

AGENDA
WASHINGTON EFSEC STANDARDS DEVELOPMENT GROUP
Friday, June 14, 2002
8:00 a.m. – 1:00 p.m.
St. Placid Priory, 500 College St. NE, Lacey, Washington, 98516
Phone (360) 438-2595

1. Welcome and introductions
2. Review of last meeting's minutes
3. Presentations
 - A. Water Quantity: Revised Draft Proposed Rule for Standard – Chuck Lean
 - B. Air Quality: Revised Draft Proposed Rule for Standard – Mike Lufkin
 - C. General Mediation Process: Draft Proposal – Mike Lufkin
 - D. Socio-economics: Draft Proposed Rule for Standard – Brian Carpenter
 - E. Oregon Habitat Rules – Gail McEwen, from Oregon's Department of Fish & Wildlife, Habitat Division, and Tom Meehan, from Oregon's EFSC
4. Report on wetlands – Chuck Blumenfeld
5. Report on “deviation from standards” workgroup – Stephany Watson
6. Next meeting and organization of remaining work

June 14, 2002

EFSEC Standards Development Group

Meeting Minutes

Lacey, Washington

Introduction, Review of May 23 Meeting Minutes

Bud Krogh opened the meeting and those present introduced themselves. Mr. Krogh asked if there were corrections to the May 23, 2002, minutes. Carol Jolly noted that the minutes said Tom Morrill was with the Department of Ecology, while he actually is with the Attorney General's office. Also, she pointed out an incorrect spelling of Mr. Morrill's last name on the May 23 attendance list. Justin Long, Mr. Krogh's paralegal, said he would make these corrections.

Water Quantity

Chuck Lean presented his latest revised draft for a water quantity standard. Mr. Lean said he made three changes since the May 23 draft. First, as Mr. Lean said in a memorandum to the group dated June 13, 2002, he added "the Fish & Wildlife consultation results to the report of examination" in section (II), part (D)(3)(a) of the June 14, 2002, draft.

Second, also in section (II), part (D)(3), Mr. Lean selected 90 days as a time limit for applicants to provide EFSEC with a report of examination, identifying changes in water rights that need to be made. Mr. Lean said at the meeting that he picked three months arbitrarily. However, he also said in his memorandum he selected 90 days because it "was a compromise designed to insure (a) that Ecology was working on a real application; and (b) that the report of examination would be completed in time for consideration in the EIS and at the hearing."

The third change was the removal of section (II), part (E), "Other Authority," from Mr. Lean's May 23 draft. This section had served as an escape clause, making clear that the draft standard in no way "intended to limit or prohibit EFSEC's authority." While this escape clause is no longer part of the draft water standard, Mr. Lean noted that section (II), part (D)(2) of the draft still cites chapter 80.50 RCW as a basis for EFSEC's determination of whether to authorize water use or not; and some believe it is possible to interpret 80.50 RCW as giving EFSEC unlimited authority.

Mr. Lean asked if he should put in the draft a recommendation or rule that if a party is going to apply for water, it should come in with a water examination of some sort. Allen Fiksdal suggested that a report of examination could be part of the application. Mr. Lean asked what people thought of requiring parties to file applications with reports of examination six months ahead of time. Sue Mauermann said she liked these recommendations and thought something should be built into the rule.

After further discussion, it was agreed that Mr. Lean would incorporate in his next draft the idea that when a party picks a date for filing its application, it should go to Ecology six months ahead of this date and wait five days for Ecology to decide whether or not it can prepare a report of examination on time. If Ecology says it can do it, a schedule should be laid out for accomplishing the report of examination. Mr. Lean said he would also include an escape clause ensuring that the language of the proposed standard cannot become a determinant in a dispute between an applicant and Ecology over whether or not Ecology timely prepared a report of examination.

Mr. Lean raised the point that the draft's current language does not allow for EFSEC to issue new water rights. He said Ecology does not think EFSEC has the authority to issue new water rights and others disagree. Mr. Lean said he wants people to at least know what is happening if the existing language continues to exist in its current form. Mr. Lean said it may be an inaccurate statement according to law for the language in his draft to disallow EFSEC the authority to issue new water rights.

Jim Luce said he is not sure he wants to close the door on the possibility of issuing new water rights, although he would not envision doing that in his policy.

Rusty Fallis said he thinks it would involve lots of work for EFSEC to get to the point of issuing new water rights and that leaving the language in its current form would not forever foreclose the possibility of EFSEC going in that direction. Because the group is attempting to generate certainty, he suggested leaving the language in its current form.

Ms. Mauermann said the draft's current language would not forever close the issue, but it would require a rule to go back. Mr. Lean remarked that in return for Ecology giving up the priority processing issue, he saw this issue as EFSEC's portion of the compromise.

Mr. Luce said that after listening to the discussion, he would like to leave the language as it is in Mr. Lean's current draft.

Mr. Lean also brought up the possibility of striking the ending portion of section (II), part (D)(2), beginning with the phrase "as well as." He will consult Ms. Mauermann further on this possibility.

Wetlands Report

Mike Lufkin was not yet present at the meeting, so Chuck Blumenfeld volunteered to report on the progress of the wetlands group. Mr. Blumenfeld said the group had a couple of conference calls in the past two weeks. He thinks modifications of an Ecology draft will be agreed to and hopefully the proposed draft can be circulated for review in advance of the first meeting in July.

Mr. Fiksdal commented that upon seeing the draft he felt it was a good approach and asked if others agreed. Mr. Blumenfeld explained that only the wetlands group had seen the draft at this point, but he felt it reflected standard practice and appeared to be good.

"Deviation from Standards" Work Group Report

Stephany Watson summarized why and how the group was formed. She said the group sprang from last meeting's discussion of Mr. Lufkin's air quality presentation, in which he put forth a proposal to strengthen an applicant's showing with EFSEC when the

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applicant has received a green light in the SEPA process. She said Chuck Blumenfeld mentioned at the May 23 meeting that such a procedure should be generally applicable to matters other than air quality compliance, and the group agreed to form to discuss this suggestion.

Ms. Watson said the group met by conference call to discuss whether and how a balance can be struck between requiring applicants to raise their issue in the SEPA process and the hearing requirements of the EFSEC statute. There was general consensus that the processes should not be duplicative. Intervenors who have concerns that can be considered in the SEPA process should raise them there, whenever possible, and applicants should have some confidence that matters dealt with in the SEPA process will not be re-litigated in the EFSEC adjudicatory hearing.

The group believed that excessive uncertainty could be removed from the EFSEC process by including a declaration in the new rules stating that the statutory balancing requirements are embodied in the standards EFSEC ultimately adopts. EFSEC should not be able to order additional processes or other project changes in the name of "balance." Grant Bailey drafted some language to capture these ideas.

Ms. Watson said the group also discussed the importance and difficulty of timing the SEPA and EFSEC processes. Often, the DEIS is not issued until some time into the EFSEC adjudication. One idea was to have an EFSEC public meeting earlier in the process. Mr. Fallis volunteered to put together a timing proposal attempting to synchronize the two processes. However, there was concern among some that procedural issues such as this may be beyond the scope of the standards process in which this group is engaged. Ms. Watson said there will be a conference call next week to further discuss these ideas.

Mr. Fallis added that another issue is the timing of environmental impact statements. The group is trying to figure out how to get environmental documents timed in a way that is useful.

Mr. Blumenfeld said it was his understanding that this is a standards group. He asked Mr. Luce if it was his vision for this group to come up with procedural regulations as well. Mr. Luce said it is in so far as they aid standards. Mr. Blumenfeld confirmed that it is not Mr. Luce's vision to completely stay away from procedural issues.

After further discussion, Ms. Watson said the group's plan is to have something in draft form by the next meeting.

Air Quality

Mr. Lufkin said he has not been able to do much with this issue since it is not yet decided whether EFSEC has authority to go beyond state and federal regulations. Because this issue must be resolved before the air quality draft can be shaped further, the issue was laid to rest until a later time. The group took a fifteen-minute break.

Socio-economics

Brian Carpenter briefly summarized his last socio-economics draft and reminded the group that he last presented on April 25, 2002. No new draft proposed rule has been written since then. He said he did not know exactly what to do about the environmental justice section. The issue raised by Sandi Swarthout, he said, is that the fire districts do

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not want to be told what to do as far as mitigation. The goal is to get parties such as fire, water, and sewer districts talking about mitigation up front.

Roger Ferris, executive secretary for the Washington Fire Commissioners Association, introduced himself. He said his main statement is that it is really important for the fire districts to be engaged up front in order for them to estimate the socio-economic impact of the proposed facility on their services and the need for mitigation. Mr. Ferris said the fire districts need flexibility; sometimes a fire district needs a piece of equipment and other times it needs money.

Ms. Swarthout said she did not think the fire districts need measurements for mitigation. She said the fire districts can do those things for themselves.

Mr. Krogh commented that the group's purpose is to create certainty. Mr. Ferris responded that the fire districts would love certainty, but unfortunately with so many diverse groups that does not work. He said certainty is not a part of the fire districts' culture, and they would appreciate an exception.

Ms. Jolly said she thought a general directive is fine because the issue is *when* applicants consult with local government services to determine socio-economic impacts. The purpose of creating certainty and substantive standards is to speed progress.

Victoria Lincoln said she thought some general language on doing things up front and giving local governments an opportunity to identify issues with applicants would work well. She read to the group some language she drafted. She stated that it should be shown that an applicant worked with the local government on any potential socio-economic impact prior to application. This may include impacts on the local population, local housing, local government services, and local workforce and economy, but there are bound to be other socio-economic impacts in addition to these. Acknowledging these things, Ms. Lincoln felt, will ensure that applicants work with local governments up front.

Ms. Jolly asked what happens if impacts are evaluated by applicants and government agencies prior to application, and things simply do not go forward. Ms. Lincoln said she did not know the answer to that.

Margaret Kirkpatrick, who works with Oregon's EFSC, said in Oregon the applicant contacts all local government agencies in an area, attempts to get a letter from the head of each agency saying there are or are not impacts in respective areas, and helps until adverse impacts are accounted for. She said the applicant pays for all of this.

Mr. Blumenfeld asked what happens if local governments do not want a facility to be built and simply do not respond to the applicant's calls. Ms. Kirkpatrick said the burden is then on the locals to find socio-economic impacts.

Ms. Kirkpatrick added that there are some socio-economic standards in Oregon, but she hopes Washington will go beyond these standards. There are instances where standards have been circumvented and communities negatively impacted; the picture is not "totally rosy" she said.

Mr. Carpenter said the big issue to him is whether the Council needs to take a proactive approach to promoting the hiring of local workforces and having maximum economic benefits to local communities. He thinks it should.

Mr. Fallis said EFSEC has to implement SEPA so EFSEC is required to consider socio-economic impacts. However, he thinks it is beyond EFSEC's charge to adopt a rule pursuing economic development in communities.

Mr. Krogh asked Ms. Kirkpatrick if it is beyond Oregon's EFSC to pursue economic development in communities. Ms. Kirkpatrick was unclear what the answer might be. She felt it was not the state's business to tell applicants they should be hiring locally, but it is possible for conditions to come about that do such a thing. In one instance, applicants were set to hire locally, but there was not enough local workforce. She said it's really a case-by-case basis.

Mr. Krogh said the group has Ms. Lincoln's ideas as sort of an introduction to what Mr. Carpenter had before. Mr. Krogh asked Mr. Carpenter to blend both Ms. Lincoln's and Ms. Kirkpatrick's ideas into a new draft. He suggested Mr. Carpenter and Ms. Lincoln work together and Ms. Watson assist them.

There arose discussion on environmental justice. Specifically, Ms. Thomas said one issue is whether or not a plant has a greater environmental impact in a densely populated area as compared to a less populated area. She asked if Washington adopted its own environmental justice standard (one other than the federal standard). Ms. Jolly said Washington has not adopted its own standard for a variety of complicated reasons, mainly because there is no statutory or statewide mandate about environmental justice.

Mr. Carpenter felt there was an opportunity to start an environmental justice standard, but it seemed that most others felt there should not be an effort to start an environmental justice standard. Thus, after further discussion, Mr. Krogh proposed there not be a substantive standard on environmental justice in Mr. Carpenter's next draft for June 27, 2002.

General Mediation Process

Mr. Lufkin explained that the idea for having some sort of mandatory general mediation requirement arose from a fish and wildlife discussion at a previous meeting. Mr. Lufkin said the first part of his draft was basically a purpose statement. The purpose of the mediation regulation is to settle disputes or at least define issues.

The second part of his draft is the process. Mr. Lufkin said he included some structure, but did not include a lot of detail. He said the Notice of Mediation must be filed 30 days after the deadline for late intervention (which is after comments are due on the draft environmental impact statement). Other portions of the draft included the selection of a mediator, conduct of the mediation, and who needs to be present at the mediation.

Mr. Lufkin said he felt uncomfortable about section (II), part (G), "Reporting Requirement." Specifically, if agreement is not reached, how will parties work toward a refinement of the issues? Also, in section (III), "Mediation – Costs," Mr. Lufkin asked if the applicant should bear the costs of mediation. Finally, Mr. Lufkin asked the group if mediation is needed. Does it assist EFSEC? Does it serve a purpose? He said he heard from some it does not.

Karen McGaffey said she thinks it does not need to be mandatory. She said she feels it is helpful as an option because often it is not an issue that needs to be resolved. Rather, it is a fundamental disagreement.

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Mr. Fallis mentioned that Darrel Peebles had felt it was useful to force people opposed to a project to state their position; it forces people to come out.

Ms. Kirkpatrick said there was no mandatory mediation process in Oregon.

Ms. Thomas mentioned that the group might want to look at the Washington Utilities and Transportation Commission's rule on mediation. She volunteered to draft something from the basis of the Washington UTC process and have it ready for review June 27, 2002.

Oregon Habitat Presentation

Gail McEwen, Acting Land Resources Program Manager, Habitat Division, and Tom Meehan, Environmental Specialist, Facility Siting, Oregon Department of Fish and Wildlife (ODFW), gave a slide presentation describing how the ODFW habitat mitigation policy works in relation to the siting of energy facilities in Oregon. Ms. McEwen took part in writing new habitat rules for the ODFW in the 1990s. Mr. Meehan was involved in EFSC's adoption of the main goals of the ODFW's revised habitat rules. Their slide presentation as well as the Oregon statute for fish and wildlife habitat mitigation policy (Division 415) will be distributed electronically before the next meeting.

Ms. McEwen defined the purpose, policy, and definition of habitat mitigation according to the ODFW. She explained that in Oregon there are six habitat categories, established according to ranges of habitat types. These types include essential habitats, limited habitats, important habitats, irreplaceable habitats, and habitats that include high restoration potential. For each of the six habitat categories, the ODFW has created mitigation goals. These mitigation goals, defined for each respective habitat category, make up the habitat goals, or standards, for the ODFW.

Mr. Meehan said that, basically, EFSC adopted ODFW's flow chart of mitigation goals (according to the six habitat categories) as one of its standards. He said the EFSC facility siting administrative rules contain a "Fish and Wildlife Habitat Standard" (OAR 635-415-0025). Mr. Meehan said in his slide presentation, "This standard requires EFSC to make a finding that the design, construction, operation and retirement of the facility is consistent with the fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025."

However, Oregon's EFSC can approve a facility even if it does not meet a standard such as the ODFW standard because of the EFSC "Balancing Test." This test maintains that as long as "the overall public benefits of the facility outweigh the damage," (OAR 345-022-0000) the facility may be approved.

Mr. Meehan went on to explain in more detail how the ODFW's mitigation policy is applied to the EFSC process. The ODFW identifies "species of concern" (species most likely to be impacted by the proposed project). The developer's consultants categorize habitats and propose mitigation. This information is sent to the Oregon Office of Energy (OOE) staff and the ODFW staff for review. The OOE and ODFW staffs review the proposed habitat categories and mitigation. Finally, these staffs provide comments to the applicant and work with applicants to resolve conflicts.

Mr. Meehan said this system of working with the OOE and ODFW to resolve conflicts with applicants has worked pretty well. He said that to date, no case has gotten

“really ugly.” He said everyone agrees there will be differences of opinion, but none have been worth fighting about.

Mr. Meehan also gave a brief summary of the EFSC itself. It is a seven-member group not affiliated with other agencies. Members are appointed by the Governor to four-year terms (two terms maximum). Under state law, large energy facilities have to receive EFSC’s approval. The Council has the authority and obligation under law to devise a process in which it reviews and approves or rejects applications. The Council’s decision binds all state agencies and all cities and counties. An appeal of the Council’s final decision goes directly to Oregon’s Supreme Court, not through lower courts. Mr. Meehan said this is clearly a decision to consolidate and streamline decision-making. Ideally, it is one-stop permitting.

Mr. Krogh asked Ms. Kirkpatrick what drawbacks there may be to the Oregon system. She said that habitat category five (“Habitat having high potential to become either essential or important habitat”) has not worked well. It is hard to define and most people end up going to category four (“Important habitat”) or six (“Habitat that has low potential to become essential or important habitat”) and skip five. She said if Washington’s EFSEC wants a habitat standard, Oregon is a very good place to start. However, she recommends fixing this problem. Also, recently applicants have ended up with no ability to meet category one mitigation requirements (the no net loss standard). Ms. Kirkpatrick said she thought applying the balancing test and using more discretion in this situation would be helpful.

After more questions and answers, Mr. Krogh asked Dave Mudd to brainstorm with Ms. Kirkpatrick, Ms. McEwen, Mr. Meehan, Ms. McGaffey, Grant Bailey, and Bill Frymire on what a habitat first draft might look like. Mr. Mudd agreed to take a first cut at drafting something by the first meeting in July. Ms. Watson will aid in organizing and coordinating the group.

Next Meeting

The group agreed to meet next on June 27, 2002, and again July 12, 2002. It was later arranged for both these meetings to take place at St. John’s Episcopal Church, 114 20th Avenue SE, Olympia, Washington, 98501. On June 27, the group will discuss need (Mark Anderson), socio-economics (Brian Carpenter), a general mediation process (Liz Thomas), water quantity (Chuck Lean), and deviation from standards (Stephany Watson). There will also be a brief report on wetlands (Chuck Blumenfeld).

June 14, 2002
EFSEC Standards Development Group
Meeting
Attendance

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June 13, 2002

MEMORANDUM

TO: EFSEC Standards Group
FROM: Chuck Lean
SUBJECT: Latest Water Outline

Attached is the latest version of a water quantity standard. This has only three changes from the last version:

- (1) I added the Fish & Wildlife consultation results to the report of examination.
- (2) On timing, my notes indicated that I was supposed to fix this, but I do not recall if we reached consensus on how. I arbitrarily decided to make the report of examination due 90 days after the application was submitted. This was a compromise designed to insure (a) that Ecology was working on a real application; and (b) that the report of examination would be completed in time for consideration in the EIS and at the hearing.
- (3) I omitted the escape clause giving referring to a general authority in EFSEC beyond what is expressly set forth here. (I don't know if I really did that because the substantive law provision of D(2) still makes reference to SEPA and chapter 80.50 RCW, as well as water code provisions which include a "public

WATER RIGHTS POINTS FOR CONSIDERATION

Draft June 14, 2002

I. EFSEC Water Resources Policy and Purpose

- A. Policy.** Water is a finite and valuable natural resource and its prudent management is necessary to promote the health and welfare of all citizens. It shall be EFSEC's policy to promote the use of the state's water resources in a manner that maximizes the net benefits to the natural environment and the state's need for energy facilities. Consistent with this policy EFSEC should encourage, to the extent practicable, water conservation measures for all energy facilities under its jurisdiction.
- B. Purpose.** The purpose of this rule is to set forth how applicant's proposing to use water resources for an energy facility may request and receive authorization for their intended use.

II. Procedures for water use authorization

- A. Submission of Water Rights.** Applicants proposing to use water for an energy facility must either (1) submit water right(s) or other water use authorizations suitable for use by the proposed energy facility without change, (2) submit water right(s) which are approvable to be changed to meet the point(s) of withdrawal, place of use and purpose of use identified in the application, or (3) submit water rights from both categories sufficient to meet the needs of the proposed facility. Submitted water rights or other authorizations to use water must be specifically identified in the application. In no event will EFSEC authorize the use of a larger quantity of water than authorized by the water rights submitted by the applicant and identified in the application.
- B. Beneficial Use Requirement.** Water rights submitted by the applicant and identified in the application shall have been beneficially used and not subject to relinquishment for nonuse.
- C. Water Rights Suitable for Use Without Change.** An applicant may identify in the application water right(s), leases of water rights held by others, or agreements to provide water by municipal corporations or other water purveyors in quantities sufficient to meet the requirements of the proposed energy facility. In such event, EFSEC shall determine whether the applicant holds, or will hold, sufficient legal authority to water in a quantity sufficient to meet the requirements of the proposed energy facility.
- D. Water Rights Which Require Changes.**

(1) If the applicant submits water right(s) that require changes to: (a) the point(s) of withdrawal and/or diversion; (b) the place of use; and/or (c) the purpose and time of use, in order to make the water right(s) suitable for use by the proposed energy facility, then EFSEC shall determine whether to authorize water use incorporating the requested change(s).

(2) EFSEC's determination shall be based on the substantive law applicable to a water rights change application (including but not limited to chapters 43.21A, 90.03, 90.14, 90.44, and 90.54 RCW, together with implementing regulations and judicial decisions, but not including requirements for priority processing of applications), as well as chapters 80.50 and 43.21C RCW.

(3) (a) Within 90 days of submitting its application, the applicant must provide EFSEC with a report of examination, identifying the water rights changes to be made, the quantities of water (both in gallons per minute and acre feet per year) which are eligible to be changed, together with any limitations on the use, including time of year; the report of examination shall also include comments by the Department of Fish and Wildlife with respect to the proposed changes. (b) The report of examination shall normally be prepared by Ecology and submitted to EFSEC. Ecology's cost for preparation of the report shall be borne by the applicant. (c) In the event that Ecology notifies the applicant that it will be unable to prepare a report of examination 90 days of submittal of the application, the report of examination may be prepared by a consultant retained by the applicant. If the report of examination is prepared by a consultant, Ecology may provide EFSEC with any comments related to the requested changes that it deems appropriate.

(4) If EFSEC authorizes the applicant's requested water use in the site certification agreement, it may specify the terms and conditions of water use. EFSEC will not change the water rights acquired by the applicant. Rather, those water rights will be identified in the site certification agreement and form the basis for the water use authorized by EFSEC. No other use shall be made of those water rights during the life of the site certification agreement.

E. **Options for Applicant.** Nothing in this section shall prevent an applicant from seeking to obtain new water rights from Ecology, or from applying to change a water right to either Ecology or a Water Conservancy Board, but any such application shall be separate and distinct from an application for site certification.

Draft Mediation Regulation

5/21/02

I. Mediation - Purpose

The Council finds that a mediation process, in which the parties, through an independent mediator, seek a settlement of their disputes in good faith, offers an opportunity to settle disputes between parties with less cost and time, and to the satisfaction of all parties. Such a process also provides the parties an opportunity to refine unresolved issues, and to discuss methods of streamlining or reducing the cost of litigation.

II. Mediation - Process

A. Mediation shall be mandatory for all parties involved in EFSEC adjudication process.

B. Notice of Mediation. The nature of the EFSEC adjudicatory process is such that the appropriate time to conduct a meaningful mediation may vary from project to project. Therefore, the timing for commencing the mediation process shall be left to the sound discretion of the presiding officer. A mediation may also be commenced at the request of the parties. However, if a Notice of Mediation has not been issued within thirty (30) days after the deadline for late intervention, and after the close of comments on the draft environmental impact statement, the presiding officer shall immediately file a notice of mediation on all parties.

C. Selection of Mediator. The Council shall select a qualified mediator for the parties. A qualified mediator must be: (1) An attorney licensed to practice before the courts of this state having at least five years of legal experience, (2) an individual, who may be an attorney, with special skill or training in the administration of environmental and natural resource issues, or (3) an individual, who may be an attorney, with special skill or training as a mediator. The mediator may not have any financial or personal interest in the applicant's project and may not be related to a party. If a party objects to the mediator selected by the Council, the objecting party must within ten days of the selection, file a notice of objection with the presiding officer. The notification must contain the basis for the party's objection. The presiding officer shall rule on the notice of objection in a timely manner, and shall notify the Council immediately if the selection of a new mediator is required.

D. Conduct of the mediation. The parties will: (1) make a serious attempt to resolve their disputes by (a) identifying underlying interests, (b) isolating points of agreement and disagreement, (c) exploring alternative solutions, and (d) considering compromises or accommodations; and (2) cooperate fully with the mediator and give

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prompt attention to, and respond to, all communications from the mediator. (3) The mediator may conduct a pre-mediation session, the mediation and separate meetings with one or more parties in any manner he or she considers appropriate to assist the parties to reach a resolution of their dispute that is timely, fair and cost-effective.

E. Representation at Mediation. The presence of all parties at mediation conferences is required, unless the presiding officer grants an exception. Representation at a mediation conference must include at minimum: Person/s who have full authority to settle the issues being considered without further consultation; and person/s who have a full understanding of the dispute and full knowledge of the facts.

F. Mediation communication privileged. The proceedings of any mediation shall not be reported or recorded in any manner, except for agreements that may be reached by the parties during the course of the conference. Statements made by or to the mediator, or by or to any party or other participant in the conference, may not later be introduced as evidence, may not be made known to the Council at the adjudicative hearing, or may not be construed for any purpose as an admission against interest, unless they are independently admissible. No party shall be bound by anything done or said at the conference unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to that agreement and the appellant shall sign a request to withdraw the appeal.

G. Reporting Requirement. The presiding officer may request that the mediator file a report containing settlement agreements reached, statements refining issues, and any other information that the presiding officer deems relevant. Provided that nothing in the report shall violate the provisions of section (6) above.

III. Mediation - Costs

Costs of the mediation, including reasonable compensation for the mediator's services, shall be borne by the applicant. The details of those costs and fees, including the compensation of the mediator, must be set forth in a mediation agreement. Each party shall bear its own costs and expenses, including legal fees and witness expenses, in connection with the mediation proceeding.

**DIVISION 415
FISH AND WILDLIFE HABITAT MITIGATION POLICY**

635-415-0000

Purpose

The purpose of these rules is to further the Wildlife Policy (ORS 496.012) and the Food Fish Management Policy (ORS 506.109) of the State of Oregon through the application of consistent goals and standards to mitigate impacts to fish and wildlife habitat caused by land and water development actions. The policy provides goals and standards for general application to individual development actions, and for the development of more detailed policies for specific classes of development actions or habitat types.

Stat.Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119
Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119
Hist.:

635-415-0005

Definitions

For the purposes of OAR 635-415-0000 through 635-415-0025 only:

- (1) "Department" means the Oregon Department of Fish and Wildlife.
- (2) "Development Action" means any activity subject to regulation by local, state, or federal agencies that could result in the loss of fish and wildlife habitat. Development actions may include, but are not limited to, the planning, construction, and operational activities of local, state, and federal agencies. Development actions also include subsequent re-permitting for activities with new impacts or continued impacts that have not been mitigated consistent with current standards.
- (3) "Essential Habitat" means any habitat condition or set of habitat conditions which, if diminished in quality or quantity, would result in depletion of a fish or wildlife species.
- (4) "Fish and Wildlife" means all fish, shellfish, intertidal animals, wild birds, amphibians, reptiles, and wild mammals over which the Fish and Wildlife Commission has jurisdiction.
- (5) "Habitat" means the physical and biological conditions within the geographic range of occurrence of a species, extending over time, that affect the welfare of the species or any sub-population or members of the species.
- (6) "Habitat Quantity" means the amount of a given habitat type.
- (7) "Habitat Quality" means the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it.
- (8) "Habitat Type" means the classification of a site or area based on its dominant plant, soil, and water associations or other salient features (e.g. tidal influence, salinity, substrate, alkalinity, etc.) of value to the support and use by fish and wildlife.

(9)“Home Range” means the area that a species traverses in the scope of normal life-cycle activities.

(10)"Impact" means an adverse effect of a development action upon fish and wildlife habitat.

(11)“Important Habitat” means any habitat recognized as a contributor to sustaining fish and wildlife populations on a physiographic province basis over time.

(12)"In-kind Habitat Mitigation" means habitat mitigation measures which recreate similar habitat structure and function to that existing prior to the development action.

(13)“In-proximity Habitat Mitigation” means habitat mitigation measures undertaken within or in proximity to areas affected by a development action. For the purposes of this policy, “in proximity to” means within the same home range, or watershed (depending on the species or population being considered) whichever will have the highest likelihood of benefiting fish and wildlife populations directly affected by the development.

(14)“Irreplaceable” means that successful in-kind habitat mitigation to replace lost habitat quantity and/or quality is not feasible within an acceptable period of time or location, or involves an unacceptable level of risk or uncertainty, depending on the habitat under consideration and the fish and wildlife species or populations that are affected. “Acceptable”, for the purpose of this definition, means in a reasonable time frame to benefit the affected fish and wildlife species.

(15)“Limited habitat” means an amount insufficient or barely sufficient to sustain fish and wildlife populations over time.

(16)"Mitigation" means taking one or more of the following actions listed in order of priority:

(a)Avoiding the impact altogether by not taking a certain development action or parts of that action;

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

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

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

(e)Compensating for the impact by replacing or providing comparable substitute resources or environments.

(17)“Mitigation Bank” means fish and/or wildlife habitat that is restored, created, or enhanced for the purpose of selling habitat credits in exchange for anticipated unavoidable future habitat losses due to development actions.

(18)“Mitigation Plan” means a written plan or statement that thoroughly describes the manner in which the impact of a development action will be reduced or eliminated over time, avoided, and/or minimized; and the affected environment, including fish and wildlife habitat, monitored, restored, rehabilitated, repaired and/or replaced or otherwise compensated for in accordance with OAR 635-415-0010 of these rules.

(19)“Native” means fish and wildlife species, subspecies or populations that occur currently or historically in Oregon through natural (i.e. nonhuman) colonization or immigration, rather than by human action or intervention.

(20)“Nonnative” means a fish or wildlife species not native to Oregon; foreign or introduced.

(21)“Net Benefit” means an increase in overall in-proximity habitat quality or quantity after a development action and any subsequent mitigation measures have been completed and monitored.

(22)“Net Loss” means a loss of habitat quantity and/or habitat quality resulting from a development action despite mitigation measures having been taken.

(23)“Off-site” means outside the boundary of the development action.

(24)“Off-proximity Habitat Mitigation” means habitat mitigation measures undertaken outside the area that would constitute “in-proximity mitigation” but within the same physiographic province as the development action.

(25)“Out-of-kind Habitat Mitigation” means habitat mitigation measures which result in different habitat structure and function that may benefit fish and wildlife species other than those existing at the site prior to the development action.

(26)“Physiographic Province” means any one of ten major geographical areas within the State of Oregon based on differences in topography, climate, and vegetation as defined in the *Oregon Wildlife Diversity Plan* (OAR 635-100-0001 through 0040).

(27)“Project Life” means the period of time during which a development action is subject to regulation by local, state, or federal agencies.

(28)“Project Proponent” means any individual, corporation, association or agency or their delegated representative that proposes a development action.

(29) “Reliable Method” means a mitigation method that has been tested in areas with site factors similar to those affected by a development action and the area in which the mitigation action is being proposed and that has been found (e.g., through field trials, demonstration projects or scientific studies) to produce the habitat effects required to meet the mitigation goal for that action.

(30)“Site Factors” means climate, soil series, sediments, hydrology, salinity, pH, DO, plant community, fish and wildlife use, or other characteristics of an area that determine its capacity to produce vegetation or maintain habitat features valuable to fish and wildlife.

(31)“Watershed” means a drainage basin encompassing a stream, its tributaries, and associated uplands at the USGS 4th Field Hydrologic Unit level.

Stat.Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Hist.:

635-415-0010

Fish and Wildlife Habitat Mitigation Policy

It is the fish and wildlife habitat mitigation policy of the Oregon Department of Fish and Wildlife to require or recommend, depending upon the habitat protection and mitigation opportunities provided by specific statutes, mitigation for losses of fish and wildlife habitat resulting from development actions.

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Priority for mitigation actions shall be given to habitat for native fish and wildlife species. Mitigation actions for nonnative fish and wildlife species may not adversely affect habitat for native fish and wildlife.

Stat.Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119
Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119
Hist.:

635-415-0015

Application of Fish and Wildlife Habitat Mitigation Policy

(1)The Department shall work with regulatory and planning agencies, land management agencies, private developers, operators, public interest groups, and the public to implement this Fish and Wildlife Habitat Mitigation Policy.

(2)The Department shall apply the requirements of this division when implementing its own development actions, and when developing recommendations to other state, federal, or local agencies regarding development actions for which mitigation for impacts to fish and wildlife habitat is authorized or required by federal, state, or local environmental laws or land use regulations.

(3)In applying this policy, the Department shall identify and utilize the habitat protection and mitigation opportunities provided by applicable federal, state, and local environmental laws and land use regulations, and shall participate throughout the duration of these regulatory processes to coordinate Department mitigation requirements or recommendations with those of other agencies. If the regulatory authority of an agency provides for mitigation of cumulative or historic losses, the Department shall apply the standards of OAR 635-415-0025 in making its recommendations.

(4)When making recommendations on local land use actions, the Department shall follow the provisions of its certified State Agency Coordination Program and OAR Chapter 635 Division 405.

(5)Unless required by statute, the Department may elect not to recommend or require mitigation for a development action if, in the opinion of the Department, the impacts to fish and wildlife habitat are expected to be inconsequential in either nature, extent, or duration; or if staff resources are not available.

(6)Nothing in this policy shall be construed to vest authority in the Department where no such statutory or regulatory authority has been granted.

Stat.Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119
Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119
Hist.:

635-415-0020

Implementation of Department Habitat Mitigation Requirements and Recommendations

(1)The Department shall provide mitigation consistent with the goals and standards of OAR 635-415-0025 for Department development actions that impact fish and wildlife habitat.

(2)The Department shall require mitigation consistent with the goals and standards of OAR 635-415-0025 for development actions that impact fish and wildlife habitat for which the Department has statutory authority to require mitigation as a condition of a permit or order.

(3)The Department shall recommend mitigation consistent with the goals and standards of OAR 635-415-0025 for development actions which impact fish and wildlife habitat for other than Department actions when:

(a)Federal or state environmental laws or land use regulations authorize or require mitigation for impacts to fish and wildlife; or

(b)Local environmental laws or land use regulations authorize or require mitigation for impacts to fish and wildlife habitat; or

(c)The proposed development action requires either an amendment to an acknowledged comprehensive plan or land use regulation relating to fish and wildlife habitat protection, or adoption of a new land use regulation relating to fish and wildlife habitat protection, and the Department believes that mitigation is necessary to comply with Statewide Planning Goal 5 or other applicable statewide planning goal requirements for fish and wildlife habitat protection.

(4)The Department's recommendations or requirements for mitigating the impacts of a development action shall be based on the following considerations:

(a)The location, physical and operational characteristics, and duration of the proposed development action; and

(b)The alternatives to the proposed development action; and

(c)The fish and wildlife species and habitats which will be affected by the proposed development action; and

(d)The nature, extent, and duration of impacts expected to result from the proposed development action.

(5)The Department shall require the project proponent to prepare a written mitigation plan approved by the Department if required by an ODFW implemented statute; or recommend or require a written plan approved by the Department if the impacts of the proposed development action may, in the opinion of the Department, be so significant in nature, extent, or duration that mitigation measures to achieve the goals and standards of OAR 635-415-0025 cannot be identified without the evaluation that would be provided in a written mitigation plan.

(6)The Department may recommend or require the posting of a bond, or other financial instrument acceptable to the Department, to cover the cost of mitigation actions based on the nature, extent, and duration of the impact and/or the risk of the mitigation plan not achieving mitigation goals.

(7)The Department may consider the use of mitigation banks or payment-to-provide mitigation based on the nature, extent, and duration of the impact and/or the risk of the mitigation plan not achieving mitigation goals.

(a)The Department may consider the use of mitigation banks and payment-to-provide mitigation only for habitat categories two through six and only if they are consistent with the mitigation goals and standards identified in OAR 635-415-0025.

(b)The amount of payment-to-provide mitigation, recommended or required, shall include at a minimum the cost of property acquisition, mitigation actions, maintenance,

monitoring, and any other actions needed for the long-term protection and management of the mitigation site.

(8) In addition to any other information that may be required by law, a written mitigation plan prepared for the Department shall:

(a) Include the information required in OAR 635-415-0020(4)(a-d); and

(b) Describe the mitigation actions which shall be taken to achieve the fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025; and

(c) Describe and map the location of the development action and mitigation actions including the latitude and longitude, township, range, section, quartersection and county; and

(d) Complement and not diminish mitigation provided for previous development actions; and

(e) Include protocols and methods, and a reporting schedule for monitoring the effectiveness of mitigation measures. Monitoring efforts shall continue for a duration and at a frequency needed to ensure that the goals and standards in OAR 635-415-0025 are met, unless the Department determines that no significant benefit would result from such monitoring; and

(f) Provide for future modification of mitigation measures that may be required to meet the goals and standards of OAR 635-415-0025; and

(g) Be effective throughout the project life or the duration of project impacts whichever is greater.

(h) Contain mitigation plan performance measures including:

(A) Success Criteria. The mitigation plan must clearly define the methods to meet mitigation goals and standards and list the criteria for measuring success;

(B) Criteria and a timeline for formal determination that the mitigation goals and standards have been met;

(C) Provisions for long-term protection and management of the site if appropriate;

(D) A reporting schedule for identifying progress toward achieving the mitigation goals and standards and any modification of mitigation measures. Mitigation goals and standards must be achieved within a reasonable time frame to benefit the affected fish and wildlife species.

(9) The requirement for a mitigation plan pursuant to OAR 635-415-0020(8) may, at the discretion of the Department, be partially or entirely fulfilled by incorporation of environmental assessments or environmental impact statements prepared for the proposed development action; or by local government land use regulations which implement the requirements of Statewide Planning Goals 5, 8, 15, 16 or 17 pertaining to fish and wildlife habitat protection.

(10) The project proponent is responsible for the expenses of developing, evaluating, and implementing the mitigation plan and monitoring the mitigation site; however, to the extent that available resources allow, the Department may take one or more of the following actions to assist in the development of a mitigation plan:

(a) Identify fish and wildlife species and habitats to be affected by the proposed development action;

(b) Determine the Habitat Categories that are likely to be affected by the proposed development action;

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(c)Identify the nature, extent, and duration of potential impacts upon fish and wildlife habitat resulting from the proposed development action;

(d)Identify mitigation measures to achieve the goals and standards of OAR 635-415-0025.

(e)Furnish any information or counsel to further the purpose of OAR Chapter 635 Division 415.

Stat.Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Hist.:

635-415-0025

Fish and Wildlife Habitat Mitigation Goals and Standards

(1)"Habitat Category 1" is irreplaceable, essential habitat for a fish or wildlife species, population, or a unique assemblage of species and is limited on either a physiographic province or site-specific basis, depending on the individual species, population or unique assemblage.

(a)The mitigation goal for Category 1 habitat is no loss of either habitat quantity or quality.

(b)The Department shall act to protect Category 1 habitats described in this subsection by recommending or requiring:

(A)Avoidance of impacts through alternatives to the proposed development action; or

(B)No authorization of the proposed development action if impacts cannot be avoided.

(2)"Habitat Category 2" is essential habitat for a fish or wildlife species, population, or unique assemblage of species and is limited either on a physiographic province or site-specific basis depending on the individual species, population or unique assemblage.

(a)The mitigation goal if impacts are unavoidable, is no net loss of either habitat quantity or quality and to provide a net benefit of habitat quantity or quality.

(b)The Department shall act to achieve the mitigation goal for Category 2 habitat by recommending or requiring:

(A)Avoidance of impacts through alternatives to the proposed development action; or

(B)Mitigation of impacts, if unavoidable, through reliable in-kind, in-proximity habitat mitigation to achieve no net loss of either pre-development habitat quantity or quality. In addition, a net benefit of habitat quantity or quality must be provided. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.

(c)If neither 635-415-0025(2)(b) (A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(3)"Habitat Category 3" is essential habitat for fish and wildlife, or important habitat for fish and wildlife that is limited either on a physiographic province or site-specific basis, depending on the individual species or population.

(a)The mitigation goal is no net loss of either habitat quantity or quality.

(b)The Department shall act to achieve the mitigation goal for Category 3 habitat by recommending or requiring:

(A)Avoidance of impacts through alternatives to the proposed development action; or

(B)Mitigation of impacts, if unavoidable, through reliable in-kind, in-proximity habitat mitigation to achieve no net loss in either pre-development habitat quantity or quality. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.

(c)If neither 635-415-0025(3)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(4)"Habitat Category 4" is important habitat for fish and wildlife species.

(a)The mitigation goal is no net loss in either existing habitat quantity or quality.

(b)The Department shall act to achieve the mitigation goal for Category 4 habitat by recommending or requiring:

(A)Avoidance of impacts through alternatives to the proposed development action; or

(B)Mitigation of impacts, if unavoidable, through reliable in-kind or out-of-kind, in-proximity or off-proximity habitat mitigation to achieve no net loss in either pre-development habitat quantity or quality. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.

(c)If neither 635-415-0025(4)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(5)"Habitat Category 5" is habitat for fish and wildlife having high potential to become either essential or important habitat.

(a)The mitigation goal, if impacts are unavoidable, is to provide a net benefit in habitat quantity or quality.

(b)The Department shall act to achieve the mitigation goal for Category 5 habitat by recommending or requiring:

(A)Avoidance of impacts through alternatives to the proposed development action; or

(B)Mitigation of impacts, if unavoidable, through actions that contribute to essential or important habitat.

(c)If neither 635-415-0025(5)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(6)"Habitat Category 6" is habitat that has low potential to become essential or important habitat for fish and wildlife.

(a)The mitigation goal is to minimize impacts.

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(b)The Department shall act to achieve the mitigation goal for Category 6 habitat by recommending or requiring actions that minimize direct habitat loss and avoid impacts to off-site habitat.

Stat.Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119



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