



**OREGON ADMINISTRATIVE RULES
OREGON DEPARTMENT OF FISH AND WILDLIFE**

DIVISION 415

FISH AND WILDLIFE HABITAT MITIGATION POLICY

635-415-0000

Purpose

The purpose of these rules is to further the Wildlife Policy (ORS 496.012) and the Food Fish Management Policy (ORS 506.109) of the State of Oregon through the application of consistent goals and standards to mitigate impacts to fish and wildlife habitat caused by land and water development actions. The policy provides goals and standards for general application to individual development actions, and for the development of more detailed policies for specific classes of development actions or habitat types.

Stat. Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

635-415-0005

Definitions

For the purposes of OAR 635-415-0000 through 635-415-0025 only:

- (1) "Department" means the Oregon Department of Fish and Wildlife.
- (2) "Development Action" means any activity subject to regulation by local, state, or federal agencies that could result in the loss of fish and wildlife habitat. Development actions may include, but are not limited to, the planning, construction, and operational activities of local, state, and federal agencies. Development actions also include subsequent re-permitting for activities with new impacts or continued impacts that have not been mitigated consistent with current standards.
- (3) "Essential Habitat" means any habitat condition or set of habitat conditions which, if diminished in quality or quantity, would result in depletion of a fish or wildlife species.
- (4) "Fish and Wildlife" means all fish, shellfish, intertidal animals, wild birds, amphibians, reptiles, and wild mammals over which the Fish and Wildlife Commission has jurisdiction.
- (5) "Habitat" means the physical and biological conditions within the geographic range of occurrence of a species, extending over time, that affect the welfare of the species or any sub-population or members of the species.
- (6) "Habitat Quantity" means the amount of a given habitat type.
- (7) "Habitat Quality" means the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it.
- (8) "Habitat Type" means the classification of a site or area based on its dominant plant, soil, and water associations or other salient features (e.g. tidal influence, salinity, substrate, alkalinity, etc.) of value to the support and use by fish and wildlife.
- (9) "Home Range" means the area that a species traverses in the scope of normal life-cycle activities.
- (10) "Impact" means an adverse effect of a development action upon fish and wildlife habitat.
- (11) "Important Habitat" means any habitat recognized as a contributor to sustaining fish and wildlife populations on a physiographic province basis over time.
- (12) "In-kind Habitat Mitigation" means habitat mitigation measures which recreate similar habitat structure and function to that existing prior to the development action.
- (13) "In-proximity Habitat Mitigation" means habitat mitigation measures undertaken within or in proximity to areas affected by a development action. For the purposes of this policy, "in proximity to" means within the same home range, or watershed (depending on the species or population being considered) whichever will have the highest likelihood of benefiting fish and wildlife populations directly affected by the development.
- (14) "Irreplaceable" means that successful in-kind habitat mitigation to replace lost habitat quantity and/or quality is not feasible within an acceptable period of time or location, or involves an unacceptable level of risk or uncertainty, depending on the habitat under consideration and the fish and wildlife species or populations that are



OREGON ADMINISTRATIVE RULES
OREGON DEPARTMENT OF FISH AND WILDLIFE

affected. "Acceptable", for the purpose of this definition, means in a reasonable time frame to benefit the affected fish and wildlife species.

(15) "Limited habitat" means an amount insufficient or barely sufficient to sustain fish and wildlife populations over time.

(16) "Mitigation" means taking one or more of the following actions listed in order of priority:

(a) Avoiding the impact altogether by not taking a certain development action or parts of that action;

(b) Minimizing impacts by limiting the degree or magnitude of the development action and its implementation;

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the development action and by monitoring and taking appropriate corrective measures;

(e) Compensating for the impact by replacing or providing comparable substitute resources or environments.

(17) "Mitigation Bank" means fish and/or wildlife habitat that is restored, created, or enhanced for the purpose of selling habitat credits in exchange for anticipated unavoidable future habitat losses due to development actions.

(18) "Mitigation Plan" means a written plan or statement that thoroughly describes the manner in which the impact of a development action will be reduced or eliminated over time, avoided, and/or minimized; and the affected environment, including fish and wildlife habitat, monitored, restored, rehabilitated, repaired and/or replaced or otherwise compensated for in accordance with OAR 635-415-0010 of these rules.

(19) "Native" means fish and wildlife species, subspecies or populations that occur currently or historically in Oregon through natural (i.e. nonhuman) colonization or immigration, rather than by human action or intervention.

(20) "Nonnative" means a fish or wildlife species not native to Oregon; foreign or introduced.

(21) "Net Benefit" means an increase in overall in-proximity habitat quality or quantity after a development action and any subsequent mitigation measures have been completed and monitored.

(22) "Net Loss" means a loss of habitat quantity and/or habitat quality resulting from a development action despite mitigation measures having been taken.

(23) "Off-site" means outside the boundary of the development action.

(24) "Off-proximity Habitat Mitigation" means habitat mitigation measures undertaken outside the area that would constitute "in-proximity mitigation" but within the same physiographic province as the development action.

(25) "Out-of-kind Habitat Mitigation" means habitat mitigation measures which result in different habitat structure and function that may benefit fish and wildlife species other than those existing at the site prior to the development action.

(26) "Physiographic Province" means any one of ten major geographical areas within the State of Oregon based on differences in topography, climate, and vegetation as defined in the Oregon Wildlife Diversity Plan (OAR 635-100-0001 through 0040).

(27) "Project Life" means the period of time during which a development action is subject to regulation by local, state, or federal agencies.

(28) "Project Proponent" means any individual, corporation, association or agency or their delegated representative that proposes a development action.

(29) "Reliable Method" means a mitigation method that has been tested in areas with site factors similar to those affected by a development action and the area in which the mitigation action is being proposed and that has been found (e.g., through field trials, demonstration projects or scientific studies) to produce the habitat effects required to meet the mitigation goal for that action.

(30) "Site Factors" means climate, soil series, sediments, hydrology, salinity, pH, DO, plant community, fish and wildlife use, or other characteristics of an area that determine its capacity to produce vegetation or maintain habitat features valuable to fish and wildlife.

(31) "Watershed" means a drainage basin encompassing a stream, its tributaries, and associated uplands at the USGS 4th Field Hydrologic Unit level.

Stat. Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119



**OREGON ADMINISTRATIVE RULES
OREGON DEPARTMENT OF FISH AND WILDLIFE**

635-415-0010

Fish and Wildlife Habitat Mitigation Policy

It is the fish and wildlife habitat mitigation policy of the Oregon Department of Fish and Wildlife to require or recommend, depending upon the habitat protection and mitigation opportunities provided by specific statutes, mitigation for losses of fish and wildlife habitat resulting from development actions. Priority for mitigation actions shall be given to habitat for native fish and wildlife species. Mitigation actions for nonnative fish and wildlife species may not adversely affect habitat for native fish and wildlife.

Stat. Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

635-415-0015

Application of Fish and Wildlife Habitat Mitigation Policy

(1) The Department shall work with regulatory and planning agencies, land management agencies, private developers, operators, public interest groups, and the public to implement this Fish and Wildlife Habitat Mitigation Policy.

(2) The Department shall apply the requirements of this division when implementing its own development actions, and when developing recommendations to other state, federal, or local agencies regarding development actions for which mitigation for impacts to fish and wildlife habitat is authorized or required by federal, state, or local environmental laws or land use regulations.

(3) In applying this policy, the Department shall identify and utilize the habitat protection and mitigation opportunities provided by applicable federal, state, and local environmental laws and land use regulations, and shall participate throughout the duration of these regulatory processes to coordinate Department mitigation requirements or recommendations with those of other agencies. If the regulatory authority of an agency provides for mitigation of cumulative or historic losses, the Department shall apply the standards of OAR 635-415-0025 in making its recommendations.

(4) When making recommendations on local land use actions, the Department shall follow the provisions of its certified State Agency Coordination Program and OAR Chapter 635 Division 405.

(5) Unless required by statute, the Department may elect not to recommend or require mitigation for a development action if, in the opinion of the Department, the impacts to fish and wildlife habitat are expected to be inconsequential in either nature, extent, or duration; or if staff resources are not available.

(6) Nothing in this policy shall be construed to vest authority in the Department where no such statutory or regulatory authority has been granted.

Stat. Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

635-415-0020

Implementation of Department Habitat Mitigation Requirements

(1) The Department shall provide mitigation consistent with the goals and standards of OAR 635-415-0025 for Department development actions that impact fish and wildlife habitat.

(2) The Department shall require mitigation consistent with the goals and standards of OAR 635-415-0025 for development actions that impact fish and wildlife habitat for which the Department has statutory authority to require mitigation as a condition of a permit or order.

(3) The Department shall recommend mitigation consistent with the goals and standards of OAR 635-415-0025 for development actions which impact fish and wildlife habitat for other than Department actions when:

(a) Federal or state environmental laws or land use regulations authorize or require mitigation for impacts to fish and wildlife; or

(b) Local environmental laws or land use regulations authorize or require mitigation for impacts to fish and wildlife habitat; or



OREGON ADMINISTRATIVE RULES
OREGON DEPARTMENT OF FISH AND WILDLIFE

(c) The proposed development action requires either an amendment to an acknowledged comprehensive plan or land use regulation relating to fish and wildlife habitat protection, or adoption of a new land use regulation relating to fish and wildlife habitat protection, and the Department believes that mitigation is necessary to comply with Statewide Planning Goal 5 or other applicable statewide planning goal requirements for fish and wildlife habitat protection.

(4) The Department's recommendations or requirements for mitigating the impacts of a development action shall be based on the following considerations:

(a) The location, physical and operational characteristics, and duration of the proposed development action; and

(b) The alternatives to the proposed development action; and

(c) The fish and wildlife species and habitats which will be affected by the proposed development action; and

(d) The nature, extent, and duration of impacts expected to result from the proposed development action.

(5) The Department shall require the project proponent to prepare a written mitigation plan approved by the Department if required by an ODFW implemented statute; or recommend or require a written plan approved by the Department if the impacts of the proposed development action may, in the opinion of the Department, be so significant in nature, extent, or duration that mitigation measures to achieve the goals and standards of OAR 635-415-0025 cannot be identified without the evaluation that would be provided in a written mitigation plan.

(6) The Department may recommend or require the posting of a bond, or other financial instrument acceptable to the Department, to cover the cost of mitigation actions based on the nature, extent, and duration of the impact and/or the risk of the mitigation plan not achieving mitigation goals.

(7) The Department may consider the use of mitigation banks or payment-to-provide mitigation based on the nature, extent, and duration of the impact and/or the risk of the mitigation plan not achieving mitigation goals.

(a) The Department may consider the use of mitigation banks and payment-to-provide mitigation only for habitat categories two through six and only if they are consistent with the mitigation goals and standards identified in OAR 635-415-0025.

(b) The amount of payment-to-provide mitigation, recommended or required, shall include at a minimum the cost of property acquisition, mitigation actions, maintenance, monitoring, and any other actions needed for the long-term protection and management of the mitigation site.

(8) In addition to any other information that may be required by law, a written mitigation plan prepared for the Department shall:

(a) Include the information required in OAR 635-415-0020(4)(a)-(d); and

(b) Describe the mitigation actions which shall be taken to achieve the fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025; and

(c) Describe and map the location of the development action and mitigation actions including the latitude and longitude, township, range, section, quartersection and county; and

(d) Complement and not diminish mitigation provided for previous development actions; and

(e) Include protocols and methods, and a reporting schedule for monitoring the effectiveness of mitigation measures. Monitoring efforts shall continue for a duration and at a frequency needed to ensure that the goals and standards in OAR 635-415-0025 are met, unless the Department determines that no significant benefit would result from such monitoring; and

(f) Provide for future modification of mitigation measures that may be required to meet the goals and standards of OAR 635-415-0025; and

(g) Be effective throughout the project life or the duration of project impacts whichever is greater.

(h) Contain mitigation plan performance measures including:

(A) Success Criteria. The mitigation plan must clearly define the methods to meet mitigation goals and standards and list the criteria for measuring success;

(B) Criteria and a timeline for formal determination that the mitigation goals and standards have been met;

(C) Provisions for long-term protection and management of the site if appropriate;

(D) A reporting schedule for identifying progress toward achieving the mitigation goals and standards and any modification of mitigation measures. Mitigation goals and standards must be achieved within a reasonable time frame to benefit the affected fish and wildlife species.



OREGON ADMINISTRATIVE RULES
OREGON DEPARTMENT OF FISH AND WILDLIFE

(9) The requirement for a mitigation plan pursuant to OAR 635-415-0020(8) may, at the discretion of the Department, be partially or entirely fulfilled by incorporation of environmental assessments or environmental impact statements prepared for the proposed development action; or by local government land use regulations which implement the requirements of Statewide Planning Goals 5, 8, 15, 16, or 17 pertaining to fish and wildlife habitat protection.

(10) The project proponent is responsible for the expenses of developing, evaluating, and implementing the mitigation plan and monitoring the mitigation site; however, to the extent that available resources allow, the Department may take one or more of the following actions to assist in the development of a mitigation plan:

- (a) Identify fish and wildlife species and habitats to be affected by the proposed development action;
- (b) Determine the Habitat Categories that are likely to be affected by the proposed development action;
- (c) Identify the nature, extent, and duration of potential impacts upon fish and wildlife habitat resulting from the proposed development action;
- (d) Identify mitigation measures to achieve the goals and standards of OAR 635-415-0025.
- (e) Furnish any information or counsel to further the purpose of OAR Chapter 635 Division 415

Stat. Auth.: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.138, ORS 496.171, ORS 506.109 & ORS 506.119

635-415-0025

Implementation of Department Habitat Mitigation Recommendations

(1) "Habitat Category 1" is irreplaceable, essential habitat for a fish or wildlife species, population, or a unique assemblage of species and is limited on either a physiographic province or site-specific basis, depending on the individual species, population or unique assemblage.

(a) The mitigation goal for Category 1 habitat is no loss of either habitat quantity or quality.

(b) The Department shall act to protect Category 1 habitats described in this subsection by recommending or requiring:

(A) Avoidance of impacts through alternatives to the proposed development action; or

(B) No authorization of the proposed development action if impacts cannot be avoided.

(2) "Habitat Category 2" is essential habitat for a fish or wildlife species, population, or unique assemblage of species and is limited either on a physiographic province or site-specific basis depending on the individual species, population or unique assemblage.

(a) The mitigation goal if impacts are unavoidable, is no net loss of either habitat quantity or quality and to provide a net benefit of habitat quantity or quality.

(b) The Department shall act to achieve the mitigation goal for Category 2 habitat by recommending or requiring:

(A) Avoidance of impacts through alternatives to the proposed development action; or

(B) Mitigation of impacts, if unavoidable, through reliable in-kind, in-proximity habitat mitigation to achieve no net loss of either pre-development habitat quantity or quality. In addition, a net benefit of habitat quantity or quality must be provided. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.

(c) If neither 635-415-0025(2)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(3) "Habitat Category 3" is essential habitat for fish and wildlife, or important habitat for fish and wildlife that is limited either on a physiographic province or site-specific basis, depending on the individual species or population.

(a) The mitigation goal is no net loss of either habitat quantity or quality.

(b) The Department shall act to achieve the mitigation goal for Category 3 habitat by recommending or requiring:



OREGON ADMINISTRATIVE RULES
OREGON DEPARTMENT OF FISH AND WILDLIFE

(A) Avoidance of impacts through alternatives to the proposed development action; or
(B) Mitigation of impacts, if unavoidable, through reliable in-kind, in-proximity habitat mitigation to achieve no net loss in either pre-development habitat quantity or quality. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.

(c) If neither 635-415-0025(3)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(4) "Habitat Category 4" is important habitat for fish and wildlife species.

(a) The mitigation goal is no net loss in either existing habitat quantity or quality.

(b) The Department shall act to achieve the mitigation goal for Category 4 habitat by recommending or requiring:

(A) Avoidance of impacts through alternatives to the proposed development action; or

(B) Mitigation of impacts, if unavoidable, through reliable in-kind or out-of-kind, in-proximity or off-proximity habitat mitigation to achieve no net loss in either pre-development habitat quantity or quality. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.

(c) If neither 635-415-0025(4)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(5) "Habitat Category 5" is habitat for fish and wildlife having high potential to become either essential or important habitat.

(a) The mitigation goal, if impacts are unavoidable, is to provide a net benefit in habitat quantity or quality.

(b) The Department shall act to achieve the mitigation goal for Category 5 habitat by recommending or requiring:

(A) Avoidance of impacts through alternatives to the proposed development action; or

(B) Mitigation of impacts, if unavoidable, through actions that contribute to essential or important habitat.

(c) If neither 635-415-0025(5)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.

(6) "Habitat Category 6" is habitat that has low potential to become essential or important habitat for fish and wildlife.

(a) The mitigation goal is to minimize impacts.

(b) The Department shall act to achieve the mitigation goal for Category 6 habitat by recommending or requiring actions that minimize direct habitat loss and avoid impacts to off-site habitat.

(7) For proposed developments subject to this rule with impacts to greater sage-grouse habitat in Oregon, mitigation shall be addressed as described in OAR 635-140-0000 through 635-140-0025, except that any energy facility that has submitted a preliminary application for site certificate pursuant to ORS 469.300 et seq. on or before the effective date of this rule is exempt from fulfilling the avoidance test contained in 635-140-0025, Policy 2, subsections (a), (b), (c) and (d)(A). Other mitigation provisions contained in 635-140-0025, Policy 2, subsections (d)(B) and (e), and Policies 3 and 4 remain applicable.

Stat. Auth.: ORS 496.012, ORS 496.112, ORS 496.118, ORS 496.138, ORS 496.146, ORS 496.171, ORS 498.500, ORS 498.502, ORS 506.109 & ORS 506.119

Stats. Implemented: ORS 496.012, ORS 496.112, ORS 496.118, ORS 496.138, ORS 496.146, ORS 496.171, ORS 498.500, ORS 498.502, ORS 506.109 & ORS 506.119

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