

OREGON DEPARTMENT OF STATE LANDS
DIVISION 85
ADMINISTRATIVE RULES GOVERNING THE ISSUANCE AND ENFORCEMENT
OF REMOVAL-FILL AUTHORIZATIONS WITHIN WATERS
OF OREGON INCLUDING WETLANDS

Oregon Mitigation Regulations

141-085-0115

Compensatory Mitigation (for Water Resources)

(1) The Department may require compensatory mitigation as a condition of an authorization to compensate for reasonably expected adverse effects to water resources of the state and navigation, fishing and public recreation uses on waters of this state other than freshwater wetlands or estuarine areas. Such conditions impose obligations on the permit holder beyond the expiration of the authorization.

(2) Such compensatory mitigation may include, but is not limited to:

(a) Offsite or onsite enhancement (e.g., planting or seeding riparian vegetation or exposing enclosed culverted systems) of water resources of the state;

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

(c) Compensation to a third party, as approved by the Department, for the purpose of watershed health or to improve the navigation, fishing or public recreation uses of waters of this state. A permit holder, with the approval of the Department, may contract with a third party to construct, monitor or maintain the compensatory mitigation site. The permit holder remains responsible for compliance with the compensatory mitigation conditions unless the authorization is transferred to another entity in accordance with these rules.

(3) The Department may approve of compensatory mitigation for effects to waters of this state other than freshwater wetlands or estuarine areas, when the applicant demonstrates in writing that the compensatory mitigation plan will replace or provide comparable substitute for water resources of the state and/or navigation, fishing and public recreation uses lost by project development.

(4) The Department may require some form of long term protection for the compensatory mitigation site.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: LB 7-1994, f. 12-15-94, cert. ef. 1-1-95; DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 1-2006, f. 3-21-06, cert. ef. 3-27-06; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0121

Freshwater Compensatory Wetland Mitigation (CWM) Applicability, General Requirements; Functional Assessments

(1) The following rule sections, OAR-141-085-0121 to 141-085-0151, apply to removal-fill that occur within freshwater wetlands and do not apply to removal-fill:

(a) Within estuarine wetlands covered by ORS 196.830 and OAR-141-085-0240 thru 141-085-0266, except as specifically noted in the estuarine mitigation rules or where estuarine wetland restoration or enhancement is proposed to compensate for effects to freshwater wetlands; or

(b) Within areas covered by an approved Wetland Conservation Plan (WCP) authorized under ORS 196.668 to 196.692.

(2) For projects where reasonably expected adverse effects to the water resources including wetland functions cannot otherwise be avoided, or minimized, a CWM plan will be required to compensate for the reasonably expected adverse effects of the project by replacing the functional attributes of the wetland impacted by project development. Compensatory wetland mitigation shall be limited to replacement of the functional attributes of the lost wetland. The requirements to provide CWM impose obligations on the permit holder that extend beyond the expiration date of the authorization.

(3) For projects described in (2) requiring CWM and involving project development on 0.2 (two-tenths) of an acre or less of wetlands, there is a rebuttable presumption that on-site CWM is impracticable. The applicant may propose to fulfill CWM requirements through off-site CWM without first considering on-site CWM.

(4) For projects described in (2) requiring CWM involving project development effects greater than 0.2 (two-tenths) of an acre, the applicant shall first consider on-site CWM to provide the replacement of the functional attributes of the lost wetland. If on-site CWM is impracticable as documented by the applicant, off-site CWM shall be utilized. In considering off-site CWM, the applicant may create, restore, conserve or enhance a wetland or if the project development occurs within the service area of an established wetland mitigation bank, the applicant may purchase credits, if available, from the bank to fulfill CWM requirements so long as the functional attributes of the lost wetland are replaced. If no mitigation bank is available, CWM may be fulfilled through payment in lieu of mitigation as described in OAR 141-085-0131.

(5) The Department will review the CWM plan for sufficiency and compliance with these rules. The Department may make recommendations for improvements to CWM plans, at any time prior to the permit decision, based on the demonstrated success of existing CWM projects. The Department will approve the final CWM plan as a part of the individual removal-fill permit. In approving the final CWM plan, the Department may, after consulting with the applicant, require conditions necessary to ensure success of the CWM plan and to ensure the requirements in these rules are met.

(6) To the extent possible, the Department shall develop and make available to the public a listing of known compensatory wetland mitigation sites (e.g., wetland mitigation banks).

(7) The applicant shall complete and include in the application an assessment of wetland functional attributes. The assessment shall assess:

(a) Existing functional attributes of the entire wetland at the proposed project impact site;

(b) Functional attributes reasonably expected to be adversely effected, including those functional attributes decreased or lost due to the proposed project;

(c) Existing functional attributes at the proposed CWM site, if the site is currently wetland; and

(d) The projected net gain or loss of specific functional attributes at the CWM site as a result of the proposed CWM project.

(8) Wetland functional attributes to be assessed include, but are not limited to:

(a) Water quality and quantity functions;

(b) Fish and wildlife habitat functions;

(c) Native plant communities and species diversity functions; and

(d) Recreational and educational values.

(9) The Oregon Freshwater Wetland Assessment Method shall not be used to satisfy the requirements of OAR 141-085-0121(7).

(10) HGM is the preferred, but not required, functional assessment method. When HGM is used, the appropriate HGM guidebook should be used . Until the Department develops additional guidebooks or methods, the "Judgmental Method" in the Willamette Valley Guidebook may be adapted and used to assess wetland functions in other regions.

(11) If best professional judgment is used to evaluate any or all wetland functional attributes, a discussion of the basis of the conclusions is required. 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.

(12) Additional assessments or data may be required by the Department if the functional assessment results, public/agency review comments, or the Department's review indicate that there may be reasonably expected adverse effects to rare or listed plant or animal species, adjoining property owners, or if the project's effects are not readily apparent.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 1-2006, f. 3-21-06, cert. ef. 3-27-06; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0126

Requirements for All CWM

(1) CWM shall replace:

(a) Wetland habitat type(s) effected by the project, as classified per Cowardin system and class (e.g., palustrine forested);

(b) HGM class/subclass(es) effected by the project (e.g., riverine impounding), using the Oregon HGM Statewide Classification (Oregon Department of State Lands 2001); and

(c) The functional attributes of the lost wetland (effected wetland).

(2) The Department may approve exceptions to the requirements of OAR 141-085-0126(1) if the applicant demonstrates, in writing, that the alternative CWM:

(a) Is environmentally preferable;

(b) Replaces wetland functions that address problems (such as flooding) that are identified in a watershed management plan or water quality management plan approved by a watershed council or public agency;

(c) Replaces wetland types (Cowardin/HGM) and functions historically lost in the region; or

(d) Replaces rare or uncommon plant communities appropriate to the region, as identified in the most recent ONHP plant community classification.

(3) A permit holder, with the approval of the Department, may at any time contract with a third party to construct, monitor or maintain the CWM site. The permit holder cannot delegate responsibility for compliance with the CWM requirements unless the authorization has been transferred in accordance with OAR 141-085-0034.

(4) For linear projects (e.g., roads or utility lines with wetland effects in several watersheds), the applicant may compensate for all wetland effects at a single CWM site.

(5) CWM:

(a) Shall be completed prior to or concurrent with 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. The ratio of CWM required for delayed projects may be increased according to the provisions of OAR-141-085-0136;

(b) Shall include native vegetation plantings aimed at re-establishment of a dominance of native plants; and

(c) Shall 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 hydrology is not.

(6) CWM sites may fulfill multiple purposes including storm water retention or detention provided:

(a) The requirements of OAR 141-085-0126(1) and (2) are met;

(b) No alteration is required to maintain the stormwater functions that would degrade the functional attributes; and

(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.

(7) CWM using wetland enhancement must conform to the following additional requirements. The CWM shall:

(a) Be conducted only on degraded wetlands as defined in OAR 141-085-0010;

(b) Result in a demonstrable net gain in wetland functions at the CWM site as compared to those functions lost or diminished at the wetland conversion site and those functional attributes previously existing at the CWM site;

(c) Not replace or diminish existing wetland functional attributes with different wetland functional attributes unless the applicant justifies, in writing, that it is environmentally preferable to do so;

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

(e) Identify the causes of wetland 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.

(8) A conservation easement, deed restriction or similar legally binding instrument shall be part of a CWM plan.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 1-2006, f. 3-21-06, cert. ef. 3-27-06; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0131

Requirements for CWM Involving Wetland Mitigation Banks, Payment In Lieu of Mitigation or Conservation

(1) The requirements in this section are in addition to the general requirements in OAR 141-085-0121.

(2) Mitigation Bank Credits. Purchase of mitigation bank credits from an appropriate and approved mitigation bank is preferable to payment in lieu of mitigation. The Department will approve the bank option only after on-site mitigation has been examined and found to be impracticable. Documentation of the purchase of the required number of mitigation bank credits must be received by the Department prior to issuance of the authorization.

(3) Payment in lieu of mitigation:

(a) The individual removal-fill permit or letter of authorization for an activity shall not be issued until payment has been made in the amount identified in the CWM plan as approved by the Department. Once an approved removal-fill permit activity has begun as proposed, the payment in lieu of mitigation payment shall be considered as non-refundable.

(b) The amount to pay to the Department to provide CWM shall be the average cost of credits available from all active mitigation banks in the state as compiled annually by the Department.

(4) Conservation:

(a) Conservation of wetlands may be used for meeting the CWM requirement when the wetland proposed for conservation:

(A) Supports a significant population of rare plant or animal species; and/or

(B) Is a rare wetland type (S1 or S2 according to the Oregon Natural Heritage Program); or

(C) Is a vernal pool, fen or bog.

(b) Conservation should be encouraged as the preferred CWM option when the effect site is a wetland type that is exceptionally difficult to replace, such as vernal pools, fens and bogs.

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

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 1-2006, f. 3-21-06, cert. ef. 3-27-06; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0136

Ratio Requirements for CWM

(1) The purpose of CWM ratios is to:

(a) Ensure that the state's wetland resource base is maintained as required in ORS 196.672;

(b) Offset the temporal loss of wetland functions as compensatory mitigation sites mature (i.e., become fully functional replacement of the lost, effected wetland);

(c) Replace wetland functions that may be size dependent; and

(d) Compensate for the likelihood of success in the different CWM methods (creation, restoration and enhancement). The methods are techniques used to achieve the replacement of functional attributes lost from the effected wetland.

(2) Except as provided in Sections (3) through (6) of this section, the following minimum ratios shall be used in the development of CWM plans:

(a) Restoration: One (1) acre of restored wetland for one (1) acre of effected wetland.

(b) Creation: One and one-half (1.5) acres of created wetland for one (1) acre of effected wetland.

(c) Enhancement: Three (3) acres of enhanced wetland for one (1) acre of effected wetland.

(d) Enhancement of cropped wetland as determined by the Department: Two (2) acres of enhanced cropped wetland for one (1) acre of effected wetland. 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.

(e) Conservation: Variable: See OAR 141-085-0131(4).

(3) The Department shall double the minimum ratio requirements for project development effecting existing CWM sites; for example, using enhancement to

compensate for effects to an existing CWM site will require a ratio of six (6) acres enhanced for every one (1) acre effected.

(4) The Department may increase the ratios when:

(a) Mitigation is proposed to compensate for an unauthorized removal or fill activity; and/or

(b) Mitigation is not proposed for implementation concurrently with the authorized effect.

(5) 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 (1) acre of wetland and open water habitat, with depths less than thirty-five (35) feet, for one (1) acre of wetland effected;

(b) Three (3) acres of wetland and open water habitat, with depths greater than thirty-five (35) feet, for one (1) acre of wetland effected;

(c) One (1) acre of a combination of restored, created or enhanced wetland and upland, comprising at least fifty percent (50%) wetland, for one (1) acre of wetland effected.

(6) 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) Based on the value the Department determines under OAR 141-085-0131(3), allow the applicant, upon approval by the Department, to pay the entire cost of CWM:

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

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

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 1-2006, f. 3-21-06, cert. ef. 3-27-06; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0141

Requirements for All CWM Plans/Application Requirements

(1) On-site or off-site CWM involving the creation, restoration and/or enhancement of wetlands by the applicant. A CWM plan shall, at a minimum, include:

(a) CWM site information including:

(A) Area (size) of the CWM wetland proposed for effect relative to the total area of the wetland.

(B) 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;

(C) Legal description (Township, Range, Quarter Section and tax lot(s)) and a USGS or similar map showing the CWM site location relative to the effected site, longitude and latitude, physical address (e.g., 512 Elm Street), and road milepost (e.g., mp 25.21).

(b) Existing physical and biological baseline information of CWM site including:

(A) A wetland determination/delineation report (OAR 141-090).

(B) A functional assessment, except when PTP or purchase of credits from a wetland mitigation bank is proposed, of any existing wetlands at the CWM site, proposed for enhancement or other alteration, including a description of the factors leading to the degraded condition of the site (OAR 141-085-0121).

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

(D) A general description of water source, duration, frequency of inundation or saturation, depth of surface or subsurface water and approximate location of all water features (wetlands, streams, lakes) within 500 feet of the CWM site.

(E) HGM and Cowardin classification of any wetlands present within the CWM site.

(c) CWM plan description including:

(A) CWM plan goals, objectives and success criteria.

(B) The CWM concept in general terms including a description of how the plan, when implemented, will restore, reverse, minimize or control the causes of wetland degradation and ensure that the wetland functions of the effected wetland are replaced.

(C) A description of the rationale for the CWM site selection using a method approved by the Department.

(D) Proposed water source, duration, frequency of inundation or saturation of the CWM project.

(E) Any known CWM site constraints or limitations.

(F) Proposed HGM and Cowardin classification.

(G) Proposed net losses and gains of wetland functions.

(H) A description of how the applicant will maintain and protect the direct CWM site beyond the monitoring period.

(I) CWM construction plans including:

(i) Scaled site plan showing CWM project boundaries, existing wetlands, restoration, creation and enhancement areas.

(ii) Scaled grading plan with existing and proposed contours and cross section locations.

(iii) Description of construction methods (access, equipment).

(iv) Schematic of any proposed hydrological structures.

(v) Scaled cross sections showing elevations, distance.

(vi) Planting plan (with species, size, number, spacing and installation methods).

(vii) Monitoring plan (schedule, timetable, methods).

(viii) Contingency plan for CWM failures.

(ix) Implementation schedule and construction sequence.

(J) A reference site, combination of reference sites, or reference data of the same HGM class or subclass (e.g. from the Willamette Valley HGM Guidebook) and representing a less functionally altered condition than the CWM site. Compare and relate the sites and/or data to the CWM goal.

(K) Provisions for a financial security instrument (OAR-141-085-0176), if the effect is greater than .2 (two-tenths) of an acre. The financial security instrument is not required for the application but will be required prior to permit issuance.

(L) Plans for restoration projects shall include data substantiating that the site was formerly, but is not currently, a wetland (e.g. a wetland delineation report).

(M) Plans for vegetated buffers, if needed, to protect the viability and functions of the CWM site.

(N) Plans for the long-term protection of the CWM site:

(i) Compensatory mitigation sites and compensatory wetland mitigation sites will need to be permanently protected from destruction with appropriate real estate instruments or agreements (e.g. conservation easements, deed restrictions, long-term management

agreements with land trusts or public ownership). Situations where such protection will be required include but are not limited to:

(A) When the permit holder is likely to sell the mitigation site within five (5) years of project completion;

(B) When the permit holder is an absentee owner of the mitigation site;

(C) When the permit holder is not likely to actively participate in managing and maintaining the mitigation site; or

(D) When the permit holder is not the owner of the mitigation site.

(ii) The applicant shall offer a preferred method and justification.

(iii) The Department will make the final determination for the need and type of long-term protection.

(2) Other CWM. A CWM plan using conservation in lieu must include:

(a) Written documentation that the requirements in OAR 141-085-0131(4) are met.

(b) A conservation plan that shall include:

(A) Maps showing the wetland conservation area including all delineated wetlands to be conserved;

(B) The surrounding land uses and an analysis of the probable effects of those land uses and activities on the conserved wetlands;

(C) Measures that may be necessary to minimize the effects of surrounding land uses and activities on the conserved wetlands;

(D) Identification of the party(ies) responsible for long term protection of the conserved wetlands;

(E) A legally binding long term protection instrument (e.g. conservation easement); and

(F) A long-term management plan that addresses the specific requirements of the wetlands to be conserved.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 1-2006, f. 3-21-06, cert. ef. 3-27-06; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0146

Removal-Fill Authorization Conditions for CWM Plans

(1) For permits involving CWM:

(a) The approved CWM plan shall become part of the removal fill authorization and, by reference, all portions of the CWM plan shall become conditions of the authorization.

(b) Additional compensatory mitigation conditions may be included in the authorization.

(c) All compensatory mitigation conditions shall be enforceable until the CWM is deemed successful by the Department in accordance with OAR 141-085-0151, regardless of the authorization expiration date.

(2) Conditions for authorizations shall also state:

(a) If applicable, the amount of the payment in lieu of mitigation made by the applicant and how it was calculated; and

(b) If applicable, the mitigation bank utilized; and

(c) The loss of wetland by area, Cowardin and HGM class(es), and function(s) of wetland(s) expected to be lost or impaired; and

(d) The applicant's remaining responsibility after payment in lieu of mitigation payment was made, if any, and;

(e) No removal or fill of any amount of material shall be permitted within compensatory wetland mitigation sites without prior authorization of the Department.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0151

Monitoring Requirements for CWM Plans Involving On-site or Off-site Creation, Restoration or Enhancement of Wetlands

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

(a) Determine if the CWM complies with the conditions of the authorization;

(b) Evaluate whether the CWM meets the goals, objectives and success criteria of the CWM plan; and

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

(2) The permit holder shall monitor the CWM site and provide to the Department:

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

(b) An annual written monitoring report that includes all data necessary to document compliance with CWM conditions and success in meeting the CWM goals. These data may include photographs, topographic surveys, plant survival data, botanical surveys, results from functional assessment, hydrologic data and other information as required to demonstrate compliance. The report shall include the following sections:

(A) Introduction;

(B) Goals, objectives and success criteria;

(C) Methods;

(D) Results;

(E) Summary and recommendations;

(F) Figures;

(G) Appendices with data and photographs.

(3) Monitoring shall be conducted for 5 years unless otherwise specified by the Department.

(4) The Department may require modifications to the CWM plan as well as require additional monitoring any time the CWM is failing to meet the CWM goals.

(5) At the end of the five (5) year monitoring period, the Department shall determine if the mitigation project meets the CWM success criteria. If it fails to meet the success criteria, the Department may require modifications to the CWM site as well as additional site monitoring.

(6) When the CWM complies with the compensatory mitigation success criteria, as described in the approved removal-fill authorization, the Department shall notify the permit holder in writing of compliance with the authorization's conditions and that additional monitoring is not required. If the Department fails to notify the permit holder within ninety (90) calendar days of the Department's receipt of the final monitoring report, the permit shall be deemed in compliance and no further monitoring required.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-

141-085-0156

Payments; Expenditure of Funds for Compensatory Wetland Mitigation Payment in lieu of Mitigation; Agency Department Accounting of Payment in lieu of Mitigation Funds and Expenditures

- (1) The Department shall utilize the Oregon Wetlands Mitigation Revolving Fund Account authorized pursuant to ORS 196.640 et seq. to hold and disperse money collected from the program.
 - (a) The Department shall expend funds collected under the payment in lieu of mitigation option of compensatory wetland mitigation only to:
 - (A) Restore, enhance, or create wetlands (including acquisition of land or easements as necessary to conduct restoration, enhancement or creation projects) as compensatory mitigation to compensate or replace wetland functional attributes lost or diminished as result of an approved removal-fill authorization activity;
 - (B) Purchase credits from an approved wetland mitigation bank for the purpose of fulfilling the CWM requirements of an approved removal-fill authorization activity;
 - (C) Monitor the compensatory wetland mitigation; or
 - (D) Conduct site management for the compensatory mitigation project as necessary to assure that the mitigation is successful.
- (2) The Department shall expend funds collected under the payment in lieu of option of compensatory wetland mitigation only within the geographic region, as defined by OAR-141-085-0010 of these rules, in which the wetland functional attributes occur, unless the Department determines, in writing that expending the funds is not feasible or appropriate within a respective region.
- (3) The Department shall expend funds collected from specific approved removal-fill activities within two (2) years from the authorization issuance date unless the Department determines, in writing, that meeting the two year time limit is not feasible.
- (4) Third party recipients of funds collected under the payment in lieu of mitigation option of a compensatory wetland mitigation plan shall sign a written agreement provided by the Department that requires the recipient(s) to utilize the funds for specific wetland compensatory mitigation that has been reviewed and approved by the Department. Such review and approval will also be contingent on the submission of a specific monitoring program that is acceptable to the Department.
- (5) All payment-in-lieu monies collected and expended, as well as the success of the compensatory wetland mitigation, authorized by the Department in accordance with these rules, shall be recorded by the Department and shall include:

(a) A description of the compensatory wetland mitigation funded and including an evaluation of the success of these projects in meeting project goals.

(b) A description of the wetland functional attributes lost or diminished from approved removal-fill activities summarized individually and cumulatively by basin.

(c) A summary of the amount of payments collected and expended on individual compensatory wetland mitigation projects as well as cumulatively by basin.

(d) A description of the wetland functions expected to accrue as a result of compensatory wetland mitigation projects funded in accordance with these rules and summarized by basin and statewide.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0161

Department Responsibilities Under Payment in lieu of mitigation Option

The Department, by eliminating the applicant's responsibility for compensatory wetland mitigation by approving a removal-fill authorization including a payment in lieu of mitigation option, assumes the following responsibilities to:

(1) Defend the sufficiency of the compensatory wetland mitigation plan to compensate or replace the wetland functional attributes lost or diminished; and

(2) Monitor, manage, and otherwise assure the success of the compensatory wetland mitigation project performed by the Agency Department or designated third party(ies) under these rules.

(2) The Department, as part of an intergovernmental agreement, may transfer or extend the Department's responsibility for the compensatory wetland mitigation plan to another person or governmental agency.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0171

Mitigation for Temporary Impacts

Projects that do not result in the permanent loss of wetland functions and values, must, as part of the application, provide a rehabilitation plan for temporary effects, including:

(1) Plans and specifications for rehabilitating the area of temporary effects, including grading plans and planting plans, timeline and location of fill disposal areas; and

(2) Planting plans shall specify species, number and spacing. Such plans shall be designed to re-establish the pre-effect conditions of the site as rapidly as is reasonably possible.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

141-085-0176

Security Bonding and Instruments

(1) Financial Security Instruments are required for CWM projects. DSL may waive the requirement for a financial security instrument for impacts less than two tenths of an acre where the low risk of mitigation project failure does not justify the expense of such an instrument. Financial security instruments are not required when CWM is satisfied by purchase of credits from wetland mitigation bank or payment in lieu of mitigation is utilized. To ensure compliance with CWM requirements, the Department may allow for any of the following types of financial security instruments:

(a) Surety bond;

(b) Certificate of Deposit;

(c) Irrevocable letter of Credit; or

(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.

(2) No financial security instrument is required for projects conducted by government agencies.

(3) Financial Security Form: The applicant shall file the financial security instrument's on a form prescribed and furnished by the Department. The financial security instrument(s) shall be made payable to the Oregon Department of State Lands.

(4) Commencement of the liability period. The period of liability shall begin at the time of authorization issuance. The liability period shall be established by the Department and be clearly stated in the removal-fill authorization.

(5) Determining the financial security instrument amount. The Department shall annually set the amount of the financial security instrument based on the greater of the statewide

average for in lieu of mitigation or the cost of mitigation bank credit(s) in the applicants' bank service area.

(6) General terms and conditions of financial security instruments.

(a) The instrument shall be in an amount determined by the Department as provided in OAR 141-085-0176(5) of these rules and be made payable to the "Oregon Department of State Lands".

(b) The financial security instrument shall be conditioned upon faithful performance of all of the requirements of these rules as well as the conditions of the removal-fill authorization.

(c) Liability period. The permit holder's liability under the financial security instrument shall be for the duration of responsibility for the CWM as set out in the approved removal-fill authorization and these rules. Except as approved by the Department, a financial security instrument shall be posted to guarantee specific phases of the required CWM provided the sum of the bonds authorized for the phases equals or exceeds the total amount required to complete the CWM. The scope of work to be guaranteed and the liability assumed under each phase of the instrument shall be specified in detail in the authorization and financial security instrument form.

(7) Surety bonds: Surety bonds shall be executed by the permit holder and a corporate surety licensed to do business in Oregon. Such surety bonds shall be not be cancelable during their term.

(8) Certificates of Deposit; certificates of deposit shall be assigned to the Department, in writing, and upon the books of the bank issuing such certificates.

(9) Letters of credit shall be subject to the following conditions:

(a) The letter may only be issued by a bank organized or authorized to do business in the state of Oregon.

(b) The letter must be irrevocable prior to release by the Department.

(c) The letter must be payable to the "Department of State Lands" in part or in full upon demand by and receipt from the Department of a notice of forfeiture issued in accordance with OAR 141-085-0176 of this rule.

(10) 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 shall not release an existing financial security instrument until the permit holder has submitted and the Department has approved the replacement. Replacement of a financial security instrument shall not constitute a release under OAR 141-085-0176 of these rules.

(11) Financial Security Instrument Release. The Department shall authorize release of the financial security instrument when the CWM meets the requirements of the CWM

plan and conditions of the removal-fill authorization. The permit holder shall file a request with the Department for the release of all or part of a financial security instrument. The request shall 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 sought to be released.
- (e) The type and appropriate dates of CWM work performed.
- (f) A description of the results achieved relative to the permit holder's approved CWM plan.

(12) Forfeiture of financial security instruments. The Department shall declare forfeiture of all or part of a financial security instrument for any removal-fill authorization project area or an increment of a project area if CWM activities are not conducted in accordance with the approved CWM plan or the permit holder defaults on the conditions under which the financial security instrument was posted. The Department shall identify, in writing, the reasons for the declaration.

(13) Determination of Forfeiture Amount and Utilization of Funds. The permit holder shall forfeit the amount of the financial security instrument for which liability is outstanding and DSL shall either utilize funds collected from bond forfeiture to complete the CWM on which bond coverage applies or deposit the proceeds thereof in the Oregon Wetlands Mitigation Revolving Fund Account for use in the payment of costs associated with wetland mitigation activities.

Stat. Auth.: ORS 196.825

Stats. Implemented: ORS 196.800 - 196.990

Hist.: DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 2-2003(Temp) f. & cert. ef. 11-26-03 thru 5-23-04; DSL 1-2004, f. & cert. ef. 5-21-04; DSL 6-2007, f. 12-13-07, cert. ef. 1-1-08

Freshwater Wetland Mitigation Banks

141-085-0400

Purpose

These rules describe when, and under what conditions, the Department will allow mitigation banking as a means of wetland compensation when fill or removal of material is proposed in wetlands regulated by the State of Oregon. Mitigation banking is used to provide larger scale compensatory wetland mitigation in advance of anticipated smaller wetland losses. These rules also specify the requirements to obtain authorization to develop a wetland mitigation bank.

Stat. Auth.: ORS 196.825 & 196.600 - 196.665

Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990

Hist.: LB 2-1997, f. & cert. ef. 2-14-97; DSL 6-2002, f. 11-25-02 cert. ef. 1-15-03; DSL 1-2003, f. & cert. ef. 7-10-03; DSL 1-2004, f. & cert. ef. 5-21-04