



MEMORANDUM

November 1, 2007

TO: CLATSOP COUNTY

FROM: MICHELLE RUDD

RE: Comparison of Clatsop County Mitigation standards to those of the state and federal government

Each of the general concepts and provisions of the Standards Document is captured in state or federal regulations, or both, applicable to mitigation of impacts to waters of the state and waters of the United States. Those regulations, while far more detailed and exacting than the provisions of the Standards Document, are in no way inconsistent with Clatsop County requirements. Thus state and federal approval of a Bradwood Landing Mitigation Plan by DSL and the Corps as part of their review of a Joint Permit Application for the project will in all respects satisfy the more general requirements of the Standards Document.

The Standards Document requires that fill and dredging activities “shall be mitigated through project design and/or compensatory mitigation (creation, restoration or enhancement of another area) to ensure that the integrity of the estuary ecosystem is maintained.” Standards Document § 4.218(1). Similarly, DSL regulations provide that the general policy for mitigation is “creation, restoration or enhancement of an estuarine area to maintain the functional characteristics and processes of the estuary * * *.” OAR 141-085-0256.

Likewise, the hierarchy of “mitigation actions” is identical in the Standards Document, DSL regulations, and Corps regulations: each set of regulations require a project proponent to first avoid, then to minimize, then to rectify, reduce, or eliminate impacts, and only then to compensate for impacts through mitigation. *See* Standards Document § 4.218(2)(A)-(E); OAR 141-085-0029(7); 33 CFR § 320.4(r)(1).

Subsection (3) of the Standards Document sets forth a mechanism for establishing “Resource Category” determinations for impact sites and basing mitigation goals on those determinations. Similarly, DSL regulations provide detailed definitions of estuarine systems, lands, substrate types, vegetation, and habitat. *See* OAR 141-085-0246; OAR 141-085-0248; OAR 141-085-0250; OAR 141-085-0252; OAR 141-085-0254. In addition, like subsection (3) of the Standards Document, DSL rules incorporate a classification system for habitat types, *see* OAR 141-085-0254, assigning a “Relative Value” to estuarine habitats. OAR 141-085-0256 governs specific mitigation requirements based on such Relative Value, including preservation of “unique features” and a preference for “in-kind” or “like-kind” mitigation. Indeed, subsections (9) and (10) of the Standards Document provide that habitat types and mitigation trade

requirements will be established in coordination with state and federal agencies. DSL's "mitigation trade method" in OAR 141-085-0256 is expressly incorporated for establishing mitigation requirements for estuarine wetlands impacts. *See* Standards Document § 4.218(9).

Subsection (4) describes the contents of the "mitigation plan" required of permit applicants. As with subsection (3), DSL regulations mirror this subsection but contain more detailed plan requirements. For example, the requirements in Section 4.218(4)(A) and (B) are paralleled in OAR 141-085-0141(1)(c)(I)(ix); Section 4.218(4)(C) has its counterpart in OAR 141-085-0141(1)(c)(I)(ii); and the counterpart for Section 4.218(4)(D) is found at OAR 141-085-0141(1)(I)(v). Subsection (4)(E) has its parallel at OAR 141-085-0141(1)(b)(D), subsection (4)(F) at OAR 141-085-0141(1)(c)(M), and subsection (4)(G) at OAR 141-085-0141(1)(c)(I)(vi). Subsection (4)(H) and subsection (7) of the Standards Document require monitoring of mitigation sites. DSL regulations similarly provide detailed monitoring requirements. *See* OAR 141-085-0141(1)(c)(I)(vii) and OAR 141-085-0151. Both subsection (4)(I) and subsection (6) of the Standards Document require contingency plans for mitigation. Counterpart requirements are found at OAR 141-085-0141(1)(c)(I)(viii). Subsection (J) provides for "accountability requirements" such as bonding; both DSL regulations and federal regulations contain the same requirement. *See* OAR 141-085-0141(1)(c)(K); OAR 141-085-0176; 33 CFR § 325.4(d). Both the Standards Document and the DSL regulations contemplate that mitigation plans should define and be evaluated against "goals, objectives and performance standards." Standards Document § 4.218(4), (5); OAR 141-085-0141(1)(c)(A) (referring to mitigation "goals, objectives and success criteria").

The list of exempted activities in subsection (11) of the Standards Document is paralleled by state and federal regulation. *See* OAR 141-085-0010(76), (182); OAR 141-085-0020; 33 CFR § 323.4(a). Finally, subsections (15) through (25) of the Standards Document include provisions to coordinate mitigation within the comprehensive land use plan and other land use law. Both federal and state regulations similarly require compatibility with the land use requirements of local governments. OAR 141-085-0256(1), for example, provides that "[n]o mitigation proposal may be inconsistent with an acknowledged comprehensive land use plan and implementing ordinances * * *."

Given that Clatsop County's mitigation standards are fully met by compliance with the provisions imposed by the DSL under the Removal Fill Law and Corps in administering Section 404 of the Clean Water Act and approval of the Bradwood Landing project is properly conditioned upon compliance with a state and federally approved mitigation plan.