

Comparison of State and Federal Programs
Side-By-Side Comparison:
State Removal-Fill and Federal Section 404 Programs

Updated based upon Revised Final Draft of Removal-Fill Rules, July 3, 2002 (**proposed**)

July 17, 2002

State Removal Fill Program	Federal Clean Water Act Section 404 Program
Water Dependency	
<p>Issue</p> <p>Water dependency is a precondition for approving projects under the federal 404(b)(1) guidelines. The state has no “water dependency” test per se for freshwater wetlands, but nonwater dependent fills are strictly limited in estuaries (ORS 196.825(4)). The federal “water dependency” test is similar in effect to the <u>public interest tests</u> that are listed under proposed state rules at OAR 141-085-0029(3), and the <u>alternatives analysis</u> required under proposed 141-085-0029(4), when combined with the state statutory requirement that the Director consider <i>“The availability of alternative sites for the proposed fill.”</i> (ORS 196.825(3)(c)) Both the state and federal governments require that before a permit is issued the applicant must prove that there is no “practicable” alternative that would have less adverse effect (proposed OAR 141-085-0029(4)), and the state and federal definitions of “practicable” are identical (proposed OAR 141-085-0011(157)) <i>“Practicable” means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.</i> DSL’s premise is that federal sequencing in the 404(b)(1) guidelines results in no greater scrutiny than that applied under the Removal-Fill Law and rules. The Clean Water Act (CWA) (33 U.S.C. 466 et seq.) itself contains no standard for evaluating alternative sites for proposed fills, while the Removal-Fill Law does contain such a provision. Section 404 of the CWA is very broad and contains less detail than the Removal-Fill law. The federal 404 program places a heavy reliance on administrative rules and legal precedents. Section 404 never explicit calls out “wetlands “ for protection.</p>	
<p>State Standards</p> <p>The basic standard for permit decisions is consistency with <i>“The protection, conservation and best use of the water resources of this state.”</i> (ORS 196.805(1)) For fills, the legislature has also required a determination that the proposed fill would not <i>“unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and recreation.”</i> (ORS 196.825 (2))</p> <p>In applying those decisional standards to a fill permit application, the law requires that the director <i>“consider”</i> the eight factors listed in ORS 196.825, and the proposed rules require it (proposed OAR 141-085-0029). The legislature delegated to DSL the power to determine the weight to be given to these factors. Among the considerations are the economic cost to the public if the proposed fill is not accomplished (discussed below on the next page), and the availability of alternative sites to the proposed fill (ORS 196.825(3)(d)). We are certain that a review of the permit history of the Division would show that the state standards, while different, are applied by DSL in a manner as protective of the resource as if the 404(b)(1) guidelines had been applied. (continued)</p>	<p>Federal Standards</p> <p>The Corps requires the applicant to examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (404(b)(1) Guidelines, Sec. 230.10(a))</p> <p>The so-called “water dependency” provision in the guidelines creates a presumption that there are practicable alternatives to “non-water dependent” discharges proposed for special aquatic sites (i.e., wetlands). “Non-water dependent” discharges are those associated with activities which do not require access or proximity to or siting within the special aquatic site to fulfill their basic purpose. An example is a fill to create a restaurant site, since restaurants do not need to be in wetlands to fulfill their basic purpose of feeding people.</p> <p style="text-align: right;">(continued)</p>

(Water Dependency continued)

Factors to consider under **proposed** 141-085-0029(3):

(3) Public Interest Tests.

- (a) The Division shall consider the public need for the project including the social, economic or other public benefits likely to result from the project. If the applicant is a public body, the Division may rely on the public body's findings as to local public need and benefit;
- (b) The Division shall consider the economic cost to the public if the project is not accomplished;
- (c) The Division shall consider whether the project would interfere with public health and safety; and
- (d) The Division shall consider whether the project is compatible with the comprehensive plan.
- (e) The Division shall determine the degree to which, if at all, the project, will unreasonably interfere with the public trust uses of the waters of the state.
- (f) The Division shall determine the degree to which, if at all, the project is inconsistent with the protection, conservation and best use of the water resources of this state.

The Division will only issue an individual removal-fill permit only upon the Division's determination that a fill or removal project represents the practicable alternative that would have the least adverse impacts on the water resources and the public trust uses (**proposed** 141-085-0029(4)):

(4) In determining whether or not an alternative might be the practicable alternative with the least adverse impacts, the Division will consider the type, size and relative cost of the project, the condition of the water resources, and the public trust uses. The financial capabilities of the applicant is not the primary consideration, but rather the characteristics of the project and what constitutes a reasonable project expense are the most relevant factors in determining the most practicable alternative. The applicant bears the burden of providing the Division with all information necessary to make this determination.

(a) A practicable alternative is:

- (A) Capable of being done (i.e., feasible); and
- (B) Proposed on a site that is available to the applicant for the project purpose. Sites that are not presently owned or controlled by the applicant, but could be reasonably obtained, utilized, expanded, or managed to fulfill the basic purpose may be considered if otherwise feasible.

(b) No authorizations may be issued for a substantial fill in an estuary for a non-water dependent use unless the following apply:

- (A) The fill is for a public use;
- (B) The fill satisfies a public need that outweighs the harm, if any, to navigation, fishery and recreation; and
- (C) The project meets all other review standards of these rules.

(Water Dependency continued)

The mere fact that an alternative site may cost more does not necessarily mean it is not practicable (see Sec. 230.10(a)(2)). The applicant may rebut the presumption through a clear showing in a given case. At the same time, the presumption is intended to have the effect of forcing a hard look at the feasibility of using an environmentally preferable site.

Economics

Issue

Does the state program give greater weight to economic considerations than the federal government, and therefore offer less resource protection?

State Standards

When reviewing the state program for 404 transfer in 1996, EPA was concerned that the state statute (ORS 196.825) appeared to put the burden of proof on the Division for showing why the Director should not issue a permit, and for assessing the economic cost to the public if the proposed fill is not accomplished. The Removal-Fill Law requires that the Director “consider” certain factors (ORS 196.825[3][a-h]) including cost, and that the Legislature has delegated to the Division the power to determine the weight to be given to these factors.

EPA remained concerned about the legal adequacy of the state statute in this regard and the Division proposed a statutory change (no change has been made to date). Even without the statutory change, the state and federal programs are still equivalent. The rules for fill and removal permits (OAR 141-085-0029) contain criteria similar to EPA’s 404(b)(1) guidelines. The rules give great weight to environmental standards and none to purely economic standards. The “*practicable alternatives*” standard, which is identical to the federal standard, allows consideration of economics (OAR 141-85-0029(4)(a)). However, as stated above, the **proposed** rules at OAR 141-084-0029(4) state:

The financial capabilities of the applicant is not the primary consideration, but rather the characteristics of the project and what constitutes a reasonable project expense are the most relevant factors in determining the most practicable alternative.

Federal Standards

The U.S. Army Corps of Engineers Regulatory Program Regulations at 33 CFR Part 320.4(a) state as follows:

“...For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency’s 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see Section 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.” (emphasis added)

The regulations then continue by providing general criteria to be considered in evaluating every application. The regulations grant the district engineer a considerable amount of latitude in how the factors are weighed in the decision. For example, Section 320.4(3) states in part, as follows:

“The specific weight of each factor is determined by its relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal...”

State/Federal Mitigation & Sequencing Requirements

Issue

Are the state’s requirements for compensatory mitigation and proper sequencing in evaluating projects before compensatory mitigation is even considered, weaker than federal standards? Does the state have a “no net loss” policy for wetlands?

State Standards

• Policies

The 1989 Wetland Conservation Act contains findings and policies (ORS 196.668 and 196.672) pertaining to wetland conservation. ORS 196.672(4) and (5) contain a “no net loss” equivalent policy as follows:

“(4) Maintain a stable resource base of wetlands through the mitigation of losses of wetland resources and the adoption of the procedural mitigation standard currently used by federal agencies.

(5) Establish the opportunity to increase wetland resources by encouraging wetland restoration and creation where appropriate.”

• Alternatives Analysis

Sequencing:

“Mitigation” is defined in ORS 196.800(10) as follows (paraphrase). Reduction of adverse affects in the following order:

- Avoiding impact altogether
- Minimizing impacts
- Rectifying the impact
- Reducing or eliminating the impact
- Compensating for the impact

The **proposed** rules at OAR 141-085-0029 state as follows:

(5) **Mitigation.** The Division will only issue a permit for the practicable alternative with the least adverse impacts to the water resources upon the Division’s determination that the project includes appropriate and practicable steps to reduce (mitigate) reasonably expected adverse impacts of the project to the water resources and public trust uses.

Mitigation shall be considered in the following sequence:

(a) **Avoidance.** The Division shall first consider whether the project can be accomplished by avoiding removing material or placing fill material from or on waters of the state altogether (e.g., by moving the location of a proposed structure, either on-site or off-site, to avoid filling wetlands);

Federal Standards

• Policies

The Memorandum of Agreement between the EPA and the Department of the Army concerning mitigation under the 404(b)(1) guidelines (February 6, 1990) is the primary policy document used by the federal government to evaluate acceptable mitigation for standard permit applications.

- Establishes goal of “no net loss”
- Recognizes that no net loss may not be achieved in each and every permit decision

• Alternatives Analysis

Sequencing:

1. Avoid impacts to the maximum extent practicable.
2. Remaining impacts will then be mitigated to the extent practicable by requiring steps to minimize impacts.
3. Compensate for aquatic resource values.

May deviate from sequence when:

1. Mitigation part of comprehensive plan.
2. Needed to avoid environmental harm.
3. Result in environmental gain.
4. Result in insignificant loss.

Compensatory mitigation:

1. May not be used to reduce environmental impacts in the selection of least damaging alternative (i.e., cannot use mitigation to justify permitting an alternative with greater impacts).
2. “is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.”

Mitigation Policies

- On-site preferred to off-site

(b) **Minimization.** If the Division determines that the project cannot be accomplished without adverse impacts to water resources and/or public trust uses, the Division shall then consider whether limiting the degree or magnitude of the activity and its implementation can minimize adverse impacts (e.g., bio-engineered and non-structural streambank stabilization techniques, such as bank sloping and revegetation, shall be installed instead of solutions relying primarily on concrete and riprap, whenever technical feasible, suitable and environmentally preferable);

(c) **Rectification.** If the Division determines that impacts cannot be further minimized, the Division shall then consider whether repairing, rehabilitating or restoring (e.g., restoring site conditions along a pipeline corridor after installation is complete) the project area can rectify the impact;

(d) **Reduction or elimination.** When project impacts have been minimized and rectified to the maximum extent practicable, the Division will consider whether the impacts can be further reduced or eliminated over time by monitoring and taking appropriate corrective measures (e.g., assure that site restoration methods have effectively revegetated the site); and

(e) **Compensation.** The Division shall then consider how the applicant's proposal would compensate for impacts by replacing or providing comparable substitute wetland or water resources and/or public trust uses. **Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of practicable alternatives. (emphasis added)**

The state's **proposed** standards for compensatory freshwater wetland mitigation are more stringent and far more specific than those contained in the federal mitigation MOA (see **proposed** OAR 141-085-0100 to 0171).

- In-kind preferred to out-of-kind
- Restoration should be first choice
- "Preservation" acceptable only in exceptional circumstances
- Mitigation banking-may be acceptable
- 1 for 1 functional replacement minimum
- 1 for 1 acreage replacement is surrogate
- Margin of safety should be built-in