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December 8, 1997

Mel Stewart
5180 Zosel Ave. S.
Salem OR 97306

Re: *Petition for Public Records Disclosure Order: Division of State Lands Records*

Dear Mr. Stewart:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on December 1, 1997, requests certain "information." We take it to be a request for the Attorney General to direct the Division of State Lands to make available records providing that information. Your request was as follows:

(1) Date rule making was initiated and adopted on the 'Wetlands Mitigation Banking' Rule and 'Compensatory Mitigation' Rule.

(2) Question: Has any new rule making been initiated that would affect any of these rules. If so, identify them.

For the reasons that follow, we respectfully deny your petition because the Division did not actually deny your request. For convenience, we also provide brief answers to your questions and describe relevant Division records that you may inspect if you wish to verify those answers.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. Upon receipt of a request to inspect public records, an agency must respond in a reasonable manner and within a

reasonable time. The agency may consult with legal counsel before responding, and may require the requestor to prepay the staff cost of making such records available.

In this particular situation, the agency proceeded reasonably in response to your request and did not deny you access to public records. First, please keep in mind that you are involved in litigation with the Division concerning the wetland mitigation issues which were the subject of your request. Division staff were aware that you are represented by counsel in that proceeding. Also, with all due respect, please also keep in mind that because of previous difficulties concerning your contacts with Division staff, the Division had previously asked you not to directly contact the Division, but to send any communications to the Department of Justice. This situation is very similar to that which we addressed in our order dated April 19, 1995, concerning your previous petition for a public records disclosure order. (Copy enclosed.) In that order, we denied your petition because the Division had not denied your public records request. As we stated in that order: "Division staff did not refuse to make those records available. Rather, they asked you to transmit your request through your legal counsel * * * to the Assistant Attorney General who represents the Division."

For these reasons, Division staff reacted cautiously when you made your most recent request. Division staff contacted Department of Justice trial counsel, who advised that the information and records should be made available to you through your legal counsel in the litigation. At no time did the Division refuse to provide the information and records to you. Rather, the Division was trying to respond to your request in compliance with advice from its legal counsel.

We are informed by Shannon Relaford, Administrative Specialist for the Policy and Planning Section of the Division of State Lands, that these are the answers to the questions you posed:

(1) On August 15, 1995, the State Land Board authorized the Division to begin rulemaking to govern public and private wetland mitigation banks. The Board adopted those rules on February 11, 1997. On February 18, 1994, the Division began rulemaking to govern compensatory mitigation. The Board adopted those rules on January 1, 1995.

(2) Neither the mitigation banking rules nor the compensatory mitigation rules have been amended since they were originally adopted.

Ms. Relaford informs us that you may inspect the Division's rulemaking files and minutes of State Land Board meetings, which are the source of these answers.[1/] Should you wish to do that, please make arrangements through William R. Cook, Assistant Attorney General, who is general counsel for the Division. He can be reached at 229-5725 (Portland, four days a week) or 378-4409 (Salem, one day a week).

For these reasons, we respectfully deny your petition.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

JAA02818
Enclosure
cc: Earle Johnson, DSL
Danna Brabender, AAG (Trial)
William Ghiorso, Esq.

[1/] The agency is legally entitled to charge you a fee to reimburse it for its actual cost in making such records available, including photocopy costs and staff time reviewing records. ORS 192.440(3).