

**NOTICE OF PROPOSED RULEMAKING FILING  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT**

*For internal agency use only.*

Department of State Lands

OAR 141-102

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**FILING CAPTION**

OAR Chapter 141, Division 102, Revisions to the Oregon Essential Indigenous Anadromous Salmonid Habitat (ESH) Rules

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Last Date and Time for Public Comment: [March 2, 2021, 5:00 p.m.]

|                   |           |              |                  |
|-------------------|-----------|--------------|------------------|
| February 16, 2021 | 3:00 p.m. | Zoom Meeting | Peter Ryan       |
| Hearing Date      | Time      | Address      | Hearings Officer |
| February 17, 2021 | 5:00 p.m. | Zoom Meeting | Peter Ryan       |
| Hearing Date      | Time      | Address      | Hearings Officer |

**RULEMAKING ACTION**

*List each rule number separately (000-000-0000) below. Attach proposed, tracked changed text for each rule at the end of the filing.*

**ADOPT:**

**AMEND:**

141-102-0000, 141-102-0010, 141-102-0020, 141-102-0030, 141-102-0040

**REPEAL:**

**RULE SUMMARY:**

*Include a summary for each rule included in this filing.*

141-102-0000 (Replace rulemaking requirement for ESH Map updates. Add additional purpose to develop and implement a process for responding to requests to review the accuracy of an ESH designation and mapping.)

141-102-0010 (Add policies to provide for public comment and tribal engagement, while promoting ESH awareness to protect habitat.)

141-102-0020 (Removed reference to data standard in definition for Essential.)

141-102-0030 (Identify 2021 Essential Salmonid Habitat Map and describe how the Department will conduct outreach to promote ESH awareness.)

141-102-0040 (To allow for more frequent updates, the Department, in consultation with ODFW, shall revise designated ESH when advised that new or higher quality data are available. A person may request a review of an existing designation at any time. The Department will initiate a process for tribal input and consultation and public review and comment whenever ESH Map changes are proposed. If annual changes occur, final designations and an updated map will be adopted no later than February 1 of each year.)

## **STATEMENT OF NEED AND FISCAL IMPACT.**

### **Need for Rule(s):**

As defined in ORS 196, streams that are designated as Oregon Essential Indigenous Anadromous Salmonid Habitat (ESH) are those necessary to prevent the depletion of indigenous anadromous salmonid species during their life stages of spawning and rearing. ESH includes designated streams as well as off channel rearing or high flow refugia habitat with a permanent or seasonal surface water connection to an ESH stream.

Due to the nature of the resource, changing conditions can alter what is considered ESH. Revisions to the rules are needed to update the designated ESH Map that was last adopted by rule in 2015. Additional rule changes are needed to allow for more frequent and regular ESH updates and to ensure a transparent process for requesting designation changes.

To meet these needs, the Oregon Department of State Lands (DSL) is amending administrative rules under OAR 141-102 to adopt the 2021 ESH Map as the rule's base Map, develop a new process to allow for more frequent revisions to the Map, including additions, modifications, or deletions, as well as create an opportunity for the public to request review of a current ESH designation. This rule change is also needed to outline tribal and public engagement policies and processes.

### **Fiscal and Economic Impact:**

A minimal fiscal impact is predicted.

ESH is a threshold designation used to determine the need for and type of permit required for fill or removal activities under ORS 196. An ESH designation does not affect the cost of a permit, nor does the proposed rule alter the criteria for or definition of ESH which are outlined in ORS 196. The proposed rule develops a new process that allows for more frequent Map updates outside of the formal rulemaking process. It also develops a process for requesting changes to ESH designations and outlines how public engagement and comment will be sought.

The cumulative fiscal impact to tribal governments, landowners, small businesses, water districts, etc. cannot be predicted and quantified but is expected to be minimal. Newly designated ESH may lead to an increase in the number of projects involving less than 50 cubic yards of removal or fill that will require a permit where they did not before. Fiscal impacts may include the cost of preparing a permit application, hiring a consultant, and developing compensatory mitigation for any unavoidable impacts. The same process used to add an ESH designation can also be used to remove a designation. This would have the inverse effect, adding the 50 cubic yard exemption and providing a cost saving to those projects.

A fiscal impact to DSL may occur due to the new process to accept requests to change an ESH

designation and mapping, and the increased frequency to adopt updates to ESH. The level of impact will depend on the number of requests and comments received and cannot be determined at this time. Based on the history of ESH Map revisions, a minimal fiscal impact to the agency is expected.

**Statement of Cost of Compliance:**

**(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).**

***1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):***

The Oregon Department of Fish and Wildlife (ODFW) is the steward of the Oregon Fish Habitat Distribution database, which is used to inform the designation of ESH streams. ODFW may be economically affected by the rule revisions based on an estimated increase in review requests and limited staff capacity. This includes the need for ODFW to respond to annual data requests from DSL, and the need for ODFW staff to evaluate individual requests for ESH designation reviews. A request to evaluate specific ESH designations may occur when a person submits a request to DSL for an accuracy review of an existing ESH determination, or during the public and tribal government review process before revisions to ESH designations are finalized.

The Oregon Department of Agriculture (ODA) has a newly formed program administered through OAR 603-905, where eligibility is determined based on ESH designations. As designations change, ODA will need to notify program participants regarding any change in program eligibility.

The Oregon Department of Environmental Quality (DEQ) is delegated the authority by the U.S. Environmental Protection Agency (EPA) to issue National Pollutant Discharge Elimination System (NPDES) general permits in Oregon. The 700PM NPDES general permit provides coverage for discharges from motorized suction dredge mining and other mining equipment commonly used for in-water placer mining operations, but the permit cannot be assigned for motorized placer mining in streams designated ESH. As designations change, DEQ will need to notify each registrant when that permit assignment is no longer valid due to new ESH designations.

If the proposed rules are adopted, DSL anticipates that other state agencies, units of local government, and the public will continue to comply with the removal-fill law in the same manner as before. These rules do not affect directly or indirectly the cost of compliance, though the Department recognizes the potential fiscal impacts from new additions and removals of ESH designations discussed above in the Fiscal and Economic Impact section.

***2. Cost of compliance effect on small business (ORS 183.336):***

***a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:***

ESH is a threshold designation used to determine the need for and type of permit required for removal-fill activities; therefore, new designations will not affect the cost of a permit. However, new ESH designations may lead to an increase in the number of projects involving less than 50 cubic yards of removal-fill that will require a permit where they did not before. The inverse, adding the 50 cubic yard exemption back when a ESH designation is removed, is also a possibility and would provide a cost saving for those projects. Fiscal impacts due to these changes for small businesses cannot be predicted.

***b. Projected reporting, recordkeeping and other administrative activities required for compliance, including***

*costs of professional services:*

There will be no additional costs of compliance resulting from administrative activities.

*c. Equipment, supplies, labor and increased administration required for compliance:*

There will be no additional costs of compliance resulting from equipment, supplies, labor, and administration.

**Describe how small businesses were involved in the development of these rule(s)?**

Three small business representatives were invited to and participated on the rules advisory committee. These included businesses representing placer miners, development interests, and recreational fishing. The Oregon Farm Bureau and Oregon Water Resource Congress participated in the RAC representing the farming community. Other businesses are welcome to comment during the public comment period.

**Documents Relied Upon, and where they are available:**

ORS 196.810 and 196.800–196.990 & 390.805-390.925 are available on the Oregon Legislature's website: [https://www.oregonlegislature.gov/bills\\_laws/Pages/ORS.aspx](https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx)

OAR 141-102 is available on the Secretary of State's website:  
[http://sos.oregon.gov/archives/Pages/oregon\\_administrative\\_rules.aspx](http://sos.oregon.gov/archives/Pages/oregon_administrative_rules.aspx).

In addition, the rulemaking record will be available on the Department's rulemaking website:  
<https://www.oregon.gov/dsl/Laws/Pages/Rulemaking.aspx>

**Was an Administrative Rule Advisory Committee consulted? Yes or No?**

**If not, why not?**

Yes. Rule Advisory Committee (RAC) meetings were held on September 22, October 7, November 4, and December 10, 2020. The RAC included 18 members representing policy advisors from partner agencies, federally recognized tribes in Oregon, conservation groups, agriculture, local government, and small business interests.