



Oregon

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Staff report – SIGNIFICANT HABITAT AND FUTURE CONDITIONS

MEMORANDUM

To: Acquisitions, Restorations, and Emerging Issues Committee

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I. Introduction

In June 2025, the ARE Committee reviewed four foundational questions regarding the Measure 76 (M76) Land Acquisition grant program. Past program improvement efforts have struggled to resolve several ongoing concerns through interventions at the process/procedure level, so staff have requested that the ARE committee—and, ultimately, the OWEB board—provide direction and guidance to help address these issues at the foundational level; specifically, direction and guidance will clarify policy interpretation and assumptions that underlie program implementation decisions.

Our collaborative efforts to address these foundational questions should consider the language in the Constitution and statute, advice from legal counsel, historical context from the original drafters and proponents of the ballot measure language and other foundational documents, past experiences that have resulted in current program structure, and input from a diversity of OWEB partners, including but not limited to the land trust community and Tribes.

This memo addresses the second foundational question outlined in the document provided to the ARE committee for its June 2025 meeting:

“Should OWEB’s land acquisition program incorporate an expectation of active restoration of properties acquired, or is a land transaction that solely protects land sufficient to meet OWEB’s interpretation of Constitutional and statutory requirements, even if existing habitat values are more modest, limited, or marginal?”

II. Introduction to Significant Habitat and Future Conditions

M76 constitutional language directs OWEB to use lottery funds in the Natural Resources subaccount to “secure long-term protection for lands... that provide *significant habitats* for native fish and wildlife” (Article XV, Section 4b(1)(b)) (emphasis added), among other uses. OWEB’s interpretation and implementation of this language has been that lands protected under M76 land acquisitions grants should be either 1) of high existing habitat value, or 2) restorable to a desired future condition that creates high habitat value. Given these habitat

expectations, the agency signals to applicants that there should be a viable path and commitment to restoring marginal properties. Under current program guidance, management plans are required by the agency. In addition, the agency requests that these plans encompass a 20-year timeframe, with multiple 5-year implementation periods. A schedule of actions is included in the management plan.

Based on these interpretations of Constitutional and statutory language, OWEB staff have developed eligibility criteria, applications processes, funding conditions, and management plan requirements aimed at ensuring habitat expectations are met. These requirements were also informed by significant staff concerns about some past land acquisition projects in which land with negligible habitat values was acquired with OWEB funding, and then restoration outcomes were excessively slow or even virtually non-existent.

However, from the perspective of some program applicants and partners, the processes and procedures built around this policy interpretation have become excessively burdensome. Partner feedback has referenced challenges with:

- Limited eligibility for projects that protect habitat with more modest habitat values;
- Requirements for desired future habitat conditions that are outlined in grant agreement and conservation easement (CE) without guaranteed funding from OWEB to achieve these conditions; and
- Requirements for detailed OWEB-approved management plans to demonstrate the applicant's ability reach those desired future conditions, among other issues.

Some partners have also suggested that OWEB's high expectations in this area have created an unintentional negative feedback cycle, in which applicants feel they must set themselves unrealistic restoration goals in order to be able to compete for funding, but then when they fail to meet overly ambitious targets and timelines, their sense is that OWEB staff perceive a project failure and then further increase documentation requirements for future funding cycles.

The remainder of this memo provides additional detail on the Constitutional, statutory, and rule language that provides sideboards for internal program guidance and processes implementing this program. Future committee discussion topics under this question might include:

1. How should OWEB staff and our partners think about interpretation of the "significant habitat" language referenced above? If we fund protection of land with limited existing habitat value, do we need to require active restoration to meet our Constitutional mandate?
2. Would it be helpful to more clearly define "significant habitat" in program rules? If so, what might that process and language look like? Who should we ask to help?
3. If we determine that a proactive restoration requirement is appropriate, what kinds of changes should we consider in the way we document or enforce that requirement?

In easement structure and content, management planning, and funding conditions generally, how are we doing at striking the delicate balance between accountability of public funds vs. flexibility and the ability to respond to changing conditions? Do you see ways we can better balance these grantmaking values?

III. Constitutional and Statutory Language regarding Habitat Requirements

OWEB's land acquisition grant program is grounded in the Article XV Section 4b of the Oregon Constitution (also referenced above), which requires the funding of long-term protection of lands and waters that provide significant habitats for native fish and wildlife from the funds in the Natural Resources subaccount of the Parks and Natural Resources Fund. The Constitution further requires that this funding be used for the acquisition of interests in land or water that will protect or restore native fish or wildlife habitats, which interests may include but need not be limited to fee interests, conservation easements, or leases.

Statutes guiding OWEB's programs more explicitly state the following:

- ORS 541.956 – "...shall be used only for the following activities: (1) Acquiring from willing owners interests in land and water that will protect or restore native fish or wildlife habitats..."
- ORS 541.932(9) – "(OWEB) may fund projects involving the acquisition of lands and waters, or interests therein from willing sellers, for the purpose of maintaining or restoring watersheds and habitats for native fish or wildlife."
- ORS 541.958 – "Any project that the board approves for funding shall comply with the following criteria: ... The project provides a public benefit by supporting improved: a) Water quality, b) Native fish or wildlife habitat, or c) Watershed or ecosystem function."

IV. Administrative Rule Language regarding Habitat Requirements

The purpose of the Land Acquisition grant programs as outlined in rule mirrors the Constitutional and statutory language above: "In accordance with Section 4(b)(2) of Article XV of the Oregon Constitution and ORS 541.956, OWEB may consider grant applications that propose to acquire Property Interests in lands from willing sellers for the purpose of maintaining or restoring watersheds and habitats for native fish or wildlife."

OAR 695-045-0180 describes several grant application evaluation criteria, including three that relate in some way to habitat: "OWEB shall evaluate grant applications for:

- (1) The consistency of the Project with the Board's established priorities and principles and conservation priorities established in local, regional, or state conservation plans for land acquisitions;
- (2) The significance of the projected ecological outcomes;
- (3) The capacity of the grant applicant, or intended property manager, to complete the acquisition of the Property Interest and to achieve and sustain the proposed ecological outcomes over time;"

The first evaluation criterion listed above references the 2004 “OWEB Ecological Priorities for Land Acquisition by Basin” document. This document includes seven conservation principles, which are summarized as: 1) protecting large, intact areas; 2) stabilizing areas “on the brink,” 3) securing transition areas, 4) restoring function, 5) protecting sites with exceptional biodiversity values, 6) improving connectivity, and 7) complementing existing ecological networks. It also outlines priority habitats and species for the fifteen major river basins in Oregon. The purpose of this 2004 document is described as:

“...to 1) help OWEB respond to acquisition applications and expend funds on acquisition projects in an informed and strategic manner; and 2) ensure that acquisition projects address critical watershed resources and processes. This report describes both a general framework for identifying priorities as well as specific high priority attributes for each basin. The report focuses only on priorities related to ecological benefits - the habitats, species and key ecosystem principles and processes that should be addressed by land acquisition project applications. OWEB considers many other factors when it reviews land acquisition applications, including such things as the capacity of the grantee to manage the property over time and the level of community support. Projects with strong ecological benefits may not be funded if they fail to meet other criteria. Moreover, OWEB may decide to approve projects with lower priority ecological attributes when such projects address other agency goals.”

Administrative rule also defines a management plan as: “Management Plan” is a description of the planned future management of a Property Interest that is consistent with guidance established by OWEB and includes, but is not limited to, actions such as species and habitat management practices, proposed restoration projects, Stewardship and monitoring, land uses, public access, and educational and research opportunities.’ While not described in administrative rule as a requirement, program guidance requires land acquisition grantees to develop management plans for all OWEB funded projects.

Finally, administrative rule describes the funding mechanism and process for land acquisition grants as “The (OWEB) Director may approve the distribution of grant funds when: (a) The funding conditions, if any, imposed by the Board are satisfied to the full satisfaction of the Director; (b) The legal and financial terms of the proposed real estate transaction are approved by the Director; (c) The title restrictions required under ORS 541.960 are approved by the Director; (d) A grant agreement is executed by the Director and the grant applicant; (e) The Director has reconciled conditionally approved funding with actual Project costs; and (f) The grant applicant has satisfied the match requirements under OAR 695-045-0175 and OAR 695-005-0060(2).”

The OWEB grant agreement template for land acquisitions includes an exhibit outlining required conditions that must be met prior to disbursement of grant funds for the transaction. These conditions include both initial and secondary project-specific conditions and standard conditions that apply to all land acquisition projects. The title restriction referenced above is either a conservation easement that OWEB holds on fee projects, or the third-party right of enforcement for conservation easement projects. For fee projects, the conservation easement template that OWEB provides for use by grantees includes conditions related to Conservation Values, defined as “The Property, in its

existing, enhanced, or restored state, has, or will have, certain ecological features associated with it which will contribute to the protection or restoration of native fish or wildlife habitats, watersheds, or water quality in Oregon. Those ecological features, whether currently existing, or likely to exist in the future, are referred to as the “Conservation Values” herein.”

In instances where restoration is a requirement of grant funding as documented via funding condition(s), the conservation easement template includes the following language: “The Conservation Values include future conditions that will result from planned restoration actions on the part of Owner. A description of the future conditions (the “Description of Restored Conditions”) is part of the Baseline Inventory Documentation and details the restoration outcomes intended by Owner, which, when achieved, will be considered an integral part of the Conservation Values to be monitored and protected under this Easement.”

V. OWEB Land Acquisition Program Practice and Implementation regarding Habitat Requirements

The implementation of the land acquisition program has evolved over time, incorporating Constitutional and statutory obligations (e.g., use of conservation easements to meet the title restriction statute), requirements and procedures outlined in the applicable administrative rule (e.g., 18-month due-diligence period for funded projects), and extensive programmatic guidance and requirements (e.g., a conservation easement template). Collectively, this program structure is intended to help applicants and grantees understand OWEB requirements, and help the agency minimize risk and ensure that public funds are used on projects that meet the mandated purposes described above.

As described in the September 2025 ARE memo regarding conservation easements, OWEB has consistently required the use of conservation easements as a legal instrument to minimize both risk to the agency as it meets the title restriction requirement in ORS 541.960, and risk to the protected conservation values by ensuring the ongoing use of the property is for the specific conservation purposes of the grant. In addition, OWEB has developed a set of provisions and approaches to address program requirements regarding significant habitat and future conditions. These collective requirements are discussed in turn below. Unless specifically noted as explicitly required by the Oregon Constitution, OWEB’s statutes, or required in administrative rule, all requirements are grounded in OWEB guidance and policy decisions. As a result, many of these decisions fall squarely within the decision space of the OWEB board and/or executive leadership.

Identification of conservation values

Conservation easements typically protect existing conservation values by compelling action on the part of the easement grantor, with a recognition that those values may periodically fluctuate or trend toward change for a number of reasons, including restoration or enhancement. These attributes are then encapsulated as the easement “Conservation Values” becoming a defined term and determining the foundation for the easement’s purpose, restrictions, and any reserved rights. Conservation values are intended to capture what is known about the property as of the date of granting the

easement, providing the background for developing appropriate use restrictions that are specific to the needs of the particular property, the easement holder and landowner goals.

OWEB's easement includes a description of both the existing state of the property *and* the anticipated potential future state of the property. OWEB's easement language notes that the property has, *or will have*, certain ecological features that will contribute to the protection or restoration of native fish or wildlife habitats, watersheds, or water quality in Oregon. The easement's formal Conservation Values are not only existing, but also those that are *intended to or may* result from restoration and enhancement on the property. This approach has been developed by OWEB staff as a result of the concerns outlined above, based on policy interpretation and project histories, that protection of land with low existing habitat value would not meet the Constitutional requirement to protect "significant habitats" in the absence of proactive restoration requirements.

Baseline Inventory Documentation (and Description of Restored Conditions)

Generally, all conservation easements include reference to and incorporation of baseline documentation as a record of the property's conditions and the conservation values at the time the easement is transferred. This information serves as the background for all future monitoring and potential enforcement needs. The baseline can provide crucial evidence in an enforcement action. The baseline documentation is incorporated into the easement deed, making the document part of the easement obligations.

OWEB's easement documents and describes both baseline and anticipated future conditions of the property expected to result from restoration actions. These "restored conditions" then become the "Conservation Values" under the terms of the easement, thus protecting these restored conditions from being undone.

Prohibited Uses

OWEB's easement lays out the uses of the property through restricting uses to activities consistent with laws, and the Purpose of the easement, which is to protect the conservation values over time in a manner consistent with the Constitution and OWEB's statutes, as well as the management plan.

The easement also identifies certain uses that are prohibited, unless specifically authorized in the management plan or approved in writing by OWEB. These prohibited uses include (i) commercial or industrial activities; (ii) new construction, expansion, or installation of improvements of any kind; (iii) cutting or removal of trees or other vegetation, other than danger trees, noxious weeds, or vegetation obstructing roadways; (iv) grading, excavation, or alteration of the land surface; (v) alteration of natural water courses, lake shores, wetlands or other water bodies; (vi) off-road vehicle use; (vii) possession of domestic, farm or exotic animals; or (viii) granting or permitting any lien, easement or other encumbrance to attach to the Property. OWEB staff routinely receive requests for, review, and approve otherwise prohibited activities, such as removing vegetation for restoration or cultural uses, and livestock grazing to achieve vegetation conditions that benefit birds. The review process for such requests enables OWEB staff to confirm that the proposed uses, which could be detrimental to the conservation values, are carried out in a manner that is consistent with the purpose of the easement.

Management Plan

The management plan becomes a driving force of the property's use under the easement. The management plan outlines in detail:

- How the conservation values will reach the restored future condition,
- The required timeline,
- What uses of the property are acceptable and under what conditions.

OWEB's management plan guidance is specifically called out in the easement language, and any management plan must conform to the version of this guidance in place at the time of development or any future revision. Grantees may propose management plan revisions at any time, including changes to their restoration outcomes or timeline. Change requests are sent by email, or via a revised management plan, to OWEB staff, who then determine what is reasonable in the context of what was proposed in the grant application, circumstances that resulted in the change request, and any other applicable factors.

OWEB management plan guidance requires, among other more administrative information, the following:

- A description of the opportunities and challenges the plan addresses, the desired outcomes from implementation of the plan, and the timeframe for the desired outcomes, along with commitments for the active management necessary to achieve those outcomes.
- Inventories of natural resource, social, and economic information for identification of resource concerns and facilitation of the planning process. The data must be summarized and used to prioritize resource concerns for restoration, enhancement, or maintenance, considering biodiversity value or rarity, significance in regional conservation plans, and long-term viability at the property (for example, identification and prioritization of threats to conservation values factoring in severity, scope, and/or irreversibility).
- An identification and description of the desired future conditions for the property, specifically what it is expected to look like at the end of the term of the management plan. The planning process for large-scale restoration may yield information that necessitates changes to the desired future conditions and OWEB expects that such changes will result in a restoration scope and scale that are as consistent with the initial restoration intent as practical.
- Priority management strategies that serve as a framework for achieving the desired future conditions for the property, including maintaining current conservation values as appropriate.
- Development and consideration of alternative strategies to solve resource concerns. If the property will undergo large-scale restoration, developing alternative strategies and identifying the preferred alternative may best be completed as part of

the restoration design process. In that case, the management plan should state that the restoration design will contain the alternatives.

- A schedule of operations, listing actions organized by management strategy. The schedule includes the specific resource concerns, the management practices to address the resource concerns, the timeframe in which each action will be started and finished, who will be responsible for implementation, and funding sources. When significant restoration planning and design work are necessary, the management plan must include actions and an implementation plan and schedule for such work. The management plan must also specify that the grantee will obtain OWEB review and approval of the restoration designs when they are complete. As a condition of management plan approval, OWEB may require a plan update to incorporate the restoration implementation plan and schedule if that information is not clear in the restoration design itself. In such case, the final restoration design should be appended to the management plan or incorporated by reference.
- Description of what will be monitored and maintained, the frequency and duration of field monitoring, the monitoring protocols, description of how monitoring will be analyzed and summarized, process by which management actions will be adapted as necessary to ensure success (including consultation with OWEB), and identification of maintenance actions that will be taken. The implementation of management actions should be evaluated for effectiveness on a schedule determined to be appropriate for the actions. The evaluation should determine whether the current management is solving the resource concerns, and if not, how the management needs to be adjusted. The extent and complexity of monitoring can vary, depending on the management issues facing the property, the complexity of the property's ecological systems, and other factors.