

## **Wetland Model Code for Goal 5 Safe Harbor Protection and Compliance State Law**

This model code is intended to assist jurisdictions implement a program to protect locally significant wetlands using the Goal 5 safe harbor option, OAR 660-23-0100(4). It also addresses a local government's obligation to notify DSL when a proposed activity may impact a wetland, OAR 215.418 and 227.350. The code incorporates compliance with the notice requirement in the local permit review process. The specific organization and language in the model code are not prescribed by statute or rule.

[        ] Yellow highlighted text should be reviewed and customized by each jurisdiction. Additionally, when modifying the code to meet the individual needs and concerns of a city or county the planning staff and local decision makers should preserve the following elements of the code to insure compliance with state law.

### **1) Specific exempt, allowed and prohibited uses for a safe harbor program to protect locally significant wetlands**

*OAR 660-23-0100(4)(b) states that local governments can,*

*(b) Adopt a safe harbor ordinance to protect significant wetlands consistent with this subsection, as follows:*

*(A) The protection ordinance shall place restrictions on grading, excavation, placement of fill, and vegetation removal other than perimeter mowing and other cutting necessary for hazard prevention; and*

*(B) The ordinance shall include a variance procedure to consider hardship variances, claims of map error verified by DSL, and reduction or removal of the restrictions under paragraph (A) of this subsection for any lands demonstrated to have been rendered not buildable by application of the ordinance.*

Safe harbor codes are very restrictive. The exempt and allowed activities are those that support enhancement of wetland functions and those that allow continuation of existing uses. Provision in the code for new uses that have an adverse impact of wetland functions need to be supported with an ESEE analysis.

### **2) Imprecision of the local wetland inventory boundary**

Because the LWI boundary only approximates the edge of a wetland, some added review process is needed to insure the code is applied where it needs to be applied. The model code attempts to describe a process that will result in the least cost for an applicant. A wetland delineation is only required when other no-cost or lower-cost options for demonstrating avoidance cannot be used.

### **3) Local government obligation for wetland notice to DSL**

City and counties are required to notify DSL when a proposed activity could impact a wetland. Oregon revised statute 215.418 for counties and 227.350 for cities state,

*(1) After the Division of State Lands has provided the [jurisdiction] with a copy of the applicable portions of the State-wide Wetlands Inventory, the county shall provide notice to the division, the applicant and the owner of record, within five working days of the acceptance of any complete application for the following that are wholly or partially within areas identified as wetlands on the State-wide Wetlands Inventory:*

- a. Subdivisions;*
- b. Building permits for new structures;*
- c. Other development permits and approvals that allow physical alteration of the land involving excavation and grading, including permits for removal or fill, or both, or development in floodplains and floodways;*
- d. Conditional use permits and variances that involve physical alterations to the land or construction of new structures; and*
- e. Planned unit development approvals.*

The model code attempts to provide a reasonable process to insure a city will meet its obligation to notify DSL given the imprecision of an LWI wetland boundary.

# MODEL WETLAND PROTECTION AREA ORDINANCE

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### **I. Wetland Protection Areas-Wetland Review Applicability**

- A. This ordinance is applicable to all wetlands within [jurisdiction], whether on the Local Wetland Inventory map or not.
- B. Wetland Review, as defined by this code, is applicable to development [or specify permits, including all that would potentially result in non-exempted activities] on parcels containing any wetland protection area(s); or where any portion of the proposed development is within 20 feet of wetland protection area(s) on adjacent parcels as shown on the LWI map.
- C. Unless otherwise stated, the [jurisdiction] shall apply the provisions of Sections I through XIII in conjunction and concurrently with the requirements of any other development permit being sought by an applicant. If no other permit is being sought the [Planning Director or designee] shall serve as the approving authority.

*Note: The 20 foot measurement is not a buffer or setback. It is an allowance for LWI map inaccuracy when the expense of a precise delineation may not be warranted. Also note that compliance with state and federal wetland regulations for all wetlands, mapped or unmapped, remains the legal responsibility of the landowner.*

### **II. Wetland Protection Area, Purpose**

The purposes of establishing a wetland protection area are:

- A. To implement the goals and policies of the [jurisdiction] Comprehensive Plan;
- B. To protect [jurisdiction's] wetland areas, thereby protecting the hydrologic and ecologic functions these areas provide for the community;
- C. To protect water quality and natural hydrology, to control erosion and sedimentation, and to reduce the adverse effects of flooding;
- D. To protect fish and wildlife habitat;
- E. To protect the amenity values and educational opportunities of [jurisdiction's] wetlands as community assets;

- F. To improve and promote coordination among local, state, and federal agencies regarding development activities in and near wetlands.

### **III. Wetland Protection Area, Definitions**

The following definitions shall apply to Sections I through **XIII**:

**Economic, Social, Environmental, Energy (ESEE) Analysis** – Analysis required of local governments when protection measures for Locally Significant Wetlands are developed to address the unique economic, social, environmental, and energy considerations within their community. ESEE “consequences” are the positive and negative economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. [See OAR 660-023-0040 for more detail on ESEE Decision Process.]

**Delineation** – A determination of wetland presence that includes marking the wetland boundaries on the ground and/or on a detailed map prepared by professional land survey or similar accurate methods. A delineation is a precise map and documentation of actual wetland boundaries on a parcel, whereas wetland boundaries identified on a local wetland inventory boundary are approximated with an accuracy target of 5 meters (approximately 16.5 feet) [See OAR 141-90-005 et seq. for specifications for wetland delineation reports.]

**Determination** – Means a decision of the presence or absence of wetlands. A determination made in the office using existing available information including maps and aerial photography is an “offsite” determination and is considered advisory only. An “onsite” determination involves site-specific data collection consistent with the 1987 US Army Corps of Engineers Wetlands Delineation Manual and Regional Supplements.

**Locally Significant Wetland** - Wetlands are determined to be Locally Significant Wetlands based on Oregon Administrative Rules for Identifying Significant Wetlands (OAR 141-86-300 through 141-86-350). If the assessed wetland unit provides “diverse” wildlife habitat, “intact” fish habitat, “intact” water quality function, or “intact” hydrologic control function, then the wetland is locally significant. Locally Significant Wetlands are identified on the **[jurisdiction]** Local Wetland Inventory as such. Locally Significant Wetlands also constitute the Wetland Protection Area (unless otherwise indicated in this ordinance).

**Local Wetlands Inventory (LWI)** - Maps and report adopted by **[jurisdiction]** entitled **[list name of report that inventories wetlands]** and any subsequent revisions as approved by the Oregon Department of State Lands. The LWI is a comprehensive survey and assessment of all wetlands over **[list minimum size (generally half acre)]** acre in size within the urbanizing area. This includes both locally significant wetlands, and wetlands that are not identified as locally significant. This also includes “probable wetlands,” which are areas noted during the course of the LWI field work that appear to meet, or do meet, wetland criteria but are small or of undetermined size, and are mapped as a point rather than a polygon on the LWI map.

**Oregon Freshwater Wetland Assessment Methodology (OFWAM)** - A wetland function and quality assessment methodology developed by the Oregon Department of State Lands to assess water quality, hydrologic control, fish habitat, and wildlife habitat.

**Wetlands not subject to Goal 5 protection** – All state jurisdictional wetlands, mapped or not, are subject to the state Removal-Fill Law administered by DSL. All wetlands are “potentially jurisdictional wetlands.” Wetlands on the Local Wetland Inventory map which are not identified as Locally Significant are considered “Other Potentially Jurisdictional Wetlands.” These wetlands are not subject to [jurisdiction] wetland protection area standards, but, like all wetland areas, are subject to DSL notice/review and potentially subject to DSL and the US Army Corps of Engineers permitting.

**Wetland Professional** - A professional with a background in wetland science and knowledgeable of the process for conducting wetland delineations and determinations.

**Wetland** - An area inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and which, under normal circumstances, does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

**Wetland Protection Area** - An area subject to the provisions of this chapter that is constituted by wetlands determined to be locally significant as shown on the Local Wetland Inventory (unless otherwise indicated). The wetland protection area extends 20 feet from the mapped LWI boundary unless an onsite or off site determination or wetland delineation allows for a more refined estimation of the wetland boundary (See Section VII(1).

#### **IV. Prohibited Activities within Wetland Protection Areas**

Except as exempted or allowed in this code, the following activities are prohibited within a wetland protection area:

1. Placement of new structures or impervious surfaces
2. Excavation, grading, fill, or removal of vegetation,
3. Expansion of areas of landscaping with non-native species, such as a lawn or garden, into the wetland protection area
4. Disposal or temporary storage of refuse, yard debris, or other material.
5. Discharge or direct runoff of untreated stormwater. [Consider locally outside of rule]
6. Any use not specifically allowed or exempted in Sections V and IV, or pursued through a variance under Section X.

#### **V. Exempted Activities within Wetland Protection Areas**

The following activities and continuation and/or maintenance thereof are exempted from all wetland protection area regulations, provided that any applicable state or federal permits are secured:

1. A continuation of any use, except those identified as Allowed uses under Section VI, that was lawfully existing on the date of adoption of this ordinance [insert date], may continue within a wetland protection area. Such use or development

- may continue at a similar level and manner as existed on the date of adoption of this ordinance per the standards for Non-Conforming Development in Chapter [site whatever code section for jurisdiction].
2. The maintenance and alteration of pre-existing ornamental landscaping so long as no additional native vegetation is disturbed. The provisions of this section shall not be affected by any change in ownership of properties containing a wetland protection area.
  3. Restoration and enhancement of native vegetation;
  4. Cutting and removal of trees which pose a hazard to life or property due to threat of falling;
  5. Cutting and removal of trees to establish and maintain defensible space for fire protection.
  6. Removal of non-native vegetation
  7. Maintenance and repair of existing utilities.
  8. Normal farm practices such as grazing, plowing, planting, cultivating, harvesting, and other practices under the review authority of ODA.

The following activities are also exempted from wetland protection area regulations, but are subject to state or federal permits:

9. Maintenance of existing drainage ways, ditches, or other structures, to maintain flow at original design capacity and mitigate upstream flooding, provided that management practices avoid sedimentation and impact to native vegetation, any spoils are placed in uplands, and any applicable state permits are obtained;
10. Emergency stream bank stabilization to remedy immediate threats to life or property. (Department of State Lands)
11. Wetland restoration and enhancement activities. (Department of State Lands)

## **VI. Allowed Activities within Wetland Protection Areas**

The following activities and maintenance thereof are allowed within a wetland protection area upon City review and approval and provided any applicable state or federal permits are secured:

1. Replacement of a permanent, legal, nonconforming structure in existence on the date of adoption of this ordinance with a structure on the same building footprint, or expansion of the original building footprint if it does not encroach into additional wetland area, and in accordance with the provisions of Sections [list sections of code related to nonconforming uses].
2. Installation of interpretive/educational displays and/or public pedestrian paths, as long as these do not present an obstruction that would increase flood velocity or intensity.
3. [Discussion of specific limited protection program addressing specific wetlands that had ESEE analysis done. Delete if no ESEE was performed].
4. New fencing may be permitted by the [Planning Director or designee] where the applicant demonstrates that the following criteria are satisfied:
  - a. The fencing does not affect the hydrology of the site;
  - b. The fencing does not present an obstruction that would increase flood velocity or intensity;

- c. Fish habitat is not adversely affected by the fencing;
- d. Applications for new fencing within a wetland protection area shall contain a scale drawing that clearly depicts the wetland area boundary on the wetland resource. [*Consider locally. The Safe Harbor rule makes no mention of fences*]

## **VII. Wetland Review-Submittal Requirements**

Where Wetland Review is applicable (see Section I) applicants shall submit the following materials (unless otherwise indicated):

1. A scale drawing that clearly depicts any LWI map wetland boundary within the subject parcel and any wetland within 20 feet of the development on an adjacent parcel, all surface water sources, existing trees and vegetation, property boundaries, and proposed site alterations including proposed excavation, fill, structures, and paved areas.
2. Written statement of compliance with approval criteria for any proposed Allowed activities (as identified for each activity in Section VI(1-?).
3. Demonstration of wetland protection area avoidance. The placement of structures or impervious surfaces, vegetation removal or grading within the vicinity of any wetland protection area shall require demonstration that all impact to the wetland shall be avoided. Avoidance can be demonstrated by *any one* of the following:
  - a. Keeping all development activity including vegetation removal and grading at least 20 feet from the edge of the wetland boundary shown on the LWI map;
  - b. Submitting an offsite determination, conducted by DSL, that concludes the proposed activities will occur outside the wetland; OR
  - c. Submitting an onsite determination, conducted by a qualified wetland professional, that concludes the proposed activities will occur outside the wetland protection area; OR
  - d. Submitting a current wetland delineation (completed within the last five years), certified by DSL, that shows the proposed activities will occur outside the wetland protection area.

Activities listed as “Allowed” under Section VI, and which are acknowledged to occur within a wetland protection area, do not require any “demonstration of avoidance” as per Section VII(1).

## **VIII. Approval Criteria**

In approving Allowed activities under Section VI, and/or ensuring compliance with Section IV (Prohibited activities), the approving authority shall base its decision on the following criteria in addition to the required criteria for any other permit or approval that is being sought. Approvals shall be based on compliance with the following criteria:

1. Demonstration of avoidance of impacts to wetland protection area as outlined under Section VII(1); or
2. The proposed project will not result in excavation or filling of a wetland or reduction of wetland area that has been identified as part of a wetland protection area, except as allowed in criteria outlined specifically under Section VI (1-?).

## **IX. Decision process, Approval period, Extensions**

[This section can be utilized as each jurisdiction chooses . Since each jurisdiction is nuanced in its processes. Things to consider would be whether all allowed uses can be approved by staff (i.e. Type I or Tier I), or if there is local desire for certain uses to be approved by PC or CC]

## **X. Variances**

- A. The *[Planning Commission or Hearings Officer]* shall be the approving authority for applications for variances to the Wetland Protection Area provisions. The procedures of chapter *[insert appropriate reference to the variance chapter]* shall be followed for approval of a variance except that the variance criteria of this section shall also apply.
- B. Mapping Error Variances and Corrections. The *[Planning Director or the Director's designee]* may correct the location of the wetland protection overlay zone when the applicant has shown that a mapping error has occurred and the error has been verified by the DSL. Delineations verified by DSL shall be used to automatically update and replace LWI mapping. No formal variance application or plan amendment is needed for map corrections where approved delineations are provided
- C. Hardship Variances. The *[Planning Commission or Hearings Officer]* may grant a variance to the provisions of this ordinance only when the applicant has shown that all of the following conditions exist: *[Standard variance suggestions, consider locally, including overlap with existing variance provisions]*
1. Through application of this ordinance, the property has been rendered not buildable;
  2. The applicant has exhausted all other options available under this chapter to relieve the hardship;
  3. The variance is the minimum necessary to afford relief;
  4. All state and federal permits required for authorization of wetland impacts are obtained.
  5. No permitted type of land use for the property with less impact on the wetland is feasible and reasonable;
  6. There is no feasible on-site alternative to the proposed activities, including but not necessarily limited to; reduction in size, density or intensity, phasing of project implementation, change in timing of activities, revision of road and lot layout, and/or related site planning considerations, that would allow a reasonable economic use with less adverse impacts
  7. The proposal utilizes to the maximum extent possible innovative construction, design, and development techniques, including pervious surfaces, which minimize to the greatest extent possible net loss of wetland functions and values;
  8. The area of disturbance is limited to the area that has the least practical impact on the wetland functions and values
- D. Alternative Hardship Review. The following scenarios provide an exemption from the standards outlined in Sections **IV and VI**: *[Suggested "clear and objective" variance provision, consider locally]*
1. The subject property contains less than 3,000 sq. feet of contiguous area outside of the wetland protection area; or
  2. The subject property contains 30,000 square feet or more, and proposed site disturbance is no more than 10 percent of the total lot area; or

3. The amount of allowable disturbance shall be that which will have the least practicable impact on the wetland area given the characteristics and context of the subject property and wetland area.

#### **XI. Notification and Coordination with State Agencies**

- A. The [jurisdiction] shall notify the Oregon Department of State Lands in writing of all applications to the [jurisdiction] for development activities - including development applications, building permits, and other development proposals - that occur in, or within 20 feet of, any wetland identified on the Local Wetlands Inventory map.
- B. When conducting a wetland review under this Chapter, the approving authority shall consider recommendations from the Oregon Department of Fish and Wildlife regarding OAR 635-415 "Fish and Wildlife Habitat Mitigation Policy." (Note: Recommendations from ODFW are advisory only.)

#### **XII. Unauthorized Alterations and Enforcement**

When a wetland has been altered in violation of this Chapter, enforcement shall be conducted as outlined in (site relevant Code). In instances where violations of Department of State Lands (DSL) requirements have occurred, DSL enforcement mechanisms apply. In some cases, both local and DSL enforcements may occur.

#### **XIII. Economic, Social, Environmental, Energy (ESEE) Provisions**

*Note to jurisdiction: A jurisdiction can develop the following section to outline for a Comprehensive Plan Amendment to undertake an ESEE analysis to identify allowed and prohibited activities that differ from those listed in section IV and VI.*

- A. Plan Amendment Option. Any owner of property affected by the wetland protection area may apply for a quasi-judicial comprehensive plan amendment. This amendment must be based on a specific development proposal. A change in the boundary of the wetland protection area or a change in the allowed uses within the wetland protection area must be adopted through a plan amendment process. A proposed amendment must be supported by an Environmental, Social, Economic and Energy (ESEE) consequences analysis prepared in accordance with OAR 660-23-040. If the application is approved, then the ESEE analysis shall be incorporated by reference into the [Jurisdiction] Comprehensive Plan, and the [Jurisdiction] Local Wetland Inventory map.

Plan amendment applications shall adhere to the following requirements:

1. The ESEE analysis must demonstrate to the ultimate satisfaction of the [jurisdiction] City/County Council that the adverse ESEE consequences of not allowing the conflicting use are sufficient to justify the loss, or partial loss, of the resource;
2. The ESEE analysis must consider existing opportunities for accommodating a conflicting use outside of the wetland protection area;