



**OAR 141-102 OREGON ESSENTIAL INDIGENOUS SALMONID HABITAT RULEMAKING  
RULEMAKING ADVISORY COMMITTEE (RAC)**

**OCTOBER 7, 2020 MEETING SUMMARY**

**Overview**

The OAR 141-102 Rulemaking Advisory Committee was convened by the Oregon Department of State Lands (DSL or Department) on September 22, 2020 via Zoom. The RAC was convened to provide input on proposed amendments to the administrative rules governing revisions, additions to or deletions of GIS maps of Essential Indigenous Salmonid Habitat in Oregon.

**RAC Members and Attendance**

<b>Present?</b>	<b>Name</b>	<b>Affiliation</b>
Yes	Joy Vaughan	Oregon Department of Fish & Wildlife (ODFW)
Yes	Michael Powers	Oregon Department of Agriculture (ODA)
Yes	Alternate: Tyler Manitsas	
Yes	Jessica Dorsey	League of Oregon Cities
No	Alternate: Kristel Griffith	
Yes	Lauren Smith	Association of Oregon Counties
Yes	Mary Anne Cooper	Oregon Farm Bureau
Yes	April Snell	Oregon Water Resources Congress
Yes	Stacey Detwiler	Rogue Riverkeepers
No	Alternate: Robyn Janssen	
Yes	Kimberly Priestly	WaterWatch of Oregon
Yes	Helena Linnell	Coquille Indian Tribe
Yes	Gary James	Confederated Tribes of the Umatilla Indian Reservation
Yes	Kelly Coates	Cow Creek Band of the Umpqua Tribe
Yes	Lindsay McClary	Confederated Tribes of the Grand Ronde
Yes	James (Jim) Capurso	U.S. Forest Service
No	Jake Crawford	Fly Water Travel
Yes	Scott Lepman Contact: Alexandra Keister	Scott Lepman Company – Real Estate Appraisal

<b>Present?</b>	<b>Name</b>	<b>Affiliation</b>
Yes	Troy Brandt	Oregon Chapter, American Fisheries Society
Yes No	Tom Quintal Alternate: Mike Hunter	Mining Industry
<b>Staff/Advisors</b>		
No	Bill Ryan	DSL, Deputy Director
Yes	Kaitlyn Wiggins	DSL, Rules Coordinator
Yes	Pete Ryan	DSL, Project Manager
Yes	Dana Hicks	DSL, Planning & Policy Manager
No	Andrea Celentano	DSL, Policy & Legislative Analyst
Yes	Jim Owens	Jim Owens Consulting Company, Facilitator
Yes	Jon Bowers	ODFW, GIS Coordinator
<b>Interested Parties</b>		
No	Rich Nawi	Klamath-Siskiyou Wildlands Center
No Yes	Jennifer Fairbrother Alternate: Kirk Blaine	Native Fish Society
No	Kelley Beamer	Coalition of Oregon Land Trusts
No	Vanessa Green	Network of Oregon Watershed Councils
No	Tammy Dennee	Oregon Cattleman's Association
No	Racquel Rancier Alternate: Breeze Potter	Oregon Water Resource Department
Yes	Nancy Taylor	Oregon Department of Fish & Wildlife

### **Welcome and Introductions/Agenda Review/Meeting #1 Summary**

Jim Owens, Facilitator, welcomed the group and asked for introductions. He then reviewed the agenda, indicating that the meeting would focus on concepts for a proposed future Map update process and a proposed short-term process. He asked for corrections or questions about the Meeting #1 Summary. Jon Bowers indicated that the first sentence in the fourth to last paragraph should read “not meet” versus “not need”.

Kaitlyn Wiggins, DSL Rules Coordinator, reminded the group that the meeting was being recorded and that the audio recording and a meeting summary will represent the official public record of the RAC deliberations. She also reminded the group of the Operating Principles:

- If you are unable to attend and are designating an alternate, please advise us prior to the meeting.

- Participation in the conversations is limited to RAC members; Interested Parties are welcome to observe.
- If you and your alternate are both attending, only the member may participate in the conversations.

### **Review of Project Purpose and Scope**

For the benefit of new members, Peter Ryan, DSL's ESH rulemaking project manager, summarized the project's purpose and scope. He noted that the main goal for this rulemaking is to update the designated ESH Map that was last updated in 2015. The Department has historically updated the ESH map through rulemaking and would like the RAC to look for a new approach to allow more frequent and regular ESH map updates while ensuring a transparent process.

Jim then summarized the two concepts identified in the Briefing Paper on Focus of RAC Deliberations distributed prior to the meeting and indicated that today's conversation would inform the drafting of Rule language to be brought to the RAC for review at its third meeting. He emphasized that the RAC is not being asked to review and comment on requests for specific ESH Map changes. Those requests will be responded to individually by DSL, after consultation with ODFW, pursuant to a screening process and requirements established in ODFW's Fish Habitat Distribution Data Stewardship Plan.

### **Proposed Future Map Update Process**

Pete reviewed the concept for the frequency of and process for undertaking Future ESH Map updates. The Department is proposing an annual update process to replace the practice of receiving/acting upon Map change requests every 5 years. In lieu of a formal rulemaking process, an administrative process with public notice and comment is proposed. His PowerPoint presentation can be found at:

<https://www.oregon.gov/dsl/Laws/Documents/ESH%20RAC%20%20-%20Future%20Map%20Updates.pdf>

Mike Powers, Oregon Department of Agriculture, explained that HB 2437 authorizes maintenance activities in dry, traditionally maintained agricultural channels to be conducted without removal or fill permit subject to certain conditions. It prohibits maintenance activities in channels that have been designated and mapped by DSL as ESH. His agency is currently working with DSL and ODFW to develop a process to screen requests for maintenance activities and to establish a notice of maintenance activities review process.

Peter then explained that the concept before the RAC proposes that requests for Map changes made through the Agricultural Drainage Channel Maintenance program would be submitted to the Department of Agriculture and would be subject to a DSL/ODFW screening process that duplicates to the extent practical that currently being developed by ODA.

In response to a question of what's driving the proposed new approach to Map updates, staff responded that during the last five-year hiatus, a significant amount of new data was identified

that merited mapping. The desire for a more frequent, easier-to-manuever process was expressed during the last rulemaking. Also, technology advances in the intervening years enable easier Map updates. It was also asked whether there have been any changes to ODFW's data standards since the last update. Jon Bowers, ODFW, responded that the 2020 Stewardship Plan for the Oregon Fish Habitat Distribution Database replaces the ODFW Fish Habitat Distribution Update Protocol (Update Protocol). It describes how the data will be maintained over time and outlines a process for accepting or rejecting proposed changes to the data. He stated that the fundamental process has not changed but that the Stewardship Plan provides more details on the database update process.

Gary James asked why bull trout habitat is not designated as ESH. *Response:* The specific species identified for ESH consideration was a Legislative determination; bull trout habitat is expected to be encompassed by habitat for other indigenous species. Gary also noted that monitoring and enforcement are essential ingredients of any habitat protection program and wondered how they are being addressed in this rulemaking. *Response:* Monitoring and enforcement are integral to DSL's mission. The scope of this rulemaking is limited to the ESH Map update process.

In response to a question from Jessica Dorsey, staff confirmed that there are no changes to removal/fill process or permitting associated with this rulemaking. Tom Quintal asked why the dairy industry is not represented on the RAC. *Response:* The industry is represented through the Oregon Farm Bureau; the Oregon Cattlemen's Association is also an interested party.

Mary Anne Cooper asked how five-year authorizations granted through the ODA Agricultural Drainage Channel Maintenance program would be affected by annual ESH designations. She indicated that her organization believes that such authorizations should be permitted to continue until they expire. Michael Powers indicated that the interagency process to develop a screening and notice program for maintenance will be addressing this issue. Mary Anne also asked whether the proposed new Map update process would represent a staff burden for DSL. *Response:* Being a GIS-based process, the Map update process is not as onerous as it was when it was largely paper-based. Shifting from formal rulemaking to an administrative process is also expected to lessen the staff burden.

Lindsay McClary noted that the proposed public comment/notice process should not be considered to substitute for Tribal government-to-government consultation. *Response:* It is not intended to. DSL will contact the tribes individually to determine preferences for engagement.

Scott Lepman stated concerns that ESH designation may be an inverse condemnation/taking and that fill/removal regulations contribute to housing scarcity/affordability. Tom Quintal raised issues about the effects of state ESH designation on mining on federal lands and the conflict between ocean acidification and expanded protection of salmonid habitat through designation as ESH. Jim indicated that these issues are beyond the scope of this rulemaking and are more properly raised with the Legislature.

### **Proposed Short-Term Process**

Pete presented a short PowerPoint Process for responding to ESH Map change requests during this rulemaking. That presentation can be found at:

<https://www.oregon.gov/dsl/Laws/Documents/ESH%20RAC%202%20-%20Current%20Map%20Change%20Requests.pdf>

Kelly Coates asked if tribal government-to-government consultation would be affected by the proposed 30-day public comment period will be provided during which requested Map changes can be submitted pursuant to the following process. *Response:* DSL will separately contact the Tribes to determine how they wish to engage in the short term.

Scott asked about the Department intentions to provide notice to affected property owners. *Response:* Statute defines the notification process for such rulemaking.

There were no other comments on the proposed short-term process.

### **Potential Additional Topics for RAC Discussion**

In response to Jim's query about other topics that the RAC desires to address as part of this rulemaking, Scott repeated his earlier comment that the failure to provide notice to individual landowners could be cause for takings claims. *Response:* ESH is a threshold determination of the need for and type of permit required for fill/removal activities; it is not a determination of land use and there is no takings. Tom repeated his concern that adding ESH adversely affects private mining activities. He indicated that he felt that he could not add anything to the rulemaking process and he and his alternate are resigning from the RAC.

### **Summary and Next Steps**

Jim indicated that meeting materials will be posted to the rulemaking web page within the next couple of days and a meeting summary will be distributed as soon as completed. The intent is to return at the third meeting with draft Rule language for both a future Map update process and a process for responding to ESH Map change requests during this rulemaking. Jim will send out a Doodle poll for early November meeting. The team thanked the members for their participation.