



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.