2023 Business and the Environment Conference and Expo

December 6, 2023

Wetlands Permitting

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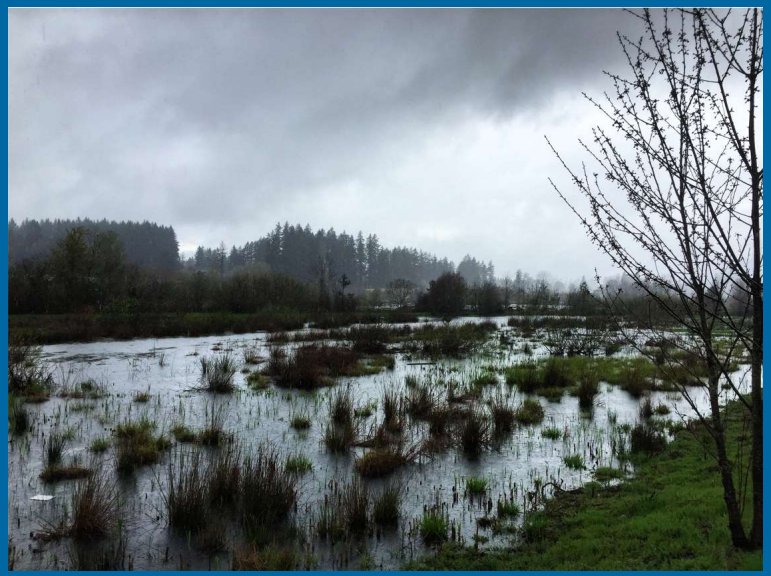
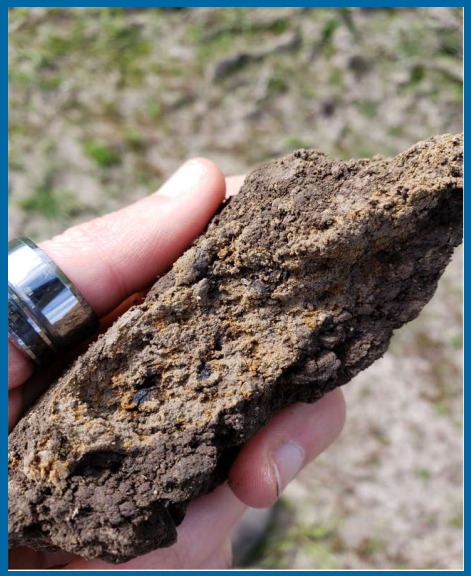
STATE OF OREGON

OREGON DEPARTMENT OF STATE LANDS

What is a Wetland?

- Unless significantly altered, wetlands contain:
  - water (hydrology)
  - specialized soils (hydric)
  - wetland-adapted vegetation (hydrophytic)





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Why Are Wetlands Important?

- Improve local water supply
- Reduce effects of local flooding (flood protection)
- Erosion control
- Improve water quality
- Stormwater treatment – constructed wetlands
- Provide opportunities for education and research
- Public recreation hotspots
  - Bird watching, hunting, hiking, kayaking, running, camping, etc.
- Habitat for hundreds of species of wildlife (bio-diversity hotspots)
- Economic Benefits –
  - When incorporated into a town or city's green infrastructure, wetlands perform ecosystem services that can save localities countless amounts of money (due to the above)

A Brief History of Wetland/Waterway Removal-Fill Regulation in OR

1967

State regulation started as a removal law

1971

State regulation of fill and removal

1972

Federal Clean Water Act adopted

1989

State regulation of wetlands clarified

1991

Wetland mitigation bank program launched

2019

Online statewide wetlands inventory launched

State Authority

- **Removal-Fill Law** regulates removals and fills in "waters of this State" and applies to all waters

Waters of this State

Tidal and non-tidal bays
Intermittent and perennial streams
Lakes
Wetlands
Territorial sea
Other waters

Federal Authority

- **Section 404 of the Clean Water Act** (CWA) establishes a program to regulate the discharge of dredged and fill material into "waters of the United States"
- **Section 10** of the **Rivers and Harbors Act** of 1899 (33 USC 403) prohibits the obstruction or alteration of navigable waters of the United States without a permit from the Corps of Engineers

Where are Wetlands Found?

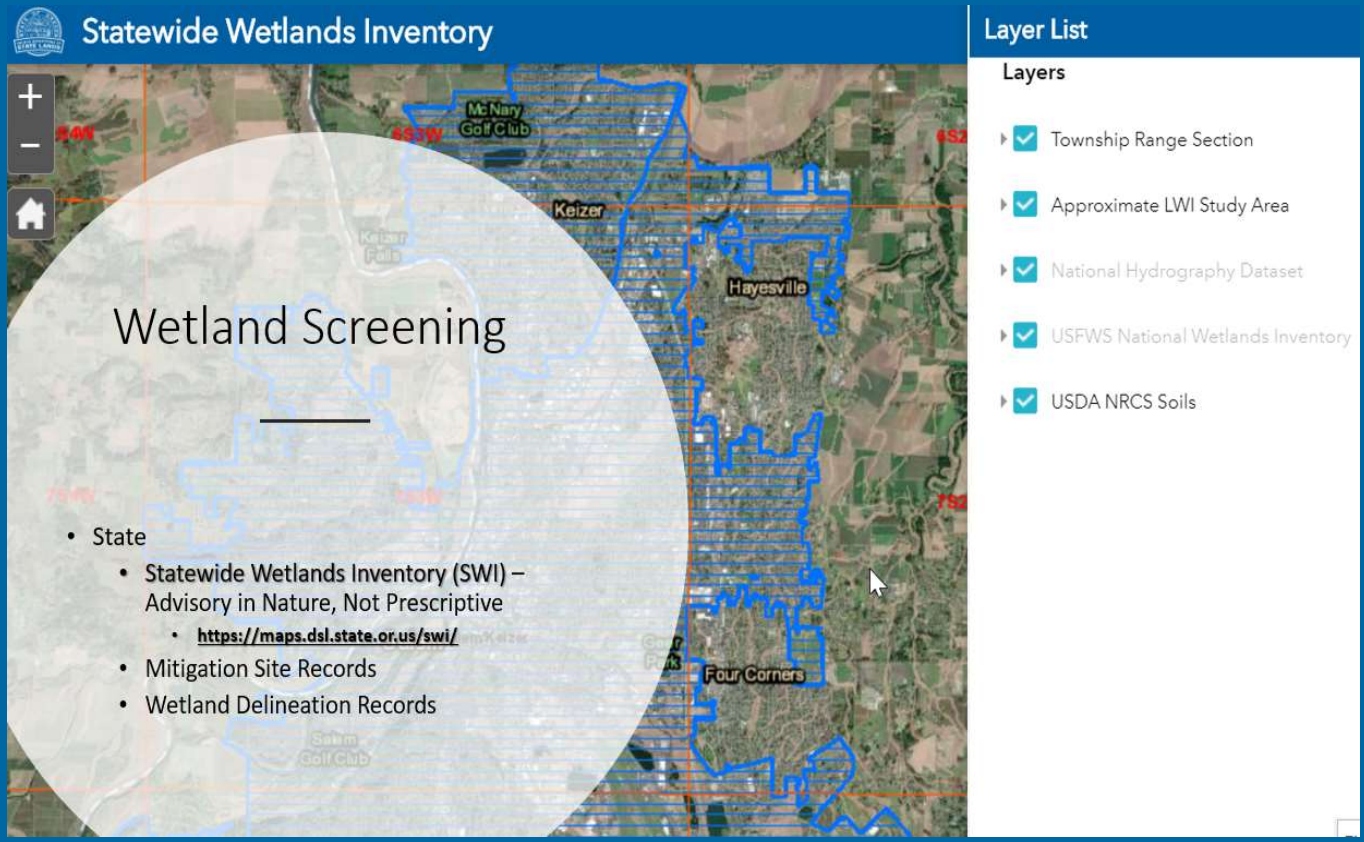
Wetlands exist throughout the state (even in areas you may not think)

- Farmed wetlands
- Residential yards
- Fallow fields
- Abandoned properties
- Next to ditches
- Etc.

Precise boundaries of wetlands are determined via a Wetland Delineation

Where are Wetlands Found? - state

- Statewide Wetland Inventory Map is a useful cursory planning and wetland screening tool
  - Soils
  - Streams
  - Local wetland inventories
  - NWI- wetlands
  - Mitigation site boundaries (coming)
  - Wetland Determination Study Areas (coming)



https://maps.dsl.state.or.us/swi/

When Do I Need a R-F Permit? (3-part test)

1. **Location:** Will the activity occur within the boundary of a jurisdictional wetland or waterway?

2. **Activity:** Is there an exemption in law for the proposed activity?

3. **Volume:** For most wetlands and many waterways….will the activity exceed 50c.y. of ground alteration?

Do the math: Yes + No + Yes = Permit Needed

1. Location: Waters of This State

- **Territorial Sea**: low tide to the 3-mile limit (but not ocean beaches)
- **Tidally-influenced waterways**: up to the highest measured tide line
- **Rivers and streams** (perennial & intermittent): up to the ordinary high water line.
- **Ponds, lakes and reservoirs**
- **Some ditches**
- **Wetlands** of all types, shapes and sizes: within the delineated wetland boundary (some artificially created wetlands are not state jurisdictional)

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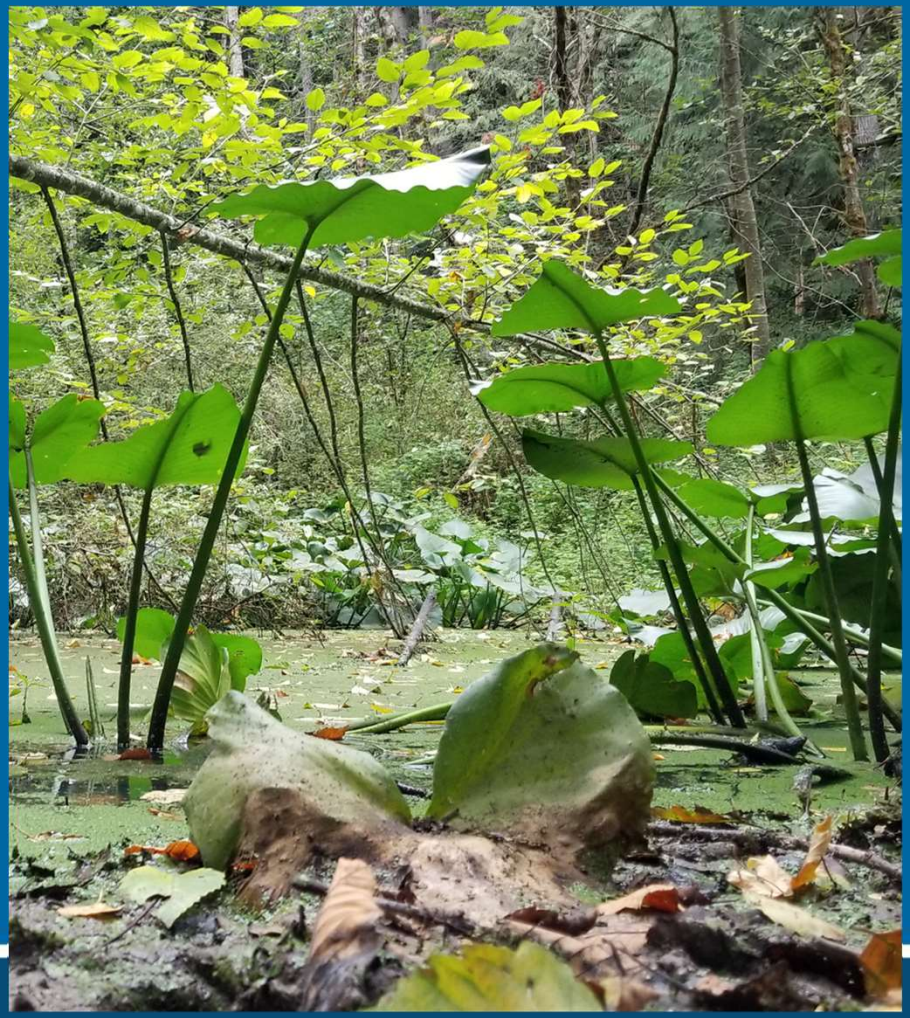
2. Activity: Many Exemptions in the R-F Law



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- Certain power-generating dam projects
- State forest management practices (FPA)
- “Navigational servitude” for fed-authorized navigation channels
- Maintenance of water control and transportation structures
- Some forms of voluntary habitat restoration
- Many agricultural practices
- Changing a point of diversion for a surface Water Right
- Non-motorized activity <1c.y. in designated “ESH”

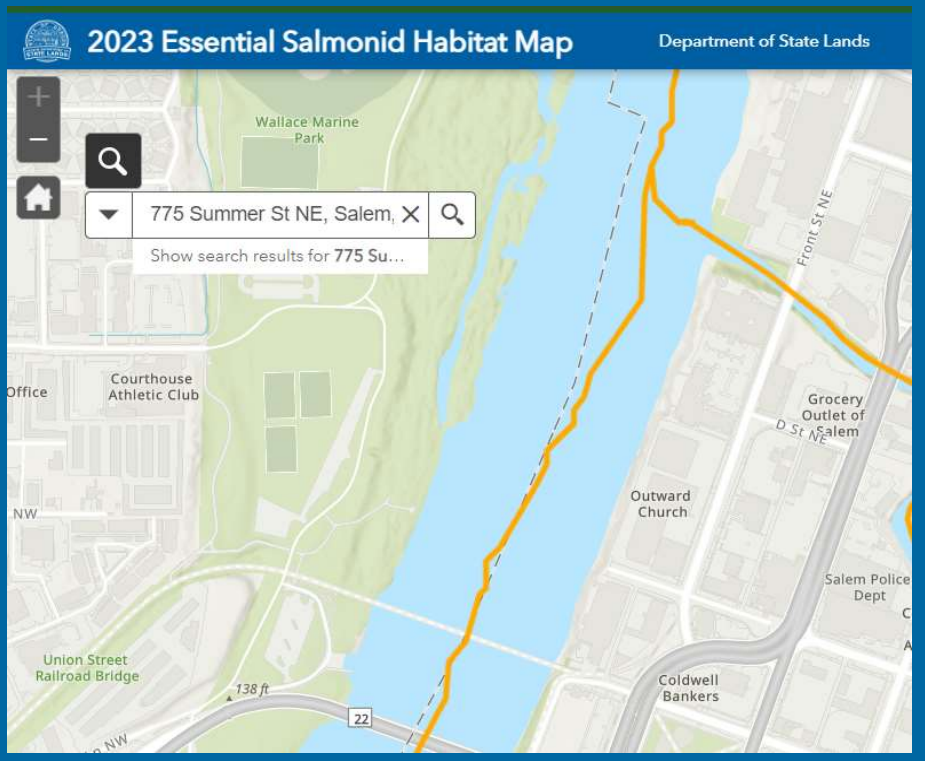
3. Volume

>50 c.y. of removal or fill:

- Most wetlands and many waterways
- Removal is counted annually
- Fill is counted for duration of ownership
- 50 c.y. equals about 4 to 5 dump truck loads

Any amount of removal or fill:

- Waterways (and some wetlands) designated as Essential Salmonid Habitat (ESH)
- Designated State Scenic Waterways (SSW)
- Territorial sea, but only for renewable energy projects



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So, You Need a R-F Permit (4 kinds)

- **Individual Permit**:
  - More complicated, impactful projects. Compensatory mitigation usually required. No General Permit or General Authorization available.
  - Up to 120-day process defined by statute:
    - Up to 30-day completeness review
    - 30-day public and other agencies review period
    - Up to 60-day final technical review period & decision
- **General Permit**:
  - Six types: <0.2 ac in wetlands; maintenance dredging; transportation; vernal pools
  - Up to 40-day process: 15d./15d./10d.

So, You Need a R-F Permit (continued)

- **General Authorization**:
  - Nine kinds: bank stabilization, piling, minimal disturbance in ESH; temporary impacts; habitat improvement
  - Simple notification to DSL: No alternatives analysis; no mitigation
  - 30 days to confirm eligibility
  - Changes coming! Public comment starts February 1.

- **Emergency Permit**:
  - For minimum work needed to alleviate an imminent threat to health, safety or substantial property.
  - One day to one week.
  - May require more work or mitigation after emergency has subsided.

Key Pieces of the Application

- Project purpose, need & description
- Project drawings relative to identified wetlands/waterways
- Assessment of proposed impacts to wetlands/waterways
- The alternatives analysis: Practicable alternative sites and designs that could reduce or eliminate impacts?
- Compensatory mitigation:
  - Not a replacement to the alternatives analysis
  - Goal is to replace lost area, functions & values
  - Options: Permittee-provided; mitigation bank; in-lieu-fee; payment-to-provide

What? I May Need a Federal Permit Too?

- Section 404 Clean Water Act: discharge of material into waters of the U.S.
- Administered by US Army Corps of Engineers
- Same application form ("JPA") as DSL but different process
- Can run concurrent with DSL's process
- Federal process often longer. Why?
  - Historic/cultural/tribal consultation required
  - Threatened & endangered species consultation often required
  - Water Quality Certification from DEQ required
  - Coastal Zone Mgmt. Act consistency determination required

What? I May Need a DEQ Permit Too?

401 water quality certification when Corps is involved in permitting

Programmatic for water quality permitting when 401 certification doesn't apply – Mutual Agreement Order

- Protection from potential water quality violations
- Flexibility in conditions
- Coordinated through R-F permit

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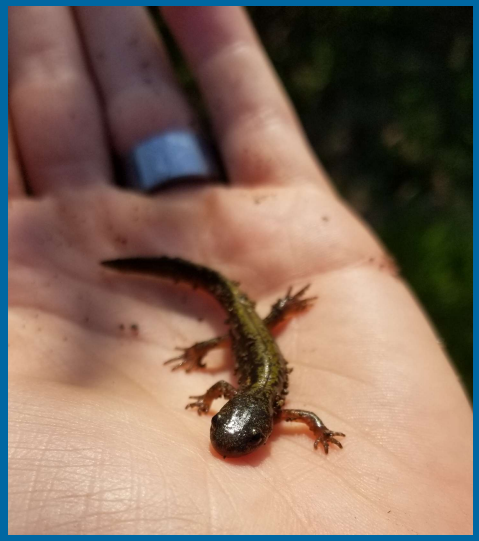
This Was Fascinating. Tell Me More!



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- Oregon Revised Statute: 196.795 – 196.990
- Oregon Admin. Rule:
  - 141-085 (Removal-Fill generally and individual permits)
  - 141-089 (General Authorizations)
  - 141-093 (General Permits)
- Our handy-dandy brochure: https://www.oregon.gov/dsl/WW/Documents/rf_brochure.pdf
- The Removal-Fill Guide: https://www.oregon.gov/dsl/WW/Documents/Removal_Fill_Guide.pdf
- Contact a DSL Permit Coordinator: https://www.oregon.gov/dsl/WW/Pages/WWStaff.aspx
- DSL Speaker's Bureau: https://www.oregon.gov/dsl/About/Pages/Speakers.aspx
- Pre-application meetings:
  - Early coordination meetings for complex projects: https://www.oregon.gov/dsl/WW/Pages/PreApp.aspx
  - via Regional Solutions: https://www.oregon.gov/gov/admin/regional-solutions/pages/default.aspx
  - Field meetings: DSL, Corps, ODFW, DEQ
- Proposed Rulemaking: https://www.oregon.gov/dsl/Laws/Pages/Rulemaking.aspx