

12/3/20

ESH RULEMAKING SYNOPSIS

Purpose of Rulemaking

- Update Map of Essential Salmon Habitat last updated in 2015, based upon ODFW's Fish Habitat Distribution Data and associated Stewardship Plan.
- ODFW is steward of the fish habitat distribution database that is the basis for the ESH Map designations. ODFW updates the database continuously.
- ESH designations create a threshold for DSL's removal-fill permitting; it is not in itself a permit nor a determination of an authorized use.
- Explore options for more frequent Map updates (annually if necessary) and process for such.

Status of Rulemaking Process

- 18-member RAC convened; represents mix of agencies, tribes, interest groups and small business interests.
- RAC has met 3 times beginning in late September, with fourth and final meeting scheduled for December 10.
- Staff presented a draft Rule and Fiscal Impact Statement during the third RAC meeting and is providing revised drafts based upon RAC input at the December 10 meeting.

Limitations on Rulemaking/RAC Role

- Limited to DSL authority to periodically update the ESH Map to reflect the addition, modification, or deletion of designated ESH habitat as recommended by ODFW.
- Not reviewing ODFW's Fish Habitat Distribution Database or Stewardship Plan.
- DSL review of individual Map change requests limited to screening for sufficiency, with change requests processed by ODFW pursuant to its Stewardship Plan.
- Focus is on the process to revise the ESH Map, not reviewing state policy to protect ESH nor definitions of such.
- Not reviewing removal/fill rules or regulatory process.

Department's Goals

- Update Map more frequently to avoid delays in acting on Map change requests, with expectation that there would be fewer, less significant Map changes if completed on an annual basis.
- Reduce administrative burden associated with the formal rulemaking process.
- Reflect that advances in technology reduce administrative burden of the Map update process.
- Establish a screening process to ensure change requests are complete before being submitted to ODFW for scientific review. This includes change requests submitted through ODA and the Agricultural Drainage Channel Maintenance program.
- Create a process to provide for notification to all nine federally recognized tribes in Oregon and opportunities for input and engagement outside of the public comment period.

- Provide an easier-to-navigate Map update process, including a “how to” document for both reading the ESH Map and for submitting Map change requests.
- Ensure a transparent process for accepting and processing Map change requests and promoting awareness of ESH and ESH Map updates.
- Clarify that ODFW is the steward for the fish habitat distribution database. Stewardship for the database is accomplished collaboratively by the database steward in consultation with the ad-hoc workgroup, comprised of state and federal agencies that conduct field surveys of fish and fish habitat.

Proposed Rule Revisions

- In lieu of formal rulemaking every 5 years, create a rolling process for the receipt of Map change requests – additions, modifications, or deletions of ESH designations – that can be submitted to DSL at any time, with an annual administrative process to update the Map when needed.
- Specify coordination with other natural resource agencies, and specifically with ODFW and ODA.
- Specify the process for public notice and comment and for tribal notification and engagement.
- Reference the 2021 ESH Map as the base Map for future annual updates.

Process for Submitting/Acting Upon Map Change Requests During This Rulemaking

- Draft 2021 ESH Map is currently available for review. The ability to comment on the Map will take place during the public comment period.
- Public notice and the 30-day comment period will occur after the completion of the RAC process and once the proposed rules are finalized and posted by DSL.
- Comments, including change requests, will be screened by DSL prior to submittal to ODFW.
- Upon completion of its review, ODFW submits recommended Map changes to DSL. DSL revises 2021 ESH Map as needed/adopts Map as base map for future updates.
- Notice provided when 2021 Map is adopted, and rule change is filed permanent.

Key Issues

- Ensuring the tribes are included in the ESH process.
- Coordination with Department of Agriculture’s Agricultural Drainage Channel Maintenance program (HB 2437). How five-year notices may be affected by annual ESH designations.
- Notice of ESH change requests/Map modification changes to individual property owners and interest groups.
- How Map errors will be processed in terms of public comment.