

# OAR 141-090 Rulemaking Public Comments and Agency Response



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The public comment period was open from March 1, 2023, to March 31, 2023, at 5:00 PM. The Department received comments from three individuals in total, two of whom submitted via the comment form.

Please note that comments are presented in the order they were received by the Department, with most recent comments listed first. Comments that were received via PDF are attached at the end of the document.

## Comments Received via Comment Form

### Justin Hennick – March 15, 2023 (1 of 2)

**Comment:** Upon researching your website I feel this is a great opportunity to share a situation I have become involuntarily involved in. Just recently a “developer” bought a piece of property (7 acres but only 1 acre of useable land) adjacent to my property sight unseen. This developer was completely unaware of many elements affecting the property. The elements I would like to point out are the ones obtaining to OAR 141-090. There is prominent creek (which feeds into the Willamette river) and a large majority of this property is that of wetlands. The buyers plans include building a long stretch (approx 500 yards) of road/driveway through the wetland region and more plans of putting a culvert in this prominent creek. This project will most definitely require removal and refill techniques associated to OAR 141-090 and likely put the surrounding lands, as well as my adjacent property, at risk for unnatural flooding zones. I understand a need to increase housing, but we also need to maintain the natural habitat. New and updated laws should protect current waterways, ensure stability of the natural land, and continue to provide safety to many other wildlife species. This developer has stated that Oregon cannot landlocked land; therefore he has the right to do what he wants. I feel we need to increase land preservation techniques by updating OAR- 141-090 to meet current practices and stricter standards, which protects not only the sensitive natural environment and wildlife species, but also landowners rights and privacy.

### Agency Response:

The purpose of OAR 141-090 is to establish standards and procedures by which the Department makes jurisdictional determinations for the purpose of regulating fill and removal within the waters of this state. The rules also establish minimum standards for wetland delineation reports submitted to the Department for review and the procedures for Department review and approval. The situation described above is better addressed by the Department’s rules governing the issuance and enforcement of removal-fill authorizations within the waters of

this state, OAR 141-085. We invite you to contact a Department aquatic resource coordinator for the county in question (<https://www.oregon.gov/dsl/WW/Pages/WWStaff.aspx>).

**Justin Hennick – March 16, 2023 (2 of 2)**

**Comment:** In addition to my previous story/comment i wanted to add I was informed today that ODFW would require a fish passage right away permit for starters and that is with many other with many factors still yet to play out. 2 of those factors are still usage of a wetland area and approval of an add to an already established intersection that involves hazards.

**Agency Response:**

I would again recommend reaching out to the Department's aquatic resource coordinator for the county in question. They may have recommendations and can provide information about commenting on a removal-fill permit application.

**Thomas Dee, Aura/Benthos Ecosystem Services LLC – March 31, 2023**

**Comment:** The use of the term "other waters" doesn't align with the use of "non-wetland waters" in 141-085. They should be consistent. The definition of "removal" on page 6 states "However, in designated ESH areas (OAR 141-102) and in designated State Scenic Waterways (OAR 141-5 100) the 50-cubic-yard minimum threshold does not apply." This is ambiguous and could be interpreted as you can remove as much as you want in ESH. Lots of great changes in here. Thanks for providing clarity and doing away with some antiquated rules!

**Agency Response:**

The proposed definition for "other waters" in OAR 141-090 purposefully removed the "of this state" to help those preparing delineations understand that the Department needs to see all wetlands and other waters present within a study area regardless of an eventual jurisdictional determination call. The OAR 141-085 definition of "non-wetland waters" is "waters of this state other than wetlands...", and therefore, it should not be confused with the OAR 141-090 definition of "other waters".

The definition proposed for "Removal" is identical to the definition used for that term in the Division 85 (Removal-Fill) rules. The term use is identical to maintain consistency between rules.

Thank you for your comments.

## Comments Received via PDF Letter

*Note: The following comments were included in a PDF letter, which is attached.*

### **Marc Van Camp, President, Coos-Curry County Farm Bureau – March 27, 2023**

#### **Comment:** Fiscal and Economic Impact - GIS (Geographic Information System):

The requirement to have data submitted using GIS is unreasonable, unnecessary, and excessively expensive. There is no need for such an exact system to be needed to evaluate Wetland Determinations and Delineations. With these rules, DSL will require the public and private sector to make expensive investments in GIS equipment and training. DSL has not demonstrated the need to the use of GIS information.

#### **Agency Response:**

The reason the Department is proposing to request GIS information is statutory; ORS 196.674 states that the Department shall compile and maintain a comprehensive Statewide Wetlands Inventory (SWI) and make that inventory accessible to the public. The Department has made the SWI available as an online map that uses GIS information. The goal is to have an SWI that is revised as new or more complete information becomes available and to have wetland information that can be easily shared with city and county planning offices and the public. Many individuals and firms preparing delineations already possess the equipment and skills to provide GIS files to the Department. For those firms that don't, the requirements are being phased in over a two- to five-year period to address the impact.

#### **Comment:** Cost of Compliance - GIS

The proposed rules impose an unreasonable cost for small business to comply with the GIS requirement. The systems worked without the requirement of GIS information for many years. For farmers and ranchers, this expense will make it so that it is not economically feasible to "clean out a ditch" or do some other fill/removal project to the betterment of their operation.

#### **Agency Response:**

Many consultants preparing delineation reports have GIS or CAD systems to prepare figures for their reports. The new requirements propose asking for the digital map files used to create those figures. Firms or individuals currently without these capabilities will have two to five years to prepare before this information is required. Many farming and ranching activities are covered by exemptions to the Removal Fill Law. Exemptions specific to agricultural activities are in OAR 141-085-0535. The Department receives relatively few delineation report review requests from agricultural operators. Those that are received are generally performed by professional consultant firms, many of whom already possess GIS technology capability. Farmers and ranchers will need to meet this requirement if they plan to submit a delineation report to the Department for review and approval after the two- to five-year phase in period.

**Comment:** 141-090-0015 - Policy

The deletion of aerial photographs in 141-090-0015(2)(c) is unnecessary and removed one tool that a landowner or agent can use in clarifying Wetland Determinations and Delineations.

**Agency Response:**

The new terminology does not exclude the use of aerial photographs. Aerial photographs are considered an example of the type of remotely sensed imagery that can be provided.

**Comment:** 141-090-0020 - Definitions:

The proposed rule 141-090-0020(11) is too broad. The purpose of these rules is to provide a basis for Wetland Determinations and Delineations. By removing the wording of "wetlands" from this section and substituting "waters of the state" for the "Determination" definition creates confusion. CCFB recommends "including wetlands" after "waters of the state" for clarity.

**Agency Response:**

The Department appreciates the comment, but because the proposed definition of "Waters of this State" includes wetlands in the list of features covered by the term, adding an additional reference to wetlands would be redundant.

**Comment:** 141-090-0035 - Standards and Requirements for Wetland delineation reports submitted to the Department

The proposed rule 141-090-0035(5)(a) Using Highest Measured Tide Line and Stream Ordinary High-Water Line as a standard. This is not the correct standard to evaluating Wetland Determinations and Delineations. This standard does not consider extreme weather events such as fast snow melt events, extreme rain events, king tides or floods. The ordinary high water tide line or average high-water mark is the correct standard. The use of Highest Measured Tide Line and Stream Ordinary High-Water Line as a standard is inconsistent with 141-090-0020(20).

The proposed change under 141-090-0035(5): The rules requiring submittal of GIS data is inappropriate and should be removed.

The language under 141-090-0035(10): The requirements for determination of Farmed sites is unreasonable. If it is farmed, then there is no need for 3 aerial photos from 3 different years or irrigation information. Farming includes grazing cattle, harvesting hay or any other crops.

The language under 141-090-0035(12): Ditches should not be included in Wetland Determinations and Delineations.

The language under 141-090-0035(12)(A): This section describes documentation of fish presence or absence to be based on ODFW "StreamNet". That is not an authoritative source. Much of the information is subjective without any on site verification of whether fish are or are not present.

**Agency Response:**

OAR 141-090-0020(20) defines "Jurisdictional Determination" and includes two examples of types of jurisdictional determination boundaries. Other boundaries are provided in the OARs

included in the definition. Highest Measured Tide and Ordinary High Water Line are defined and used in OAR 141-085 to describe removal-fill jurisdiction by type of water.

The requirement to submit GIS data is needed to compile and maintain a comprehensive Statewide Wetlands Inventory and to make that inventory accessible to the public.

The multiple aerial photograph requirement for farmed sites in OAR 141-090-0035(10) is present in the current rule and was left as is in the proposed rules because multiple information sources and photo years are necessary for reviewing actively farmed and managed sites. Special procedures and additional imagery are often needed to delineate wetlands in farmed areas because the vegetation and soil are artificially manipulated. Many wetlands in agricultural areas are farmed and exempt until a land use change is proposed. OAR 141-090-0035(10) applies when a removal fill permit is needed for a non-exempt farm use.

Ditches are included in OAR 141-090-0035(12)(b) because ditches can affect the presence, location, and extent of wetlands. Ditches are included in OAR 141-090-0035(12)(e)(A) because the Department needs to review all wetlands and other waters in a study area to determine jurisdiction. See OAR 141-085-0515(8) for a description of ditches that can be jurisdictional.

OAR 141-090-0035(12)(h)(A) provides potential sources to document fish presence. The Department is including the Oregon Fish Habitat Distribution Database (to replace StreamNet) as a potential source of authoritative data on fish presence.

**Comment:** USDA determined Prior Converted and Farmed Wetlands:

I have seen nothing in the proposed Wetland Determinations and Delineations rules that specifically excluded prior converted or farmed wetlands. These lands clearly do not need a wetland delineation determination. It needs to be made clear that the proposed Wetland Determinations and Delineations rules do not apply to these agriculture lands.

**Agency Response:**

If zoned exclusive farm use pursuant to ORS 215.203, a prior converted cropland (PCC) certification by the Natural Resource Conservation Service exempts specific agricultural activities from the state Removal-Fill Law. However, a PCC certification does not eliminate the requirement for all wetlands and other waters on a parcel or in a project study area to be included in a wetland delineation report. Regulation of these wetlands depends upon whether a non-farm usage of the land is being proposed. Normally, many normal farming and ranching activities are exempt. Exemptions specific to agricultural activities are in OAR 141-085-0535.

**Comment:** 141-090-0050 Request for Reconsideration, Contested Case, and Independent Review/Appeal:

The changes proposed lack a fair and balance approach to any case where there is a difference of opinion on Wetland Determinations and Delineations. No longer will there be an independent review of contested cases, instead, that power is to be given to the "Director". Having the "Director" decide appeals is clearly a "conflict of interest". CCFB supports the original language. The period of 21 calendar days in this section for submitting written request for review or appeal is too short. It does not provide sufficient time for the landowner or agent to prepare the request

for review or appeal. The period for submitting a request for review or appeal should be 60 business days.

Except for the recommendation for increasing the period for submitting request for review or appeal, this section should remain as originally written without any revisions or updates.

**Agency Response:**

The Department was required to remove all references to the independent review process per Oregon Laws 2012, c. 108, § 2, which expired on January 2, 2022. The Rulemaking Advisory Committee requested and approved the proposed appeal process to replace the independent review process. The independent review process had not been used since it was first added to the rules in 2013.

Applicants requesting reconsideration of a jurisdictional determination (JD) have 6 months from the date of the original decision to initiate an informal reconsideration review process. If an applicant disagrees with the reconsideration decision, they have the choice of pursuing a contested case proceeding pursuant to ORS 183.413 through 183.470 or requesting an appeal of the reconsideration decision from the Department's Director. Both processes must be initiated within 21 calendar days of the reconsideration decision. Combining these dates, applicants then have more than 200 calendar days from the date of the original jurisdictional determination decision to express disagreement with that decision.