



# Oregon

Theodore R. Kulongoski., Governor

## Oregon Watershed Enhancement Board

775 Summer Street NE, Suite 360

Salem, OR 97301-1290

(503) 986-0178

FAX (503) 986-0199

[www.oregon.gov/OWEB](http://www.oregon.gov/OWEB)



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## MEMORANDUM

**TO:** Oregon Watershed Enhancement Board

**FROM:** Melissa Leoni, Senior Policy Coordinator

**SUBJECT:** **Agenda Item T: Administrative Rulemaking  
January 16-17, 2008 OWEB Board Meeting**

### I. Introduction

This report seeks Board authorization to begin administrative rulemaking to address three areas of OWEB's administrative rules. Not all three areas may ultimately require rule language changes, but staff are seeking permission now to be able to pursue rulemaking that could be completed by May 2008, if needed.

### II. Background

OWEB staff completed an extensive review and update of its administrative rules in 2004. This rulemaking involved three major components:

- Updating and restructuring the current rules to include a separate division for each grant type and filling in gaps created by the new structure;
- Adding to the rules current fiscal and administrative policies and procedures; and
- Reworking the watershed restoration grant division to include the regional review team process, staff recommendation process, and revised evaluation criteria used to make funding decisions.

The goals for the rules restructuring project were to provide better clarity and consistency for applicants, to update the rules to reflect current policies and practices, and to make the review process more transparent to applicants.

In 2004, OWEB also completed rulemaking for watershed council support grants that completed the transition to merit-based watershed council support criteria begun in 2002. The rule revisions attempted to capture how watershed councils are able to illustrate their efforts to identify and address key watershed issues and emphasized past council accomplishments. The rules were drafted to more clearly describe the merit criteria that are used to evaluate watershed council support grant applications. The intent of the rules was that watershed council applicants who demonstrate a high level of performance will be awarded more funding than applicants who do not demonstrate the same high level of performance.

The 2004 council support rules also added language intended to reward organizational efficiencies with extra funding. The rules included language that certain characteristics can be used as a factor in recommending a higher funding level for an applicant. These characteristics include whether a council is an umbrella watershed council, serves an area larger than three 4<sup>th</sup> field hydrologic units, or supports multiple separate watershed councils. This was meant to be an incentive to reward the efficiencies gained by sharing resources. It was not intended to say that a single watershed organization serving a large geographic area or multiple councils is necessarily more effective, or that OWEB desires to see the consolidation or merger of councils.

### **III. Watershed Council Support Rules**

At the May 2007 meeting, the Board directed staff to evaluate the council support funding distribution criteria, including bonuses for umbrella watershed councils and whether there should be a bonus award for “two or more watershed councils” demonstrating operational efficiencies. In August of 2007, staff recommended in its report on the Mid-Coast Watersheds Council that OWEB should review policies and rules applicable to umbrella watershed councils. The issue for discussion and potential rule revision is the council support funding allocation formula or criteria, including whether umbrella or multiple watershed councils should be allocated additional funding, how that additional increment is determined, and how additional funding is distributed.

The reality of council support funding is that the actual funding formula or award level must be based upon the results of the evaluation and the amount of money available to award. Neither factor is known until near the end of the process and is therefore not described in detail in the administrative rules. The 2004 rule revisions allowed staff to apply organizational characteristics to the funding allocation formula. For the 2005-2007 and 2007-2009 awards, umbrella watershed councils, as defined in rule, received an additional 18, 9 or 22 percent of their base award, depending on their organizational type. OWEB staff and Board members have received comments suggesting that this approach doesn’t work well for umbrella councils, multiple council applicants, or single council applicants that may have higher costs based on non-organizational factors.

Staff would like to explore options for improving the funding formula and criteria. This may be achievable without a change to the administrative rules, but we cannot disregard that rulemaking may be needed. Furthermore, this policy issue and any alternatives need to be discussed with the Board Council Support Subcommittee before a course of action is decided.

If rulemaking is needed, it will be critical to have the rules adopted by the Board at the May 2008 meeting in order to have them apply to the next watershed council support grant cycle. To be ready for Board adoption in May, staff propose the following rulemaking schedule:

<b>Dates/Deadlines</b>	<b>Actions</b>
January 2008	Board Subcommittee meeting/discussion
January 16-17	Request Board approval to begin rulemaking
Jan 22-Feb 15	RAC meetings (if needed) and rule drafting
February 15	Submit Rulemaking Notice to Secretary of State, Archives Division
February 19-27	Board Subcommittee review of proposed rules
March 3-31	Draft rules available and Public Comment Period (4 weeks)
March 19-20	Board update on rules and process

April 1	Notify legislators and public about rules
April 1-11	Finalize rules and prepare staff report
April 14-May 20	Finish revising council support application/instructions
May 20-21	Board adoption of rules
June 1	Application materials available on website

#### **IV. Restoration Grant Eligibility**

When the Governor’s Watershed Enhancement Board was created, and the grant program associated with it was established, the Legislature wanted to make sure that the funding made available for watershed enhancement was not eligible to support projects that were required to “mitigate” or offset a resource loss. Rather, the purpose of the funds was to provide a net natural resource (watershed) benefit. The purposes of OWEB grant investments as stated in its enabling statutes are to improve fish and wildlife and their habitats.

Over the years, OWEB has continued to focus its conservation investments on projects having a net benefit for watershed health. OWEB’s administrative rules prohibit grant funds be used for a restoration project “constructed solely to comply with a state or federal agency enforcement order, legal judgment or mitigation requirement” (OAR 695-010-0040(3)). Staff are encountering 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 are 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.

There are clear instances where it would not be appropriate for OWEB funds to be associated with mitigation requirements. For example, OWEB funding for the creation of 15 acres of wetlands would not be appropriate if those 15 acres were used to mitigate the filling of 15 wetland acres for a development project. There is no net benefit to watershed health in that instance. Other examples are not so clear. Are OWEB funds appropriate for use in restoration projects associated with a Habitat Conservation Plan under the federal Endangered Species Act, or associated with restoration objectives under a hydroelectric relicensing settlement agreement—especially if they only describe broad ecological outcomes?

Staff recommend further exploration of this policy issue to determine whether administrative adjustments or specific rule changes are needed to clarify if and how OWEB funds may be used in these types of scenarios. It is not certain that a rulemaking will be necessary to address this matter. Nevertheless, staff seek Board approval to enter into rulemaking on this matter in order to preserve the option to have final rules in place by late spring, rather than waiting until next fall.

#### **V. Grant Administration**

Since the 2004 rule restructuring, staff have been tracking issues associated with the rules that have created frustration with grantees or generated requirements for staff that do not effectively or efficiently assist in the grant administration effort. There are two areas where a policy discussion and re-visitation of the grant administration rules could benefit the program. The first is the requirement for and consequences of landowner agreements. The second has to do with the ability of the grant program manager to amend grants.

### **A. Landowner Agreements**

Prior to 2004, OWEB rules required landowner agreements for all projects on private lands (OAR 695-020-0055(6)) and prohibited funding from being released until all documents required by the Board had been submitted (OAR 695-020-0090(4)). The rule revisions in 2004 merged the two concepts into the following rule:

*695-005-0060 (4) Prior to disbursement of Board funds for projects involving private lands, the Board must receive a signed cooperative agreement between the landowner and the Grantee that, at a minimum, includes: (a) Permission to access the private land, at times agreeable to the landowner, to implement the project, inspect the project, monitor the effectiveness of the project, or perform repairs or maintenance; and (b) Identification of the party responsible for repairs and maintenance of the project.*

The purpose of this rule is to ensure that OWEB grant recipients have permission to access the project site and to implement the project as proposed. Under the current rule language, all agreements must be signed before any funding may be released. This requirement has not been met on a significant number of grants, and has been waived more than 40 times over the last year. Staff would like to have a discussion as to whether there is a better tool to allow grants to move forward without requiring all landowner signatures up front for complex projects with many landowners. This policy discussion also involves a discussion of whether or not it is OWEB's responsibility to monitor landowner agreements.

### **B. Grant Amendments**

OAR 695-005-0050 (1) does not allow staff to process a grant amendment unless the grantee has all other reporting and administrative functions completed.

*695-005-0050 (1) The Board will only enter into new agreements or amendments to existing agreements, exclusive of Small Grant agreements, with prior Grantees if all reporting obligations under earlier agreements have been met.*

This rule was added in 2004 to address grant management recommendations identified a 2000 Secretary of State Audit of OWEB's grant management. The requirement that all reporting obligations be met prior to entering into a new agreement is an appropriate form of discipline for both OWEB and the grantee. Staff would like to have a policy discussion about whether Small Grants should continue to be exempted, whether the rule creates inefficiencies in managing grant amendments, and the appropriate linkage between grantee responsiveness and grant management functions.

In addition to these two specific issues, staff have identified a number of minor technical adjustments that would make the rules more consistent (e.g. consistent distinction between Director and designee, clarification between effectiveness monitoring and post project implementation reporting).

## **VI. Recommendation**

Staff recommend the Board authorize staff to begin administrative rulemaking to address issues relating to watershed council support, restoration grant eligibility, and grant administration rules.