

Oregon Department of State Lands Administrative Rules for Mitigation Banks and In-Lieu-Fee Compensatory Mitigation

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 CM: Mitigation banks established and operated under these rules must meet the principal objectives of compensatory 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.

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

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

History:

[DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019](#)

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

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

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

[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 CM 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 the following to nominate a representative for an IRT:

(A) State natural resource agencies, including Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, and Oregon Department of Land Conservation and Development;

(B) Federal natural resource agencies, including the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and National Oceanic and Atmospheric Administration (NOAA) Fisheries;

(C) Local regulatory and natural resource agencies, including the Soil and Water Conservation District, and the local Government Planner or equivalent.

(b) The Department may invite other members of the IRT based on particular interest in the project by regulatory and resource agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the project, and persons and groups with 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 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) All requirements for CM 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 losses of waters of this state in the service area by HGM and Cowardin wetland classes or stream type as defined in OAR 141-085-0690;

(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;

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

(L) A draft interagency bank instrument agreement following the current template document provided by the Department. Exceptions to the template must be approved in writing by the Department.

(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.

Statutory/Other Authority: ORS 196.825 & 196.600-196.692

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

History:

[DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019](#)

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

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

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

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

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

141-085-0730

Establishment of Mitigation Credits

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

(a) The minimum mitigation requirements as stated in OAR 141-085-0692 with adjustments, as appropriate; 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. 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 for buffers at the discretion of the Department. Such buffers will be subject to appropriate administrative site protection pursuant to OAR 141-085-0695.

(4) Wetland 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 a larger wetland bank.

Statutory/Other Authority: ORS 196.825 & 196.600 – 196.692

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

History:

[DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019](#)

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

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

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

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 achieving performance standards 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 mitigation bank, all applicable rules governing CM.

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 Oregon Removal Fill Mitigation Fund may be used to purchase approved bank credits where such purchases will provide appropriate compensatory mitigation.

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

Statutory/Other Authority: ORS 196.825 & 196.600-196.692

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

History:

[DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019](#)

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

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

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

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

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

[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.

Statutory/Other Authority: ORS 196.825 & 196.600 – 196.692

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

History:

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

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

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.

Statutory/Other Authority: ORS 196.825 & 196.600 – 196.692

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

History:

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

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

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

[141-085-0750](#)

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

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

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

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

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

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

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

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

(C) RMV = Real Market Land Value of the proportion of the tax lot acreage to be mitigated for, adjusted based on zoning;

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

(E) mm = Mitigation Multiplier representing the number of credits typically generated per unit area of mitigation conducted.

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

(3) 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.

Statutory/Other Authority: ORS 196.825 & 196.600-196.692

Statutes/Other Implemented: 196.600-196.692 & 196.800-196.990

History:

[DSL 2-2019, amend filed 03/28/2019, effective 04/01/2019](#)

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

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

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