



Oregon

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November 23, 2011

TO: Land Conservation and Development Commission

FROM: Jim Rue, Acting Director
Katherine Daniels, Farm and Forest Lands Specialist

SUBJECT: **Agenda Item 7, December 7-9, 2011 LCDC Meeting**

**POSSIBLE ADOPTION OF AMENDMENTS TO ADMINISTRATIVE RULES:
OAR CHAPTER 660, DIVISION 33, SPECIFIC TO
SOILS ASSESSMENT OF AGRICULTURAL LAND**

I. SUMMARY

The commission is asked to consider the proposed adoption of amendments to OAR 660-033-0030. The proposed amendments would implement House Bill 3647 (2010) and create a new process for assessing agricultural land capability where published capability ratings are challenged.

II. RECOMMENDED ACTION

The department recommends that the commission review and discuss each of the major components of the proposed rule amendments as described in section IV of this staff report, and adopt the proposed revisions to OAR 660-033-0030.

III. BACKGROUND

This matter originally came before the commission on October 6, 2011. At the October hearing, the commission listened to the staff presentation and recommendations, received public testimony and discussed various aspects of the proposed rule amendments. Rather than take action, the commission directed staff to continue to refine the proposed rule amendments to respond to concerns that were raised in public testimony. The commission then closed the public hearing and continued the agenda item to the December 7-9 meeting. Staff has made several changes to the proposed rule amendments intended to respond to concerns that were raised, which are described in section IV.

IV. PROPOSED CHANGES TO DRAFT RULE AMENDMENTS

The proposed changes to the draft rule amendments at OAR 660-033-0030 respond to concerns raised at the October hearing with regard to contracting requirements. The proposed changes eliminate the state contracting process and substitute a more focused process for department review of soils assessments. The proposed changes can be summarized as follows:

- Deletion of the requirement that soils professionals contract with the state, including insurance provisions. Property owners will now contract directly with soils professionals. This was the single greatest issue of concern in the October testimony. It was viewed as a cumbersome process with little direct benefit to the parties involved.
- Clarification that written consent of property owner is required for submittal and release of soils assessments to a county and that trespass is not permitted. This also was a major concern raised by several people.
- Addition of a review and field check process for soils assessments prior to release to counties. Systematic sample reviews and field checks by a state-contracted soils professional of about 20 percent of soils assessments will provide practical information to counties and the auditing committee. Dropping the state contracting process (as described in the first bullet) will free up a portion of the administrative fee to be used for this purpose.
- Require a biennial re-application process. A biennial re-application process is less complicated than a “delisting” process where a negative committee audit occurs.
- Several proposed minor and housekeeping amendments to OAR 660-033-0030. These include minor corrections offered by department staff at the October meeting, minor corrections suggested by legal counsel and other minor wording changes.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS

The department recommends that the commission adopt the proposed amendments to OAR 660-033-0030 as noted in option 1 below.

1. I move the commission adopt revisions to OAR 660-033-0030 as proposed by the department and contained in this staff report.
2. I move the commission adopt revisions to OAR 660-033-0030 as proposed by the department and as further amended by the commission at this meeting.

ATTACHMENTS

- A. Proposed amendments to OAR 660-033-0030
- B. October 6-7 staff report
- C. House Bill 3647

1 **660-033-0030**

2 **Identifying Agricultural Land**

3
4 (1) All land defined as “agricultural land” in OAR 660-033-0020(1) shall be inventoried
5 as agricultural land.

6
7 (2) When a jurisdiction determines the predominant soil capability classification of a lot
8 or parcel it need only look to the land within the lot or parcel being inventoried.
9 However, whether land is “suitable for farm use” requires an inquiry into factors beyond
10 the mere identification of scientific soil classifications. The factors are listed in the
11 definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry
12 requires the consideration of conditions existing outside the lot or parcel being
13 inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for
14 farm use, Goal 3 nonetheless defines as agricultural “lands in other classes which are
15 necessary to permit farm practices to be undertaken on adjacent or nearby lands.” A
16 determination that a lot or parcel is not agricultural land requires findings supported by
17 substantial evidence that addresses each of the factors set forth in OAR 660-033-0020(1).

18
19 (3) Goal 3 attaches no significance to the ownership of a lot or parcel when determining
20 whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be
21 examined to the extent that a lot or parcel is either “suitable for farm use” or “necessary
22 to permit farm practices to be undertaken on adjacent or nearby lands” outside the lot or
23 parcel.

24
25 (4) When inventoried land satisfies the definition requirements of both agricultural land
26 and forest land, an exception is not required to show why one resource designation is
27 chosen over another. The plan need only document the factors that were used to select an
28 agricultural, forest, agricultural/forest, or other appropriate designation.

29
30 (5)(a) More detailed data on soil capability than is contained in the [U.S.D.A.] **USDA**
31 Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used
32 to define agricultural land. However, the more detailed soils data shall be related to the
33 NRCS land capability classification system.

34
35 **(b) If a person concludes that more detailed soils information than that contained in**
36 **the Internet soil survey of soil data and information produced by the National**
37 **Cooperative Soil Survey operated by the NRCS of the USDA as of January 2, 2012**
38 **would assist a county to make a better determination of whether land qualifies as**
39 **agricultural land, the person must request that the department arrange for an**
40 **assessment of the capability of the land by a professional soil classifier who is chosen**
41 **by the person, using the process described in section (9) of this rule.**

42
43 **(c) This section and section (9) of this rule apply to:**
44

1 **(A) A change to the designation of land planned and zoned for exclusive farm use,**
2 **forest or mixed farm-forest to a non-resource plan designation and zone on the basis**
3 **that such land is not agricultural land; and**

4
5 **(B) Excepting land use decisions under section (7) of this rule, any other proposed**
6 **land use decision in which more detailed data is used to demonstrate that land**
7 **planned and zoned for exclusive farm use does not meet the definition of**
8 **agricultural land under OAR 660-033-0020(1)(a)(A).**

9
10 **(d) This section and section (9) of this rule implement Oregon Laws 2010, chapter**
11 **44, section 1, effective on October 1, 2011. After this date, only those soils**
12 **assessments certified by the department under section (9) of this rule may be**
13 **considered by local governments in land use proceedings described in subsection (c)**
14 **of this section. However, a local government may consider soils assessments that**
15 **have been completed and submitted prior to October 1, 2011.**

16
17 **(e) This section and section (9) of this rule authorize a person to obtain additional**
18 **information for use in the determination of whether land qualifies as agricultural**
19 **land, but do not otherwise affect the process by which a county determines whether**
20 **land qualifies as agricultural land as defined by Goal 3 and OAR 660-033-0020.**

21
22 (6) Any county that adopted marginal lands provisions before January 1, 1993, may
23 continue to designate lands as “marginal lands” according to those provisions and criteria
24 in *former* ORS 197.247 (1991), as long as the county has not applied the provisions of
25 ORS 215.705 to 215.750 to lands zoned for exclusive farm use.

26
27 (7)(a) For the purposes of approving a land use application **on high-value farmland**
28 **under ORS 215.705, the county may change** the soil class, soil rating or other soil
29 designation of a specific lot or parcel if **the property owner:**

30
31 (A) [~~The property owner-s~~] **S**ubmits a statement of agreement from the NRCS that the
32 soil class, soil rating or other soil designation should be adjusted based on new
33 information; or

34
35 (B) Submits a report from a soils scientist whose credentials are acceptable to the Oregon
36 Department of Agriculture that the soil class, soil rating or other soil designation should
37 be changed; and

38
39 (C) Submits a statement from the Oregon Department of Agriculture that the Director of
40 Agriculture or the director’s designee has reviewed the report described in subsection
41 (7)(B) of this section and finds the analysis in the report to be soundly and scientifically
42 based.

43
44 (b) Soil classes, soil ratings or other soil designations used in or made pursuant to this
45 section are those of the NRCS Internet soil survey for that class, rating or designation
46 before November 4, 1993, except for changes made pursuant to subsection (a) of this

1 section. [By December 1, 1998, the department shall provide to all counties and other
2 interested persons a list of soils that qualify land as high value farmland under this
3 section.]
4

5 (8) For the purposes of approving a land use application **on high-value farmland** under
6 OAR 660-033-0090, 660-033-0120, 660-033-0130 and 660-033-0135, soil classes, soil
7 ratings or other soil designations used in or made pursuant to this definition are those of
8 the NRCS Internet survey as of January 2, 2012 for that class, rating or designation.
9

10 **(9) Soils Assessments by Professional Soil Classifiers.**

11
12 **(a) A “professional soil classifier” means any professional in good standing with the**
13 **Soil Science Society of America (SSSA) who has been certified by the SSSA to have**
14 **met the requirements as of October 1, 2011 for:**
15

16 **(A) Certified Professional Soil Classifier; or**

17
18 **(B) Certified Professional Soil Scientist, and who has been determined by an**
19 **independent panel of soils professionals as defined in subsection (h) of this section to**
20 **have:**
21

22 **(i) Completed five semester hours in soil genesis, morphology and classification;**

23
24 **(ii) At least five years of field experience in soils classification and mapping that**
25 **meets National Cooperative Soil Survey standards, as maintained by the NRCS or**
26 **three years of field experience if the applicant holds an MS or PhD degree; and**
27

28 **(iii) Demonstrated competence in practicing soils classification and mapping without**
29 **direct supervision, based on published SSSA standards.**
30

31 **(b) The department will develop, update quarterly and post a list of professional soil**
32 **classifiers (henceforth ‘soils professionals’) who are qualified to perform soils**
33 **assessments under this rule.**
34

35 **(A) Qualified soils professionals shall include those individuals who have either met**
36 **the requirements of subsection (a)(A) of this section or the requirements of**
37 **subsection (a)(B) of this section as determined by a majority vote of an independent**
38 **panel of soils professionals.**
39

40 **(i) A person must apply to the department for initial inclusion on the list described**
41 **in subsection (b) of this section.**
42

43 **(ii) Qualified soils professionals must reapply to the department for listing on a**
44 **biannual basis.**
45

1 **(B) A soils assessment auditing committee as defined in subsection (i) of this section**
2 **will periodically reevaluate qualifications of soils professionals by auditing soils**
3 **assessments, considering sample department reviews and field checks as described**
4 **in subsection (f) of this section and verifying continued good standing of soils**
5 **professionals with the SSSA.**
6

7 **(i) When reviewing applications for relisting, the department will consider the**
8 **recommendations of the auditing committee and make final determinations as to the**
9 **continued qualifications of soils professionals to perform soils assessments under**
10 **this rule.**
11

12 **(ii) The department will re-approve soils professionals for listing when audits,**
13 **sample reviews and field checks reveal a pattern of demonstrated competence in**
14 **practicing soils classification and mapping consistent with section (9)(a)(B)(iii) of**
15 **this rule, and when the SSSA verifies that the soils professional is in good standing**
16 **with the SSSA.**
17

18 **(c) A person requesting a soils assessment shall:**
19

20 **(A) Choose a soils professional from the posted list described in subsection (b) of**
21 **this section:**
22

23 **(B) Privately contract for a soils assessment to be prepared; and**
24

25 **(C) On completion of the soils assessment, submit to the department payment of a**
26 **non-refundable administrative fee to be established by the department as provided**
27 **in statute to meet department costs to administer this rule.**
28

29 **(d) On completion of the soils assessment, the selected soils professional shall submit**
30 **to the department:**
31

32 **(A) A Soils Assessment Submittal Form that includes the property owner's and soils**
33 **professional's authorized signatures and a liability waiver for the department; and**
34

35 **(B) A soils assessment that is soundly and scientifically based and that meets**
36 **reporting requirements as established by the department.**
37

38 **(e) The department shall deposit fees collected under this rule in the Soils**
39 **Assessment Fund established under Oregon Laws 2010, chapter 44, section 2.**
40

41 **(f) The department shall review the soils assessment by:**
42

43 **(A) Performing a completeness check for consistency with reporting requirements;**
44 **and**
45

1 **(B) Arranging for a person who meets the qualifications of ‘professional soil**
2 **classifier’ in subsection (a) of this section to conduct systematic sample reviews and**
3 **field checks of soils assessments and make a recommendation to the department as**
4 **to whether they are soundly and scientifically based.**

5
6 **(C) Within 30 days of the receipt of a soils assessment subject to review under this**
7 **subsection, the department shall determine whether the soils assessment is soundly**
8 **and scientifically based. Where soils assessments are determined not to be soundly**
9 **and scientifically based, the department will provide an opportunity to the soils**
10 **professional to correct any noted deficiencies. Where noted deficiencies are not**
11 **corrected to the satisfaction of the department, written notification of the noted**
12 **deficiencies will be provided to the soils professional, property owner and person**
13 **who requested the soils assessment.**

14
15 **(g) A soils assessment produced under this rule is not a public record, as defined in**
16 **ORS 192.410, unless the person requesting the assessment utilizes the assessment in**
17 **a land use proceeding. If the person decides to utilize a soils assessment produced**
18 **under this section in a land use proceeding, the person shall inform the department**
19 **and consent to the release by the department of certified copies of all assessments**
20 **produced under this section regarding the land to the local government conducting**
21 **the land use proceeding. The department may not disclose a soils assessment prior**
22 **to its utilization in a land use proceeding as described in this rule without written**
23 **consent of the person paying the fee for the assessment and the property owner.**

24
25 **(A) On receipt of written consent, the department shall release to the local**
26 **government all soils assessments produced under this rule as well as any**
27 **department notifications provided under subsection (f) of this section regarding**
28 **land to which the land use proceeding applies.**

29
30 **(h) As used in this rule, “Independent panel of soils professionals” means a**
31 **committee of three professionals appointed by the department that, quarterly or as**
32 **needed, reviews and makes determinations regarding the qualifications of**
33 **individuals seeking to be listed as soils professionals to perform soils analyses.**

34
35 **(A) Such panel shall consist of:**

36
37 **(i) A member of the SSSA;**

38
39 **(ii) The Oregon State Soil Scientist; and**

40
41 **(iii) An Oregon college or university soils professional.**

42
43 **(B) Panel members shall meet the qualifications of professional soil classifiers as**
44 **defined in this rule or shall have experience mapping and teaching soil genesis,**
45 **morphology and classification in a college or university setting.**

1 **(C) The department’s farm and forest lands specialist shall serve as staff to the**
2 **panel.**

3
4 **(D) In reviewing qualifications of applicants with respect to required semester hours**
5 **of academic study under section (9)(a)(A)(i) of this rule, panel members may adjust**
6 **for differences in academic calendars.**

7
8 **(i) As used in this rule, “Soils assessment auditing committee” means a group of**
9 **three professionals that, annually or as needed, reviews and makes**
10 **recommendations to the department regarding the continuing qualifications of soils**
11 **professionals to perform soils analyses under this rule.**

12
13 **(A) Committee members shall be appointed by the independent panel of soils**
14 **professionals and shall meet the qualifications of professional soil classifier as**
15 **defined in section (9)(a) of this rule.**

16
17 **(B) The department’s farm and forest lands specialist shall serve as staff to the**
18 **committee.**

19
20 **(j) As used in this rule, “person” shall have the meaning set forth in ORS**
21 **197.015(18).**



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September 23, 2011

TO: Land Conservation and Development Commission (LCDC)

FROM: Katherine Daniels, Farm and Forest Lands Specialist

SUBJECT: **Agenda Item 5, October 6-7, 2011 LCDC Meeting**

PUBLIC HEARING AND POSSIBLE ADOPTION OF AMENDMENTS TO ADMINISTRATIVE RULES: OAR 660, DIVISION 33 SOILS ASSESSMENT OF AGRICULTURAL LAND

I. SUMMARY

The Land Conservation and Development Commission (LCDC) will consider the proposed adoption of amendments to OAR 660-033-0030 regarding soils assessment of farmland. The proposed rule amendments would implement House Bill 3647 (2010) and create a new process for assessing agricultural land capability. HB 3647 requires that when a person wishes to challenge the published soil capability ratings of the Natural Resources Conservation Service, they must request that the department arrange for a soils assessment by a “professional soil classifier” in good standing with the Soil Science Society of America (SSSA). The bill authorizes the department to charge a fee to meet the costs of assessing the soils and administrative costs, to be deposited in a Soils Assessment Fund, from which payment will be made to contracted soil classifiers.

II. BACKGROUND

HB 3647 was intended to ensure that consultants who assess agricultural soils have the necessary field and mapping experience to do this work. The bill was also intended to reduce potential conflicts of interest that can occur when consultants are secured directly through landowners. Finally, local governments rarely have staff that are qualified to review and evaluate soils reports. For this reason, virtually all such reports are given great deference at the local level and are the primary basis for many rezonings from agricultural use to various non-resource uses, as well as many approvals of nonfarm dwellings and nonfarm land divisions. All of these issues were recognized by the Legislature when it passed HB 3647 in 2010.

The Soil Science Society of America is the nationally-recognized organization that evaluates and certifies professional soil scientists and soil classifiers who meet specific educational and experience requirements. Certified soil classifiers must have field experience classifying and mapping soils, while certified soil scientists do not necessarily have these qualifications. While HB 3647 calls for the new process to use “professional soil classifiers,” the SSSA will not be

certifying new soil classifiers as of January 1, 2012. To maintain the intent of HB 3647 to use soils professionals with adequate field classification and mapping experience, the department recommends that proposed rule amendments allow certified soil scientists with equivalent education and experience as soil classifiers to also be contracted by the department to perform soils analysis.

The development of a qualified list of contracted and certified soil scientists will enable DLCD to provide landowners with a list of soils professionals from which they can choose. Landowners may entertain bids and select the bid of their choice. County planning staffs can be better assured of reviewing soils reports from qualified professionals. Staff outreach to county planning departments indicates support for HB 3647 and this rulemaking.

At its June 22, 2011 meeting, the commission authorized the appointment of a rules advisory committee to assist department staff in the development of draft rule amendments. Members were appointed including: a self-employed certified soil classifier, a county planning director, and representatives of the SSSA, the Department of Agriculture, 1000 Friends of Oregon and the U.S. Natural Resources Conservation Service. This committee met twice and its recommendations are substantially included in the attached recommended rule amendments.

In summary, the proposed rule amendments:

- 1) Define the qualifications of a “professional soil classifier”
- 2) Authorize an independent panel of soils professionals to determine qualifications of applicants
- 3) Describe a process for qualifying applicants to contract with the department
- 4) Describe a process for landowners to request a soils assessment
- 5) Describe a process for contractors to submit to the department for payment
- 6) Describe a process for the release of soils assessments to local governments
- 7) Authorize a soils assessment auditing committee to periodically assess soils reports and reevaluate qualifications of contractors

III. PROCUREMENT OF CONTRACTED SERVICES

Department planning staff is coordinating with operations staff and the Department of Administrative Services to establish a procurement process for the contracted services of soils professionals. The Soil Science Society of America has assisted in this process by notifying all currently-certified soil scientists and soil classifiers residing in Oregon, Washington, Idaho and California on August 29th of the opportunity to apply to contract with the department. Operations staff arranged for a webinar on September 7th to assist applicants in the application process. ORPIN (Oregon Procurement Information Network) will accept applications to contract with the department from September 20th to September 28th. Part of the application includes a prequalification agreement that applicants are asked to sign. On September 29th applications will be forwarded to the independent panel of soils professionals (described in rule), for its review and determination of qualifying applicants. On receipt of the panel’s determinations, operations staff will confirm that the qualified applicants have submitted a prequalification agreement and

will advise the planning staff to post the names of qualifying soils professionals on the DLCD website. We anticipate having these names posted online prior to the commission's October 6-7 meeting.

IV. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS

Staff recommends that the commission adopt the proposed amendments to OAR 660-033-0030 as noted in option #1 below.

1. The commission may adopt the proposed rule amendments as drafted. In that case, the appropriate motion is: I move the commission adopt revisions to OAR 660-033-0030 as proposed by the department and contained in this staff report.
2. The commission may adopt the proposed rules with amendments by the commission, by motion, at this meeting. The appropriate motion would be: I move the commission adopt revisions to OAR 660-033-0030 as proposed by the department and as further amended by the commission at this meeting.

ATTACHMENTS

- A. Proposed amendments to OAR 660-033-0030
- B. HB 3647

75th OREGON LEGISLATIVE ASSEMBLY--2010 Special Session

Enrolled
House Bill 3647

Sponsored by COMMITTEE ON AGRICULTURE, NATURAL RESOURCES AND RURAL COMMUNITIES

CHAPTER

AN ACT

Relating to soil information; appropriating money; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) If a person concludes that more detailed soils information than that contained in the Internet soil survey of soil data and information produced by the National Cooperative Soil Survey operated by the Natural Resources Conservation Service of the United States Department of Agriculture would assist a county to make a better determination of whether land qualifies as agricultural land, the person must request that the Department of Land Conservation and Development arrange for an assessment of the capability of the land by a professional soil classifier who is:

- (a) Certified by and in good standing with the Soil Science Society of America; and
- (b) Chosen by the person.

(2) A soils assessment produced under this section is not a public record, as defined in ORS 192.410, unless the person requesting the assessment utilizes the assessment in a land use proceeding. If the person decides to utilize a soils assessment produced under this section in a land use proceeding, the person shall inform the Department of Land Conservation and Development and consent to the release by the department of certified copies of all assessments produced under this section regarding the land to the local government conducting the land use proceeding. The department:

- (a) Shall review soils assessments prepared under this section.
- (b) May not disclose a soils assessment prior to its utilization in a land use proceeding as described in this subsection without written consent of the person paying the fee for the assessment.
- (c) Shall release to the local government conducting a land use proceeding all soils assessments produced under this section regarding land to which the land use proceeding applies.

(3) Before arranging for a soils assessment under this section, the department shall charge and collect from the person requesting the assessment a fee in an amount intended to meet the costs of the department to assess the soils and administer this section.

(4) The department shall deposit fees collected under this section in the Soils Assessment Fund established under section 2 of this 2010 Act.

(5) This section authorizes a person to obtain additional information for use in the determination of whether land qualifies as agricultural land, but this section does not other-

wise affect the process by which a county determines whether land qualifies as agricultural land.

SECTION 2. The Soils Assessment Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Soils Assessment Fund shall be credited to the fund. Moneys in the fund are continuously appropriated to the Department of Land Conservation and Development to meet the costs of the department to assess soils under and to administer section 1 of this 2010 Act.

SECTION 3. (1) Section 1 of this 2010 Act becomes operative October 1, 2011.

(2) The Department of Land Conservation and Development may adopt rules and take any other actions before the operative date specified in subsection (1) of this section that are necessary to enable the department to exercise, on and after the operative date specified in subsection (1) of this section, the duties, functions and powers of the department pursuant to section 1 of this 2010 Act.

SECTION 4. This 2010 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2010 Act takes effect on its passage.

Passed by House February 12, 2010

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Chief Clerk of House

.....
Speaker of House

Passed by Senate February 20, 2010

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President of Senate

Received by Governor:

.....M.,....., 2010

Approved:

.....M.,....., 2010

.....
Governor

Filed in Office of Secretary of State:

.....M.,....., 2010

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Secretary of State