



**US Army Corps
of Engineers**
Portland District



United States
Environmental Protection
Agency



Special Joint Public Notice

Notice of Change to Aquatic Resources Mitigation in Oregon

Issue Date: March 20, 2019

The Oregon Department of State Lands (DSL), United States (U.S.) Army Corps of Engineers, Portland District (Corps), and U.S. Environmental Protection Agency (EPA) jointly announce changes to mitigation that may be required as part of the state and federal permit programs. The Corps requires an applicant to obtain a permit for the placement of dredge or fill materials into waters of the U.S. under Section 404 of the Clean Water Act and co-administers Section 404 with the EPA. Under the Oregon Removal-Fill Law, DSL requires an applicant to obtain a permit for most projects that either place fill materials into or remove fill from waters of the state. Both the federal and state programs may require mitigation as part of an approved permit.

Oregon Department of State Lands

Beginning April 1, 2019, DSL will implement a rule affecting how mitigation will be determined under the Oregon Removal-Fill Law. DSL's new rules will bring Oregon's mitigation program into alignment with the 2008 Federal Compensatory Mitigation Final Rule. The DSL rule will provide more consistent, successful, and sustainable benefits for all aquatic resources across the state. Existing exemptions are not affected.

The rule will require that proposed project impacts to wetlands and streams use appropriate assessment tools to ensure proper replacement of functions and values. For wetlands, DSL will require applicants to use the Oregon Rapid Wetland Assessment Protocol (ORWAP 3.1) for impacts to tidal waters, wetland types that are aquatic resources of special concern, and wetland impacts greater than 0.20 acres. For streams DSL will require applicants to use the Stream Function Assessment Method (SFAM) beginning July 1, 2019, for impacts to non-tidally influenced wadeable, intermittent or perennial streams, and aquatic resources of special concern that are associated with these intermittent or perennial streams. As with current DSL rules, under the new rule function and value assessment requirements may be waived for voluntary wetland and stream restoration projects on a case-by-case basis at DSL's discretion. Assessments are not required for General Authorizations.

DSL will require that best professional judgment be used if ORWAP or SFAM do not apply, and best professional judgment may be used when wetland impacts are less than or equal to 0.2 acres. DSL continues to require that the Vernal Pool Function Assessment Method be used to assess the functions and values of vernal pools in the Agate Desert in Jackson County.

Applicants can use information from the assessments to demonstrate that impacts are being mitigated through avoidance, minimization, and compensatory mitigation. If compensatory mitigation is required for unavoidable impacts, applicants can demonstrate that the proposed mitigation site is eligible to replace the primary functions and values provided at the impact site and will provide a sufficient amount of mitigation to compensate for the impacts. To assist in this demonstration, beginning April 1, 2019, a new protocol for determining wetland and stream mitigation eligibility in Oregon will be available. Applicants will use the protocol for calculating their required amount of mitigation.

To accommodate transition to the new assessment requirements, DSL will continue to accept the following as part of an application that is determined complete by October 1, 2019: 1.) a department approved Hydrogeomorphic Method for wetlands function assessment, and 2.) best professional judgment to assess stream functions and values. Applications that are not complete by October 1, 2019 will need to be resubmitted using the new function assessment and mitigation requirements.

In the future, through additional state rulemaking, the DSL anticipates using SFAM outputs to determine how much stream compensatory mitigation is required. To reach this goal, the Corps, EPA, and DSL will be conducting additional work on SFAM. This phased-in approach to stream mitigation policy will provide incremental improvements in program outcomes, while providing time to adjust to new tools and protocols.

U.S. Army Corps of Engineers

Corps requirements for what constitutes a complete Department of the Army permit application have not changed. To ensure consistency between the federal and state programs, and to prevent the duplication of efforts on behalf of applicants, the Corps encourages applicants to use ORWAP and SFAM assessments where appropriate when submitting an application for a Department of the Army permit. Functions- and values-related information required under the DSL rule will be accepted by the Corps for reviewing proposed projects, including proposed mitigation. In addition the Corps encourages permit applicants to use the new protocols for determining wetland and stream mitigation eligibility and for calculating their required amount of compensatory mitigation. Whereas the Corps will accept DSL-required assessments for wetland impacts greater than 0.20 acres and for stream impacts, on a case-by-case basis the Corps may request the use of assessment tools for impacts up to 0.2 acres.

General Information

Development of the wetland and stream assessment tools and compensatory mitigation protocols has been a joint effort of DSL, Corps and EPA. An applicant's use of the tools and protocols will help to support decision making in a consistent, predictable, robust, repeatable and defensible way. Changing from acreage-based to functions- and values-based mitigation will make mitigation more function- and watershed-based and provide better ecological outcomes.

Planning mitigation for anticipated impacts will be easier with the use of the Oregon Explorer Aquatic Mitigation Portal. The Portal includes wetland and stream map viewers for completing the office portion of an ORWAP or SFAM assessment, respectively. The Portal also includes a Mitigation Planning Map Viewer, which may be used for strategically planning mitigation projects on a watershed basis. The Portal is located at (<https://oregonexplorer.info/topics/aquatic-mitigation?ptopic=38>).

For additional information related to the functions- and values-based stream and wetlands mitigation, please see the DSL website at: <https://www.oregon.gov/dsl/WW/pages/aquatic-resources-mitigation-framework.aspx>. You also may view the Corps Regulatory website for mitigation at: <https://www.nwp.usace.army.mil/Missions/Regulatory/Mitigation.aspx>. These sites provide access to helpful fact sheets, frequently asked questions, the eligibility and accounting protocol, the stream and wetlands assessment tools, and a listing of opportunities for technical training on the assessment tools.

We encourage you to stay informed by visiting the Aquatic Resources Mitigation Framework website: <https://www.oregon.gov/dsl/WW/Pages/Aquatic-Resources-Mitigation-Framework.aspx> and the DSL rulemaking website: www.oregon.gov/dsl/Laws/Pages/Rulemaking.aspx. You may ask questions and continue to provide comments regarding SFAM via DSL's dedicated e-mail box AquaticResourceMitigationProject@dsl.state.or.us.

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