



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Oregon State Office
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Portland, Oregon 97208



In Reply Refer to:

9101/6720/7220 (OR-931) P

September 07, 2007

EMS TRANSMISSION 09/14/2007

Instruction Memorandum No. OR-2007-082

Expires: 9/30/2008

To: All District Managers

From: State Director, Oregon/Washington

Subject: Compliance with Oregon/Washington State Removal-Fill Statutes

Program Area: Fisheries, Hydrology, Engineering

Purpose: This Instruction Memorandum (IM) clarifies the Bureau of Land Management's (BLM) responsibility for complying with the Oregon and Washington state statutes pertaining to removal and fill permits for development activities in or near aquatic environments and wetlands.

Policy/Action: Prior to conducting activities in or near aquatic and wetland habitats, Oregon Districts shall comply with the [Oregon Revised Statute, Chapter 196.759-990](#), Removing and Filling of Material and the Spokane District shall submit a [Joint Aquatic Resources Permit Application](#) and obtain appropriate permits from the Washington Department of Fish and Wildlife and Washington Department of Ecology. Activities include, but are not limited to, aquatic restoration projects such as large wood, boulder, and gravel placement; bank restoration; construction and maintenance of roads and trails; and bridge and culvert placement.

Timeframe: This guidance is effective immediately.

Budget Impact: Minimal

Background: In Fiscal Year 2006 the State Office and District fisheries staff discussed whether or not the BLM was required to obtain the Division of State Lands (DSL) removal and fill permits, pursuant to the *Oregon Revised Statute 196.800* for activities in or near aquatic and wetland habitats. The topic became of mutual interest to the United States Department of Agriculture (USDA) Forest Service (FS) Region 6 (R6) and the BLM when both agencies collaborated on a programmatic Endangered Species Act consultation for aquatic restoration activities, including those involving removal and fill. The USDA Office of General Council (OGC), in consultation with the Department of the Interior (DOI) Regional Solicitor's office, researched whether sovereign immunity would negate the requirement for

R6 and the BLM to obtain state removal and fill permits for activities in or near aquatic or wetland habitats.

The Clean Water Act (CWA) contains two waivers of sovereign immunity: 1) a general waiver found at [33 USC 1323 \(a\)\(2\)](#) and 2) a waiver specifically applicable to the discharge of removal and fill material found at [33 USC 1344\(t\)](#). The latter section makes clear that, in addition to the removal and fill permits required from the Army Corps of Engineers (ACOE), a federal agency must also comply with “State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements.”

The 9th Circuit Court of Appeals addressed the above CWA sovereign immunity waivers in the context of the State of Washington removal and fill permit requirements under Washington’s Shoreline Management Act *Friends of the Earth v. U.S. Navy*, 841 F2d 927 (9th Cir. 1988). In that case the 9th Circuit found that the Navy was required to obtain the State removal and fill permit, even though it had obtained a CWA section 404 removal and fill permit from the ACOE.

While investigating this topic, the USDA OGC consulted counsel for the Federal Highway Administration (FHA) regarding whether or not it was appropriate for federal agencies to obtain removal and fill permits for activities in or near aquatic or wetland habitats. The FHA includes the Oregon DSL removal and fill permit on its project checklist. Based upon the U.S. Navy case and State statutes, FHA counsel agreed obtaining a permit is appropriate for federal activities with the potential to affect aquatic or wetland habitats.

The DOI Regional Solicitor’s office has reviewed the information and analysis provided by the USDA OGC and concurs that federal agencies including the BLM, must comply with both OR/WA statutes for removal and fill activities.

Manual/Handbook Sections Affected: None

Coordination: This IM has been coordinated with OR-931 and OR-932 staff, USDA FS R6 Office staff, USDA OGC, and the DOI Solicitor’s office.

Contact: If you have any questions, please contact Al Doelker, Fisheries Biologist, at 503-808-6067.

Districts with Unions are reminded to notify their unions of this Instruction Memorandum and satisfy any bargaining obligations before implementation. Your servicing Human Resources Office or Labor Relations Specialist can provide you assistance in this matter.

Signed by
Michael S. Mottice
Acting, Associate State Director

Authenticated by
Paj Shua Cha
Records Section

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