

**JUNE 20, 2001**

**TO: NEAL COENEN, OFFICE OF THE GOVERNOR**

**FROM: DICK BENNER, DIRECTOR**

**JEFFREY WEBER, SALMON RECOVERY SPECIALIST**

**CC: LCDC, DLCD MANAGERS**

**SUBJECT: 2001 OREGON PLAN ANNUAL REPORT AND EVALUATION**

Thanks for the opportunity to provide you with our evaluation of DLCD's accomplishments, and the challenges we face, under the *Oregon Plan for Salmon and Watersheds*. We think it is important to assess how the salmon recovery landscape as has evolved since we initiated the *Oregon Coastal Salmon Recovery Initiative* in late 1995. Certainly, we have made progress, but we are not now where we anticipated Oregon's initiative would bring us. Several themes have coalesced as we have continued to discuss the Oregon Plan amongst ourselves. In this memo we share with you our view of the most nagging challenges we face; we are ready to discuss these issues further with you at your convenience.

You will see from the enclosed annual report that DLCD's Oregon Plan measures are largely based on Statewide Planning Goals 5 and 16. Those goals contain provisions that are immediately pertinent to protecting aquatic habitat and watershed functions important to salmonids. They can be used, and in our opinion should be used, to conserve riparian and estuarine habitats and functions.

What is not immediately evident in our Oregon Plan measures is that the fundamental contribution of the statewide planning program to salmon recovery derives from planning goals that are not even related to aquatic habitat. Goals 3, 4, and 14—Agriculture Lands, Forest Lands, and Urbanization, respectively—are responsible for the basic *pattern* of land use in Oregon, whereby resource lands cannot be converted to non-resource uses without meeting several rigorous tests; and urban areas are circumscribed by a boundary beyond which urbanization cannot occur, again, without meeting rigorous state requirements. The land use pattern that results from Oregon's planning program essentially conserves aquatic habitat. Imagine the challenge of trying to restore healthy salmon populations in the Tualatin or the Clackamas or the Hood River basin in the absence of the urban growth boundaries. Sub-urbanization of entire river basins—which are now mostly reserved for agricultural and forestry uses use—would mean more roads, more culverts, more use of private vehicles, and more parking lots per person—all of which cause aquatic system degradation. Large-lot "sprawl" development invariably results in fragmentation of the landscape, including fragmentation of stream and riparian corridors. Unfortunately, there is very little in the "costs of sprawl" literature about the ecological costs of dispersed, as opposed to compact, development.

Certainly, there are consequences to stream systems from compact growth as well. However, we believe these consequences can be adequately addressed through land development strategies

and practices collectively referred to as “Low Impact Development.” In part because of this evaluation of our measures, we intend to begin to try to address, through technical assistance, the effects of impervious surfaces on stream systems.

In the remainder of this memo, we have tried to answer the points you listed in your “Annual Agency Reports” memo distributed by e-mail in early May. Each of the following bullets corresponds to an item in your memo. Please feel free to call either of us when you want to discuss strategies for any of the items we address below. Dick is in Salem at (503) 378-0050 x223, and Jeff is in Portland at (503) 731-4065 x26.

➤ **WHAT YOU HAVE ACCOMPLISHED OR NOT**

DLCD’s original contribution to the Oregon Coastal Salmon Restoration Initiative (OCSRI) was based on implementation of 1) the 1996 revisions of the Goal 5 rule and 2) the Coastal Nonpoint Pollution Control Program (CNPCP). Both of these programs rely on regulation to achieve environmental quality objectives. We have made some progress in both of these areas. Several local jurisdictions have adopted programs to improve protection of riparian corridors and wetlands, as required under Goal 5. And we have succeeded in meeting several of the federal conditions for “full approval” of Oregon’s coastal nonpoint program.

However, progress has not been as much as we might have originally anticipated. At this point, most of Oregon’s 276 local jurisdictions do not yet have riparian or wetland protection programs that comply with the 1996 revisions to Goal 5. And several of the conditions for full approval of our CNPCP remain a challenge. There are several reasons for our modest progress, which we discuss below.

Outside the regulatory sphere, we have been able to make some important contributions to watershed health.

Over the past few years we have teamed up with other agencies to produce several valuable planning and development tools that can be used by any local jurisdiction. In 1997 we teamed up with ODOT in the Transportation and Growth Management (TGM) program to produce the *Smart Development Code Handbook*. In 1999, the TGM program produced the *Model Development Code and User’s Guide for Small Cities*, which furthers the principles of “smart growth.” Smart growth specifically seeks to encourage efficient and “livable” urban development that provides transportation choices. These documents have been supplemented with additional technical assistance materials. Most importantly, in a joint project with DEQ, we recently produced the *Water Quality Model Code and Guidebook*, which is a companion to the *Model Development Code and User’s Guide*. Together, these materials provide valuable technical and legal assistance for Oregon’s small jurisdictions, which all too often cannot afford a full-time planning staff. They facilitate the adoption of local land use codes that will ensure efficient utilization of land and urban services, will reduce the effect of urban development on water quality, and which will provide for future growth that won’t destroy the “small town” feel of so many of Oregon’s small cities.

Using federal coastal management resources, we developed a computer-based information system called the “Dynamic Estuary Management Information System,” or DEMIS, to assist in identifying sites that are suitable for restoration of estuarine functions and values. We have completed DEMIS modules for five Oregon estuaries. We anticipate that DEMIS will be useful as watershed councils begin to turn their attention from upland watershed assessments to the estuarine system.

The three important things we have *not* accomplished since the beginning of the Oregon Plan are, first, further riparian protection; second, fully addressing the hydrologic effects of urban development; and third, agreement among experts on what constitutes “adequate” riparian protection inside urban growth boundaries. The first of these will require money, the second a continuing ability to develop technical assistance materials, and the third time, trial, and error.

➤ **ANALYZE YOUR CONSTRAINTS (INTERNAL, EXTERNAL, BUDGET, ETC.)**

The items we cited above that we have *not* accomplished can be attributed to several factors.

First, the internal ones. The scope of statewide land use program—and thus the scope of DLCD staff’s consultation with and technical assistance to local governments—often does not assign highest priority to aquatic habitat-related land use plan improvements. Water quality, watershed health, aquatic habitat, and salmon recovery—regardless of the how it is played—all tend to be diluted by other local planning priorities and problems. These include such things as current planning and permit reviews, which can consume most of a local staff’s time; transportation planning; regional problem solving; code revisions; Periodic Review; and UGB adjustments. Even though environmental protection is on an equal footing in the Statewide Planning Goals with farm and forest land protection and urban growth management, natural resource protection has generally received a lower priority in practice. (Note that this practical situation is fully consistent with Oregon’s custom of leaving natural resource protection to federal and state authorities.) Further, DLCD’s staff expertise is greatest in other areas of land use planning. Quite simply, we do what we are and what we know—in other words, our work is a reflection of our staff expertise, and salmon recovery and watershed health are new areas of expertise.

Finally, like many other state agencies, and in particular like local governments, our responsibilities continue to increase in scope and complexity as our resources continue to decline in real terms. At some point, it is simply not possible to do more with less.

The priority ranking of natural resource protection through the local plan is influenced by external factors as well. Salmon recovery tends to get diluted by other planning responsibilities at the local level simply because increased regulation to protect natural resources has become the basis for intense conflict at the local level. The political climate in Oregon has grown increasingly hostile towards environmental regulation. Mere talk of increased riparian buffers, for example, has been the source of considerable conflict based on the perception that increased buffers constitute a taking of private property.

Of course, at this moment, there are two huge barriers to improved protection of riparian buffers at the local level. Ironically, the first was the publication of the 4(d) rule. We have observed that local governments have been reluctant to undertake Goal 5 work to protect riparian corridors since the draft 4(d) rule was first published in December 1999. At that time, the preface to the rule mentioned a 200-foot buffer along streams. While the final rule does not include that reference, local governments feel caught between the Goal 5 safe harbor and the more general—but obviously higher—standard in the 4(d) rule. Some local governments have told DLCD staff that they think the Goal 5 riparian safe harbor gets in the way of their qualifying for the “MRCI limit” in the 4(d) rule. When we hear reference to this issue, we tell local officials that both the standard Goal 5 process for riparian corridors and the wildlife habitat rule (OAR 660-023-0110) probably provide adequate basis for a jurisdiction to comply with Goal 5 *and* qualify for the MRCI limit.

The second barrier to improved riparian protection at the local level is, of course, Measure 7. Even though many jurisdictions have now recovered from the initial shock and flurry of activities to adopt (and then repeal) regulations to implement the measure, and there is some indication it will not survive judicial review, Measure 7 has clearly shaken any local efforts to use the local plan as a means to protect natural resources. And while the measure does provide for a minimum level of regulation sufficient to implement federal laws, no one knows just what that minimum is.

In the end, if and when the uncertainties about the 4(d) rule and Measure 7 are cleared up, we will still face the *real* barrier: money. Local governments need state or federal funding to participate in salmon recovery in general, and to adopt local regulations to improve protection of riparian corridors. DLCD's highest priority OPSW measure has not received funding since the 97-99 allocation of \$320,000 for local Goal 5 work. Interestingly, when we *did* have money to distribute for local Goal 5 work, we were surprised to discover that many local governments did not apply for funds because they did not have the capacity to take on additional work, *even when it was fully funded* with state dollars.

In the end, we are not likely to make great progress in using the land use program specifically for salmon recovery objectives until local governments have the full capacity to fully execute their existing comprehensive planning responsibilities. Funding for full comprehensive planning capacity at the local level will remain a challenge into the foreseeable future.

➤ **ASSESS EMERGING ISSUES, DEMANDS OR OPPORTUNITIES**

Local governments have consistently been a "blind spot" in the Oregon Plan. Further, local governments are far more concerned about the ESA and the 4(d) rule than they are about the Oregon Plan. For many local officials, the ESA constitutes a real threat. As we approach local officials on the subject of salmon recovery, we get asked "What's the Oregon Plan, and what does it have that can help me with the 4(d) rule?" Specifically, most local government references to the 4(d) rule are in fact to its so-called *limit for Municipal, Residential, Commercial, and Industrial development, including redevelopment*, or the "MRCI limit" noted above. And we can't really answer that question right now, in part because the 4(d) rule also stands within the Oregon Plan's blind spot. The truth is, there is not much in the Oregon Plan for local governments to use as they try to deal with the ESA. There has been some discussion about DLCD adjusting its rules to provide "cover" for local jurisdictions that want to qualify for the 4(d) limit. We have heard this sentiment expressed at both the federal and the local level. However, we are not convinced that there is a clear need for redundancy between the 4(d) rule and the Statewide Planning Program. For one thing, rule changes cost about \$50,000, and we have not budgeted for ESA-related rule writing. For another, almost by definition, efforts under the 4(d) rule are to avoid expensive litigation, *not to restore native fish populations*. We would prefer to maintain our focus on the real problem, which is to restore native fish.

As I noted above, most jurisdictions do not have sufficient capacity to undertake salmon recovery efforts beyond avoiding take. However, avoiding take by qualifying for the MRCI limits in the 4(d) rule may not be an effective use of resources.

Our analysis of the 4(d) rule is that it involves two distinctly different standards. (Note that this is an arguable position with which NMFS disagrees.) The 4(d) rule prohibits take, which for the purposes of land development has been defined to include "significant habitat modification." But the MRCI limit is based on "evaluation considerations" that are based in turn on achieving

*properly functioning condition*, or PFC. While—in the reference commonly used by NMFS—“putting the landscape on the trajectory to achieving properly functioning condition” is clearly necessary for recovery, it is a far higher standard than merely avoiding take. And further, a complex suite of local programs will be necessary to address the range and kinds of opportunities and constraints that will be present across the urban landscape, from heavily-developed and – paved urban centers to areas just recently brought into a UGB. In the end, there is some chance that trying to qualify for the 4(d) limit may not be the most effective use of local investment in support of salmon recovery. We believe that the development of local programs to put the landscape on the trajectory to achieving PFC should probably be postponed until *geographically explicit* population recovery plans are developed.

We’ve summarized just one agency’s thinking on the 4(d) rule, but that does not represent the breadth of agencies who manage the Oregon Plan. We suggest that the Oregon Plan agencies come together to address the 4(d) rule and the needs of local governments as soon as possible.

In the bigger picture, it is pretty clear that the Oregon Plan, BPA’s Fish and Wildlife Program, and activities under the ESA are simply different species. They all appear to be necessary and legitimate, but do not appear to be well coordinated. We are all working within our own spheres, driven by our own timetables, statutory requirements, funding cycles and so on, which appear to be beyond our control. Institutionalization of the Oregon Plan will require that we develop a single all-encompassing framework within which all programs and efforts can relate.

➤ **IDENTIFY NEEDS YOU HAVE TO IMPROVE IMPLEMENTATION AND/OR CHANGE IMPLEMENTATION OF A PROGRAM**

Given the gridlock and the lack of funding for riparian protection inside UGBs, we are not likely to make a whole lot of progress in implementing Goal 5 riparian rules. Without money, we are not in a position to relieve the gridlock. As such, while we will not let up our emphasis on the need to get the rules implemented at the local level, we are starting to turn our attention to a more important function of the urban landscape.

More than anything else, impervious surfaces are the greatest cause of urban stream degradation. And they are the most difficult urban landscape feature to remedy. In areas of new development, it has become increasingly important to minimize the effect on streams of urban development. Practices that are collectively called “Low Impact Development” are available to reduce the collection and delivery of stormwater runoff offsite. While we have been putting our efforts into protecting riparian corridors, without effective stormwater controls, the water in streams and stream forms themselves will continue to be degraded as a result of standard stormwater management practices. In short, effective stream corridor management *must* address the effects on streams of impervious surfaces. We anticipate collaborating with DEQ, ODFW, and other interested agencies to develop a program to provide technical assistance to local officials and developers on Low Impact Development strategies, practices, and techniques.

➤ **IDENTIFY MORE BROADLY THINGS THAT NEED TO BE ADDRESSED OVERALL TO ADVANCE THE PROGRESS OF THE OREGON PLAN**

We can think of a handful of items that would further the objectives of the Oregon Plan.

- ❖ In conjunction with federal agencies, local governments, and watershed councils, develop recovery programs basin by basin, including high priority places, populations, and actions.
- ❖ The Oregon Plan is based in part on existing regulations. However, there is considerable

well-organized resistance at the local level even to implementing existing state regulations which themselves may not be adequate to protect aquatic systems and resources.

- ❖ Regionalization of the plan needs to move forward. Regionalization can serve to institutionalize the plan by having each region identify and prioritize the most pressing recovery-related tasks. These should be both programmatic and geographic priorities, and they should be reviewed annually.
- ❖ We all need to work to improve the tenor of the relationship between Oregon and NMFS staff. Sometimes this can get extremely charged, judgmental, and personalized. There needs to be room for disagreement.

Again, many thanks for providing an opportunity to step outside our Oregon Plan measures to provide some assessment of the challenges ahead. We look forward to working with you and the rest of the Oregon Plan community to work through them.