



Permitting and Mitigation in Oregon's Wetlands and Waters (Division 85) Rulemaking Advisory Committee Overall Summary and Outcomes August 2025

Overview

The Division 85 Rulemaking Advisory Committee (RAC) was convened by the Oregon Department of State Lands to advise the Department on updates to the state's removal-fill rules, with a focus on developing clear, consistent, and effective guidance for stream mitigation, umbrella mitigation banks, and in-lieu fee programs, as well as improving overall regulatory clarity and environmental outcomes.

The RAC met six times between March 2025 and August 2025. The RAC was comprised of eleven members representing a variety of interests:

- The Wetlands Conservancy
- Oregon Department of Transportation
- Clean Water Services
- Anderson Perry
- Interfluve
- Grande Ronde Model Watershed
- Green Banks, LLC
- City of Portland
- Cow Creek Band of Umpqua Tribe of Indians
- League of Oregon Cities
- Clackamas Water Environment Services

Summary of Input

At the beginning of the RAC process, DSL provided members with draft revisions to key portions of Division 85. RAC members reviewed and provided feedback on proposed rule updates and were encouraged to suggest alternatives or revised language. Many comments led to changes in the proposed rules. Below is a summary of key themes from the discussions and DSL's responses.

Purpose and Scope

RAC members supported DSL's efforts to improve clarity and usability in the Division 85 rules. Several emphasized the importance of clearly stating the rules' purpose and clarifying definitions for consistency across state and federal permitting processes. There were multiple comments requesting that DSL explicitly define key terms and processes, particularly where they relate to jurisdiction and exemptions.

DSL agreed with many of these suggestions and updated definitions and the purpose statement accordingly.

Permitting and Jurisdiction

(141-085-0510(3), (41), (42), (85); -0515(2); -0530; -0585)

- Definition of "Tidal River" and Jurisdictional Clarity:
 - Members emphasized the need for the rule to distinguish between the saline wedge and freshwater tidal influence areas. Several noted that tidal rivers such as the Columbia include freshwater portions with tidal fluctuation, and suggested the rule clarify whether jurisdiction applies to both freshwater and saline segments. DSL shared that while a definition is defined by statute, there is room for more clarity on the freshwater sections, and will consider clarifying the definition in future updates.
- Definition and Use of "Restoration":
 - Members discussed the need to clarify the terms “restoration” and “enhancement” in the rule language to avoid ambiguity, particularly regarding mitigation processes and general authorizations. Suggestions were made to either further define the term or replace it with alternatives such as “habitat improvement” to better reflect the range of activities covered. DSL shared that there is currently a distinction between "voluntary habitat restoration" and "habitat improvement" projects. The difference currently is in: the amount of application fee, level of functional assessments, and level of resource delineation that is required. Under the proposed rule, DSL will be able to allow the lower level of all three for both categories of project. This particular rule change has no effect on compensatory mitigation rules or process.
- Scenic Waterways and Related Adjacent Lands:
 - Members recommended incorporating the statutory definition of “related adjacent lands” directly into the rule text to reduce confusion and reliance on external references. DSL added “related adjacent lands” to OAR 141-085-0515(2).
 - Members recommended that DSL explicitly reference DEQ’s Outstanding Resource Waters and other agency-designated protections in the rule to ensure alignment across regulatory frameworks. DSL shared that the rule change aims to align with statute and Division 100, and referencing the Outstanding Resource Waters would expand DEQ’s jurisdiction. Two of the three Outstanding Resource Waters are subject to DEQ’s zero cubic yard threshold for permitting.
- Exemptions and Stormwater Infrastructure:
 - Members raised concerns about the lack of reference to municipal stormwater systems and legally constructed ponds in the exemptions section. There was discussion around how to ensure maintenance needs for stormwater systems are appropriately considered while maintaining environmental protection standards. DSL acknowledged the importance of considering municipal stormwater systems and legally constructed ponds and shared

that exemptions for certain stormwater system and municipal ponds are covered under a separate administrative rule.

Stream Mitigation and Accounting Background

(OAR 141-085-0510(90), (95); -0680(3)(j); -0685(3)(c); -0690; -0692)

- **Clarity and Transparency in Functional Scoring and Adjustments:**
 - Members expressed concern that the crediting and debiting formula may not fully reflect ecological changes over time and recommended reviewing how adjustments are applied to avoid unintended reductions in required mitigation. Some members expressed concern that applying both a function score reduction and an adjustment for vegetation lag could result in double penalties for the same impact. Others sought confirmation that the system avoids disincentivizing slow-developing, high-value restoration approaches. DSL acknowledged these concerns, and agreed that they do not want to disincentivize high-value restoration approaches. They explained that the crediting and debiting formula, including adjustments, will remain as proposed for this rulemaking.
 - Members expressed concern that the current SFAM value scores might not fully capture important ecological attributes, such as biodiversity in herbaceous vegetation. They recommended future updates to the method to account for this. DSL shared that in future SFAM updates they will consider vegetation biodiversity and additional ecological attributes.
- **Essential Salmon Habitat (ESH) and Mapping Limitations:**
 - Members raised concerns about the accuracy and completeness of the ESH designation, especially regarding migratory and rearing habitats. Several noted that limitations in the designation could reduce the reliability of SFAM outputs, which rely on ESH and other mapped layers. DSL explained that ESH is defined in statute, and DSL is unable to change the ESH mapping approach in this rulemaking. DSL will coordinate with ODFW and other agencies to address updates outside of this process.
- **Use of Linear Feet as Unit of Measure:**
 - Members offered mixed feedback on using linear feet along the stream centerline as the primary metric for mitigation accounting. Some were concerned that this approach might undervalue broader floodplain or riparian restoration benefits and could incentivize narrower stream designs or projects. Several noted that important riparian restoration efforts extending beyond the streambank may not be fully credited under the proposed approach. DSL shared appreciation for the feedback, and they will maintain linear feet as the primary unit of measure for mitigation accounting in this rulemaking. DSL will maintain consideration of floodplain and riparian benefits captured through existing review processes.

- Although some noted that reviewers currently consider stream width informally, others questioned whether the proposed method sufficiently captures the ecological contributions of wider or more complex project footprints.
- Distinction Between Stream Types in Credit Accounting:
 - Members supported DSL's proposal to allow separate assessments of intermittent and perennial streams but to pool them into a single credit total, consistent with wetland mitigation practices. DSL will implement the proposal to pool intermittent and perennial stream credits, while maintaining separate assessments for accuracy.

Stream Mitigation, Accounting, and Policies for Special Circumstances

(OAR 141-085-0510(90), (95); -0680(3)(j); -0685(3)(c); -0690; -0692; -0700(2)(b); -0705(1)(e))

- Thresholds for requiring function based accounting to determine mitigation requirement:
 - Members expressed concern about requiring mitigation for very small stream impacts, particularly those affecting only one or two linear feet. Several members recommended establishing a minimum threshold for requiring mitigation, suggesting that small-scale impacts may not warrant full mitigation or long-term assessment requirements. DSL reiterated that the thresholds for requiring an individual permit for stream impacts must be met before stream mitigation would be required, and therefore may not be required for small stream impacts. DSL will continue considering both size and stream context.
 - Some members proposed allowing surplus stream function gains to be tracked and used as advanced mitigation credited toward future projects. DSL shared they are open to considering tracking surplus contributions for future use, and will not be making changes to the advanced mitigation rule at this time as a rule change isn't needed for this option to be possible.
 - Members supported the inclusion of a flexible, size-scaled threshold for triggering SFAM-based mitigation accounting. They appreciated the approach that accounts for both project size and stream context, such as geomorphic stability and substrate composition.
- Stream function assessment and mitigation methodology:
 - Members recommended clear application of credit gains across project types, especially in cases involving conservation easements or other protective mechanisms. Members emphasized the importance of flexibility in the rule when predicted function gains or losses cannot be directly assessed using SFAM, such as in large rivers or highly engineered systems. DSL will retain flexibility for project-specific considerations and will allow the use of professional judgment where SFAM is not fully applicable, including for large rivers and engineered systems.
 - There was broad support for incorporating DSL's judgment and site-specific conditions into the ten-year projection of stream function outcomes, rather than requiring extensive monitoring.
- In-kind replacement for highly valued functions:

- Members agreed with the principle of in-kind replacement when highly valued stream functions are lost, particularly to avoid cumulative degradation in critical functions.
- Members asked for clarity on how mitigation banks would demonstrate gains in specific functions and whether predicted gains or only actual baseline improvements would be required. DSL will require demonstration of predicted gains in specific functions for mitigation banks, with flexibility to verify actual gains as projects mature.
- Mitigation for bed and bank hardening:
 - Members voiced concern that requiring mitigation for all hardening could discourage functionally beneficial projects, especially in degraded or urban stream systems where some hardening is necessary for stability. DSL will require mitigation only for new hardening efforts, and will also consider adding a definition of hardening as a result of this rulemaking.
 - Several members advocated for greater recognition of “nature-based solutions,” offering a working definition and encouraging its inclusion to support innovative restoration strategies. DSL shared that nature-based solutions may better fit within the Division 89 or 93 rules, and that DSL will continue to consider the applicability of nature-based solutions as they relate to Division 85 rules.
- Terminology and rule language clarity:
 - Members suggested revising language to clarify the difference between “stabilization” and “hardening,” as well as incorporating the concept of natural stream migration into definitions. DSL will review and consider revising definitions to distinguish “stabilization” from “hardening” and incorporate natural stream migration concepts.
 - There was general agreement that discretionary language, such as “unless otherwise determined by the department” is important to preserve flexibility and ensure that the rules can accommodate a range of project types and ecological contexts. DSL agreed and shared that discretionary language will be retained to preserve flexibility.
- Financial assurance and administrative alignment:
 - Members supported tying financial assurance waivers to the same thresholds used for stream accounting and mitigation requirements to maintain consistency across rule sections and minimize confusion for applicants. DSL will align financial assurance waiver thresholds with those used for stream mitigation requirements.

Compensatory Mitigation

(OAR 141-085-0510(16–17), (45), (58–59), (77), (93), (102); -0680(2)(a)(F); -0692(4)(c); -0695(3); -0694(1)(g); -0750(5); -0720; -0725; -0730; -0735; -0740; -0750)

- Equity and regional access to mitigation options:
 - Members voiced strong concern that mitigation banks and in-lieu fee programs are significantly lacking in Eastern Oregon, which forces permittees to rely on permittee-responsible mitigation that is often more costly and less ecologically effective in these underserved regions. DSL acknowledged the geographic gaps in mitigation options and will

explore opportunities to expand access in underserved regions; no changes are included in this rulemaking.

- Clarification of rule applicability and terminology:
 - Several members requested clearer and more precise definitions for key terms such as “self-sustaining,” “location,” and “disproportionate wetland loss,” explaining that the current lack of formal definitions or mapped criteria creates confusion and risks inconsistent application across projects and regions. DSL will consider removing the proposed addition of “self-sustaining” to mitigation plan requirements in the rules. DSL will also provide further clarity on, and will create guidance for, how newly added terms such as “location” and “disproportionate” will be determined and evaluated by the agency.
 - Members identified opportunities to streamline and clarify rule language to improve consistency and reduce redundancy throughout the document, noting that overly complex or repetitive text can hinder understanding and compliance. DSL agreed and said that redundant and unclear language will be reduced to the extent appropriate.
- Limitations on enhancement as a mitigation method:
 - Multiple members expressed concern that the existing restrictions on enhancement projects, especially in areas experiencing significant wetland loss, could inadvertently reduce opportunities for ecological uplift, noting that enhancement can often provide greater or more immediate benefits than restoration or creation in certain contexts. DSL shared that they will clarify enhancement requirements and use limitations to ensure that this compensatory mitigation method is available where ecologically appropriate.
- Evaluation of mitigation objectives:
 - Members requested clear criteria on how DSL would determine whether restoration or creation constitutes the “principal objective” of a mitigation project, raising concerns about mixed-method projects that incorporate enhancement and how these would be judged under the rule. DSL shared that the principal objectives are meant to be maximized, and serve as a conceptual framework to guide the best compensation possible.
 - Members recommended allowing enhancement to play a meaningful role when combined with restoration or creation, urging clarity in the rule so that projects with integrated approaches are fairly assessed against the rule’s intent and ecological goals. Through guidance, DSL will clarify that enhancement may be combined with restoration or creation where ecologically appropriate.
- Suggestions for rule clarity and structure:
 - There was broad agreement that simplifying and organizing the rule more effectively would make it easier for applicants, reviewers, and stakeholders to navigate, interpret, and apply the requirements, thereby enhancing overall efficiency and effectiveness. DSL will restructure portions of the rule to improve navigation and clarity without changing substantive requirements.

Fiscal Impact Statement

- The RAC reviewed the Fiscal and Economic Statement. Members did not share any comments or concerns on the Fiscal and Economic Statement.

Racial Equity Statement

- The RAC reviewed the Racial Equity Statement to determine whether DSL's rule changes would have any identifiable impact on specific racial groups in Oregon.
- Members agreed with including in the official racial equity statement that there is no discernible impact positively or negatively on racial equity as a result of the proposed rule changes.

Need for Rules

- DSL shared a document which focused on the major points behind the rulemaking was shared with the RAC and members were invited to share if they felt anything had been missed. Members did not highlight anything missing.