

Department of State Lands

Division 141-085

PROPOSED RULE CHANGE SUMMARY BY MAJOR TOPIC (7/17/2008)

**Administrative Rules
Governing the Issuance
& Enforcement of
Removal-Fill Authorizations
Within Waters of Oregon,
Including Wetlands**

DOCUMENT STATISTICS

Existing Division 85 Rule:

- 90 pages/single-spaced
- 42,000 words
- 227 definitions

Proposed Division 85 Rule:

- 82 pages/double-spaced
- 23,000 words
- 75 definitions

GENERAL

- Bold fonts have been used to highlight important subject matter in each major section.
- Use of the special fonts or double-spacing enables the user to find topics more readily.
- No regulatory meaning is associated with this formatting.

POLICY

- No substantive changes were made to this section.

DEFINITIONS

The list of defined terms was shortened from 227 to 75 by using the following criteria:

- Terms defined in statute were generally not repeated
- Terms in common usage without a special meaning in the Removal-Fill program were deleted
- Terms not used in the rule were deleted; and
- Terms used only once in the rule were defined in the rule section where they were used.

The following terms were added, newly defined, or the meaning was substantively changed:

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

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

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

(21) "**Ecologically Preferable**" means having a higher likelihood of replacing functions and services or of improving water resources of this state.

(29) "**Functions and Services**" are those ecological characteristics or processes associated with a wetland and the societal benefits derived from those characteristics. These ecological characteristics are "functions," whereas the associated societal benefits are "services."

(33) "**In-lieu Fee**" means the federally approved compensatory mitigation and compensatory wetland mitigation program used to compensate for reasonably expected adverse effects of project development on Waters of the United States and Waters of this state.

(34) "**Interagency Review Team (IRT)**" is an advisory committee to the Department on wetland mitigation bank projects and in-lieu fee projects.

(37) "**Location**" means project location.

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

(49) "**Payment In-Lieu Mitigation**" means compensatory wetland mitigation for waters of this state that is performed using cash paid to the Department or by agreement of the Department to an approved third party. The payment in-lieu program is not approved to compensate for impacts to waters of the United States.

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

(55) "**Project Site**" means the geographic area where the project is being proposed or considered.

(59) "**Reasonably Expected Adverse Effect**" and "**Adverse Impact**" mean the actual, 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.

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

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

(68) "**Temporal Loss**" of the functions and services provided by waters of this state means the loss that occurs between the time of their destruction or degradation and the time of their replacement.

(69) "**Tidal Habitat**" means habitat located between the highest measured tide and extreme low tide (or to the elevation of any eelgrass beds which is lower), that is flooded with surface water at least annually, during most years.

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

(73) **"Wetland Enhancement"** means increasing the condition, functions and services of an existing degraded wetland.

(75) **"Wetland Restoration"** means to reestablish a former wetland, sufficient to meet wetland criteria.

REMOVAL-FILL JURISDICTION

- The jurisdictional section was rewritten and reorganized for greater clarity.
- "Seeps and springs" were added as a type of jurisdictional water.
- Guidance was added for determining the jurisdictional portions of reservoirs.

EXEMPTIONS

- The exemption section was rewritten and reorganized for greater clarity.
- A separate section was created just for agricultural activities.
- We created some redundancy for the sake of having all the agricultural exemptions in one place.

PERMITS AND AUTHORIZATIONS

- The permits and authorizations section was rewritten and reorganized for greater clarity.
- Note the use of the terms "Location," "Project," "Project Site," "Reasonably Expected Adverse Effect," "Adverse Impact," and "Removal-Fill Site." These terms have precise meanings in the context of the rule (refer to Definitions Section).

The term "location" means project location. A "project" consists of integrally related component parts, which have no independent utility. This requires us to look at reasonably expected adverse effects or adverse impacts from the project as a whole.

"Project Site" as used in 196.825(11)(a)(A) refers to the project in its entirety, and that distinguishes it from the "removal-fill site," a term also used in that same subsection.

"Reasonably Expected Adverse Effect and Adverse Impact" includes both the direct and indirect results from project development (ORS 196.825 (4)). We can require compensatory mitigation for impacts that we can reasonably infer would occur from the project. For example, let's take the case of subdivided lots with wetlands in them. Even if the applicant did not propose to fill the wetlands in those lots as part of his or her proposed project, we can still look at the entire project, and require the applicant to show us those lots on his or her site plan.

We defined the term "Removal-Fill Site" to establish that projects may include more than one removal-fill site, and that cumulatively, even if one or more of these sites is less than 50CY, in total, the 50CY threshold can still be met.

COMPENSATORY MITIGATION

To help improve mitigation success, the compensatory wetland mitigation section, in particular, was extensively revised and substantively changed. Here is what has changed:

- To avoid confusing the public, the Department proposes to adopt the same key mitigation terms used in the new federal mitigation regulations and to interpret them in the same way.
- Freshwater is now "non-tidal."
- The section on estuarine mitigation in the current rule is being repealed.
- We have incorporated estuarine mitigation into the new proposed Compensatory Wetland Mitigation (CWM) section by adding "Tidal Waters." Thus, non-tidal and tidal CWM requirements are merged.
- A mitigation options hierarchy has been created by giving preference for mitigation that is in the ground and successful, i.e., established mitigation bank, in-lieu fee credits and advance mitigation credits. A functions and services replacement assessment is used to verify mitigation success. Payment In-Lieu Mitigation is granted a lower priority than in-lieu credits because the Corps will not accept payment in-lieu mitigation to compensate for impacts to waters of the United States.
- The permittee-responsible mitigation provisions have been beefed up to improve mitigation success. On-site or off-site options are subject to functions and services replacement and site suitability criteria.
- Conservation of non-tidal wetland and tidal waters may be used for meeting the CWM requirement in special circumstances.

- CWM site suitability factors are going to be applied to establish a watershed-based approach and to improve the sustainability of the CWM site.
- Wetland “services” assessment added to functional assessment requirement.
- More specificity has been added with regard to the administration protection for publicly owned sites.
- There are new CWM plan requirements, including the need to submit an updated long-term maintenance plan before the Department will release the CWM site from CWM monitoring obligations.
- There are also new plan requirements for CWM that proposes to use the conservation option. These requirements include the need for a long-term projection instrument; a long-term management plan with a funding mechanism and a protection instrument.
- The new monitoring section now stipulates final report requirements for release:
 - Final site mapping, by type and method
 - Final functions and services assessment
 - Final long-term maintenance plan/steward/funding
- The temporary impacts section now includes requirement for monitoring
- A new pilot program for advance mitigation has been added.