

DEPARTMENT OF STATE LANDS

DIVISIONS 85, 89, 93, 100 AND 102

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DEPARTMENT OF STATE LANDS

DIVISION 85

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

141-085-0500

General

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

141-085-0506

Policy

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

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

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

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

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

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

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

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

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

(6) **Restoration and Conservation Programs.** The Department will encourage and facilitate the restoration of waters of this state through voluntary restoration and conservation programs.

(7) **Compensatory Mitigation.** Through its permitting and enforcement programs, the Department will seek to offset losses of the functions and values of the water resources of this state.

(8) **Mitigation Banks.** The Department will allow the use of mitigation banks to offset adverse effects from removal or fill activities to the waters of this state.

141-085-0510

Definitions

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

(1) "**Applicant**" means a landowner or person authorized by a landowner to conduct a removal or fill activity and who has authority and responsibility to fully execute the terms and conditions of an authorization as evidenced by their signature on the application.

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

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

(4) "**Authorization**" means an individual permit, general authorization, general permit or emergency authorization.

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

(6) "**Baseline Conditions**" means the ecological conditions, wetland functions and values and the soils and hydrological characteristics present at a site before any change by the applicant is made.

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

(8) "**Beds**" means:

(a) For the purpose of OAR 141-089, the land within the wet perimeter and any adjacent non-vegetated dry gravel bar; and

(b) For all other purposes, "beds" means that portion of a waterway that carries water when water is present.

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

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

(11) "**Channel**" means a natural (perennial or intermittent stream) or human made (e.g., drainage ditch) waterway that periodically or continuously contains moving water and has a defined bed and bank that serve to confine the water.

(12) "**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.

(13) "**Coastal Zone Certification Statement**" means a signed statement by the applicant or an authorized agent indicating that the proposed project will be undertaken in a manner consistent with the applicable enforceable policies of the Oregon Coastal Management Program.

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

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

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

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

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

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

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

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

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

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

(24) "**Degraded Wetland**" refers to a wetland in poor condition with diminished functions and values resulting from hydrologic manipulation (such as diking, draining and filling) and other disturbance factors that demonstrably interfere with the normal functioning of wetland processes.

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

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

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

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

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

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

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

(32) "**Essential Indigenous Anadromous Salmonid Habitat (ESH)**" means the streams designated pursuant to ORS 196.810 that are necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing, and any adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface water connection to an ESH stream.

(33) "**Estuary**" means:

(a) For waters other than the Columbia River, the body of water from the ocean to the head of tidewater that is partially enclosed by land and within which salt water is usually diluted by fresh water from the land, including all associated estuarine waters, tidelands, tidal marshes and submerged lands; and

(b) For the Columbia River, all waters from the mouth of the river up to the western edge of Puget Island, including all associated estuarine waters, tidelands, tidal marshes and submerged lands.

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

(35) "**Fill**" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state. However, in designated ESH areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) "fill" means any amount of deposit by artificial means.

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

(37) "**Forestland**" means the same as used in the Forest Practices Act and rules (ORS 527.610 to 527.992); land which is used for the commercial growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied.

(38) "**Functions and Values**" are those ecological characteristics or processes associated with a water of this state and the societal benefits derived from those characteristics. The ecological characteristics are "functions," whereas the associated societal benefits are "values."

(39) "**Highest Measured Tide**" means the highest tide projected from actual observations within an estuary or tidal bay (see OAR 141-085-0515).

(40) "**Hydrogeomorphic Method (HGM)**" means the method of wetland classification and functional assessment based on a wetland's location in the landscape and the sources and characteristics of water flow.

(41) "**Independent Utility**" as used in the definition of "project," means that the project accomplishes its intended purpose without the need for additional phases or other projects requiring further removal-fill activities.

(42) "**In-Lieu Fee Mitigation**" means the federally approved compensatory mitigation program used to compensate for reasonably expected adverse impacts of project development on waters of the United States and waters of this state with fees paid by the applicant to the Department or other sponsor, as approved by the Department.

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

(44) "**Intermittent Stream**" means any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish.

(45) "**Legally Protected Interest**" means a claim, right, share or other entitlement that is protected under state or federal law. A legally protected interest includes, but is not limited to, an interest in property.

(46) "**Listed Species**" means any species listed as endangered or threatened under the federal Endangered Species Act (ESA) and/or any species listed as endangered or threatened by the State of Oregon.

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

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

(49) "**Maintenance**" means the periodic repair or upkeep of a structure in order to maintain its original use. "Maintenance" includes a structure being widened by no more than twenty percent of its original footprint at any specific location in waters of this state if necessary to maintain its serviceability. "Maintenance" also includes removal of the minimum amount of sediment either within, on top of or immediately adjacent to a structure that is necessary to restore its serviceability, provided that the spoil is placed on upland.

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

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

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

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

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

(e) Compensating for the effect by creating, restoring, enhancing or preserving substitute functions and values for the waters of this state.

(51) "**Mitigation Bank**" or "**Bank**" means a site created, restored, enhanced or preserved in accordance with ORS 196.600 to 196.655 to compensate for unavoidable adverse impacts to waters of this state due to activities which otherwise comply with the requirements of ORS 196.600 to 196.905.

(52) "**Mitigation Bank Instrument (MBI)**" means the legally binding and enforceable agreement between the Department and a mitigation bank sponsor that formally establishes the mitigation bank and stipulates the terms and conditions of the mitigation bank's construction, operation and long-term management.

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

(54) "**Mitigation Bank Sponsor**" or "**Sponsor**" means a person or single legal entity that has the authority and responsibility to fully execute the terms and conditions of a mitigation bank instrument.

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

(56) "**Non-Motorized Methods or Activities**" are those removal-fill activities within ESH that are completed by hand and are not powered by internal combustion, hydraulics, pneumatics and electricity. Hand-held tools such as wheelbarrows, shovels, rakes, hammers, pry bars and manually operated cable winches are examples of common non-motorized methods.

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

(58) "**Non-Wetland Waters**" means waters of this state other than wetlands, including bays, intermittent streams, perennial streams, lakes and all other regulated waters.

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

(60) "**Ordinary High Water Line (OHWL)**" means the line on the bank or shore to which the high water ordinarily rises. The OHWL excludes exceptionally high water levels caused by large flood events (e.g., 100-year events).

(61) "**Oregon Rapid Wetland Assessment Protocol (ORWAP)**" is a method for rapidly assessing wetland functions and values (as well as other attributes) in all wetland types throughout Oregon.

(62) "**Payment In-Lieu Mitigation**" means compensatory mitigation for waters of this state that is fulfilled by using funds paid to the Department. The payment in-lieu program is not approved to compensate for impacts to waters of the United States.

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

(64) "**Person**" means a person or a public body, as defined in ORS 174.109; the federal government, when operating in any capacity other than navigational servitude or any other legal entity.

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

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

(67) "**Preservation**" means to permanently protect waters of this state having exceptional ecological features.

(68) "**Private Operator**" means any person undertaking a project for an exclusively non-income-producing and nonprofit purpose.

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

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

(71) "**Prospecting**" means to search or explore for samples of gold, silver or other precious minerals, using non-motorized methods; by filling, removing or moving by artificial means less than one cubic yard of material at any one individual site; and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single ESH stream in a single year.

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

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

(74) "**Push-Up Dam**" means a berm of streambed material that is excavated or bulldozed (i.e., pushed-up) from within the streambed itself and positioned in the stream in such a way as to hold or divert water in an active flowing stream. The push-up dam may extend part way or all the way across the stream. Push-up dams are most frequently used to divert water for irrigation purposes associated with agricultural production including livestock watering. Push-up dams are reconstructed each water-use season; high water usually flattens or breaches them; and equipment is used to breach or flatten them at the close of the water-use season.

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

(76) "**Reconstruction**" means to rebuild or to replace the existing structure in-kind.

(77) "**Recreational Placer Mining**" means to search or explore for samples of gold, silver or other precious minerals by removing, filling or moving material from or within the bed of a stream, using non-motorized equipment or a motorized surface dredge

having an intake nozzle with an inside diameter not exceeding four inches and a muffler meeting or exceeding factory-installed noise reduction standards.

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

(79) "**Removal**" means the taking of more than 50 cubic yards of material (or its equivalent weight in tons) in any waters of this state in any calendar year; or the movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation. However, in designated ESH areas (OAR 141-102) and in designated Scenic Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.

(80) "**Removal-Fill Site**" means the specific point where a person removes material from and/or fills any waters of this state. A project may include more than one removal-fill site.

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

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

(83) "**Service Area**" means the boundaries set forth in a mitigation bank instrument that include one or more watersheds identified on the United States Geological Survey, Hydrologic Unit Map -1974, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects from project developments to waters of this state. Service areas for mitigation banks are not mutually exclusive.

(84) "**State Scenic Waterway (SSW)**" means a river or segment of river or lake that has been designated as such in accordance with Oregon Scenic Waterway Law (ORS 390.805 to 390.995).

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

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

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

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

(89) "**Water Quality**" means the measure of physical, chemical and biological characteristics of water as compared to Oregon's water quality standards and criteria set out in rules of the Oregon Department of Environmental Quality and applicable state law.

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

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

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

(93) "**Wetland Creation**" means to convert an area that has never been a wetland to a wetland.

(94) "**Wetland Enhancement**" means to improve the condition and increase the functions and/or values of an existing degraded wetland.

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

(96) "**Wetland Restoration**" means to reestablish a former wetland.

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

Removal-Fill Jurisdiction by Type of Water

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) Wastewater treatment;
- (b) Settling of sediment;
- (c) Stormwater detention and/or treatment;

- (d) Agricultural crop irrigation or stock watering;
- (e) Fire suppression;
- (f) Cooling water;
- (g) Surface mining, even if the site is managed for interim wetlands functions and values;
- (h) Log storage; or
- (i) Aesthetic purposes.

(8) **Jurisdictional Ditches.** Except as provided under section (9), ditches artificially created from upland are jurisdictional if they:

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

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

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

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

- (a) Ten feet wide or less at the ordinary high water line;
- (b) Artificially created from upland or from wetlands;
- (c) Not adjacent and connected or contiguous with other wetlands; and
- (d) Do not contain food or game fish.

141-085-0520

Removal-Fill Jurisdiction by Volume of Material

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

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

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

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

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

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

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

141-085-0525

Measuring and Calculating Volume of Removal and Fill

(1) **Calculating Removal Volume.** Removal volume for all waters includes the full extent of the excavation within the jurisdictional area.

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

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

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

141-085-0530

Exemptions for Certain Activities and Structures

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

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

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

(2) **Fill for Construction, Operation and Maintenance of Certain Dams and Water Diversion Structures.** Filling the beds of the waters of this state for the purpose of constructing, operating and maintaining dams or other diversions for which permits or certificates have been or will be issued under ORS Chapters 537 or 539 and for which preliminary permits or licenses have been or will be issued under ORS 543.010 through 543.610 is exempt.

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

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

- (a) The project meets the definition of maintenance under OAR 141-085-0510(49);
- (b) The structure was serviceable within the past five years; and
- (c) The maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the wetlands or waters of this state were affected as a result of the original construction of those structures.

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

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

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

141-085-0534

Exemptions for Certain Voluntary Habitat Restoration Activities

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

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

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

(2) Conditions of Exemption: Activities described in Sections (3) through (8) of this rule are exempt from permit requirements under the following conditions:

(a) Activities are not conducted in areas designated as State Scenic Waterways;

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

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

- (d) The activities will not convert waters of this state to uplands;
- (e) The activities will cause no more than minimal adverse impact on waters of this state including impacts related to navigation, fishing, and public recreation;
- (f) The activities will not cause the water to rise or be redirected in such a manner that it results in flooding or other damage to structures or substantial property off of the project site; and
- (g) All necessary access permits, right of ways and local, state, and federal approvals have been obtained.

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

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

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

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

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

(8) Other Activities Customarily Associated with Habitat Restoration in Essential Indigenous Anadromous Salmonid Habitat (ESH). A permit is not required for voluntary habitat restoration activities resulting in less than 50 cubic yards of removal-fill in waters of this state. This includes the disposal of material resulting from the restoration activities within the project area as long as it assists in accomplishing the

objectives of the habitat restoration project. The activities must be consistent with the Oregon Aquatic Habitat Restoration and Enhancement Guide and utilize materials or structures that would naturally and/or historically occur at the project site. Notice of the activity must be provided, submitted on a form provided by the Department, at least 30 calendar days prior to commencing the activity.

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

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

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

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

141-085-0535

Exemptions Specific to Agricultural Activities

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

(1) **Converted Wetlands.** For the purposes of this rule:

(a) "Converted wetlands" means agriculturally managed wetlands that, on or before June 30, 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that are managed for commercial agricultural purposes.

(b) "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any other waters of this state that are located within or adjacent to a converted wetland area.

(2) **Exemptions Do Not Apply to Nonfarm Uses.** The exemptions under OAR 141-085-0535(3) and (4) do not apply to any fill or removal that involves changing an area of wetlands to a nonfarm use.

(3) **Normal Farming and Ranching Activities on Converted Wetlands.** Exempt activities on converted wetlands include:

(a) Plowing;

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

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

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

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

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

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

(8) Agricultural Drainage Ditch Maintenance. Exempt maintenance of agricultural drainage ditches under OAR 141-085-0530(4) includes disposal of dredged material in a thin layer on converted wetlands, provided such disposal does not change wetland to upland. For the purposes of this exemption, "ditch" is defined in OAR 141-085-0510(26).

(9) Push-Up Dams.

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

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

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

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

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

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

141-085-0540

Types of Authorizations

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

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

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

(3) **General Permits.** GPs are adopted by rule and apply to a category of activities statewide or on a geographical basis for use by any person, or for use by a specific person for multiple activities. The Department may initiate rulemaking or a person may request the Department to initiate rulemaking to create a General Permit (OAR 141-093).

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

141-085-0545

Fees and Disposition

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Public body; or

(c) Commercial operator.

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

(a) Less than 500 cubic yards;

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

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

(d) Over 50,000 cubic yards.

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

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

(a) The application fee; and

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

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

141-085-0550

Application Requirements for Individual Permits

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

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

(3) **Fee Required for a Complete Application.** A complete application must include the appropriate fee.

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

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

(a) The applicant and property owner information including name, mailing address, phone number and e-mail address:

(A) If the applicant is not the owner of the land upon which the removal-fill activity (including mitigation) is to occur and does not hold an easement allowing the activity on that land, a written authorization from the owner of the land consenting to the application must be provided. For the purpose of this rule, a condemner is the landowner when:

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

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

(B) If the application is on behalf of a business entity, a certificate of incumbency must be provided to certify that the individual signing the application is authorized to do so.

(C) If permittee-responsible mitigation is proposed and the application for a permit or authorization is submitted on behalf of a closely held corporation, limited partnership, Limited Liability Company (LLC) or trust, the Department will require from each shareholder or stockholder, limited partner, member, trustee, current beneficiary or other principal:

(i) A joint and several personal guarantee securing compliance with mitigation obligations; and

(ii) A written promise to make all reasonable efforts to maintain the business entity in active status until all mitigation obligations have been satisfied.

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

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

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

(d) Project information including:

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

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

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

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

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

(e) A description of the purpose and need for the project. All projects must have a defined purpose or purposes and be based on a documented need or needs. The project purpose and need statement must be specific enough to allow the Department to determine whether the applicant has considered a reasonable range of alternatives.

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

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

(A) Impeding, restricting or increasing flows;

(B) Relocating or redirecting flow; and

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

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

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

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

(k) A functions and values assessment that meets the requirements in OAR 141-085-0685 when permanent impacts to wetlands are proposed.

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

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

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

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

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

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

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

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

(p) For each proposed removal-fill impact site and physical mitigation site, a list of the names and addresses of the adjacent property owners, including those properties located across a street or stream from the proposed project.

(q) Mailing labels, when there are more than five names and addresses of adjacent property owners.

(r) A signed local government land use affidavit.

(s) A signed Coastal Zone Certification statement, if the project is in the coastal zone.

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

(a) The public use of the proposed project;

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

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

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

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

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

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

141-085-0555

Individual Removal-Fill Permit Application Review Process

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

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

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

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

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

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

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

Public Review Process for Individual Removal-Fill Permit Applications

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

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

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

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

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

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

(a) The Department may, as a result of the public review process or the Department's investigations, request that the applicant submit supplemental information and answer additional questions prior to the Department making the permit decision. The Department may schedule a permit review coordination meeting with interested agencies or groups and the applicant to provide the applicant an opportunity to explain the project and to resolve issues; and

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

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

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

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

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

(6) Final Review

(a) The Department will make a final permit decision within 90 calendar days after determining an application is complete; or

(b) The applicant may request additional time to respond to comments or to satisfy other requirements. The applicant and the Department may agree to extend the timeline for making a final permit decision beyond 90 calendar days. If no agreement is reached, the Department will make a final permit decision within the original 90-day time period.

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

141-085-0565

Department Determinations and Considerations in Evaluating Individual Permit Applications

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

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

(3) **Department Determinations.** The Department will issue a permit if it determines the project described in the application:

(a) Has independent utility;

(b) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.990; and

(c) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation, when the project is on state-owned lands.

(4) Department Considerations. In determining whether to issue a permit, the Department will consider all of the following:

(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the Department may accept and rely upon the public body's findings as to local public need and local public benefit;

(b) The economic cost to the public if the proposed fill or removal is not accomplished;

(c) The availability of alternatives to the project for which the fill or removal is proposed;

(d) The availability of alternative sites for the proposed fill or removal;

(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety;

(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations;

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion;

(h) Whether the proposed fill or removal is for stream bank protection; and

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

(5) Alternatives Analysis. The Department will issue a permit only upon the Department's determination that a fill or removal project is consistent with the protection, conservation and best use of the water resources of this state and would not unreasonably interfere with the preservation of the use of the waters of this state for navigation, fishing and public recreation. The Department will analyze a proposed project using the criteria set forth in the determinations and considerations in sections

(3) and (4) above (OAR 141-085-0565). The applicant bears the burden of providing the Department with all information necessary to make this determination.

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

(a) The fill is for a public use;

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

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

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

(a) Permit denial;

(b) Fill of two acres or more in wetlands;

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

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

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

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

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

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

141-085-0575

Permit Appeals

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

(2) **Other Aggrieved Person Appeal Within 21 Calendar Days.** Any person who is aggrieved or adversely affected by the Department's final decision concerning an individual permit or a condition therein may file a written request for a hearing with the Department within 21 calendar days after the authorization approval date. The request must include the reasons for the request for hearing.

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

(a) To be "adversely affected" by the Department's individual removal-fill permit decision, the person must have a legally protected interest that would be harmed, degraded or destroyed by the authorized project. Eligible parties may include adjacent property owners and other parties; or

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

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

(a) The hearing will be conducted as a contested case;

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

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

(5) **Referral to the Office of Administrative Hearings.** The referral of a request for hearing to the Office of Administrative Hearings by the Department will include the

individual removal-fill permit, or denial, and the request for hearing. An administrative law judge will conduct a contested case hearing only on the issues raised in the request for hearing and the referral from the Department.

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

(7) **The Proposed Order.** The Administrative Law Judge will issue a proposed order containing findings of fact and conclusions of law within 20 calendar days of the hearing, and as required by ORS 183.460, provide an opportunity to file written exceptions with the Department.

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

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

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

141-085-0580

Discovery in Contested Cases

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

Permit Conditions, Permit Expiration Dates and Permit Transfer

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

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

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

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

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

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

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

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

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

(a) Upon the written request of the authorization holder, the Department may modify permit conditions to address changes in operating conditions or changes to the project. At its discretion, the Department may circulate proposed project modifications for public review as described in OAR 141-085-0560. Situations where public review may be necessary include those that would result in an increase in adverse impacts or those that involve significant changes in operating conditions; or

(b) At the time of permit renewal, the Department may modify permit conditions to address new standards in effect at the time of the permit renewal request or new information related to water resource impacts.

(8) Transfer of Permit Responsibility. Authorizations are issued to the applicant and are not automatically transferred through property transactions. The applicant is responsible for complying with the conditions of the permit, unless the permit is officially transferred to a different person or party. A transfer form must be submitted to the Department for review and approval. Transfers are approved through one of the following means:

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

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

141-085-0590

Renewal and Extension of Individual Removal-Fill Permits

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

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

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

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

(b) Include the base fee;

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

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

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

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

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

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

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

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

(c) Deny the request for permit renewal.

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

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

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

141-085-0595

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

(1) DEQ Remedial Action Waiver. Pursuant to ORS 465.315, no removal-fill authorization is required for remedial action conducted on a site selected or approved by the Department of Environmental Quality. The responsible party must notify the Department of its intended action, pay applicable fees, and comply with the substantive requirements that the Department would otherwise apply.

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

(a) The Department of Corrections, pursuant to ORS 421.628, relating to siting corrections facilities;

(b) The Environmental Quality Commission, pursuant to ORS 459.047, relating to siting solid waste land fills; and

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

141-085-0665

Expedited Process for Industrial or Traded-Sector Sites

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

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

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

(a) Expedited jurisdictional determinations by the Department;

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

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

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

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

141-085-0676

Emergency Authorizations

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

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

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

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

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

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

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

(b) The location of the project;

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

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

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

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

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

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

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

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

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

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

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

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

(a) Compensatory mitigation or compensatory wetland mitigation;

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

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

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

141-085-0680

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

(1) **Applicability.** OAR 141-085-0680 through 0760 applies to removal-fill that occurs within wetlands and tidal waters and applies to all forms of compensatory mitigation (i.e., mitigation bank, in-lieu fee mitigation, advance mitigation, permittee responsible mitigation, and payment in-lieu mitigation). OAR 141-085-0680 through 141-085-0760 does not apply to removal-fill within areas covered by an approved Wetland Conservation Plan.

(2) **Principal Objectives for CWM.** For projects where impacts to wetlands or tidal waters cannot be avoided, CWM will be required to compensate for the reasonably expected adverse impacts in fulfillment of the following principal objectives.

(a) The principal objectives of CWM are to:

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

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

(C) Enhance, restore, create or preserve wetlands or tidal areas that are self-sustaining and minimize long-term maintenance needs;

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

(E) Minimize temporal loss of wetlands and tidal waters and their functions and values.

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

(3) **General Requirements.**

(a) Permittee-responsible CWM at an off-site location will be located within the 4th field Hydrologic Unit Code (HUC) in which the removal-fill site is located.

(b) Impacts to tidal waters must be replaced in the same estuary unless the Director determines that it is environmentally preferable to exceed this limitation.

(c) Projects that involve 0.20 acres or less of permanent wetland impact may use mitigation banks, in-lieu fee, or payment in-lieu mitigation without addressing the principle objectives set forth in Section (2) of this rule.

(d) Payment in-lieu fee mitigation may not be used if appropriate mitigation bank credits or in-lieu fee credits are available at the time of the permit decision.

141-085-0685

Functions and Values Assessment

(1) **Purpose.** The purpose of the functions and values assessment is to document those wetland or tidal waters functions and values anticipated to be lost as a result of the project and help ensure that the proposed CWM will replace those functions and values.

(2) **Assessment Requirements.** Elements of a functions and values assessment must include the following:

(a) Existing functions and values at the proposed project site;

(b) Functions and values reasonably expected to be adversely impacted by the proposed project;

(c) Existing functions and values at the proposed CWM site, if the site is currently wetland or tidal waters; and

(d) The projected net gain or loss of specific functions and values as a result of the CWM project compared to the reasonably expected adverse impacts as a result of the project.

(3) **Methods.** Wetland functions and values assessment methods and requirements are as follows:

(a) All applications for tidal waters impacts or for wetland impacts of greater than 0.20 acres must include a functions and values assessment using the reference-based method in the appropriate Hydrogeomorphic Method (HGM) guidebook for Oregon wetlands, if available. If not available, the Oregon Rapid Wetland Assessment Protocol (ORWAP) is the required method.

(A) The same functions and values assessment method must be used on the impact site and the proposed CWM site.

(B) A functions and values assessment is not required for the CWM site if CWM is proposed to be fulfilled by purchase of bank credits, advance mitigation credits, or fee in-lieu program credits.

(C) If the same reference-based HGM is not available for both the impact site and the CWM site, then ORWAP must be used for both the impact site and the CWM site.

(D) If a reference-based HGM is not available for all wetland subclasses on the impact site, then ORWAP must be used for all wetlands on the impact site.

(b) For non-tidal wetland impacts involving impacts of 0.20 acres or less, ORWAP is the preferred method, but best professional judgment may be used to assess wetland functions and values. A written discussion of the basis of the conclusions based on best professional judgment must be provided. For example, if the water quality function is determined to be "low," a detailed rationale based upon direct measurement or observation of indicators of water quality function must be discussed.

(c) If best professional judgment is used, wetland functions and values to be assessed must include, but are not limited to:

(A) Water quality and quantity;

(B) Fish and wildlife habitat;

(C) Native plant communities and species diversity; and

(D) Recreation and education.

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

141-085-0690

Additional Requirements for CWM

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

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

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

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

- (a) Replaces functions and values that address problems (such as flooding) that are identified in a watershed management plan or water quality management plan;
- (b) Replaces important wetland or tidal waters types (Cowardin/HGM) and functions and values disproportionately lost in the region;
- (c) Replaces rare or uncommon plant communities appropriate to the region, as identified in the most recent Oregon Natural Heritage Program plant community classification; or
- (d) Is for the replacement of a non-tidal wetland or tidal water type that is technically impracticable to replace. Upon demonstration of such to the satisfaction of the Department, the Department may require re-consideration of alternatives to ensure that all practicable opportunities to avoid and minimize impacts have been reasonably incorporated into the project.

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

(4) **CWM Ratios.**

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

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

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

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

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

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

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

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

(D) Two acres of enhanced cropped wetland for one acre of impacted wetland (2:1). Cropped wetland is converted wetland that is regularly plowed, seeded and harvested in

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

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

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

(e) The Department may increase the ratios when:

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

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

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

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

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

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

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

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

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

(i) On an annual basis for a period not to exceed 20 years over the life expectancy of the operation, whichever is less; or

(ii) On an annual basis over time at a monetary rate per cubic yard or ton of aggregate material removed annually from the site.

(h) Alternative methods may be used for mitigation crediting and/or impact debiting by applying a wetland function-based accounting method approved by the Department.

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

(6) **CWM in Areas with High Natural Resource Value.** CWM projects must not degrade areas with existing high natural resource values (e.g., forested uplands).

(7) **CWM Hydrology Must Be Self-Sustaining.** CWM must not rely on features or facilities that require frequent and regular long-term maintenance and management. For example, permanent water control structures may be acceptable, whereas pumping from a groundwater well to provide adequate hydrologic support is not acceptable.

(8) **Multiple Purpose CWM.** CWM sites may fulfill multiple purposes including storm water retention or detention, provided:

(a) All other CWM requirements are met;

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

(c) The runoff water entering the CWM site has been pretreated to the level necessary to assure that state water quality standards and criteria are met in the mitigation area;

(d) Construction of storm water facilities in existing wetlands meets the criteria for enhancement;

(e) Construction of the CWM site will not adversely affect adjacent wetlands or tidal waters;

(f) Construction of the CWM site will not significantly change pre-development hydrologic conditions or increase peak flows or velocity to receiving streams; and

(g) Stormwater discharges to existing or CWM wetlands will not result in hydrologic conditions that impair vegetation or substrate characteristics necessary to support wetland functions.

(9) **Special Requirements for Enhancement as CWM.** CWM enhancement must conform to the following additional requirements. Enhancement must:

(a) Be conducted only on degraded wetlands or tidal waters;

(b) Result in a demonstrable net gain in functions and values at the CWM site as compared to those functions and values lost or diminished as a result of the project and those functions and values that already exist at the CWM site;

(c) Not replace or diminish existing wetland or tidal waters functions and values with different functions and values unless the applicant justifies, in writing, that it is ecologically preferable to do so;

(d) Not consist solely of the conversion of one HGM or Cowardin class to another;

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

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

(10) **Preservation as CWM.** Preservation of wetlands or tidal waters may be used for meeting the CWM requirement when the wetland or tidal waters site proposed for preservation is demonstrated to be under threat of development (e.g., zoned for a development use), and one of the following applies:

(a) The preservation site supports a significant population of rare plant or animal species;

(b) The preservation site is a rare wetland or tidal waters type (S1 or S2 according to the Oregon Natural Heritage Program);

(c) The preservation site is a native, mature forested wetland; or

(d) The preservation site, with existing and ongoing management, is in good condition and is highly functioning (as determined using a Department-approved assessment method). Preservation must also accomplish one or more of the following:

(A) Serves a documented watershed need; or

(B) Preserves wetland types disproportionately lost in the watershed.

(11) **Preservation as the Preferred CWM Option.** Preservation may be accepted as the preferred CWM option when the lost or diminished functions and values are exceptionally difficult to replace. Examples of such waters include, but are not limited to, vernal pools, fens, bogs and tidal spruce wetlands, as defined by the Oregon Natural Heritage Program.

(12) **Special Case; CWM for Linear Projects in Multiple Watersheds.** The Department will review and approve CWM for linear projects in multiple watersheds

(e.g., roads or utility lines with wetland or tidal waters impacts) on a case-by-case basis and may establish other CWM requirements than those explicitly set forth in these rules.

141-085-0695

Administrative Protection of CWM Sites

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

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

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

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

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

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

(e) An access easement, conveyed to the Department, must be recorded on the deed for all CWM sites on non-public lands, using a template provided by the Department.

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

141-085-0700

Financial Security for CWM Sites

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

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

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

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

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

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

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

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

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

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

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

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

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

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

security instrument until the permit holder has submitted and the Department has approved the replacement.

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

- (a) The precise location of the CWM area;
- (b) The permit holder's name;
- (c) The removal-fill authorization number and the date it was approved;
- (d) The amount of the financial security instrument filed and the portion proposed for release; and
- (e) A description of the results achieved relative to the permit holder's approved CWM plan.

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

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

141-085-0705

Requirements for All CWM Plans

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

- (a) CWM plan overview, including:
 - (A) CWM ecological goals and objectives;

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

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

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

(b) CWM site ownership and location information:

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

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

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

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

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

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

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

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

(iii) A general description of the existing and proposed water source, duration and frequency of inundation or saturation, and depth of surface water for wetlands or tidal waters on the CWM site. This information must include identification of any water rights necessary to sustain the intended functions. Evidence that the water right has either been secured or is not required must be documented in the first year mitigation monitoring report; and

(iv) Plans that involve enhancement must include identification of the cause(s) of degradation and how the plan will reverse it and sustain the reversal.

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

(C) Approximate location of all water features (e.g., wetlands, streams, lakes) within 500 feet of the CWM site.

(D) Any known CWM site constraints or limitations.

(E) Plans for CWM by means of restoration must include documentation sufficient to demonstrate that the site was formerly, but is not currently, a wetland or tidal water.

(e) A functions and values assessment. A summary of the assessment must be placed in the body of the CWM plan, and supporting data sheets or assessment model outputs must be placed in an appendix of the CWM Plan.

(f) CWM drawings and specifications, including:

(A) Proposed construction schedule;

(B) Scaled site plan(s) showing CWM project boundaries, existing and proposed wetland or tidal waters boundaries, restoration, creation and enhancement areas, buffers, existing and proposed contours, cross-section locations, construction access location and staging areas;

(C) Scaled cross sections showing existing and proposed contours and proposed water depths;

(D) Plant list for each Cowardin and HGM class at the CWM site (include scientific names and wetland indicator status);

(E) Schematic of any proposed water control structures; and

(F) For CWM sites involving tidal waters, plan views and cross sections must show relevant tidal elevations relative to mean lower low water (MLLW) using the nearest local tidal datum. The elevation of MLLW must be referenced to the North American Vertical Datum 1988 (NAVD88).

(g) Proposed CWM performance standards. The applicant may propose to use applicable pre-defined performance standards as approved by the Department, or may provide CWM site-specific performance standards that:

(A) Address the proposed ecological goals and objectives for the CWM;

(B) Are objective and measurable; and

(C) Provide a timeline for achievement of each performance standard.

(h) A description of the proposed financial security instrument. The Department will determine the amount of security required. A final financial security instrument will be required prior to permit issuance unless otherwise approved by the Department.

(i) A monitoring plan including specific methods, timing, monitoring plot locations, and photo-documentation locations.

(j) A long-term maintenance plan describing:

(A) How the applicant anticipates providing for maintenance of the CWM site beyond the monitoring period to ensure its sustainability (e.g., maintenance of any water control structures, weed management, prescribed burning, and vandalism repair);

(B) Expected long-term ownership of the CWM site and the anticipated responsible party or parties for long-term maintenance; and

(C) How the maintenance activities are anticipated to be funded.

(k) The CWM plan must identify the long-term protection instrument for the CWM site in accordance with OAR 141-085-0695.

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

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

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

(b) Maps showing the preservation site including all delineated wetlands or tidal waters to be conserved;

(c) Documentation demonstrating that the proposed preservation site meets the requirements of OAR 141-085-0690(10);

(d) The surrounding land uses and an analysis of both the short-term and long-term known and probable effects of those land uses and activities on the preserved wetlands or tidal waters;

(e) Measures that may be necessary to minimize the effects of surrounding land uses and activities on the preserved wetlands or tidal waters;

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

(g) A long-term protection instrument;

(h) A long-term management plan with a funding mechanism that addresses the specific management needs to optimize and maintain functionality and ecological sustainability of the wetlands or tidal waters to be preserved; and

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

(3) Authorization Conditions for CWM Plans.

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

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

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

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

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

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

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

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

(g) For authorizations involving a mitigation bank credit purchase, proof of the purchase of the required number of mitigation bank credits must be received by the Department prior to issuance of the authorization.

141-085-0710

Monitoring Requirements for CWM

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

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

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

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

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

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

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

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

(3) **Duration.** Monitoring must be conducted for five years unless otherwise specified by the Department.

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

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

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

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

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

141-085-0715

Mitigation for Temporary Impacts

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

141-085-0720

Mitigation Banking Purpose, Applicability and Policies

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

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

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

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

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

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

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

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

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

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

141-085-0725

Process for Establishing Mitigation Banks

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

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

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

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

(b) The objectives of the proposed mitigation bank;

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

- (d) The proposed service area;
- (e) A market or other analysis that demonstrates the general need for the mitigation bank;
- (f) A description of the technical feasibility of the proposed mitigation bank;
- (g) The proposed ownership arrangements and long-term management strategy for the mitigation bank;
- (h) How the mitigation bank addresses each of the principal objectives for CWM listed in OAR 141-085-0680; and
- (i) Names and addresses of all landowners within 500 feet of the bank.

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

- (a) The Prospectus is complete and will proceed to the public notice; or
- (b) The Prospectus is incomplete.

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

(6) **Department May Decline to Participate.** If a mitigation bank sponsor cannot demonstrate the need for the mitigation credits or the technical feasibility and ecological desirability of the bank, the Department may decline to participate in its development.

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

- (a) Post the notice on the Department's web site for 30 calendar days;
- (b) Send the notice to city and county planning departments, affected state and federal natural resource and regulatory agencies, adjacent landowners, conservation organizations and other interested persons requesting such notices;

(c) Briefly describe the proposed mitigation bank and reference the Prospectus provided by the bank sponsor; and

(d) Solicit comments for 30 calendar days from the date of the public notice.

(8) Consideration of Comments Received During the Public Notice Period. All comments received will be provided to the bank sponsor and to the IRT. If comments are not received from an interested party within the 30-day comment period, the Department will assume the entity does not desire to provide comments.

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

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

(A) Oregon Department of Environmental Quality;

(B) Oregon Department of Fish and Wildlife;

(C) Oregon Department of Land Conservation and Development;

(D) U.S. Fish and Wildlife Service;

(E) U.S. Environmental Protection Agency;

(F) Soil and Water Conservation District; and

(G) Local Government Planner, or equivalent.

(b) The Department may appoint other members of the IRT based on the nature and location of the project, particular interest in the project by persons or groups, and/or any specific expertise that may be required by the Department in development of the MBI.

(c) The IRT acts in an advisory capacity to the Department in the establishment and operation of mitigation banks. The IRT member agencies may elect to be signatories on the MBI. By participating as signatories, IRT member agencies confirm that the approved bank supports the regulatory authorities and/or missions of the IRT agency. The IRT may:

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

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

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

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

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

(a) If the proposed bank is for wetland mitigation, all requirements for CWM plans per OAR 141-085-0680 through 141-085-0710; and

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

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

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

(C) A description of the projected wetland losses in the service area by HGM and Cowardin wetland classes;

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

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

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

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

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

(I) Detailed contingency plans describing how project deficiencies or performance failures will be corrected, including assignment of responsibilities for failures such as floods, vandalism, damage by pests and wildlife, invasion by weedy vegetation, etc.;

(J) Land use affidavit; and

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

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

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

(b) The draft MBI is incomplete.

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

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

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

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

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

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

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

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

141-085-0730

Establishment of Mitigation Credits

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

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

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

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

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

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

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

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

141-085-0735

Release, Use and Sale of Mitigation Credits

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

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

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

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

(5) **The Department May Purchase Bank Credits.** Funds from the wetland mitigation bank revolving fund may be used to purchase approved bank credits where such purchases will provide appropriate CWM.

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

141-085-0740

Authorization for Mitigation Banks

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

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

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

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

141-085-0745

In-Lieu Fee Mitigation

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

(1) **Applicability.** In-lieu fee mitigation involves the payment of funds to an approved sponsor to satisfy compensatory mitigation requirements for impacts to waters of this

state. In-lieu fee mitigation differs from other forms of mitigation in that advanced credits can be released upon approval of a program Instrument, before Department approval of the mitigation site.

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

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

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

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

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

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

141-085-0750

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

The Department will use the Oregon Removal-Fill Mitigation Fund to hold and disperse money collected from the program.

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

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

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

(c) Monitor the compensatory mitigation;

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

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

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

141-085-0755

Advance Mitigation; Standard Path

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

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

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

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

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

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

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

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

141-085-0760

Pilot Program for Advance Mitigation; Alternate Path

(1) **Objective.** The objective of advance mitigation is to provide compensatory wetland mitigation that replaces wetland functions and values before authorized wetland impacts. Currently, the Department has an advance mitigation option available through the mitigation banking program (OAR 141-085-0720 through 0745.) and standard path advance mitigation program (OAR 141-085-0755). The current methods of advance mitigation remain in effect and are not modified by this alternate path approach. The purpose for creating alternate path advance mitigation is to:

- (a) Reduce or eliminate the temporal loss of wetland functions and values associated with permittee responsible CWM;
- (b) Reduce the risk of mitigation site failure by demonstrating mitigation site success prior to credit release;
- (c) Reduce entry requirements associated with wetland mitigation banking by reducing initial administrative requirements and performance security requirements; and
- (d) Reduce the Department's administrative burden for authorizing advance mitigation.

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

- (a) Requirements for baseline condition documentation, including but not limited to: wetland delineation, wetland functions and values assessment, site selection criteria, proposed success criteria, and monitoring plan;
- (b) Department approval of baseline documentation;
- (c) Advance mitigation site development including removal-fill authorization, as necessary;
- (d) Mitigation site monitoring by the advance mitigation proponent; and
- (e) Petition to the Department for credit certification including, but not limited to, final wetland delineation and functions and values assessment, monitoring results, credit ledger management, and long-term management and site protection plan.

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

- (a) Accomplishes the program purposes described in Section (1) of this rule;
 - (b) Provides CWM of quality at least commensurate with wetland mitigation banking; and
 - (c) Influences the viability of the existing wetland mitigation banking program.
- (4) **Applications May Be Limited.** The Department may limit the number of applicants for the alternate path advance mitigation pilot program.

141-085-0765

Compensatory Non-Wetland Mitigation (CNWM)

- (1) **Compensatory Non-Wetland Mitigation (CNWM) for Waters Other Than Wetlands or Tidal Waters.** The Department will also require CNWM for unavoidable impacts to waters of this state for waters other than wetlands or tidal waters. Such conditions may impose obligations on the permit holder beyond the expiration of the authorization.
- (2) **Scope of CNWM.** CNWM will be commensurate with removal-fill impacts and may include, but is not limited to:
- (a) Offsite or onsite enhancement, creation, restoration and preservation of water resources of this state such as rivers, intermittent and perennial streams, lakes, ponds and springs; and
 - (b) Offsite and onsite improvements to enhance navigation, fishing and public recreation uses of waters of this state.
- (3) **CNWM Approval Standard.** In order for the Department to approve compensatory mitigation for impacts to waters of this state other than wetlands or tidal waters, the applicant must demonstrate in writing, using a method approved by the Department, that the compensatory mitigation plan will replace or provide comparable substitute water resources of this state.
- (4) **CNWM Conditions of Approval.** The Department may require that the CNWM include:
- (a) Defined performance standards;
 - (b) Site monitoring and reporting using a method approved by the Department;
 - (c) Administrative protection of the CNWM site; and

(d) Financial security.

141-085-0770

Complaints and Investigations

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

(a) Removal-fill without a valid authorization;

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

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

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

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

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

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

141-085-0775

Enforcement Actions and Procedures; Appeals

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

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

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

- (A) Comply with conditions of a permit, authorization or order;
- (B) Remove an unpermitted fill;
- (C) Restore the site of an unpermitted removal;
- (D) Pay a civil penalty;
- (E) Provide compensatory mitigation; and
- (F) Forfeit their right to apply for new removal-fill permits or authorizations (debarment).

(b) The following administrative remedies may be used to implement appropriate enforcement actions:

(A) Cease and desist orders may be issued to prevent damage. The Department may issue an order requiring any person to cease and desist from any project if the Department determines that such violation or threatened violation presents an imminent and substantial risk of injury, loss or damage to water resources.

(i) A cease and desist order may be entered without prior notice or hearing and will be served upon the person by personal service or by registered or certified mail.

(ii) A cease and desist order will state that a hearing will be held on the order if a written request for hearing is filed by the person subject to the order within 10 calendar days after receipt of the order.

(iii) If a person subject to a cease and desist order files a timely request for a hearing, the Department will hold a contested case hearing before the Office of Administrative Hearings pursuant to the applicable provisions of ORS 183.310 through 183.550.

(iv) Cease and desist orders will not be stayed during the pendency of a hearing conducted under this section.

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

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

(C) Restoration orders may be issued when cooperative agreement cannot be reached to resolve the violation. Restoration orders are appealable;

(D) Revocation or suspension of an authorization, as per OAR 141-085-0780; and

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

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

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

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

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

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

141-085-0780

Revoking or Suspending an Authorization; Allowing Corrective Action

(1) **Revocation or Suspension if Out of Compliance.** The Department may revoke or

suspend an authorization if an alleged violator is not in compliance with any conditions of an authorization, or if the applicant failed to provide complete and accurate information in the permit application.

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

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

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

(b) The Notice will include the following information:

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

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

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

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

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

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

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

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

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

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

141-085-0785

Civil Penalties; Appeals

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

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

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

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

- (a) The particular section of the statute, rule, order or authorization involved;
- (b) A short and plain statement of the matter asserted or charged;
- (c) A statement of the party's right to request a hearing within 20 calendar days of receiving the notice;
- (d) A statement of the amount of civil penalty assessed and terms and conditions of payment; and
- (e) Notification that the party may request a contested case hearing.

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

(6) Calculating the Civil Penalty.

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

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

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

(i) A value of 1 will be applied if the alleged violator was unaware of the Removal-Fill Law at the time of the alleged violation;

(ii) A value of 2 will be applied if the alleged violator was aware of the Removal-Fill Law at the time of the alleged violation and in cases of permit non-compliance; or

(iii) A value of 5 will be applied if the alleged violator had a previous violation. A previous violation exists, if there was an adjudication (either in court or administrative hearing), or the violator failed to appeal an enforcement order (and a final order was issued), or the violator signed a consent agreement. This value will not be imposed if the previous violation occurred more than five years prior to the current incident.

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

(i) A value of 1 will be applied when the person responds to communications from the Department, supplies information requested by the Department, permits access to the site to conduct site investigations and/or complies with restoration as requested by the Department; or

(ii) A value of 3 will be applied when the person is not responsive to communications from the Department, not cooperative in providing information as requested by the Department and/or the person does not, after receiving verbal or written notification from the Department, cease the activity alleged to constitute a violation or threatened violation.

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

(i) A value of 1 will be applied if the damage to the resource is minimal and/or the resource is expected to naturally self-restore within one year; or

(ii) A value of 3 will be applied if the adverse impacts are significant and/or not expected to naturally self-restore within one year. In the case of permit non-compliance, a value of 3 will be applied if failure to correct the deficiency could result in reasonably expected adverse impacts to waters of this state or a deficiency in the obligation to provide mitigation.

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

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

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

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

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

DEPARTMENT OF STATE LANDS

DIVISION 89

ADMINISTRATIVE RULES GOVERNING THE ISSUANCE AND ENFORCEMENT OF GENERAL AUTHORIZATIONS WITHIN WATERS OF THIS STATE

141-089-0620

General

- (1) **Special Headings and Fonts.** Where headings, special fonts or double-spacing are used, they are for the convenience of the user only and have no substantive effect.
- (2) **Applicability of OAR 141-085.** Unless otherwise specified under OAR 141-089, the provisions of OAR 141-085 apply to General Authorizations.
- (3) **Previous GAs Repealed.** OAR 141-089-0095 through 141-089-0615 were repealed on March 1, 2011.
- (4) **Projects Authorized under Previous GAs.** Authorizations issued under the previous OAR set forth in Section (3) of this rule will remain in effect until January 1, 2012. At the Department's discretion, limited extensions may be allowed for projects that have been started but not completed by this date. Written approvals for extensions must be obtained from the Department before January 1, 2012.

141-089-0625

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

GAs are adopted individually by rule and can be found in OAR 141-089-0660 through 141-089-0835.

- (1) **Waiver of Permit Requirements.** An individual removal-fill permit may not be necessary if a proposed activity meets the requirements of a General Authorization (GA). Any person proposing to conduct a removal-fill activity under a GA must first notify the Department in writing and pay any applicable fee to the Department.
- (2) **Establishment.** General Authorizations are adopted, amended and repealed as administrative rules in accordance with the Administrative Procedure Act (ORS 183.310 through 183.550). A General Authorization may be granted on a statewide or other geographic basis.

(3) **Criteria for Adoption.** The Department may adopt a GA based upon a finding that the category of activities of removal-fill:

- (a) Are substantially similar in nature;
- (b) Would cause only minimal individual and cumulative environmental impacts; and
- (c) Would not result in long-term harm to the water resources of this state.

(4) **Department Findings.** These General Authorizations are made pursuant to ORS 196.850 and are based upon the determination that the authorized activities are similar in nature and when conducted in accordance with these rules will not result in long-term harm to water resources of the state, and will cause only minimal individual and cumulative environmental effects.

(5) **Amend or Rescind.** The Department may amend or rescind any GA, through rulemaking, upon a determination that the removal-fill activity conducted under the General Authorization has resulted in or would result in more than minimal adverse effect or long-term harm to the water resources of this state. Any person may request the Department apply this provision. Such a request must include the specific General Authorization to be rescinded or amended and the reasons for the request.

(6) **Expiration of General Authorizations.** The Department will conduct a review of the GAs on or before March 1, 2016. The review will include public notice and opportunity for public hearing. At the completion of its review, the Department will decide whether to modify, reissue or rescind the GAs.

141-089-0630

Project Applicability

(1) **Applicability.** This rule sets forth conditions under which a person may, without an individual removal-fill permit from the Department, place or remove material within waters of this state, excluding State Scenic Waterways, as defined in OAR 141-085 for the purposes set forth in each GA.

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

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

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

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

- (a) Waterway Habitat Restoration;
- (b) Wetland Ecosystem Restoration;
- (c) Waterway Bank Stabilization;
- (d) Piling Placement and Removal;
- (e) Certain Transportation-Related Activities in ESH; and
- (f) Temporary Impacts to Non-Tidal Wetlands.

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

141-089-0635

Fees; Disposition of Fees

(1) **Fees.** For removal-fill volumes that equal or exceed 50 cubic yards, a flat fee of \$250.00 will be assessed and must be submitted with the notification for the following GAs:

- (a) Certain Transportation-Related Activities in ESH;
- (b) Temporary Impacts to Non-Tidal Wetlands;

(c) Piling Placement or Removal; and

(d) Removing and Disposing of Sediment Behind Tidegates and Within Hydraulically Closed Perimeters.

(2) **Fee for Project with Combined GAs.** For a project which combines multiple GAs under OAR 141-089-0630 and for which a fee is required for more than one of the GAs according to OAR 141-089-0635(1), a flat fee of \$250.00 will be required for the project.

(3) **Fees Deposited in the Common School Fund.** The Department will credit any fee collected under this section to the Common School Fund for use by the Department in administration of ORS 196.600 through 196.905.

141-089-0640

Pre-Construction Notification

(1) **Project Notification Required.** A complete project notification must be submitted to the Department at least 30 calendar days before starting the project. A complete notification is one that contains all the information required on the form provided by the Department and all required attachments. The project may begin 30 calendar days from agency receipt of the notification.

(2) **Review of the Notification.** Within 30 calendar days of receipt, the Department will review the notification for completeness and eligibility, make one of the following determinations and notify the responsible party that:

(a) The notification is complete and the project is eligible under the GA;

(b) The notification is incomplete and the person must supply certain specified missing, inaccurate or insufficient information. The person may amend and resubmit the notification within 120 calendar days of the notice for reconsideration, unless instructed by the Department to do otherwise. Submission of an amended notification starts a new 30-day review period; or

(c) The project is ineligible for certain specified reasons. The person may then either revise the project and submit for reconsideration within 120 days of the notification or apply for an individual permit under OAR 141-085. Submission of an amended notification commences a new 30-day review period.

(3) **Timeframe for Resubmittal of Incomplete or Ineligible Notifications.** If a revised notification or application is not resubmitted within 120 calendar days of an incompleteness or ineligible determination, the Department will presume that the responsible party does not intend to provide revisions to the notification and may administratively close the file. If the Department closes the file under these

circumstances, the Department will retain the application fee. If the Department receives a subsequent notification or application for the same or similar project after a file has been closed, the responsible party must pay any applicable fees for the new notification at time of submission.

141-089-0645

Expiration of Project Eligibility

(1) Except as provided below under Section (2) of this rule for the Recreational and Small Scale Placer Mining GA (See OAR 141-089-0820):

(a) A notification confirmed as eligible under a GA will be valid for three years or until the project is complete, whichever occurs first; and

(b) Requests for renewals or extensions will not be granted.

(2) Expiration and Renewal of Recreational Placer Mining Authorizations are according to the following:

(a) Authorizations issued under the Recreational Placer Mining GA expire on December 31 of each year;

(b) When an authorization is issued, a completed Recreational Placer Mining Report Form must be submitted to the Department by December 31 of each year the authorization was active; and

(c) Renewal of the authorization will require submission of a completed Recreational Placer Mining Report for the previous year.

141-089-0650

General Conditions

The following conditions apply to all general authorizations except for Removing and Disposing of Sediment Behind Tidegates and Within Hydraulically Closed Perimeters (OAR 141-089-0760 through 141-089-0775):

(1) **Responsible Party.** The person listed on the notification as the responsible party is responsible for the activities of all contractors or other operators involved in project work covered by the GA.

(2) **Copy of Approved Notification Available for Inspection.** A copy of the notification approved by the Department must be available at the work site whenever noticed activities are being conducted.

(3) **Site Access Required.** Employees of the Department and all authorized representatives must be permitted access to the project area at all reasonable times for the purpose of inspecting work performed under a notification.

(4) **Archeological Resources.** If any archeological sites, resources or artifacts are discovered during construction, work must immediately cease and the State Historic Preservation Office must be contacted.

(5) **ODFW Fish Passage Requirement.** The noticed activity must meet Oregon Department of Fish and Wildlife requirements for fish passage before the project is started (ORS 509.580 through 509.901 and OAR 635-412-0005 through 635-412-0040).

(6) **Hazards to Recreation, Navigation and Fishing.** The activity must be timed so as not to interfere with or create a hazard to recreational and commercial navigation and fishing.

(7) **Work Period in Jurisdictional Areas.** Fill or removal activities below the Ordinary High Water Line must be conducted when recommended by ODFW, unless otherwise coordinated with Oregon Department of Fish and Wildlife and approved in writing by DSL. Work is prohibited when fish eggs are present within the reach where activities are being conducted.

(8) **Pre-Construction Resource Area Fencing or Flagging.** Prior to any site grading, the boundaries of any avoided wetlands, waterways and riparian areas adjacent to the project site must be surrounded by noticeable construction fencing or flagging. There must be no vegetation removal or heavy equipment within marked areas. The marked areas must be maintained during construction of the project and be removed immediately upon project completion.

(9) **Erosion Control Methods.** The following erosion control measures must be installed at the construction site prior to construction and maintained during and after construction to prevent erosion and minimize movement of soil into waters of this state:

(a) All exposed soils must be stabilized during and after construction in order to prevent erosion and sedimentation;

(b) Filter bags, sediment fences, sediment traps or catch basins, leave strips or berms, or other measures must be used to prevent movement of soil into waterways and wetlands;

(c) To prevent erosion, use of compost berms, impervious materials or other equally effective methods, must be used to protect soil stockpiled during rain events or when the stockpile site is not moved or reshaped for more than 48 hours;

(d) Unless part of the permanent fill, all construction access points through, and staging areas in, riparian and wetland areas must use removable pads or mats to prevent soil compaction. However, in some wetland areas under dry summer conditions, this requirement may be waived upon approval by DSL. At project completion, disturbed areas with soil exposed by construction activities must be stabilized by mulching and native vegetative plantings/seeding. Sterile grass may be used instead of native vegetation for temporary sediment control if native vegetation is unavailable. If soils are to remain exposed for more than seven days after completion of the permitted work, they must be covered with erosion control pads, mats or similar erosion control devices until vegetative stabilization is installed;

(e) Where vegetation is used for erosion control on slopes steeper than 2:1, tackified seed mulch must be used so the seed does not wash away before germination and rooting;

(f) Dredged or other excavated material must be placed on upland areas having stable slopes and must be prevented from eroding back into waterways and wetlands;

(g) Erosion control measures must be inspected and maintained as necessary to ensure their continued effectiveness until soils become stabilized; and

(h) All erosion control structures must be removed when the project is complete and soils are stabilized and vegetated.

(10) **Hazardous, Toxic, and Waste Material Handling.** Petroleum products, chemicals, fresh cement, sandblasted material and chipped paint, wood treated with leachable preservatives or other deleterious waste materials must not be allowed to enter waters of this state. Machinery refueling is to occur at least 150 feet from waters of this state and confined in a designated area to prevent spillage into waters of this state. Barges must have a containment system to effectively prevent petroleum products or other deleterious material from entering waters of this state. Project-related spills into waters of this state or onto land with a potential to enter waters of this state must be reported to the Oregon Emergency Response System (OERS) at 1-800-452-0311.

(11) **Raising or Redirecting Water.** The project must not cause water to rise or be redirected and result in damage to structures or property.

(12) **Wetlands of Conservation Concern.** The project must not involve impacts to wetlands identified as a wetland type of conservation concern. Wetlands of Conservation Concern are bogs, fens, playas, salt flats, alkaline lakes, hot springs, native wet prairies, vernal pools, inter-dunal wetlands, mature forested wetlands,

ultramafic soil wetlands, wooded tidal wetlands, and un-diked tidal wetlands, as determined by the Department.

(13) **Waste Disposal.** Old piling and other waste material discarded by the project must be disposed of in an appropriate disposal facility. There must be no temporary storage of piling or other waste material below top of bank, in any wetland, Federal Emergency Management Administration designated floodway, or an area historically subject to landslides.

(14) **DSL May Halt or Modify.** DSL retains the authority to temporarily halt or modify the project in case of unforeseen damage to natural resources.

(15) **Work Area Isolation.** The work area must be isolated from the water during construction. All structures and materials used to isolate the work area must be removed immediately following construction and water flow returned to pre-construction conditions. All fish must be salvaged from the isolated area in accordance with Oregon Department of Fish and Wildlife requirements.

(16) **Spoil Disposal.** Spoil materials, not used in the project, must be placed in an upland location. Spoil materials used in the project must be included in the cumulative removal-fill calculation for the activity.

141-089-0655

Enforcement

Failure to adhere to the terms of any general authorization when performing activities authorized under this division, is a violation of the Removal-Fill Law and may be subject to appropriate enforcement in accordance with OAR 141-085.

141-089-0656

Authorization Decision Appeals

A person whose project is determined by the Department to be ineligible for a General Authorization may appeal the Department's decision according to OAR 141-085-0575(1), (5) through (10) and OAR 141-085-0580.

General Authorization for Certain Minimal Disturbance Activities within ESH

141-089-0660

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, fill, remove or move small quantities of material for certain activities within waters of this state designated Essential Indigenous Anadromous Salmonid Habitat (ESH).

141-089-0665

Eligibility Requirements

Activities are limited to four cubic yards of removal and fill at any individual site and, cumulatively, not more than 10 cubic yards of removal and fill within a designated ESH stream for the entire project.

141-089-0670

Authorized Activities

Eligible projects are limited to installation, removal, construction, maintenance and inspection for the following activities:

- (1) **Investigative Drilling.** Investigative drilling to gather necessary technical data for designing structures.
- (2) **Scientific Measurement.** Scientific measurement devices, such as staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar structures, whose purpose is to measure and record scientific data.
- (3) **Surveys.** Surveys for historical resources.
- (4) **Maintenance of Water Intake Structures.** Removal of sediment, sand and gravel necessary to maintain flow for an existing water intake structure.

141-089-0675

Activity-Specific Conditions

Projects eligible for this General Authorization must adhere to the General Conditions listed under OAR 141-089-0650.

General Authorization for Piling Placement and Removal within ESH

141-089-0680

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, place or remove piling in waters of this state designated as Essential Indigenous Anadromous Salmonid Habitat (ESH) as described in OAR 141-102.

141-089-0685

Eligibility Requirements

To be eligible, a project must adhere to the following:

- (1) **Purpose.** Individual piling and piling placed for over-water structure support (e.g., piling associated with docks, piers, boardwalks), mooring and turning dolphins, navigational aids without footings or other support structure as approved by the Department.
- (2) **Piling Material.** Round steel piling 24 inches in diameter or smaller, steel H-piling designated as HP24 (depth of section 24 inches or less) or smaller, or untreated wood, pre-cast concrete or plastic piling.
- (3) **Limited Placement.** Piling must be placed:
 - (a) So as not to form headwalls or other bank treatment structures;
 - (b) So as not to impede normal water flow into or within wetlands or deflect water in a manner that causes erosion;
 - (c) So as not to create new uplands;
 - (d) In non-wetland waters;
 - (e) In non-tidal waters; and
 - (f) By vibratory hammer or impact hammer, subject to the activity-specific conditions set forth in OAR 141-089-0695. Hydraulic jetting is not allowed.

(4) **Removal.** Piling must be removed by means of vibratory method only according to the activity-specific conditions set forth in OAR 141-089-0695.

141-089-0690

Authorized Activities

(1) **Number of Piling Installed is Limited.** Placement of no more than five pilings or one dolphin consisting of three to five pilings; and

(2) **Number of Piling Removed is Limited.** Removal of no more than five pilings or one dolphin consisting of three to five pilings.

141-089-0695

Activity-Specific Conditions

Projects eligible for this GA must adhere to the general conditions in OAR 141-089-0650 and the following activity-specific conditions:

(1) **Minimum Necessary.** Number of pilings must be the minimum necessary to fulfill the essential purpose.

(2) **Sound Attenuation.** A vibratory hammer must be used whenever feasible. If an impact hammer must be used to drive or proof steel piles, sound attenuation measures including cushion blocks (wood blocks between pile and hammer) and bubble curtains operated to distribute air bubbles around 100 percent of the piling for the full depth of the water column must be used:

(a) If water velocity is 1.7 miles per hour or less, an unconfined bubble curtain may be used; or

(b) If water velocity is greater than 1.7 miles per hour, a confined bubble curtain (e.g., bubble ring surrounded by fabric or metal sleeve) must be used.

(3) **Method for Removal of Piling.** Removal of piling must be conducted using a vibratory method:

(a) Piling must not intentionally be broken by twisting or bending;

(b) Upon removal, piling must be handled to effectively contain all adhering sediment. All return flows must meet state water quality standards; and

(c) Piling and containment materials must be disposed in an approved upland disposal site.

(4) **Removal Problems in Uncontaminated Sediment.** If wood piling breaks above or below the bed surface within an area of uncontaminated sediment, piling must be cut at least three feet below the bed surface or otherwise pushed into that depth, then covered with a cap of clean substrate.

(5) **Removal Problems in Contaminated Sediment.** If wood piling breaks above the bed surface within an area of known contaminated sediment, piling must be cut at the bed surface or otherwise pushed to that depth. If piling breaks in contaminated sediment below the bed surface, no further attempt at removal may be made and the hole must be covered with a cap of clean substrate.

(6) **Prevent Perching.** Piling must be fitted with devices to effectively prevent perching by fish-eating bird species.

(7) **Barge or Top of Bank Position.** Piling must be placed or removed from a barge-mounted or above top-of-bank position. If barge-mounted, barge must not at any time be grounded in the bed or banks.

General Authorization for Temporary Impacts to Non-Tidal Wetlands

141-089-0700

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, temporarily place or remove material in non-tidal wetlands for purposes of construction staging, placement or maintenance of utility lines or constructing temporary access.

141-089-0705

Eligibility Requirements

To be eligible, a project must adhere to the following:

(1) **Wetland Conversion.** Activities must not permanently convert wetland to upland.

(2) **Woody Vegetation.** The project must not convert forested or shrub wetlands to a different Cowardin class.

(3) **Wetland Delineation and Concurrence.** A copy of a valid, Department-approved wetland delineation map and concurrence letter must be provided with the notification, unless otherwise directed by the Department.

141-089-0710

Authorized Activities

The project is limited to temporary impacts of 0.2 acres or less of non-tidal wetlands. This threshold applies to all activities associated with the project (e.g., placement of the utility lines, material stockpiling, equipment storage, staging and vehicle access).

141-089-0715

Activity-Specific Conditions

Projects eligible for this GA must adhere to the general conditions in OAR 141-089-0650 and the following activity-specific conditions:

(1) **Temporary Impact Rectification.** Rectification of temporary impacts includes re-establishment of pre-existing contours and pre-existing vegetation.

(2) **Timing of Temporary Impact Rectification.** Re-establishment of pre-construction contours must be completed immediately following project completion and within the same construction season as the temporary impact. Planting must be completed within six months of re-establishment of pre-existing contours.

(3) **Post-Construction Report Required.** Within two years of planting, a report must be submitted to the Department. The report must include:

(a) Data plots, according to OAR 141-090, to confirm that the wetland area impacted by the project meets wetland criteria; and

(b) Photos taken at the previously established photo points.

(4) **Protection of Ground Surface.** Before placing temporary fill in wetlands, fabric must be placed to allow complete removal of all temporary materials from the wetlands. If necessary to assist with removal of the fill, chain link fence or similar material may be placed under the fill. All fabric, fencing and other materials must be completely removed at project completion.

(5) **Stockpile Topsoil.** When trenching, the upper 12 inches of topsoil must be removed and stockpiled separately from subsurface soils and used as the final layer in backfilling.

(6) **Prevent Hydraulic Piping.** The project must be constructed to prevent underground hydraulic piping to dewater the site or adjacent wetlands. If the native underlying soils are not used as bedding material, and a coarser, non-native soil or other material is used, preventive measures must be used such as restoration of the restrictive layer and placement of clay or other impermeable plugs. Such plugs must be placed at each wetland boundary.

General Authorization for Waterway Bank Stabilization

141-089-0720

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, place or remove material in non-tidal waterways for the purpose of stabilizing the actively eroding banks of non-tidal waters.

141-089-0725

Eligibility

To be eligible, a project must be for the purpose of bank stabilization in non-tidal waters and meet the project criteria for the authorized activities listed in OAR 141-089-0730.

141-089-0730

Authorized Activities

(1) **Bio-Engineering.** This activity includes placement of woody vegetation, vegetated geogrids, biodegradable logs, straw bales or straw logs used for bank protection, bank reshaping, terracing and erosion control.

(2) **Bank Terracing.** This activity includes bank terracing and sloping to facilitate establishment of woody vegetation. The project must meet the following criteria:

- (a) The slope must not be steeper than 3:1 (H/V) ratio;
- (b) Bank treatments must be replanted with native woody vegetation; and
- (c) If fabric is necessary, no petroleum-based fabric is allowed.

(3) **Placement of Large Wood.** Trees or root wads may be used. The project must meet the following criteria:

- (a) Trees must have a trunk diameter greater than or equal to 12 inches;
- (b) The basal ends must be oriented upstream;
- (c) If fastening is necessary, only smooth, single-string wire, degradable rope or pinning may be used. Braided wire cable is not allowed; and
- (d) If anchoring is necessary, only rock ballast, untreated wood posts, stabilizing wood or key pieces of wood may be used as anchors.

(4) **Engineered Log Jams.** Log jams may be placed in order to stabilize the bank for woody vegetation establishment. The project must meet the following criteria:

- (a) The length of key pieces of wood with trimmed rootwads must be one and one-half times the bankfull width or a minimum of 25 feet in length when bankfull width exceeds 15 feet. The length of key pieces of wood with trimmed rootwads must be the twice the bankfull width or a minimum of 30 feet in length when bankfull width exceeds 15 feet;
- (b) Large wood must be intact, hard and undecayed to partially decayed hardwoods or conifers;
- (c) The log jam must not occupy more than 20 percent of the bankfull width;
- (d) If fastening is necessary, only smooth, single-string wire, pinning or degradable rope may be used. Braided wire cable is not allowed; and
- (e) If anchoring is necessary, only rock ballast, untreated posts, stabilizing wood or key pieces of wood may be used as anchors.

(5) **Log Toe Placement.** The project must meet the following criteria:

- (a) Log toes must not extend more than one foot above the elevation of the water at base flow; and
- (b) Logs must be large enough to withstand the hydraulic energy in the stream and be anchored securely to the bank by burial.

(6) **Porous Weir.** This activity includes the construction of a self-sustaining, low profile, structure including but not limited to cross vanes and artificial riffles. A porous weir delays but does not store water. It is used to redirect flow toward the center of the channel, provide energy dissipation and promote increased sedimentation along banks

while allowing fish passage through a porous design. The project must meet the following criteria:

- (a) Porous weirs must be placed so scour pools occur in areas where pools would naturally form in a pool and riffle complex;
- (b) Porous weirs must not result in culvert inlet or outlet scour;
- (c) Porous weirs must be sized appropriately for the system so as not to require annual maintenance;
- (d) Porous weirs must be constructed of materials that mimic natural substrate found within the system;
- (e) The structure must not exceed 100 cubic yards and 40% of the channel cross-section width; and
- (f) The activity is limited to 100 cubic yards for every one-half mile of waterway, unless otherwise approved by the Department.

141-089-0735

Activity-Specific Conditions

Proposed projects eligible for this General Authorization must adhere to the general conditions in OAR 141-089-0650 and the following activity-specific conditions:

- (1) **Anchoring.** Anchoring materials must:
 - (a) Not restrict or redirect flows; and
 - (b) Be set below grade to minimize the appearance.
- (2) **Ballast.** Use of rock and gravel for ballast and porous weirs is limited as follows:
 - (a) Only the minimal amount necessary may be used to achieve project objectives;
 - (b) Rock must be placed in a manner that does not increase the upland surface area;
 - (c) Rock must be placed in a way as to minimize adverse impacts to the active channel;
 - (d) All rock must be placed, not dumped, from above the bank line; and
 - (e) Only erosion resistant rock from an upland source may be used. No broken concrete or asphalt is allowed.

(3) **Natural Materials.** Material used must be similar to materials currently or historically found naturally in the stream reach.

General Authorization for Certain Transportation-Related Activities

141-089-0740

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, fill or remove material in waters of this state for certain transportation-related activities.

141-089-0745

Eligibility Requirements

(1) In order to be eligible, a project must be for one of the authorized activities listed in OAR 141-089-0750.

(2) When replacing an existing culvert for fish passage under OAR 141-089-0750 (4), notification must be accompanied by an ODFW-signed Fish Passage Plan for a Road Stream Crossing.

141-089-0750

Authorized Activities

A project must adhere to the following:

(1) **Removal of Garbage.** Removal of garbage, trash and rubble (e.g., broken concrete, broken asphalt, and metal waste) from in and around transportation structures is allowed in all waters of this state when:

(a) The removal does not adversely affect woody vegetation, wetlands or waters;

(b) The trash, garbage and rubble removed under this GA are disposed at a facility licensed to accept trash and garbage; and

(c) There is no stockpiling of removed garbage, trash and rubble within waters of this state.

(2) **Large Wood Relocation.** Large wood located in and around transportation structures may be relocated below the Ordinary High Water Line, below the highest measured tide, and in wetlands.

(3) **Investigative Drilling.** Drilling of test holes and borings is allowed for the purposes of planning and designing a transportation structure.

(4) **Replacement of Existing Culverts for Fish Passage.** Culvert replacement for fish passage is allowed when the new footprint of the structure exceeds the exempt maintenance allowance.

141-089-0755

Activity-Specific Conditions

Proposed projects eligible for this GA must adhere to the general conditions listed in OAR 141-089-0650.

General Authorization for Removing and Disposing of Sediment Behind Tidegates and within Hydraulically Closed Perimeters

141-089-0760

Purpose

(1) These rules set forth conditions under which a project proponent may, without an individual removal-fill permit from the Department, dispose (fill), and place (fill), remove (removal), or alter material in waters of this state for the purposes of removing and disposing of sediment while maintaining or cleaning natural or artificially created drainage ditches upstream from tidegates and within hydraulically closed perimeters. For the purposes of this General Authorization, “hydraulically closed perimeters” means, all water flow and hydraulic connectivity to the surrounding watershed is controlled by pumps.

(2) This general authorization is exclusive to:

(a) The disposal of sediments within waters of this state, such as wetlands, removed as a result of ditch maintenance and cleaning in drainage ditches upstream of tidegates; and

(b) The removal of material from drainage ditches (cleaning) upstream of tidegates that does not meet the requirements described in OAR 141-089-0760(4) below.

(3) Drainage ditches that have a free and open connection to other natural waterways and are presumed to contain food and game fish are waters of this state.

(4) The regular maintenance of ditches as defined in OAR 141-085-0510(26) is exempt from regulation under the Removal-Fill Law and this General Authorization as set forth in OAR 141-085-0535(8).

(5) The placement of sediment removed from drainage ditches on wetlands may be an activity subject to the Removal-Fill Law, OAR 141-085 and this General Authorization.

(6) A notification must be sent to the Department before any person starts an activity authorized by this General Authorization. The term and conditions of issuance shall be stated in the approved notification. The term shall not exceed the expiration date on the approved notification.

(7) This General Authorization is made pursuant to ORS 196.850 and is based on the determination that the authorized activities are similar in nature and when conducted in accordance with this general authorization rule will not result in long-term harm to water resources of the state, and will cause only minimal individual and cumulative environmental effects.

(8) This General Authorization does not apply to activities or waters exempt from the Removal-Fill Law as described in OAR 141-085.

(9) Other structures, uses and activities included in the notification for this General Authorization that are subject to another general authorization under OAR 141-089 or individual permit under OAR 141-085 will not be authorized or covered by this General Authorization. An application encompassing multiple activities must be processed as an individual removal-fill permit under OAR 141-085.

(10) Unless otherwise specified, the terms used in this General Authorization are defined in OAR 141-085.

(11) In the event a dispute arises about the applicability of this General Authorization to any project notification, the Department shall make the final determination. The Department shall rely on the responsible party's notification and supporting documentation for its decision.

141-089-0765

Eligibility Requirements; Ineligible Projects

(1) This rule sets forth conditions under which a person may, without an individual removal-fill permit from the Department, place or remove material within waters of this state, excluding State Scenic Waterways, as defined in OAR 141-085 for the purposes set forth in this GA. The activity must:

(a) Be conducted for the specific purpose of disposal of sediments within waters of this state (e.g. wetlands) as a result of maintenance/cleaning of drainage ditches upstream of tidegates and within hydraulically closed perimeters; or

(b) Be conducted for the specific purpose of the removal of material (cleaning) from drainage ditches upstream of tidegates and within hydraulically closed perimeters that does not meet the requirements described in OAR 141-089-0760(4) above; and

(c) Remove, fill or alter 50 or more cubic yards in waters of this state.

(2) A project is not eligible for this general authorization if:

(a) The project fails to meet any eligibility or mandatory requirements; or

(b) The project notification includes any structure, use or activity subject to another general authorization under OAR 141-089 or individual permits under OAR 141-085.

141-089-0770

Mandatory Requirements

The Department will review each notification to ensure that a project complies with the following mandatory requirements:

(1) The removal of sediments from drainage ditches must be kept to the minimum amount necessary to remove recently deposited materials. Additional channel widening or deepening beyond that amount is not allowed under this General Authorization.

(2) The sediments removed from drainage ditches may be spread in a thin layer (three inches or less) on farmed wetland or wet pasture provided the effects are temporary and there is no permanent conversion from wetland to upland. Freshwater wetland (other than farmed wetland or wet pasture mentioned above), salt marsh, tidal flats or permanent or semi-permanent open water areas must not be used for sediment disposal.

141-089-0775

Conditions of Issuance of General Authorization

Responsible parties must adhere to the conditions of the general authorization.

(1) The responsible party must conduct all work in compliance with the comprehensive plan, zoning requirements and other local, state and federal regulations pertaining to the project. Local land use planning department approval must be obtained if the project is located within a Federal Emergency Management Agency designated floodway. All other necessary approvals and permits must be obtained before starting the authorized project. All necessary approvals and permits must be obtained before starting the project under this General Authorization.

(2) The responsible party must obtain all necessary access permits or rights-of-way prior to entering lands owned by another for the purposes of completing a project authorized under this general authorization.

(3) The responsible party must conduct the activity during the time period recommended by the Oregon Department of Fish and Wildlife, unless after consultation with ODFW, a waiver is granted by Department for a longer or alternative time period. Work is prohibited when fish eggs are present within the reach where activities are being conducted.

(4) The responsible party must ensure that the activity will not interfere with fish passage, as required by the Oregon Department of Fish and Wildlife.

(5) When listed species are present, the responsible party must comply with the state and Federal Endangered Species Acts. If previously unknown listed species are encountered during the project, the responsible party must contact the Department as soon as possible.

(6) The responsible party must not disturb or destroy known archeological sites unless authorized under a permit issued by the State Historic Preservation Office. When previously unknown occurrences of archeological sites are discovered during construction, the responsible party must immediately stop work at the discovery site and contact the Department.

(7) The responsible party must ensure that the authorized work does not unreasonably interfere with or create a hazard to recreational navigation.

(8) The responsible party must ensure that woody vegetation removal is limited to the minimum amount needed to complete the project including construction access.

(9) The responsible party must ensure that areas disturbed in the course of completing the authorized work are stabilized with the appropriate erosion control best

management practices and re-vegetated with the same mix of native herbs, shrubs and/or trees in approximately the same numeric proportion as were removed from the site, unless otherwise approved by the Department. Grass seed mixes of exotic and certified-free of noxious weeds that will hold the soil and not persist, are permitted.

(10) The responsible party must ensure that no petroleum products, chemicals or deleterious materials are allowed to enter the waters of this state.

(11) The responsible party must adhere to all applicable Department of Environmental Quality (DEQ) water quality requirements. If a 401 Water Quality Certification (WQC) is issued by DEQ in conjunction with a US Army Corps of Engineers 404 permit for the same project, the water quality conditions in the 401 WQC will govern water quality requirements pertaining to the authorized removal-fill activity. In this event, a copy of the 401 Water Quality Certification must be retained on site.

(12) For drainage ditch cleaning activities, the responsible party must comply with the following:

(a) Removal of existing woody vegetation, other than that growing within the maintained channel bed is prohibited;

(b) Only sand and silt sediments may be removed. This General Authorization is not for the removal of gravel;

(c) Erosion of disturbed areas (e.g., drainage ditch banks and work areas) must be minimized through re-vegetation with grass and/or planting of trees and shrubs;

(d) Removal must be conducted with land-based equipment from one side of the drainage ditch unless specifically authorized by the Department;

(e) At any time excavated material is placed on adjacent dikes it must be stabilized to eliminate erosion back into the drainage ditch; and

(f) If excavated material is to be thinly spread over adjacent wetland, wet pasture or farmed wetland, it is to be spread before the onset of winter rains, and controlled from eroding back into the drainage ditch.

(13) The responsible party must not remove and/or dispose of sediments in violation of the applicable state water quality standards.

(14) The responsible party must keep a copy of the approved notification available at the work site whenever the authorized activity is being conducted.

(15) Employees of the Department and all duly authorized representatives must be permitted access to the project area at all reasonable times for the purpose of inspecting work performed under this General Authorization.

(16) The Department makes no representation regarding the quality or adequacy of the project design, materials, construction, or maintenance, except to approve the project's design and materials as satisfying the resource protection, scenic, safety, recreation, and public access requirements of ORS Chapters 196 and related administrative rules.

(17) The State of Oregon, and its officers, agents and employees must be held harmless from any claim, suit or action for property damage or personal injury or death arising out of the design, material, construction or maintenance of the authorized improvements.

(18) The Department may add other project-specific conditions to the approved notification as necessary to meet the requirements of this General Authorization. Such additional conditions may be needed to ensure that the project will cause only minimal individual and cumulative environmental effects and will not result in long-term harm to water resources of the state.

(19) The Department may, at any time, by notice to affected responsible parties, revoke or modify any approved notification of a project granted under this General Authorization if it determines the conditions of the General Authorization are insufficient to minimize individual or cumulative environmental effects.

(20) The responsible party is responsible for the activities of all contractors or other operators involved in project work covered by the notification.

General Authorization for Waterway Habitat Restoration

141-089-0780

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, place or remove material in waterways of this state for the purpose of improving aquatic habitat and facilitating species recovery in waterways.

141-089-0785

Eligibility Requirements

Projects eligible for this general authorization must be for the purpose of waterway habitat restoration.

141-089-0790

Authorized Activities

The following activities may be combined for a single project and the volume thresholds for each activity may be calculated separately:

(1) **Barrier Removal.** Barriers may be removed to reconnect waterway corridors, reestablish wetlands, restore natural channel and flow conditions, and assist fish and wildlife movement. The project must meet the following criteria:

(a) Removal is limited to artificially created barriers including, but not limited to culverts, dams, earthen embankments, spillway systems, tidegates, outfalls and pipes; and

(b) Cumulative removal-fill volume for this activity must not exceed 200 cubic yards.

(2) **Grade Control.** This activity includes construction of grade control structures to stabilize channel grade, reduce erosion, reconnect a waterway to the floodplain or reduce channel incision. The project must meet the following criteria:

(a) Grade control structures must be constructed of materials that mimic natural substrate found within the system;

(b) Grade control structures must be sized appropriately for the system to prevent creating a fish passage barrier or require annual maintenance; and

(c) The activity is limited to 100 cubic yards for every one-half mile of waterway, unless otherwise approved by the Department.

(3) **Fish and Wildlife Passage.** This activity includes installation or replacement of fish passage structures including, but not limited to vertical slot fishways, nature-like fishways and lamprey ramps to aid fish and/or wildlife passage. The project must meet the following criteria:

(a) Oregon Department of Fish and Wildlife (ODFW) must be notified;

(b) Passage structures must be designed to consider the velocity, depth, pool-length and jump-height preferences of native species;

(c) Passage structures must be sized appropriately for the system yet be stable; and

(d) The activity is limited to 100 cubic yards for every one-half mile of waterway, unless otherwise approved by the Department.

(4) **Installation or Replacement of Fish Screening Structures.** The project must meet the following criteria:

- (a) Oregon Department of Fish and Wildlife (ODFW) must be notified;
- (b) Screens must meet ODFW fish screen criteria; and
- (c) Cumulative removal-fill for this activity must not exceed 100 cubic yards in waters of this state.

(5) **Porous Weir.** This activity includes the construction of a self-sustaining, low profile, structure. A porous weir delays but does not store water. It is used to redirect flow toward the center of the channel, provide energy dissipation and promote increased sedimentation along banks while allowing fish passage through a porous design. This activity includes, but is not limited to cross vanes and artificial riffles. The project must meet the following criteria:

- (a) Porous weirs must be placed so scour pools occur in areas where pools would naturally form in a pool and riffle complex;
- (b) Porous weirs must not result in culvert inlet or outlet scour;
- (c) Porous weirs must be sized appropriately for the system so as not to require annual maintenance;
- (d) Porous weirs must be constructed of materials that mimic natural substrate found within the system;
- (e) The structure must not exceed 100 cubic yards and 40% of the channel cross-section width; and
- (f) The activity is limited to 100 cubic yards for every one-half mile of waterway, unless otherwise approved by the Department.

(6) **Side Channel and Alcove Habitat.** This activity is limited to reconnecting existing side channel or alcove habitat, as follows:

- (a) Cumulative removal-fill volume may not exceed 200 cubic yards unless otherwise approved by the Department;
- (b) Reconnection consists only of the removal of artificial barriers; and
- (c) The side channel or alcove being reconnected must be naturally formed and does not require alteration or reconstruction.

141-089-0795

Activity-Specific Conditions

Proposed projects eligible for this General Authorization must adhere to the general conditions in OAR 141-089-0650 and the following activity-specific conditions:

- (1) **Anchoring.** Anchoring materials must not restrict or redirect flows, be set below grade to minimize the appearance, and be placed in areas naturally containing such material.
- (2) **Rock and Gravel Placement.** Rock and gravel placement are subject to the following conditions:
 - (a) Only the minimal amount necessary may be used to achieve project objectives;
 - (b) Rock must be placed in a manner that does not increase the upland surface area;
 - (c) Rock must be placed to minimize adverse impacts to the active channel;
 - (d) All rock must be placed, not dumped, from above the bank line; and
 - (e) Only erosion-resistant rock from an upland source may be used. No broken concrete or asphalt is allowed.
- (3) **Natural Materials.** Material used must be similar to materials currently or historically found naturally in the stream reach.
- (4) **Self Sustaining.** Activities other than installation or replacement of passage structures or fish screens must be self-sustaining and not require annual maintenance or manipulation.
- (5) **Post-Project Reporting.** Upon completion of the project, the project must be reported to the Oregon Watershed Enhancement Board at <http://www.oregon.gov/OWEB> by completing the Oregon Watershed Restoration Inventory (OWRI) form. The DSL General Authorization number must be included on the reporting form.

General Authorization for Wetland Ecosystem Restoration

141-089-0800

Purpose

These rules set forth the conditions under which a person may, without an individual removal-fill permit from the Department, carry out restoration activities for the purpose of wetland ecosystem restoration. Under this General authorization (GA), wetland ecosystem restoration means the manipulation of the physical, chemical or biological characteristics of a site with the goal of returning natural or historical functions to a disturbed or altered wetland.

141-089-0805

Eligibility Requirements

(1) **Project Purpose.** The project purpose is to improve the existing condition of a site to repair (rehabilitate) or return (re-establish) natural or historical functions to a disturbed or former wetland. The project may not be for the purpose of altering a site to produce conditions that did not previously exist in order to augment specific functions.

(2) **Compatible with Management Plans.** The project must not be detrimental to existing functions and values that address problems identified in a watershed management plan or water quality management plan.

(3) **Evidence Required.** Current site conditions must exhibit alterations in topography, soils, native vegetation or hydrology that have resulted in wetland loss or wetland disturbance that is potentially reversible.

(4) **Conversion.** The project will not result in conversion of wetlands to uplands and will not include the conversion of existing, functional wetland ecosystems to another aquatic use.

(5) **Minimal Adverse Impacts.** The project will not cause more than minimal adverse impacts to undisturbed wetland communities on-site or adjacent to the site.

(6) **Non-native Species** The project will not involve the introduction of non-native plants other than for temporary soil stabilization. Native seed mixes are preferred. When native seed mix is not available, non-native seed mix that will hold the soil and not persist may be used if certified free of noxious weeds.

(7) **Hydrology.** Hydrologic manipulation must result in the hydrology of the restored site approximating the conditions that existed before the disturbance or alteration, to the

extent practicable. Hydrology conditions include timing of inflow and outflow, duration, frequency and hydroperiod.

(8) **Consistent with Wetland Conservation Plan.** If the project is in an area for which there is a Department-approved Wetland Conservation Plan, the activities must be in conformance with that plan.

(9) **Compensatory Mitigation.** Projects cannot be for the purpose of constructing compensatory wetland mitigation.

141-089-0810

Authorized Activities

The following activities are allowed under this general authorization:

(1) **Vegetation Management.** Ground-altering activities needed to re-establish and maintain native vegetation, such as mechanized land clearing to remove non-native vegetation and disking for seedbed preparation and planting of native wetland species.

(2) **Floodplain Contouring.** Floodplain contouring of wetland terraces to reconnect a waterway to an adjacent wetland or expand the area of seasonal inundation. This activity does not include modification of a stream channel.

(3) **Microtopography Establishment.** Grading and contouring to re-establish microtopography (hummocks, minor ridges, very shallow depressions) in areas that have been previously leveled, scalped or otherwise disturbed to eliminate pre-existing microtopography. Activity is limited to six-inch maximum elevation rise or drop.

(4) **Macrotopography Establishment.** Shallow excavation to create scrapes, basins, meanders and swales that do not exceed two feet in depth from existing or original ground surface and have minimum side slopes of 6:1 or gentler. If shallow excavation is combined with berm construction described in Section 6 of this rule, the maximum depth of inundation must not exceed two feet.

(5) **Removal of Materials.** Removal of soil or other materials that have been placed in a wetland for the purpose of restoring the natural and/or historical topography.

(6) **Low Earthen Berms and Spillways.** Construction of low earthen berms and vegetated spillways that impede, contain or direct surface water may be used to extend the area or duration of shallow inundation. The design height of the berms must be no more than 18 inches from the existing ground level and have a maximum top width of four feet, variable slopes at a minimum of 6:1 or gentler on the water side, and maximum slopes of 6:1 on the land side, unless gentler slopes do not result in the conversion of wetland to upland. These structures may be installed to manipulate

seasonal water depth, duration and degree of fluctuation that would be characteristic of natural or historical hydrologic conditions and to manage invasive species. When berms are combined with shallow excavation described in Section (4) of this rule, the maximum depth of inundation must not exceed two feet.

(7) **Removal of Structures.** Removal of diversion structures, water control structures, small (three feet high or less) berms and tidegates, as long as the removal does not cause water to rise or be redirected in such a manner to result in damage to structures or substantial property.

141-089-0815

Activity-Specific Conditions

Proposed projects eligible for this General Authorization must adhere to the general conditions in OAR 141-089-0650 and the following activity-specific conditions:

(1) **Invasive Species.** Persons must control invasive species and comply with Oregon's weed laws (ORS Chapters 452, 561 and 570); and

(2) **Post-Project Reporting.** Upon completion of the project, the project must be reported to the Oregon Watershed Enhancement Board at <http://www.oregon.gov/OWEB> by completing the Oregon Watershed Restoration Inventory (OWRI) form. The DSL General Authorization number is required to be included on the reporting form.

General Authorization for Recreational Placer Mining within ESH that is Not Designated SSW

141-089-0820

Purpose

These rules set forth conditions under which a person may, without an individual removal-fill permit from the Department, fill, remove and move material in waters of this state for the purpose of recreational placer mining within areas designated as Essential Indigenous Anadromous Salmonid Habitat (ESH) that is not designated as State Scenic Waterway (SSW).

141-089-0825

Eligibility Requirements

- (1) **Purpose.** The activity is for the specific purpose of recreational placer mining.
- (2) **Essential Salmonid Habitat.** The activity is conducted within ESH.
- (3) **Threshold.** The activity will remove, fill or move less than twenty-five (25) cubic yards of material annually from or within the bed of a stream designated as ESH.
- (4) **Wetted Perimeter.** The activity is confined to the wetted perimeter.
- (5) **Disturbance of Woody Vegetation.** The activity does not disturb the streambank, including any rooted or embedded woody plants below the Ordinary High Water Line.
- (6) **Fish Passage.** The activity does not divert a waterway or obstruct fish passage.
- (7) **Minimization of Impounded Water.** The activity creates only the minimal area of impounded water necessary to operate the dredge and the impoundment structure is removed immediately upon completion of the mining activity.
- (8) **No Disturbance of Stream Structure.** No movement is allowed of boulders, logs, stumps or other woody material from within the wet perimeter other than movement by hand and non-motorized equipment.
- (9) **Dredge Intake Nozzle Limited.** If a motorized suction dredge is used, it must have an intake nozzle that has an inside diameter not exceeding four inches.
- (10) **Expiration of Recreational Placer Mining Authorizations.** Authorizations issued under the Recreational Placer Mining GA expire on December 31 of each year.
- (11) **Renewal.** Renewal of the authorization will require submission of a completed Recreational Placer Mining Report for the previous year to the Department.

141-089-0830

Authorized Activities

Recreational placer mining in Essential Indigenous Anadromous Salmonid Habitat including motorized suction dredging, not to exceed 25 cubic yards annually.

141-089-0835

Activity-Specific Conditions

Proposed projects eligible for this General Authorization must adhere to the general conditions in OAR 141-089-0650 and the following activity-specific conditions:

- (1) **Prevent Fish Stranding.** Upon completion of the activity at a given location, the responsible party must level all piles and fill all furrows, potholes and other depressions created by the activity.
- (2) **Wetted Perimeter.** The activity is confined to the wetted perimeter.
- (3) **Disturbance of Woody Vegetation.** The activity does not disturb the streambank, including any rooted or embedded woody plants below the Ordinary High Water Line.
- (4) **Fish Passage.** The activity does not divert a waterway or obstruct fish passage.
- (5) **Minimization of Impounded Water.** The activity creates only the minimal area of impounded water necessary to operate the dredge and the impoundment structure is removed immediately upon completion of the mining activity.
- (6) **No Disturbance of Stream Structure.** No movement is allowed of boulders, logs, stumps or other woody material from within the wet perimeter other than movement by hand and non-motorized equipment.
- (7) **Dredge Intake Nozzle Limited.** If a motorized suction dredge is used, it must have an intake nozzle that has an inside diameter not exceeding four inches.
- (8) **Annual Report Required.** By December 31 of each year, the responsible party must submit to the Department an annual report, on a form provided by the Department, the estimated amount of material filled, removed or moved in each specific waterway mined during the preceding calendar year. When no jurisdictional activity was conducted, the report must be submitted reporting zero cubic yards for the year.

DEPARTMENT OF STATE LANDS

DIVISION 93

ADMINISTRATIVE RULES GOVERNING THE ISSUANCE AND ENFORCEMENT OF GENERAL PERMITS WITHIN WATERS OF THIS STATE

141-093-0100

General

- (1) **Special Headings and Fonts.** Where headings, special fonts or double-spacing are used, they are for the convenience of the user only and have no substantive effect.
- (2) **Applicability of OAR 141-085.** Unless otherwise specified under OAR 141-093, the provisions of OAR 141-085 apply to General Permits (GPs).

141-093-0103

Agency Process and Standards for Establishing General Permits

- (1) **May Apply Statewide or Regionally.** The Department may undergo rulemaking to develop GPs on a statewide or geographic basis for an applicant or group of applicants.
- (2) **Activities Similar and Predictable.** Activities authorized under a GP must be substantially similar in nature, be recurring or ongoing, and have predictable effects and outcomes.
- (3) **Rulemaking.** The Department will adopt GPs by rule, and will condition each GP to minimize adverse environmental effects.
- (4) **Periodic Review.** The GPs will be periodically reviewed for compliance with the review standards set forth in ORS 196.600 through 196.905 and the Department must find that each GP will not result in long-term harm to water resources of this state.
- (5) **Amend or Rescind.** The Department will amend or rescind any GP established by rule upon a determination that the activities conducted under the GP have resulted in unacceptable individual or cumulative environmental effects or long-term harm to the water resources of this state.

141-093-0104

Project Applicability

(1) **Applicability.** This rule sets forth conditions under which a person may, without an individual removal-fill permit from the Department, place or remove material within waters of this state, excluding State Scenic Waterways, as defined in OAR 141-085 for the purposes set forth in each GP.

(2) **Department Determination of Eligibility.** To be eligible for a GP, a project must comply with the general conditions described in OAR 141-093-0135 as well as individual GP purpose, eligibility, authorized activities and activity-specific conditions. In the event a dispute arises as to the applicability of a GP to any project application, the Department will make the final determination.

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

(4) **Individual Permit May Be Required.** The Department may require an individual removal-fill permit for a project that would otherwise be authorized by a GP if:

(a) The activity conducted under the permit may have unpredictable effects or outcomes which may result in unacceptable individual or cumulative environmental effects to waters of this state; or

(b) The activity might result in long-term harm to the water resources of this state; or

(c) If the Oregon Department of Fish and Wildlife, the Oregon Department of Environmental Quality or the affected local land use planning department request that the Department do so.

141-093-0105

Application Requirements and Completeness Review for Authorizing Projects under a General Permit

(1) **Authorization Required.** Authorization from the Department is required before starting any project covered by a GP.

(2) **Required Information.** A complete, signed application must be submitted on forms provided by the Department, and must contain all applicable information set forth in OAR 141-085-0550. An approved, unexpired wetland delineation is required when wetlands are proposed for impact, unless otherwise approved by the Department.

(3) **Applicant Signature Required.** The applicant signature is required. As used in this section, “applicant” means a person who has the authority and responsibility to fully execute the terms and conditions of an authorization issued under these rules. The applicant becomes the authorization holder. The OAR 141-085-0510(1) definition of “applicant” does not govern use of the term in this Division.

(4) **Fee Required.** Any person proposing to conduct an activity under a GP must apply to the Department in accordance with the procedures set forth in OAR 141-085-0545.

141-093-0107

Completeness and Eligibility Review for Authorizing Projects under a GP

(1) **Initial Review.** The Department will review the application within 15 calendar days of agency receipt of the application to determine whether the application is complete and the project is eligible for a GP.

(a) **Complete and Eligible Application.** A complete application is one that contains all the information required in the Department’s application. An eligible project is one that meets the eligibility requirements, activity-specific application requirements and authorized activities listed under the GP.

(b) **Incomplete Application Notification.** If the Department determines that the application is incomplete or deficient, the Department will notify the applicant in writing and list the missing or deficient information. The applicant may resubmit the entire amended package for reconsideration within 120 calendar days from date of the Department’s notice, unless instructed by the Department to do otherwise. Submission of a new or amended application package starts a new 15-calendar day initial review period.

(b) **Ineligible Projects.** If the review of the application results in a determination that the project is ineligible for a GP, the applicant will be notified and informed of the reason for ineligibility. The applicant may then either revise the project and resubmit the application for reconsideration or apply for an Individual Permit under OAR 141-085 within 120 calendar days from date of agency determination.

(2) **Timeframe for Resubmittal.** If a revised application is not resubmitted within 120 calendar days of an incompleteness or ineligibility determination, the Department may administratively close the application. If the Department closes the file under this circumstance, the Department will retain the application fee. A subsequent application for the same or similar project will require payment of an application fee.

141-093-0110

Public Review Process for Authorizing Projects under a GP

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

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

(3) **Deadline for Receipt of Public Comments.** All recommendations and comments regarding the application must be submitted in writing to the Department within the period established by the Department, but not more than 15 calendar days from the date of the notice. If a commenter fails to comment on the application within the comment period, the Department will assume the commenter has no objection to the project.

(4) **Department Review of Public Comments.** The Department will review and consider substantive comments received during the public review period. The Department may request the applicant to provide additional information to address comments.

141-093-0115

Department Determinations and Considerations in Evaluating Applications to Authorize Projects under a GP

(1) **Departmental Final Review.** The Department will evaluate the information provided in the application, conduct its own investigation, and consider the comments submitted during the public review process to determine whether or not to issue an authorization under a GP. The Department will render a decision within 40 calendar days of receipt of a complete application.

(2) **Extension of Decision Deadline.** The applicant may request additional time to respond to comments or to satisfy other requirements. The applicant and the Department may agree to extend the timeline for making a final authorization decision beyond the 40 calendar days following receipt of a complete application. If no agreement is reached, the Department will make a final authorization decision within the original 40-day time period.

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

(4) **Department Determinations.** The Department will issue an authorization under a GP if it determines the project described in the application:

(a) Has independent utility;

(b) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 through 196.990;

(c) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation, when project is on state-owned lands; and

(d) Meets the purpose and eligibility requirements in the GP.

(5) **Department Considerations.** In determining whether to issue an authorization under a GP, the Department will consider all of the following:

(a) The public need for the proposed fill or removal and the social, economic and other public benefits likely to result from the proposed fill or removal. When the applicant for an authorization under a GP is a public body, the Department may accept and rely on the public body's findings as to local public need and local public benefit;

(b) The economic cost to the public if the proposed fill or removal is not accomplished;

(c) The availability of alternatives to the project for which the fill or removal is proposed;

(d) The availability of alternative sites for the proposed fill or removal;

(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety;

(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations;

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion;

(h) Whether the proposed fill or removal is for stream bank protection; and

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

(6) **Alternatives Analysis.** The applicant bears the burden of providing the Department with the alternatives analysis used to derive the practicable alternative that has the least reasonably expected adverse impacts on waters of this state. The alternatives analysis must provide the Department all the underlying information necessary to support its considerations under section (5) of this rule.

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

(a) The fill is for a public use;

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

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

(8) **Written Findings.** In the following cases, the Department will prepare written findings to document a decision for an authorization under a GP:

(a) Permit denial;

(b) Fill of two acres or more in wetlands;

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

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

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

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

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

(9) **Marine Reserves and Marine Protected Areas.** The Department will only authorize a removal-fill activity within an area designated by the State Land Board as a marine reserve or a marine protected area if the removal-fill activity is necessary to study,

monitor, evaluate, enforce, protect or otherwise further the studying, monitoring, enforcement and protection of the reserve or marine protected area.

141-093-0120

Expiration and Annual Billing

(1) **Term of Authorizations Issued Under a General Permit.** Authorizations under a General may be kept active for up to three years, provided annual fees are received by the Department before the anniversary date of the authorization.

(2) **Annual Billing Notice.** An annual fee is assessed for each year that the authorization is in effect. The annual fee is equal to the base fee in effect at the time of annual billing and is due by the anniversary date of issuance of the authorization. Before the anniversary date of authorization, the Department will send an annual billing notice to the authorization holder.

(3) **Failure to Pay Annual Billing Fee.** When an GP authorization holder fails to submit the annual fee, the Department will expire the authorization on the anniversary date of the authorization.

(4) **One-Time Fee Assessment for Authorization under a General Permit.** Authorization under a GP may be issued for up to three years, the Department may, at the request of the applicant, assess a one-time fee based on the fee schedule in effect at the time of the application or annual billing. The one-time fee must include:

(a) The application fee; and

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

141-093-0125

Enforcement

Failure to adhere to the terms of any authorization issued under this division is a violation of the Removal-Fill Law and may be subject to appropriate enforcement in accordance with OAR 141-085.

141-093-0130

Appeal Process for Authorizations Issued under General Permits

The provisions of OAR 141-085-0575 and 141-085-0580 are incorporated here by reference.

141-093-0135

General Conditions

(1) **Responsible Party.** The person listed on the application as the applicant is responsible for the activities of all contractors or other operators involved in project work covered by the authorization under the GP.

(2) **Copy of Authorization Available for Inspection.** A copy of the authorization must be available at the work site whenever authorized activities are being conducted.

(3) **Site Access Required.** Employees of the Department and all authorized representatives must be permitted access to the project area at all reasonable times for the purpose of inspecting work performed under this authorization.

(4) **Archeological Resources.** If any archeological sites, resources or artifacts are discovered during construction, work must immediately cease and the State Historic Preservation Office must be contacted.

(5) **ODFW Fish Passage Requirement.** The authorized activity must meet Oregon Department of Fish and Wildlife requirements for fish passage before commencing the project (ORS 509.580 through 509.901 and OAR 635-412-0005 through 635-412-0040).

(6) **Hazards to Recreation, Navigation or Fishing.** The activity must be timed not to interfere with or create a hazard to recreational or commercial navigation or fishing.

(7) **Work Period in Jurisdictional Areas.** Fill or removal activities below the Ordinary High Water Line must be conducted when recommended by ODFW, unless otherwise coordinated with Oregon Department of Fish and Wildlife and approved in writing by DSL. Work is prohibited when fish eggs are present within the reach where the authorized activities are being conducted.

(8) **Pre-Construction Resource Area Fencing or Flagging.** Prior to any site grading, the boundaries of any avoided wetlands, waterways and riparian areas adjacent to the project site must be surrounded by noticeable construction fencing or flagging. There will be no vegetation removal or heavy equipment within marked areas. The marked areas must be maintained during construction of the project and be removed immediately upon project completion.

(9) **Erosion Control Methods.** The following erosion control measures must be installed at the construction site before construction and maintained during and after construction to prevent erosion and minimize movement of soil into waters of this state:

(a) All exposed soils must be stabilized during and after construction in order to prevent erosion and sedimentation;

(b) Filter bags, sediment fences, sediment traps or catch basins, leave strips or berms, or other measures must be used to prevent movement of soil into waterways and wetlands;

(c) To prevent erosion, use of compost berms, impervious materials or other equally effective methods, must be used to protect soil stockpiled during rain events or when the stockpile site is not moved or reshaped for more than 48 hours;

(d) Unless part of the permanent fill, all construction access points through, and staging areas in, riparian and wetland areas must use removable pads or mats to prevent soil compaction. However, in some wetland areas under dry summer conditions, this requirement may be waived upon approval by DSL. At project completion, disturbed areas with soil exposed by construction activities must be stabilized by mulching and native vegetative plantings or seeding. Sterile grass may be used instead of native vegetation for temporary sediment control if native vegetation is unavailable. If soils are to remain exposed for more than seven days after completion of the permitted work, they must be covered with erosion control pads, mats or similar erosion control devices until vegetative stabilization is installed;

(e) Where vegetation is used for erosion control on slopes steeper than 2:1, tackified seed mulch must be used so the seed does not wash away before germination and rooting;

(f) Dredged or other excavated material must be placed on upland areas having stable slopes and must be prevented from eroding back into waterways and wetlands;

(g) Erosion control measures must be inspected and maintained as necessary to ensure their continued effectiveness until soils become stabilized; and

(h) All erosion control structures must be removed when the project is complete and soils are stabilized and vegetated.

(10) **Hazardous, Toxic, and Waste Material Handling.** Petroleum products, chemicals, fresh cement, sandblasted material and chipped paint, wood treated with leachable preservatives or other deleterious waste materials must not be allowed to enter waters of this state. Machinery refueling is to occur at least 150 feet from waters of this state and confined in a designated area to prevent spillage into waters of this state. Barges must have a containment system to effectively prevent petroleum

products or other deleterious material from entering waters of this state. Project-related spills into waters of this state or onto land with a potential to enter waters of this state must be reported to the Oregon Emergency Response System (OERS) at 1-800-452-0311.

(11) **Raising or Redirecting Water.** The project must not cause water to rise or be redirected and result in damage to structures or property.

(12) **Wetlands of Conservation Concern.** The project must not involve impacts to wetlands identified as a wetland type of conservation concern. Wetlands of Conservation Concern are bogs, fens, playas, salt flats, alkaline lakes, hot springs, native wet prairies, vernal pools, inter-dunal wetlands, mature forested wetlands, ultramafic soil wetlands, wooded tidal wetlands, and un-diked tidal wetlands, as determined by the Department.

(13) **Waste Disposal.** Old piling and other waste material generated by the project must be disposed of in an appropriate disposal facility. There must be no temporary storage of piling or other waste material below top of bank, in wetlands; in a Federal Emergency Management Administration designated floodway, or in an area historically subject to landslides.

(14) **DSL May Halt or Modify.** DSL retains the authority to temporarily halt or modify the project in case of unforeseen damage to natural resources.

(15) **Work Area Isolation.** The work area must be isolated from the water during construction. All structures and materials used to isolate the work area must be removed immediately following construction and water flow returned to pre-construction conditions. All fish must be salvaged from the isolated area in accordance with Oregon Department of Fish and Wildlife requirements.

(16) **Spoil Disposal.** Spoil materials, not used in the project, must be placed in an upland location. Spoil materials used in the project must be included in the cumulative removal-fill calculation for the activity.

(17) **Additional Conditions.** The Department may impose additional conditions, if necessary, to eliminate and reduce the reasonably expected adverse impacts of project development to waters of this state.

State General Permit for Transportation-Related Structures

141-093-0140

Purpose

This General Permit (GP) authorizes removal-fill for certain activities related to existing transportation structures.

141-093-0141

Eligibility Requirements

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

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

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

(2) **Wetlands of Conservation Concern.** The project must not involve impacts to wetlands identified as a wetland type of conservation concern. Wetlands of Conservation Concern are bogs, fens, playas, salt flats, alkaline lakes, hot springs, native wet prairies, vernal pools, interdunal wetlands, mature forested wetlands, ultramafic soil wetlands, wooded tidal wetlands, and undiked tidal wetlands, as determined by the Department.

141-093-0145

GP-Specific Application Requirements for Authorizing Projects

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

(a) Bank credit purchase from a Department-approved mitigation bank with a service area that includes the proposed removal-fill site and supplies the appropriate Ecologic System and Class (e.g., Palustrine emergent) under the Cowardin Classification System;

(b) In-lieu fee credit purchase; and

(c) Cash payment to the Department's payment in-lieu program.

(2) **Compensatory Non-Wetland Mitigation.** Compensatory non-wetland mitigation must be provided by the permit holder, unless otherwise approved by the Department.

141-093-0150

Authorized Activities

(1) **Existing Structures.** Widening, replacing, expanding use, maintaining and removing existing:

(a) Roads;

(b) Bridges;

(c) Pedestrian paths;

(d) Culverts;

(e) Boat ramps; and

(f) Airport runways and taxiways.

(2) **Integrally-Related Activities.** Activities integrally related with existing roadway structures, such as geo-technical borings, signs, guardrails and maintenance of stormwater facilities.

(3) **Increase in Scour Protection.** Providing larger footprint for new scour protection and bank stabilization associated with projects listed above.

(4) **Restoring Fluvial Processes.** Restoration or enhancement of natural stream health, including fluvial processes, associated with projects listed above.

(5) **Fish and Wildlife Habitat Enhancement.** Providing fish or wildlife passage or habitat in conjunction with transportation-related structures.

(6) **Grade Control.** Installing grade control where necessary to prevent channel headcut migration for the projects listed above.

141-093-0151

General Permit-Specific Conditions

(1) **General Conditions Apply.** All the requirements, procedures and conditions set forth in OAR 141-093-0105 through 141-093-0135 apply to this GP.

(2) **Proof of Mitigation Purchase.** Before an authorization is approved, the Department must have proof of purchase of wetland mitigation bank credit, in-lieu fee credit purchase, or cash payment of the correct in-lieu amount.

General Permit for Minor Removal-Fill Impacts to Certain Non-Tidal Wetlands

141-093-0155

Purpose

Non-Tidal Wetland Impacts. This General Permit (GP) authorizes removal-fill activity in certain non-tidal wetlands subject to the terms and conditions contained herein.

141-093-0160

Eligibility Requirements

(1) **Threshold.** The removal-fill activity in certain non-tidal wetlands must not exceed two-tenths (0.20) of an acre for the entire project.

(2) **No Impact to Tidal Wetlands.** The project must not involve impacts to tidal wetlands.

(3) **No Impacts to Waterways.** The project must not involve impacts to any non-wetland waters.

(4) **No Impacts to ESH or State Scenic Waterways.** The project must not involve impact to Essential Indigenous Anadromous Salmonid Habitat or State Scenic Waterway-designated areas.

(5) **No Impacts to Wetlands of Conservation Concern.** The project must not involve impacts to wetlands identified as a wetland type of conservation concern. Wetlands of Conservation Concern are bogs, fens, playas, salt flats, alkaline lakes, hot springs, native wet prairies, vernal pools, interdunal wetlands, mature forested wetlands,

ultramafic soil wetlands, wooded tidal wetlands, and undiked tidal wetlands, as determined by the Department.

141-093-0165

Compensatory Wetland Mitigation. Unless otherwise approved by the Department, compensatory mitigation options are:

- (1) Bank credit purchase from a Department-approved mitigation bank with a service area that includes the proposed removal-fill site and supplies the appropriate Ecologic System and Class (e.g., Palustrine emergent) under the Cowardin Classification System;
- (2) In-lieu fee credit purchase; and
- (3) Cash payment to the Department's payment in-lieu program.

141-093-0170

Authorized Activities

This GP authorizes a person to conduct removal-fill activity in certain non-tidal wetlands in an amount equal to or less than two-tenths (0.20) of an acre per project.

141-093-0175

General Permit-Specific Conditions

- (1) **General Conditions Apply.** All the requirements, procedures and conditions set forth in OAR 141-093-0105 through 141-093-0135 apply to this GP.
- (2) **Proof of Mitigation Purchase.** Before an authorization is approved, the Department must have proof of purchase of wetland mitigation bank credit, in-lieu fee credit purchase, or payment of the correct in-lieu amount.

DEPARTMENT OF STATE LANDS

DIVISION 100

ADMINISTRATIVE RULES GOVERNING THE ISSUANCE AND ENFORCEMENT OF REMOVAL-FILL PERMITS IN STATE SCENIC WATERWAYS

141-100-0005

Definitions

In addition to the definitions contained in ORS 390.805 through 390.835 and in OAR 141-085, the following definitions apply:

(1) "**Beds**" means the land within the wet perimeter and any adjacent non-vegetated dry gravel bar.

(2) "**Emergency Circumstances**" means immediate natural or human caused events the effects of which require prompt action to prevent irreparable harm, injury or damage to persons or property.

(3) "**Irreparable**" means without reasonable possibility of repair or restoration, or an extreme condition that cannot be corrected.

(4) "**Prospecting**" means to search or explore for samples of gold, silver or other precious minerals, using non-motorized methods, from among small quantities of aggregate.

(5) "**Recreational Placer Mining in State Scenic Waterways**" means to search or explore for samples of gold, silver or other precious minerals and remove, fill or move by artificial means, either through motorized or non-motorized methods, from or within the bed of a State Scenic Waterway by methods other than dredging. **Note**-Due to action by the 2001 Oregon Legislative Assembly (Oregon Laws 2001, Chapter 499, Section 4), the Department is no longer authorized to issue permits for dredging related to recreational placer mining in State Scenic Waterways.

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

(7) "**State Scenic Waterway**" means Waldo Lake, or a river or a segment of a river that has been designated under ORS 390.805 through 390.925 or any subsequent act, and includes related adjacent lands.

(8) "**State Scenic Waterway Emergency Removal-Fill Permit**" is an authorization issued by the Director for temporary, emergency-specific removal-fill activity in a State Scenic Waterway or jurisdictional waters within its related adjacent land.

(9) "**State Scenic Waterway Individual Removal-fill Permit**" is an authorization issued by the Department for any removal, filling or alteration of the bed and banks of a State Scenic Waterway and its related adjacent lands.

(10) "**Special Attribute**" means an aesthetic, scenic, environmental, scientific, recreational or similar feature identified by OPRD in a State Scenic Waterway Management Plan as the value that caused a particular waterway to be included in the Oregon Scenic Waterway Program. (ORS 390.845).

(11) "**Waters of a State Scenic Waterway**" are any waters within a designated State Scenic Waterway, including waters within its related adjacent lands that are subject to the jurisdiction of the Department.

(12) "**Wet Perimeter**" means the area of the stream that is under water, or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

141-100-0010

Purpose

Pursuant to ORS 390.835(2) and (3), these rules establish procedures for the consideration and processing of permit applications for fill, removal and other alterations of the beds and banks of a State Scenic Waterway and in jurisdictional waters within related adjacent lands.

141-100-0020

Policy

The Department will:

(1) **Preserve.** Preserve the natural setting and free-flowing character of State Scenic Waterways and related adjacent lands for recreation, fish and wildlife uses for present and future benefit to the public.

(2) **Recognize Best Use of Waters.** Recognize recreation, fish and wildlife uses as the highest and best uses of the waters of a State Scenic Waterway.

(3) **Protect.** Protect the outstanding scenic, geological, botanical, historic, archaeological, outdoor recreation and fish and wildlife values along State Scenic Waterways by protecting the special attributes (as listed in each Scenic Waterway Management Plan prepared by OPRD) that caused the waterway to be included in the Scenic Waterway system.

(4) **Require Non-structural Techniques.** Require applicants to employ streambank stabilization and rehabilitation techniques utilizing native riparian vegetation and other non-structural alternatives, unless it can be demonstrated such approaches are unlikely to be effective for the given situation under consideration by the Department.

(5) **Require Permits** Prohibit filling, removal and alteration of the beds and banks of State Scenic Waterways, except as provided under OAR 141-100-0035, unless a permit is issued by the Director as provided in these rules.

(6) **Cooperate with Local, State and Federal Agencies.** Recognize the interrelated nature of regulatory activities affecting State Scenic Waterways and the need to achieve coordinated management and protection of State Scenic Waterway values. The Department shall work in close cooperation with state, local and federal agencies, particularly OPRD, Water Resources Department (WRD), Department of Environmental Quality (DEQ), Oregon Department of Fish and Wildlife (ODFW), U.S. Army Corps of Engineers (COE), affected tribes, and local government land use planning agencies.

(7) **Provide for Public Comment.** Recognize the high level of public interest in State Scenic Waterway management by providing opportunities for comment on proposed policies or rules and individual applications.

(8) **Ensure Compatibility with Land Use.** Adhere to the Department's State Agency Coordination Plan (OAR 141-095-0005 through 141-095-0015), to assure compliance with the statewide planning goals and compatibility with acknowledged city and county comprehensive land use plans.

141-100-0030

Coordination with Key Agencies Involved in State Scenic Waterway Management

(1) **Cooperative Effort.** Managing the State Scenic Waterway Program is a cooperative effort of the OPRD, WRD and the Department. In addition, ODFW, DEQ, the Department of Forestry (DOF) and the Oregon State Marine Board play key roles. Therefore, the Department will:

- (a) Coordinate the review and issuance of all State Scenic Waterway removal-fill permits with the affected state agencies;
- (b) Coordinate the investigation of alleged State Scenic Waterway removal-fill violations with affected agencies;
- (c) Advise applicants of the need to obtain concurrence from OPRD for projects on related adjacent lands; and
- (d) Seek to utilize the expertise of other state agency's staff.

(2) **Tribal and Federal Coordination.** Because many State Scenic Waterways are also included in the federal Wild and Scenic River system or similar designations on tribal lands, the Department will work closely with the appropriate federal agencies including the U.S. Forest Service (USFS), U.S. Bureau of Land Management (BLM), the U.S. Army Corps of Engineers (USACE) and affected tribes as follows:

- (a) Fully coordinate the review and issuance of all State Scenic Waterway removal-fill permits with the analysis outlined in the Application Review Procedures for Scenic Waterway Removal-fill Permits (OAR 141-100-0045), and participate in National Environmental Protection Act review or any similar evaluations conducted by federal agencies; and
- (b) Immediately notify the appropriate federal agency or affected tribe of alleged State Scenic Waterway removal-fill violations.

141-100-0035

Exemptions from Permit Requirements in State Scenic Waterways

- (1) **Prospecting.** A permit will not be required for non-motorized methods of recreational prospecting resulting in filling, removing or moving by artificial means less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material from within the bed or wet perimeter of any single State Scenic Waterway in a single year. Recreational prospecting is prohibited from any site where fish eggs are present.
- (2) **Oregon Department of Fish and Wildlife (ODFW).** ODFW may construct facilities or make improvements to facilitate the passage or propagation of fish and exercise other responsibilities in managing fish and wildlife resources.
- (3) **Oregon Water Resources Department (OWRD).** OWRD may construct and maintain stream gauge stations and other facilities related to OWRD's duties in the administration of the water laws

141-100-0040

Permit Types

Unless exempt under OAR 141-100-0035, one of the following types of permits is required prior to undertaking any amount of removal-fill activity within the bed and banks of a State Scenic Waterway and in waters of this state on related adjacent lands:

- (1) State Scenic Waterway Individual Removal-fill Permit; or
- (2) State Scenic Waterway Emergency Removal-fill Permit.

141-100-0045

State Scenic Waterway Individual Removal-Fill Permits

(1) **Application Procedures.** Applications for approval of all regulated removal-fill activities in State Scenic Waterways must be submitted to the Department in writing, in advance of the proposed activity, and must include all information needed to evaluate the request. The application must be submitted on the Joint Permit Application Form of the COE and the Department and must meet the standards for completed applications in OAR 141-085.

(2) **Fees.** Fees must be submitted for a complete application in accordance with the current fee schedule under OAR 141-085.

(3) **Application Review Procedures:**

(a) Applications must be reviewed within 30 calendar days from receipt and processed in a manner consistent with OAR 141-085, the Department rules for individual removal and fill permits;

(b) In reviewing an application, the Department will conduct the necessary investigations to develop a rational basis for a decision consistent with the requirements of the policies of this rule; and

(c) The Department may consult with any person, group or agency interested in or affected by a permit decision.

(4) **Public Review Process.** All applications for impact to State Scenic Waterways must be available for public comment for 30 calendar days.

(a) The Department will provide application notice for comment to the Department of Fish and Wildlife, Department of Environmental Quality, Department of Land Conservation and Development, Department of Agriculture, Water Resources

Department, Business Development Department, State Parks and Recreation Department, State Historic Preservation Office, Department of Geology and Mineral Industries, Department of Transportation, Department of Forestry, and any other affected state and federal agency and tribes. The Department will also provide application notice to adjacent property owners listed on the application and interested persons who request notice;

(b) In accordance with the procedures in the State Agency Coordination Program, the Department will provide application notice to the appropriate local government planning department(s) for a determination of the proposed activity's compatibility or non-compatibility with the affected city and county comprehensive plan(s) and land use regulations. If it is necessary to adopt findings of compliance with the statewide planning goals, the Department will act in accordance with its State Agency Coordination Program; and

(c) Recommendations and comments regarding the project must be submitted in writing to the Director within 30 calendar days from the date the application is provided for comment. The Department will give reasonable consideration to permit conditions or comments offered by any person.

141-0100-0052

Agency Considerations and Determinations.

(1) **Issuance.** The Department will issue State Scenic Waterway removal-fill permits only upon written findings that:

(a) The proposed activity is consistent with the State Scenic Waterway Act (ORS 390.805 through 390.925 or an applicable OPRD Scenic Waterway Management Plan or interim classification. The Department will coordinate with OPRD and WRD prior to making this determination;

(b) The proposed activity is consistent with ORS 196.800 through 196.990 administered according to OAR 141-085 related to removal of materials from the beds or banks and filling of any waters of this state;

(c) The proposed activity meets a demonstrated need and minimizes adverse impacts to special attributes of designated State Scenic Waterways; and

(d) The proposed activity, individually or collectively, would not degrade fish, wildlife or recreation values.

(2) **Denial.** The Director will deny any permit application, based upon written findings, if the proposed activity is not consistent with the policies under ORS 390.805 through 390.925 for State Scenic Waterways or ORS 196.800 through 196.825 and ORS

196.845 through 196.870 for removal of material from the bed and banks and filling any waters of this state.

(3) **Findings.** Written findings are required for all authorizations or denials of a permit application.

(4) **Expiration.** No State Scenic Individual Removal-Fill Permit will be issued for more than five years from issue date.

(5) **Renewal.** State Scenic Individual Removal-Fill Permits, not associated with recreational placer mining issued under OAR 141-100-0055, may be renewed for multi-year projects in the same manner as OAR 141-085.

141-100-0055

Recreational Placer Mining within State Scenic Waterways

(1) **Limited Activities.** No placer mining is permitted on waters within State Scenic Waterways other than recreational placer mining.

(2) **Threshold.** A complete application in accordance with OAR 141-085-0550 and authorization under OAR 141-100-0045 will be required for non-dredge recreational placer mining involving filling, removing or moving by artificial means any amount of material from within the bed or wet perimeter of any single scenic waterway or waters within jurisdictional waters within related adjacent lands.

(3) **Eligibility Criteria.** To be eligible for a Scenic Waterway Individual Removal-Fill permit for recreational, non-dredge placer mining, the operation must conform to the following:

(a) The activity must be for recreational placer mining as defined in OAR 141-100-0005(5);

(b) The activity must not dam or divert a waterway or obstruct fish passage;

(c) The activity must not occur outside the wet perimeter, nor extend the wet perimeter;

(d) The activity must not involve disturbance of rooted or embedded woody plants including trees and shrubs, regardless of their location (for example, on gravel bars);

(e) The activity must not include excavation from the streambank between the edge of the wet perimeter and the Ordinary High Water Line;

- (f) The activity must not include movement of boulders, logs, stumps or other woody material from the wet perimeter other than movement by hand and non-motorized equipment;
- (g) Upon completion of the mining activity all piles, pits, furrows or potholes outside the main channel of the waterway created by the activity must be leveled by hand;
- (h) The recreational placer miner must obtain landowner permission before operating;
- (i) The activity must occur only during the recommended in-water work period identified in the Oregon Department of Fish and Wildlife's "Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources" and is prohibited during periods when fish eggs could be in the activity site;
- (j) The activity must comply with other applicable local, state, and federal laws and regulations, including the federal Endangered Species Act; and
- (k) The activity must not impede recreational boating.

(4) **Annual Report Required.** The authorization holder must report, on a form provided by the Department, the amount of material removed, placed or altered in each State Scenic Waterway in during the year of authorization. The Department must receive this report before December 31 of each year that the individual permit is valid.

(5) **Expiration.** The State Scenic Waterway Individual Removal-Fill Permit for recreational placer mining is valid for up to one year.

(6) **Renewal.** The State Scenic Waterway Individual Removal-Fill permit for recreational placer mining may be conditionally renewed for up to five years when annual reports are submitted for the previous year according to OAR 141-100-0055(4).

141-100-0060

Scenic Waterway Emergency Removal-Fill Permits

(1) **Application Procedures.** Applications for a State Scenic Waterway Emergency Removal-Fill Permit may be made verbally (e.g., by phone), or by written application, including facsimile, by the following procedures:

(a) Applicants must provide the Department the following information:

(A) Location of emergency;

(B) A description of the emergency;

(C) The proposed action to be taken; and

(D) The potential consequences of taking no action.

(b) Within five calendar days of receiving a verbal confirmation of an emergency permit for removal-fill activities, the applicant must submit to the Department a written emergency permit application and applicable fees, in accord with the procedures herein.

(2) **Review Standards.** The Director may issue State Scenic Waterway Emergency Removal-Fill Permits only after determination that:

(a) Natural or human-caused situation exist which cause the emergency circumstance, such as, but not limited to, flooding, landslides, wildfire, and hazardous substance spills; and

(b) It is necessary to make repairs or take action to prevent irreparable harm, injury, or damage to persons or property.

(3) **Review Procedures.** The Director may conduct the review of State Scenic Waterway Emergency Removal-Fill Permit applications by:

(a) Consulting with ODFW and OPRD before issuing a temporary Emergency Removal-Fill Permit as provided by ORS 390.835(3)(a) and DEQ and WRD ,if applicable. Consultation may be achieved by Memorandum of Agreement with the applicable agencies or on a case-by-case permit review;

(b) Completing an investigation sufficient to develop a rational basis for a decision consistent with the requirements of the Issuance Standards;

(c) Consulting with any applicable tribes or federal land managers and regulators, as allowed by circumstances and time constraints, and by reasonable consideration to those agencies' recommendations for temporary permit conditions; and

(d) Assuring compatibility of the project, to the extent practical, with the affected local government(s) comprehensive plan and land use regulations.

(4) **Permit Decisions:**

(a) The Director may issue a State Scenic Emergency Removal-Fill Permit, only if all the review standards for emergency waterway permits are met. Emergency permit issuance by the Director may be made by written confirmation to the applicant, verbally (to be followed by written confirmation), or through procedures established in Memoranda of Agreement with other agencies (e.g., through the Oregon Emergency Response System);

(b) The Department staff may visit the site of the emergency permitted activity as soon as practicable following permit issuance; and

(c) Following the issuance of an emergency permit, the Department may review the emergency permit and determine if any further action is necessary to modify the permit conditions after the emergency has passed.

141-100-0070

Appeals

(1) **Applicants.** Any applicant whose application to the Department for a permit has been denied, or who objects to any of the permit conditions imposed by the Director, may, within 21 calendar days of the denial of the permit or the imposition of any condition, request a hearing from the Director. The hearing will be conducted as a contested case hearing in accordance with ORS 196.825(6).

(2) **Aggrieved or Adversely Affected Persons.** Any person, excluding permit applicants, aggrieved or adversely affected by issuance or denial of a permit by the Director may file a written request for hearing within 21 calendar days after the date the permit was granted in the manner provided by ORS 196.835.

141-100-0080

Enforcement

The Director is authorized to take civil, criminal and administrative action to enforce the requirements of this Division using the authorities provided by the Removal-Fill Law according to ORS 196.860 through 196.990 and OAR 141-085.

141-100-0090

Appeals of Enforcement Orders

Any person aggrieved by a proposed enforcement order of the Director for a removal-fill violation in a State Scenic Waterway may request a contested case hearing within 20 calendar days of the date of personal service or mailing of the notice of order. However, requesting a contested case hearing on a Cease and Desist Order must be made within 10 calendar days of the date of personal service or mailing of the notice of order. Hearing procedures are the same as for other Removal-Fill Law violations as provided in OAR 141-085.

DEPARTMENT OF STATE LANDS

DIVISION 102

OREGON ESSENTIAL INDIGENOUS ANADROMOUS SALMONID HABITAT (ESH)

141-102-0000

Purpose

Pursuant to ORS 196.810(b), these rules:

- (1) Designate "essential indigenous anadromous salmonid habitat (ESH)" on maps that are made a part of this rule;
- (2) Establish the process to amend the designation; and
- (3) Require an authorization from the Department for activities involving the fill or removal of any amount of material in ESH unless the activity is exempt.

141-102-0010

Policy

- (1) It is the policy of the State of Oregon to protect ESH.
- (2) To achieve this policy, the Department shall:
 - (a) Consult with the Department of Fish and Wildlife (ODFW) concerning the status of Oregon's indigenous anadromous salmonid species;
 - (b) Identify ESH in consultation with ODFW and the public through rulemaking; and
 - (c) Review all projects proposed in ESH pursuant to the standards set forth in the state's Removal-Fill Law (ORS 196.600 to 196.990) and rules (OAR 141-085)

141-102-0020

Definitions

- (1) "Essential" means those portions of a stream reach that fill all or part of the basic or indispensable spawning or rearing needs of indigenous anadromous salmonids and are

those areas necessary to prevent the depletion of indigenous anadromous salmonids. Such areas include "spawning habitat" and "rearing habitat" as defined below under subsections (3) and (4) of this section (*Oregon Fish Habitat Distribution Data Standard, Version 1.0, March 2008*: <http://gis.oregon.gov/DAS/EISPD/GEO/docs/bioscience/OregonFishHabitatDistributionDataStandardv1.pdf>).

(2) "Indigenous anadromous salmonid" means chum, sockeye, Chinook and Coho Salmon, and steelhead and cutthroat trout, that are members of the family of Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority.

(3) "Spawning Habitat" " includes areas where eggs are deposited and fertilized. For some species, including salmonids, this also includes areas where gravel emergence occurs and where at least some juvenile development occurs.

(4) "Rearing Habitat" includes areas outside primary spawning habitats where juvenile fish take up residence during some stage of juvenile development and use the area for feeding, shelter, and growth. Some migration also occurs as juvenile and adult fish move between the ocean and spawning grounds.

141-102-0030

Designation of Essential Salmon Habitat (ESH)

(1) Areas designated as ESH shall include the waters of this state as described in OAR 141-085, including streams and any adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface water connection to the stream.

(2) The streams and stream segments designated as ESH are shown on maps that are incorporated by reference in this rule.

(3) The Department will make available detailed maps of ESH at cost and the maps are also available for downloading and viewing on the Department's website (<http://oregonstatelands.us/>).

[Publications: Publications referenced are available from the agency.]

141-102-0040

Revisions to ESH

Revisions, additions to or deletions from the list and maps of ESH shall be made by amendment to these administrative rules according to the following procedure:

(1) The Department will consult annually with ODFW on the accuracy of the ESH designations.

(2) In consultation with ODFW and other affected parties, the Department may revise the maps when new or higher quality data become available and/or when new state or federal listings or delistings occur that would substantially change the extent of designated habitat.

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