

STAFF REPORT

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| Agenda Item No.: | 7 |
| Work Plan: | Private Forests Work Plan |
| Topic: | Water Quality Protection |
| Presentation Title: | Riparian Rules/SSBT Rulemaking – Proposed Rule Language |
| Date of Presentation: | September 7, 2016 |
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SUMMARY

This agenda item presents proposed rule language and necessary supporting documentation for the Riparian Rules/ Salmon-Steelhead-Bull Trout (SSBT) rulemaking. Upon direction and approval from the Board of Forestry (Board), the Department of Forestry (department) will complete any final edits and submit necessary materials to the Secretary of State's office in time to publish proposed rule language in the October 2016 Oregon Bulletin.

The Riparian Rulemaking Advisory Committee (RRAC) has completed their work assignment for 2016, and has reached consensus on all major policy topics, except equity relief. . The department completed an analysis on policy choices for equity relief. This equity analysis and RRAC discussions informed the department recommendation on this topic. The RRAC also provided input on department recommendations on how to carry current rule constructs into the new SSBT rules. Based on the RRAC consensus recommendations, the department drafted proposed rule language. At their August meeting, the RRAC reached consensus on the facilitator's report on the RRAC process and on the proposed rule language, except for the equity relief language.

The department requests approval of the RRAC consensus policy recommendations (Attachment 1), the policy clarifications on all other rules applies (Attachment 2), and the department recommendations on equity relief (Attachment 3). The department recommends the Board accept the Riparian Rulemaking Advisory Committee Report (Attachment 4). The department requests that the Board direct the department to move forward with formal administrative rule making, which includes a public involvement process, for the Riparian/Salmon-Steelhead-Bull Trout proposed rules (Attachments 7 and 8).

The RRAC will meet again in 2017, prior to the close of the public comment period for proposed rules. The department will recommend approval of the economic analysis as required in ORS 527.714(7) in the first quarter of 2017, followed by a recommendation to approve final rules in April 2017. Under this timeline, the new rules would likely begin to apply in July 2017.

CONTEXT

The Board of Forestry's 2011 Forestry Program for Oregon supports an effective, science-based, and adaptive FPA as a cornerstone of forest protection on private lands in Oregon. The Board's guiding principles and philosophies includes a commitment to continuous learning, evaluating, and appropriately adjusting forest management policies and programs based upon ongoing monitoring, assessment, and research (Value Statement 11). The Board values broad-based,

informed public participation and consensus-based decision-making whenever possible (Value Statement 10).

BACKGROUND

At their November 5, 2015 meeting, the Board adopted a final riparian prescription package for small and medium fish streams in western Oregon. The package described the elements that need to be included in rule language. Specifically, the decision applies to small and medium SSBT streams that are located in the Coast Range, South Coast, Interior, and Western Cascades Forest Practices Act (FPA) geographic regions. The Board also directed the department to establish a rulemaking advisory committee.

As discussed at the July 2016 Board meeting, the RRAC met in May and June to discuss remaining aspects of the Board's decision package, including:

- Oregon Department of Fish and Wildlife's Fish Habitat database and how that relates to determination and location of SSBT;
- The meaning and criteria for well-distributed throughout the riparian management area;
- Equity relief;
- Issues with Board direction that "all other rules apply;"
- Rule language structure within the FPA; and,
- Draft Economic Impact Analysis and Statement of Need and Fiscal Impact.

The RRAC met seven times, once each in the months of February, March, April, May, and June; a sixth subgroup of the RRAC meeting in July; and a final RRAC meeting in August. The RRAC approved the facilitator report in Attachment 4, which captures the full history of RRAC proceedings. The RRAC reached consensus on all major policy topics, except equity relief. The department also presented the draft Economic Impact Analysis and Statement of Need and Fiscal Impact (Attachment 5) for the proposed rule and asked the RRAC members to provide written feedback on these documents.

ANALYSIS

Based on the RRAC consensus recommendations, the department drafted proposed rule language for review by the RRAC. The department circulated proposed rule language and supporting documentation among key audiences in July and August:

- A subcommittee of the RRAC met to provide comments on proposed rule language;
- The Northwest and Southwest Regional Forest Practices Committees (RFPC) met jointly to fulfill their mandate to assist the Board in developing rules appropriate to the geographic regions in consideration;
- Department field personnel provided feedback relating to clarity and implementation of rule language through a webinar; and
- After incorporation of the above comments, the RRAC met to review and comment on revised rule language, the 2016 RRAC report, and department recommendations on how SSBT rules would differ from all other fish-bearing stream rules.

The RRAC had approved the proposed approach to rule language structure within the Forest Practices Act (FPA) administrative rules. Given the complexity of changes involved with the Division 640 rules, the department opted to delete this Division in its entirety. In its place, a new

Division 642 captures the former Division 640 content and adds language for the SSBT rules: Attachment 6 provides a “reader friendly” version of this new Division 642, formatted to emphasize changes and additions to the former Division 640. Attachment 7 contains the formal, proposed final language for Oregon Administrative Rules (OAR) directly affected by the Board’s November 2015 decision. Attachment 8 contains “housekeeping” proposed final rule language; housekeeping means changes to existing rules to maintain correct references to the new rules in Attachment 7.

At the August RRAC meeting, the department reviewed the decisions on how to carry current rule constructs into the new SSBT rules. This work relates to the Board’s policy decision that “all other rules apply” and was included as a work item in the RRAC charter. Attachment 2 documents the recommendations on policy clarification for all other rules apply. The department also discussed comments provided by the RRAC on the proposed rule language, and reviewed the department’s proposed modifications to the rule language based on these comments. The department also identified areas where comments would not result in changes to the proposed rule language. The department briefly discussed the status of the equity relief discussion and noted that the group did not reach consensus on equity relief, therefore the departments was not asking the RRAC for consensus on the equity relief section of the proposed rule language. The facilitator conducted a consensus check. The RRAC agreed with consensus on the proposed rule language (excluding the equity relief section) and the Department’s proposed modifications (all 2, 3, and 4s).

At their meetings, the RRAC discussed at length how to determine encumbrance and equity relief; however, they were not able to reach a consensus on this topic. They did agree on the meaning of “parcel” and generally agreed with the approach for determining additional encumbrances. The RRAC generally agreed that the Board intended to provide relief to some landowners. However, there were differing perspectives about the degree of encumbrance that should trigger relief, whether the number of landowners eligible for relief should be a factor in determining whether the trigger for relief is appropriate, how to weigh relief with reduced protection for a portion of SSBT streams, and what might constitute appropriate relief. The department completed the analysis on policy choices for equity relief and held additional discussions with a subset of RRAC members to discuss comments and concerns about equity provisions and see if there was opportunity for consensus. The equity discussions indicated that different fundamental views about the Board’s policy decisions on SSBT protection prevented further movement toward consensus. The analysis and RRAC discussions informed the department recommendation on this topic (Attachment 3).

RECOMMENDATIONS

The department recommends that the Board:

- (1) Adopt the RRAC consensus policy recommendations (Attachment 1), the policy clarifications on all other rules applies (Attachment 2), and the department recommendations on equity relief (Attachment 3).
- (2) Accept the Riparian Rulemaking Advisory Committee Report (Attachment 4).
- (3) Direct the department to move forward with formal administrative rule making for the Riparian/Salmon-Steelhead-Bull Trout rules (Attachment 7 and 8).

NEXT STEPS

- 1) File Notice of Proposed Rulemaking and Statement of Need and Fiscal Impact with Secretary of State by September 14, 2016.
- 2) Send notice to legislators as per ORS 183.335(15) by September 14, 2016.
- 3) Conduct public hearings (last quarter 2016).
- 4) Hold final Committee meeting (first quarter 2017) to review and comment on hearing report, fiscal impact, and proposed final rules.
- 5) Recommend Board approval of final economic analysis as per ORS 527.714(7) (first quarter 2017).
- 6) Recommend Board approval of proposed final riparian/SSBT rule language (April 2017).
- 7) Establish rule effective date of July 1, 2017.

ATTACHMENTS

- 1) Board of Forestry (BOF) Riparian Rulemaking Advisory Committee (RRAC) Consensus Decisions as of August 19, 2016
- 2) Department Recommendations: “All Other Rules Apply” for the Salmon, Steelhead and Bull Trout Riparian Rulemaking
- 3) Department Recommendations: Equity Provisions for the Salmon, Steelhead and Bull Trout Riparian Rulemaking
- 4) Report to the Oregon Board of Forestry: Riparian Rulemaking Advisory Committee August 2016 (Prepared by DS Consulting)
- 5) Statement of Need and Fiscal Impact
- 6) Reader-friendly version: Proposed rule language - OAR Chapter 629 Division 642
- 7) Formal proposed rule language for submission to Secretary of State
 - a. OAR Chapter 629 Division 600
 - b. OAR Chapter 629 Division 635
 - c. OAR Chapter 629 Division 640
 - d. OAR Chapter 629 Division 642
- 8) Formal proposed rule language “housekeeping” package for submission to Secretary of State