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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 141
DEPARTMENT OF STATE LANDS

FILED
01/27/2021 8:56 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Corrected Hearing Instructions: Revisions to the Oregon Essential Indigenous Anadromous Salmonid Habitat (ESH) Rules

03/04/2021

Note: DSL has extended the comment period through March 4, 2021.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/02/2021 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Kaitlyn Wiggins
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 02/16/2021
TIME: 3:00 PM - 4:00 PM
OFFICER: Pete Ryan
ADDRESS: Zoom Meeting
775 Summer St NE
#100
Salem, OR 97301

DATE: 02/17/2021
TIME: 5:00 PM - 6:00 PM
OFFICER: Pete Ryan
ADDRESS: Zoom Meeting
775 Summer St NE
#100
Salem, OR 97301

SPECIAL INSTRUCTIONS:
Staff will provide an informational overview of ESH from 3:05-3:15. Participants are encouraged to show up by 3:15; if no one has joined the hearing by that time, the hearing will formally conclude.

SPECIAL INSTRUCTIONS:
Staff will provide an informational overview of ESH from 5:05-5:15. Participants are encouraged to show up by 5:15; if no one has joined the hearing by that time, the hearing will formally conclude.

NEED FOR THE 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.

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

OAR 141-102 is available on the Secretary of State's website:

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>

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, returning the 50 cubic yard exemption and providing cost savings 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.

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) 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 603-095, 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)(a) 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 an 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.

(2)(b) There will be no additional costs of compliance resulting from administrative activities.

(2)(c) 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 rule 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.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

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

AMEND: 141-102-0000

RULE SUMMARY: Replace the rulemaking requirement for ESH map updates. Add additional purpose of developing and implementing a process for responding to requests to review the accuracy of an ESH designation and mapping.

CHANGES TO RULE:

141-102-0000

Purpose ¶

Pursuant to ORS 196.810(1)(b), these rules:¶

~~(1) Designate~~ Further define "essential indigenous anadromous salmonid habitat (ESH)" on maps that are made a part of this rule;¶

~~(2) Designate ESH in consultation with the Oregon Department of Fish and Wildlife (ODFW) and in consultation with other affected parties;~~¶

~~(23) Establish the process to amend the designation~~ ESH designations as new information becomes available; ¶

~~(4) Develop and implement a process for responding to requests to review the accuracy of an ESH designation and mapping; and~~¶

~~(35) Require an authorization from the Department for activities involving the fill or removal of any amount of material in ESH unless the activity is exempt.~~

Statutory/Other Authority: ORS 196.810

Statutes/Other Implemented: ORS 196.800 - 196.990, 390.805 - 390.925

AMEND: 141-102-0010

RULE SUMMARY: Add policies to provide for public comment and tribal engagement, while promoting ESH awareness to protect habitat.

CHANGES TO RULE:

141-102-0010

Policy ¶

(1) It is the policy of the State of Oregon to protect ESH.¶

(2) To achieve this policy, the Department shall:¶

(a) Consult with ~~the Department of Fish and Wildlife (ODFW)~~ concerning the status of Oregon's indigenous anadromous salmonid species;¶

(b) Identify ESH in consultation with ODFW and ~~the public through rulemaking; and~~¶
~~affected parties.~~ ¶

(c) Provide for public comment. Recognize the high level of public interest in ESH by providing opportunities for public review and comment when there are proposed changes to ESH designations.¶

(d) Provide for tribal engagement to all federally recognized Tribes in Oregon. Recognize the varied interests and unique connections Tribes have with salmonids and their habitat by providing opportunities for meaningful tribal engagement and government to government consultation. ¶

(e) Promote awareness of ESH. Raising awareness is the best way to protect ESH. Coordinate with other natural resource agencies to promote awareness of ESH and ESH updates.¶

(f) Review all projects proposed in ESH pursuant to the standards set forth in the state's Removal-Fill Law (ORS 196.600 to 196.990) and rules (OAR 141-085).

Statutory/Other Authority: ORS 196.810

Statutes/Other Implemented: ORS 196.800 - 196.990, 390.805 - 390.925

AMEND: 141-102-0020

RULE SUMMARY: Remove the reference to the ODFW Data Standard in the definition of Essential.

CHANGES TO RULE:

141-102-0020

Definitions ¶¶

(1) "Essential" means those portions of a stream reach that fill all or part of the basic or indispensable spawning or rearing needs of indigenous anadromous salmonids and are those areas necessary to prevent the depletion of indigenous anadromous salmonids. Such areas include "spawning habitat" and "rearing habitat" as defined below under sections (3) and (4) of this rule (~~Oregon Fish Habitat Distribution Data Standard, Version 2.0, February 2011: <http://www.oregon.gov/DAS/CIO/GEO/standards/docs/oregonfishhabitatdistributiondatastandardv2.pdf>~~)

¶¶

(2) "Indigenous anadromous salmonid" means chum, sockeye, Chinook and Coho Salmon, and steelhead and cutthroat trout, that are members of the family of Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority.¶¶

(3) "Spawning Habitat" includes areas where eggs are deposited and fertilized. For some species, including salmonids, this also includes areas where gravel emergence occurs and where at least some juvenile development occurs.¶¶

(4) "Rearing Habitat" includes areas outside primary spawning habitats where juvenile fish take up residence during some stage of juvenile development and use the area for feeding, shelter, and growth. Some migration also occurs as juvenile and adult fish move between the ocean and spawning grounds.

Statutory/Other Authority: ORS 196.810

Statutes/Other Implemented: ORS 196.800 - 196.990, 390.805 - 390.925

AMEND: 141-102-0030

RULE SUMMARY: Identify the 2021 Essential Salmonid Habitat Map and describe how the Department will conduct outreach to promote ESH awareness.

CHANGES TO RULE:

141-102-0030

Designation of Essential Salmon Habitat (ESH) ¶

(1) Areas eligible for designation as ESH shall include the waters of this state as described in OAR 141-085, including streams and any adjacent off-channel rearing or high-flow refugia habitat with a permanent or seasonal surface water connection to the stream. ¶

(2) The streams and stream segments designated as ESH are shown ~~on maps that are incorporated by reference in the 2021 Essential Salmonid Habitat Map. The Department may modify ESH designations based on the best available information following this rule.~~ process in OAR 141-102-0040. ¶

(3) The Department will make ~~available~~ detailed maps of ESH ~~at cost and the maps are also available for downloading and viewing on the Department's website~~

~~(<http://www.oregon.gov/dsl/PERMITS/Pages/esshabitat.aspx>)~~ designated ESH available on the Department's website; physical maps will be made available upon request, at cost. ¶

(4) The Department will conduct outreach to notify federally recognized Tribes in Oregon and the affected public to promote awareness of ESH and ESH updates.

Statutory/Other Authority: ORS 196.810

Statutes/Other Implemented: ORS 196.800 - 196.990, 390.805 - 390.925

AMEND: 141-102-0040

RULE SUMMARY: 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.

CHANGES TO RULE:

141-102-0040

Revisions to ESH ¶

~~Revisions, additions to or deletions from the list and maps of ESH shall to ESH designations shall be made in accordance with the current ODFW Stewardship Plan for the Oregon Fish Habitat Distribution Database and the following procedure:¶~~

~~(1) Requests to change an ESH designation and mapping may be submitted to the Department at any time. The Department will submit requests to ODFW for consideration. ¶~~

~~(2) Additions, modifications, and deletions to ESH accepted by ODFW may be made by amendment to these administrative rules according to the following procedure: opted by the Department during the next annual update process, subject to input from interested parties received in accordance with section (5), and based on the best available information. ¶~~

~~(3) Corrections in data entry and map alignment accepted by ODFW may be adopted by the Department outside of the annual update process. Adopted changes are considered effective but may not be reflected on ESH maps until the next annual map update. ¶~~

~~(14) The Department will consult annually with ODFW on the accuracy of the ESH designations since the last update. ¶~~

~~(2a) In consultf advised by ODFW that new or higher quality data are not available, ESH designations with ODFW and other affected parties¶ not change for that year. ¶~~

~~(b) When advised by ODFW that new or higher quality data are available, the Department may revise the maps when new or higher quality data become available and/or when new state or federal listings or delistings occur that would substantially change the extent of designated habitat; shall adopt the revised ESH designations, subject to input from interested parties received in accordance with section (5), and based on the best available information. ¶~~

~~(5) The Department will provide opportunity for input from interested parties on proposed annual changes to ESH designations as provided in accordance with section (2) of this rule before adopting a revised map. ¶~~

~~(a) The Department will notify federally recognized Tribes within Oregon about revisions to ESH at least 60 days before annual changes are adopted. ¶~~

~~(b) Revisions to ESH must be available for public review and comment for a minimum of 30 calendar days. The Department may extend the comment period at its discretion. ¶~~

~~(c) Recommendations and comments regarding revisions to ESH designations must be submitted in writing to the Department, either electronically or by mail. ¶~~

~~(6) If annual changes occur, final designations and an updated map will be adopted no later than February 1 of each year.~~

Statutory/Other Authority: ORS 196.810

Statutes/Other Implemented: ORS 196.800 - 196.990, 390.805 - 390.925