Development, US Army Corps of Engineers,
7 National Marine Fisheries Service, US Fish and Wildlife Service. Membership may additionally
8 include, but is not limited to: land owners or their representative(s) within the Advance Aquatic
9 Resource Plan coverage area; applicable local government staff; local watershed council(s)
10 representative; business representatives, conservationist or environmental interests, affected
11 tribal governments, and elected officials. Other membership will be at the discretion of the
12 Advance Aquatic Resource Plan sponsor.

13 (4) Approval Process for Advance Aquatic Resource Plans.

14 (a) Submittal Requirements. A completed Advance Aquatic Resource Plan will be submitted to
15 the Department in the form, manner and number prescribed by the Department. Submittals
16 will be processed as a request for a proposed order of the director.

17 (b) Completeness and Technical Sufficiency Review.

18 (A) The Department will conduct a review to determine if all required Advance Aquatic
19 Resource Plan elements are complete and technically sufficient to prepare a draft order of the
20 director.

21 (B) If the Department determines that the Advance Aquatic Resource Plan is incomplete or
22 technically insufficient, the Department will notify the Advance Aquatic Resource Plan sponsor
23 in writing including identification of issues and provide opportunity for re-submittal. This
24 determination does not preclude further agency consideration of the subject matter.

25 (c) Draft Order

26 (A) In developing the Draft Order, the Department will evaluate the information contained in
27 the Advance Aquatic Resource Plan and conduct any investigation that the Department
28 considers appropriate.

29 (B) In developing the Draft Order, the Department will consult with affected local, state and
30 federal agencies and affected tribal governments to assess any potential effects of the Advance
31 Aquatic Resource Plan on those entities' programs, policies or requirements.

32 (C) If the Advance Aquatic Resource Plan is complete and technically sufficient, the Department
33 will prepare a draft order including at least the following elements:

34 (i) Findings of compliance or noncompliance with the determinations described in (4)(e)(B) of
35 this section.

- 1 (ii) A summary of the Advance Aquatic Resource Plan coverage area and activity types
2 addressed by the Plan.
- 3 (iii) A description of other eligibility criteria or standards for projects involving removal or fill
4 activity to be included in the Advance Aquatic Resource Plan.
- 5 (iv) Jurisdictional determinations of presence or absence of waters of this State or approval of
6 boundaries of waters of this State, depending on level of identification conducted pursuant to
7 (3)(a)(E) of this section. All remaining requirements to obtain wetland delineations for future
8 removal-fill applications will be defined.
- 9 (v) A description of standards by which future applications for removal-fill authorizations will be
10 processed including the requirements for when an application will be determined complete,
11 and whether the Department will shorten its processing timelines. At the Department's
12 discretion, application completeness requirements may be reduced to the extent such
13 information is already provided in the Advance Aquatic Resource Plan. The information
14 included in future removal-fill application must be sufficient to allow the Department consider
15 the factors listed in ORS 196.825(3), to consider any other factors identified by the Department,
16 and to make the determinations that are listed in ORS 196.825(1). At the Department's
17 discretion, applications for future removal-fill authorization may be processed on a shorter
18 timeline than otherwise established by OAR 141-085 except that public review requirements
19 pursuant to OAR 141-085 will always apply.
- 20 (vi) Any general conditions that are identified in the Advance Aquatic Resource Plan for
21 activities addressed by the Plan.
- 22 (vii) A description of the annual reporting requirements, amendment process, and 5-year
23 renewal process for the approved Advance Aquatic Resource Plan.
- 24 (viii) Grounds and mechanisms for suspension or revocation of the order.
- 25 (ix) Any other conditions of, or limitations to, the order that the Department determines are
26 appropriate.
- 27 (d) The draft order shall be released for a 30-day public comment period prior to finalization.
28 The form and manner of public noticing shall be determined by the Department. After
29 completion of the public comment period, the Sponsor shall be provided the opportunity to
30 respond to public comments received. The Department may release an amended draft order
31 for a second 30-day public comment period if the Department determines that significant
32 changes to the draft order warrant a second comment period.
- 33 (e) Final Order. A final order will approve, approve with conditions, or deny the Advance
34 Aquatic Resource Plan.

- 1 (A) If denied, the director shall identify the reasons for denial and provide an opportunity to
2 amend and resubmit the Advance Aquatic Resource Plan. This determination does not preclude
3 further agency consideration of the subject matter
- 4 (B) The director will only issue an order approving an Advance Aquatic Resource Plan where the
5 director determines that:
- 6 (i) The Advance Aquatic Resource Plan is consistent with the protection, conservation and best
7 use of the water resources of this state as specified in ORS 196.600 to 196.905;
- 8 (ii) The Advance Aquatic Resource Plan would not unreasonably interfere with the paramount
9 policy of this state to preserve the use of its waters for navigation, fishing, and public
10 recreation;
- 11 (iii) A public need is fulfilled by approval of the Advance Aquatic Resource Plan; and
- 12 (iv) Implementation of the Advance Aquatic Resource Plan not inconsistent with governing
13 jurisdiction(s) Comprehensive Plan(s) and local land use regulations and ordinances.
- 14 (f) Appealing the Decision. A final order of the director approving, approving with conditions, or
15 denying an Advance Aquatic Resource Plan may be appealed as described in OAR 141-085-0575
16 for permit decisions. All final orders will include a notice of the right to a contested case
17 hearing.
- 18 (5) Administration of Approved Advance Aquatic Resource Plans.
- 19 (a) Annual Reports. The Advance Aquatic Resource Plan sponsor shall prepare an annual report
20 summarizing use of the Advance Aquatic Resource Plan for the previous year, its effectiveness
21 in meeting the established goals and purpose, and any known, substantive changes in
22 conditions within the coverage area that could materially affect ongoing implementation or
23 cause unintended adverse effects to waters of this State. Other annual report content
24 requirements may be defined in the final order. The first annual report is due one year from the
25 date that the Department issued the final order. Each subsequent report will be due the same
26 date each year thereafter that the final order approving the Advance Aquatic Resource Plan
27 remains in effect.
- 28 (b) Amendment Process. The Department or plan sponsor may initiate an Advance Aquatic
29 Resource Plan or final order amendment upon a finding that the current Advance Aquatic
30 Resource Plan or final order is not substantially achieving the goals, purpose or need; or
31 substantive changes in conditions within the coverage area are materially affecting ongoing
32 Advance Aquatic Resource Plan implementation or causing unintended adverse effects to
33 waters of this State. The requirements and mechanism for Advance Aquatic Resource Plan or
34 final order amendment will be defined in the final order. At the Department's discretion, draft
35 amended Advance Aquatic Resource Plans and draft amended orders may be circulated for
36 Technical Advisory Committee review and public comment.

1 (c) 5-Year Review and Renewal.

2 (A) Each final order is effective for five years from the date of issuance. The final order may be
3 renewed up to four times, for a total term of 20 years. Upon written notice from the plan
4 sponsor that renewal of the Advance Aquatic Resource Plan is desired, the Department will
5 review each approved Advance Aquatic Resource Plan and final order. The plan sponsor shall
6 submit the request, if any, at least six months prior to the expiration of the final order. After
7 such review the director may request new or updated information and act to modify, reissue or
8 revoke the final order approving the Advance Aquatic Resource Plan. In making this decision,
9 the Department will consider whether:

10 (i) There have been substantive changes in circumstances or conditions that would affect the
11 waters of this State to a greater extent than originally anticipated or would otherwise adversely
12 affect the compliance of the Advance Aquatic Resource Plan with the determinations made
13 pursuant to (4)(d)(B) of this section;

14 (ii) There have been changes in applicable laws, administrative rules or regulations that require
15 the Advance Aquatic Resource Plan or final order to be re-evaluated;

16 (iii) The Advance Aquatic Resource Plan and final order, as implemented, over the preceding
17 five years is substantially meeting the goals, purpose and need as established in the Advance
18 Aquatic Resource Plan and final order.

19 (B) The Department may initiate Advance Aquatic Resource Plan or final order review at any
20 time outside of the five-year cycle if it determines that there have been changes in
21 circumstances or conditions that must be considered in advance of the five-year cycle.

22 (d) Suspension, Revocation. At any time, and upon a finding by the director that the Advance
23 Aquatic Resource Plan or final order is not being implemented in good faith or implementation
24 of the Advance Aquatic Resource Plan or final order is otherwise allowing or facilitating
25 significant, unanticipated adverse effects to waters of this State, the director may either
26 suspend the final order and provide opportunity to correct, or revoke the final order without
27 opportunity to correct. Each final order will state whether it may be suspended or revoked
28 without a right to an appeal. If a right to appeal a suspension or revocation is allowed, it shall
29 be as provided in OAR 141-085-0575 for permit decisions.

30 (e) Cancellation. Upon written request by the Advance Aquatic Resource Plan sponsor and for
31 any reason, the Department will act to cancel the final order.

32 **Statutory/Other Authority:** ORS 196.825800 - 196.990 & 196.600 - 196.692

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

34 **History:**

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

1 [141-085-0770](#)

2 **Complaints and Investigations**

3 (1) Violations. A violation is:

4 (a) Removal-fill without a valid authorization;

5 (b) Non-compliance with any condition of an authorization;

6 (c) Obtaining an authorization or reporting on conditions of an authorization by
7 misrepresentation or by failure to fully disclose known material facts;

8 (d) Failing to comply with any term of an enforcement agreement or order;

9 (e) Failing to comply with the requirements of the Removal-Fill Law or these rules; or

10 (f) Non-compliance with any condition of an approved wetlands conservation plan.

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

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

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

19 **History:**

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

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

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

23 [141-085-0775](#)

24 **Enforcement Actions and Procedures; Appeals**

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

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

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

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

- 1 (B) Remove an unpermitted fill;
- 2 (C) Restore the site of an unpermitted removal;
- 3 (D) Pay a civil penalty;
- 4 (E) Provide compensatory mitigation for unauthorized impacts or mitigation shortfalls. At the
5 discretion of the Department and in accordance with these rules, mitigation may include
6 payment in-lieu of mitigation, purchase of mitigation bank credits or purchase of in-lieu fee
7 credits; and
- 8 (F) Forfeit their right to apply for new removal-fill permits or authorizations (debarment).
- 9 (b) The following administrative remedies may be used to implement appropriate enforcement
10 actions:
- 11 (A) Cease and desist orders may be issued to prevent damage. The Department may issue an
12 order requiring any person to cease and desist from any project if the Department determines
13 that such violation or threatened violation presents an imminent and substantial risk of injury,
14 loss or damage to water resources.
- 15 (i) A cease and desist order may be entered without prior notice or hearing and will be served
16 upon the person by personal service or by registered or certified mail.
- 17 (ii) A cease and desist order will state that a hearing will be held on the order if a written
18 request for hearing is filed by the person subject to the order within 10 calendar days after
19 receipt of the order.
- 20 (iii) If a person subject to a cease and desist order files a timely request for a hearing, the
21 Department will hold a contested case hearing before the Office of Administrative Hearings
22 pursuant to the applicable provisions of ORS 183.310 through 183.550.
- 23 (iv) Cease and desist orders will not be stayed during the pendency of a hearing conducted
24 under this section.
- 25 (v) Neither the Department nor any duly authorized representative of the Department will be
26 liable for any damages a person may sustain as a result of a cease and desist order issued under
27 this section.
- 28 (B) Consent agreements and consent orders are cooperative in nature and are used when an
29 agreement can be reached to resolve the violation. In signing a consent agreement, the violator
30 waives his or her right to appeal;
- 31 (C) Restoration orders may be issued when a cooperative agreement is not reached to resolve
32 the violation. Restoration orders are appealable;
- 33 (D) Revocation or suspension of an authorization, as per OAR 141-085-0780

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

3 (F) Notice of violations may be issued to establish that a violation has occurred. Notice of
4 violations are appealable.

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

9 (4) Request for Hearing. If a person subject to a restoration order under this section files a
10 timely request for hearing, the Department will hold a contested case hearing before the Office
11 of Administrative Hearings according to the applicable provisions of ORS 183.310 through
12 183.550. If the person fails to request a hearing, a final order will be issued upon a prima facie
13 case made on the record of the agency.

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

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

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

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

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

35 **History:**

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

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

1 DSL 1-2011, f. & cert. ef. 3-1-11
 2 DSL 1-2009, f. 2-13-09, cert. ef. 3-1-09

3 [141-085-0780](#)

4 **Revoking or Suspending an Authorization; Allowing Corrective Action**

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

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

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

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

16 (b) The Notice will include the following information:

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

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

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

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

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

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

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

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

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

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

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

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

9 **History:**

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

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

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

13 [141-085-0785](#)

14 **Civil Penalties; Appeals**

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

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

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

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

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

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

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

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

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

- 1 (5) Appeals Procedures. Procedures for requesting an appeal on a civil penalty are as set forth
2 in OAR 141-085-0775(4) and (6).
- 3 (6) Calculating the Civil Penalty. The amount of civil penalty (F), as expressed in U.S. currency
4 dollars, will be determined by the Department using the following formula: $F = BPCI$:
- 5 (a) "B" is the base fine factor of \$1,000;
- 6 (b) "P" is the prior knowledge factor to be determined as follows:
- 7 (A) A value of 1 will be applied if the alleged violator was unaware of the Removal-Fill Law at
8 the time of the alleged violation;
- 9 (B) A value of 2 will be applied if the alleged violator was aware of the Removal-Fill Law at the
10 time of the alleged violation and in cases of permit non-compliance; or
- 11 (C) A value of 5 will be applied if the alleged violator had a previous violation. A previous
12 violation exists, if there was an adjudication (either in court or administrative hearing), or the
13 violator failed to appeal an enforcement order (and a final order was issued), or the violator
14 signed a consent agreement. This value will not be imposed if the previous violation occurred
15 more than five years prior to the current incident.
- 16 (c) The cooperation value ("C") will be determined by the Department after reviewing the past
17 history of the person in taking all feasible steps or procedures necessary or appropriate to
18 correct the violation for which the penalty is being assessed. The value will be assessed as
19 follows:
- 20 (A) A value of 1 will be applied when the person responds to communications from the
21 Department, supplies information requested by the Department, permits access to the site to
22 conduct site investigations and/or complies with restoration as requested by the Department;
23 or
- 24 (B) A value of 3 will be applied when the person:
- 25 (i) Has ceased to be responsive to communications from the Department;
- 26 (ii) Has ceased to be cooperative in providing information as requested by the Department; or
- 27 (iii) Does not cease the activity alleged to constitute a violation or threatened violation after
28 receiving verbal or written notification from the Department.
- 29 (d) "I" is the water resource adverse effect factor to be determined as follows:
- 30 (A) A value of 1 will be applied if the damage to the resource is minimal and/or the resource is
31 expected to naturally self-restore within one year; or
- 32 (B) A value of 3 will be applied if the adverse impacts are significant and/or not expected to
33 naturally self-restore within one year. In the case of permit non-compliance, a value of 3 will be

1 applied if failure to correct the deficiency could result in reasonably expected adverse impacts
2 to waters of this state or a deficiency in the obligation to provide mitigation.

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

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

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

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

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

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

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

32 **History:**

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

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

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