



Oregon

Tina Kotek, Governor

HPAC Workgroup Recommendation Template

Last Update: August 17, 2023

Workgroup

- Availability of land
- Land development permit applications
- Codes and design
- Workforce shortages
- Financing

Recommendation: Wetlands (B)

Expand the Availability & Affordability of Oregon Wetland Mitigation Banks:

Through emergency order direct Department of State Lands (DSL) and the Department of Environmental Quality (DEQ) for a minimum of 5 years to adopt “Waters of the United States” (WOTUS) definition as the “Waters of the State” definition for residential properties within Urban Growth Boundaries of Cities. To assure water quality and mitigate environmental harm from loss of wetlands resulting from adoption of new “Waters of the State” definition, through DSL and DEQ, the state of Oregon at its own expense and discretion shall take measures which the state deems necessary to offset the loss of wetlands resulting from this recommendation.

Related Work Plan Topics:

Wetland Recommendations B

Adoption Date:

August 17, 2023

Method of Adoption

Wetland mitigation, credits and mitigation banks were initial recommendations on the Land Availability workgroup from the full Housing Production Advisory Council (HPAC). An initial survey was sent to the Land Availability members asking to prioritize the recommendation based on speed of implementation, production of housing units, AMI levels of affordability and cost. Wetlands as a topic hindering development was identified in the top ten items. In mid July, the workgroup Chairs of the Land Availability and Land Development Committee were notified from support staff that both committees were working on wetland related recommendations. Co-Chairs, Eric Olsen and Deb Flagan agreed that the two committees

would combine their recommendations into one joint recommendation to streamline Subject Matter Expert (SME) coordination and time.

At the August 7, 2023 Land Permitting Workgroup meeting the recommendations were reviewed and agreed to move to the Land Availability for final recommendation and presentation to the full HPAC.

At the August 16, Land Availability Work Group meeting the attending work group members voted to move forward the Wetland Recommendation as outlined in these standards of analysis form. The members present at the time of vote were Brenda Bateman (2nd Motion), Rep Helfrich, Karen Rockwell (1st Motion), Joel Madsen, Elissa Gerler & Deb Flagan unanimously to advance to Full HPAC for consideration. Natalie Janney was present from the Land Development/Permitting WG Committee.

Co-chairs Guidance: Standards for Analysis

1. Clearly describe the housing production issue that the recommended action(s) will address.

This recommendation is addressing several issues that are hindering housing production in Oregon including:

- lack of available wetland mitigation banks,
- high costs of mitigating wetlands,
- a broad definition of wetlands that includes degraded areas, and
- the inclusion of protected wetlands in buildable lands inventories presents an inflated and inaccurate picture.

2. Provide a quantitative, if possible, and qualitative overview of the housing production issue.

Below are examples and metrics of the issues being addressed through this recommendation:

1. Lack of available wetland mitigation banks.

A policy adopted in April 2019 has made wetland banking no longer economically viable for many in the industry leaving communities without a reasonable path to mitigate wetlands. The new regulations significantly increased how many banked acres are required to create a wetland credit. Currently one (1) mitigation credit allows for one (1) acre to be mitigated for purposes of development. Before 2019 a wetland banker may have generated 100 credits from a 165 acre bank. Today, depending on exact circumstances, that same site under the new rules could easily generate only 50 acres of credits. Without new banks entering into the market, and with an increase in the need for mitigation, the regulations have created an inflated market for this product which is both restricting development and increasing the cost of developed housing.

Another issue is availability of basins that are operating in the existing In-Lieu Fee (ILF) program. DSL has two fee-in-lieu programs. The ILF program can be used to satisfy

both state and federal compensatory mitigation requirements. Payment-In-Lieu (PIL) program can only be used to satisfy state compensatory mitigation requirements. For the Corps-approved ILF program DSL currently has only six (6) service areas approved. The PIL program can be used anywhere in the state if no suitable mitigation bank credits or ILF credits are available.

In addition, over 98 square miles of wetlands have been created or enhanced by the State of Oregon. Unfortunately due to Administrative issues, none of that state funded activity has been used for wetland mitigation credits, although it is currently allowed by statute.

2. High costs of mitigating wetlands.

Oregon has a very small number of mitigation banks around the state. In most watersheds, there is only one bank. Due to the shortage of mitigation banks, the cost of buying credits is extremely high.

In some of the examples collected, the costs can range from \$75,000 per acre (Sheridan & McMinnville) to \$200,000 per acre (Washington County). One ten acre project in Sheridan (that was inside the UGB, zoned residential, with developed residential all around) was composed of hydric soils. Mitigating onsite was not possible and the cost of credits was close to \$700,000. With the costs being transferred to the end user, the project did not pencil out.

In regards to the proposed three-year suspension for the soil temporal loss rule (OAR 141-085-0692-4b) as it applies to wetland mitigation banks, the existing rule is proving to be a significant deterrent to new bank construction. The science of soil disturbance is not in question. What is in question is how soil health is measured and what role does soil disturbance play in wetland mitigation bank functions and values. Furthermore, the existing functional assessment tool (Oregon Rapid Wetland Assessment Protocol) rule does not provide a mechanism for measuring soil functions that could determine soil health.

3. A broad definition of wetlands that includes degraded areas.

The May 25, 2023, U.S. Supreme Court decision in Sackett vs EPA clarifies the federal level jurisdiction of the Environmental Protection Agency (EPA), and Army Corps of Engineers over wetlands and how they are defined. The State of Oregon now has a viable path for development of marginal or degraded wetlands to allow for needed housing development in Oregon.

There are several examples of degraded existing farmland being held within the Urban Growth Boundaries of municipalities but unable to convert to residential development due to being held to the former federal definitions of wetlands. The designation in addition to the high cost to mitigate (or lack of available mitigation banks) leads to economic uncertainty for developers or time consuming delays.

The decision provides states greater latitude in determining what wetlands must be protected and/or mitigated in order to be developed. Federal protections which have

been adopted (or expanded) by the DSL should now be relaxed to the maximum extent possible as an emergency measure in order to increase available land for housing while still in compliance with federal law.

4. The inclusion of protected wetlands in buildable lands inventories presents an inflated and inaccurate picture.

Buildable Land Inventories are not a true reflection of land that is developable for cities. For this reason, land designated as a wetland should be excluded from a City's Buildable Land Inventory but should not preclude development on them.

Oregon's strong Urban Growth Boundary regulations presume there is a 20 year inventory of buildable land within that boundary. Furthermore, many cities have a significant percentage of what are technically considered by the state as "buildable lands" but are in fact wetlands. To develop on sites so encumbered, housing development must either 1) purchase expensive wetland mitigation bank credits or 2) design around and avoid wetlands entirely. Typically, option 1) is not economically viable due to the cost of purchasing credits and consulting fees associated with the permitting process to actually use credits. This option can take years to implement if credits are available (often not the case) for the basin in which the property resides. Option 2) reduces the "buildable land" available for a land development site. This means that these acres are not actually available for the city at large.

For these reasons, inclusion of wetlands in a city's available land does not accurately reflect the true buildable lands available to a community's housing unit capacity. The state rules used to identify buildable lands need to reflect areas that can realistically be developed. Buildable Lands Inventory methodology should be amended to exclude wetlands for consideration for purposes of unit count, however this should not preclude development on them through option 1).

Another important note is that many of the UGB were completed over 20 years ago and because of change in laws more and more land has been deemed wetlands significantly reducing the areas of buildable land and inaccurately representing the developable areas for many Willamette Valley cities.

When the DSL completed its statewide wetland inventory several years ago, it considered the presence of hydric soils as a primary indicator of an area that is a wetland. As a result, significant portions of the buildable lands inventories of a number of Willamette Valley municipalities were included in the inventory (including Adair Village, Crewell, Harrisburg, Independence, Lebanon, Millersburg, Philomath, Sheridan and more). Many of these areas were within the Urban Growth Boundaries and had been planned for residential development. Many of these newly marked wetlands look nothing like a wetland and maintain no wetland functions/values - however they are now major impediments to planned development and results in a shortage of land within the BLI.

3. To assess the issue and potential action(s), include subject matter experts representing all sides of the issue in workgroup meetings, including major government, industry, and stakeholder associations.

- a. *List the observers and participating SMEs at the workgroup meetings as the recommendation was developed. Identify which participating SMEs provided information to the workgroup and how. Summarize the information and perspective provided by the participating SMEs. If the participating SMEs expressed disagreement or concern with the workgroup recommendation, describe the reason.*
- **Jay Blake**, Planning Director City of Warrenton: 8/16/2023 SME: [BLI Constrained](#)
 - **Bob Bobosky** SME: [Mitigation Banker](#)
 - **Cascades West Regional Consortium** (has 11 municipal members from the Linn and Benton region including Adair Village, Albany, Brownsville, Corvallis, Halsey, Harrisburg, Millersburg, Monroe, Philomath, Tangent):
 - **Department of State Lands**: 8/08/2023 meeting with Bill Ryan, Melody Rudenko, and Dana Hicks with the following HPAC members present: Karen Rockwell, Eric Olsen, Deb Flagan & Natalie Janney attended
 - PDF included support: DSL response to HPAC Land Availability Workgroup Wetland Recommendations 08.14.23
 - **Donna Downing**, Senior Legal Policy Advisor for the National Association of Wetland Managers 8/15/2023 SME: SCOTUS Sackett decision
 - **Ray Fiori**, Oregon Wetlands LLC: 8/2/2023 SME: [Mitigation Banker](#)
 - **Don Herbert**, General Partner, Lor-Rene Acres, FLP
 - **Dave Hunnicutt**, Oregon Property Owners Association
 - **Shawn Irvine**, City of Independence: 8/2/2023 SME: [Mitigation Credits in Lieu](#)
 - **Brian Latta**, City of Dallas: 8/2/2023: SME: [Watershed State Mitigation Areas](#)
 - **Allen Martin**: Technical Side of building wetland banks
 - **Tom Mesdag**: Independence property owner
 - **Ariel Nelson**, League of Oregon Cities: SME: BiOp
 - **Tom Skarr**, Developer
 - **Christopher Staggs** AIA | NCARB | LEED AP, AriaTouch Development
 - **John Van Staversen**, Pacific Habitat Services, DSL RAC Member
 - **Nick Veroske**, Willamette Equities: SME: [Developer](#)
 - **Chris Workman**, City of Philomath – Written SME (attached) – BLI Constrained
- Land Availability Meeting 1 (4/25/2023) Observers included: n/a
 - Land Availability Meeting 2 (5/8/2023) Observers included: n/a
 - Land Availability Meeting 3 (5/25/2023) Observers included: Mary Kyle McCurdy (1000 Friends), Ted Reid (Metro), Anneliese Koehler (Metro), Laura Combs (Metro) and Michael Burdick (AOC), Brian Hoop (Housing Oregon), Ariel Nelson (League of Oregon Cities), Michael Burdick (Association of Oregon Counties)
 - Land Availability Meeting 4 (6/7/2023) Observers included: Mary Kyle McCurdy (1000 Friends), Ted Reid (Metro), Anneliese Koehler (Metro), Laura Combs (Metro), Brock Nation (Oregon Realtors), and Michael Burdick (AOC), Brian Hoop (Housing Oregon), Ariel Nelson (LOC),
 - Land Availability Meeting 5 (6/21/2023) Observers included: Mary Kyle McCurdy (1000 Friends), Ted Reid (Metro), Anneliese Koehler (Metro), Laura Combs (Metro), Brock Nation (Oregon Realtors), Jeremy Rogers (Oregon Realtors) and Ariel Nelson (LOC).

- Land Availability Meeting 6 (7/6/2023) Observers included: Mary Kyle McCurdy (1000 Friends), Brian Hoop (Housing Oregon), Brock Nation (Oregon Realtors), Trell Anderson (Housing Oregon), Ramsay Weit (Housing Oregon)
- Land Availability Meeting 7: (7/19/2023) Observers included: Ted Reid (Metro), Andy Shaw (Metro), Anneliese Koehler (Metro), Laura Combs (Metro), Eryn Kehe (Metro), Trell Anderson (Housing Oregon), Travis Phillips (Housing Oregon), Michael Burdick (AOC),
- Land Availability Meeting 8: (8/2/23) Observers included: Ted Reid (Metro), Anneliese Koehler (Metro), Laura Combs (Metro), Trell Anderson (Housing Oregon), Travis Phillips (Housing Oregon), Ramsay Weit (Housing Oregon), Ariel Nelson (LOC), Mary Kyle McCurdy (1000 Friends), Peggy Lynch (LWVOR), Eric Zechenelly (OMHA)
- Land Availability Meeting 9: (8/16/23) Observers included: Ted Reid (Metro), Anneliese Koehler (Metro), Laura Combs (Metro), Trell Anderson (Housing Oregon), Ariel Nelson (LOC), Mary Kyle McCurdy (1000 Friends), Peggy Lynch (LWVOR), Eric Zechenelly (OMHA), Jay Blake (City of Warrenton), Gail Henrikson (Clatsop County), Lauren Poor (OFB), Melody Rudenko (DSL), Mark Landauer (Special Districts), Tracy Rainey (Clean Water Services), Nick Green (Catalyst), Andy Shaw (Metro)

4. Provide an overview of the expected outcome of the recommended action(s), including quantitative/qualitative context if available.

The outcome of these recommendations is to expand the availability of buildable land within the Urban Growth Boundaries. The recommendations are not a deregulation of wetlands policies, they are a review and change of how wetlands are mitigated and are a conversation between all parties of intent and execution.

The Wetland and Land Use Change in the Willamette Valley, Oregon: 2005 to 2020 report (included in the attachments) Section 5.0 Conclusions and Discussion states that over the last 15 years, the Willamette Valley alone has actually experienced a NET GAIN of wetlands of 571 acres PER YEAR or 8,565 total acres of new wetlands.*

The workgroup did a quick analysis...If 8,565 acres of degraded or hydric soil wetlands were eliminated from the "wetland" classification and converted to housing, at an average of 8 units per acre, **the new lands would support 68,520 dwellings.**

**Moss, J.M., T. Divoll, J.C. Morlan, and T. O'Neill. 2022. Wetland and Land Use Change in the Willamette Valley, Oregon: 2005 to 2020. SWCA Environmental Consultants, Portland, Oregon, and Oregon Department of State Lands, Salem, Oregon.*

5. Estimate of the time frame (*immediate, short, medium, long-term*), feasibility (*low, medium, high*), and cost (*low, medium, high*) for implementation of the recommended action(s).

Time Frame	Feasibility	Cost
<input type="checkbox"/> Long-term	<input checked="" type="checkbox"/> High	<input type="checkbox"/> High
<input checked="" type="checkbox"/> Medium-term	<input type="checkbox"/> Medium	<input checked="" type="checkbox"/> Medium**
<input type="checkbox"/> Short-term	<input type="checkbox"/> Low	<input type="checkbox"/> Low
<input type="checkbox"/> Immediate		

**This is variable

Add additional context here:

Several of the costs will be in the form of additional staffing resources for the Department of State Lands, and costs for the wetland banks.

6. Provide a general overview of implementation, the who and how for the recommended action(s).

Several of the items require increasing staff capacity for the DSL. To see their comments on how they would approach structuring the recommendations see their comments from the letter uploaded “DSL response to HPAC Land Availability Workgroup Wetland Recommendations 08.14.23.”

7. Outline the data and information needed for reporting to track the impact and implementation of the recommended action(s).

- a. *Identify the data the Governor’s Office would need to track to determine if the recommendation is increasing housing production. Flag any areas where data does not exist leaving a gap in understanding outcomes or impacts.*

Direct DSL to provide a clear inventory of land that is considered wetland and overlay the margin wetlands within the Urban Growth Boundaries that would have been developable prior to 2019. If the 2019 regulations are not repealed, Urban Growth Boundaries that were drawn for municipalities future growth prior to that date should be evaluated and potentially re-drawn.

Direct DSL to coordinate with counties and cities for development of an Advanced Aquatic Resource Plan (AARP) for each basin throughout the state. The intent of the AARP is to identify functional needs and areas with mitigation opportunities. As part of that plan, cities shall be permitted to exclude all wetlands which are planned to be preserved from the city’s 20-year available land inventory.

Determine the hurdles to mitigation credits on the previously developed State-funded 98 acres of wetlands and extend credits to maximum extent possible.

8. Identify any major externalities, unknowns, tradeoffs, or potential unintended consequences.

The State of Oregon is in a moment of equity and re-evaluating the balance between necessary state codes and regulations and those that have been put in place to keep people out. Continuing to create policies and regulations that restrict housing and escalate prices creates “have” and “have not” situations and perpetuate the state’s exclusionary past.

Many of the recommendations will need rule changes; however, the loss of local wetlands benefits like flood storage, groundwater recharge, and fish and wildlife habitat, could result in adverse impacts and will need to be weighed against the need for expanding housing.

Oregon is a state of natural wonder and protecting its natural resources is a priority. Being stewards of the land is essential, and solid land use and environmental laws are critical to steward and preserve nature. They should not, however, be a mechanism to restrict growth or to escalate the cost of housing. The rules need to be in balance with the needs of our changing communities. We are in a housing crisis, and the unhoused are living in our wetlands and our forests and our beaches. Communities are suffering as their working citizens can no longer afford the cost of housing within their communities, and are forced to commute longer distances to jobs.

We are in a humanitarian moment and must acknowledge the environmental impacts of the unhoused or underhoused are taking a serious toll on our state. Our hiking paths are lined with tents. Our state parks are occupied by local minimum wage workers. And the unhoused population continues to grow while the middle income families continue to get squeezed out.

The growing impact is real and compromises natural features of our state that these restrictive laws are protecting.

This is the moment to look at the state's laws and policies to determine what needs to change or evolve in order to respond to the housing crisis and keep communities healthy. Everyone deserves a place to call home.

Please include any relevant reports, data analyses, presentations, or other documents that would be informative and useful for the full HPAC as the recommendation is discussed and considered.

Webpage Links:

- California “Housing and Local Land Development Opportunities” Web Page: <https://www.dgs.ca.gov/RES/Projects/Page-Content/Projects-List-Folder/Housing-and-Local-Land-Development-Opportunities>
- California “Statewide Housing Plan” Web Page: <https://statewide-housing-plan-cahcd.hub.arcgis.com/>
- Sackett vs EPA Case: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf
- Oregon Department of State Lands “Wetland and Land Use Change in the Willamette Valley, Oregon: 2005 to 2020 Volume 1: Final Report: https://www.oregon.gov/dsl/WW/Documents/WetlandAndLandUseChangeWV_Report2005-2020.pdf
- Youtube recording from a presentation from Dave Hunnicut, Oregon Property Owners Assn, at the Willamette Realtor Association Conference in Adair Village (2018): https://www.youtube.com/watch?v=rxJqKTXtj_I
- Oregon House Bill 2796 (2019 Session, Rep Brian Clem): Allows DSL to suspend, modify, or revoke rules to obtain authority to assume federal wetland permitting. <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureDocument/HB2796/A-Engrossed>
- Oregon House Bill 2899 (2023 Session, Rep Cate): Removes certain lands from definitions of buildable lands for purposes of urbanization. <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2899>

Attachments:

- Brochure: Flood Insurance & the Endangered Species Act 07-17-2023
- NACo Platform Change FEMA BiOp - Commissioner Yamamoto (July 2023)
- Department of State Lands Written Feedback to Land Availability and Permitting Work Group’s DSL draft Wetlands Recommendations
- Pending: Presentation by Donna Downing, Senior Legal Policy Advisor for the National Association of Wetland Managers 8/15/2023 SME: SCOTUS Sackett decision

Counties and the NFIP

Counties have a critical relationship with FEMA and the NFIP. Participation in the NFIP is a prerequisite to most federal disaster assistance, and flood insurance is a prerequisite to obtaining any federally backed loan for a property located within FEMA’s designated Special Flood Hazard Area (SFHA), commonly known as the 100-year floodplain.

The NFIP establishes the minimum floodplain development standards that the vast majority of counties use to regulate development in floodplains in their communities.

FEMA is currently revising the NFIP’s minimum standards for regulating development in floodplains. As part of those revisions, FEMA is contemplating how to integrate federal ESA-based requirements into its standards – standards which counties will be required to **adopt and enforce** to continue to participate in the NFIP.



Florida key deer

While these changes started in Florida, Washington and Oregon, FEMA is now drafting changes to the regulations that would apply **nationwide**.

FEMA is moving forward with new regulations proposing ESA-based “performance standards” (e.g., “no net loss,” or “no adverse effect” to ESA species or habitat) that local jurisdictions will be required to apply when reviewing local floodplain permits.



Southern Flow Corridor, Tillamook County, OR

These standards translate into **significant new restrictions on development in floodplains.**

Experience in Oregon and Washington where local governments have tried to implement these standards has shown that they are complicated, confusing, and expensive. These standards limit development density for new residential, commercial, and industrial projects, limit new impervious surfaces, require compensatory flood storage, and restrict the removal of vegetation.

National Flood Insurance Program (NFIP)

These changes will affect counties across the country. As of 2023, there are **nearly 5 million FEMA policies in force (PIF)**, providing more than a *trillion dollars* in coverage across the United States.

Top 10 States for NFIP Policies	May-23
Total	4,737,789
FLORIDA	1,687,630
TEXAS	694,828
LOUISIANA	473,912
NEW JERSEY	207,336
SOUTH CAROLINA	203,504
CALIFORNIA	194,726
NEW YORK	167,450
NORTH CAROLINA	133,521
VIRGINIA	94,907
GEORGIA	75,776

FEMA is increasingly becoming a regulatory agency, rather than an insurance and disaster assistance entity.

FEMA has a limited focus (NFIP and ESA), while counties must deal with multiple laws—federal, state, and local. So far FEMA’s efforts at integrating the ESA into the NFIP have not taken into consideration state and local requirements or programs already aimed at protecting and restoring listed species and their habitats.

NACo Asks to FEMA

NFIP-ESA Interface

- Work directly with NFIP-participating jurisdictions to determine what, if any, changes to NFIP minimum standards are necessary and appropriate
- Develop any new ESA-based requirements in concert with the local jurisdictions that FEMA expects to implement them
- Integrate any new standards with existing permit requirements and programs (e.g., Clean Water Act section 404 permits) to avoid conflicting or redundant requirements
- Exempt common agricultural activities from NFIP-based permit requirements

Funding and Training

- Provide additional funding and training to NFIP participating communities to implement any new requirements
- Provide additional funding to defend against inverse condemnation claims due to ESA implementation through NFIP

Proposed NACo NFIP-ESA Platform

The National Association of Counties urges the Federal Emergency Management Agency to ensure that any approach taken by FEMA to integrate the Endangered Species Act (ESA) into the National Flood Insurance Program (NFIP) is narrowly tailored to FEMA’s authority and includes extensive input from impacted local and state governments, including consideration of local land use laws and ordinances that are already in place to promote and protect endangered species and their designated critical habitat.

Flood Insurance & the Endangered Species Act (ESA)



NFIP-ESA Interface

NACo and affected counties must engage as FEMA develops and implements new regulations integrating the Endangered Species Act (ESA) into the National Flood Insurance Program (NFIP). *FEMA’s plans to implement the ESA through the NFIP effectively makes every local floodplain permit a federal action.*

ANY COUNTY WITH BOTH FLOODPLAINS AND ENDANGERED SPECIES WILL BE AFFECTED

Contact Us

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Proposed Platform Change to Comprehensive Emergency Management

Under COMPREHENSIVE EMEGENCY MANAGEMENT, insert:

W. FEMA Implementation of the Endangered Species Act through the National Flood Insurance Program: The National Association of Counties (NACo) urges the Federal Emergency Management Agency (FEMA) to ensure that any approach taken by FEMA to integrate the Endangered Species Act (ESA) into the National Flood Insurance Program (NFIP) is narrowly tailored to FEMA's authority and includes extensive input from impacted local and state governments, including consideration of local land use laws and ordinances that are already in place to promote and protect endangered species and their designated critical habitat.

Sponsor(s): David Yamamoto, Commissioner, Tillamook County, Oregon.

Background: Counties have a critical relationship with FEMA and the NFIP. Participation in the NFIP is a prerequisite to most federal disaster assistance, and flood insurance is a prerequisite to obtaining any federally backed loan for a property located within FEMA's designated Special Flood Hazard Area (SFHA) – commonly known as the 100-year floodplain. The primary – and in many counties the only – way to get that required flood insurance is through the NFIP. Before a community can participate in the NFIP, that county must first adopt floodplain development regulations as least as restrictive as FEMA's minimum floodplain development standards set forth in 44 CFR §60.3. As a result, FEMA's minimum floodplain development standards provide the framework for how the vast majority of counties regulate development in floodplains in their communities.

FEMA is currently preparing revised NFIP's minimum standards for regulating development in floodplains. As part of these revisions, FEMA is contemplating how to integrate federal ESA-based requirements into those standards – standards which counties will ultimately be required to adopt and enforce to continue to participate in the NFIP. While these changes started in Florida, Washington, and Oregon, FEMA is now drafting changes to the regulations that would apply ***nationwide***. The impacts of these changes to the NFIP have the potential to be profound for counties across the country.

These changes started in Florida, followed by Washington, Oregon, and California, where lawsuits were initiated alleging impacts from floodplain development under the NFIP on ESA-listed species, particularly aquatic species, and their designated critical habitat. Each of those suits resulted in a Biological Opinion directing FEMA to change how NFIP-participating cities and counties in those states regulate floodplains. Those changes aimed to severely constrain when and how development in floodplains is permitted. Most recently, in Oregon, FEMA has rolled out its plan to require cities and counties there to ensure that floodplain development results in "no net loss" of floodplain functions. This standard translates into significant new restrictions on development in floodplains, including limiting development density for new residential, commercial, and

industrial projects, limiting new impervious surfaces, requiring compensatory flood storage, and restricting the removal of vegetation. FEMA has outlined its plan to implement these changes regardless of conflicts with state and local laws and land use regulations. As FEMA prepares nationwide regulatory changes, it is relying on its approach in Washington and Oregon to form the foundation for those nationwide changes.

The Center for Biological Diversity (CBD) recently filed a 60-day notice of intent to sue FEMA if FEMA does not implement provisions from the Oregon NFIP-ESA Biological Opinion. The changes that the CBD is pressing FEMA to implement would apply **nationwide**. They include changing FEMA's floodplain mapping procedures to substantially expand the areas that are regulated under the NFIP, and severely restricting – in many cases outright prohibiting – new development within existing and expanded floodplains.

Impacts: It is critical that counties become involved in the NFIP regulation changes to preserve your land use authority and protect the development capacity of land within your jurisdictions. Given FEMA's broad definition of development (any manmade change to the land), the integration of the ESA into the NFIP in a manner that is not narrowly tailored to FEMA's limited authority has the potential to upend local land use control and critically needed residential, commercial, and industrial development in counties across the nation. This is particularly problematic because FEMA has failed to acknowledge state's land use planning powers and the existing and ongoing robust efforts by communities to avoid, minimize and mitigate impacts to endangered species and their habitats. The proposed NFIP changes are poised to overburden local communities with unnecessary, costly, and conflicting regulations that local jurisdictions will be required to implement.

The consequence to communities for non-compliance could result in suspension or termination from the NFIP, throwing homeowners in the floodplain into default on the terms and conditions of federally backed mortgages, and rendering communities ineligible for FEMA disaster relief funds and access to other FEMA relief programs.

Local jurisdictions will be forced to carry out regulatory oversight of a new program developed under the auspices of the ESA that they lack the financial, technological, and other resources needed to fully implement. They will likely face significant and costly litigation for property rights takings as a result of newly imposed development prohibitions on properties within the SFHA, and could face severe economic impacts due to new restriction on development within the SFHA that remove opportunities for growth and continued development of business and industry. The ESA implementation also has the potential to hamstring existing species recovery efforts by directing resources to a program with limited ability to impact species recovery, while directing state and local resources away from work undertaken under more comprehensive and coordinated recovery plans.



Oregon

Tina Kotek, Governor

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State Land Board

MEMORANDUM

Tina Kotek

Governor

LaVonne Griffin-Valade

Secretary of State

Date: August 14, 2023 Tobias Read
To: Deborah Flagan, Land Availability Workgroup Chair State Treasurer
From: Bill Ryan, Deputy Director, Oregon Department of State Lands
Subject: DSL comments on the Housing Production Advisory Council 8/9/2023 Draft
Recommendations for Wetlands—Mitigation

The Oregon Department of State Lands appreciates the efforts of the Housing Production Advisory Council subgroups and the opportunity to review draft recommendations pertaining to wetlands and wetlands mitigation. We also appreciate the changes incorporated following our initial conversation on August 8, and are pleased to submit the below comments regarding the August 9, 2023, revised version.

The Department's mission is, "ensuring Oregon's school land legacy and protecting wetlands and waterways of the state through superior stewardship and service." Wetlands are tremendously important to Oregon communities, contributing by cleaning water, reducing flood hazards, and providing natural areas for people and wildlife. Oregon's existing wetlands laws and policies reflect the value of protecting wetlands for current and future generations of Oregonians.

In general, DSL believes Oregon can continue to protect wetlands while supporting housing production by:

- Expanding the pace and scale of mitigation. With additional resources, including staff and funding, the Department can commit to faster and expanded processes.
- Prioritizing where efforts and resources should be focused. It may take years to reach the scale of Governor Kotek's Executive Order, but with further direction on priority areas, near-term progress can be made as additional resources are provided.

Specific comments below provide clarification on existing Oregon law, and DSL policies and programs. The draft overview statement and draft recommendation being commented on is in blue, with our responses in black.

COMMENTS ON OVERVIEW STATEMENTS

1. The May 25, 2023, U.S. Supreme Court decision in *Sackett vs EPA* clarifies the federal level jurisdiction of the Environmental Protection Agency (EPA), and Army Corps of Engineers over wetlands and how they are defined. The State of Oregon now has a viable path for development of marginal or degraded wetlands (not GOAL 5 determined significant wetlands) to allow for needed housing in Oregon. In summary, the decision provides the states with greater latitude in determining what wetlands must be protected and/or mitigated in order to be developed.

The Sackett decision does not affect state-level wetlands jurisdiction under Oregon's Removal-Fill Law (ORS 196.600-990). DSL agrees that state laws protect wetlands that are no longer considered Waters of the United States (WOTUS). Oregon statute requires protection and replacement of wetlands under the Removal-Fill Law, which the Oregon Legislature has authority to change. State laws in Oregon are in place to provide protections to resources Oregon deems important, including streams, wetlands, and other water resources.

Before state protections were in place, many wetlands were lost – about 57 percent in the Willamette Valley; 75 percent in the Klamath Basin; and up to 94 percent in coastal estuaries ([Historical Loss of Wetlands, Oregon Explorer](#)) There is also ongoing loss or degradation of wetlands associated with activities that are exempt from the Removal-Fill Law. The “marginal or degraded wetlands” referenced in the recommendation are primarily wetlands that are under agricultural management, for example, grass seed fields or pasture. These wetlands are degraded in that they have altered hydrology, vegetation, and soils relative to less disturbed wetlands; however, these wetlands still provide critical functions such as flood protection, winter season salmon habitat, support for other fish and wildlife species, improving water quality, and groundwater recharge. The effects of climate change make these functions even more valuable today than in the past.

DSL is waiting for further information from the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps), and guidance from the Corps' Portland District, regarding implementation of the Sackett decision. Applicants will likely still need to coordinate with the Corps to determine if their project would fall under federal jurisdiction since the state cannot make this decision.

2. Oregon has significantly increased rules governing aspects of some wetland protection, enhancement, mitigation and banking over and above federal law.

DSL conducts rulemaking to clarify and implement statute and to ensure we are most effectively achieving Oregon's statutory goals. Rulemaking cannot expand DSL's regulatory authority.

Changes to compensatory mitigation were incorporated through rulemaking in 2018-19 to address shortcomings in wetland protection programs nationwide and in Oregon. Those changes were developed in collaboration with the Corps and EPA. Studies showed the practice of requiring acre for acre mitigation leads to an overall loss of functions of aquatic resources across the nation. The updated rules brought Oregon's mitigation program into alignment with the federal standards to provide more successful, sustainable benefits for the environment. State wetland permitting rules are not more stringent than the 2008 Federal Rule. However, state and federal requirements do differ in some ways since the programs that support them are independent. DSL and Corps work in unison to streamline the permitting and mitigation banking process for applicants.

3. Oregon has an existing program which permits developers to pay a “fee in lieu” of purchasing actual wetland mitigation credits from private wetland bankers if private credits/banks are not available in a particular watershed basin NOTE: At present there are 8 basins currently operating under the fee-in-lieu program.

DSL has two fee-in-lieu programs. The **In-Lieu-Fee (ILF)** program can be used to satisfy both state and federal compensatory mitigation requirements. **Payment-In-Lieu (PIL)** program can only be used to satisfy state compensatory mitigation requirements. For the Corps-approved ILF program DSL currently [has 6 service areas](#) approved. The PIL program can be used anywhere in the state if no suitable mitigation bank credits or ILF credits are available.

4. With approval from Army Corp of Engineers, Oregon is able to offer a “fee in lieu” for any watershed basin in Oregon prior to the actual building of the wetland mitigation bank that would be the source of the credit. NOTE: Private banks must have their banks “certified” before the credit is available to developers.

Federal mitigation rules require that an ILF program begin project construction at an approved ILF mitigation site within 3 growing seasons of selling an advance credit. To lower our risk of non-compliance, DSL’s current practice is to wait to sell credits until we have a project identified. This also helps DSL price the mitigation credits because the cost of the project can be more accurately estimated.

COMMENTS ON RECOMMENDATIONS

1. DSL to obtain approvals from the Army Corp of Engineers for a “fee in lieu” program for every watershed basin in Oregon relating to federally protected wetlands.

DSL could develop a proposal to expand the ILF program agreement to have credits available in additional areas of the state. Expansion of the ILF program will require that DSL develop the supporting information required by the Corps, which must be specific to the service area(s) being requested. Since the Corps review and approval process may take over a year, sequencing our requests based on priority areas is recommended. DSL would need to know the priority areas identified by the HPAC so that we can prioritize those areas first. DSL would need additional staff and funding resources to implement this recommendation and needs a sense of the scope of the ILF expansion (how many watersheds over what timeframe) in order to provide an informed estimate of staffing and funding required.

2. DSL to create a new fee in lieu plan for all wetlands not protected by federal regulations.

DSL’s existing PIL program can achieve this recommendation with additional staff resources. Accepting more funds will make it even more challenging to meet the state’s goals of wetland replacement and to meet our key performance measure of using the PIL funds on a wetland project within 1 year of collecting those dollars. DSL will need to partner with local governments and natural resource organizations in priority areas to identify and implement mitigation projects. DSL will also need to contract for services needed in a timely manner. DSL would need additional staff and funding resources to implement this recommendation and needs a sense of the scope of the PIL expansion (how many watersheds over what timeframe) in order to provide an informed estimate of staffing and funding required.

3. Direct DSL to create rules by which to distinguish between wetlands which are protected under state law only and those protected under federal law per Sackett decision.

DSL is not able to make rules that identify which wetlands are protected under federal law. DSL can coordinate with the EPA and Corps to understand where federal jurisdiction (waters of the US) may differ from State jurisdiction (waters of the state) as they implement the Sackett decision. As a part of the permitting process, DSL already reviews wetland delineations and other materials submitted by applicants to determine state jurisdiction. Therefore, DSL does not need to create new rules on what is jurisdictional under state law. If the desire is to improve general understanding of where state law applies and where federal law applies, such clarification can be provided.

4. Require every watershed basin in Oregon to have an available inventory of at least 10 years of mitigation credits (total from private and “fee in lieu” banks) as estimated from housing production numbers defined in the governor’s executive order and informed by AARP (see 5 below). As part of this program:

DSL is required to demonstrate the market need for mitigation credits in an ILF services area before it will be approved by the Corps. There is not a way to directly correlate 10 years of housing need to 10 years of mitigation credit demand in a service area; however, areas with a known demand and higher concentration of potential wetlands could help prioritize where the ILF program may be the most needed or to encourage private mitigation banks to establish. DSL has provided information from a high-level GIS analysis to explore which urban growth boundaries are more likely to have wetlands to Matthew Tschabold and Svetha Ambati from the Governor’s Housing and Homelessness Initiative.

Developing credits in every Oregon watershed would be a huge undertaking and take years. Should this recommendation be adopted, DSL recommends prioritizing a small number of watersheds e.g., those with the greatest housing needs and wetlands encumbering the developable lands.

- a. Permit “fee in lieu” funds generated from those wetlands protected only by state rules to be used for the following:
 - i. Funding of local stormwater treatment facilities in cities in which the wetland was mitigated

Current rules allow wetland mitigation projects to fulfill multiple purposes including stormwater retention or detention if the compensatory mitigation requirements are still met (OAR 141-085-0680 (3)(h)). Under current rules, funds collected to offset wetland impacts could not be used for a standalone storm water treatment facility or other infrastructure that are not also waters of the state. DSL could evaluate using PIL funds on wetland projects that seek to improve stormwater management when that is a watershed priority. DSL would need local and state government partners to help identify local needs and potential projects.

DSL could seek rule changes to allow this sort of out-of-kind use of mitigation funds on wetlands no longer regulated by the federal government; however, the loss of local wetlands benefits like flood storage, ground water recharge, and fish and wildlife habitat, could result in significant adverse impacts.

ii. Flood control measures part of FEMA BiOp flood plain ordinance in regions where wetland mitigated

Similar to our comments under “i.” above, DSL could consider supporting multi-purpose wetland projects, including wetlands that provide flood control measures. DSL can work with our federal and state agency partners to integrate FEMA BiOp requirements with Removal-Fill Law and other regulatory requirements for compensatory mitigation projects as more information is available regarding those requirements.

iii. Building of wetland banks (see note 5 below)

DSL could expand the use of PIL credits for offsetting effects to wetlands that are jurisdictional under only state law. It takes at least two years to develop and construct a large-scale wetland mitigation project and years longer for the wetlands developed to achieve full functioning status. This results in a temporal loss of wetlands functions if PIL funds are accepted prior to a mitigation project being constructed. Should this recommendation be adopted, DSL strongly recommends an up-front investment in mitigation projects in order to minimize the temporal loss of wetland functions.

DSL could also consider using PIL dollars to fund the development of private or public mitigation banks. Under this type of partnership, DSL contracts with a bank sponsor for a portion of the bank credits that will be developed. Any remaining credits could be sold by the bank sponsor at market price.

iv. Wetland enhancement

Wetland enhancement is one of the methods of wetland mitigation that is accepted by the Department. We currently use PIL funds to support wetland enhancement projects.

v. Wetland replacement which considers function only instead of both area and function

Most wetland functions are correlated with wetland area. A function assessment informs what functions are present, but wetland area quantifies that function. For example, a wetland may be in a location and have the characteristics for the capture and slow release of flood waters, but how much water is released and for how long is related to the size of the wetland.

There isn't an ecological basis for separating functions and wetland area. The minimum 1:1 replacement ratio (mitigation acres to impact acres) in state and federal rule acknowledges this size to function correlation. Ratios also support the use of rapid function assessments rather than detailed quantification of function for each wetland which takes significantly more time and money. DSL could not consistently and fairly determine the amount of mitigation required using existing tools without considering the area of impacted wetlands and the use minimum replacement ratios.

5. Where DSL is the only jurisdiction over the wetland, emphasis should be given to replacing or enhancing FUNCTION within the basin, rather than focusing on not losing wetland area (goals to be adjusted). This will help to improve overall water quality/flood management within the basin.

See comments under “4.v.” above. DSL could prioritize funding wetland projects that provide priority functions under the current compensatory mitigation rules. See comments under “4.i.” above.

6. Direct DSL to coordinate with counties and cities for development of an Advanced Aquatic Resource Plan (AARP) for each basin throughout the state. As part of that plan, cities shall be permitted to exclude all wetlands which are planned to be preserved from the city’s 20-year available land inventory.

Prior attempts to finalize AARPs were not successful because the Corps could not approve the advance alternative analysis. If there were no federally jurisdictional wetlands within the AARP study area, DSL and local governments would have the flexibility to develop AARPs. A significant expansion of the number of AARPs would require additional staff resources at DSL. DSL would need additional staff and funding resources to implement this recommendation and needs a sense of the scope of the AARP development effort (how many cities and counties and over what timeframe) in order to provide an informed estimate of staffing and funding required. Many or most local jurisdictions would require financial support for this process.

7. As part of “fee in lieu” program outlined above, DSL shall:
 - a. Utilize a competitive bidding process to the maximum extent possible for the building of wetland banks
 - b. Provide the option to existing wetland bankers in markets (basins) where “fee in lieu” becomes available to sell existing credits to DSL at fair market value
 - c. To expedite the process and provide flexibility for DSL in the creation and management of new wetland banks and purchasing of existing banks, permit the agency to operate outside of DAS.

DSL does not have additional comments on recommendation 7. These would be helpful components of expanded in-lieu-fee and payment-in-lieu programs.

8. As an emergency measure, wetland protections that are required for a developer as adopted by the DSL and DEQ should be relaxed to the maximum extent possible while still in compliance with federal law for the next 5 years. To accomplish this while assuring water quality and other wetland protection standards, through DSL and DEQ the state of Oregon at its own expense and discretion shall perform those activities indicated in 4(a) and any other measures which the state deems necessary for an offset from the loss of wetlands.

This recommendation would put the entire cost of offsetting the effects of wetlands loss on the people of Oregon. It would require changes to the Removal Fill Law (ORS 196.600-990) and subsequent rulemaking. Short of such a major policy and statutory change, DSL can consider how best to reduce the cost of wetland protections through increased flexibility in rules via rulemaking. Improved integration of stormwater requirements and DSL requirements for compensatory mitigation is an area that would benefit from further discussion with experts in that field. This would require additional staff capacity and rulemaking.