



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

DECEMBER 10, 2020 MEETING SUMMARY

Overview

The OAR 141-102 Rulemaking Advisory Committee has been convened by the Oregon Department of State Lands (DSL or Department) to provide input on proposed amendments to the administrative rules governing revisions, additions, or deletions to Essential Indigenous Salmonid Habitat designations in Oregon. The group's fourth meeting was convened via Zoom on December 10, 2020.

An audio link to the meeting can be found at: [link to DSL's YouTube page](#)

RAC Members and Attendance

| Present? | Name | Affiliation |
|----------|-----------------------------|--|
| Yes | Joy Vaughan | Oregon Department of Fish & Wildlife (ODFW) |
| Yes | Ellen Hammond | Oregon Department of Agriculture (ODA) |
| Yes | Alternate: Tyler Manitsas | |
| Yes | Jessica Dorsey | League of Oregon Cities |
| No | Alternate: Kristel Griffith | |
| No | Lauren Smith | Association of Oregon Counties |
| No | Mary Anne Cooper | Oregon Farm Bureau |
| No | April Snell | Oregon Water Resources Congress |
| Yes | Robyn Janssen | Rogue Riverkeepers |
| No | 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 | Calla Hagle | Burns Piute Tribe |
| Yes | James (Jim) Capurso | U.S. Forest Service |

| Present? | Name | Affiliation |
|---------------------------|--|--|
| Yes | Jake Crawford | Fly Water Travel |
| Yes | Scott Lepman Contact: Alexandra Keister | Scott Lepman Company – Real Estate Appraisal |
| Yes | Troy Brandt | Oregon Chapter, American Fisheries Society |
| Staff/Advisors | | |
| No | Bill Ryan | DSL, Deputy Director |
| Yes | Kaitlyn Wiggins | DSL, Rule Coordinator |
| Yes | Pete Ryan | DSL, Project Manager |
| Yes | Dana Hicks | DSL, Planning & Policy Manager |
| Yes | Andrea Celentano | DSL, Policy & Legislative Analyst |
| Yes | Jim Owens | Jim Owens Consulting Company, Facilitator |
| Yes | Jon Bowers | ODFW, GIS Coordinator |
| Interested Parties | | |
| 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 No | Racquel Rancier Alternate: Breeze Potter | Oregon Water Resource Department |
| Yes | Nancy Taylor | Oregon Department of Fish & Wildlife |

Welcome and Introductions/Agenda Review/Meeting #3 Summary

Jim Owens, Facilitator, welcomed the group and asked for introductions. He then reviewed the agenda, indicating that the goals for the meeting were to review revised drafts of the rules and fiscal impact statement. The process for submitting and responding to requests for changes to the 2021 ESH Map and the next steps in the rulemaking process were also explained. He indicated that the goal was to wrap up the RAC process in this meeting, recognizing that members already devoted a fair amount of time to the rulemaking.

He then asked for corrections or questions about the Meeting #3 Summary; there were none.

Review of Scope of This Rulemaking

Dana Hicks, DSL Planning & Policy Manager, reminded the group that the rulemaking is focused on the process to amend ESH designations through the adoption of an ESH Map, and that the Department is not amending state policy to protect ESH, definitions of ESH, removal/fill rules, or the regulatory process. It is recognized that ODFW is the steward of the Fish Habitat Distribution Database that is the basis for ESH Map designations, and that ODFW updates the database continuously. Review of ODFW's database or Stewardship Plan is outside the scope of this rulemaking.

Revised Draft Rule

Andrea Celentano, DSL, walked the group through proposed changes to the existing rules, focusing on substantive changes from the draft presented at the third meeting.

Revisions to the Policy section are intended to highlight the intent to provide for public involvement and tribal coordination in order to promote awareness of the rules and ESH requirements. Scott Lepman expressed concern about how individual landowners will be informed of the changes to ESH designations. A: The Department is exploring multiple avenues to promote awareness of updates to the ESH map and is developing a comprehensive awareness strategy around these updates. Recognizing that communication strategies evolve and change, the intent is to adaptively manage communication and outreach rather than listing specific strategies in the rules. It is hoped that by creating an annual update process, there will be more awareness and certainty about the process.

In the Designation of ESH section, reference is added to a base map adopted in rule, with provisions for more frequent updates in coordination with ODFW. Revisions also address outreach to the affected public and coordination with tribes to increase awareness. Because there will be considerable changes to the Map as part of this update and thus many affected landowners, the Department is still developing the best strategy to increase awareness of Map changes. With more frequent updates, fewer changes are likely and targeted outreach to property owners will be more manageable. Scott suggested that, with annual updates, the burden on agencies will increase. Similarly, the burden on the public to be informed will increase. As a mechanism for better informing property owners, he suggested obtaining mailing lists of affected property owners from title companies. A: Staff thanked Scott for the suggestion and noted that the agency relies upon local governments to help inform property owners of environmental and other regulations affecting their properties. Troy Brandt stated that it is not unusual for property owners and other stakeholders to not be directly informed of changes in regulations; to contact every landowner would be excessively burdensome. Individuals bear some the responsibility to stay informed.

Andrea pointed out that the bulk of the edits are in the Revisions to ESH section. Corrections in data entry and map alignment accepted by ODFW may be adopted by DSL outside of the annual update process, though these corrections may not be reflected on the map until the annual update. The Department will consult with ODFW annually on the need and extent of Map updates; if ODFW does not recommend changes, no map update will occur during that year. Prior to Map adoption, DSL will provide a 60-day notification to the nine federally recognized tribes within Oregon, and a 30-day public comment period will occur. In the years that the Map is updated, a revised Map will be adopted by February 1 to align with other permitting processes. Jim Capurso asked whether tribal notification will include all proposed

Map changes or be geographically specific to each tribe. A: Notice will be provided to all nine federally recognized tribes within Oregon for all annual updates.

Andrea thanked RAC members for their input and indicated that comments received prior to the meeting will be considered when developing the final rule draft.

Revised Draft Fiscal Impact Statement

Peter Ryan, DSL Project Manager, reviewed a revised draft Fiscal Impact Statement (FIS), noting that the scope of the FIS is limited to the impact of the rule revisions, rather than the impact of the existing rules. Overall, a minimal fiscal impact is expected, as ESH is a threshold designation used to determine the need for and type of permit required for fill or removal activities under ORS 196; it is not in itself a permit. An ESH designation does not affect the cost of a permit, nor do the proposed rules alter the criteria for or definition of ESH. There may be 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, but the number of qualifying projects is difficult to quantify. Approximately 1,700 additional stream miles will be designated as ESH during this year's update, which is about an 8% overall increase. Most additional stream miles are on U.S. Forest Service land, so the effect on private landowners is expected to be minimal. If a removal-fill permit is needed, fiscal impacts may include the costs of preparing a permit application, hiring a consultant, and developing compensatory mitigation for any unavoidable impacts.

A fiscal impact to DSL may occur due to the new process to review change requests to ESH designations, and the increased frequency of map updates. However, with an annual process, fewer requests for changes are expected. It is possible that the resources needed for annual map updates will be about the same as that of engaging in the rulemaking process every five years.

Fiscal impacts are also expected for ODFW, as the steward of the Oregon Fish Habitat Distribution Database, and to the Oregon Department of Agriculture (ODA), as the manager of the Agricultural Drainage Channel Maintenance program. Jon Bowers, ODFW, confirmed DSL's expectation that effects on ODFW are not expected to be overly burdensome. With the increased frequency of map updates, fewer database change requests are expected. Ellen Hammond, ODA, indicated that an annual update process will be extremely helpful, though impacts to ODA are difficult to calculate because it is not clear how many notifications the agency will receive. ODA's biggest challenge will be identifying how to manage approved projects that are subsequently designated ESH – a challenge still being discussed by the agency. Scott raised a concern about the agencies having adequate resources to process additional permits resulting from new ESH designations. A: No significant increase in the number of change requests is expected resulting from the change in the frequency of map updates. The Department reports annually to the Legislature on permit processing times, including permits within ESH. If permit times increase, the agency shifts its resources or seeks additional staffing.

Regarding the impact on small businesses, because ESH is a threshold determination for removal-fill permits, it does 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. The overall fiscal impact to small businesses cannot be predicted. No additional costs of compliance resulting from administrative activities are expected.

Ellen Hammond noted that there may be potential costs to agricultural businesses taking part in ODA's Agricultural Drainage Channel Maintenance program, specifically if an ESH designation was added after the project's initiation. Impacts may arise from businesses halting channel maintenance activities while obtaining a removal-fill permit, as well as the cost of applying for the permit as described above.

Process for Responding to 2021 ESH Map Changes

Peter reminded the group that requests to review ESH designations may be submitted to the Department during the 30-day public comment period. The draft 2021 ESH Map is currently available for review. Once change requests are received, DSL will make sure information is complete then submit them to ODFW. Based on ODFW's Stewardship Plan, ODFW will indicate whether additional information is needed or whether the request should be approved or denied. ODA is working on a change request form for use by all three agencies. If the form is not completed in time for DSL's public comment period, DSL will create its own temporary form. Based upon ODFW recommendation, DSL will revise the 2021 ESH Map, which will then become the base map for future updates. Jessica Dorsey asked about the process for someone requesting more information about specific Map designations versus requesting a Map change. A: There will be an ESH webpage with a contact for questions. The Department also plans to create a user manual for accessing the ESH map and requesting Map changes.

Scott asked whether a property owner needs to hire a wetland consultant and/or a fish biologist to submit a change request. A: It depends on the situation. ODFW's Stewardship Plan lays out the process for adding or removing ESH designations based on survey protocols or on-site observation by ODFW fish biologists.

Next Steps in Rulemaking Process

Peter discussed the next steps in the Department's rulemaking process:

- Once RAC comments are reviewed and responded to, the Department will submit the final rule draft to the Department of Justice and DSL management.
- Upon approval, the Notice of Proposed Rulemaking will be filed with the Secretary of State. This filing starts the 30-day public comment period. The target timeframe is early January. *Update: public comment will begin in early February to allow more time for outreach.*
- Notice will then be provided to the RAC, Legislators, media, stakeholders, and the general public.
- A public hearing will be conducted during the comment period.

- Following any additional revisions and review by DOJ and DSL management, the Department will file permanent rules with the Secretary of State. This is expected in late winter.

Summary/Closing Remarks

After thanking RAC members for their participation, Jim asked for any closing comments. Scott said he appreciated being a participant and the responses to his questions. Lindsay McClary and Kelley Coates expressed appreciation for the provision of a 60-day notice period for the tribes and the recognition of tribes being separate from the public. Jim thanked ODFW and ODA for their active participation and DSL staff thanked RAC members for their time and insights.