



Oregon Administrative Rules

Oregon Department of Fish and Wildlife

DIVISION 410

NATURAL RESOURCE LOSSES

635-410-0000

Authority of the Department of Fish and Wildlife

ORS 468B.060 provides the Oregon Department of Fish and Wildlife with authority to seek damages in a court of competent jurisdiction for the value of fish and wildlife injured or killed as the result of pollution or violation of the condition of any permit, and for all costs of restoring fish and wildlife production in affected areas. In addition, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) provides for recovery of damages to natural resources by the federal government and/or state governments. OAR 635-410-0000 through 635-410-0035 describe how the Department shall investigate, document and assess the value of natural resource losses pursuant to its authority under state and federal law. Nothing in these rules, however, shall preclude assessment of losses according to formulas set forth in CERCLA regulations.

Stat. Auth.: ORS 468B.060, ORS 496.138, ORS 496.146, ORS 496.750, ORS 506.119 & ORS 506.720

Stats. Implemented: ORS 468B.060, ORS 496.138, ORS 496.146, ORS 496.750, ORS 506.119 & ORS 506.720

Hist.: DFW 10-1998, f. & cert. ef. 2-5-98

635-410-0005

Policy

The Department shall:

- (1) Promptly investigate natural resource losses to determine the cause and extent of damage to fish and wildlife and their habitat.
- (2) Seek compensation from any persons responsible for the injury or destruction of fish, wildlife and habitat, and the costs of restoration of affected fish and wildlife production, including habitat restoration.
- (3) Work cooperatively with other state and federal agencies to:
 - (a) Eliminate sources of pollution or other environmental damage;
 - (b) Prevent natural resource losses through educational efforts and through enforcement of antipollution and other environmental laws; and
 - (c) Ensure that violations of antipollution and other environmental laws are pursued to the fullest extent of the law.

Stat. Auth.: ORS 468B.060, ORS 496.138, ORS 496.146, ORS 496.750, ORS 506.119 & ORS 506.720

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635-410-0010

Definitions

For the purposes of OAR 635-410-0000 through 635-410-0035:

- (1) "Affected area" means the area or areas in which natural resources have been directly or indirectly affected.
- (2) "Damages" means the amount of money sought by the Department in a court of competent jurisdiction for the value of fish and wildlife injured or destroyed, and for the cost of restoring fish and wildlife production, including habitat restoration.
- (3) "Department" means the Oregon Department of Fish and Wildlife.
- (4) "Fish and wildlife" means all fish, shellfish, intertidal animals, wild birds, amphibians, reptiles and wild mammals.
- (5) "Fish kill" means injury or destruction of fish or their productivity, regardless of cause.
- (6) "Natural resources" means land, fish, wildlife, biota, air or water.
- (7) "Natural resource losses" means any injury or destruction of fish, wildlife or their habitat, when caused by pollution or violation of the condition of any permit.
- (8) "Net economic value" means the sum of all net values for products and services associated with recreational and commercial uses of the affected natural resources, such as consumer surpluses and producer surpluses, plus the sum of all nonuse (or preservation) values, such as option and existence values.
- (9) "Pollution" means any such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any



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liquid, gaseous, solid, radioactive or other substance into any waters of the state which will or tends to, either by itself or in connection with any other substance, create a public nuisance, or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife, fish or other aquatic life or the habitat thereof.

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Stats. Implemented: ORS 468B.060, ORS 496.138, ORS 496.146, ORS 496.750, ORS 506.119 & ORS 506.720
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635-410-0015

Investigation Procedures

In investigating any natural resource loss, the Department shall use generally recognized and accepted scientific field, laboratory and analytical procedures to guide the field investigation of the natural resource loss, and specifically to:

- (1) Analyze and determine the cause(s) of losses;
- (2) Promptly respond to and mitigate losses;
- (3) Determine habitat or fish and wildlife management measures that may be required to restore fish and wildlife production in affected areas;
- (4) Determine violations of statute, rule or permits; and
- (5) Inform Department staff, other agencies, the general public and news media on the extent, nature, and causes of natural resource losses.

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635-410-0020

Safety Policy

It is the policy of the Department that no person shall enter potentially contaminated areas without the use of protective clothing and equipment as required by Oregon law. All personnel shall observe recommended precautions when working in chemically contaminated areas, and shall comply with applicable rules and statutes of the Oregon Occupational Health and Safety Administration.

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Hist.: DFW 10-1998, f. & cert. ef. 2-5-98

635-410-0025

Unauthorized Collection of Samples

No person shall collect injured or dead fish or wildlife without the express written consent of the Department. Any unauthorized collection may be considered tampering with evidence in violation of ORS 162.295, and illegal possession of wildlife, pursuant to ORS 498.002.

Stat. Auth.: ORS 468B.060, ORS 496.138, ORS 496.146, ORS 496.750, ORS 506.119 & ORS 506.720
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635-410-0030

Calculation of Numbers and Monetary Value of Fish and Wildlife, and Cost of Restoring Productivity Pursuant to ORS 468B.060

In calculating the number and monetary value of fish and wildlife injured or killed, as well as the cost of restoring productivity pursuant to ORS 468B.060, the Department shall use the following formula:

- (1) Fish Kills: Number of Fish.



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(a) If non-adult fish were injured or killed, the survival rate to the adult life stage, or catchable size in the case of game or food fish, for any given non-adult life stage shall be multiplied by the number of that life stage killed or injured to estimate adult equivalents.

(A) Survival rates specific to the population affected shall be used if information is available.

(B) Standard survival rates shall be assumed if no survival rates specific to the affected population are available.

(C) Standard survival rates (to catchable size) by life stage to be used for Pacific salmon, steelhead and resident trout species are provided as follows:

(i) Chinook -- Redd Size Eggs 4,500; Eggs 0.01; 0 Fry <60 mm 0.02; 0+ Fry >60 mm 0.05; 1+ 0.20; 2+ 1.00;

(ii) Steelhead -- Redd Size Eggs 3,300; Eggs 0.01; 0 Fry <60 mm 0.02; 0+ Fry >60 mm 0.06; 1+ 0.25; 2+ 1.00;

(iii) Coho -- Redd Size Eggs 2,800; Eggs 0.01; 0 Fry <60 mm 0.02; 0+ Fry >60 mm 0.06; 1+ 0.25; 2+ 1.00;

(iv) Searun Cutthroat -- Redd Size Eggs 1,750; Eggs 0.01; 0 Fry <60 mm 0.02; 0+ Fry >60 mm 0.08; 1+ 0.30; 2+ 1.00;

(v) Resident Trout 10-15 inches -- Redd Size Eggs 1,400; Eggs 0.02; 0 Fry <60 mm 0.03; 0+ Fry >60 mm 0.09; 1+ 0.35; 2+ 1.00;

(vi) Resident Trout 5-10 inches -- Redd Size Eggs 250; Eggs 0.03; 0 Fry <60 mm 0.06; 0+ Fry >60 mm 0.20; 1+ 0.70; 2+ 1.00.

(D) Standard survival rates (to catchable size) by life stage to be used for common warmwater game fish species are provided as follows:

(i) Bass -- Eggs (nest size assumed to be 5,000 eggs) 0.005; 0 Fry (Hatched) 0.020; 0+ Fry (Autumn) 0.15; 1+ 0.50; 2+ 1.00; 3+ 1.00;

(ii) Other -- Eggs (nest size assumed to be 5,000 eggs) 0.002; 0 Fry (Hatched) 0.008; 0+ Fry (Autumn) 0.08; 1+ 0.25; 2+ 0.50; 3+ 1.00.

(E) If the number of fish injured or killed in a juvenile life stage cannot be estimated effectively because of difficulty in observing or collecting dead and injured fish, the adult equivalent of that life stage shall be estimated as the greater of the number of harvestable (legal-sized) fish killed or injured, or the adult equivalent population of that life stage estimated for a comparable freshwater area.

(b) If the fish loss or associated habitat damage may reduce production of future generations, the loss of adults in subsequent generations prior to full restoration or recovery of adult production through artificial or natural means shall be estimated.

(c) The adult loss for each species shall be determined as the sum of actual adult losses, plus adult equivalents of non-adult life stages, plus loss of adults in subsequent generations.

(2) Fish Kills: Value of Fish. After calculating numbers lost as provided in 635-410-0030(1), the Department shall determine for each species the greatest value, after comparing values calculated by using each of the following methods (if applicable):

(a) Multiply the monetary value provided for any species identified in ORS 496.705(2)(a) through (k), by the adult loss.

(b) Multiply the monetary value provided for any food fish species identified in ORS 506.720 by the adult loss.

(c) Multiply the adult loss for any species otherwise protected by the wildlife laws (and not specifically provided for in ORS 496.705 or ORS 506.720 or the laws of the United States) by \$25.

(d) Determine the replacement cost for fish or wildlife species not specifically identified in ORS 496.705 or ORS 506.720 by using appropriate scientific, governmental or commercial information on costs of fish and wildlife propagation (e.g., the values from American Fisheries Society Monetary Values of Fish or vendor price lists). This cost shall be adjusted for inflation from the date of publication or documentation of the information used. The replacement cost shall include all administrative costs of the Department in direct support of the replacement or restocking effort.

(e) If hatchery replacement of an affected species is inappropriate pursuant to any applicable statute or rule, estimate all expected costs to the Department of obtaining, transporting and successfully introducing replacement wild stock. This estimate shall include administrative costs in direct support of the replacement effort.

(f) Estimate the reduction in net economic value associated with the affected fish and wildlife species from appropriate published or documented sources (e.g., agency reports or scientific publications), taking into account commercial, recreational, nonuse and other values associated with the resource. This estimate shall be adjusted for inflation from the date of publication or documentation of the information used.



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635-410-0035

Damage Assessment Procedure

- (1) The Department may seek recovery in damages for natural resource losses pursuant to CERCLA, either in lieu of or in addition to any recovery authorized by ORS 468B.060.
- (2) Pursuant to ORS 468B.060, the Department shall pursue recovery in the form of damages or, where desirable, in-kind compensation. The Department shall claim the full value of fish or wildlife injured or destroyed and, where applicable, the cost of restoring production in affected areas, including but not limited to habitat restoration.
- (3) Before initiating suit for damages in any court of competent jurisdiction, the Department shall serve a letter by registered or certified mail upon the responsible party demanding compensation for the value of the fish or wildlife injured or destroyed and the cost of restoring production in affected areas, including but not limited to habitat restoration.
- (4) If after 60 days from the date of mailing the responsible party fails or refuses to pay, the Department may seek recovery in a court of competent jurisdiction.
- (5) Any sums collected shall first be made available for habitat or population restoration work in the affected region.
- (6) In-kind compensation, in the form of habitat restoration or other actions beneficial to restoration of fish or wildlife production, may be acceptable to the Department, provided that, at a minimum:
 - (a) The services are commensurate in value with the monetary value of the compensation claim;
 - (b) The form of in-kind compensation is acceptable to both the Department's Habitat Conservation Division and the appropriate Regional Office.

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