

## **General Comment for Entire Rule (DSL Responses in Red)**

1. What is the difference between “other waters” and “waters of the state”? Specifically, are these mutually exclusive terms or does “other waters” include waters that may not be considered “waters of the state”? **Response: “Waters of this state” are defined in ORS 196.800(15)<sup>1</sup> as they are regulated by the state Removal Fill Law. “Other waters” is a general term to mean all waters other than wetlands since wetland is a defined term.**
2. Why did the Department remove reference to “waters of the state” throughout the rules and replace it with just “waters”? Does this change broaden the scope of DSL’s jurisdiction beyond the definition in ORS 196.800(15)? **Response: No, this does not broaden the scope of state jurisdiction. By definition, “waters of this state” are the water features that are subject to the Removal-Fill Law, so using the term “waters of this state” is incorrect in some rules since a jurisdictional determination is the purpose of a delineation report. As proposed in the draft rules, the definition of “other waters” is regardless of jurisdiction.**
3. What is the intent behind replacing the term “parcel” with “tax lot” throughout the document? **Response: The Department locates sites primarily based on tax maps and tax lots. Some consultants were confused by the term parcel, and we changed this for consistency and to eliminate confusion that perhaps a parcel was different than a tax lot.**
4. Do the proposed rules authorize a consultant to conduct a delineation on private property that crosses ownerships? For example, if a property owner seeks a wetland delineation, do your rules allow the consultant to delineate on neighboring properties? **Response: No.**
5. Update to include “waters” determination/delineation too (not just wetland delineation concurrences). **Response: Yes.**
6. Additional explanation for why DSL is requesting Cowardin and HGM classifications, and ARSC designations when present: **Statute gives DSL broad authority to regulate wetlands and waterway to ensure their protection, conservation, and best use of the water resources of this state (196.805). Further, 196.825 obligates DSL to only issue a permit when the activity is consistent with the protection, conservation, and best use of water resources of this state. To know if an activity is thusly consistent, we must be able to identify and understand what the potential affects to water resources are. Therefore, we do things like require delineations, functional assessments, and a joint permit application (JPA) form that require descriptions of chemical, physical and biological characteristics of each wetland or waterbody. In its professional judgement, DSL has identified Cowardin and HGM classifications as tools to characterize wetland types, and ARSC designations to identify and better understand sensitive or rare aquatic resources for which impact may have outsized consequences and/or certain implications or special needs for mitigation and thus require closer scrutiny.**

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<sup>1</sup> 196.800 (15) “Waters of this state” means all natural waterways, tidal and nontidal bays, intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the boundaries of this state, all other navigable and nonnavigable bodies of water in this state and those portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended

## Comments related to Specific Rules (DSL Responses in Red)

### Rule 141-090-0005 Purpose

One comment did not like removing “of this state” from the first sentence of the purpose statement “The purpose of these rules is to establish standards and procedures by which the Department of State Lands makes jurisdictional determinations of wetlands and other waters ~~of this state.~~” Response: DSL proposes changing the first sentence to read, “The purpose of these rules is to establish standards and procedures by which the Department of State Lands makes jurisdictional determinations for the purpose of regulating fill and removal within waters of this state.”

### Rule 141-090-0010 Applicability

(1) One comment did not like changes to this section. Response: DSL proposes changing this section to read, “These rules establish the standards and procedures used by the Department of State Lands to identify ~~wetlands and other~~ waters of this state, which are subject to regulation and authorization requirements of the Removal-Fill Law (ORS 196.800 to 196.990)”.

### Rule 141-090-0015 Policy

No discussion

### Rule 141-090-0020 Definitions

(3) If these rules were adopted as proposed, would Aquatic Resources of Special Concern (ARSC) only be within “waters of the state” as defined in ORS 196.800(15)? Are there ARSC that are not “waters of the state”? Response: All ARSCs are waters of this state.

Are there definitions for these habitats that can be included here in the rule? Response: ARSCs are listed by title in rule and described in the Removal Fill Guide. This approach was requested and agreed on during rulemaking for Divisions 141-085 and 141-093. In addition, DSL staff are producing a field guide that will provide additional information and photos to help describe these habitats. What will the process be for “others as determined by the Department”? Will it be a public process? There is no description of that. Response: During rulemaking for rule sections 141-085 and 141-093, the rules advisory committee approved this flexibility to allow for new scientific developments.

(7) One comment questioned whether definition of “Consultant” allows for other types of organizations that may provide professional services (e.g., CREST). Response: DSL recommends changing definition to read, “Consultant means a person, as defined in ORS 196.800(10)<sup>2</sup>, who provides professional services to the public.”

(10) DSL determined **waters of this state** should be restored in this definition, “**Determination**” means a decision that a site may, does, is unlikely to, or does not contain waters of this state. A determination

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<sup>2</sup> ORS 196.800(10) “Person” means a person, a public body, as defined in ORS 174.109, the federal government, when operating in any capacity other than navigational servitude, or any other legal entity. ORS 174.109 “Public body” defined. Subject to ORS 174.108, as used in the statutes of this state “public body” means state government bodies, local government bodies and special government bodies. [2001 c.74 §2]

does not include the exact location or boundaries of any wetlands or other waters determined to be present.”

(13) The RAC noted that the definition of fill proposed for Division 90 rule did not match the definition of fill used in Division 85. The Division 85 definition of fill combines two laws, ORS 196.800(3) and ORS 196.810(1)(b). **Response: For consistency, DSL agrees that the definition of fill in the two rule sets should match.**

(20) One comment requested adding (s) to legal landowner creating “legal landowner(s)”. **Response: Statute does not include (s) in ORS. Instead, ORS refers to either landowner or landowners as needed.**

(21) One comment requested adding “s” to “wetland” in this definition so that it reads, “means a wetlands inventory map”. **Response: DSL will make this change.**

(26) What is the intent behind the changes to “normal circumstances”? Why has the Department removed references to vegetative conditions? **Response: The first sentence was revised to align with the U.S. Army Corps of Engineers (USACE) guidance on normal circumstances. The second sentence is unchanged.**

Another comment suggested the following addition to definition for Normal Circumstances: Normal circumstances incorporates the extent and relative permanence of the physical alteration of hydrology, soils and/or vegetation, and may result in an area determined as non-wetland. Normal circumstances do not include actions or activity subject to enforcement of the Removal-Fill law, such as ... **Response: Again, the language was revised to align our definition with USACE guidance. The additional language suggested here could be addressed by the consultant as needed in the report text.**

(29) Other waters. Why did the department remove “of this state” from the definition of “other waters” in new 141-090-0020(29)? Is the intention to extend jurisdiction waters that are not considered “waters of the state”? **Response: No, the definition was previously incorrect because not all “other waters” are jurisdictional waters of this state. The definition is not about jurisdiction.** Another comment felt, “By removing “of this state” from these sections it reads like DSL can make jurisdictional determinations and apply removal-fill laws to “other waters,” which based upon the new definition, may not be jurisdictional “waters of this state.” **Response: Making a clear distinction between “Other Waters” and “Waters of this State” clarifies that consultants need to identify and document all potentially regulated features on a site, so that DSL can make determinations of what is and is not jurisdictional. Removal-fill permit requirements are not solely based on jurisdiction as certain types of activities and volumes of removal and fill are exempt.**

(33) Why is the Department proposing a definition of “removal” that is different from the statutory definition of “removal”? If the intention is just to clarify the law, it may be more helpful to make those clarifications in a separate location that does not change the definition of removal. **Response: DSL chose to use the removal (and fill) definition from OAR 141-085-0510(90) to better align Division 90**

rules with Division 85. The removal definition in Division 85 includes requirements from ORS 196.810(1)(b)<sup>3</sup> and ORS 390.835(2)<sup>4</sup> that we wanted included in Division 90 for consistency and clarity.

Comment asked what is the basis for including weight? **Response: Comes from statute, ORS 196.800(13)(a).** And does DSL intend to require weight in applications? **Response: ORS says cubic yards or the equivalent weight in tons.** Providing this info could be burdensome to applicants and the value in reviewing applications is unclear. **Response: Delineation reports do not normally ask for removal fill weights but may ask for area and volume of removal fill activity in waters of this state.** Another comment suggested changing the portion of this definition that reads “on or within the bed of such waters” to read, “below the ordinary high water line of such waters”. **Response: The removal definition proposed for Division 90 is the same as that used in Division 85 for consistency.**

(37) What is the intent behind the changes to “site-specific” methods? **Response: DSL revision to the definition of site-specific methods is intended to encourage consultants to provide site-specific information while avoiding generic or boilerplate language that does not further characterize the site. Excessive amounts of the latter can significantly slow down review times.**

(38) The RAC requested DSL add “potential wetlands” to Statewide Wetlands Inventory (SWI) definition: “Statewide Wetlands Inventory” (SWI) means a composite of wetland mapping (i.e., LWI, NWI, approved wetland delineations) and other natural resource mapping for the state of Oregon that is provided by the Department. The SWI is a screening tool to help identify approximate locations of **potential** wetlands and waters and is continually revised as additional digital mapping information is received or obtained by the Department.” **DSL will make this change.**

(39) What is the intent behind broadening the definition of “study area”? Could this new definition require a larger area for study than previously required under existing rules? **Response: A study area can be any defined area for purposes of the delineation report. The removed language was confusing because it was limited to legally defined spaces. We are making the designation of study area more flexible.**

(41) Include language to make clear that man-made and artificial features are also included. Unless they aren't. **Response: See General Comment for Entire Rule, Response #1 and #2 for background. Generally, man-made and artificial features are not included in the definition of “waters of this state” but there are exceptions, as detailed in Division 85 rule.**

(44) Change reference throughout from “wetland delineation report” to “delineation report”? **Response: DSL agrees this would provide clarity that the boundaries of all waters of this state are to be located as part of a report review. However, ORS 196.818 is titled, “Wetland delineation reports;**

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<sup>3</sup> 196.810(1)(b): Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (3) and (13), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required. “Essential indigenous anadromous salmonid habitat” as defined under this section shall be further defined and designated by rule by the Department of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.

<sup>4</sup> 390.835(2): Filling of the beds or removal of material from or other alteration of the beds or banks of scenic waterways for purposes other than recreational prospecting not requiring a permit shall be prohibited, except as permitted by the Director of the Department of State Lands upon a finding that such activity would be consistent with the policies set forth under ORS 390.805 to 390.925 for scenic waterways and in a manner consistent with the policies set forth under ORS 196.800 to 196.825 and 196.845 to 196.870 for removal of material from the beds and banks and filling of any waters of this state. The Director of the Department of State Lands shall administer and enforce the provisions of this subsection.

review by Department of State Lands; fees; rules”, so DSL did not propose this change. The definition for Wetland Delineation Report and other rule text is intended to provide this clarity. Additionally, after further discussion DSL will restore “of this state” where previously removed to this definition.

(45) Change reference throughout from “wetland map” to “delineation map”? Response: DSL agrees that this would provide clarity that the boundaries of all waters of this state are to be located as part of a report review. DSL will change the title of the “Wetland Map” definition to “Delineation Map” and change occurrences of wetland map to delineation map throughout rule where appropriate.

#### Rule 141-090-0025 Procedures for Determinations Conducted Entirely by the Department

Similar question on 141-090-0025(d)&(e) – Collectively these changes appear to be significantly broadening the determination area outside of specific lots or parcels. What is the Department’s intent behind this change? Response: Regarding 141-090-0025(d)&(e), DSL assumes this question is referring to (4)(d)&(e). If that is the case the intent of the change to (d) site location map is to ensure staff create a map that will allow easy relocation. The intent for the change to (e) detailed site map is to ensure that a detailed site plan is prepared to document site conditions at the time of the site visit.

(9)(e) or (f) Suggested this addition to (e) soil survey map or (f) sketch map, “or equivalent map using GIS shapefiles downloaded from online source”. Response: DSL needs further explanation for this suggestion. Remember this portion of the rule is for determinations conducted entirely by the DSL.

#### Rule 141-090-0030 Technical Requirements

(1) What is the new “manual” referenced in the rule change? Response: There is not a new manual. The Department intent by simply using the term “manual” here is because it is defined in OAR 141-090-0020(20). However, DSL does suggest an additional change to delete “including regional supplements” because this text is also redundant to the definition. Therefore, the new recommended language is: “(1) Wetland determinations and delineations shall be conducted in accordance with the Manual, and any supporting technical or guidance documents issued by the Department.”

#### Rule 141-090-0032 Fees for Wetland Delineation Report Review

No discussion

#### Rule 141-090-0035 Standards and Requirements for Wetland Delineation Reports Submitted to the Department

(5) The RAC found the first sentence of this rule confusing and questioned whether DSL’s intent is to require GIS data. Response: Yes, GIS data will be required. DSL proposes changing first sentence of rule to read: “GIS data must be submitted and conform to the Delineation GIS Template and Data Description provided by the Department.

What is the “Delineation GIS Template and Data Description” referenced? Response: The Delineation GIS Template and Data Description is the document DSL is developing to explain what the Department needs for the GIS data submitted.

Specify what GIS data is required at submittal (wetland, water, and study area boundaries?) **Response: The agency is preparing a template and data description that will be available before the new rule becomes effective.** What about waiting to submit GIS until after DSL approved (avoid risk of having incorrect wetland boundary info in DSL database). **Response: Staff will need to see files during the review process. Solution will be to accept a draft submittal when report received followed by a request for final submittal if needed prior to approval.**

Requiring GIS Data will add effort, but it should generally be minimal. **Response: Agreed, DSL will need to be flexible about this requirement in the beginning.**

Two comments referred to cost impacts from this rule change. (1) I understand the intent with having standardized data statewide, but I expect this will be burdensome to many applicants. (2) This can be quite a significant increase in time and money to the applicant. **Response: DSL will include a draft statement of the fiscal and economic impact and the cost of compliance from this rulemaking in our "Notice of Proposed Rulemaking" and share this with the RAC prior to our last meeting. We will ask the RAC to provide feedback for this fiscal impact and cost of compliance language at the final meeting.**

Feels populating metadata may pose a problem for some individuals. **Response: DSL will provide a template for submitting GIS data, and delineation GIS data description document for completing this step.**

(7)(b & c) Regarding classification of waters: are we using Cowardin for classifying waters? **Response: Yes.** We suggest considering alignment with Oregon Stream Classification for certain waters. **Response: Cowardin works for streams, is more commonly known, and Division 85 does not require classification of streams using the Oregon Stream Classification for permitting purposes.**

Does this mean this (identifying Cowardin, HGM, and ARSC types) will be required even if it is determined that wetlands can be avoided and not impacted? **Response: Yes, DSL proposes requiring this information for all wetlands and other waters in the study area to streamline completion of any current or future JPA form. The information is simple to identify and collect as part of the delineation and will provide applicants flexibility if plans change as projects develop.** Consider only requiring the specific data formats if wetlands cannot be avoided so that the extra work can be avoided by applicants. **Response: Again, DSL believes any extra work requirement is minimal and having this information available up front will allow plans to change without requiring an expensive second visit by consultants to gather information that could have easily been collected during the original site visit.**

(10) Asking for clarification for "Farmed sites". Annually cultivated sites? Are tree farms and orchards intended to be included in this section? **Response: Yes, among others. Farmed sites are identified because agricultural management practices can influence a wetland determination.**

(11) No questions about change from use of "precision" to "accuracy". One comment approved the addition of reference to ORS 672 et seq in the rule.

(11)(c) One comment requested changing a portion of the text in this rule from "identified on the map" to "identified on a map". **Response: Agreed, DSL will change to "identified on a map".**

(12)(a & b): Add report text requirement to include information on existing structures, impervious areas, and general vegetation. **Response: This location already asks for descriptions of landscape settings, land uses and alterations that likely affect presence of wetlands or other waters on the site. Existing structures are asked for under map requirements (141-090-0035(14)(d)).**

(12)(e)(A-H) Would a consultant be required to describe and include in their report upland waters or waters that are not “waters of the state”? **Response: Consultants must describe all wetlands and other waters so that DSL may determine which ones are waters of this state. “Upland waters” is not a category that DSL uses. DSL also proposes adding “and width” to (12)(e)(A) so that it reads, “Area, in acres, for wetlands, ponds, reservoirs, and lakes; length, in feet and width, of streams, ditches, and reservoirs;”**

Regarding description of all wetlands, does DSL want longitude and latitude for each polygon, or opposite ends of linear polygons? **Response: DSL requires latitude and longitude for sample plot locations. Wetland polygons will be identified in GIS.** If so, include in one or more tables? **Response: This description information can be in the report text, or in an organized table if that affords a better way to provide the information.** For (A, C, D, and F) added with one or more tables? and (H) if known. **Response: Again, this information can be in the report text, or in an organized table. It will also be included in the GIS attribute table.**

(12)(e)(G) The RAC asked for more information regarding section (G) (originally F). This section requests information about wetlands below the ordinary high water line. One member indicated that they do not support this rule change at this time. **Response: DSL believes wetlands below ordinary high water are just like any other wetland and need to be delineated and described if located in a delineation report’s study area. But DSL agrees that no other wetland types (e.g., slope wetlands) are specifically called out in rule. Therefore, DSL proposes to remove section (12)(e)(G) and the reference to wetlands below the ordinary high water line in 141-090-0035(14)(f)(A), and instead explain when and how to map these wetlands in a future wetland delineation guidance document. DSL will continue to request information for wetlands below the ordinary high water line when they are observed in a report’s study area.**

(12)(f) Add report text requirement to include information on past DSL concurrence and any changes to extent wetland/waters. **Response: The rule requests explanation of development in area mapped previously as wetlands or other waters.**

(12)(h)(E) Wants to add the following after “imagery” “such as aerial photography and”? **Response: DSL considers imagery sufficient.**

(12)(i) Would like rule to elaborate rather than reference previous OAR (12)(e) and (h): **Response: DSL considers the reference sufficient in this case.**

(13) Suggest some inset maps will not require a scale bar example being those that show state or county areas. **Response: A scale bar is required for all maps including inset maps for consistency.**

(13)(a) Looking for alternative to “small-scale”. Vicinity is common, but small-scale is often incorrectly confused with enlargement. **Response: DSL agrees and will change to, “A location map clearly naming geographical places, waterways, and major roads in the vicinity.”**

13(b) I believe Metro data is typically used in the metro area. Is that being left out intentionally or should that be included as and, "or" along with County? **Response: Assessor tax lot maps can be obtained from multiple sources and will be accepted if current and accurate. Metro sources their tax lot maps from the counties.**

(13)(d) Suggests the following edits for this definition. Replace county soil survey with “Natural Resources Conservation Service soil survey map (or equivalent map using GIS shapefiles download

from online source". Also points out that "some soil series are not hydric but have hydric inclusions." Response: DSL will change to read, "The NRCS county soil survey map including the map unit symbol, name, and hydric status for all soil series mapped within the study area."

(14)(e) Define term "recent" (within past 5 years) as it relates to mapping "recent fill areas" and "normal circumstances". Response: DSL will remove "recent" from this rule. Second comment to add "if known" to request for location of recent fill and removal. Response: "If known" is implied. It would be difficult to map and describe something you could not see on the ground or by reviewing remote imagery.

(14)(f)(A-F) The RAC comments for this section matched those for section (7) and (12)(e). Response: See DSL responses for sections (7) and (12)(e). DSL also proposes adding "and width" to (14)(f)(C) so that it reads, "Area, in acres, for wetlands, ponds, reservoirs, and lakes; length, in feet **and width**, of streams, ditches, and reservoirs;"

(14) and (16) Require data to be collected within 2 years of report submittal? Response: DSL currently handles this question on a case-by-case basis, because data longevity depends on a lot of site-specific factors.

(16) Asks about data forms: Does this include forms generated by third-party software, or data sheets modified to have more spaces for herbaceous plants and fewer trees/shrubs? Response: Yes, if the data form used includes all entries consistent with the current version provided for the appropriate regional supplement to the manual.

(16)(b) Asks if lat/long requirement is for centroid of site or actual sample plots? Response: The latitude and longitude requirement are for actual sample plot locations.

#### Rule 141-090-0040 Procedures for Review and Approval of a Wetland Delineation Report Submitted to the Department for a Jurisdictional Determination

(3)(f)(C)(xii) RAC member suggested that 60 days may not be adequate time before rejecting a report if site is remote, snowbound or if hydrology data from the early part of the growing season. Response: Following a RAC member comment, DSL added "communications" to one of the reasons that can affect how the 60 calendar days are counted. This portion of the rule now reads, "Additional clarifying information, requested revisions, or communication requesting additional time are not provided within 60 calendar days of the Department's written request."

#### Rule 141-090-0045 Duration, Revision, Expiration and Reissuance of Jurisdictional Determinations

No discussion

#### Rule 141-090-0050 Request for Reconsideration, and Contested Case, and Independent Review

One comment requested a new dispute resolution process to replace the Independent Review Panel portion of this rule that sunsetted earlier this year. Response: DSL proposes adapting the appeal process DSL currently uses for proprietary authorization disputes (141-082-0340). The proposed adapted appeal process will read:



#### **141-090-0050, Request for Reconsideration, and Contested Case, and Appeal**

(4) In the event that the landowner, agent, or applicant with landowner permission disagrees with the reconsideration decision, that party may:

(a) Request a contested case proceeding pursuant to ORS 183.413 through 183.470 by submitting a written request so that it is received by the Department within 21 calendar days of the reconsideration decision; or

(b) Request an appeal by submitting a written request so that it is received by the Department within 21 calendar days of the reconsideration decision. The appeal option is available only when the disagreement is over a wetland determination or delineation that has been the subject of reconsideration by the Department. The appeal option is not available for ordinary high water or highest measured tide determinations and does not involve a review of whether the wetland or other water is subject to state regulation.

(A) The Director shall decide the appeal within 60 calendar days after the date of delivery of the appeal.

(B) The Director may affirm the reconsideration decision, issue a new or modified decision, or request the appellant to submit additional information to support the appeal.

(C) When an applicant has exhausted the appeal process before the Director, they may submit an appeal for a contested case hearing pursuant to ORS 183.413 through 183.470.