



OAR 141-089, General Authorizations

RAC Meeting #4 Summary

August 17, 2023; 1:00 – 3:00 p.m.

Overview

The OAR 141-089 Rulemaking Advisory Committee was convened by the Oregon Department of State Lands on August 17, 2023, via Zoom. The purpose of the RAC is to provide input on proposed amendments to the administrative rules governing Division 089, General Authorizations.

RAC Members and Attendance

Name	Affiliation	Present?
Members		
Scott Barrie	Oregon Home Builders Association	
Janelle Booth	Oregon League of Cities	Y
Tommy Cianciolo	Trout Unlimited	Y
Brian Cook	Clean Water Services	Y
Chris Gannon	Network of Oregon Watershed Councils	Y
Dave Hunnicutt	Oregon Property Owners Association	Y
Andrea Klaas	Oregon Public Ports Association	
KC Klosterman	CRH - River Bend Materials (Representing Oregon Business and Industry)	Y
Drew Raby	(alternate)	
Brad Livingston	Oregon Department of Transportation	
Kathy Majidi	Association of Clean Water Agencies	Y
Lauren Poor	Oregon Farm Bureau	
Timothy Sautter	Association of Oregon Counties	Y
Nancy Taylor	Oregon Department of Fish and Wildlife	Y
Joy Vaughn	(alternate)	Y
John VanStaveren	Wetlands Conservancy	Y
Staff/Advisors		
Danielle Boudreaux	Oregon Department of State Lands	Y
Melinda Butterfield	Oregon Department of State Lands	Y
Dana Hicks	Oregon Department of State Lands	
Kirk Jarvie	Oregon Department of State Lands	Y
Steve Faust	3J Consulting; Facilitator	Y

Interested Parties		
Kelly Albers	NRCS	
Rich Angstrom	Oregon Concrete and Aggregate Producers Association	
Bill Brignon	USFS	
Steve Brink	Idaho Power	
Jeffrey Brittain	Oregon Department of Environmental Quality	
Jeff Burrington	Oregon Department of Land Conservation	
Megan Gerber	Wilbur Island Wetland Mitigation Bank	
Michael Lambert	Confederated Tribes of the Umatilla Indian Reservation (CTUIR)	
Rachele Lyon	Lyons Construction	Y
Michael Martin	Oregon League of Cities	
Ariel Nelson	Oregon League of Cities	
Shawn Priddle	Oregon State Marine Board	Y
Dirk Renner	USFWS	
April Snell	Oregon Water Resources Congress	
Ken Yates	Oregon Water Resources Congress	Y
Jana McDonald		
Jason Yaich	City of Corvallis	
Lauren Zatkos		Y

Welcome and Introductions/Meeting Protocols

- Steve Faust introduced himself and the DSL staff members before briefly going over meeting protocols.

Meeting #3 Follow-Up

- Summarized key point as stated in the “RAC Meeting 3 Comments Log” document.
- Chris Gannon proposed another suggested. He suggested clarifying the term “spud pile” so DSL modified language slightly to address this. “The temporary placement of spud piles (i.e., piles driven into the bed of a waterway to provide stability for a barge” during construction activities.
- There were no additional changes suggested.

141-089-0680

- Dave Hunnicutt requested copy of DOJ opinion by considering DSL’s policy regarding fill below OHW. Kirk will check with management to see if that DOJ email can be released.
- Brian Cook. Can this GA be utilized within a wetland ESH? This GA can only be used within waterways. The GA specifically requires the project may be within no-wetland waters.

141-089-0685

- No discussion.

141-089-0690

- Chris Gannon. Does the GA include maintaining and repairing the existing dock.
- John van Staveren. Why not non-residential dock's separated out? This is because the non-residential docks typically only have pile work below OHW. Docks are typically above OHW.
- Brian Cook. Season placement. Is this a seasonal replacement that needs to be applied for annually? This is addressed later in the GA.

141-089-0695

- Placement, Modification, and Removal of Residential Docks.
 - Dave Hunnicutt.
 - Does ODFW have jurisdictional authority to make their guidelines in Rule or are they asking DSL to use these guidelines? DSL is following the guidelines in part to avoid Federal Take. DSL has the authority to incorporate ODFW guidelines into DSL requirements. ODFW states they typically don't put things into Rule unless told to do so by lawyers; ODFW has been working with guidelines in the past.
 - Has DSL heard people heard complaints about the ODFW guidelines? DSL has heard some people aren't concerned about the guidelines and others who want larger docks. DSL's main complaint received is regarding dock size and some complain that the grating is more expensive. If an applicant wants a larger dock, they can still apply for a dock, but would go through the Individual Permit process so DSL can better evaluate the potential impacts. This often does require some dock size negotiations and some mitigation.
- Pile or Anchor Replacement for Existing Non-residential Dock and Other Over-Water Structures.
 - Kirk states that it's possible that replacing 10 piles that's 24" diameter, it's possible to go over 50cyd. Therefore, may recommend modifying language to include non-ESH waters.
- Derelict Piling Removal.
 - This includes any derelict, including residential, commercial, etc.
 - Three ODFW districts support up to 50 piles to be removed under this GA because of the benefits to fish species. ODFW would request back fill holes with native sand or other native material.
 - Brian Cook. Supports increasing to allow more than 10 piles. Recommends language stating "unless approved by DSL" to allow DSL to allow more than 50 piles. Kirk will have to get back regarding this suggestion.
 - John van Staveren supports increasing to allow more than 10 piles.
 - DSL will modify the GA to increase the limit from 10 to 50 piles.

- Nancy Taylor. ODFW had question about vibratory hammer. Why wouldn't someone use a vibratory hammer? It has to do with the consistency of the sediment. Also, sometimes "proofing" is needed to ensure the final setting.

141-089-0720

- No discussion.

141-089-0725

- No discussion.

141-089-0730

- Brian Cook. Recommends plantings by following March to allow January and February plantings. Chris Gannon points out that some parts of the state the land would be frozen into March.
 - Kirk suggestions that if we move this timeline to March, the February reference under another location in the GA should also be changed to March. No objections were stated for Kirk's suggestion.
- Chris Gannon. Proposed language to address treating non-native weed work until natives are established. Brian Cook has concerns because it may be difficult to achieve because sometimes the erosion control used may be non-native, which will be replaced with natives. Recommends being thoughtful of the language. Kirk Jarvie states they could propose language to state it excludes non-invasive sterile species. Kirk Jarvie also points out that there isn't a maximum percent weed coverage allowed. Focusing more on using BMPs.
 - Kirk Jarvie suggested proposed language to address treating non-native weed work until natives are established except for non-native sterile erosion control species. No objections were stated.
- Slopes not greater than 3:1 ratio requirement. Brian Cook recommends more flexibility to allow for creating contours that match the surrounding slopes. Kirk suggestions slopes cannot be steeper than 3:1 ratio unless the slopes adjacent to the project area is naturally steeper. Brian supports this change.
- Placement of Large Wood text.
 - Chris Gannon. Has concerns about the wood requirements because on eastside they deal with much smaller streams and often use juniper. For example, if stream is 8-feet deep, then truck diameter would have to be 4-feet as currently proposed, which is large.
 - Nancy Taylor. Have examples that is can be difficult to adhere to the requirements as proposed. Root wads may be large enough in the ground, but then broken when removed. Also, harder to obtain the larger the trees. ODFW recommends changing root wad and truck diameter equal to ¼ OHW. Also recommend using Active Channel Width and Active Channel Depths instead. This language could result in limiting the amount this GA could be used in larger streams. Nancy Taylor. State projects often use trees available that are available on-site. Brian Cook is concerned that the sizes could be

too large because OHW can extend well past the active channel in some cases. Chris Gannon suggests obtaining feedback from other sources on how to better size the trees. Tommy Cianciolo says that they use juniper species frequently. Also, should clarify that juniper would also be allowed. Nancy Taylor to email some proposed language to Kirk Jarvie to try to make some modification.

- Dave Hunnicut. Was this GA focused to smaller stream? DSL states yes.

141-089-0735

- Chris Gannon. Recommends adding language to the end of the following requirement. Rock must be placed in a way as to minimize adverse impacts to the active channel “and downstream streambank”. Kirk Jarvie will add this language.
- Brian Cook. Recommends allow placement of material from within the channel when appropriate. They sometimes have equipment traverse bank line when area is dewatered. Kirk will propose language to accommodate this suggestion.
- Chris Gannon. Recommend changing “Natural” Materials to “Native” Materials and “Non-natural” to “Non-native”. Kirk will make this change.
- Brian Cook. To clarify, re-establishing bank contours would not be allowed under the GA. Is this correct? Kirk Jarvie confirmed this is correct. Kirk confirmed it could re-create wetlands and not re-create uplands, then DSL would allow this under the GA.

Meeting Summary

- Meeting #6 is being moved to October 26th.
- DSL Will send out an updated track changes GA, recording, and meeting summary.

Interested Party Comments

- Shawn Priddle. Season removal of recreation structures. Can we make this more specific? For example, what about floating restroom? Can we clarify what is a recreational structure? Also, can we clarify that boat docks as recreation platforms don’t count as recreation structures? Kirk will think about this to make sure there is no unintended consequences by adding floating restrooms to allowed structure.

MEMORANDUM

DATE: November 18, 2016

TO: Eric Metz, Oregon Department of State Lands

FROM: Debra Maryanov, Assistant Attorney General

SUBJECT: Question regarding large woody debris

QUESTION: Is removal of floating large woody debris regulated under the Removal-Fill laws?

ANSWER: Probably not if the person wants to *remove floating* large woody debris. While the legislative changes in 2013 to definitions in ORS 196.800(7) and (8) could support the conclusion that the legislature intended to grant DSL authority to regulate removal of floating large woody debris, the text of ORS 196.805(1) and 196.810(1)(a) plainly limit the regulation of large woody debris to that debris that is literally within the “beds or banks” of any waters of this state, and not large woody debris that is floating in the waters. Below is a brief summary of my research and analysis.

Relevant Statutes

ORS 196.800(7): “Large woody debris” means any naturally downed wood that captures gravel, provides stream stability or provides fish habitat, or any wood placed into waters of this state as part of a habitat improvement or conservation project.

ORS 196.800(8): “Material” means rock, gravel, sand, silt and other inorganic substances, and large woody debris, removed from waters of this state and any materials, organic or inorganic, used to fill waters of this state.

ORS 196.805: Policy. (1) The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Department of State Lands, and implement control of the *removal of material from the beds and banks* or filling of the waters of this state.

ORS 196.810(1)(a): Except as otherwise specifically permitted under ORS 196.600 to 196.905, a person may not **remove any material from the beds or banks of any waters of this state** or **fill any waters of this state** without a permit issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan. (Emphasis added.)

ORS 196.810(1)(g): As used in paragraphs (b) and (c) of this subsection:

(A) “Bed” means the land within the wet perimeter and any adjacent nonvegetated dry gravel bar.

(E) “Wet perimeter” means the area of the stream that is under water or is exposed as a nonvegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

ORS 196.812: Large woody debris; rules. The provisions of ORS 196.600 to 196.905 do not affect the removal of large woody debris if the large woody debris:

- (1) Poses a direct and demonstrable danger to livestock, human life or real property;
- (2) Poses a risk of harm to transportation facilities including, but not limited to, culverts, bridges and roads located near or within the beds or banks of any waters of this state;
- (3) Prevents or obstructs navigation within the beds or banks of any waters of this state; or
- (4) Meets conditions for the removal of large woody debris as specified in rules of the Director of the Department of State Lands.

Analysis

2013 Oregon Laws, c 198, § 1 amended ORS 196.800 to define the term “large woody debris” and to add large woody debris to the definition of “material” for purposes of the removal-fill statutes. *See also* ORS 196.800(7) and (8).¹

When read in isolation, ORS 196.800(7) or (8) seem to allow DSL to regulate the removal of floating large woody debris from the waters of this state. However, the plain text of ORS 196.805(1) and 196.810(1)(a), which were not amended in 2013, establish a distinction between the Department’s authority to regulate fill—broadly referencing filling of “the waters of this state”—and its authority to regulate removal—more narrowly referencing “from the beds and banks of the waters of this state.” Therefore, because large woody debris that is floating is not on the beds and banks of the waters of this state, taking it from the water is not “removal” as used in ORS 196.805(1) and 196.810(1)(a). Because taking large woody debris that is floating in the water is not “removal,” it is not regulated by the removal aspects of the removal-fill law.²

Commented [JK1]: While the specific issue of this memo pertains to large woody debris (LWD), DSL concludes that the logic applied to LWD regulation would equally apply to any floating thing. That is, it becomes fill when placed in a waterway (below our jurisdictional line) but only becomes removal when it is removed from the bed and banks of a waterway.

Although it is my opinion that the plain text of ORS 196.805(1) and 196.810(1)(a) answers the question that you asked, I did check the legislative history of 2013 Oregon Laws, c. 198 for any language that might change my opinion. Some of the testimony provides support to the conclusion that the legislature intended to address the removal of floating large woody debris by asserting that the reason for the proposal was to keep large woody debris in the streams generally. However, the testimony is not so clear as to override the plain text of ORS 196.805(1) and 196.810(1)(a). Following are brief summaries of what I found.

- The Oregon Council Trout Unlimited asserted: “HB 2396 protects large woody debris in the stream yet has measures in the bill to remove LWD which has hazardous potential.” (Testimony of Tom Wolf, submitted to the House Committee on Agriculture and Natural Resources, March 3, 2013).

¹ 2013 Oregon Laws, c. 198, § 5 added a new provision to the removal-fill statutes that lists several exemptions from the standard permitting processes that will apply to large woody debris. None appear relevant to our analysis.

² We note that the placement of large woody debris in a water of this state so that the debris floats probably is regulated by the filling provisions of the removal-fill laws.

- The Oregon Department of Fish and Wildlife explained:
“House Bill 2396 adds large woody debris (large wood) to the definition of material for the purposes of the removal-fill provisions. This means that the Department of State Lands (DSL) would have authority to regulate the removal of large wood from waters of the state. DSL currently regulates the placement but not removal of large wood. Large wood in stream, river, wetland, lake and estuarine systems is very important for fish and wildlife habitat. Research has shown that large wood is a vital and naturally occurring component of healthy stream ecosystems. Oregon’s native fish species evolved with stream and estuarine systems that contained significant amounts of large wood. Ecological benefits of large wood include fish habitat, stream channel and streambank stability, and biological diversity.” (Testimony of Curt Melcher, submitted to the House Committee on Agriculture and Natural Resources, March 5, 2013).
- The City of Portland, Bureau of Environmental Services explained that “[t]he Bureau places large woody debris in streams and waterways, at a cost of approximately \$800 - \$1000 per piece, to restore stream channel morphology and enhance fish and wildlife habitat.” (Testimony of Dean Marriott, submitted to the House Committee on Agriculture and Natural Resources, March 5, 2013).
- The Native Fish Society stated: “The intent of this bill, to require a removal permit from the Department of State Lands before large wood can be removed from streams, is a good one and something the Native Fish Society has supported for several legislative sessions.” (Testimony of Jim Myron, submitted to the Senate Committee on Environment and Natural Resources, April 3, 2013).

Division 141-089 Rulemaking: Meeting #4 RAC Comments Summary and Response Log

Affected Rule Section	RAC Comment	Response
Certain Over-water Structures Placement and Removal within ESH		
141-089-0680; -0685; -0690; -0695	Not a RAC comment	After further review, DSL staff have concluded that the “within ESH” qualifier of each section header is not necessary. In most cases the limitations on these activities would keep them under 50 cy thus only jurisdictional if in ESH. However, the if activity did go over 50 cubic yards in non-ESH waters (e.g., derelict piling removal on the Columbia (a predominantly non-ESH waterway!)), we still want people to have access to this GA.
141-089-0690(3)	It may be helpful to define the term “public recreation structure”.	Subsection revised to read: (3) Seasonal placement and removal of public recreation structures. <i>For the purposes of this section, “public recreation structure” means a non-commercial swimming platform, water slide, water ski ramp, floating restroom, or similar structure, but not including structures used as boat docks, deployed for the benefit of the general public.</i>
141-089-0695(1)(c)	Not a RAC comment	After further review, DSL staff have concluded that an additional qualifier is needed when defining the term “modified” or “modification” since docks affixed to piling above OHW/HMT are not jurisdictional. (c) For the purposes of this section “modified” or “modification” means a proposed change in the number or configuration of piling or anchors. <i>For residential docks placed below the ordinary high water line or highest measured tide line (e.g., floating docks),</i>

Affected Rule Section	RAC Comment	Response
		<i>“modified” or “modification” additionally means an increase in the dock’s over-water footprint.”</i>
141-089-0695(5)(a)	RAC supports allowance for removal of up to 50 derelict piling considering the potential environmental and public safety benefits of this activity.	Subsection revised to read: (a) Removal of up to 50 piling per project is authorized ;
141-089-0695(5)(b)	Backfill material for piling removal needs a clarification.	Subsection revised to read: (b) Authorization includes the backfilling of <i>native</i> sand or <i>other</i> native material into holes left by piling removal; and
141-089-0695(6)(j)	Backfill material for piling removal needs a clarification.	Subsection revised to read: (j) Backfilling. Placement of <i>native</i> sand or other <i>native</i> materials is required in holes left by the removal of piling.
Waterway Bank Stabilization Using Bio-engineering		
141-089-0730(1)(a)	Flexibility needed when natural slopes in the area are steeper than 3:1.	Subsection revised to read: (a) The slope must not be steeper than 3:1 (H/V) ratio <i>unless otherwise approved by the Department when natural slopes within the waterway reach are steeper than 3:1;</i>
141-089-0730(1)(c)	Provide a specific date for establishment of vegetation, consistent with General Conditions (141-089-0650) but allow flexibility for regions that have later growing season. Provide some flexibility for cases where power or water are not available for irrigation. Require removal of irrigation structures when no longer needed. (RAC member comment after meeting #4)	Subsection revised to read: (c) <i>Planting of native vegetation must be completed by March of the year following establishment of the new contours unless otherwise approved by the Department. Where power and irrigation water can be made available, irrigation must be provided as necessary until vegetation is established. Irrigation structures must be removed when no longer needed. Invasive weed control must additionally be provided until vegetation is established.</i>

Affected Rule Section	RAC Comment	Response
	Include weed control (but allow non-native temporary erosion control seeding)	(Note: “invasive” used rather than “non-native” acknowledging that temporary erosion seeding may involve non-persistent non-native species.)
141-089-0730(2)(a)	Multiple concerns about wood size specificity not being appropriate to all areas and watersheds around Oregon. Size of wood is dependent on many factors including stream flow variability, streambed geomorphology, bank conditions, type of large wood, etc.	Subsection deleted and replaced with: <i>“At a minimum, root wad diameter, trunk diameter and tree length must be of a size sufficient to withstand the rate of flow that caused the bank erosion.”</i>
141-089-0730(2)(c)	Multiple concerns about limitation to intact conifer. Some projects will use available native trees on the site such as hardwoods, juniper, etc. Additionally, non-conifer tree structure and decay timelines offer other benefits to stream ecology.	Subsection deleted and replaced with: <i>“Large wood must be of a species native to the riparian zone within the project area or a reference area unless otherwise approved by the Department.”</i>
141-089-0730(3)(c)	Multiple concerns about limitation to intact conifer. Some projects will use available native trees on the site such as hardwoods, juniper, etc. Additionally, non-conifer tree structure and decay timelines offer other benefits to stream ecology.	Subsection deleted and replaced with: <i>“Logs must be of a species native to the riparian zone within the project area or a reference area unless otherwise approved by the Department.”</i>
141-089-0735(2)(c)	Note that incorrectly placed ballast rock can have adverse effects to downstream stream banks as well.	Subsection revised to read: (c) Rock must be placed in a way as to minimize adverse impacts to the active channel <i>and downstream banks</i> ; and
141-089-0735(2)(d)	Rule should acknowledge that rock might also be placed from a de-watered position or barge-mounted position.	Subsection revised to read: (d) All rock must be placed, not dumped, from above the bank line, <i>from a de-watered position or from a barge-mounted position.</i>
141-089-0735(3)	Term “Natural” should be replaced with “Native” for consistency.	Subsection title revised to read: (3) <i>Native Materials.</i>

Affected Rule Section	RAC Comment	Response
141-089-0735(3)(b)	Term “nonnatural” should be replaced with “nonnative” for consistency.	Subsection revised to read: (b) Other temporary use of <i>nonnative</i> materials as necessary for compliance with OAR 141-089-0650 (General Conditions);
141-089-0735(4)	Concern that even a very small/incidental creation of upland resulting from the bio-engineering could dis-qualify a project from the GA. (RAC member comment after Meeting #4)	Subsection revised to read: (4) Uplands. Activity cannot create new uplands nor reestablish lost uplands resulting from the bank erosion event(s), <i>other than incidental creation necessary to achieve the bio-engineered bank stabilization.</i>