Oregon Watershed Enhancement Board

Policy guidance to clarify eligible uses of OWEB funds related to mitigation projects and funds

Effective Date: **April 27, 2009**

Approved By: Tom Byler, Executive Director

Background

In 2004, the OWEB Board adopted an administrative rule that states:

> "*The Board will not consider:*
> *(3) A watershed improvement project constructed solely to comply with a state or federal agency enforcement order, legal judgment or mitigation requirement;...*" (OAR 695-010-0040)

This rule was adopted to prevent the use of OWEB funds to satisfy a legal obligation of another party. The staff discussion before the Board on this issue beginning in January of 2008, focused on the desire to prevent the use of OWEB funds from subsidizing development that is required to "mitigate" for an environmental alteration. The Board discussion distinguished between direct permit or other legal requirements (e.g. DSL removal-fill permit requirement, EPA enforcement order, or judicial order to restore a site as part of a legal settlement, etc.) and a general legal requirement (e.g. state law prohibits blocking anadromous fish passage) that is not specific to an individual action.

Since adoption of the rule, a number of questions have arisen concerning the intent and application of the rule. In 2005, OWEB asked the Department of Justice (DOJ) for advice on the applicability of the rule to local government mitigation requirements and whether the rule could be interpreted to make eligible for OWEB funding projects required by state or federal law where there has not been a specific or cited violation that must now be corrected. DOJ advised OWEB that projects required only by local government are eligible for funding because the rule only specifies state and federal actions, but if the local government requirement is imposed solely because of a state or federal requirement for mitigation, the project is ineligible for funding. DOJ also concluded that OWEB's rules (as currently written) make mitigation projects required by state or federal entities ineligible, regardless of whether there has been an order or judgment reflecting violations of law requiring mitigation.

The Board and staff decided in 2008 not to amend the rule, and instead provide additional guidance for staff, grantees, and grant reviewers. This policy guidance document further defines and clarifies eligibility for projects under OAR 695-010-0040.

OWEB Policy
The intent of the administrative rule is to fund voluntary, pro-active watershed improvement projects that aren't specifically required by the state or federal government. For the purposes of this policy, mitigation means activities designed specifically to compensate for the adverse ecological effects of a project or development activities, or to resolve violations of law.

The following are examples of project and funding situations and explanation regarding whether OWEB funding is eligible to participate in such situations.

A. Required Mitigation
Projects designed exclusively to compensate for the adverse ecological impacts of another project or development, or to address violations of law as required by a state or federal enforcement order, are not eligible for OWEB funding. Specific elements of a mitigation project that aren't required, for example the creation of additional habitat benefits for other species or additional acres of wetlands restored or created beyond those required, may be eligible for OWEB funding if an applicant clearly demonstrates the added value of OWEB's investment and has clear mechanisms for separately accounting for those additional habitat values or acres.

Examples: A developer needs to mitigate for the loss of 10 acres of wetlands. The developer is not eligible for OWEB funding to restore or enhance those 10 acres of wetlands. If however, the developer was working with a landowner who was interested in restoring 15 acres of wetland; the developer could pay the costs associated with the 10 acres required for mitigation and OWEB funding could be used to restore the remaining five acres.

The funding used to support the required mitigation is not eligible to be counted towards the required match for OWEB grants.

Examples: If the developer spends $100,000 to restore 10 wetland acres as compensatory mitigation and OWEB funds are proposed to support the restoration of an additional five acres, the $100,000 cannot be used as match for the OWEB grant.

B. Actions Required or Encouraged by State or Federal Law
Projects designed to comply with state or federal law, but where no specific mitigation requirement, judgment, or enforcement order exists are eligible for OWEB funding.

Examples: Fish passage projects designed to comply with ORS 509.580 – 509.910 and agricultural water quality projects designed to implement local agricultural water quality management plans (ORS 580.900 – 580.933) are eligible for OWEB funding. Voluntary actions developed to meet the objectives of an approved recovery plan under the Endangered Species Act (ESA) are eligible for OWEB funding.

If a state or federal agency initiates an enforcement order against a landowner under the Clean Water Act or ESA, the actions required by that enforcement order are ineligible for OWEB funding.

C. Local Requirements

The eligibility of projects designed to address a local government order, judgment, or mitigation requirement, if the requirement is solely a function of local government and does not originate in state or federal requirements are not addressed by the rule. Therefore projects designed to address local government mitigation requirements based solely on local government codes, and not state or federal requirements for such codes, are currently eligible for OWEB funding. However, if a county or city adopts a code to implement a state or federal requirement, then OWEB funds cannot be used on a project to meet those codes.

Staff believe this exception to the rule has only been used once. The exception is also inconsistent with Board intent to fund voluntary, value-added watershed improvement projects and the use of OWEB funds for this purpose is discouraged and will not be considered unless an applicant can demonstrate a compelling ecological benefit from the project.

> **Examples:** Wetland mitigation required as a condition of a local government development permit, because that mitigation is required under Oregon's removal-fill laws, is not eligible for OWEB funding. Mitigation required by a local government permit for impacts in an Environmental Conservation Zone (adopted to address state land use planning goals that do not require mitigation) is technically eligible for OWEB funding, but is not a priority of the Board.

D. Habitat Conservation Plans

A Habitat Conservation Plan (HCP) is used to obtain an incidental take permit from the U.S. Fish and Wildlife Service or NOAA Fisheries under the Endangered Species Act. Actions that meet the discretionary actions under an HCP, and the associated take permit, are eligible for OWEB funding. If the take permit requires specific mitigation actions, including the restoration of habitat values or protection of specific acres of habitat, those activities are ineligible for OWEB funds.

> **Examples:** A restoration project to restore Willamette Valley prairie habitat, which addresses the objectives of a Willamette Valley Prairie HCP, but is not required by the take permit or designed to generate mitigation credits, is eligible for OWEB funding.
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> A restoration project that is required to mitigate for three acres of Willamette Valley prairie habitat under an HCP and take permit is not eligible for OWEB funding.
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> A project proposes acquisition of a 20 acre property containing 10 acres of high quality Willamette Valley prairie habitat and then use of the property for mitigation required by the take permit. The acquisition of the property and protection of the 10 existing acres of habitat would be eligible for OWEB funding if the conservation easement held by OWEB specifically describes the habitat to be protected and has a detailed baseline report that maps the acreage, describes the quality of the habitat, and photo documents current conditions. However, the acres and habitat conditions protected with OWEB funds cannot be used for mitigation credits. Mitigation credits could only be generated under the take permit if additional acres are restored or habitat quality is improved above the OWEB easement baseline using other funding sources. The restoration or enhancement activities associated with the mitigation credits are ineligible for OWEB funding and cannot be used as match for the OWEB acquisition grant.

E. Mitigation or Settlement Funds

Where a legal judgment includes the creation of a fund for habitat restoration or protection purposes, but does not identify specific restoration or habitat mitigation projects, OWEB funds are eligible as cost share with, but not as an offset to, these funds to implement specific projects. Examples of these types of funds include Bonneville Power Administration (BPA) mitigation funds, Pelton-Round Butte settlement funds, and other negotiated settlements.

> **Examples:** The Pelton-Round Butte relicensing agreement required the licensee to establish a fund to accomplish two general outcomes, improved fish habitat and increased protected stream flow. The agreement specified a process and criteria, but not individual projects or specific quantified outcomes. Projects designed to meet the two outcomes and that are eligible under the fund are eligible for OWEB funds, and the Pelton-Round Butte funds may be used as match for an OWEB grant. Similarly, BPA mitigation funds aren't targeted to specific projects or property acquisitions and projects that are eligible for BPA funds are also eligible for OWEB funding, and the BPA funds may be used as match.
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> Alternatively, if a mitigation or settlement fund identified specific parcels to be protected or specific quantified restoration outcomes to be accomplished, these projects would be ineligible for OWEB funding. In this instance, OWEB could partner on the protection of additional habitat acres or stream flow or on restoration actions above and beyond those required by the fund, but not those activities needed to meet the specific outcomes required by the fund.

F. Wetland Mitigation Banking

By statute, "mitigation bank" means a wetland site, created, restored or enhanced to compensate for unavoidable adverse impacts (ORS 196.600(3)). OWEB funds are not eligible to be used to establish a mitigation bank to offset permitted environmental alterations. This is consistent with the January 2008 Oregon Interagency Recommendations developed by OWEB and a number of other state and federal agencies on the use of restoration funds and funding of mitigation banks. The Interagency Recommendations propose that agencies prohibit the use of restoration funds for the purpose of establishing or creating credits for a mitigation bank.

However, the Interagency Recommendations do propose that agencies allow restoration funds to be used with "payment to provide" or "fee-in-lieu" mitigation funds for watershed restoration projects. These funds are payments made to agencies in lieu of physical compensatory mitigation, which are then used to finance other voluntary conservation actions that result in resource benefits that equal or exceed the original mitigation obligation. OWEB funds could be used with these types of funds on a restoration projects in a similar fashion to the Required Mitigation situation described in Section A.

> **Examples:** A watershed council working with a landowner who is interested in restoring 15 acres of wetland could restore five acres using "fee-in-lieu" funds and apply to OWEB to fund the restoration of the remaining 10 acres. This is possible only if the 10 acres restored with OWEB funds are not used to establish a mitigation bank or generate additional mitigation credits and there is a accounting of the habitat values achieved through each funding source. The "fee-in-lieu" funds also cannot be used as match because they are required to achieve a specific mitigation obligation.

G. Conservation Banking

Conservation banks are permanently protected privately or publicly owned lands that are managed for endangered, threatened, and other at-risk species. A conservation bank is a market enterprise that offers landowners incentives to protect habitat, including selling habitat or species credits to parties who need to compensate for environmental impacts.

Since conservation banks have not yet been established in Oregon, OWEB will treat projects involving conservation banking on a case by case basis and will develop guidance as conservation banking policy and standards are more fully established.

H. Ecosystem Services Markets

Ecosystem services mean the environmental benefits arising from the conservation, management, and restoration of ecosystems. Currently there are individual markets for carbon, wetlands, habitat, open space, and hazard reduction. There is also an effort underway in Oregon to develop an integrated ecosystem services marketplace, but similar to conservation banking, the policy and standards have yet to be established. Further guidance needs to be developed related to leveraging OWEB funds with ecosystem services market funds.

> **Examples:** In the OWEB land acquisition program, the purchase price of the interest to be acquired is currently valued using standard real estate methods for both land and water right interests. Where OWEB funds are requested to protect existing riparian or oak savannah habitat through a land acquisition grant, those protected acres should not subsequently be used to create carbon credits using another market valuation of the interest already protected with OWEB funding. At some future time, OWEB may want to consider the market values of carbon sequestration in its due diligence evaluation of land acquisition grants to ensure that it is only paying fair market value for the ecosystem services acquired.