

Department of State Lands

Division 141-085

**DRAFT (7/10/2008)**  
**Administrative Rules**  
**Governing the Issuance**  
**& Enforcement of**  
**Removal-Fill Authorizations**  
**Within Waters of Oregon,**  
**Including Wetlands**

**Table of Contents**

Division 85

**GENERAL**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11 141-085-0001 General ..... 1

**POLICY**

12  
13  
14 141-085-0002 Policy ..... 2

**DEFINITIONS**

15  
16  
17 141-085-0003 Definitions ..... 4

**REMOVAL-FILL JURISDICTION**

18  
19  
20 141-085-0004 Removal-Fill Jurisdiction by Type of Water ..... 12

21 141-085-0005 Removal-Fill Jurisdiction by Volume of Material ..... 15

22 141-085-0006 Measuring and Calculating Volume of Removal and Fill ..... 15

**EXEMPTIONS**

23  
24  
25 141-085-0007 Exemptions for Certain Activities and Structures ..... 17

1	141-085-0008	Exemptions for Agricultural Activities .....	19
2			
3		<b>PERMITS AND AUTHORIZATIONS</b>	
4	141-085-0009	Types of Authorizations.....	22
5	141-085-0010	Fees; Amounts and Disposition.....	22
6	141-085-0011	Application Requirements for Individual Removal-Fill Permits .....	23
7	141-085-0012	Individual Removal-Fill Permits Application Review Process .....	26
8	141-085-0013	Public Review Process for Individual Removal-Fill	
9		Permit Applications .....	27
10	141-085-0014	Review Standards for Individual Removal-Fill Permit Decisions ...	29
11	141-085-0015	Alternatives Analysis .....	31
12	141-085-0016	Emergency Authorizations .....	32
13	141-08500017	Permit Appeals.....	34
14	141-085-0018	Discovery in Contested Cases .....	36
15	141-085-0019	Permit Conditions, Permit Expiration Dates and Permit Transfer..	36
16	141-085-0020	Renewal and Extension of Individual Removal-Fill Permits .....	38
17	141-085-0021	Permit Requirements and Interagency Coordination for	
18		Department of Environmental Quality Approved Remedial	
19		Action, Corrections Facilities, Solid Waste Land Fills and Energy	
20		Facilities .....	39
21	141-085-0022	Expedited Process for Industrial or Traded Sector Sites.....	40
22	141-085-0023	General Authorizations (GA); Standards and Criteria; Process	
23		for Establishing.....	41
24	141-085-0024	General Permits; Standards and Criteria;	
25		Process for Establishing.....	42
26			
27		<b>COMPENSATORY MITIGATION</b>	
28	141-085-0025	Compensatory Wetland Mitigation (CWM); Applicability and	
29		Priorities .....	45
30	141-085-0026	CWM Site Selection .....	46
31	141-085-0027	Functions and Services Assessment .....	48
32	141-085-0028	Additional Requirements for CWM .....	49

1	141-085-0029	Administrative Protection for CWM Sites .....	53
2	141-085-0030	Financial Security for CWM Sites.....	54
3	141-085-0031	Requirements for All CWM.....	56
4	141-085-0032	Monitoring Requirements for CWM.....	61
5	141-085-0033	Mitigation for Temporary Impacts.....	63
6	141-085-0034	Wetland Mitigation Banking.....	63
7	141-085-0035	Process for Establishing a Mitigation Bank .....	64
8	141-085-0036	Establishment of Mitigation Credits.....	67
9	141-085-0037	Use and Sale of Mitigation Credits.....	68
10	141-085-0038	Removal-Fill Permits for Mitigation Banks.....	69
11	141-085-0039	Records; Reporting .....	70
12	141-085-0040	Payments; Expenditure of Funds for Payment In-Lieu	
13		Mitigation.....	70
14	141-085-0041	Advance Mitigation; Standard Path.....	71
15	141-085-0042	Pilot Program for Advance Mitigation; Alternate Path .....	72
16	141-085-0043	Compensatory Mitigation (CM).....	73
17			
18		<b>PERMIT VIOLATIONS; COMPLAINTS AND UNAUTHORIZED ACTIVITIES</b>	
19	141-085-0044	Complaints and Investigations .....	75
20	141-085-0045	Enforcement Actions and Procedures; Appeals.....	75
21	141-085-0046	Revoking or Suspending an Authorization; Allowing	
22		Corrective Action.....	77
23	141-085-0047	Civil Penalties; Appeals.....	78
24			
25		<b>FEDERAL LAND AND WATER CONSERVATION FUNDS</b>	
26	141-085-0048	Receipt and Application of Federal Land and	
27		Water Conservation Funds .....	82
28			
29			
30			

1 Department of State Lands

2  
3  
4 Division 141-085

5  
6  
7 *PUBLIC OUTREACH DRAFT (7/10/2008)*

8  
9  
10 Administrative Rules  
11 Governing the Issuance  
12 & Enforcement of  
13 Removal-Fill Authorizations  
14 Within Waters of Oregon,  
15 Including Wetlands

16  
17  
18  
19 GENERAL

20  
21 **141-085-0001**

22  
23 **General**

24  
25 (1) **Applicability.** Unless the context requires otherwise, the definitions contained in this  
26 division are generally applicable throughout OAR Chapter 141. The definition in the  
27 specific division controls the usage of the word in that Division.

28  
29 (2) **Headings and Fonts.** Where headings, special fonts or double-spacing are used,  
30 they are for the convenience of the user only and have no substantive effect.  
31

1  
2 **POLICY**  
3

4 **141-085-0002**  
5

6 **Policy**  
7

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

10  
11 (a) Interfere with the paramount policy of this state to preserve the use of its waters for  
12 navigation, fishing and public recreation uses; or  
13

14 (b) Be inconsistent with the protection, conservation and best use of the water resources  
15 of this state.  
16

17 (2) **Department Will Use Fair, Predictable Approach.** To the extent possible, the  
18 Department will administer these rules to ensure persons receive timely, fair, consistent  
19 and predictable treatment including timely communication and consistent application and  
20 interpretation of these rules and the removal-fill law.  
21

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

27 (4) **Department Will Recognize Multiple Interests.** The Department will recognize the  
28 interests of adjacent landowners, tribal governments, public interest groups, watershed  
29 councils, state and federal agencies, and local government land use planning agencies.  
30

31 (5) **Department's General Policies on Wetland Regulation.** In regard to the regulation  
32 of wetlands, the Department will administer these rules to ensure that:  
33

34 (a) The protection, conservation and best use of this state's wetland resources, including  
35 their functions and services, are promoted through the integration and coordination of the  
36 local comprehensive plans and the Department permitting process; and  
37

38 (b) A stable wetland resource base is maintained through avoidance of reasonably  
39 expected adverse effects, and by compensating for unavoidable wetland impacts.  
40

- 1 **(6) Department's General Policies on Restoration and Conservation Programs. The**  
2 **restoration of wetlands and non-wetland waters through voluntary restoration and**  
3 **conservation programs is encouraged and facilitated.**  
4
- 5 **(7) The Department Will Recognize Other Programs.** The Department will administer  
6 the removal-fill program in a manner consistent with and in support of the following:  
7
- 8 (a) The Oregon Plan as described in ORS 541.405;  
9
  - 10 (b) The applicable Oregon Wetlands Benchmark;  
11
  - 12 (c) The Oregon Coastal Management Program;  
13
  - 14 (d) The State Agency Coordination Program; and  
15
  - 16 (e) The State Scenic Waterway Act.  
17

1  
2 **DEFINITIONS**  
3

4 **141-085-0003**

5  
6 **Definitions**  
7

8 The following definitions will be used in addition to those in ORS 196.600, 196.800,  
9 196.815, 196.830, 196.860 and 196.905:

10  
11 (1) "**Applicant**" means a landowner or person authorized by a landowner seeking an  
12 authorization to conduct a project under ORS 196.800 to 196.990 and who has authority  
13 and responsibility to fully execute the terms and conditions of the authorization as  
14 evidenced by their signature on the application

15  
16 (2) "**Aquatic Life and Habitats**" means the aquatic environment including all fish,  
17 wildlife, amphibians, plant-species and other biota dependent upon environments created  
18 and supported by the waters of this state. Aquatic life includes communities and species  
19 populations that are adapted to aquatic habitats for at least a portion of their life.

20  
21 (3) "**Artificially Created**" means waters or wetlands constructed entirely from upland.

22  
23 (4) "**Artificial Means**" means the purposeful movement or placement of material by  
24 humans and/or their machines.

25  
26 (5) "**Authorization**" means an individual permit, general authorization, general permit or  
27 emergency authorization.

28  
29 (6) "**Bankfull Stage**" means the two-year recurrence interval flood elevation.

30  
31 (7) "**Basin**" means one of the eighteen (18) Oregon drainage basins identified by the  
32 Oregon Water Resources Department as shown on maps published by that agency.

33  
34 (8) "**Beds or Banks**" means the physical container of the waters of this state, bounded  
35 on freshwater bodies by the ordinary high water line or bankfull stage, and in tidal bays  
36 and estuaries by the limits of the highest measured tide. The "bed" is typically the  
37 horizontal section and includes non-vegetated gravel bars. The "bank" is typically the  
38 vertical portion.

39  
40 (9) "**Buffer**" means an upland or wetland area immediately adjacent to or surrounding a  
41 wetland or other water that is set aside to protect the water from conflicting adjacent land  
42 uses and to support ecological functions.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41

(10) “**Channel**” means a natural (perennial or intermittent stream) or human made (e.g., drainage ditch) waterway of perceptible extent that periodically or continuously contains moving water and has a defined bed and banks that serve to confine the water.

(11) “**Coastal Zone**” means the area lying between the Washington border on the north to the California border on the south, bounded on the west by the extent of this state’s jurisdiction as recognized by federal law, and the east by the crest of the coastal mountain range, excepting:

(a) The Umpqua River basin, where the coastal zone extends to Scottsburg;

(b) The Rogue River basin, where the coastal zone extends to Agness; and

(c) The Columbia River basin, where the coastal zone extends to the downstream end of Puget Island.

(12) “**Compensatory Mitigation (CM)**” means activities conducted to replace non-wetland water resources to compensate for the reasonably expected adverse effects of project development or to resolve violations.

(13) “**Compensatory Wetland Mitigation (CWM)**” means activities conducted to create, restore, enhance or protect wetland functions and services to compensate for the reasonably expected adverse effects of project development or to resolve violations.

(14) “**Comprehensive Plan**” means a generalized, coordinated land use map and associated policies of the governing body of a local government.

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

(16) “**Certified Credit**” as used in compensatory wetland mitigation banking, results when the wetland mitigation bank has met or exceeded the performance standards established in its Mitigation Bank Instrument. Once credits are certified, they are available for sale or exchange.

(17) “**Day of Violation**” means the first day and each day thereafter on which there is a failure to comply with any provision of the removal-fill law, rules adopted by the Department, or any order or authorization issued by the Department.



- 1 (18) **“Deep Ripping, Tiling and Moling”** refer to certain specific mechanical methods  
2 used to promote subsurface drainage of agricultural wetlands.  
3
- 4 (19) **“Degraded Wetland”** refers to a wetland with diminished functions and services  
5 resulting from hydrologic manipulation (such as diking, draining and filling) that  
6 demonstrably interferes with the normal functioning of wetland processes.  
7
- 8 (20) **“Department”** means the Oregon Department of State Lands and the Director or  
9 designee.  
10
- 11 (21) **“Ecologically Preferable”** means having a higher likelihood of replacing functions  
12 and services or of improving water resources of this state.  
13
- 14 (22) **“Emergency”** means natural or human-caused circumstances that pose an  
15 immediate threat to public health, safety or substantial property including crop or  
16 farmland.  
17
- 18 (23) **“Erosion-Flood Repair”** means riprap or any other work necessary to preserve  
19 existing facilities and land from flood and high streamflows.  
20
- 21 (24) **“Essential Indigenous Anadromous Salmonid Habitat (ESH)”** means the habitat  
22 that is necessary to prevent the depletion of indigenous anadromous salmonid species  
23 during their life history stages of spawning and rearing.  
24
- 25 (25) **“Estuary”** means: (a) For waters other than the Columbia River, the body of water  
26 from the ocean to the head of tidewater that is partially enclosed by land and within which  
27 salt water is usually diluted by fresh water from the land, including all associated  
28 estuarine waters, tidelands, tidal marshes and submerged lands; and (b) For the  
29 Columbia River, all waters from the mouth of the river up to the western edge of Puget  
30 Island, including all associated estuarine waters, tidelands, tidal marshes and submerged  
31 lands.  
32
- 33 (26) **“Extreme Low Tide”** means the lowest estimated tide that can occur. The elevation  
34 of Extreme Low Tide is established at -3.5 feet Mean Lower Low Water.  
35
- 36 (27) **“Fill”** means the total of deposits by artificial means equal to or exceeding 50 cubic  
37 yards or more of material at one location in any waters of this state.  
38
- 39 (28) **“Forestland”** means the same as used in the Forest Practices Act and rules (ORS  
40 527.610 to 527.992 as land which is used for the commercial growing and harvesting of  
41 forest tree species, regardless of how the land is zoned or taxed or how any state or local  
42 statutes, ordinances, rules or regulations are applied.

- 1  
2 (29) **“Functions and Services”** are those ecological characteristics or processes  
3 associated with a wetland and the societal benefits derived from those characteristics.  
4 These ecological characteristics are “functions,” whereas the associated societal benefits  
5 are “services.”  
6
- 7 (30) **“Geographic Region”** for the purposes of the payment in lieu option or a  
8 compensatory wetland mitigation plan, means one of the 18 Oregon drainage basins  
9 identified by the Oregon Water Resources Department (WRD) as shown on maps  
10 published by WRD.  
11
- 12 (31) **“Highest Measured Tide”** means the highest tide projected from actual  
13 observations of a tide staff within an estuary or tidal bay (see OAR 141-085-XXXX).  
14
- 15 (32) **“Hydrogeomorphic Method”** or **“HGM”** is a method of wetland classification and  
16 functional assessment based on a wetland’s location in the landscape and the sources  
17 and duration of water flow.  
18
- 19 (33) **“In-lieu Fee”** means the federally approved compensatory mitigation and  
20 compensatory wetland mitigation program used to compensate for reasonably expected  
21 adverse effects of project development on waters of the United States and waters of this  
22 state.  
23
- 24 (34) **“Interagency Review Team (IRT)”** is an advisory committee to the Department on  
25 wetland mitigation bank projects and in-lieu fee projects.  
26
- 27 (35) **“Legally Protected Interest”** means a claim, right, share, or other entitlement that  
28 is protected under state or federal law. A legally protected interest includes, but is not  
29 limited to, an interest in property.  
30
- 31 (36) **“Listed Species”** means any species listed as endangered or threatened under the  
32 federal Endangered Species Act (ESA) and/or any species listed as endangered or  
33 threatened by the State of Oregon.  
34
- 35 (37) **“Location”** means project location.  
36
- 37 (38) **“Maintenance”** as used in maintenance of structures, means the periodic repair or  
38 upkeep of a structure in order to sustain its original extent and use.  
39
- 40 (39) **“Mitigation Bank Instrument (MBI)”** means the legally binding and enforceable  
41 agreement between the Department and a mitigation bank sponsor that formally

1 establishes the wetland mitigation bank and stipulates the terms and conditions of its  
2 construction, operation, and long-term management.

3  
4 (40) "**Mitigation Bank Prospectus**" or "**Prospectus**" is a preliminary document  
5 prepared by a mitigation bank sponsor describing a proposed bank.

6  
7 (41) "**Mitigation Bank Sponsor**" or "**Sponsor**" is a person who is proposing, or has  
8 established and/or is maintaining a mitigation bank. The sponsor is the entity that  
9 assumes all legal responsibilities for carrying out the terms of the MBI unless otherwise  
10 specified in the MBI.

11  
12 (42) "**Natural Waterways**" means waterways created naturally by geological and  
13 hydrological processes, waterways that would be natural but for human-caused  
14 disturbances (e.g., channelized or culverted streams, and waters behind dams, weirs or  
15 other structures as measured to the maximum pool or top of the spillway, whichever is  
16 lower), and that otherwise meet the definition of waters of this state.

17  
18 (43) "**Navigational Servitude**" means activities of the federal government that directly  
19 result in the construction or maintenance of congressionally authorized navigation  
20 channels.

21  
22 (44) "**Non-Motorized Methods or Activities**" are those removal-fill activities within  
23 Essential Indigenous Anadromous Salmonid Habitat that are completed by hand and are  
24 not powered by internal combustion, hydraulics, pneumatics, or electricity. Hand-held  
25 tools such as wheelbarrows, shovels, rakes, hammers, pry bars and cable winches are  
26 examples of common non-motorized methods.

27  
28 (45) "**Non-Water Dependent Uses**" means uses that do not require location on or near  
29 a waterway to fulfill their basic purpose.

30  
31 (46) "**Non-Wetland Waters**" means waters of this state other than wetlands, including  
32 tidal and non-tidal bays, intermittent streams, constantly flowing streams and lakes.

33  
34 (47) "**Office of Administrative Hearings**" means the state agency that provides  
35 Administrative Law Judges to conduct contested case proceedings.

36  
37 (48) "**Ordinary High Water Line**" (OHWL) means the line on the bank or shore to which  
38 the high water ordinarily rises annually in season. The OHWL excludes exceptionally high  
39 water levels caused by large flood events (e.g., 100 year events).

40  
41 (49) "**Payment In-Lieu Mitigation**" means compensatory wetland mitigation for waters  
42 of this state that is performed using cash paid to the Department or by agreement of the

1 Department to an approved third party. The payment in-lieu program is not approved to  
2 compensate for impacts to waters of the United States.

3  
4 (50) **“Perennial Stream”** means a stream that has continuous flow in parts of its bed all  
5 year round during years of normal rainfall.

6  
7 (51) **“Plowing”** means all forms of tillage, and similar physical means for the breaking  
8 up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing  
9 does not include the deep ripping, or redistribution of materials in a manner that changes  
10 any waters of this state to upland.

11  
12 (52) **“Practicable”** means capable of being accomplished after taking into consideration  
13 cost, existing technology, and logistics with respect to the overall project purpose.

14  
15 (53) **“Prior Converted Cropland”** means land that the Natural Resource Conservation  
16 Service of the United States Department of Agriculture, or its successor agency, certifies  
17 as prior converted cropland.

18  
19 (54) **“Project”** means the primary development or use intended to be accomplished for  
20 which the fill or removal is proposed (e.g., retail shopping complex, residential  
21 development, stream bank stabilization or fish habitat enhancement). Projects consist of  
22 integrally related component parts that would have no independent utility were those  
23 individual parts to be constructed separately. Projects may include more than one  
24 removal-fill site.

25  
26 (55) **“Project Site”** means the geographic area where the project is being proposed or  
27 considered.

28  
29 (56) **“Prospecting”** means searching or exploring for samples of gold, silver or other  
30 precious minerals from small quantities of aggregate, using non-motorized methods such  
31 as gold panning.

32  
33 (57) **“Public Use”** means a publicly owned project or a privately owned project that is  
34 available for use by the public.

35  
36 (58) **“Push-Up Dam”** is a berm of streambed material that is excavated or bulldozed  
37 (i.e., pushed-up) from within the streambed itself and positioned in the stream in such a  
38 way as to hold or divert water in an active flowing stream. The push-up dam may extend  
39 part way or all the way across the stream. Push-up dams are most frequently used to  
40 divert water for irrigation purposes associated with agricultural production including  
41 livestock watering. Push-up dams are re-constructed each water use season; high water

1 usually flattens or breaches them or equipment is used to breach or flatten them at the  
2 close of the water use season.

3  
4 (59) “**Reasonably Expected Adverse Effect**” and “**Adverse Impact**” mean the actual,  
5 direct or indirect, reasonably expected or predictable results of project development upon  
6 waters of this state including water resources, navigation, fishing and public recreation  
7 uses.

8  
9 (60) “**Recreational and Small Scale Placer Mining**” includes, but is not limited to, the  
10 use of motorized surface dredges having an intake nozzle with an inside diameter not  
11 exceeding four (4) inches, and a muffler meeting or exceeding factory-installed noise  
12 reduction standards. To be considered recreational, suction dredging must remove, fill or  
13 alter less than 25 cubic yards of material annually from the bed of a stream designated as  
14 Essential Salmon Habitat. Motorized placer mining exceeding this threshold is not  
15 considered to be recreational or small scale, and requires an individual permit from the  
16 Department.

17  
18 (61) “**Reference Site**” means a site or sites that represent the desired future  
19 characteristics and condition to be achieved by a compensatory mitigation plan.

20  
21 (62) “**Removal**” means the taking or movement of 50 cubic yards or more of material (or  
22 its equivalent weight in tons) in any waters of this state in any calendar year; or the  
23 movement by artificial means of an equivalent amount of material, including channel  
24 relocation. However, in designated Essential Indigenous Anadromous Salmonid Habitat  
25 areas, compensatory wetland mitigation and compensatory mitigation sites and in  
26 designated State Scenic Waterways, the removal or movement of any amount of material  
27 meets this definition.

28  
29 (63) “**Removal-Fill Site**” means the specific point where a person removes material from  
30 the bed or banks or fills any waters of this state. A project may include more than one  
31 removal-fill site.

32  
33 (64) “**Serviceable**” means capable of being used for its intended purpose.

34  
35 (65) “**State Scenic Waterway (SSW)**” means a river or segment of river or lake that has  
36 been designated as such in accordance with Oregon Scenic Waterway Law (ORS  
37 390.005 to 390.995).

38  
39 (66) “**Substantial Fill**” in an estuary is any amount of fill regulated by the Department  
40 that would result in reasonably expected adverse effects on navigation, fishing and/or  
41 public recreation uses.

- 1 (67) **“Temporary Impacts”** means those impacts that do not result in the permanent loss  
2 of function and/or area, and are rectified within twelve (12) months. .  
3
- 4 (68) **“Temporal Loss”** of the functions and services provided by waters of this state  
5 means the loss that occurs between the time of their destruction or degradation and the  
6 time of their replacement.  
7
- 8 (69) **“Tidal waters”** means habitat located between the highest measured tide and  
9 extreme low tide (or to the elevation of any eelgrass beds which is lower), that is flooded  
10 with surface water at least annually, during most years.  
11
- 12 (70) **"Violation"** means conducting removal-fill activities in any waters of this state  
13 without an authorization or order, or in a manner contrary to the conditions set out in an  
14 authorization or order issued by the Department.  
15
- 16 (71) **"Water Quality"** means the measure of physical, chemical, and biological  
17 characteristics of water as compared to Oregon's water quality standards and criteria set  
18 out in rules of the Oregon Department of Environmental Quality and applicable state law.  
19
- 20 (72) **“Wetland Creation”** means to convert an area that has never been a wetland to a  
21 wetland.  
22
- 23 (73) **"Wetland Enhancement"** means increasing the condition, functions and services of  
24 an existing degraded wetland.  
25
- 26 (74) **“Wetland Hydrology”** means the permanent or periodic inundation or prolonged  
27 saturation sufficient to create anaerobic conditions in the soil and support hydrophytes.  
28
- 29 (75) **"Wetland Restoration"** means to reestablish a former wetland, sufficient to meet  
30 wetland criteria.  
31  
32

1  
2 **REMOVAL-FILL JURISDICTION**  
3

4 **141-085-0004**  
5

6 **Removal-Fill Jurisdiction by Type of Water**  
7

8 (1) **Pacific Ocean.** The Pacific Ocean is jurisdictional from the line of extreme low tide  
9 seaward to the limits of the territorial sea.  
10

11 (2) **Tidal Estuaries, Tidal Bays and Tidal Rivers.** Estuaries, tidal bays and rivers below  
12 the head of tide are jurisdictional to the elevation of the highest measured tide, or to the  
13 upper edge of wetland, whichever is higher. The head of tide is the farthest point  
14 upstream where a river is affected by tidal fluctuations. The highest measured tide  
15 elevation on a parcel may be determined by a land survey referenced to the Tidal  
16 Elevations in Oregon Estuaries tidal datum tables, or based on actual tide gauge  
17 measurements during a wintertime spring tide. In lieu of surveyed elevations, subject to  
18 approval by the Department, highest measured tide elevation may be based upon  
19 observation of the highest of the field indicators listed in (a) through (f) below. These field  
20 indicators are often not observable within the upper riverine portion of an estuary, in  
21 which case a land survey is required:  
22

23 (a) The uppermost drift or wrack (or debris) line containing small driftwood, mats of  
24 filamentous algae (algae that form long visible chains, threads, or filaments that  
25 intertwine forming a mat), seaweeds, seagrasses, pieces of bulrush or other emergent  
26 vascular plants, styrofoam or other buoyant plastic debris, bivalve shells, crab molts, or  
27 other aquatic invertebrate remains; or  
28

29 (b) The uppermost water mark line on an eroding bank; or  
30

31 (c) The uppermost water mark line (e.g., discoloration; sediment, barnacles, snails, or  
32 algae growth) visible on a hard shoreline or bank consisting of bedrock, boulders,  
33 cobbles, riprap or a seawall; or  
34

35 (d) The uppermost intertidal zone inhabited by a community of barnacles, limpets, and  
36 littorine snails along shorelines composed of bedrock, riprap, boulders, and/or cobble; or  
37

38 (e) The uppermost tidal marsh/upland boundary, as indicated by a dominant plant  
39 community characteristic of saltwater, brackish, or freshwater tidal plant communities  
40 (e.g., as described by Christy and Brophy, 2007. *Estuarine and Freshwater Tidal Plant*  
41 *Associations in Oregon*. Oregon Natural Heritage Information Center, Oregon State

- 1 University) changing to a dominant plant community typical of uplands (i.e., the line of  
2 non-aquatic vegetation); or  
3
- 4 (f) The intertidal/upland boundary along sandy shores as indicated by the appearance of  
5 a distinct dune plant community.  
6
- 7 **(3) Non-Tidal Waters, Including, Rivers, Intermittent and Perennial Streams, Lakes  
8 and Ponds.** These waters are jurisdictional to the ordinary high water line (OHWL) or,  
9 absent readily identifiable field indicators, to the bankfull stage. OHWL is indicated in the  
10 field by the following physical characteristics:  
11
- 12 (a) Clear, natural line impressed on the shore;  
13
- 14 (b) Change in vegetation from riparian (e.g., willows) to upland (e.g., oak, fir) dominated;  
15
- 16 (c) Textural change of depositional sediment or changes in the character of the soil (e.g.  
17 from sand, sand and cobble, cobble and gravel to upland soils);  
18
- 19 (d) Elevation below which no fine debris (needles, leaves, cones, seeds) occurs;  
20
- 21 (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or  
22
- 23 (f) Other appropriate means that consider the characteristics of the surrounding areas.  
24
- 25 **(4) Wetlands.** Wetlands are jurisdictional within the wetland boundary.  
26
- 27 **(5) Seeps and Springs.** Jurisdiction over seeps and springs extends to the ordinary high  
28 water line or, absent readily identifiable field indicators, to the line of upland vegetation.  
29
- 30 **(6) Reservoirs.** Jurisdiction over reservoirs extends to the normal operating pool level or  
31 the upper edge of adjacent wetland, whichever is higher.  
32
- 33 **(7) Artificially Created Wetlands and Ponds.** These waters are jurisdictional if they  
34 meet one of the following criteria:  
35
- 36 (a) They are not created entirely from upland;  
37
- 38 (b) They are identified in an authorization as a mitigation site;  
39
- 40 (c) They are equal to or greater than one acre unless constructed for the purpose of:  
41
- 42 (A) Wastewater treatment;



- 1  
2 (B) Settling of sediment for stormwater detention;  
3  
4 (C) Farm or stock watering;  
5  
6 (D) Fire suppression;  
7  
8 (E) Cooling water;  
9  
10 (F) Surface mining, where the site is managed for interim wetlands use or not protected  
11 as a significant wetland in the comprehensive plan;  
12  
13 (G) Log storage; or  
14  
15 (H) Aesthetic purposes, including golf course features.  
16  
17 **(8) Certain Artificially Created Channels or Ditches.** Portions of artificially created  
18 channels or ditches are jurisdictional if they:  
19  
20 (a) Are adjacent to a wetland, or  
21  
22 (b) Contain food or game fish.  
23  
24 **(9) Certain Irrigation Canals and Irrigation Ditches.** Existing irrigation canals and  
25 ditches that meet the following tests are not jurisdictional:  
26  
27 (a) Are operated and maintained for the primary purpose of conveying water for irrigation;  
28 and  
29  
30 (b) Are dewatered during the non-irrigation season except for water incidentally retained  
31 in isolated low areas of the canal/ditch.  
32  
33 **(10) Certain Roadside Ditches and Ditches Alongside Railroads.** Certain drainage  
34 ditches alongside roads and railroads are not jurisdictional if they are 10 feet wide  
35 (average) or less at OHWL and:  
36  
37 (a) Are not adjacent to wetlands, or  
38  
39 (b) Do not contain food or game fish.  
40  
41  
42

1 **141-085-0005**

2  
3 **Removal-Fill Jurisdiction by Volume of Material**

4  
5 The following criteria are used to determine jurisdictional volume thresholds that trigger  
6 the requirement for an authorization.

7  
8 (1) **Oregon State Scenic Waterways (SSWs).** In SSWs, the threshold volume is any  
9 amount greater than zero, except for prospecting.

10  
11 (2) **Streams Designated as Essential Indigenous Anadromous Salmonid Habitat**  
12 **(ESH).** The threshold volume is any amount greater than zero, except for prospecting.

13  
14 (3) **Compensatory Mitigation Sites.** The threshold volume is any amount greater than  
15 zero for compensatory mitigation sites referenced in an authorization.

16  
17 (4) **All Waters of This State.**

18  
19 (a) For fill activities, any combination of either organic or inorganic material deposited by  
20 artificial means at any one location in waters of this state equal to or exceeding 50 cubic  
21 yards; and

22  
23 (b) For removal activities, the taking or movement by artificial means of more than 50  
24 cubic yards of inorganic material or the equivalent weight in tons in any calendar year.

25  
26  
27  
28 **141-085-0006**

29  
30 **Measuring and Calculating Volume of Removal and Fill**

31  
32 (1) **Calculating Removal Volume.** Removal volume for all waters includes the full extent  
33 of the excavation within the jurisdictional area. Removal also includes moving material  
34 within the jurisdictional area.

35  
36 (2) **Calculating Fill Volume.** For waters other than wetlands, fill volume is measured to  
37 the ordinary high water line (OHWL). For wetlands, fill volume is measured to the height  
38 of the fill, excluding buildings.

39  
40 (3) **Calculating Volume for Channel Relocation.** When calculating the volume for  
41 channel relocation the threshold is met considering either the volume of material removed  
42 to construct the new channel or the volume needed to fill the old channel to the OHWL

1  
2 (4) **Projects that Involve Both Fill and Removal.** For projects that involve both fill and  
3 removal, the combined volumes are used to determine whether a permit is required.  
4  
5

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41

## EXEMPTIONS

**141-085-0007**

### **Exemptions for Certain Activities and Structures**

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

(1) **Forest Management Practices.** Forest management practices are activities within the beds and banks of non-navigable waterways and wetlands on forestlands that are directly connected with a forest management practice and are referenced in a forest management plan. This exemption does not apply to removal-fill activities associated with land use conversion to a non-forest use. Forest management practices must be related to commercial growing or harvesting of forest tree species, and include, but are not limited to:

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

(2) **Fills for Construction, Operation and Maintenance of Certain Dams and Water Diversion Structures.** Fill for dams or other water diversions for which valid authorizations or certificates have been or must be issued by the Oregon Water Resources Department (WRD) under ORS Chapters 537 or 539 (water appropriation) and for which preliminary authorizations or licenses have been or must be issued under ORS 543 or 543A (hydropower), are exempt.

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

(4) **Maintenance or Reconstruction of Certain Water Related Structures.**

Maintenance or reconstruction of certain structures such as dikes, dams, levees, groins,

1 riprap, tidegates, drainage ditches, irrigation ditches, irrigation structures, and tile drain  
2 systems is exempt, provided that:

3  
4 (a) The structure was serviceable within the past five years;

5  
6 (b) Volumes and area of impact from structure maintenance must be limited to the  
7 minimum necessary to allow the structure to function as originally designed and for its  
8 original purpose, but in no case must the impact encroach into jurisdictional areas by  
9 more than an additional 20 percent;

10  
11 (c) Maintenance is limited to the structure itself, and does not include dredging of the  
12 sediment that accumulates around the structure; and

13  
14 (d) Such maintenance or reconstruction would not significantly adversely affect wetlands  
15 and other waters of this state to a greater extent that the wetlands or waters of this state  
16 were affected as a result of the original construction of those structures.

17  
18 **(5) Maintenance Including Emergency Reconstruction of Roads and Transportation**  
19 **Structures.** Maintenance or emergency reconstruction of recently damaged parts of  
20 otherwise serviceable roads or other transportation structures, including groins and riprap  
21 protecting roads, causeways, bridge abutments or approaches, is exempt.

22  
23 **(7) Prospecting and Non-Motorized Activities within Designated Essential**  
24 **Indigenous Anadromous Salmonid Habitat (ESH) and State Scenic Waterways.** A  
25 permit is not required for prospecting or other nonmotorized activities resulting in  
26 removal-fill of less than one cubic yard of material at any one individual site and,  
27 cumulatively, not more than five cubic yards of material within a particular stream  
28 segment in a single year. Prospecting or other nonmotorized activities may be conducted  
29 only within the bed or wet perimeter of the waterway and must not occur at any site  
30 where fish eggs are present.

31  
32 **(8) Fish Passage and Fish Screening Structures in ESH.** Less than 50 cubic yards of  
33 removal-fill for the construction and maintenance of fish passage and fish screening  
34 structures is exempt, provided the project complies with the design guidelines of the  
35 Oregon Department of Fish and Wildlife. This exemption includes removal of material that  
36 inhibits fish passage or prevents fish screens from functioning properly.

37  
38 **(9) Culverts.** Culvert maintenance, repair, removal and replacement are exempt when all  
39 of the following criteria are met:

40  
41 (a) The removal-fill volume and area of impact is limited to the minimum necessary to  
42 restore the function of the culvert and provide fish passage;

1  
2 (b) If needed to provide fish passage, the removal and fill activities do not encroach into  
3 jurisdictional areas more than an additional 20 percent;

4  
5 (c) The culvert has been serviceable within the past five (5) years; and

6  
7 (d) The culvert is replaced in a manner consistent with the current design guidelines of  
8 the Oregon Department of Fish and Wildlife.

9  
10  
11  
12 **141-085-0008**

13  
14 **Exemptions for Agricultural Activities**

15  
16 (1) **Exemptions Do Not Apply to Nonfarm Uses.** The exemptions in sections (2)  
17 through (5) do not apply to any removal-fill that involves changing an area of wetlands to  
18 a nonfarm use.

19  
20 (2) **Normal Farming and Ranching Activities on Converted Wetlands.** These  
21 activities include:

22  
23 (a) Plowing;

24  
25 (b) Grazing;

26  
27 (c) Seeding;

28  
29 (d) Cultivating;

30  
31 (e) Conventional crop rotation;

32  
33 (f) Harvesting for the production of food and fiber;

34  
35 (g) Upland soil and water conservation practices; and

36  
37 (h) Reestablishment of crops under federal conservation reserve program provisions.

38  
39 (3) **Certain Activities Conducted on Exclusive Farm Use (EFU) Zoned Land.**

40 The following activities on EFU land as designated in the city or county comprehensive  
41 plan are exempt:

- 1 (a) Drainage or maintenance of farm or stock ponds located on a working farm or ranch  
2 that were created by human activity and are used predominately for agricultural  
3 purposes;  
4
- 5 (b) Maintenance of existing farm roads, provided the new excavation and embankment of  
6 the roadbed may encroach into wetlands by no more than an additional 20 percent;  
7
- 8 (c) Maintenance of existing farm roads in such a manner as to not significantly affect  
9 wetlands;  
10
- 11 (d) Subsurface drainage by deep ripping, tiling or moling on converted wetlands; and  
12
- 13 (e) Any activity described as a farm use, including new farm road construction that is  
14 conducted on certified prior converted cropland, so long as agricultural management of  
15 the land has not been abandoned for five or more years.  
16
- 17 **(4) Activities Customarily Associated with Agriculture in ESH.** These are activities  
18 that are commonly and usually associated with the raising of livestock or the growing of  
19 crops in Oregon. Removal-fill covered by this exemption must not exceed 50 cubic yards  
20 of material, and includes, but is not limited to, all the activities covered in this section of  
21 the rule, including push-up dams. In addition, this exemption extends to the removal  
22 and/or disposal of material resulting from maintenance activities as set forth in this  
23 section of the rules.  
24
- 25 **(5) Push-Up Dams.**  
26
- 27 (a) Department-authorized push-up dams greater than 50 cubic yards can continue to be  
28 maintained indefinitely during the irrigation season and reconstructed each successive  
29 season provided the work is done in compliance with all original permit conditions and the  
30 most recent Oregon Department of Fish and Wildlife fish passage design guidelines. In  
31 the event of conflicts with the original permit conditions, the most recent fish passage  
32 design guidelines must be controlling.  
33
- 34 (b) Push-up dams that were built prior to September 13, 1967 are exempt if they meet the  
35 following tests:  
36
- 37 (A) Reconstructed, serviceable and used within the past five years; and  
38
- 39 (B) Have the same effect as when first constructed (i.e., size and location); and  
40
- 41 (C) Are operated in a manner consistent with the water right certificate and ORS 540.510  
42 (5).

1  
2 (c) Push-up dams less than 50 cubic yards used for agricultural purposes in Essential  
3 Indigenous Anadromous Salmonid Habitat are exempt.  
4

5 (6) **Additional Exemptions for Certain Structures.** In addition to the special agricultural  
6 exemptions listed in this section, maintenance, or reconstruction of certain structures  
7 such as dikes, dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches,  
8 irrigation structures, and tile drain systems is exempt, provided that:  
9

10 (a) The structure was serviceable within the past five years;  
11

12 (b) Volumes and area of impact from structure maintenance must be limited to the  
13 minimum necessary to allow the structure to function as originally designed and may  
14 encroach into jurisdictional areas by no more than an additional 20 percent;  
15

16 (c) Maintenance is limited to the structure proper, and does not include dredging of the  
17 sediment that accumulates behind dams; and  
18

19 (d) Such maintenance or reconstruction would not significantly adversely affect wetlands  
20 and other waters of this state to a greater extent that the wetlands or waters of this state  
21 were affected as a result of the original construction of those structures.  
22  
23



1  
2 **PERMITS AND AUTHORIZATIONS**  
3

4 **141-085-0009**  
5

6 **Types of Authorizations**  
7

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

10  
11 (1) **Individual Permits.** Individual Removal-Fill Permits are issued for projects that do not  
12 qualify for expedited authorizations.

13  
14 (2) **Expedited Authorizations.**

15  
16 (i) General Authorizations are adopted by rule for a category of activities that have  
17 minimal impacts to waters of this state; and

18  
19 (ii) General Permits are issued for a category of activities or to a specific applicant for  
20 multiple activities or for a particular geographical area. The Department on behalf of the  
21 public may either initiate a General Permit, or the public may apply to the Department for  
22 a General Permit.

23  
24 (3) **Emergency Authorizations.** Emergency authorizations are issued in circumstances  
25 that pose an immediate threat to public health, safety or substantial property including  
26 crop or farmland.

27  
28  
29  
30 **141-085-0010**

31  
32 **Fees; Amounts and Disposition**  
33

34 (1) **Fee Amounts.** Fees are adjusted annually, on January 1 of each year. The current  
35 fee schedule is posted on the Department's website.

36  
37 (a) For individual permits and general permits, the fee includes a base fee and a volume  
38 fee. For each application that involves both removal and filling, the application fee  
39 assessed must be either for removal or filling, whichever fee is higher in accordance with  
40 the current fee schedule.  
41

1 (b) For General Authorizations, the fee amount is set forth in the rules establishing each  
2 general authorization (OAR 141-089).

3  
4 (c) For erosion-flood repair or streambank stabilization, including riprap, no fee is  
5 required.

6  
7 (d) No fee is required for voluntary habitat restoration projects directed solely at habitat  
8 improvement.

9  
10 (2) **Disposition of Fees.** Fees are due at the time of application submittal. Applications  
11 that do not include the fee are considered incomplete (see OAR 141-085-XXXX).

12  
13 (a) An applicant who receives an Emergency Authorization must, within 45 days after  
14 receiving the authorization, submit a fee to the department according to the current fee  
15 schedule.

16  
17 (b) Fees for multi-year individual permits must be paid annually no later than the  
18 anniversary date of the permit.

19  
20  
21  
22 **141-085-0011**

23  
24 **Application Requirements for Individual Removal-Fill Permits**

25  
26 (1) **Complete and Accurate Information Required.** Failure to provide complete and  
27 accurate information in the application may be grounds for denial, suspension or  
28 revocation of the authorization.

29  
30 (2) **Fee Required for a Complete Application.** A complete application must include the  
31 appropriate fee.

32  
33 (3) **Level of Detail Required May Vary.** The applicant is responsible for providing  
34 sufficient detail in the application to enable the Department to render the necessary  
35 determinations and decisions. The level of documentation will vary depending upon the  
36 complexity of the project, the degree of adverse impacts, the level of public interest and  
37 other factors.

38  
39 (4) **Required Information; All Applications.** A completed and signed application on  
40 forms provided by the Department including any maps, necessary photos and drawings,  
41 is required. The information must be entered in the appropriate blocks on the application  
42 form and include the following:

- 1  
2 (a) The applicant and property owner information including name, address and phone  
3 number.  
4  
5 (b) Project site location information including Township, Range, Quarter/Quarter Section  
6 and Tax Lot(s), latitude and longitude, street location if any, and location maps with site  
7 location indicated.  
8  
9 (c) The location of any off-site disposal or borrow sites if these sites contain waters of this  
10 state.  
11  
12 (d) Project information including a project description and the volumes and area of  
13 removal-fill within jurisdictional areas. Area of wetland impact must be expressed in acres  
14 to the nearest 0.01-acre.  
15  
16 (e) A description of the purpose and need for the project.  
17  
18 (f) Project plan views and cross-sectional views that clearly identify the jurisdictional  
19 boundaries of the waters of this state (e.g. wetland delineation or ordinary high water  
20 determination) and project details, such as footprint and impact area so that the amount  
21 and extent of the impact to jurisdictional areas can be readily determined.  
22  
23 (g) A written analysis of potential changes that the project may make to the hydrologic  
24 characteristics of the waters of this state, and an explanation of measures taken to avoid  
25 or minimize any adverse effects of those changes. Adverse effects to be considered  
26 include but are not limited to:  
27  
28 (A) Impeding, restricting or increasing flows;  
29  
30 (B) Relocating or redirecting flow; and  
31  
32 (C) Potential flooding or erosion downstream of the project.  
33  
34 (h) A description of the existing biological and physical characteristics of the water  
35 resources, along with the identification of the adverse effects of project development.  
36  
37 (i) A description of the navigation, fishing and public recreation uses, if any, at the project  
38 site.  
39  
40 (j) If the proposed activity involves a wetland, a wetland determination or delineation  
41 report that meets the requirements in OAR 141-090 is required. Wetland delineation is  
42 usually required to determine the precise acreage of wetland impact and compensatory

- 1 wetland mitigation requirements. Whenever possible, wetland determination and  
2 delineation reports must be submitted for review well in advance of the permit application.  
3 Although an approved wetland delineation report is not required for application  
4 completeness, a jurisdictional determination must be obtained prior to the permit  
5 decision.  
6
- 7 (k) If impacts to wetlands are proposed, a functions and services assessment for affected  
8 wetlands is required.  
9
- 10 (l) Any information, known by the applicant, concerning the presence of any listed  
11 species.  
12
- 13 (m) Any information, known by the applicant, concerning historical, cultural and/or  
14 archeological resources. Information may include but is not limited to a statement on the  
15 results of consultation with affected tribal governments and/or the Oregon State Historic  
16 Preservation Office.  
17
- 18 (n) The application must include an analysis of alternatives to derive the practicable  
19 alternative that has the least reasonably expected adverse effects on waters of this state.  
20 The alternatives analysis must be at a level of detail commensurate with the degree and  
21 severity of adverse effects. The applicant must provide the following:  
22
- 23 (A) A description of alternative project sites and designs that would avoid impacts to  
24 waters of this state altogether, with an explanation of why each alternative is not  
25 practicable;  
26
- 27 (B) A description of alternative project locations and designs that would minimize adverse  
28 effects to waters of this state;  
29
- 30 (C) A description of methods to repair, rehabilitate or restore the impact area to rectify the  
31 adverse effects; and  
32
- 33 (D) A description of methods to further reduce or eliminate the impacts over time through  
34 monitoring and taking appropriate corrective measures.  
35
- 36 (o) After reasonably expected adverse effects to the water resources have been avoided,  
37 minimized, rectified or reduced to the maximum extent practicable, a compensatory  
38 mitigation plan is required to compensate for unavoidable permanent impacts, and/or a  
39 rehabilitation plan for unavoidable temporary impacts to waters of this state must be  
40 provided.  
41

1 (p) The names and addresses of adjoining property owners, including those across a  
2 stream or across the street from the project;

3  
4 (q) The local government land use affidavit.

5  
6 (r) If the project is in the coastal zone, a Coastal zone certification statement must be  
7 provided. A coastal zone certification statement means a signed statement by the  
8 applicant or an authorized agent indicating that the proposed project will be undertaken in  
9 a manner consistent with the applicable enforceable policies of the Oregon Coastal  
10 Management Program.

11  
12 **(3) Additional Requirements for Estuarine Fill.** If the activity is proposed in an estuary  
13 for a non-water-dependent use, a complete application must also include a written  
14 statement that analyzes the following:

15  
16 (a) The public use of the proposed project;

17  
18 (b) The public need for the proposed project;

19  
20 (c) The availability of alternative, non-estuarine sites for the proposed use; and

21  
22 (d) Identified adverse effects on public navigation, fisheries and recreation.

23  
24 **(4) Additional Information as Requested.** The Department may request additional  
25 information necessary to make an informed decision on whether or not to issue the  
26 authorization.

27  
28 **(5) Permit Application Modifications.** Modifications to permit applications may be  
29 submitted at any time prior to the permit decision. If the modifications are received after  
30 the public review period, the Department will determine if it is appropriate to circulate the  
31 revised application again for public review.

32  
33  
34  
35 **141-085-0012**

### 36 37 **Individual Removal-Fill Permit Application Review Process**

38  
39 **(1) Initial Review.** Within 30 calendar days of the Department's receipt of an application,  
40 the Department will perform an initial review to determine if the application is complete  
41 and the information contained in the application adequately addresses the requirements.

1 During this time, the Department will inform the applicant of one or more of the following  
2 findings:

3  
4 (a) The application is complete and will proceed to the public review process;

5  
6 (b) The application is incomplete or deficient;

7  
8 (c) The project qualifies for a general authorization; or

9  
10 (d) The project does not require an authorization from the Department (no state permit is  
11 required).

12  
13 **(2) Failure to Perform Timely Initial Review.** If the Department fails to complete its  
14 initial review with 30 calendar days of receipt of the application, and fails to notify the  
15 applicant, the application will be deemed complete. In this situation, the Department will  
16 still provide a list of deficiencies, if applicable, to be addressed prior to the permit  
17 decision.

18  
19 **(3) Incomplete or Deficient Application.** If the Department determines that the  
20 application is deficient and incomplete, the Department will notify the applicant in writing  
21 and list the missing information. The Department will take no action on the incomplete  
22 application until the required information is submitted. The applicant must resubmit the  
23 entire amended package for reconsideration, unless instructed by the Department to do  
24 otherwise. Submission of a new application package starts a new 30 day initial review  
25 period.

26  
27  
28  
29 **141-085-0013**

### 30 31 **Public Review Process for Individual Removal-Fill Permit Applications**

32  
33 **(1) Circulation of the Application for Public Review.** Once the application has been  
34 deemed complete and sufficient, the Department will provide notification of the availability  
35 of the application for review either by U.S. mail or electronically (e.g. facsimile, e-mail,  
36 posting on the internet) to adjacent property owners, watershed councils, public interest  
37 groups, affected local government land use planning departments, state agencies,  
38 federal agencies and tribal governments in the geographic area affected by the permit.

39  
40 **(2) Copies of the Application by Request.** The Department will furnish to any member  
41 of the public upon written request and at the expense of the member of the public a  
42 printed copy of any application.

1  
2 **(3) Deadline for Receipt of Public Comments.** All recommendations and comments  
3 regarding the application must be submitted in writing to the Department within the period  
4 established by the Department, but not more than 30 calendar days from the date of the  
5 notice, except as noted under (a), below:  
6

7 (a) The Department will grant an extension of up to 75 calendar days to the Department  
8 of Environmental Quality if the application requires a Section 401 certification under the  
9 Federal Water Pollution Control Act (P.L. 92-500) as amended;  
10

11 (b) If a commenter fails to comment on the application within the comment period, the  
12 Department will assume the commenter has no objection to the project.  
13

14 **(4) Department Review of Public Comments/Public Hearing.** The Department will  
15 review and consider substantive comments received during the public review period, and  
16 may conduct any necessary investigations to develop a factual basis for a permit  
17 decision.  
18

19 (a) The Department may, as a result of the public review process and/or the  
20 Department's investigations, request that the applicant submit supplemental information  
21 prior to the Department making the permit decision. The Department will state the reason  
22 for requesting the additional information and why it is relevant to the permit decision. The  
23 Department may schedule a permit review coordination meeting with interested  
24 agencies/groups and the applicant to provide the applicant an opportunity to explain the  
25 project and to resolve issues.  
26

27 (b) At the Department's discretion, the Department may hold a public hearing to gather  
28 information necessary to make a decision.  
29

30 **(5) Applicant Response to Comments and Final Review.**  
31

32 (a) Comments resulting from the public review process must be forwarded to the  
33 applicant within seven calendar days of the comment period deadline.  
34

35 (b) The applicant may, at his or her discretion, respond to public and agency comments.  
36 The response may be in the form of additional information to support the application  
37 and/or revisions to the project that address the comments.  
38

39 (c) If no response is received from the applicant by the date specified by the Department,  
40 the Department will presume that the applicant does not intend to provide additional  
41 supporting information or revisions to the application.  
42

1 (d) The Department will render a final permit decision within 90 days after determining an  
2 application is complete.

3  
4 (e) The applicant may request additional time to respond to comments. The applicant and  
5 the Department will agree on a new permit decision date before the expiration of the 90  
6 day period. If no agreement is reached, the Department will make a final permit decision  
7 within the original 90 day time period.

8  
9 (6) **Application Withdrawal.** An applicant may withdraw an application at any time prior  
10 to the permit decision. The notice of withdrawal must be in writing to the Department.

11  
12  
13  
14 **141-085-0014**

15  
16 **Review Standards for Individual Removal-Fill Permit Decisions**

17  
18 (1) **Departmental Final Review.** The Department will evaluate the information provided  
19 in the application, conduct its own investigation, and consider the comments submitted  
20 during the public review process to determine whether or not to issue an individual  
21 removal-fill permit.

22  
23 (2) **Effective Date of Review Standards.** The Department may consider only standards  
24 and criteria in effect on the date the Department receives the complete application or  
25 renewal request.

26  
27 (3) **Considerations for Approval.** To issue an individual removal-fill permit, the  
28 Department must determine that the proposed project will be consistent with the  
29 protection, conservation and best use of the water resources of this state and would not  
30 unreasonably interfere with the paramount public policy of this state to preserve the use  
31 of its waters for navigation, fishing and public recreation, by considering the following:

32  
33 (a) The public need for the removal-fill, including the social, economic or other public  
34 benefits likely to result from the removal-fill. If the applicant is a public body, the  
35 Department may rely on the public body's findings as to local public need and benefit;

36  
37 (b) The availability of alternative locations for the removal-fill;

38  
39 (c) Whether the removal-fill is in conformance with existing public uses of the waters and  
40 with uses designated for adjacent land in an acknowledged comprehensive plan and land  
41 use regulations;



- 1 (d) The economic cost to the public if the removal-fill is not accomplished;  
2  
3 (e) The availability of alternatives to the project for the removal-fill is proposed.  
4  
5 (f) Whether the removal-fill conforms to sound policies of conservation;  
6  
7 (g) Whether the removal-fill would interfere with public health and safety;  
8  
9 (h) Whether the removal-fill is compatible with the local comprehensive plan or can be  
10 conditioned on a future local approval to meet this criterion. The Department will not  
11 issue an individual removal-fill permit for a removal-fill that is not consistent or compatible  
12 with the local comprehensive plan and/or land use regulations. The Department may  
13 issue an individual removal-fill permit requiring the applicant to obtain local land use  
14 approval prior to beginning the authorized activity;  
15  
16 (i) Whether the removal-fill will unreasonably interfere with navigation, fishing and public  
17 recreation uses of the waters of this state;  
18  
19 (j) Whether the removal-fill will increase erosion or flooding upstream and downstream of  
20 the removal-fill or redirect water from the removal-fill site onto adjacent nearby lands;  
21  
22 (k) Whether the removal-fill is for streambank protection;  
23  
24 (l) Whether the applicant has provided all practicable mitigation to reduce the adverse  
25 effects of the removal-fill.  
26  
27 **(4) Fills in an Estuary for Non-water Dependent Use.** No authorizations will be issued  
28 for a substantial fill in an estuary for a non-water dependent use unless all of the following  
29 apply:  
30  
31 (a) The fill is for a public use;  
32  
33 (b) The fill satisfies a public need that outweighs the harm, if any, to navigation, fisheries  
34 and recreation; and  
35  
36 (c) The removal-fill meets all other review standards.  
37  
38 **(5) Written Findings.** In the following cases, the Department will prepare written findings  
39 to document the permit decision:  
40  
41 (a) Permit denial;  
42

- 1 (b) Fill of two acres or more in freshwater wetlands;  
2  
3 (c) Fill in estuaries (except cable crossings, pipelines, or bridge construction);  
4  
5 (e) Removal from estuaries of more than 10,000 cubic yards of material (except for  
6 maintenance dredging);  
7  
8 (f) Placement of greater than 2,500 cubic yards of riprap in coastal streams or estuaries;  
9  
10 (g) Removal-fill in the Oregon territorial sea in accordance with Statewide Planning Goal  
11 19-Ocean Resources; and  
12  
13 (h) Approval or denial contrary to the recommendation of approval or denial by a state  
14 agency.  
15  
16  
17

18 **141-085-0015**

19  
20 **Alternatives Analysis**

21  
22 (1) **Department Determination.** To issue a permit, the Department must determine that  
23 the project proposed by the applicant represents the practicable alternative that would  
24 have the least reasonably expected adverse effects on the water resources and  
25 navigation, fishing and public recreation uses.  
26

27 (2) **Alternatives Analysis Criteria.** In determining whether or not an alternative might be  
28 the practicable alternative with the least adverse effects, the Department will consider the  
29 type, size and relative cost of the project, the condition of the water resources, and  
30 navigation, fishing and public recreation uses as depicted in the application. The basic  
31 project purpose, logistics, use of available technology and what constitutes a reasonable  
32 project expense are the most relevant factors in determining the most practicable  
33 alternative. The applicant bears the burden of providing the Department with all  
34 information necessary to make this determination. Compensatory mitigation may not be  
35 used as a method to reduce adverse effects in the evaluation of practicable alternative.  
36 When conducting its alternatives analysis, the Department will apply criteria (a) – (e),  
37 below, in order:  
38

39 (a) Whether the removal-fill can be accomplished by avoiding impacts altogether (e.g., by  
40 moving the location of a proposed structure, either on-site or off-site, to avoid filling  
41 wetlands);  
42

1 (b) If the removal-fill cannot be accomplished without adverse effects, the Department will  
2 then consider whether limiting the degree or magnitude of the removal-fill sites will  
3 minimize adverse effects, or whether the removal-fill purpose can be accomplished in a  
4 more ecologically beneficial way (e.g., bio-engineered and non-structural stream bank  
5 stabilization techniques, such as bank sloping and re-vegetation, instead of solutions  
6 relying primarily on concrete and riprap);  
7

8 (c) If the Department determines that the removal-fill's adverse effects cannot be further  
9 minimized, the Department will then consider whether repairing, rehabilitating or restoring  
10 the removal-fill impact area can rectify the adverse effects;  
11

12 (d) When removal-fill impacts have been minimized and rectified to the maximum extent  
13 practicable, the Department will consider whether the impacts can be further reduced or  
14 eliminated over time by monitoring and taking appropriate corrective measures (e.g.,  
15 assure that site restoration methods have effectively re-vegetated the site);  
16

17 (e) The Department will then consider how the applicant will compensate for reasonably  
18 expected adverse effects of the project by replacing or providing comparable substitute  
19 wetland or water resources and/or navigation, fishing and public recreation uses. For  
20 example, the Department can reasonably anticipate that residential development  
21 constructed next to wetlands could lead to impacts to wetland-associated wildlife through  
22 predation and harassment by domestic animals. The Department will require additional  
23 compensatory mitigation when it can reasonably anticipate that such impacts will occur.  
24  
25  
26

27 **141-085-0016**

## 28 **Emergency Authorizations**

29 In the event an emergency exists, the Department may issue an emergency  
30 authorization.  
31

32 (1) **Eligibility and Applicability.** In order to qualify for an emergency authorization the  
33 Department must determine that:  
34

35 (a) The emergency poses a direct threat to substantial property, including but not limited  
36 to a dwelling, farm or cropland;  
37

38 (b) Prompt action is required to reduce or eliminate the threat;  
39  
40  
41

1 (c) The nature of the threat does not allow the time necessary to obtain some other form  
2 of authorization; and  
3

4 (d) The proposed project is the minimal amount necessary to reduce or eliminate the  
5 threat and minimizes, to the extent practicable, adverse effects to waters of this state.  
6

7 (2) **Information Requirements.** Any person requesting an emergency authorization may  
8 apply verbally or in writing. Written applications may be sent via facsimile, e-mail or U.S.  
9 mail. Any request submitted verbally must be documented, in writing, by the Department  
10 and provided to the applicant. Applications for an emergency authorization must include:  
11

12 (a) The applicant planning and carrying out the activity;  
13

14 (b) The location of the project;  
15

16 (c) The nature of the emergency (specifically, the nature of the threat to public health,  
17 public safety or property and the immediacy of the threat and need to act promptly);  
18

19 (d) A description of the proposed work, including the approximate volume of material to  
20 be removed and/or filled, how the work will be accomplished and the schedule for doing  
21 the work;  
22

23 (e) The date and approximate time when the event that caused the emergency took  
24 place;  
25

26 (f) A statement as to whether the emergency action is intended as a temporary or  
27 permanent response measure; and  
28

29 (g) Additional information, as requested from the Department.  
30

31 (3) **Department Decision.** Based on review of all the available information, the  
32 Department may take the following action(s):  
33

34 (a) Approve the emergency authorization, either verbally or in writing; or  
35

36 (b) Deny issuance of the emergency authorization. If a request for an emergency  
37 authorization is denied, the applicant may resubmit the application as an individual  
38 removal-fill authorization or general authorization.  
39

40 (4) **Written Authorization Needed to Confirm Verbal Authorization.** If an emergency  
41 authorization is issued verbally, the written form of the emergency authorization must be

1 sent to the applicant within five calendar days confirming the issuance and setting forth  
2 the conditions of operation.

3  
4 (5) **Term.** The term of the emergency authorization must be limited to the time necessary  
5 to complete the planned project and must be specifically stated in the authorization. In no  
6 case must the term exceed 60 days.

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

11  
12 (a) Compensatory mitigation or compensatory wetland mitigation;

13  
14 (b) A requirement to revise the project and apply for a removal-fill permit after the  
15 emergency situation has subsided;

16  
17 (c) A requirement to submit a report on the outcome of the project or monitor the project  
18 removal-fill sites; and/or

19  
20 (d) Any other condition necessary to minimize reasonably expected adverse effects on  
21 waters of this state.

22  
23  
24  
25 **141-085-0017**

## 26 **Permit Appeals**

27  
28  
29 (1) **Applicant Appeal Within 21 Days.** An applicant may request a contested case  
30 hearing if they object to an application incompleteness determination, permit decision or  
31 permit condition imposed by the Department. The request must be in writing and must  
32 be received within 21 days of the decision. The request must include the reasons for the  
33 request for hearing.

34  
35 (2) **Other Parties Appeal Within 21 Days.** Any person who is aggrieved or adversely  
36 affected by the approval of an individual removal-fill permit by the Department may file a  
37 written request for a hearing with the Department within 21 calendar days after the  
38 authorization approval date. The request must include the reasons for the request for  
39 hearing.

1 (3) **Standing in Contested Case Hearings.** For a person, other than the applicant to  
2 have standing to request a contested case, the person must be either “adversely  
3 affected” or “aggrieved.”  
4

5 To be “adversely affected” by the individual removal-fill permit the person must have a  
6 legally protected interest that would be harmed, degraded or destroyed by the authorized  
7 project. Eligible parties may include adjacent property owners and other parties;  
8

9 (b) To be “aggrieved” by the individual removal-fill permit the person must have  
10 participated in the Department’s review of the project application by submitting written or  
11 verbal comments stating a position on the merits of the proposed removal-fill to the  
12 Department.  
13

14 (4) **Setting a Contested Case Hearing.** If the written request for hearing is timely and  
15 made by an eligible person, the matter must be referred to the Office of Administrative  
16 Hearings for hearing, and must be conducted as follows:  
17

18 (a) The hearing must be conducted as a contested case;  
19

20 (b) The permit holder and any other persons that have filed a written request and have a  
21 legally protected interest that may be adversely affected must be parties to the  
22 proceeding; and  
23

24 (c) Persons that do not have legally protected interests that are adversely affected, but  
25 are aggrieved, may nevertheless petition to be included in the contested case hearing as  
26 a party.  
27

28 (5) **Referral to the Office of Administrative Hearings.** The referral of a request for  
29 hearing to the Office of Administrative Hearings by the Department will include the  
30 individual removal-fill permit, or denial, and the request for hearing. An administrative law  
31 judge must conduct a contested case hearing only on the issues raised in the request for  
32 hearing and the referral from the Department.  
33

34 (6) **Review of Jurisdictional Determinations.** Jurisdictional determinations of the  
35 existence, or boundaries, of the waters of this state on a parcel of property, issued more  
36 than 60 calendar days before a request for hearing are final. Jurisdictional determinations  
37 are judicially cognizable facts of which the Department may take official notice under  
38 ORS 183.450(3) in removal-fill contested cases. Challenges to jurisdictional  
39 determinations are only permitted under the process set out in OAR 141-090.  
40

41 (7) **The Proposed Order.** The Administrative Law Judge must issue a proposed order  
42 containing findings of fact and conclusions of law within 20 calendar days of the hearing,

1 and as required by ORS 183.460, provide an opportunity to file written exceptions with  
2 the Department.  
3

4 **(8) The Final Order.** Within 60 calendar days after the hearing the Department will  
5 consider the record, any exceptions, and enter an order containing findings of fact and  
6 conclusions of law. The final order must rescind, affirm or modify the permit or proposed  
7 order.  
8

9 **(9) Pre-Hearing Suspension of Permits.** A permit granted by the Department may be  
10 suspended by the Department during the pendency of the contested case proceeding.  
11 Petitions for suspension must be made to the Department and will be either granted or  
12 denied by the Department. The permit must not be suspended unless the person  
13 aggrieved or adversely affected by grant of permit makes a showing before the  
14 Department by clear and convincing evidence that commencement or continuation of the  
15 fill would cause irreparable damage and would be inconsistent with ORS 196.800 to  
16 196.905.  
17

18 **(10) Issuance or Denial of a Permit.** Interested persons who request notification in  
19 writing of the Department's decision on a permit will be notified at the time of issuance or  
20 denial. The Department's failure to notify an interested person will not extend the  
21 statutory 60 calendar day timeframe for hearing requests.  
22  
23  
24

## 25 **141-085-0018**

### 26 **Discovery in Contested Cases**

27  
28  
29 In contested cases conducted on matters relating to these rules, the Department  
30 delegates to the hearing officer the authority to rule on any issues relating to discovery,  
31 except that depositions will only be awarded if it is likely that a witness will not be  
32 available at a hearing.  
33  
34  
35

## 36 **141-085-0019**

### 37 **Permit Conditions, Permit Expiration Dates and Permit Transfer**

38  
39  
40 **(1) Applicable Permit Conditions.** If the Department approves the permit, it must  
41 impose applicable conditions to eliminate or reduce the reasonably expected adverse  
42 effects of project development to waters of this state.

1  
2 **(2) Applicant Acceptance of Permit Conditions.** Once an authorization holder initiates  
3 the removal fill activity authorized by a permit, it is understood that the permit holder  
4 accepts the conditions contain within the permit.  
5

6 **(3) Enforceability of Permit Conditions.** Authorizations may include conditions,  
7 including compensatory mitigation and monitoring conditions that impose obligations  
8 beyond the expiration date of the removal/fill activity. All conditions are enforceable until  
9 such obligations are satisfied.  
10

11 **(4) Conflicts Between the Application and Permit Conditions.** The application,  
12 including all plans and operating specification, becomes an enforceable part of the  
13 removal fill authorization. In the event there is a conflict between information contained in  
14 the application and conditions in the removal fill authorization, the authorization  
15 conditions prevail.  
16

17 **(5) Permit Expiration Date.** The permit must remain in effect until the removal fill activity,  
18 approved by the authorization, is complete. The Department may issue an individual  
19 removal-fill authorization for up to five years for removal fill activities that occur on a  
20 continuing basis or will take more than one year to complete. Once the removal fill activity  
21 is complete, the permit will expire.  
22

23 **(6) Limits on Terms for Commercial Gravel Operations.** For commercial gravel  
24 removal, the Department will only issue a multi-year permit when it determines that:  
25

26 (a) There is sufficient aggregate resource or annual recharge to allow the proposed  
27 volumes to be removed; and  
28

29 (b) The authorization holder has, for at least one year preceding the pending application,  
30 conducted removal in compliance with permit conditions that apply to the same site.  
31

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

34 Upon the written request of the authorization holder, the Department may modify any  
35 permit condition. At the time of permit renewal, the Department may modify permit  
36 conditions as a result of new information related to water resource impacts or operating  
37 conditions. At its discretion, the Department may circulate any proposed modification for  
38 public review as described in OAR 141-085-XXXX. Situations where public review may  
39 be necessary include those that would result in an increase in adverse effects or those  
40 that involve significant changes in operating conditions.  
41



1 (8) **Transfer of Permit Responsibility.** Authorizations are issued to the applicant and  
2 are not automatically transferred through property transactions. The applicant is  
3 responsible for complying with the conditions of the permit, unless the permit is officially  
4 transferred to a different person or party through one of the following means:  
5

6 (a) The authorization holder submits a completed transfer form to the Department;  
7

8 (b) The Department issues a modified permit, but only if the original authorization has not  
9 expired;  
10

11 (c) If mitigation monitoring is still pending, but the authorized activity has been completed  
12 and/or the authorization expired, the mitigation obligation must be transferred to the new  
13 authorization holder. If a bond was required for the pending mitigation monitoring, a new  
14 bond must be provided prior to the transfer.  
15  
16  
17

18 **141-085-0020**  
19

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

21

22 (1) **Renewal of Individual Permits.** Individual permits may be renewed if the permit  
23 holder anticipates that the project within waters of this state will not be completed by the  
24 permit expiration date.  
25

26 (2) **Renewal Notice.** At least 90 calendar days prior to the expiration of a valid removal-  
27 fill permit, the Department will send a renewal notice to the permit holder. The renewal  
28 notice must inform the permit holder of the expiration date of the permit and offer an  
29 opportunity to renew the permit.  
30

31 (3) **Request for Renewal.** In order to renew the permit, the permit holder must respond  
32 with a request to renew the permit. The request for renewal must:  
33

34 (a) Include a short statement of the status of the project, including any compensatory  
35 mitigation requirements;  
36

37 (b) Include the base fee;  
38

39 (c) Be received by the Department at least 45 days prior to the expiration of the permit;  
40 and  
41

1 (d) If requested by the Department, be accompanied by an updated application. The  
2 Department may require an updated permit application for multi-year permits if there is a  
3 proposed change in the project or significant changes in permit requirements are needed.  
4

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

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

10  
11 (b) The Department may provide public notice of the renewal.  
12

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

15  
16 (a) Renew the permit, with or without modified conditions;  
17

18 (b) Extend the permit for an additional time period up to, but not exceeding the original  
19 term, with or without modified conditions; or

20  
21 (c) Deny the request for permit renewal.  
22

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

25  
26 (a) If more time is needed to resolve issues that arise during the renewal process; or  
27

28 (b) If the applicant failed to respond to the renewal request in a timely manner.  
29  
30  
31

32 **141-085-0021**

33  
34 **Permit Requirements and Interagency Coordination for Department of**  
35 **Environmental Quality Approved Remedial Action, Corrections Facilities, Solid**  
36 **Waste Land Fills and Energy Facilities**  
37

38 (a) Pursuant to ORS 465.315, no removal-fill authorization is required for remedial action  
39 conducted on a site selected or approved by the Department of Environmental Quality.  
40 The responsible party must notify the Department of its intended action, pay applicable  
41 fees, and comply with the conditions that the Department would otherwise apply.  
42

1 (b) The Department will issue the permits authorized by the authorized siting entity,  
2 subject to the conditions set forth by the siting entity (including conditions supplied to the  
3 siting authority by the Department). The Department will continue to exercise  
4 enforcement authority over a permit issued pursuant to this section. This section applies  
5 to:

6  
7 (A) The decisions of the Corrections Facility Siting Authority, pursuant to ORS 421.628,  
8 relating to siting corrections facilities;

9  
10 (B) The decisions of the Environmental Quality Commission, pursuant to ORS 459.047,  
11 relating to siting solid waste land fills; and

12  
13 (C) The decisions of the Energy Facility Siting Council, pursuant to ORS 469.300 et seq.  
14 related to siting energy facilities.

15  
16  
17  
18 **141-085-0022**

19  
20 **Expedited Process for Industrial or Traded Sector Sites**

21  
22 (1) **Department Assistance with Industrial Siting.** The Department will participate in  
23 planning and authorizing removal-fill within waters of this state for certain industrial or  
24 traded sector sites identified by the Economic Revitalization Team (ERT) or having the  
25 potential to be certified by the Oregon Economic and Community Development  
26 Department (OECDD). The Department will provide assistance to the maximum extent  
27 feasible, taking into account budget constraints.

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

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

36  
37 (a) Expedited jurisdictional determinations by the Department;

38  
39 (b) Technical assistance in the preparation of wetland delineation and functional  
40 assessment reports, impact avoidance and minimization strategies, alternatives analyses  
41 and compensatory mitigation plans;

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

4  
5 (d) Expedited review of removal-fill applications and prompt permit decision so long as  
6 doing so will not result in the Department missing statutory deadlines for other permits;

7  
8 (e) Assistance with the early identification and resolution of issues raised by other  
9 agencies and the public.

10  
11  
12  
13 **141-085-0023**

14  
15 **General Authorizations (GA); Standards and Criteria; Process for Establishing**

16  
17 General Authorizations are adopted individually by rule and can be found in OAR 141-  
18 089.

19  
20 (1) **Individual Permit May Not Be Necessary.** If a proposed activity meets the  
21 requirements of a general authorization, a person does not need to obtain an individual  
22 removal-fill permit for that activity. Any person proposing to conduct a removal-fill under a  
23 general authorization must first notify the Department in writing in accordance with the  
24 requirements of the specific general authorizations being sought, and pay any applicable  
25 fee to the Department

26  
27 (2) **GAs May Apply Statewide or Regionally.** General authorizations are adopted,  
28 amended and repealed as administrative rules in accordance with the Administrative  
29 Procedure Act (ORS 183.310 to 183.550). A general authorization may be granted on a  
30 statewide or other geographic basis.

31  
32 (3) **Criteria for Adopting GAs.** The Department may propose to adopt a general  
33 authorization upon a finding that the category of removal-fill, as described in the  
34 proposed general authorization (including the applicable conditions):

35  
36 (a) Are substantially similar in nature;

37  
38 (b) Would cause only minimal individual and cumulative adverse effects;

39  
40 (c) Will not result in long-term harm to the water resources of this state; and

41  
42 (d) Are consistent with the policies of these rules.

1  
2 (4) **Public May Request Department to Amend or Rescind GAs.** The Department may  
3 amend or rescind any general authorization, through rulemaking, upon a determination  
4 that the removal-fill conducted under the general authorization has resulted in or would  
5 result in more than minimal adverse effect or long-term harm to the water resources of  
6 this state. Any person may request the Department invoke this provision. Such a request  
7 must include the specific general authorization to be rescinded or amended and clearly  
8 and convincingly state the reasons for the request.  
9

10 (5) **GAs Must Be Compatible with Local Comprehensive Plan.** No general  
11 authorization is valid where the removal-fill is prohibited by the local comprehensive plan  
12 or implementing regulations or other applicable ordinance.  
13

14 (6) **GAs Valid for Five Years.** The rule promulgating the general authorization must be  
15 effective for up to a five-year term and must be reviewed, every five years. Upon review,  
16 the general authorization must be reissued in a similar or amended form or repealed.  
17

18 (7) **GAs Are Enforceable.** Failure of a person to adhere to the terms of any general  
19 authorization adopted under this section will be considered a violation of the removal-fill  
20 law and subject to appropriate enforcement in accordance with these rules.  
21  
22  
23

## 24 **141-085-0024**

### 25 26 **General Permits; Standards and Criteria; Process for Establishing**

27  
28 (1) **Purpose.** The purpose of the General Permit is to allow an applicant or group of  
29 applicants, or the Department, to propose or create a general permit that will authorize a  
30 group of activities. These activities must be:  
31

- 32 (a) Substantially similar in nature;
- 33
- 34 (b) Recurring or ongoing; and
- 35
- 36 (c) Have predictable effects and outcomes.  
37

38 (2) **May Apply Statewide or Regionally.** The Department may issue a General Permit to  
39 the general public or to an applicant or group of applicants. It may do so on a statewide  
40 basis or for a regional area.  
41

1 (3) **Do Not Apply in SSWs.** General Permit activities may not be located within a  
2 designated State Scenic Waterway (SSW).  
3

4 (4) **Application Process.** Before applying for a General Permit, a person must contact  
5 the Department to determine the Department will accept an application for a General  
6 Permit for the person's proposed activity:  
7

8 (a) The Department reserves the right to decline to accept an application for a General  
9 Permit, based on staff or resource considerations; and  
10

11 (b) The Department may require pre-application meetings, interagency meetings, or other  
12 such coordinating effort prior to accepting an application for a General Permit.  
13

14 (5) **Application Requirements.** An application for a General Permit under this rule must  
15 be submitted on an application form available from the Department:  
16

17 (a) The level of detail provided in the application must be commensurate with the scope  
18 and complexity of the proposed activities;  
19

20 (b) The Department will review the application for completeness;  
21

22 (c) When appropriate the Department may modify or waive specific completeness  
23 requirements; and  
24

25 (6) **Information Requirements.** For each type of activity, the applicant must provide, at a  
26 minimum, the following information in the application:  
27

28 (a) Activity description and purpose;  
29

30 (b) Estimated range of removal and fill volumes within waters of this state;  
31

32 (c) Estimated range of area of fill and removal within waters of this state;  
33

34 (d) Proposed number of projects to be covered on an annual basis;  
35

36 (e) Proposed geographic extent of area to be covered by the General Permit;  
37

38 (f) Anticipated adverse effects to waters of this state (including cumulative effects) and  
39 proposed measures to minimize effects;  
40

41 (g) Criteria for selecting of project sites;  
42

- 1 (h) Location information on all known project locations; and  
2  
3 (i) Adjacent landowner information for all known locations.  
4  
5 (j) The Department may require a pre-project notice for each activity to obtain any  
6 information that is deemed necessary to make a final determination.  
7  
8 **(7) Limitations to Permanent Impacts to Wetlands.** Permanent impacts to wetlands  
9 will only be allowed under a General Permit if the effects are fully described and  
10 quantified in the initial application. For known activities that will involve permanent  
11 impacts to wetlands, the applicant must provide the following:  
12  
13 (a) A wetland delineation report that meets the requirements in OAR 141-090; and  
14  
15 (b) An acceptable compensatory wetland mitigation plan.  
16  
17 **(8) Permanent Impacts to Non-Wetland Waters.** For activities that will involve  
18 permanent impacts to waters other than wetlands, the applicant must provide a  
19 compensatory mitigation plan.  
20  
21 **(9) Public Review.** The Department will send the complete application out for public  
22 review, unless the Department determines that additional notice or another appropriate  
23 method is necessary to meet the obligations for the public review. The Department  
24 reserves the right to require additional public review and notify affected parties following  
25 receipt of a pre-project notice.  
26  
27 **(10) Conditions May Be Imposed.** Activities conducted under a General Permit must be  
28 in compliance with the general and project specific conditions described in the Permit.  
29  
30 **(11) General Permits Are Enforceable.** Failure to comply with any conditions or submit  
31 any required information (e.g. pre-project notifications, mitigation monitoring reports or  
32 project completion reports) may result in suspension or revocation of the General Permit  
33 as well as subject the violator to other administrative or legal penalties.  
34  
35

1  
2 **COMPENSATORY MITIGATION**  
3

4 **141-085-0025**  
5

6 **Compensatory Wetland Mitigation (CWM); Applicability and Priorities**  
7

8 (1) **Applicability.** OAR 141-085-XXXX to XXXX apply to removal-fill that occurs within  
9 either tidal waters or non-tidal wetlands and apply to all forms of compensatory wetland  
10 mitigation (i.e., wetland mitigation bank, in-lieu fee mitigation, advance mitigation,  
11 permittee provided mitigation, payment in-lieu mitigation). OAR 141-085-XXXX to XXXX  
12 do not apply to removal-fill within areas covered by an approved Wetland Conservation  
13 Plan.  
14

15 (2) **Principal Objectives for CWM.** For projects where impacts to non-tidal wetlands or  
16 tidal waters cannot be avoided, CWM must be required to compensate for the reasonably  
17 expected adverse effects in fulfillment of the following objectives and priorities:  
18

19 (a) The principal objectives of CWM are to:

20  
21 (A) Replace non-tidal wetland or tidal water functions and services lost at the removal-fill  
22 site;  
23

24 (B) Ensure that the total area of the state's non-tidal wetland and tidal waters resource  
25 base is maintained;  
26

27 (C) Provide local replacement for locally important non-tidal wetland or tidal waters  
28 functions and services, where appropriate;  
29

30 (D) Enhance, restore or create wetland areas that are self sustaining; and  
31

32 (E) Minimize temporal loss of non-tidal wetlands and tidal waters.  
33

34 (b) Within the context of the principal objectives for CWM, the Department will consider  
35 the following priorities when approving CWM for impacts to non-tidal wetlands or tidal  
36 waters:  
37

38 (A) Use of available wetland mitigation bank credits and advance mitigation credits;  
39

40 (B) In-lieu fee program credits when mitigation bank credits or advance mitigation credits  
41 are not available;  
42



1 (C) CWM by means of permittee responsible mitigation.  
2

3 (i) Permittee sponsored on-site CWM is preferable to permittee sponsored off-site CWM  
4 when locally important non-tidal wetland or tidal waters functions and services are  
5 anticipated to be lost at the removal-fill site. "On-site" means an area that is located on  
6 the same parcel of land as the removal-fill site or on a parcel of land contiguous to the  
7 removal-fill site.  
8

9 (ii) Off-site CWM must be located as close as practicable to the non-tidal wetland or tidal  
10 waters removal-fill site. In no event must permittee responsible off-site CWM for non-tidal  
11 wetland impact be located outside of the 4<sup>th</sup> field Hydrologic Unit Code (HUC) in which  
12 the removal-fill site is located. Impacts to tidal waters must be replaced in the same  
13 estuary unless otherwise approved by the Department.  
14

15 (D) When project impacts exceed 0.2 acres and permittee-responsible CWM is  
16 impracticable, available banks credits, in-lieu fee credits or advance mitigation credits  
17 must be purchased before payment in-lieu mitigation is considered. When project impacts  
18 are equal to or less than 0.2 acres, payment in-lieu mitigation or mitigation banks may be  
19 used without first demonstrating the impracticability of permittee responsible CWM.  
20

21 (3) **Special Case; CWM for Linear Projects in Multiple Watersheds.** The Department  
22 will review and approve CWM for linear projects in multiple watersheds (e.g., roads or  
23 utility lines with non-tidal wetland or tidal waters impacts) on a case-by-case basis and  
24 may allow other CWM methods than those explicitly set forth in these rules.  
25  
26  
27

28 **141-085-0026**  
29

### 30 **CWM Site Selection** 31

32 (1) **CWM Site Selection.** CWM proposals must address, at a minimum, the site selection  
33 factors defined below when evaluating a site for CWM development:  
34

35 (a) Position of the CWM site in the watershed relative to the functions and services  
36 targeted for replacement at the removal-fill site (i.e., how the site will facilitate  
37 replacement of target functions and services);  
38

39 (b) Position of the CWM site relative to watershed processes that have been historically  
40 degraded and could be improved by CWM development (e.g., the site is in a watershed  
41 position that will contribute to water quality improvements);  
42

- 1 (c) Connectivity of the site to an existing network of protected habitats;  
2  
3 (d) Ability of the CWM site to support the targeted non-tidal wetland or tidal waters,  
4 including an evaluation of the potential for the non-tidal wetland or tidal waters to  
5 naturally occur in the proposed landscape position;  
6  
7 (e) Availability of suitable physical characteristics: reliability and availability (e.g., water  
8 right) of hydrological sources and suitable soil characteristics for the target HGM and  
9 Cowardin classes;  
10  
11 (f) The ability to support local watershed needs or priorities (e.g., as documented by a  
12 local watershed management plan) and/or local, regional or statewide conservation  
13 strategies;  
14  
15 (g) The ability to minimize requirements for significant long-term maintenance beyond the  
16 monitoring period to maintain functionality;  
17  
18 (h) Availability of buffers adequate to support and protect wetland or tidal waters  
19 functionality;  
20  
21 (i) Extent of human disturbance that would reduce the site's viability as a functionally  
22 sustainable wetland or tidal waters;  
23  
24 (j) Presence of any legal constraints or restrictions that would conflict with the site's  
25 development as CWM or the establishment of a legal protection instrument for the CWM;  
26  
27 (k) Presence of any adjacent or other nearby land uses or land use designations that  
28 could have an adverse affect on CWM functionality or sustainability, and/or the presence  
29 of any adjacent or other nearby land uses or land use designations that could be  
30 adversely affected by the CWM development; and  
31  
32 (l) Ability of the site to achieve multiple natural resource goals (e.g., satisfies other  
33 environmental regulatory standards and/or accommodates state and/or federal  
34 threatened and endangered species recovery efforts).

35  
36 (2) **Other Methods.** Other CWM site selection characteristics and methods may be used  
37 as approved by the Department.  
38  
39  
40  
41

1 **141-085-0027**

2  
3 **Functions and Services Assessment**

4  
5 (1) **Purpose.** The purpose of the functions and services assessment is to document  
6 those non-tidal wetland or tidal waters functions and services anticipated to be lost at the  
7 removal-fill site and help ensure that the proposed CWM will replace those attributes.

8  
9 (2) **Assessment Requirements.** Elements of a non-tidal wetland or tidal waters  
10 functions and services assessment include the following:

11  
12 (a) Existing functions and services of the entire non-tidal wetland or tidal waters at the  
13 proposed project removal-fill site;

14  
15 (b) Non-tidal wetland or tidal waters functions and services reasonably expected to be  
16 adversely affected due to the proposed project;

17  
18 (c) Existing functions and services at the proposed CWM site, if the site is currently non-  
19 tidal wetland or tidal waters;

20  
21 (d) The projected net gain or loss of specific functions and services as a result of the  
22 CWM project and compared to the removal-fill site. The applicant must identify specific  
23 CWM actions that are anticipated to contribute to each identified functions and services  
24 gains or losses.

25  
26 (3) **Functions and Services Assessment Methods.** Wetland functions and services  
27 assessment methods and requirements are as follows:

28  
29 (a) All applications for tidal waters impacts or for non-tidal wetland impacts of 0.2 acres or  
30 greater must include a functional assessment using the appropriate Hydrogeomorphic  
31 Method (HGM) Guidebook, or other assessment method as approved by the Department.  
32 Either the HGM reference-based or judgmental method may be used. Best professional  
33 judgment may not be used.

34  
35 (b) For non-tidal wetland impacts involving less than 0.2 acres, best professional  
36 judgment may be used to evaluate wetland functions and services. A discussion of the  
37 basis of the conclusions is required. For example, if the water quality function is  
38 determined to be "low", a detailed rationale based upon direct measurement or  
39 observation of indicators of water quality function must be discussed.

40  
41 (c) If best professional judgment is used, wetland functions and services to be assessed  
42 include, but are not limited to:

1  
2 (A) Water quality and quantity;  
3

4 (B) Fish and wildlife habitat;  
5

6 (C) Native plant communities and species diversity; and  
7

8 (D) Recreation and education.  
9

10 (d) The Oregon Freshwater Wetland Assessment Method will not satisfy the  
11 requirements of OAR 141-085-XXXX.  
12

13 **(4) Additional Requirements.** Additional assessments or data may be required by the  
14 Department if the Department's review indicates that there may be reasonably expected  
15 adverse effects to listed species or rare plant communities or to adjoining property  
16 owners, or if the project's effects are not readily apparent or clearly defined.  
17

18 **(5) Multiple CWM Sites.** DSL may require more than one mitigation site or CWM option  
19 to replace non-tidal wetland or tidal waters functions and services.  
20

21  
22  
23 **141-085-0028**

24  
25 **Additional Requirements for CWM**

26  
27 **(1) Replacement by Class and Function.**

28  
29 (a) The CWM site must have the capability to replace:  
30

31 (A) Wetland or tidal waters type(s) affected by the project, as classified per Cowardin  
32 system and class (e.g., palustrine forested);  
33

34 (B) HGM class/subclass(es) affected by the project (e.g., riverine impounding), using the  
35 Oregon HGM Statewide Classification (Oregon Department of State Lands, 2001); and  
36

37 (C) The affected functions and services of the impacted non-tidal wetland or tidal waters.  
38

39 (b) The Department may approve exceptions to replacement by class and function if the  
40 applicant demonstrates, in writing, that the alternative CWM:  
41

42 (A) Is ecologically preferable, and;

- 1  
2 (B) Replaces non-tidal wetland or tidal waters functions and services that address  
3 problems (such as flooding) that are identified in a watershed management plan or water  
4 quality management plan approved by a watershed council or public agency; or  
5  
6 (C) Replaces important non-tidal wetland or tidal waters types (Cowardin/HGM) and  
7 functions and services historically lost in the region; or  
8  
9 (D) Replaces rare or uncommon plant communities appropriate to the region, as  
10 identified in the most recent Oregon Natural Heritage Program plant community  
11 classification.  
12  
13 (c) CWM involving the conversion of non-tidal wetland to tidal waters will not be approved  
14 where the non-tidal wetland proposed for conversion provides a high level of functionality,  
15 provides locally important functions or services, or supports listed species or rare plant  
16 community or communities.  
17  
18 **(2) CWM Ratios.**  
19  
20 (a) The purpose of CWM ratios is to:  
21  
22 (A) Ensure that the total area of the state's non-tidal wetland and tidal waters resource  
23 base is maintained; and  
24  
25 (B) Replace non-tidal wetland and tidal waters functions that may be size dependent.  
26  
27 (a) Ratios must not be used to demonstrate functional replacement.  
28  
29 (b) Except as otherwise provided in this section, the following minimum ratios must be  
30 used in the development of CWM plans.  
31  
32 (A) One acre of restored non-tidal wetland or tidal waters for one acre of affected non-  
33 tidal wetland or tidal waters (1:1).  
34  
35 (B) One and one-half acres of created non-tidal wetland or tidal waters for one acre of  
36 affected non-tidal wetland or tidal waters (1.5:1).  
37  
38 (c) Three acres of enhanced non-tidal wetland or tidal waters for one acre of affected  
39 non-tidal wetland or tidal waters (3:1).  
40  
41 (D) Two acres of enhanced cropped wetland for one acre of effected wetland (2:1).  
42 Cropped wetland is converted wetland that is regularly plowed, seeded and harvested in

1 order to produce a crop for market. Pasture, including lands determined by the Natural  
2 Resources and Conservation Service to be "farmed wetland pasture," is not cropped  
3 wetland.  
4

5 (E) There is no established ratio for CWM using conservation. The acreage needed  
6 under conservation will be determined on a case-by-case basis through negotiation  
7 between the applicant and the Department.  
8

9 (d) The Department will double the minimum ratio requirements for project development  
10 affecting existing CWM sites; for example, using enhancement to compensate for effects  
11 to an existing CWM site will require a minimum ratio of six acres enhanced for every one  
12 acre affected (6:1).  
13

14 (e) The Department may increase the ratios when:  
15

16 (A) Mitigation is proposed to compensate for an unauthorized removal-fill activity;  
17

18 (B) Mitigation will not be implemented concurrently with the authorized impact; and/or  
19

20 (C) More mitigation is necessary to achieve functions and services replacement.  
21

22 (f) At the option of the applicant, CWM may consist of any one or a combination of the  
23 following CWM ratios for commercial aggregate mining operations where both the mining  
24 operation and the CWM are conducted on converted wetlands (not including pasture):  
25

26 (A) One acre of wetland and open water habitat, with depths less than 35 feet, for one  
27 acre of wetland impacted;  
28

29 (B) Three acres of wetland and open water habitat, with depths greater than 35 feet, for  
30 one acre of wetland impacted;  
31

32 (C) One acre of a combination of restored, created or enhanced wetland and upland,  
33 comprising at least 50 percent wetland, for one acre of wetland affected.  
34

35 (g) The Department may also apply the following CWM measures for commercial  
36 aggregate mining operations on converted wetland (not including pasture):  
37

38 (A) Allow for staged CWM or mined land reclamation required under ORS 517.700; or  
39

40 (B) Allow the applicant, upon approval by the Department, to pay the entire cost of CWM  
41 according to the following criteria:  
42

- 1 (i) On an annual basis for a period not to exceed 20 years over the life expectancy of the  
2 operation, whichever is less; or  
3
- 4 (ii) On an annual basis over time at a monetary rate per cubic yard or ton of aggregate  
5 material removed annually from the site.  
6
- 7 **(3) Timing of CWM Implementation.** CWM must be completed prior to or concurrent  
8 with the authorized removal-fill project. The Department may approve non-concurrent  
9 CWM if the applicant clearly demonstrates, in writing, the reason for the delay or that  
10 there is benefit to the water resources in doing so. The ratio of CWM required for delayed  
11 CWM projects may be increased to account for temporal loss.  
12
- 13 **(4) CWM in Areas with High Natural Resource Value.** CWM projects must not degrade  
14 areas with existing high natural resource values (e.g., forested uplands).  
15
- 16 **(5) CWM Hydrology Must Be Self-sustaining.** CWM must not rely on features or  
17 facilities that require frequent and regular long-term maintenance and management. For  
18 example, permanent water control structures may be acceptable, whereas pumping from  
19 a groundwater well to provide adequate hydrologic support is not acceptable.  
20
- 21 **(6) Multiple Purpose CWM.** CWM sites may fulfill multiple purposes including storm  
22 water retention or detention, provided:  
23
- 24 (a) All other CWM requirements are met;  
25
- 26 (b) No alteration or management is required to maintain the functionality of the  
27 stormwater facility that would degrade the wetland functions and services;  
28
- 29 (c) The runoff water entering the CWM site has been pretreated to the level necessary to  
30 assure that state water quality standards and criteria are met in the mitigation area;  
31
- 32 (d) Construction of storm water facilities in existing wetlands meets the criteria for  
33 enhancement; and  
34
- 35 (e) Construction of the CWM site will not adversely affect adjacent non-tidal wetlands or  
36 tidal waters.  
37
- 38 **(7) Special Requirements for Enhancement as CWM.** CWM using non-tidal wetland or  
39 tidal waters enhancement must conform to the following additional requirements.  
40 Enhancement must:  
41
- 42 (a) Be conducted only on degraded non-tidal wetlands or tidal waters;

1  
2 (b) Result in a demonstrable net gain in functions and services at the CWM site as  
3 compared to those functions and services lost or diminished at the removal-fill site and  
4 those functions and services that already exist at the CWM site;

5  
6 (c) Not replace or diminish existing non-tidal wetland or tidal waters functions and  
7 services with different functions and services unless the applicant justifies, in writing, that  
8 it is ecologically preferable to do so;

9  
10 (d) Not consist solely of the conversion of one HGM or Cowardin class to another unless  
11 the applicant can demonstrate that it is ecologically preferable to do so;

12  
13 (e) Identify the causes of non-tidal wetland or tidal waters degradation at the CWM site  
14 and the means by which the CWM plan will reverse, minimize or control those causes of  
15 degradation in order to ensure self-sustaining success; and

16  
17 (f) Not consist solely of removal of non-native, invasive vegetation and replanting or  
18 seeding of native plant species.

19  
20 (8) **Conservation as CWM.** Conservation of non-tidal wetlands or tidal waters may be  
21 used for meeting the CWM requirement when the non-tidal wetland or tidal waters  
22 proposed for conservation supports a significant population of rare plant or animal  
23 species, or is a rare wetland type (S1 or S2 according to the Oregon Natural Heritage  
24 Program). Conservation may be accepted as the preferred CWM option when the  
25 removal-fill site is a non-tidal wetland or tidal waters type that is exceptionally difficult to  
26 replace, such as vernal pools, fens, bogs and tidal spruce wetlands, as defined by the  
27 Oregon Natural Heritage Program.

28  
29  
30  
31 **141-085-0029**

### 32 **Administrative Protection of CWM Sites**

33  
34  
35 (1) **Administrative Protection Instruments.** CWM sites must be permanently protected  
36 from adverse impacts with real estate instruments.

37  
38 (2) **Standards.** Protection instructions must meet the following standards:

39  
40 (a) The permanent protection instrument must prohibit any uses of the CWM site that  
41 would violate conditions of the removal-fill authorization or otherwise adversely affect  
42 functions and services provided by the CWM site;



1  
2 (b) The holder of a protective instrument must provide prior notice to the Department if  
3 the holder intends to modify or void the instrument;

4  
5 (c) A conservation easement defined in ORS 271 may only be granted to qualifying  
6 parties such as federal, tribal, state or local resource agencies, or non-profit conservation  
7 organizations; and

8  
9 (d) Conservation easements must provide the Department a third party right-of-  
10 enforcement.

11  
12 (3) **Publicly Owned CWM Sites.** For publicly owned CWM sites, administrative  
13 protection may be provided through a locally adopted management plan.

14  
15  
16  
17 **141-085-0030**

18  
19 **Financial Security for CWM Sites**

20  
21 (1) **Purpose.** Financial security instruments are required for CWM sites as a guarantee  
22 that the CWM will be constructed, monitored and maintained in accordance with removal-  
23 fill authorization requirements.

24  
25 (2) **Exceptions.** Financial security Instruments are required for CWM projects except in  
26 the following circumstances:

27  
28 (a) No financial security instrument is required for projects conducted by government  
29 agencies;

30  
31 (b) DSL may waive the requirement for a financial security instrument for impacts less  
32 than two tenths (0.2) of an acre where the low risk of mitigation project failure does not  
33 justify the expense of such an instrument; and

34  
35 (c) Financial security instruments are not required when CWM is satisfied by purchase of  
36 credits from a wetland mitigation bank, a in-lieu fee program, advance mitigation, or  
37 payment-in-lieu mitigation.

38  
39 (3) **Types of Security Instruments.** To ensure compliance with CWM requirements, the  
40 Department may allow for any of the following types of financial security instruments:

41  
42 (a) Surety bond;

1  
2 (b) Assignment of Deposit;  
3

4 (c) Irrevocable Letter of Credit; or  
5

6 (d) Such other financial instrument as the Department deems appropriate to secure the  
7 financial commitment of the applicant to fulfill the success of the CWM.  
8

9 (4) **Financial Security Form.** The applicant must file the financial security instrument or  
10 instruments on a form or forms prescribed and furnished by the Department. Financial  
11 security instruments must be made payable to the Oregon Department of State Lands.  
12

13 (5) **Commencement of the Liability Period.** The period of liability must begin at the time  
14 of authorization issuance. The liability period must be renewable until the Department  
15 deems the CWM to be complete.  
16

17 (6) **Determining the Amount.** The Department will annually set the amount of the  
18 financial security instrument equal to either the cost of mitigation bank credit(s) with a  
19 service area covering the removal-fill site, or the current cost of payment in-lieu  
20 mitigation, whichever is greater.  
21

22 (7) **Financial Security Instrument Replacement.** The Department may allow a permit  
23 holder to replace an existing financial security instrument with another if the total liability  
24 is transferred to the replacement. The Department will not release an existing financial  
25 security instrument until the permit holder has submitted and the Department has  
26 approved the replacement. Replacement of a financial security instrument must not  
27 constitute a release.  
28

29 (8) **Financial Security Instrument Release.** The Department will authorize release of  
30 the financial security instrument when the CWM meets the requirements of the CWM  
31 plan and the conditions of the removal-fill authorization. The permit holder must file a  
32 request with the Department for the release of all or part of a financial security  
33 instrument. The request must include:  
34

35 (a) The precise location of the CWM area;  
36

37 (b) The permit holder's name;  
38

39 (c) The removal-fill authorization number and the date it was approved;  
40

41 (d) The amount of the financial security instrument filed and the portion to be released;  
42

1 (e) The type and appropriate dates of CWM work performed; and

2  
3 (f) A description of the results achieved relative to the permit holder's approved CWM  
4 plan.

5  
6 (9) **Forfeiture.** The Department will declare forfeiture of all or part of a financial security  
7 instrument for any removal-fill authorization project area or an increment of a project area  
8 if CWM activities are not conducted in accordance with the approved CWM plan or the  
9 permit holder defaults on the financial security. The Department will identify, in writing,  
10 the reasons for the declaration.

11  
12 (10) **Determination of Forfeiture Amount and Use of Funds.** The permit holder must  
13 forfeit the amount of the outstanding liability in the financial security instrument. The  
14 Department will either use the funds collected from the surety forfeiture to complete the  
15 CWM or deposit the proceeds in the Oregon Wetlands Mitigation Revolving Fund  
16 Account.

17  
18  
19  
20 **141-085-0031**

21  
22 **Requirements for All CWM Plans**

23  
24 (1) **CWM Plan Content.** CWM Plan detail must be commensurate with the size and  
25 complexity of the proposed mitigation. A CWM plan must include the following sections.

26  
27 (a) CWM plan overview, including:

28  
29 (A) CWM ecological goals and objectives;

30  
31 (B) The CWM concept in general terms including a description of how the plan, when  
32 implemented, will restore, reverse, minimize or control the causes of non-tidal wetland or  
33 tidal waters degradation; and, ensure that the functions and services of the impacted  
34 non-tidal wetland or tidal waters are replaced;

35  
36 (C) Mitigation site acreage by method(s) of mitigation proposed (restoration, creation and  
37 enhancement) and by proposed HGM and Cowardin classification for each method; and

38  
39 (D) Summary of proposed net losses and gains of non-tidal wetland or tidal waters  
40 functions.

41  
42 (b) CWM site location and ownership information:

- 1  
2 (A) CWM site ownership information (name, address, phone). If this is different from the  
3 applicant, copies of legal agreements granting permission to conduct the CWM and  
4 willingness of the property owner to provide long-term protection are required;  
5  
6 (B) Legal description (Township, Range, Quarter and Quarter-quarter Section and tax lot  
7 or lots, a USGS or similar map showing the CWM site location relative to the affected  
8 site, longitude and latitude, physical address, if any (e.g., 512 Elm Street), and road  
9 milepost (e.g., mp 25.21);  
10  
11 (c) A description of the rationale for the CWM site selection as required under OAR 141-  
12 085-XXXX; and  
13  
14 (d) CWM site existing conditions, including the following, as applicable.  
15  
16 (A) If there are existing non-tidal wetlands or tidal waters on the CWM site, then the  
17 following information must be provided:  
18  
19 (i) Area (size) of the non-tidal wetland or tidal waters proposed for CWM treatment  
20 relative to the total area of existing non-tidal wetlands or tidal waters on the CWM site;  
21  
22 (ii) A wetland determination/delineation report pursuant to OAR 141-090 for existing non-  
23 tidal wetlands on the CWM site (or for tidal waters, any wetlands above highest  
24 measured tide elevation), as necessary to confirm acreage of proposed CWM;  
25  
26 (iii) Identification of HGM and Cowardin class(es) and subclass(es) of all wetlands  
27 present within the CWM site.  
28  
29 (iv) A general description of the water source, duration and frequency of inundation or  
30 saturation, and depth of surface water for non-tidal wetlands or tidal waters on the CWM  
31 site; and  
32  
33 (v) Plans that involve enhancement must include identification of the cause(s) of  
34 degradation and how the plan will reverse it and sustain the reversal.  
35  
36 (B) A description of the major plant communities (Christy and Brophy, 2007) and their  
37 relative distribution, including the abundance of exotic species within the CWM site and  
38 associated buffers.  
39  
40 (C) Approximate location of all water features (e.g., wetlands, streams, lakes) within 500  
41 feet of the CWM site.  
42

- 1 (D) Any known CWM site constraints or limitations.  
2
- 3 (E) Plans for CWM by means of restoration must include documentation that the site was  
4 formerly, but is not currently, a non-tidal wetland or tidal waters.  
5
- 6 (e) A functions and services assessment must be completed. A summary of the  
7 assessment must be placed in the body of the CWM plan, and supporting data must be  
8 placed in an appendix of the CWM Plan.  
9
- 10 (f) Identification of a reference site, combination of reference sites, or reference data of  
11 the same HGM class or subclass (e.g. from DSL-approved HGM Guidebook) and  
12 representing a less functionally altered condition than the CWM site. Compare and relate  
13 the reference site(s) and/or data to the CWM goal.  
14
- 15 (g) CWM workplan, including:  
16
- 17 (A) Description of proposed construction methods;  
18
- 19 (B) Site preparation techniques;  
20
- 21 (C) Proposed construction schedule;  
22
- 23 (D) Proposed methods for invasive species control; and  
24
- 25 (E) Drawings and specifications, including:  
26
- 27 (i) Scaled site plan(s) showing CWM project boundaries, existing and proposed non-tidal  
28 wetland or tidal waters boundaries, restoration, creation and enhancement areas, buffers,  
29 existing and proposed contours, cross section locations, construction access location and  
30 staging areas;  
31
- 32 (ii) Scaled cross sections showing existing and proposed contours and proposed water  
33 depths;  
34
- 35 (iii) Planting plan (with species, size, number, spacing and installation methods);  
36
- 37 (iv) Schematic of any proposed water control structures; and  
38
- 39 (v) For CWM sites involving tidal waters, plan views and cross-sections must show  
40 relevant tidal elevations relative to mean lower low water (MLLW) using the nearest local  
41 tidal datum. The elevation of MLLW must be referenced to the North American Vertical  
42 Datum 1988 (NAVD88).

- 1  
2 (h) Proposed CWM performance standards must:  
3  
4 (A) Address the proposed ecological goals and objectives for the CWM;  
5  
6 (B) Must be objective and measurable;  
7  
8 (C) Measure the extent to which non-tidal wetland or tidal waters area, functions and  
9 services replacement requirements are being achieved; and  
10  
11 (D) Provide a timeline for achievement of each performance standard.  
12  
13 (i) The CWM plan must include the proposed instrument and amount of the financial  
14 security instrument. The financial security instrument will be required prior to permit  
15 issuance.  
16  
17 (j) A monitoring plan including specific monitoring methods and timing relative to the  
18 proposed performance standards, and monitoring plot and photo-documentation  
19 locations.  
20  
21 (k) A monitoring period maintenance plan, including anticipated maintenance activities  
22 required to meet performance standards for the duration of the monitoring period  
23 (including but not limited to control of invasive species), and schedule of maintenance  
24 activities.  
25  
26 (l) A long-term maintenance plan describing:  
27  
28 (A) How the applicant will provide for maintenance of the CWM site beyond the  
29 monitoring period to ensure its sustainability (e.g., maintenance of any water control  
30 structures, weed management, prescribed burning, and vandalism repair);  
31  
32 (B) Who will be the responsible party or parties for long-term maintenance; and  
33  
34 (C) How the maintenance activities will be funded.  
35  
36 (m) The Department will require an updated long-term maintenance plan before release  
37 of the site from CWM monitoring obligations.  
38  
39 (n) The CWM plan must include a proposal for long-term administrative protection of the  
40 CWM site.  
41

1 (o) 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  
3 to the permit decision may make recommendations for improvements to CWM plans  
4

5 **(2) CWM Plans Using Conservation.** A CWM plan using conservation must include:  
6

7 (a) Functions and services assessment of the removal-fill site and site proposed for  
8 conservation;  
9

10 (b) Maps showing the non-tidal wetland or tidal waters conservation area including all  
11 delineated non-tidal wetlands or tidal waters to be conserved;  
12

13 (c) The surrounding land uses and an analysis of the both the short-term and long-term  
14 known and probable effects of those land uses and activities on the conserved non-tidal  
15 wetlands or tidal waters;  
16

17 (d) Measures that may be necessary to minimize the effects of surrounding land uses  
18 and activities on the conserved non-tidal wetlands or tidal waters;  
19

20 (e) Identification of the party or parties responsible for long-term protection of the  
21 conserved non-tidal wetlands or tidal waters;  
22

23 (f) A long-term protection instrument;  
24

25 (g) A long-term management plan with a funding mechanism that addresses the specific  
26 management needs to maintain functionality and ecological sustainability of the non-tidal  
27 wetlands or tidal waters to be conserved; and  
28

29 (h) The protection instrument, management plan and funding mechanism must be in  
30 place prior to issuance of the authorization.  
31

32 **(3) Authorization Conditions for CWM Plans.**  
33

34 (a) The Department will review the CWM plan for sufficiency and compliance with these  
35 rules. In approving the final CWM plan, the Department may impose authorization  
36 conditions necessary to ensure success of the CWM plan and compliance with these  
37 rules;  
38

39 (b) The approved CWM plan becomes an enforceable part of the removal-fill  
40 authorization. In the event of conflict between CWM Plan provisions and removal-fill  
41 authorization conditions, the authorization conditions prevail;  
42

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

4  
5 (d) The permit holder cannot delegate responsibility for CWM requirements, unless the  
6 mitigation obligation has officially been transferred to the Department as per these rules;

7  
8 (e) For authorizations requiring administrative protection of the CWM site, draft  
9 administrative protection instrument(s) must be approved by the Department prior to  
10 permit issuance. A copy or copies of the recorded administrative protection instrument(s)  
11 must be submitted to the Department with the post construction report unless another  
12 schedule is approved by the Department; and

13  
14 (f) For authorizations involving payment in-lieu mitigation as CWM:

15  
16 (A) The individual removal-fill permit or letter of authorization for an activity must not be  
17 issued until payment has been made as approved by the Department;

18  
19 (B) Once an approved removal-fill permit activity has begun as proposed, the payment is  
20 non-refundable.

21  
22  
23  
24 **141-085-0032**

25  
26 **Monitoring Requirements for CWM**

27  
28 (1) **Purpose.** The purpose of the CWM monitoring requirement is to provide information  
29 for the Department to:

30  
31 (a) Determine whether the CWM complies with the conditions of the authorization  
32 including the CWM has achieved its stated goals, objectives and performance standards;

33  
34 (b) Determine whether the CWM is replacing non-tidal wetland and tidal waters area and  
35 functions and services; and

36  
37 (c) Provide information for removal-fill program monitoring.

38  
39 (2) **Monitoring Reports.** The permit holder must monitor the CWM site and provide to  
40 the Department monitoring reports commensurate with CWM site size and complexity.  
41 Those reports must include at minimum:



- 1 (a) A post construction report demonstrating as built conditions and discussing any  
2 variation from the approved plan. Unless waived by the Department, the post  
3 construction report must be submitted within 90 calendar days of completing grading;  
4
- 5 (b) An annual written monitoring report that includes all data necessary to document  
6 compliance with CWM conditions and performance standards; and  
7
- 8 (c) A sufficient number of permanent monitoring points to provide a representative  
9 sampling of the CWM site and buffers.  
10
- 11 (3) **Duration.** Monitoring must be conducted for five years unless otherwise specified by  
12 the Department.  
13
- 14 (4) **Monitoring Report Requirements.** To determine whether the CWM project will meet  
15 acreage and functional replacement requirements, the Department must receive by not  
16 later than the fifth year of the monitoring program the following additional documentation:  
17
- 18 (a) Mapping of the CWM site boundary and verification of quantities of actual restoration,  
19 creation and enhancement acreages achieved by HGM and Cowardin class;  
20
- 21 (b) Comparison of actual functions and services attained at the CWM site compared to  
22 the predicted functions and services for the CWM site identified in the CWM Plan; and  
23
- 24 (c) The final mitigation monitoring report must also include a final long-term maintenance  
25 plan identifying the responsible party and suitable funding mechanisms.  
26
- 27 (5) **Additional Monitoring.** The Department may require modifications to the CWM plan,  
28 as well as require additional monitoring, if the Department determines that the CWM fails  
29 to meet performance standards, replacement acreage requirements, or functions and  
30 services replacement requirements.  
31
- 32 (6) **Release From Monitoring Obligations.** When the Department determines that the  
33 CWM complies with the conditions of the removal-fill authorization, the Department will  
34 notify the permit holder in writing that additional monitoring is not required.  
35  
36  
37  
38

1 **141-085-0033**

2  
3 **Mitigation for Temporary Impacts**

4  
5 Applications for projects that involve temporary impacts to waters of this state must  
6 provide a rehabilitation plan including grading and planting plans. A monitoring plan to  
7 confirm the reestablishment of wetland or tidal waters, or reestablishment of wood  
8 vegetation will be required.  
9

10  
11  
12 **141-085-0034**

13  
14 **Wetland Mitigation Banking**

15  
16 Mitigation banking is used to provide compensatory wetland mitigation in advance of  
17 anticipated wetland losses. These rules also specify the requirements to obtain  
18 authorization to develop a wetland mitigation bank.  
19

20 **Policies**

21  
22 (1) **Development of Mitigation Banks is Encouraged.** The Department encourages the  
23 development and expeditious approval of mitigation banks.  
24

25 (2) **Compensation for Expected or Historic Wetland Losses.** Mitigation banks must be  
26 designed to compensate for expected or historic wetland losses to:  
27

28 (a) Ensure maintenance of regional wetland functions and services in their service area;  
29

30 (b) More closely match the demand for wetland credits with wetland losses;  
31

32 (c) Meet other ecological or watershed needs as determined by the Department; and  
33

34 (d) Meet the site selection requirements in OAR 141-085-XXXX.  
35

36 (3) **Provide CWM in Advance of Impacts.** The long-term goal of mitigation banks is to  
37 provide compensatory wetland mitigation in advance of wetland losses.  
38

39 (4) **Subject to All CWM Rules.** Mitigation banks are subject to all rules governing  
40 freshwater all non-tidal and tidal CWM.  
41  
42

1  
2 **141-085-0035**

3  
4 **Process for Establishing a Mitigation Bank**

5  
6 **(1) Prospectus and Mitigation Bank Instrument (MBI) Required.** All persons  
7 proposing to establish a mitigation bank must:

8  
9 (a) Meet with the Department to discuss their proposed bank and the content of their  
10 Mitigation Bank Prospectus;

11  
12 (b) Submit a Mitigation Bank Prospectus to the Department; and

13  
14 (c) Submit a MBI to the Department.

15  
16 **(2) Prospectus Receives 30 Day Review.** The Department will first determine if the  
17 Prospectus complies with OAR 141-085-XXXX. Prospectuses meeting these standards  
18 will proceed to the review phase. The Department will notify the sponsor in writing of the  
19 sufficiency of the document within 30 calendar days of receipt.

20  
21 (i) Upon approving the prospectus, the Department will notify city and county planning  
22 departments where the bank is located, affected state agencies, adjacent landowners,  
23 and persons who have asked to be notified; and

24  
25 (ii) The Department will consider comments received during the public notice period. If  
26 comments are not received from a state agency or from an affected local government or  
27 special district within the 30 day comment period, the Department will assume the entity  
28 does not desire to provide comments.

29  
30 **(3) Department May Decline to Participate.** If a mitigation bank sponsor cannot  
31 demonstrate the need for the mitigation credits or the technical feasibility and  
32 ecologically desirability of the bank, the Department may decline to participate in its  
33 development. In such a case, the Department may instead suggest other options to the  
34 sponsor. Such options may include the standard removal-fill permit process or  
35 participation in other wetland stewardship options.

36  
37 **(4) Public Notice of Intent to Create a Mitigation Bank.** Upon determining that a  
38 Prospectus is sufficient, the Department will issue a public notice entitled, "Intent To  
39 Create A Mitigation Bank." The notice will:

40  
41 (a) Be posted on the agency's official web site for 30 days;

- 1 (b) Be sent to city and county planning departments, and state agencies having  
2 jurisdiction over the mitigation bank site(s), federal natural resources and regulatory  
3 agencies, adjacent landowners, conservation organizations and other interested persons  
4 requesting such notices;  
5
- 6 (c) Briefly describe the proposed mitigation bank and reference the Prospectus provided  
7 by the bank sponsor; and  
8
- 9 (d) Solicit comments for 30 calendar days from the date of the public notice.  
10
- 11 (5) **Mitigation Bank Instrument (MBI)**. The MBI must contain all requirements for CWM  
12 plans, plus the following:  
13
- 14 (a) The physical location and service area of the proposed bank (indicated through the  
15 use of maps or aerial photographs clearly showing recognizable geographic place  
16 names, features, and/or watershed boundaries);  
17
- 18 (b) Demonstration of need for the bank as shown by past removal-fill activities, projected  
19 demographics for the proposed service area, statements of expected activities from the  
20 local planning agency, and like documentation;  
21
- 22 (c) List of adjacent property owners within 500 feet of any boundary of the proposed  
23 bank;  
24
- 25 (d) Proof of ownership or explicit legal and recordable permission granted by the  
26 landowner to perpetually dedicate the land upon which the bank and any associated  
27 buffer is proposed;  
28
- 29 (e) Description of any uses of the proposed bank site that may have resulted in  
30 contamination by toxic materials;  
31
- 32 (f) Description of the projected wetland losses in the service area by hydrogeomorphic  
33 and Cowardin wetland classes;  
34
- 35 (g) Description of reference site(s), if proposed;  
36
- 37 (h) Description of the method(s) used to determine the number of credits to be created at  
38 the proposed bank, as well as those that will be used to account for and report credit and  
39 debit transactions;  
40

- 1 (i) Detailed contingency plan describing how project deficiencies or performance failures  
2 will be corrected, including assignment of responsibilities for failures such as floods,  
3 vandalism, damage by pests and wildlife, invasion by weedy vegetation, etc.;
- 4
- 5 (j) Land use affidavit; and
- 6
- 7 (k) A statement indicating when each of the conditions of the MBI will terminate, unless  
8 they are perpetual in nature.
- 9
- 10 **(6) Interagency Review Team (IRT).** The Department will appoint an IRT within 30  
11 calendar days of the date of the public notice. An IRT must not have more than 10  
12 members. At least one chair must be a representative of the Department. When the  
13 Corps does not participate in a mitigation bank proposal, the Department may invite other  
14 federal involvement.
- 15
- 16 (a) The Department will invite each of the following agencies to nominate a  
17 representative for an IRT:
- 18
- 19 (A) Oregon Department of Environmental Quality;
- 20
- 21 (B) Oregon Department of Fish and Wildlife;
- 22
- 23 (C) Oregon Department of Land Conservation and Development;
- 24
- 25 (D) U.S. Fish and Wildlife Service;
- 26
- 27 (E) U.S. Environmental Protection Agency;
- 28
- 29 (F) Soil and Water Conservation District; and
- 30
- 31 (G) Local Government Planner, or equivalent.
- 32
- 33 (b) The Department may appoint other members of the IRT based on the nature and  
34 location of the project, particular interest in the project by persons or groups, and/or any  
35 specific expertise that may be required by the Department in development of the MBI.
- 36
- 37 **(7) Role of the IRT.** The IRT may:
- 38
- 39 (a) Review and comment upon the Prospectus, and provide input to the Department  
40 concerning deficiencies noted, and additional information required;
- 41

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

3  
4 (c) Review and comment on the Mitigation Banking Instrument; and

5  
6 (d) Review the performance of the bank annually, or more frequently as set by the IRT, to  
7 determine:

8  
9 (A) Compliance with the ecological goals and objectives established in the MBI;

10  
11 (B) Adequacy of financial resources and assurances to ensure continued long-term  
12 operation pursuant to those goals and objectives. This review may include site visits and  
13 audits of bank documents at irregular time periods; and

14  
15 (C) Whether, through adaptive management, the ecological goals and objectives should  
16 be reevaluated.

17  
18 (8) **Construction Timing.** At their own risk, a sponsor may begin construction of a bank  
19 prior to developing an MBI if the sponsor:

20  
21 (a) Provides the Department with detailed documentation of the baseline conditions  
22 existing at the proposed site(s) of the bank; and

23  
24 (b) Receives written consent from the Department prior to undertaking any construction.  
25 However, such consent from the Department does not exempt the sponsor from having  
26 to apply for, and obtain a removal-fill permit, if required. Written consent from the  
27 Department recognizes the sponsor's intent to create a bank but does not guarantee  
28 subsequent approval of the Mitigation Banking Instrument by the Department. The  
29 Department assumes no liability for the sponsor's actions.

30  
31  
32  
33 **141-085-0036**

34  
35 **Establishment of Mitigation Credits**

36  
37 (1) **Credit Options.** Credits can be established by using:

38  
39 (a) The minimum mitigation ratios as stated in OAR 141-085-XXXX; or

40  
41 (b) By applying a wetland functional assessment and evaluation methodology approved  
42 by the Department. Credits within a bank are determined by the difference between the

1 baseline conditions of the bank prior to restoration, enhancement, creation or  
2 conservation activities, and the increased wetland functions and services that result, or  
3 are expected to result, from those activities.  
4

5 (2) **Bonus Credits.** For those bank credits using the 1.5:1 ratio for creation, or a function-  
6 based credit accounting system, additional credits may be established by the  
7 Department, but only after five consecutive years in which the created wetland meets all  
8 performance standards. The total number for credits for such area, including the initial  
9 release and these additional credits may not exceed a 1:1 ratio.  
10

11 (3) **Buffer Area Credits.** Credits may be granted on an area basis for upland buffers at  
12 the discretion of the Department. The calculation provided here is only for banks using  
13 the minimum standard compensatory mitigation ratios and wetland functional assessment  
14 methods that do not evaluate buffers. Credits may only be established if the buffers are  
15 included as an integral part of the bank. A majority of credits produced by the bank must  
16 be from wetland restoration, enhancement, creation or conservation, and all performance  
17 standards required in the MBI are met. Buffers will be credited five years after  
18 construction. Depending upon the quality of the buffer, 10-20 acres of buffer will produce  
19 one acre of wetland credit.  
20

21 (4) **Wetland Protection Credits.** Credit for the protection of existing wetlands may be  
22 considered.  
23

24 (5) **Credits for Non-Wetland Areas.** The Department may allow a bank sponsor to  
25 create credits by improving non-wetlands such as in-stream channel habitat, riparian  
26 floodplains, non-wetland inclusions in wetland/upland mosaics, and other ecosystem  
27 components. In such cases, a bank producing credits must have produced a majority of  
28 its credits by wetland restoration, enhancement, or creation. Sponsors seeking to create  
29 credits for non-wetland ecological resources must develop a method to quantify and  
30 compare such credits to functions or services lost at the impact site. The method  
31 proposed must be acceptable to the Department, the federal action agency, and the IRT.  
32  
33  
34

35 **141-085-0037**  
36

### 37 **Use and Sale of Mitigation Credits** 38

39 (1) **Mitigation Bank Credits May Be Used to Satisfy a Permit Condition or to**  
40 **Resolve a Violation.** At the request of a mitigation bank sponsor, the director of the  
41 Department of State Lands may authorize the withdrawal of mitigation bank credits by a  
42 public benefit corporation as defined in ORS 65.001 or a public body. Such entities must

1 be designated by the director for the purpose of reserving credits for future use in  
2 accordance with this subsection. The director must manage such transactions to ensure  
3 that each credit is used no more than once to satisfy a use in accordance with this  
4 section. Mitigation Banks must report every credit sale to the Department and must  
5 provide an annual credit ledger.

6  
7 **(2) The Department May Purchase Bank Credits.** With funds received from payment  
8 in-lieu mitigation, the Department may purchase approved bank credits where such  
9 purchases will provide appropriate CWM.

10  
11 **(3) Initial Release of Credits Must Be Specified in the MBI.** The maximum number of  
12 credits that may be released for sale in advance of bank certification must be clearly  
13 specified in the MBI. In no case may this amount exceed 30 percent of the total credits  
14 initially produced.

15  
16 **(4) Release of Credits Must Be in Compliance with MBI.** The Department will not allow  
17 the sale or exchange of credits by a mitigation bank that is not in compliance with the  
18 terms of the MBI, the Removal-Fill Law, and all rules governing CWM. The Department  
19 may consult with the IRT for the bank in order to determine noncompliance and  
20 appropriate remedies, including enforcement action.

21  
22  
23  
24 **141-085-0038**

### 25 26 **Removal-Fill Permits for Mitigation Banks**

27  
28 **(1) Removal-Fill Permit Requirement.** Bank sponsors must obtain a removal-fill permit  
29 for any removal-fill necessary to create a proposed bank in jurisdictional areas. The MBI  
30 may serve as the application, at the discretion of the Department.

31  
32 **(2) Baseline Conditions Must Be Approved Prior to Construction.** When removal-fill  
33 permits are not required to establish a mitigation bank, prior to construction the  
34 Department must approve baseline conditions.

35  
36 **(3) MBI Constitutes a Department Order.** When removal-fill permits are not required to  
37 establish a mitigation bank, the Department shall consider the MBI an enforceable order.



1 **141-085-0039**

2  
3 **Records; Reporting**

4  
5 (1) **Credit Withdrawals.** The Department will maintain a record of credit releases and  
6 withdrawals for each active wetland mitigation bank.

7  
8 (2) **Annual Report to the Land Board.** The Department will report annually to the Land  
9 Board on funds expended from the Oregon Wetlands Mitigation Revolving Fund for each  
10 wetland mitigation bank.

11  
12  
13  
14 **141-085-0040**

15  
16 **Payments; Expenditure of Funds for Payment In-Lieu (PIL) Mitigation**

17  
18 The Department will use the Oregon Wetlands Mitigation Revolving Fund Account to hold  
19 and disperse money collected from the program.

20  
21 (1) **Limitations on PIL Fund Expenditures.** The Department will expend funds collected  
22 under the PIL mitigation option to:

23  
24 (a) Restore, enhance, or create wetlands (including acquisition of land or easements as  
25 necessary to conduct restoration, enhancement or creation projects) as compensatory  
26 mitigation to compensate or replace wetland functions and services lost or diminished as  
27 result of an approved project;

28  
29 (b) Purchase credits from an approved wetland mitigation bank for the purpose of fulfilling  
30 the CWM requirements of an approved project;

31  
32 (c) Monitor the compensatory wetland mitigation;

33  
34 (d) Conduct site management for the compensatory mitigation project as necessary to  
35 assure that the mitigation is successful; and

36  
37 (e) Administer the program and fund a staff position.

38  
39 (2) **Geographic Limitations of Funds Expenditures.** The Department will expend funds  
40 collected under the PIL option within the geographic region where the wetland removal-fill  
41 site occurs, unless the Department determines in writing that this option is not feasible.  
42

1  
2  
3 **141-085-0041**

4  
5 **Advance Mitigation; Standard Path**

6  
7 (1) **Set-Aside Excess Credits.** As part of an existing, active individual removal-fill permit  
8 application process, an applicant may request that the Department consider the  
9 possibility that the applicant's proposed CWM project, could result in producing potential  
10 mitigation credits in excess of those needed to satisfy project requirements.

11  
12 (2) **Additional Information Required.** If the applicant desires to preserve the option of  
13 possibly receiving additional mitigation credit for future projects from the excess credits,  
14 then the following additional information must be submitted as a part of the applicant's  
15 Compensatory Wetland Mitigation Plan:

16  
17 (a) Identify the specific area(s) of the CWM site that compensates for the specific  
18 permitted effect, and identify the specific areas of the CWM site that are proposed for  
19 credit in future projects;

20  
21 (b) Include separate protection instruments for each area of the CWM site (existing and  
22 proposed);

23  
24 (c) Provide a separate monitoring program for each section of the CWM site (existing and  
25 proposed); and

26  
27 (d) Provide a table showing how much credit, in acres under suitable mitigation ratios, is  
28 being claimed at the CWM site.

29  
30 (3) **Applicant Assumes All Risk.** If the applicant elects to pursue this option, he/she  
31 does so completely at his/her own risk. CWM in advance does not create the  
32 presumption that a proposed future wetland impact will be authorized, or that the CWM  
33 will be considered suitable CWM. A separate alternative analysis will be required for each  
34 and every separate individual removal-fill permit application.

35  
36 (4) **Monitoring Requirements.** Monitoring to determine if success criteria are met must  
37 continue for five years or until the success criteria are achieved, whichever is longer.  
38 Such monitoring requirements must apply to each designated mitigation area, or for the  
39 entire mitigation site if constructed at one time.

1 **141-085-0042**

2  
3 **Pilot Program for Advance Mitigation; Alternate Path**  
4

5 (1) **Objective.** The objective of advance mitigation is to provide compensatory wetland  
6 mitigation that replaces wetland functions and services prior to authorized wetland  
7 impacts. Currently, the Department has an advance mitigation option available through  
8 the mitigation banking program (OAR 141-085-XXXX.). This current method of advance  
9 mitigation remains in effect and is not modified by this alternate path approach. The  
10 purpose for creating alternate path advance mitigation is to:

11  
12 (a) Reduce or eliminate the temporal loss of wetland functions and services associated  
13 with permittee responsible CWM;

14  
15 (b) Reduce the risk of mitigation site failure by demonstrating mitigation site success prior  
16 to credits release;

17  
18 (c) Reduce entry requirements associated with wetland mitigation banking by reducing  
19 initial administrative requirements and performance surety requirements; and

20  
21 (d) Reduce the Department's administrative burden for authorizing advance mitigation.  
22

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

26  
27 (a) Requirements for baseline condition documentation, including but not limited to:  
28 wetland delineation, wetland functions and services assessment, site selection criteria,  
29 proposed success criteria, and monitoring plan;

30  
31 (b) Department approval of baseline documentation;  
32

33 (c) Advance mitigation site development including Removal-fill authorization, as  
34 necessary;

35  
36 (d) Mitigation site monitoring by the advance mitigation proponent; and  
37

38 (e) Petition to the Department for credit certification including, but not limited to, final  
39 wetland delineation and functions and services assessment, monitoring results, credit  
40 ledger management, and long-term management and site protection plan.  
41

1 (3) **Term of Pilot Program.** The Department will evaluate the pilot program no later than  
2 five years after implementation and may continue, modify or suspend the program  
3 depending on evaluation outcome. The Department's evaluation will consider the extent  
4 to which the program:

5  
6 (a) Accomplishes the program purposes described in (1) above;

7  
8 (b) Provides CWM of quality at least commensurate with wetland mitigation banking; and

9  
10 (c) Influences the viability of the existing wetland mitigation banking program.

11  
12 (4) **Applications May Be Limited.** The Department may limit the number of applicants  
13 for the alternate path advance mitigation pilot program.

14  
15  
16  
17 **141-085-0043**

18  
19 **Compensatory Mitigation (CM)**

20  
21 (1) **Compensatory Mitigation (CM) for Waters Other Than Non-Tidal Wetlands or**  
22 **Tidal waters.** The Department will also require CM for unavoidable impacts to waters of  
23 this state for waters other than freshwater wetlands or tidal waters. Such conditions may  
24 impose obligations on the permit holder beyond the expiration of the authorization.

25  
26 (2) **Scope of CM.** CM will be commensurate with removal-fill impacts and may include,  
27 but is not limited to:

28  
29 (a) Offsite or onsite enhancement of water resources of this state such as rivers,  
30 intermittent and perennial streams, lakes, ponds, seeps and springs; and

31  
32 (b) Offsite or onsite improvements to enhance navigation, fishing or public recreation  
33 uses of waters of this state.

34  
35 (3) **CM Approval Standard.** The Department may approve CM when the applicant  
36 demonstrates in writing that the CM plan will replace or provide comparable substitute  
37 functions for water resources of this state and/or navigation, fishing and public recreation  
38 uses lost by project development.

39  
40 (4) **CM Conditions of Approval.** As conditions of approval, the Department may require  
41 that the CM include, but not be limited to:

- 1 (a) Defined performance standards;
- 2
- 3 (b) Site monitoring and reporting using a method approved by the Department;
- 4
- 5 (c) Administrative protection of the CM site; and
- 6
- 7 (d) Financial security.
- 8
- 9

1  
2 **PERMIT VIOLATIONS; COMPLAINTS AND UNAUTHORIZED ACTIVITIES**  
3

4 **141-085-0044**  
5

6 **Complaints and Investigations**  
7

8 (1) **Violations.** A violation is:  
9

10 (a) Removal-fill without a valid authorization;  
11

12 (b) Non-compliance with any condition of an authorization;  
13

14 (c) Obtaining an authorization or reporting on conditions of an authorization by  
15 misrepresentation or by failure to fully disclose known material facts;  
16

17 (d) Failing to comply with any terms of an enforcement order;  
18

19 (e) Failing to comply with the requirements of the Removal-Fill Law or these rules; and  
20

21 (f) Violation of any condition of an approved wetlands conservation plan.  
22

23 (2) **Reporting Suspected Violations; Complaints.** Alleged or suspected violations may  
24 be reported as complaints to the Department in person, by e-mail, facsimile, telephone or  
25 in writing. When reports of alleged or suspected violations are submitted to the  
26 Department in confidence and the information is not otherwise required by law to be  
27 submitted, the Department may keep the name of the person making the report  
28 confidential if the criteria set forth in ORS 192.501 or 192.502 are met.  
29  
30  
31

32 **141-085-0045**  
33

34 **Enforcement Actions and Procedures; Appeals**  
35

36 (1) **Enforcement Powers.** The Department is authorized to take such civil, criminal or  
37 administrative actions as are necessary to enforce the removal-fill law and these rules.  
38

39 (2) **Administrative Remedies.** The Department may take appropriate action to remedy  
40 violations or alleged violations, or to enforce these rules or a final order. The following  
41 administrative remedies may be used:  
42

1 (a) The Department may enter an order requiring any person to cease and desist from  
2 any project if the Department determines that such violation or threatened violation  
3 presents an imminent and substantial risk of injury, loss or damage to water resources. A  
4 cease and desist order may be entered without prior notice or hearing and must be  
5 served upon the person by personal service or by registered or certified mail. A cease  
6 and desist order must state that a hearing will be held on the order if a written request for  
7 hearing is filed by the person subject to the order within 10 days after receipt of the order.  
8 Cease and desist orders will not be stayed during the pendency of a hearing conducted  
9 under this subsection. Neither the Department nor any duly authorized representative of  
10 the Department will be liable for any damages a person may sustain as a result of a  
11 cease and desist order issued under this subsection;

12  
13 (b) Consent agreements are cooperative in nature and are used when an agreement can  
14 be reached to resolve the violation. In signing a consent agreement, the violator waives  
15 his or her right to appeal; and

16  
17 (c) Restoration orders may be issued when cooperative agreement cannot be reached to  
18 resolve the violation. Restoration orders may include a civil penalty and corrective action  
19 necessary to resolve the violation. Restoration orders are appealable.

20  
21 (d) Revocation or suspension of an authorization, as per OAR 14-085-XXXX.

22  
23 (3) **Notice and Due Process.** The Department will give notice of any proposed order  
24 relating to a violation by personal service or by mailing the notice by registered or  
25 certified mail to the person or public body affected. Any proposed order must include a  
26 notice of violation and must describe the nature and extent of the violation.

27  
28 (4) **Request for Hearing.** If a person subject to an order under this subsection files a  
29 timely request for hearing, the Department will hold a contested case hearing before an  
30 Administrative Law Judge according to the applicable provisions of ORS 183.310 to  
31 183.550. If the person fails to request a hearing, a final order must be issued upon a  
32 prima facie case made on the record of the agency (i.e., the Department will conclude  
33 that the permit file supports its decision).

34  
35 (5) **Restoration Orders Must be Appealed Within 20 Days.** Any person aggrieved by a  
36 proposed restoration order may request a hearing within 20 days of the date of personal  
37 service or mailing of the notice.

38  
39 (6) **Cease and Desist Orders Must Be Appealed Within 10 Days.** Cease and desist  
40 orders require that the aggrieved person make the request within 10 days of the date of  
41 personal service or mailing of the notice. The aggrieved person must still abide by the  
42 order during the appeal process.

1  
2 (7) **Written Requests for Hearings.** Any written request for a hearing concerning a  
3 proposed restoration order must admit or deny all factual matters stated in the proposed  
4 restoration order and must state any and all claims or defenses regarding the alleged  
5 violation. Any factual matters not denied must be presumed admitted, and failure to raise  
6 a claim or defense must be presumed to be a waiver of such claim or defense. Evidence  
7 must not be taken at the hearing on any issue not raised in the written request for  
8 hearing.  
9

10 (8) **Civil Remedies.** Any violation of ORS 196.600 to 196.905 or of any rule or final order  
11 of the Department under ORS 196.600 to 196.905 may be enjoined in civil abatement  
12 proceedings brought in the name of the State of Oregon; and in any such proceedings  
13 the Department may seek and the court may award a sum of money sufficient to  
14 compensate the public for any destruction or infringement of any public right of  
15 navigation, fishery or recreation resulting from such violation. Civil remedies sought under  
16 this section may also include property liens. Proceedings thus brought by the Department  
17 will set forth, if applicable, the dates of notice and hearing and the specific rule or order of  
18 the Department, together with the facts of noncompliance, the facts giving rise to the  
19 public nuisance, and a statement of the damages to any public right of navigation, fishery  
20 or recreation, if any, resulting from such violation.  
21  
22  
23

24 **141-085-0046**

25  
26 **Revoking or Suspending an Authorization; Allowing Corrective Action**  
27

28 (1) **Revocation or Suspension if Out of Compliance.** The Department may revoke or  
29 suspend an authorization if an alleged violator is not in compliance with any conditions of  
30 an authorization, or if the applicant failed to provide complete and accurate information in  
31 the permit application.  
32

33 (2) **Suspension for Delinquency of Payment.** Any authorization may be suspended  
34 during any period of delinquency of payment and must be treated as though no  
35 authorization had been issued.  
36

37 (3) **Procedures to Revoke or Suspend Authorization.** The Department may initiate the  
38 following proceedings to revoke an authorization:  
39

40 (a) The Department will issue a Notice of Intent to Revoke or Suspend to the alleged  
41 violator indicating the intent to revoke or suspend the authorization; and  
42



1 (b) The Notice must include the following information:  
2

3 (A) A statement of the alleged violator's right to a contested case hearing, and the time  
4 period in which such a request may be made;  
5

6 (B) A statement of the authority and jurisdiction under which the contested case hearing  
7 is to be held;  
8

9 (C) Citations for the relevant sections of law and rule;  
10

11 (D) A short and plain statement of the matters asserted or charged as constituting the  
12 violation(s);  
13

14 (E) A statement of any action that is necessary by the alleged violator to correct or offset  
15 the effects of the violation including, but not limited to, removal of filled material or  
16 replacement of removed material.  
17

18 (c) Any action specified in the notice must include a reasonable time period in which to  
19 complete the corrective action.  
20

21 (A) If the alleged violator completes such action within the specified time period, the  
22 revocation or suspension procedure must be terminated; and  
23

24 (B) If the authorization holder fails to request a contested case hearing, the Department  
25 may issue a final order revoking or suspending the authorization after presenting a prima  
26 facie case demonstrating that a violation has occurred.  
27

28 (4) **Multi-Year Authorizations.** If a person fails to comply with reporting requirements or  
29 any other condition of a multi-year authorization the Department may revoke the multi-  
30 year status and require annual renewal, suspend the permit pending correction, or take  
31 any other enforcement action available to the Department.  
32  
33  
34

35 **141-085-0047**  
36

### 37 **Civil Penalties; Appeals** 38

39 (1) **Civil Penalties May Be Assessed.** In addition to any other remedy allowed by law or  
40 these rules, the Department may assess a civil penalty for any violation of the removal-fill  
41 law, these rules, an authorization or an order issued pursuant to these rules (OAR 141-  
42 085).

1  
2 (2) **Each Day is a Separate Offence.** Each day a violation continues constitutes a  
3 separate offence for which the Department may assess a separate penalty.  
4

5 (3) **Multiple Penalties May Be Assessed.** A civil penalty assessed on an initial violation  
6 may be followed by one or more separate civil penalties for failure to comply with a  
7 restoration order issued on the same violation.  
8

9 (4) **Required Notice; Right to Appeal Within 20 Days.** The Department will give written  
10 notice of intent to assess a civil penalty by personal service or by registered or certified  
11 mail to the permit holder or person (hereinafter referred to as 'party') incurring the civil  
12 penalty. The notice must include the following:  
13

14 (a) The particular section of the statute, rule, order or authorization involved;  
15

16 (b) A short and plain statement of the matter asserted or charged;  
17

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

21 (d) A statement of the amount of civil penalty assessed and terms and conditions of  
22 payment; and  
23

24 (e) Notification that the party may request a contested case hearing.  
25

26 (5) **Calculating the Civil Penalty.**  
27

28 (a) The amount of civil penalty (F), as expressed in U.S. currency dollars, must be  
29 determined by the Department using the following formula:  $F = BPCI$ :  
30

31 (A) B is the *base fine* factor of \$ 1,000;  
32

33 (B) "P" is the *prior knowledge* factor to be determined as follows:  
34

35 (i) A value of 1 must be applied if the alleged violator was unaware of the removal-fill law  
36 at the time of the alleged violation; or  
37

38 (ii) A value of 2 must be applied if the alleged violator was aware of the removal-fill law at  
39 the time of the alleged violation; or  
40

41 (iii) A value of 5 must be applied if the alleged violator had a previous violation. A  
42 previous violation exists, if there was an adjudication (either in court or administrative

1 hearing), or the violator failed to appeal an enforcement order (and a final order was  
2 issued), or the violator signed a consent agreement. This value must not be imposed if  
3 the previous violation occurred more than five years prior to the current incident.  
4

5 (C) The cooperation value (C) must be determined by the Department after reviewing the  
6 past history of the person in taking all feasible steps or procedures necessary or  
7 appropriate to correct the violation for which the penalty is being assessed. The value  
8 must be assessed as follows:  
9

10 (i) A value of 1 must be applied where the person complies with restoration as requested  
11 by the Department without the need for an enforcement order or court action by the  
12 Department, or where the Department determines that restoration efforts would be  
13 unlikely to benefit the resource; or  
14

15 (ii) A value of 2 must be applied where the person does not, after receiving verbal or  
16 written notification from the Department, cease the activity alleged to constitute a  
17 violation; or  
18

19 (iii) A value of 3 must be applied where the person is not cooperative in complying with  
20 restoration as requested by the Department and the Department must issue an  
21 enforcement order or obtain a court order to restore.  
22

23 (D) "I" is water resource effect factor to be determined as follows:  
24

25 (i) A value of 1 must be applied if the damaged resource is expected to naturally self-  
26 restore within one year; or  
27

28 (ii) A value of 3 must be applied if the adverse effects are not expected to naturally self-  
29 restore within one year.  
30

31 (b) In cases where the prior knowledge (P) factor is greater than one (1) and the  
32 cooperation (C) factor is greater than one (1), the total amount of the civil penalty (F), in  
33 dollars U.S. currency, must be doubled, not to exceed \$10,000 per day.  
34

35 (c) In determining whether to assess a separate penalty for each day a violation  
36 continues, the Department may consider the number of days during which the activity  
37 alleged to constitute a violation occurred, as well as the number of days the adverse  
38 effect of this activity continues unabated.  
39

40 (6) **Failure to Pay Civil Penalty.** Once the final adjudication of any civil penalty has been  
41 calculated and noticed, the amount of the civil penalty must increase by the amount of  
42 the original civil penalty for every 20 calendar days that pass without the alleged violator

1 remitting payment to the Department for the full amount of the civil penalty and the  
2 Department taking receipt of the payment. In no case must the amount of the civil penalty  
3 be increased by more than ten times the original civil penalty amount. If a civil penalty or  
4 any portion of the civil penalty is not paid, interest must accrue at the rate of nine percent  
5 per annum on the unpaid balance (pursuant to ORS 82.010).

6  
7 (7) **Civil Penalty Relief.** The alleged violator may request from the Department a  
8 reduction or waiver of the civil penalty by showing evidence of financial hardship. The  
9 request must be received within 20 calendar days from the date of personal service or  
10 mailing of the notice of civil penalty. Evidence provided as to the alleged violator's  
11 economic and financial condition may be presented without prejudice to any claim by the  
12 person that no violation has occurred or that the person is not responsible for the  
13 violation. The Department will reduce or waive a civil penalty upon request if the  
14 Department determines that the imposition of the full civil penalty would result in extreme  
15 financial hardship for the violator, and that the public interest in avoiding extreme financial  
16 hardship outweighs the public interest in deterring future violations.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

**FEDERAL LAND AND WATER CONSERVATION FUNDS**

**141-085-0048**

**Receipt and Application of Federal Land and Water Conservation Funds**

(1) **Transfer of Federal Funds to OPRD.** The Oregon Parks and Recreation Department (OPRD) may transfer funds made available to the State of Oregon from the federal Land and Water Conservation Fund to the Oregon Wetlands Mitigation Bank Revolving Fund Account pursuant to ORS 196.650.

(2) **Funds Reserved for Acquisition.** Funds so received by the Department from OPRD must be reserved for acquisition of wetland parcels or interests therein identified by the Oregon Wetlands Priority Plan (OPRD, January 2003).