

MEMORANDUM OF UNDERSTANDING FOR THE
IMPLEMENTATION OF THE PROGRAM FOR
TRADITIONALLY MAINTAINED CHANNELS USED FOR AGRICULTURAL DRAINAGE
ORS 196.906 through 196.919

BETWEEN THE OREGON

DEPARTMENT OF AGRICULTURE
DEPARTMENT OF STATE LANDS
DEPARTMENT OF FISH AND WILDLIFE

This Agreement is between the Oregon Department of Agriculture (ODA), Oregon Department of State Lands (DSL), and Oregon Department of Fish and Wildlife (ODFW), each individually without distinction as "Party" and collectively as the "Parties."

1. AUTHORITY

This Agreement is entered into pursuant to the authority granted by ORS 196.919, ORS 190.110 and 283.110, allowing state agencies to enter into agreements with other state agencies to cooperate in performing duties, exercising powers, or administering policies or programs.

2. PURPOSE

- 2.1. The Traditionally Maintained Channels Act, ORS 196.906 through 196.919, directs ODA and DSL to enter into a Memorandum of Understanding (Agreement) for ODA to implement ORS 196.906 through 196.919.
- 2.2. Subject to the terms of the Agreement, ODA:
 - (a) May perform the functions of DSL in implementing and enforcing ORS 196.906 through 196.919.
 - (b) Shall, in coordination with Soil and Water Conservation Districts, work to provide education on the requirements of ORS 196.906 through 196.919.
 - (c) Shall, in coordination with DSL and ODFW, develop and implement a process for responding to requests to review the accuracy of the designation and mapping of essential indigenous anadromous salmonid habitat by DSL as defined in ORS 196.810.
- 2.3. ORS 196.906 through 196.919 detail the roles each Party will fulfill in the acceptance, review, validation, and other responsibilities for notifications submitted to ODA. This Agreement describes how the Parties will consult to implement their responsibilities under ORS 196.906 through 196.919, and OAR Chapter 603, Division 095.

3. EXPECTATIONS FOR THE PARTIES

- 3.1. The Parties will work together in a collaborative and transparent manner, always seeking to ensure that the obligations of each Party are met.
- 3.2. To facilitate a collaborative and effective program, the Parties will strive to meet at least biannually as a Project Team to discuss and coordinate implementation of ORS 196.906 through 196.919 and OAR Chapter 603, Division 095. Implementation efforts that will be coordinated include Parties' documenting program status, outreach efforts, identified challenges and

opportunities, and identification and incorporation of adaptive management needs, including consideration of information from the Oregon State University (OSU) study. The Project Team may meet more often as program needs require and as agreed upon by the Parties.

- 3.3. The Parties agree to effectively consult and cooperate on actions regarding maintenance of traditionally maintained channels used for agricultural drainage ("traditionally maintained channels"), maintenance notifications and related requests for variances, expedited reviews, and requests to review Essential Indigenous Anadromous Salmonid Habitat (ESH) designations, in the best interests of the people of Oregon and Oregon's fish, wildlife, and habitats and within their respective authorities.
- 3.4. Each Party acknowledges and respects the authority and responsibility of ODFW to provide input on fish and wildlife resources; potential effects of channel maintenance on those resources; whether maintenance activities meet the requirements of ORS 196.913; and recommendations on conditions to address the presence of endangered or threatened species, protect endangered or threatened species habitat quality or quantity, and protect the existing functions of the channel. Per ORS 196.915(6), ODFW may not, without the express agreement of the person, district, company, or corporation that filed the notice, enter onto and inspect the lands unless accompanied by ODA.
- 3.5. Each Party acknowledges and respects the responsibility of ODA to administer the traditionally maintained channels program according to its regulatory obligations.
- 3.6. Computation of time for the purposes of meeting the timeline requirements in OAR 603-095-4000 through 603-095-4060 shall be as follows:
 - 3.6.1 The time within which an act is to be done is computed by excluding the first day and including the last day, unless the last day falls upon any legal holiday or a Saturday, in which case, the last day is also excluded. Sunday is considered a legal holiday. For example, to count the five days for response, do not count the day the notification is received, but count forward from that date in calendar days.
- 3.7. ODA will retain all notification process documents electronically with the notification file for at least 10 years, in accordance with its records retention schedules.

4. RESPONSIBILITIES OF EACH PARTY

Consistent with ORS 196.906 through 196.919 and as described in the February 3, 2020, Letter of Intent signed by each Party Director each agency agrees as follows.

- 4.1. DSL agrees to:
 - 4.1.1. Adopt rules as necessary to implement ORS 196.906 through 919.
 - 4.1.2. Maintain web-based maps of Essential Salmonid Habitat (ESH) streams. Channels listed as ESH are not eligible for this notification program.
 - 4.1.3. Upon notice from ODA that ODA and ODFW are unable to resolve a disagreement, make the final determination regarding whether the maintenance activities described in the notice may occur without a removal or fill permit, and what conditions in addition to those required under ORS 196.913, if any, are necessary for the maintenance activities

to occur without a removal or fill permit.

4.1.4. Upon finding that a person has engaged in removal or fill activities without a permit under ORS 196.810 or in violation of ORS 196.911, 196.913 or 196.915, DSL agrees to, in consultation with ODFW, notify the person and direct the person to take any actions necessary to bring the maintenance activities into compliance with ORS 196.600 through 196.921 within a reasonable time. The following are examples of Regulation and Enforcement of non-compliance issues:

- Wetland fill of side cast material beyond the limits provided in ORS 196.906 through 196.919 and OAR Chapter 603, Division 095.
- Wetland and channel fill and removal outside of the notification process established by ORS 196.906 through 196.919.

4.1.5. Consistent with ORS 196.810, develop one or more General Permits for some maintenance activities in some channels that do not qualify for this notification program such as within wet or ESH designated channels.

4.2. ODA agrees to:

4.2.1. Perform the functions of DSL in implementing and enforcing ORS 196.906 through 196.919.

4.2.2. Provide information to landowners regarding the notification process, habitat and water quality improvement opportunities, incentives, and onsite audits.

4.2.3. Coordinate with Soil and Water Conservation Districts to engage landowners and offer technical assistance.

4.2.4. Receive notifications of maintenance activities from landowners and evaluate whether they are complete and consistent with the conditions in ORS 196.906 through 196.919.

4.2.5. Consult with ODFW and DSL regarding notifications received.

4.2.6. Perform site visits to:

- Identify additional conditions on maintenance;
- Conduct audits of ongoing or completed maintenance activities;
- Evaluate compliance with the conditions in ORS 196.906 through 196.919 and additional site-specific conditions.

4.2.7. Work with landowners to address any compliance issues identified during the onsite audits.

4.3. ODFW agrees to:

4.3.1. Conduct rulemaking to establish dry channel maintenance periods and consult with ODA and DSL during the rulemaking process.

4.3.2. Define the dry channel maintenance periods for covered maintenance activities.

4.3.3. Review all complete notices received by ODA and recommend additional mandatory conditions for a notice as needed.

4.3.4. Accompany ODA on site visits for:

- Consideration of additional maintenance activity conditions when necessary;
- Audits of ongoing or completed maintenance activities; or
- Compliance.

5. The Parties' Administrative Process for a Notification

Each Party will follow the process described in ORS 196.906 through 196.919 and OAR 603-095-4000 through 603-095-4060 and strive to use the following process to facilitate communication and coordination. See Attachment A for a diagram of the Notification Process.

- 5.1. The process is initiated and the time for calculating the deadlines in ORS 196.915 and OAR 603-095-4020 begins when ODA receives, from one or more landowners or water district(s), a notification for proposed maintenance of a traditionally maintained channel.
- 5.2. Within five days of receipt of a notification, ODA will review the notification for completeness, accuracy, and eligibility. ODA may consult with ODFW during this period. Upon completion of its review, but no later than five days after receipt of a complete notification, ODA will send the complete notification and supporting materials to the ODFW Agricultural Channel Maintenance Coordinator, or to an alternate named by ODFW. If ODA determines that a notification is incomplete, ODA will notify the applicant and explain what information is missing.
- 5.3. Notwithstanding that ODFW has 30 days from the date that it receives a complete notification to review and provide a response to ODA, ODFW will attempt to complete its initial review within five days.
- 5.4. When ODFW recommends that additional conditions may be necessary, or the potential exists for a conflict regarding compliance with OAR 603-095-4000 through 603-095-4060, ODFW will strive to immediately communicate to and coordinate with ODA to review potential recommendations.
- 5.5. If ODFW communicates to ODA that it recommends additional conditions, ODA will accept the recommendations or advise DSL and ODFW that consultation may be needed and invite DSL to participate in the notification review and in a potential site visit with ODFW and ODA.
- 5.6. ODFW and ODA will make a joint site visit at the request of either agency as soon as possible to allow enough time for a full review within the 30-day period.
- 5.7. If applicable, ODFW will submit final proposed additional conditions to ODA within the designated time period (30 days). ODFW will attempt to provide comments to ODA within 15 days of receipt of the notification from ODA.
- 5.8. ODA will review and accept the recommendations or consult with ODFW to resolve any disagreements. ODA and ODFW shall follow the dispute resolution process in Section 11 of this Agreement if needed.
- 5.9. If ODA and ODFW are unable to resolve their disagreements, ODA will forward ODFW's recommended additional conditions and ODA's response to DSL. DSL shall determine whether the maintenance activities described in the notice can occur without a removal or fill permit and what conditions in addition to those in ORS 196.913 are necessary.

- 5.10. DSL has five days to determine and send any additional final conditions as described in ORS 196.915(2)(c) to ODA.
- 5.11. Within 45 days of receipt of a complete notification, ODA will notify the landowner or water district and post the notice on the ODA website, including all mandatory and final additional conditions. If ODA does not provide a response within 45 days, the notification will become active on day 46 and the default required conditions of the notification will apply.

6. ODA-ODFW Administrative Process for a Variance Request

- 6.1. A landowner or water district representative may file a variance request along with a notification or any time thereafter, but before performing the maintenance activities for which the variance is being sought. The variance request will identify the reason(s) a landowner or water district staffer cannot meet one or more required conditions. ODFW will not recommend approval of a variance request for Regional Dry Maintenance Time Periods more than one year in advance of the time of the proposed work.
- 6.2. When ODA receives a variance request, ODA must review the request for completeness within five days of receipt and send the complete variance request to ODFW for consultation.
- 6.3. ODFW will review the variance request in a timely manner and submit comments to ODA, which may include a request for consultation with ODA. ODA and ODFW will engage in good-faith consultation to find a mutually agreeable solution.
- 6.4. ODA and ODFW will schedule a joint site visit, if requested by either agency, in a timely manner. ODA will invite DSL to participate in the site visit.
- 6.5. ODA will review the variance request, ODFW written comments, and any information gathered from a joint site visit.
- 6.6. ODA will accept the ODFW recommendations or consult with ODFW to resolve any disagreements. ODA and ODFW shall follow the dispute resolution process in Section 11 of this Agreement if needed.
- 6.7. If ODA and ODFW are unable to resolve their disagreements, ODA will forward ODFW's recommended additional conditions and ODA's response to DSL. DSL shall determine whether the maintenance activities described in the notice can occur without a removal or fill permit and what conditions in addition to those in ORS 196.913 are necessary.
- 6.8. ODA will approve or deny the request and communicate the decision to the landowner.

7. ODA-ODFW Consultation Process for an Expedited Review

- 7.1. ODA will strive to complete an expedited review request for completeness, accuracy, and eligibility within five days of receipt. The expedited review request will identify the reason(s) for the request.
- 7.2. ODA will send complete, accurate, and eligible expedited review requests to ODFW for consultation as soon as practicable after completing its evaluation.

- 7.3. ODA and ODFW will work collaboratively to consider and respond to the expedited review request, which may include conducting a site visit to obtain additional information to consider the request. The agencies will consider immediate threats to public health, safety, or substantial property, including crop or farmland.
- 7.4. ODA and ODFW will agree to provide the expedited review or agree to deny the request.
- 7.5. If the agencies agree to provide an expedited review, they will complete the review as soon as practicable to address the stated reason(s) for the expedited review request as described in OAR 603-095-4060(2).
- 7.6. ODFW and ODA will schedule a joint site visit, if requested by either agency, in a timely manner.
- 7.7. Expedited reviews, except for timelines, will follow the administrative process described above in Section 7. If ODA and ODFW cannot agree on the notification conditions resulting from the expedited review, DSL will make the final decision.

8. The Parties' Consultation Process for Requests to Review Essential Indigenous Anadromous Salmonid Habitat (ESH) Designation

- 8.1. A landowner or water district may file an ESH review request on a form provided by ODA prior to a notification submittal and before any maintenance activities begin.
- 8.2. When ODA receives an ESH review request, ODA will review the request for completeness within five days of receipt and send the complete ESH review request to ODFW.
- 8.3. If ODA deems the request to be complete, designated staff from ODA will fill out the online Fish Habitat Distribution Data Change Request form in a timely manner. Submission of a completed form will initiate a consultation between ODA and ODFW to review the ESH review request and the data change request form.
- 8.4. ODFW will then decide how to respond to the ESH data change request following its Stewardship Plan for the Oregon Fish Habitat Distribution Database or subsequent process adopted by ODFW. If ODFW determines a site visit is required to further consider the request, ODFW will coordinate the site visit with ODA.
- 8.5. ODFW will review the ESH review request in a timely manner and submit written comments and final decision to ODA and DSL. ODA will communicate the ODFW decision to the landowner or water district who filed the request.
- 8.6. DSL will update ESH designations and maps in coordination with ODFW, as provided in OAR 141-102. As part of the public review and comment process, ODA will work with DSL to identify submitted Notices for traditionally maintained channels that may receive a new designation. When DSL updates the ESH map, the Notice will become invalid for any channels newly designated as ESH.
- 8.7. Once the ESH map changes are final, ODA will contact landowners or water districts with an active Notice for activities in channels newly designated as ESH to alert them that newly designated channels no longer qualify under the Notice.

9. The Parties' Consultation Process for the Biennial Adaptive Management Review

- 9.1. The Parties will prepare a report on activities in Oregon for the maintenance of traditionally maintained channels. ODA shall coordinate preparation of the report. See ORS 196.919 Sections 10, 12, and 14 for report requirements.
- 9.2. ODA shall submit the report to the interim committees of the Legislative Assembly related to agriculture in the manner provided under ORS 192.245 no later than December 15 of each odd-numbered year through 2029.
- 9.3. To prepare the report, the Parties will consult in an adaptive management review of the implementation of the traditionally maintained channels program to determine whether implementation changes are required to best carry out the policy stated in ORS 196.906.
- 9.4. The Parties will work collaboratively to agree upon needed data collection, audits, reporting formats, and product timelines in advance of required legislative reports.
- 9.5. The development, progress, results, and adaptive management recommendations of the OSU study (ORS 196.919 Section 10) will be considered as part of the adaptive management review report.
- 9.6. ORS 196.919 Section 10 directs OSU to "...conduct a study of the benefits and impacts of maintenance activities..." and to consult with ODA, ODFW, DSL, and other interests on study questions and design with an aim toward supporting adaptive management.
- 9.7. OSU is further directed to submit a study report, which may include legislative recommendations, to the legislature and to ODA, ODFW, and DSL no later than January 1, 2025.
- 9.8. ODA will initiate the consultation on the adaptive management review report with DSL and ODFW, including collaboration on the OSU study. The Parties will provide staff and resources to prepare and submit the report in a collaborative process.

10. COMPLIANCE AND ENFORCEMENT OF ORS 196.906 THROUGH 196.917

- 10.1. Enforcement of ORS 196.906 through 196.919 is under the jurisdiction of DSL and ODA. If a Party learns that a landowner or water district has engaged in activities in potential violation of ORS 196.911, 196.913, or 196.915, or OAR 603-095-4000 through 603-095-4060, the Party shall notify the other Parties as follows. Note: this may come through a complaint, agency notification, or staff observation.
 - a. If ODA or ODFW learn of removal-fill activities that do not qualify for the traditionally maintained channels program and that have been conducted without a permit required under ORS 196.810, the agencies will notify DSL in a timely manner.
 - b. If DSL or ODFW learn of maintenance activities in traditionally maintained channels conducted without a valid notice on file with ODA, or operations conducted under a notice in violation of the requirements of the traditionally maintained channels program, the agencies will notify ODA in a timely manner.
- 10.2. ODA will conduct all compliance activities in consultation with ODFW and DSL and keep the

Parties updated on progress. For process purposes, compliance activities include agency audits and compliance investigations.

- 10.3. ODA will review the complaint or agency notification received pursuant to Section 10.1. above for completeness and validity. The complaint must include a location and description of the potential violations.
- 10.4. If ODA determines that the complaint or agency notification is complete and valid, then ODA will open a compliance case. ODA may also consider other information in addition to the complaint or agency notification when deciding if a compliance case will be opened.
- 10.5. ODA may open investigations based on staff observation of maintenance activities in traditionally maintained channels conducted without a valid notice or operations conducted under a notice in violation of the requirements of the traditionally maintained channels notice or program.
- 10.6. ODA and ODFW may enter onto and inspect lands for the purpose of ascertaining compliance with ORS 196.906 through 196.919, however, ODFW may not enter lands without the express agreement of the landowner or water district representative that filed the notice unless accompanied by ODA.
- 10.7. ODA will make a reasonable attempt to notify the landowner or water district representative to obtain consent to enter the lands, to be present for the site inspection, and to authorize the presence of an ODFW representative. ODA will only enter onto and inspect the lands during normal business hours unless coordinated with the person or under extenuating circumstances, e.g., potential violation reported on weekend.
- 10.8. If ODA determines that a site visit is required, ODA will invite ODFW and DSL to the site visit. ODA will inform the landowner or water district representative who may be on site prior to the site visit. If the landowner or water district representative denies access for ODFW or DSL staff, ODA will conduct the site visit and provide documentation to ODFW or DSL for review. If the landowner or water district representative denies access to the land to ODA, the ODA may seek an administrative warrant to gain access to the land.
- 10.9. ODA will document any evidence regarding the mandatory notice conditions and prohibitions. Evidence will be gathered through testimony, observations, and photo documentation. Note: During the investigation, ODA will also communicate agricultural water quality rules and document any concerns.
- 10.10. If violations of the mandatory notice conditions or prohibitions are documented, ODA will notify the landowner or water district representative and provide recommendations at the site visit or in after-site visit correspondence to correct the violations. Typically, this will be through in-field recommendations to expedite implementation of corrective actions.
- 10.11. ODA will follow up with the landowner or water district representative within 30 days after the timeframe for corrective actions to check for implementation of the corrective actions. If corrective actions are implemented satisfactorily, ODA will deem that compliance has been achieved and will notify ODFW and DSL of its conclusions that compliance is achieved.
- 10.12. If ODA determines that a landowner or water district has not implemented the corrective actions, ODA may refer the compliance case to DSL for enforcement. ODA will coordinate with

DSL to ensure DSL has the necessary information to determine whether enforcement will be initiated. All compliance work prior to enforcement will be led by ODA.

10.13. If ODA refers the compliance case to DSL for enforcement, ODA will provide its documentation of the investigation including investigation reports, photo documentation, and correspondence to DSL for its consideration. DSL will coordinate with ODA about any enforcement actions.

11. DISPUTE RESOLUTION AND ELEVATION

11.1 In the event of a dispute regarding aspects of this Agreement, the Parties agree to quickly and efficiently resolve disputes first through staff-level constructive dialogue. For staff-level disputes other than those involving ODFW-recommended conditions and expedited reviews (Sections 5.9, 6.7 and 7.7), ODA and ODFW staff, with DSL as needed, will prepare a summary of the dispute and elevate the dispute to a higher management level for resolution.

11.2. Elevation of the dispute should be used in the following situations:

- a. Whenever the Parties think they cannot make further progress or reach agreement.
- b. Whenever the Parties think the decision needs to be made at a higher level.
- c. Whenever the Parties think this Agreement is not being upheld.

Elevation is a positive step in appropriately resolving issues. The sequence of elevation from the staff level for each of the agencies is identified below.

Party	1 st Level	2 nd Level	3 rd Level
ODA	Agricultural Water Quality Program Manager	Natural Resources Programs Area Director	Director
DSL	Field Operations Manager or Planning and Policy Manager	Deputy Director for Operations	Director
ODFW	Habitat Resources Program Manager	Fish or Wildlife Division Administrator, Deputy Director	Director

12. AMENDMENTS

The terms of this Agreement may not be waived, altered, modified, supplemented, or otherwise amended in any manner whatsoever, except in writing and by written mutual agreement of the Parties.

13. SEVERABILITY

The Parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the Agreement did not contain the particular term or provision held to be invalid.

14. DAS REPORTING REQUIREMENT

The Parties agree that ODA shall be the Reporting Party for purposes of ORS 190.115, Summaries of

Agreements of State Agencies. ODA shall submit a summary of this Agreement to the Oregon Department of Administrative Services through the electronic Oregon Procurement Information Network (ORPIN), within the 30-day period immediately following the Effective Date of the Agreement.

15. COMPLIANCE WITH LAW

In connection with their activities under this Agreement, the Parties shall comply with all applicable federal, state, and local laws and regulations.

16. MERGER, WAIVER, AND MODIFICATION

This Agreement and all exhibits and attachments, if any, constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, or change of terms of this Agreement shall bind any of the Parties unless in writing and signed by all Parties. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given.

17. MODIFICATION OR TERMINATION

This Agreement may be modified or terminated by any Party upon 30 days written notification to the other Parties. No amendments may be made to this Agreement without the express written agreement of the Parties.

18. AMENDMENT AND REVIEW

The Parties will review this Agreement every five years with the first five-year term running from the effective date of this Agreement. First-level staff may initiate the five-year review. Any revised Agreement shall be signed by second- or third-level staff, as deemed appropriate by each Party.

19. ADDITIONAL PROVISIONS

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates set forth below.

STATE OF OREGON acting by and through its
Oregon Department of Agriculture

By: 

For: Alexis M. Taylor
Director

October 13, 2021
Date

STATE OF OREGON acting by and through
its Oregon Department of State Lands

By: Vicki L. Walker, Director Digitally signed by Vicki L. Walker, Director
Date: 2021.10.14 10:22:25 -07'00'

Vicki L. Walker
Director

Date

STATE OF OREGON acting by and through its
Oregon Department of Fish and Wildlife


By: Curt Melcher

Curt Melcher
Director

10/14/21
Date

ATTACHMENT A
Notification Process Map

Notice Review Process for Maintaining Traditionally Maintained Channels



6/21

