

Chapter 87

Goal 5 Resources

WETLAND OVERLAY (/W)

87.005 Purpose. The Wetland Overlay Zone shall provide for wetland protection in accordance with Statewide Planning Goal 5. [Ord 91-0080]

87.010 Application. The Wetland Overlay Zone shall apply to the Jackson-Frazier Wetland as inventoried in the February, 1991 ESEE Analysis adopted into the Natural Resources and Hazards Background Report of the Benton County Comprehensive Plan. [Ord 91-0080]

87.020 Uses and Activities. The following uses and activities may be permitted within the Wetland Overlay subject to the criteria contained in BCC 87.025 and other provisions of this Code.

- (1) Conservation or preservation of soil, water, vegetation, fish and other wildlife.
- (2) Outdoor recreational activities, such as fishing, birdwatching, or hiking.
- (3) Management activities to maintain or enhance wetland values, including mowing, spraying, prescribed burning, herbicide application, selective vegetation removal, maintenance of drainage ditches and other drainage controls.
- (4) Education and Scientific Research. [Ord 91-0080]

87.025 Review Criteria. The development of facilities or the installation of land improvements related to uses and activities identified in BCC 87.020 shall;

- (1) Utilize the best available management practices; and
- (2) Not result in any adverse impact to the identified natural values of the wetland which are recognized in the ESEE Analysis. [Ord 91-0080]

SURFACE MINING OVERLAY ZONE (/SM)

87.100 Purpose. The Surface Mining Overlay Zone shall protect significant aggregate and mineral resources from conflicting uses. [Ord 91-0080]

87.110 Application. The Surface Mining Overlay Zone shall be applied to the impact area for a specific surface mining site. Expansion of an existing site or establishment of a new site for removal and processing of mineral or aggregate resources may be reviewed to determine the significance of the potential site. A significant site shall be added to the Comprehensive Plan inventory of mineral and aggregate sites for protection pursuant to Statewide Planning Goal 5. The provisions for the Surface Mining Overlay Zone shall be determined on a site-specific basis in order to resolve those conflicts identified through the analysis of the economic, social, environmental, and energy consequences. The provisions of the Surface Mining Overlay Zone shall be the provisions set forth in the management plan for that site adopted pursuant to BCC 87.130 to 87.140. Such protection does not exempt the use from the provisions of the primary zone. [Ord 91-0080]

87.120 Procedure for Application. A person may initiate a zone change pursuant to BCC 53.505 to 53.525 and an amendment to the Comprehensive Plan pursuant to BCC 53.605 to 53.625 for protection of the mineral or aggregate site pursuant to Statewide Planning Goal 5. An application shall include the following information:

- (1) An estimate of the quantity of the resource, in cubic yards, as determined by drilling, digging test holes, or other survey methods.

(2) A description of the quality of the resource, including a statement of compliance with federal, state, or local standards issued by a certified lab according to the following applicable methods:

- (a) Resistance to Abrasion (AASHTO Designation T96, ASTM Designation C131, OSHD Test Method 211);
- (b) Sodium Sulfate Soundness (OSHD Test Method 206);
- (c) Oregon Air Degradation (OSHD Test Method 208); or
- (d) Other test methods appropriate for the type of resource.

(3) If the resource does not comply with the federal, state, or local standards as required in subsection (2) of this section, the description of quality shall be supported by a market analysis of the product, including such factors as use of the product, distance to market, and transportation routes.

(4) Site map showing the location of test holes and approximate limits of the resource.

(5) Description of the method(s) of extraction, including types of machinery.

(6) Vicinity map outlining the area which may be impacted by extraction operations, considering such factors as equipment noise, dust dispersion, range of projectiles, and seismic effects from blasting. The map shall show all property lines, public and private roads, existing land uses, existing structures, and water bodies within the potential impacted area. The area delineated as the potential impacted area shall be considered the affected area for purposes of public notice. Included with the map shall be pertinent information which provides the rationale for the boundary of the potential impacted area.

(7) Identification of all existing uses which may conflict with extraction of the resource, and all uses reasonably expected to occur within the zone which may conflict with extraction of the resource.

(8) A copy of the reclamation permit application to the Oregon Department of Geology and Mining Industries, if available. [Ord 91-0080]

87.130 Surface Mining Site Management Plan. (1) The Planning Commission shall conduct a public hearing pursuant to BCC 51.705 to 51.725 to review the proposed zone change and Comprehensive Plan amendment.

(2) Notice of the public hearing shall be mailed to the Oregon Department of Fish and Wildlife, and to landowners within the potential impacted area pursuant to BCC 51.605 to 51.625.

(3) The Planning Commission shall determine the economic, social, environmental, and energy (ESEE) consequences of any conflicting uses on the resource site. If any conflicting use is subject to other Statewide Planning Goals, the ESEE consequences of both resources shall be determined.

(4) The Planning Commission shall analyze the ESEE consequences and formulate the provisions for a site-specific management plan within the framework of one of the following options:

(a) Protect the resource site. All conflicting uses are prohibited within a designated impacted area. The resource site shall be of sufficient importance relative to conflicting uses, and the ESEE consequences of conflicting uses shall be of sufficient magnitude, to prohibit conflicting uses from the defined impacted area. The management plan shall specify what conflicting uses are prohibited.

(b) Allow conflicting uses fully. No conflicting uses are prohibited on the site or in the impacted area. The conflicting uses shall be of sufficient importance relative to the resource site to allow all conflicting uses to be developed to the fullest extent permitted by the zone(s), irrespective of ESEE consequences. No management plan shall be prepared and no overlay zone shall be applied.

(c) Limit conflicting uses. Conflicting uses are allowed within given parameters. Conflicting uses may be limited to an extent which affords a desired degree of protection to the resource site. The management plan shall specify what conflicting uses are allowed to the fullest extent permitted by the zone(s), what conflicting uses are prohibited, and which uses are allowed subject to standards or limitations intended to protect the resource site.

(5) The Planning Commission shall make a recommendation to the Board of Commissioners on the significance of the resource site and on the overlay zone and management plan.

(6) The Planning Commission shall adopt findings regarding:

(a) The significance of the resource site in terms of location, quality, and quantity of the resource, based on the information contained in the application; and that

(b) The proposed management plan to be implemented through the overlay zone, if any, affords the protection to the resource site required by Statewide Planning Goal 5 while balancing the applicability of other Statewide Planning Goals.

(7) The Board of Commissioners shall dispose of the recommendation pursuant to BCC 53.525 and 53.625. The management plan shall be adopted by ordinance. Findings adopted by the Board of Commissioners shall be included on the Comprehensive Plan inventory of mineral and aggregate sites protected under Statewide Planning Goal 5. [Ord 91-0080]

SENSITIVE FISH AND WILDLIFE HABITAT OVERLAY (/FW)

87.200 Purpose. The Sensitive Fish and Wildlife Habitat Overlay Zone shall protect sensitive habitats not protected by other programs such as the Willamette River Greenway Program, the Oregon Forest Practices Act or the "Cooperative Agreement between the Board of Forestry and the Fish and Wildlife Commission." The zone shall protect areas that have been identified by Oregon Department of Fish and Wildlife or Oregon Department of Forestry as containing a significant nesting, or roosting site or watering habitat for species that are classified as threatened or endangered and areas designated as sensitive bird nesting, roosting, or watering sites. Habitat protection shall be achieved through the use of site specific management plans that ensure that proposed uses and activities will not destroy or result in the abandonment of these areas. [Ord 91-0080, Ord 93-0098]

87.210 Application. (1) The Sensitive Fish and Wildlife Habitat Overlay Zone shall be applied to all Northern Bald Eagle nests and roosts, Spotted Owl nests, Osprey nests, Great Blue Heron rookeries, and Band-tailed Pigeon mineral springs.

(2) Unless alternatively identified by using cultural boundaries, waterways, topography, or through a site specific evaluation of significant habitat components, an established Sensitive Fish and Wildlife Habitat Overlay Zone shall include the area:

(b) Within 600 feet of a Great Blue Heron rookery or band-tailed Pigeon mineral spring.

(3) (a) Within 1/4 mile of a Northern Bald Eagle nest or roosting site, Spotted Owl nest, or Osprey nest; or

The County shall initiate a review of the application of this zone at the request of the property owner or ODFW if a significant change in habitat has occurred. [Ord 91-0080]

87.220 Development Permit Review Required. Within the Sensitive Fish and Wildlife Habitat Overlay Zone, the removal of trees, except for public safety or erosion control, or any development activity which requires a permit shall be subject to the review procedure and evaluation criteria set forth in BCC 87.230. The provisions of this chapter do not apply to land use actions that are under the jurisdiction of the Oregon Forest Practices Act. [Ord 91-0080, Ord 93-0098]

87.230 Review Procedure and Evaluation Criteria. (1) The County shall notify Oregon Department of Forestry (ODF) and Oregon Department of Fish and Wildlife (ODFW) of any permit proposal or tree removal within the Sensitive Fish and Wildlife Habitat Overlay Zone within seven days of the permit request. ODF and ODFW shall review the request and submit a determination of impact report to the County within 14 days of the date of notification. The report shall include conclusions regarding the consequences of allowing the proposed use to occur. If ODF and ODFW provide a finding of no impact, or if no response is received by the end of the 14 day comment period, the provisions of this Section do not apply.

(2) Submittal of a report concluding that a significant impact may occur from the proposed use shall be supported by findings that either:

(a) The proposed use would be located within 600 feet of Northern Bald Eagle nest or roosting site, Spotted Owl nest, or Osprey nest or within 300 feet of a Great Blue Heron rookery or a Band-tailed Pigeon mineral spring; or

(b) Due to unique site conditions such as topography, a proposed use located outside the area established in BCC 87.210(2) but within the overlay zone will impact the habitat. ODFW shall provide the basis for such a finding in its determination of impact report.

(3) A site specific habitat management plan shall be submitted to the County by ODF or ODFW within 14 days of the determination of impact report. The plan shall consider nesting trees, critical nesting periods, roosting sites, buffer areas, and any other relevant factors and shall also identify measures that would specifically limit the proposed use in a manner consistent with BCC 87.200. ODF and ODFW shall consult with the permit applicant, site landowners, and other persons and agencies in developing the management plan.

(4) If a determination of impact is made, the County shall review the applicant's development plan, the habitat management plan, and other relevant information. The County shall impose conditions on the proposed use in order to ensure that it will not destroy the sensitive habitat or result in abandonment of the area. The County shall deny the application if such impacts of the proposed use can not be mitigated and that the development may lead to destruction or abandonment of the sensitive habitat. [Ord 91-0080, Ord 93-0098]

FENDER'S BLUE BUTTERFLY OVERLAY (/FB)

87.300 Purpose. The Fender's Blue Butterfly Overlay shall implement the private-land provisions of the Benton County Prairie Species Habitat Conservation Plan (HCP), adopted into the Benton County Comprehensive Plan (Ord. 2013-0253), as amended. The purpose of the Fender's Blue Butterfly Overlay is to:

- (1) Reduce Benton County's and private property owners' risk of liability under the federal Endangered Species Act;
- (2) Minimize the impact to habitat of the Fender's blue butterfly;
- (3) Provide private property owners with options for ways to comply with the federal Endangered Species Act; and
- (4) In many cases relieve the property owner of the requirement to individually coordinate with U.S. Fish and Wildlife Service (USFWS) to obtain approval for construction activity, which expedites the construction timeline, increases certainty and efficiency, and allows financial savings for the property owner.

87.310 Application.

- (1) The Fender's Blue Butterfly Overlay shall apply to land designated as "Fender's Blue Zone" in the Benton County Prairie Species Habitat Conservation Plan (HCP), December 2010, or successor document, other than land within urban growth boundaries of incorporated cities.
- (2) Any modification to the Fender's Blue Butterfly Overlay designation on the Zoning Map or to the provisions of BCC 87.300 through 87.340 shall be consistent with the HCP and shall observe the procedure for modifications specified in the Implementing Agreement between Benton County and USFWS (see HCP document).
 - (a) An error in mapping may be corrected on the Zoning Map pursuant to BCC 51.110(6) and the Minor Amendment process specified in Section 8.8.0.0 of the HCP.

(b) Except as specified in subsection (2)(a) above, adding or deleting areas from the Fender's Blue Butterfly Overlay shall require an amendment to the Zoning Map pursuant to 53.505 through 53.525 and the Major Amendment process specified in Section 8.8.0.1 of the HCP.

(3) **Notification.** Benton County shall notify Oregon Department of Fish and Wildlife and the U.S. Department of Fish and Wildlife regarding applications for the following on land within the Fender's Blue Butterfly Overlay: Zoning Map or Comprehensive Plan amendments, conditional use permits, subdivisions and series partitions. No such notice shall be required for error corrections referenced in subsection (2)(a) above.

87.315 Definitions. As used in this Overlay:

- (1) "Certificate of Inclusion" means formal documentation issued by Benton County pursuant to the Benton County HCP, authorizing take of Fender's blue butterfly habitat.
- (2) "Construction activity" means the following activities:
 - (a) Building or modifying a structure;
 - (b) Placing a manufactured or modular structure;
 - (c) Conducting a septic system feasibility study;
 - (d) Installing, altering or repairing a septic system;
 - (e) Installing plumbing, mechanical or electrical facilities;
 - (f) Constructing a driveway or parking area;
 - (g) Similar activities involving ground disturbance and/or occupation of land for purposes of establishing anything constructed, installed, or portable.
- (3) "Dispersal Zone" (also known as "Lupine Zone") is defined in Section 5.1.0.0 of the HCP.
- (4) "HCP" means the Benton County Prairie Species Habitat Conservation Plan, dated December 2010, approved by the U.S. Fish and Wildlife Service (USFWS) January 2011, as amended, or successor document.
- (5) "Nectar Zone" is defined in Section 5.1.0.0 of the HCP.
- (6) "Take authorization" means approval from USFWS to cause damage to a specific amount (in land area) of Fender's blue butterfly habitat.

87.320 Authorization Required. On land located within the Fender's Blue Butterfly Overlay other than land owned by Benton County or right-of-way controlled by Benton County, the following shall apply:

- (1) Prior to initiating ground-disturbing construction activities pursuant to an approved Benton County permit, land use decision, or other authorization issued by Benton County, the property owner shall obtain one of the following:
 - (a) A Certificate of Inclusion granted by Benton County pursuant to BCC Chapter 37, specifically covering the impact of the proposed construction activity (note that not all construction activities allowed by the zoning are eligible for a Certificate of Inclusion pursuant to BCC Chapter 37);
 - (b) Written authorization from USFWS specifically authorizing the proposed construction activity;
or
 - (c) A habitat survey pursuant to Section 8.2.0.0 of the HCP, demonstrating that there is no Kincaid's lupine within 65 feet and, if inside the Nectar Zone as defined in the HCP, no native

nectar species within 33 feet of the proposed construction activities, including all associated ground-disturbing activities.

- (2) Exceptions. The following activities are exempt from the requirement in subsection (1) of this section:
 - (a) Maintaining a garden, lawn, landscaped area or driveway, existing on January 14, 2011, in the same general footprint.
 - (b) Vegetation clearing to maintain a 30-foot fire break around legally existing structures, or other construction activity within the footprint of, or within 30 feet of, a structure legally existing as of January 14, 2011, or a structure permitted or authorized by Benton County.
 - (c) Installing, maintaining or replacing a fence.
- (3) None of the options listed in subsections (1)(a) through (1)(c) of this section are land use actions.

87.330 Creation of New Parcels and Lots. Partition or subdivision of land partially or fully within the Fender's Blue Butterfly Overlay shall be subject to the following:

- (1) An application for partition or subdivision shall include all habitat surveys the applicant has access to, and the locations of all issued Certificates of Inclusion or federal take authorizations affecting the subject property.
- (2) An application for series partition or subdivision shall include habitat survey(s) prepared pursuant to Section 8.2.0.0 of the HCP and covering the entire subject property.
- (3) Partitions or subdivisions platted after August 15, 2013, shall be subject to the following:
 - (a) Eligibility of resulting parcels or lots for the granting of a Certificate of Inclusion shall be governed by BCC Chapter 37. Federal authorization will be required for construction activities on ineligible parcels and lots.
 - (b) If any of the lots or parcels in the proposed partition or subdivision are ineligible for Certificate of Inclusion coverage, then, prior to final plat approval, the applicant shall either:
 - (A) Sign documents for recording with the plat acknowledging that development of the properties that are ineligible for Certificate of Inclusion coverage will require obtaining take authorization from USFWS; or
 - (B) Submit a habitat survey, approved by USFWS, demonstrating that each parcel or lot that is ineligible for Certificate of Inclusion coverage has a buildable area meeting the setbacks to Kincaid's lupine and native nectar plants specified in BCC 87.320(1)(c). For parcels or lots upon which such a buildable area cannot be demonstrated to the satisfaction of the Planning Official, the applicant shall comply with subsection (a) of this section.

87.340 Preference to Avoiding Habitat.

- (1) Minor Setback Reduction to avoid or decrease the impact to Fender's blue butterfly habitat.
 - (a) Without obtaining a variance, an applicant may reduce the following required setbacks by up to 20%:
 - (A) Side and/or rear property line setbacks, the 30-foot setback from structures on adjacent properties, the 25-foot or 50-foot setback to a stream, and/or the 300-foot setback from a resource-zoned property;
 - (B) Right-of-way and/or edge-of-road setbacks, at the discretion of the County Engineer.

- (b) To qualify for this setback reduction, the applicant shall demonstrate that the location of the proposed construction activity for a use listed as permitted outright in the applicable zone would negatively impact Fender's blue butterfly habitat identified by habitat survey, and that the setback reduction would reduce the habitat impact.
- (2) Variance Criteria.
- (a) In considering a request for variance pursuant to BCC 53.405 through 53.425, the following may be substituted for the criterion in BCC 53.410(1):
 - (A) Reasonable development of the property in a manner consistent with the standards of the Development Code would result in either significant hardship to the property owner, or destruction of habitat for the Fender's blue butterfly identified through a habitat survey pursuant to Section 8.2.0.0 of the HCP.
 - (b) An applicant for a variance pursuant to BCC 53.405 through 53.425 shall demonstrate that variance will not result in an increase in the level of negative impact to habitat for the Fender's blue butterfly.
- (3) Property owners are encouraged to review the Prairie Conservation Strategy (Appendix E of the HCP) or contact local conservation organizations for information on methods to minimize or compensate for unavoidable impacts to habitat. Such organizations may be able to relocate Kincaid's lupine plants or other rare plants prior to construction activities.

[Ord 2013-0253 eff. 8/15/2013]