



Oregon

Theodore R. Kulongoski, Governor

Oregon Watershed Enhancement Board

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January 5, 2009

MEMORANDUM

TO: Oregon Watershed Enhancement Board

FROM: Melissa Leoni, Senior Policy Coordinator
Ken Bierly, Deputy Director

**SUBJECT: Agenda Item G: Policy Issue Discussion
January 21-22, 2009 OWEB Board Meeting**

I. Introduction

This report provides an update on four policy issues, including: (1) the efforts to clarify agency policy on the use of Measure 66 capital funds for mitigation or legally required activities; (2) invasive species management; (3) water conservation projects; and (4) working lands conservation easements.

II. Background

The four policy issues identified above are eligible for funding under OWEB's adopted administrative rules. However, clarifying intent and priorities and identifying alternative approaches to funding these types of activities is complex and could have a significant affect on OWEB's programs. These issues have been identified through Board Subcommittee discussions, Board meeting discussions, and staff considerations.

The following sections highlight each issue and identify the current status of internal and external discussions. Staff intend to engage the Board in a discussion on the mitigation project eligibility issue at the January meeting. Staff will only introduce the other three issues at this time. Attachment A provides a proposed schedule for future issue development and Board consideration.

III. "Mitigation" Project Eligibility

OWEB has adopted administrative rules guiding eligibility and preferences for restoration grants (OAR 695 Division 10). OAR 695-010-0040 specifically describes the following as ineligible for OWEB funding by the Board:

(3) A watershed improvement project constructed solely to comply with a state or federal agency enforcement order, legal judgment or mitigation requirement.

When the administrative rule was adopted it was done to prevent the use of OWEB funds (public funds) to satisfy a requirement that an individual incurred from an action that adversely impacted the environment. Subsequently, questions have been raised over the potential use of Measure 66

funds to fund a mitigation bank from which “credits” would be sold to allow others to alter wetlands. OWEB staff cooperated with a group of state and federal agencies to develop guidance describing the circumstances where restoration funds may or may not be appropriate in species and wetland mitigation projects.

Staff have also encountered significant and increasing opportunities to leverage OWEB funding with some other types of funding that could be construed as being required for mitigation purposes or to be in compliance with a state or federal legal judgment. If OWEB is to join in these opportunities, it is critical to ensure that OWEB funds are used only for restoration benefits that are above and beyond, or separable, from the actions taken to comply with mitigation or legal judgment requirements. Also, as other devices are created to trade ecosystem services, it will be important for OWEB to be clear when Measure 66 funds can and can not be involved. This is a complex and nuanced issue, and often depends on the specifics of an agreement.

Staff have determined that rule changes are not needed to clarify when and how OWEB funds may be used in these types of scenarios, but that further guidance for grantees, staff, and grant reviewers is needed. Staff have initiated internal discussions and drafted policy guidance on this subject. (Attachment B) Staff are looking for feedback on the draft policy from the Board at the January meeting, with further discussion and policy adoption planned for March.

IV. Other Policy Areas

The other three policy areas are introduced in this section of the report.

A. Water Conservation Projects

OAR 695-010-0040 describes the following as ineligible for OWEB funding by the Board:

(5) A water conservation project, unless there is a measurable instream flow benefit, groundwater benefit or water quality improvement.

The restoration and protection of stream flow is clearly within the range of activities eligible for funding by OWEB. OWEB has funded restoration projects that have resulted in conserved water and direct water right purchase or lease projects. Staff and the Board have noted that the preponderance of the large-scale water conservation related restoration projects come from the Deschutes Basin and have significant costs. The review of proposed short-term leases by the Deschutes River Conservancy in 2008 also raised questions about the benefits provided for the investment requested.

These questions have put staff in the position of reevaluating the current approach of treating water conservation applications along with all other applications. Staff are looking for ways to develop clear guidance for the Board on prioritizing stream flow restoration and acquisition grant applications, evaluate the options for future investments, and develop a context for consideration of the \$4 million Central Oregon Irrigation District restoration application (Pilot Butte Piping Project, 209-4034). Staff are also considering whether there is a more effective way to solicit and fund activities that result in instream flow benefits.

Staff recently formed a Flow Conservation Work Group (FCWG) to work through these issues. The group will consider the current contributions to flow protection and develop suggestions on approaches for focus on ecological benefits. Membership of the FCWG is identified in the table below. The first meeting of this advisory group was held on December 9, 2008. Staff plan to have two additional meetings with the FCWG and report to the Board in March or June. Conversations with the group have not proceeded sufficiently to identify the depth of recommendations that may arise from the group. Staff will also consult with the Board Land Acquisition Subcommittee as the FCWG conversations progress.

Flow Conservation Work Group

Name	Affiliation
Rich Adams	Oregon State University
Debbie Colbert	Oregon Water Resources Department
Clay Landry	Consultant
Janet Newman	Lewis & Clark College
Martha Pagel	Attorney
Andrew Purkey	National Fish and Wildlife Foundation
Adam Sussman	Consultant

B. Invasive Species Management

In terms of grant program preferences, OAR 695-010-0030 includes the following:

- (1) Projects that address altered watershed functions affecting water quality, water flow volume and duration, and the production capacity for fish over projects that address site-specific land use problems where the greatest benefit is to a private resource or land.*
- (3) Projects that change land management practices to address the causes of chronic disturbances to the watershed over projects that address only symptoms of disturbance.*

The need for stable and flexible funding to address long-term monitoring, coordinated management, strategic control, and enforcement efforts related to invasive species was recently identified in the 2008 Oregon Invasive Species Council’s (OISC) *Statewide Summit Report to Governor Kulongoski*. The Executive Summary is included as Attachment C. The efforts of the OISC and the report recommendations have raised questions about the appropriate role for OWEB in funding in invasive species management.

Between July 1999 and May 2008, the total OWEB investment in invasive species management has totaled \$22.7 million, including approximately \$5.4 million for projects involving weed control and \$2.8 million for juniper removal projects. The majority of OWEB grants involving weed control were for stream, riparian, and upland restoration projects where the noxious or invasive weed treatments were one component of a larger watershed project.

Measure 66 funds have also been appropriated to the Oregon Department of Agriculture (ODA) for weed and pest control programs, including:

- Since July 1, 2001, \$9.7 million for the ODA Noxious Weed Control Program. ODA staff work closely with the Oregon State Weed Board to prioritize weed control

projects and award noxious weed control grants that protect and enhance fish and wildlife habitat and watersheds overall.

- Since July 1, 2003, \$4.8 million for the ODA Insect Pest Control and Prevention Program. These funds are used for invertebrate plant pest eradication and control projects that protect and enhance watersheds, fish and wildlife habitat and/or water quality in Oregon from gypsy moth, Japanese beetle, Asian longhorned beetle, and many other harmful and invasive pests.

The magnitude and overwhelming nature of the battle against invasive and exotic species is significant. The questions that the Board may wish to resolve include identifying a level of funding for invasive species control and the criteria for connecting watershed health or function and invasive species control. Staff have invited the OISC to present at the March 2009 Board meeting in preparation for starting to address this issue in the summer of 2009 with discussions by the Board at the September 2009 and January 2010 meetings.

C. Working Lands Conservation Easements

In Division 45, the Board has adopted priorities for Land Acquisition grants, including defining a “Land Acquisition Project” as “a project that proposes to acquire an interest in land from a willing seller for the purpose of addressing the conservation needs of priority habitat and species consistent with conservation principles identified by the Board. Interests in land may include a lease, purchase of a conservation easement, or purchase of fee simple title.”

The Board Land Acquisition Subcommittee has raised the question of how working lands conservation easements are evaluated for funding. OWEB’s current administrative rules focus on habitat, plant community, and species ecological priorities and whether applications meet one or more conservation principles to protect those priorities. A number of working lands easement proponents argue that protection from land division and intensification of use should be sufficient for funding. This issue faces the Board on at least four pending land acquisition grant applications. Staff will be working on this issue over the spring and summer with a Board discussion in September of 2009.

V. Recommendation

This is an informational item. No Board action is requested at this time.

Attachments

- A. Working Schedule for Policy Issues
- B. Draft Mitigation Policy
- C. Oregon Invasive Special Council Statewide Summit Report to Governor Kulongoski Executive Summary

OWEB Policy Issue Development Schedule														
	2008	2009											2009	2010
Policy	Dec	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan
Mitigation														
Recommendations														
Board Discussion														
Board Action														
Water Conservation														
Advisory Group Meetings														
Recommendations														
Board Discussion														
Board Action														
Working Lands Easements														
Advisory Group Meetings														
Recommendations														
Board Discussion														
Board Action														
Invasive Species														
Advisory Group Meetings														
Recommendations														
Board Discussion														
Board Action														



Oregon Watershed Enhancement Board

Policy to clarify eligible uses of OWEB funds
related to mitigation project and funds

Effective Date: _____, 2009

Approved By: _____
Tom Byler, Executive Director

Background

In 2004, the OWEB Board adopted an administrative rule that states:

“The Board will not consider:

(3) A watershed improvement project constructed solely to comply with a state or federal agency enforcement order, legal judgment or mitigation requirement;...” (OAR 695-010-0040)

This rule was adopted to prevent the use of OWEB funds to satisfy a legal obligation of another party. The staff discussion before the Board on this issue in January of 2008, focused on the desire to prevent the use of OWEB funds from subsidizing development that is required to “mitigate” for an environmental alteration. The Board discussion distinguished between direct permit or other legal requirements (e.g. DSL removal-fill permit requirement, EPA enforcement order, or judicial order to restore a site as part of a legal settlement, etc.) and a general legal requirement (e.g. state law prohibits blocking anadromous fish passage) that is not specific to an individual action.

Since the adoption of the rule a number of questions have arisen concerning the intent and application of the rule. In 2005, Roger Wood asked the Department of Justice (DOJ) for advice on the applicability of the rule to local government mitigation requirements and whether the rule could be interpreted to make eligible for OWEB funding projects required by state or federal law where there has not been a specific or cited violation that must now be corrected. DOJ advised OWEB that projects required only by local government are eligible for funding, but if the local government requirement is imposed solely because of a state or federal requirement for mitigation, then the project is ineligible for funding. DOJ also concluded that OWEB’s rules (as currently written) make mitigation projects required by state or federal entities ineligible, regardless of whether there has been an order or judgment reflecting violations of law requiring mitigation.

This policy further defines and clarifies eligibility for projects under OAR 695-010-0040.

OWEB Policy

The intent of the administrative rule is to fund voluntary, pro-active watershed improvement projects that aren't specifically required by state or federal government. For the purposes of this policy, mitigation means activities designed specifically to compensate for the adverse ecological effects of a project or development activities, or to resolve violations of law.

The following are examples of project and funding situations and whether OWEB funding is eligible to participate in such situations.

General Eligibility.

- Projects designed to exclusively to compensate for the adverse ecological impacts of another project or development, or to address violations of law as required by a state or federal enforcement order are not eligible for OWEB funding. However, specific elements of a mitigation project that aren't required, for example the creation of additional habitat benefits or additional acres of wetlands restored or created are eligible for OWEB funding. The funding used to support the required mitigation is not eligible to be counted towards the required match for OWEB grants. For example, if a developer contributes \$100,000 to restore 10 wetland acres as compensatory mitigation and OWEB funds will be used to restore an additional 5 acres, the \$100,000 cannot be used as match for the OWEB grant.
- Projects to make actions compliant with state or federal law, but where no mitigation is required. Projects designed to comply with state or federal law, but where no mitigation requirement, judgment, or enforcement order exists are eligible for OWEB funding. Examples include fish passage projects designed to comply with ORS 509.580 – 509.910 and agricultural water quality projects designed to implement local agricultural water quality management plans (ORS 580.900 – 580.933).
- OWEB may fund a project designed to address a local government order, judgment, or mitigation requirement if the requirement is solely a function of local government and does not originate in state or federal requirements. For example, local government mitigation requirements based on local government codes, and not state or federal requirements for such codes, can be addressed with OWEB funding. However, if a county or city adopts a code to implement a state or federal requirement, then OWEB funds cannot be used to fund that project. In general, the use of OWEB funds for this purpose should be discouraged in order to honor the intent to fund voluntary, pro-active watershed improvement projects.
- **Recovery Plans.** Voluntary actions to meet the objectives of an approved recovery plan are eligible for OWEB funding.
- **Habitat Conservation Plans.** Actions that meet the objectives of a Habitat Conservation Plan, but that are not specifically required in the associated take permit or are not required by state or local government to meet the requirements of the approved HCP or take permit, are eligible for OWEB funding. For example, if a land trust wants to purchase a conservation easement to protect habitat that is also covered by a HCP, but property is not specifically mentioned in the HCP or protection is not required by the take permit, then OWEB funds could be used in the acquisition of the easement. But, if the HCP and/or take permit require specific mitigation actions, including the protection of

habitat, activities designed to meet the HCP or take permit conditions are ineligible for OWEB funds. If the HCP involves a single landowner and authorizes specific activities and offsetting actions, the use of OWEB funds would be used to satisfy a federal mitigation requirement and all activities under the HCP would be ineligible for OWEB funding.

- **Mitigation or Settlement Funds** (BPA funding, Pelton-Round Butte; FERC, and other negotiated settlements). Where a legal judgment includes the creation of a fund for habitat restoration or protection purposes, but does not identify specific restoration or habitat mitigation projects, OWEB funds are eligible as cost share with these funds to implement specific projects. For example, the Pelton Round Butte license required the licensee to establish a fund to accomplish two general outcomes, improved fish habitat and increased protected stream flow. The agreement did not specify individual projects but a process and criteria. However, OWEB funding would be ineligible if the fund identified a specific parcel to be protected or specific restoration project to be accomplished with those funds. In this instance, OWEB could partner on additional protection and restoration projects or activities, but not those needed to meet the purpose of the fund.
- **Mitigation Banking.** By statute, “Mitigation bank” means a wetland site, created, restored or enhanced to compensate for unavoidable adverse impacts. OWEB funds are not eligible to be used to establish a mitigation bank to offset permitted environmental alterations. This is consistent with the January 2008 Oregon Interagency Recommendations developed by OWEB and a number of other state and federal agencies on the use of restoration funds and funding of mitigation banks. The policy prohibits the use of restoration funds for the purpose of establishing or creating credits for a mitigation bank. The policy does allow restoration funds to be used with “payment to provide” mitigation funds for watershed restoration projects. OWEB funds could be used with these funds on a restoration projects in a similar fashion to the Mitigation or Settlement Fund situation described above.
- **Conservation Banking.** Since conservation banks have not been established yet, OWEB policy will be to treat them in the same manner as mitigation banks until conservation banking policy and standards have been fully established.
- **Ecosystem Services Markets.** Ecosystem services mean the environmental benefits arising from the conservation, management, and restoration of ecosystems. The issue of whether landowners can sell ecosystem services from lands where OWEB has contributed funding for the acquisition of fee title or a conservation easement has been raised by the land trust community. Since there are only limited markets for carbon at this time, but great speculation about the development of such markets, the appropriate role and use of OWEB funds is uncertain. At present, OWEB typically funds acquisition projects to protect existing habitat or to facilitate a change in ownership in order to enable the restoration of important habitat. OWEB protects the state’s investment in the condition and protection of that habitat through a conservation easement.

There are two principles that might be useful to guide future policy related to ecosystem services. The first principle is that OWEB funds should not be used to allow environmental degradation at some alternative location. The second principle is that

OWEB funds not be used to pay twice for the same ecological benefit.

In the future, OWEB may consider alternative valuation methods to determine the fair market value of land acquisition projects to account for ecosystem service market values. In the interim, OWEB should consider adding language to its template easement making it clear that protection of existing plant communities includes the carbon sequestration values of those communities.

Executive Summary

A year-long statewide public awareness and engagement campaign was initiated in Oregon in 2008 to address the increasing threat invasive species pose to Oregon's natural resources, economy, and quality of life, and initiate actions to better protect Oregon. The campaign includes numerous federal, state, and local governments, tribal governments, nonprofit organizations, universities, industry representatives, media, corporations, private foundations, and citizen groups.

As part of the campaign and to help coordinate an effective government response to invasive species in Oregon, the Oregon Invasive Species Council coordinated and hosted a statewide invasive species summit on July 22, 2008 in Salem, Oregon. About 175 people attended the summit, which was designed to bring federal and state agency and industry leaders and legislators together to describe the obstacles to successfully dealing with invasive species in Oregon, and strategies to address those barriers.

Summit attendees described five main concerns relative to invasive species in Oregon, and suggested potential solutions to address those concerns:

Coordination/Cooperation—Oregon needs leadership and communication/cooperation across agencies, enhanced political will to balance strategic and local issues, effective memorandums of understanding with federal agencies, and increased non-governmental participation. Solutions include clearly identifying roles of all agencies, a comprehensive inter-agency strategic plan, an effective Early Detection-Rapid Response Program, an effective outreach program, creation of regional invasive lists, coordinated and efficient tracking of data on invasives, and, where possible, lessening unnecessary duplication of effort by targeting groups or suites of species versus species-specific efforts.

Funding—There is a need for stable, flexible funding as well as emergency funding dedicated to long-term monitoring, coordinated management, strategic control, and enforcement efforts. Solutions include collecting user fees, enforcing existing fines, creating vanity plates, using lottery and Measure 66 dollars, and taxing the vectors (containers, tires, etc.).

Policy—Oregon lacks a comprehensive policy dealing with invasive species, including a lack of focus on pathways and vectors, and checkpoints at ports of entry. There are gaps and overlaps in enforcement jurisdiction. Solutions include stronger laws, clarification of noxious weed listing criteria, a statewide assessment, and legislative committees to deal with invasives.

Public Awareness—Oregonians lack knowledge about invasives and their effect on the environment and the economy. They don't understand their personal responsibility, they fear government involvement, they are confused by the plethora of information on invasives, there is no clear statement of the invasive species problem, and social norms need to shift. Solutions include a sustained multi-media campaign, better distribution of existing materials and use of existing programs, and required curriculum in the schools.

Research and Monitoring— There is no statewide baseline assessment and monitoring system, no transparent and logical risk assessment tool for prioritizing, no integrated database/information sharing system, no forum to share information and research needs, and no comprehensive statewide rapid response strategies for invasive species (note: there are response plans for a few species). Solutions include development of an incident command system to respond to new invasions, professional training on invasive species, creation of a joint federal/state program to identify priorities for research, and development of integrated monitoring programs.

The next steps are to share this report with the Governor, incorporate key strategies into the OISC strategic plan, support key legislative concepts in the 2009 legislative session, and develop and share with the Governor OISC recommendations to enhance support of invasive species efforts throughout Oregon.