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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 141
DEPARTMENT OF STATE LANDS

FILED

02/23/2023 11:34 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Revisions to the administrative rules for Wetland Delineation Report Requirements and Jurisdictional Determinations.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/31/2023 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
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HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 03/15/2023

TIME: 6:00 PM

OFFICER: Danielle Boudreaux

HEARING LOCATION

ADDRESS: Department of State Lands, 775 Summer St NE, Suite 100, Salem, OR 97301

SPECIAL INSTRUCTIONS:

The public rule hearing will be held virtually via Zoom. Meeting links and call-in information are on the DSL proposed rules web page.

NEED FOR THE RULE(S)

The proposed rulemaking will ensure information submitted to the Department is sufficient and complete, clarifying processes for property owners, consultants, and Department staff.

Proposed changes include updating technical requirements and standards for reports, requiring as applicable GIS data for Cowardin, HGM, Highest Measured Tide Line, Stream Centerline, Stream Ordinary High Water Line, Study Area Polygon, Tax Lot Polygon, Water Polygon, and Wetland Polygon two years after the rule becomes effective, and for all GIS data five years after that date, and replacing an expired portion of rule that provided a dispute resolution process for jurisdictional determinations with a new process that will allow applicants to request an appeal decision from the Department's Director.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

ORS Chapter 196: https://www.oregonlegislature.gov/bills_laws/ors/ors196.html

ORS Chapter 197: https://www.oregonlegislature.gov/bills_laws/ors/ors197.html

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The Oregon Department of State Lands is committed to the fair, just, and unbiased treatment of people of all races. Actively identifying and addressing inequities to ensure inclusive public service is one of the Department's core values.

Evaluating who proposed administrative rules will impact, and how the rules may impact some groups of people differently than others, is essential to providing equitable service. During the rulemaking process for Wetland Delineation Report Requirements and Jurisdictional Determinations rules, the Department and the Rulemaking Advisory Committee (RAC) examined the following to ultimately determine the impacts the proposed rules may have on racial equity:

- What persons and groups are subject to the rules?
 - o RAC discussion identified several groups affected by the rules: property owners, developers, natural resource consultants, and state and other municipal agencies.

- What issues are the rules seeking to address? Which racial groups are likely to be affected by those issues?
 - o The rules seek to address common reasons Department staff need to request additional information, conduct multiple site visits, or reject wetland delineation reports. All Oregon property owners, regardless of race, are likely to be affected by these rule changes. The changes will ensure information received is consistent and in a modern format to allow for more efficient review and easier sharing that helps the public identify approximate locations of wetlands and other waters and avoid unintended impacts.

- Ultimately, what impacts do these rules have on racial equity?
 - o The Department has determined, in agreement with the RAC and through careful consideration and evaluation, that these rules are unlikely to impact racial equity in Oregon.

FISCAL AND ECONOMIC IMPACT:

The proposed rules are expected to provide clearer wetland determination procedures, ensure that submitted information is sufficient and complete, and create more clarity for property owners, consultants, and Department staff. The Department is requesting GIS information to improve the Statewide Wetlands Inventory (SWI) and improve the information available for staff reviewing delineation reports. The goal is to have an SWI that can be revised as new or more complete information becomes available and to have improved wetland information available for staff to review and to share with city and county planners and the public.

The proposed rules requesting GIS data is predicted to have fiscal impact for all consulting firms providing delineation reports to the Department. Firms may need to hire staff, increase staff training, and purchase additional equipment, or enlist services from subcontractors, to meet the new GIS data requirements. The Department understands that any new requirement for preparing and submitting delineation reports has the potential to raise report preparation costs and that those additional costs will likely get passed on to the public purchasing these services.

Based on input from the RAC, phasing in a smaller subset of GIS data requirement over the first two years followed by a second three-year period for the remaining data will allow firms time to develop their GIS capabilities and spread out any new costs over several years. Two years after the rule becomes effective the Department proposes requiring data layers for Cowardin, HGM, Highest Measured Tide Line, Stream Centerline, Stream Ordinary High Water Line, Study Area Polygon, Tax Lot Polygon, Water Polygon, and Wetland Polygon, and all remaining data layers including Aquatic Resource of Special Concern, Contour Line, Photo Point, Project Mile Point, Sample Plot Point, Structure Polygon, Structure Point, and Structure Line, will be required as applicable five years after the rule becomes effective.

The fiscal impact to the Department due to the new rules is expected to be smaller than for the consulting community. DSL staff use GIS daily and are comfortable handling the files. However, there may be an uptick in requests to the Department for training or assistance when the GIS requirements are first implemented but it's hoped that the uptick will be brief as firms become comfortable with the new requirements.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

Other state agencies, the most frequent being the Oregon Department of Transportation (ODOT), prepare delineation reports for the Department to review. The economic effect for these agencies is expected to be minimal because the additional requirements to characterize wetlands and provide GIS files are steps that are already completed by these agencies for most removal fill permit applications.

(2) Effect on Small Businesses:

(2)(a) Estimate the number and type of small businesses subject to the rule(s).

The primary business types that will be affected by the proposed rule changes are consulting firms providing wetland delineation, engineering, and mapping services for the public. There are upwards of 110 firms providing some or all these services in Oregon.

(2)(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s).

The majority of the reporting, recordkeeping and administrative activities and costs required to comply with these rules remain unchanged, because the majority of these rules have been in place for multiple years. However, the new requirement for GIS will increase reporting, recordkeeping and administrative activities and costs for all firms submitting wetland delineation reports to the Department for review and approval. It is for this reason the Department is phasing in the requirement for GIS over a five-year period to allow small businesses time to develop GIS capabilities and spread out any additional costs over several years.

(2)(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

All firms without current GIS capabilities will need to hire staff and purchase new equipment, or enlist services from subcontractors or professional land surveyors, to meet the new GIS data requirements. One estimate from the Rules Advisory Committee suggested that the new GIS requirement could cost a firm as much as \$8,000 to \$10,000 per employee to get a firm up to speed in GIS. Phasing the GIS requirements in over five years will allow firms to spread the fiscal impact out over time.

There are a variety of programs that may be used to produce the information and export files in the format required by

the Department. Software suitable for generating the GIS data, such as ArcGIS Pro, can be accessed through an annual subscription beginning at \$100/year for an individual and \$765/year for a business. Subscribers will also have access to GIS training including seminars, web courses, instructor-led training, and tutorials.

Additionally, other low or no costs GIS software is available including free and open-source software that could eliminate the need to purchase more expensive products like ArcGIS Pro. The website for one free and open-sourced software product, QGIS, explains that it can be used for data-viewing needs, for data capture, for advanced GIS analysis, and for presentations of maps, atlases, and reports. The Department agrees to look at these alternative software packages to determine their feasibility.

Equipment costs for collecting GPS field data will vary depending on the equipment chosen. The Department uses the Eos Arrow unit, and they can range in price from \$3000 to \$4000 per unit depending on the options selected. Other suitable GPS equipment options used by the Department include the Trimble R1 that range in price from \$2000 to \$2500. To research different GPS receivers, the USDA Forest Service provides horizontal accuracy reports for different units that can be reviewed at <https://www.fs.usda.gov/database/gps/mtdcrept/accuracy/index.htm>.

The Department also agrees to work with consultants using alternative methods for mapping such as computer-aided design (CAD) programs and explore ways to accept those file types. ArcGIS and ArcGIS Pro already can accept some file types generated by Autodesk AutoCAD and Bentley MicroStation software.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Six small business representatives participated on the rulemaking advisory committee. These included businesses representing natural resource and wetland delineation report preparation consultants. Additionally, the Oregon Home Builders Association, The League of Oregon Cities, Association of Oregon Counties, and the Oregon Farm Bureau participated and represent development, local planning, and farming communities that may include small businesses. Other businesses are welcome to comment during the public comment period.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

141-090-0005, 141-090-0010, 141-090-0015, 141-090-0020, 141-090-0025, 141-090-0030, 141-090-0035, 141-090-0040, 141-090-0045, 141-090-0050, 141-090-0055

AMEND: 141-090-0005

RULE SUMMARY: Revised purpose statement for clarity.

CHANGES TO RULE:

141-090-0005

Purpose ¶¶

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~~ for the purpose of regulating fill and removal within waters of this state. These rules also establish minimum standards for wetland delineation reports submitted to the Department for review and the procedures for Department review and approval.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0010

RULE SUMMARY: Revised applicability statement for clarity.

CHANGES TO RULE:

141-090-0010

Applicability ¶

(1) These rules establish the standards and procedures used by the Department of State Lands to identify waters of this state that, which are subject to regulation and authorization requirements of the Removal-Fill Law (ORS 196.800 to 196.990).¶

(2) These rules are supplemental to administrative rules for issuance and enforcement of removal and fill authorizations (OAR 141-085; 141-0102); rules pertaining to wetland conservation plans and local wetlands inventories (OAR 141-086; 141-120); rules pertaining to the identification of significant wetlands (OAR 141-086); rules pertaining to General Authorizations (141-089); rules pertaining to General Permits (141-093) and rules pertaining to Oregon Scenic Waterways (141-100).¶

(3) Agencies such as the U.S. Army Corps of Engineers (~~Corps of Engineers~~ USACE) and the Natural Resources Conservation Service (NRCS) have separate regulatory authority over waters of the United States and separate jurisdictional determination procedures.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0015

RULE SUMMARY: Revised for clarity. Removed reference to Oregon Laws 2012, c. 108, § 2, which expired January 2022.

CHANGES TO RULE:

141-090-0015

Policy ¶¶

- (1) It is the policy of the State of Oregon that the protection, conservation and best use of the water resources of this state are matters of the utmost public concern (ORS 196.805) and that the state use a single definition of wetlands and a single, uniform methodology of delineating wetland boundaries (ORS 196.672).¶¶
- (2) In accord with these policies the Department shall, to the greatest extent possible:¶¶
- (a) Provide a clear process for making, ~~modify~~revising, reconsidering, or reissuing jurisdictional determinations, ~~including wetland boundary delineations;~~¶¶
- (b) Make jurisdictional determinations using the best available science, technical guidance and documents;¶¶
- (c) Use sound professional judgment in interpreting maps, ~~aerial photographs~~remotely sensed imagery, environmental data and other relevant ~~documents~~information;¶¶
- (d) Provide jurisdictional determinations that improve the level of regulatory certainty for landowners and developers and that help ensure that ~~fill or removal~~ or fill of material in waters of this state does not occur without a required removal or fill permit; and¶¶
- (e) Encourage landowners and developers to utilize wetland delineation reports at the earliest stage of site development planning ~~in order~~ to incorporate measures to avoid and minimize impacts to ~~wetlands and other waters of this state~~ and thus prevent unnecessary regulatory delays.¶¶
- (3) Because ~~wetlands and other~~ waters of this state can be affected over time by both natural changes and human activities, jurisdictional determinations are ~~not~~ valid for an ~~indefinite~~ limited period of time.¶¶
- (4) The Director of the Department of State Lands shall designate employees responsible for making jurisdictional determinations as described in these rules.¶¶
- (5) Final authority for determining the adequacy of the procedures, methods, application of technical documents, interpretation and analysis of maps and data, and conclusions regarding the identification of waters of this state and jurisdictional determinations rests with the Department except ~~as described in Oregon Laws 2012, c. 108, § 2,~~ and ~~except~~ when the Department's determination is reviewed by a court of competent jurisdiction.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: 196.800 - 196.990, 196.600 - 196.665, 196.668 - 96.692, 197.279

AMEND: 141-090-0020

RULE SUMMARY: Revised definitions for clarity. Added definitions for Aquatic Resources of Special Concern, Cowardin, Fill, Geographic Information System, Hydrogeomorphic Method, Removal, Site-specific methods, Statewide Wetlands Inventory.

CHANGES TO RULE:

141-090-0020

Definitions ¶¶

For the purpose of these rules:¶¶

(1) "Agent" means a business partner, attorney, or any individual who is legally authorized to represent the landowner's interests.¶¶

(2) "Applicant" means a person who has applied to the Department for a wetland delineation report approval, a jurisdictional determination ~~and a removal or fill authorization~~, or a removal or fill authorization.¶¶

(3) "Aquatic Resources of Special Concern" (ARSC) means waters of this state that provide functions, values and habitats that are limited in quantity because they are naturally rare or have been disproportionately lost due to prior impacts. These include bogs, fens, cold water habitat, hot springs, interdunal wetlands, kelp beds, mature forested wetlands, native eelgrass beds, off-channel habitats (alcoves and side channels), ultramafic soil wetlands, vernal pools, wet prairies, wooded tidal wetlands, certain alkaline wetlands and lakes, and others as determined by the Department.¶¶

(34) "Authorization Application" means the written application for an authorization to place fill in or remove material from waters of this state as required by OAR 141-085, 141-089, 141-0100 and 141-0102.¶¶

(45) "Basis of Jurisdictional Determination" means a summary statement of the criteria and indicators that support the Department's jurisdictional determination.¶¶

(56) "Change in Circumstances" means a change in site conditions that fundamentally alters the hydrology or substrate to the extent that the "normal circumstances" of waters of this state are changed. The change in circumstances may be due to alterations ~~on a site or alterations~~ or off-site that affect the site sufficiently to enlarge, reduce, or change the status or geographic extent of a jurisdictional water. A change in circumstances includes, but is not limited to, a dike breach or drainage system failure that restores former hydrologic conditions to a site, placement of fill material, or a water source diversion.¶¶

(67) "Consultant" means a ~~private individual or firm whose business is~~ person, as defined in ORS 196.800(10), who provides professional services to the public.¶¶

(78) "Cowardin" means Cowardin, L. M., V. Carter, F. C. Golet, E. T. LaRoe, 1979. Classification of wetlands and deepwater habitats of the United States, U. S. Department of the Interior, Fish and Wildlife Service, Washington, D.C.¶¶

(9) "Delineation" means a determination of ~~wetland presence~~ the presence of wetlands and other waters that includes marking ~~the wetland~~ boundaries on the ground and on a detailed map prepared by professional land survey or similar accurate methods.¶¶

(810) "Delineation Map" means a map included in a Wetland Delineation Report or provided with a JD by the Department that shows the tax lot(s) and study area(s) investigated and the location, size, and boundaries of all wetlands and other waters.¶¶

(11) "Determination" means a decision that a site may, does, is unlikely to, or does not contain waters of this state, ~~including wetlands~~. A determination does not include the ~~precise~~ exact location or boundaries of ~~any wetlands or waterways determined to be present~~ waters of this state.¶¶

(912) "Director" means the Director of the Department of State Lands or ~~his or their~~ designatee.¶¶

(103) "Department" means the Oregon Department of State Lands, including the Director.¶¶

(144) "Fill" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state. However, in designated essential salmonid habitat (ESH) areas (OAR 141-102) and in designated State Scenic Waterways (OAR 141-100) "fill" means any amount of deposit by artificial means.¶¶

(15) "Final Order" means a final agency action expressed in writing. "Final order" does not include any tentative or preliminary agency statement, including a "preliminary jurisdictional determination," and does not preclude further agency consideration of the subject matter of the final order.¶¶

(126) "Geographic Information System" (GIS) means a system of hardware, software and data storage that allows for the analysis and display of information that has been geographically referenced.¶¶

(17) "Global Positioning System" (GPS) means a navigation system which consists of a network of satellites and earth receiver stations which allows a person to determine, via a receiver, their respective position in latitude,

longitude, and altitude.¶

~~(138)~~ "Hydrogeomorphic Method" (HGM) means the wetland classification based on a wetland's location in the landscape and the sources and characteristics of water flow defined in Adamus, P.R.2001. Guidebook for hydrogeomorphic (HGM)-based assessment of Oregon wetland and riparian sites: Statewide classification and profiles. Oregon Division of State Lands, Salem, OR.¶

~~(19)~~ "Indicator" means soil characteristics, vegetation, hydrology evidence, or other field data that indicate, by their presence or absence, the existence of certain environmental conditions. Indicators are used with other information, mapped or anecdotal, to determine the state's jurisdiction over waters of this state and other waters.¶

~~(1420)~~ "Jurisdictional Determination" (JD) means a written decision by the Department that waters of this state subject to regulation and authorization requirements of OAR 141-085, 141-089, 141-0100 and 141-0102 are present or not present on a land parcel within a study area. The JD may include a delineation of the geographic boundaries of the water area subject to state jurisdiction. For example, a JD may include the location of a wetland boundary or the location of the ordinary high water line (ordinary high water mark) of a waterway. A JD may, but does not necessarily, include a determination that a particular activity in a water of this state is subject to authorization requirements. The decision record includes the basis of the jurisdictional determination and is a final order subject to reconsideration according to the provisions in 141-090-0050.¶

~~(215)~~ "Landowner" means the legal owner of the parcel(s) property for which a JD is requested or made.¶

~~(1622)~~ "Local Wetlands Inventory" (LWI) means a wetlands inventory map and supporting data that is conducted according to the requirements in OAR 141-086 and has been approved by the Department.¶

~~(1723)~~ "Manual" means the 1987 U.S. Army Corps of Engineers Wetlands Delineation Manual including the two regional supplements that cover Oregon: Arid West and Western Mountains, Valleys, and Coast, and applicable guidance (see OAR 141-090-0030) all of which is hereby incorporated by reference. The public may obtain a copy of the manual from the Department's website.¶

~~(1824)~~ "National Wetlands Inventory" (NWI) means the wetlands inventory prepared by the U.S. Fish and Wildlife Service.¶

~~(1925)~~ "New Information" means data, reports, photographs, observations, or similar information that is provided to or obtained by the Department after the Department has issued a jurisdictional determination or issued an authorization.¶

~~(206)~~ "Non-wetland" means an area that does not meet the wetland definition and criteria.¶

~~(217)~~ "Normal Circumstances" means the hydrology, soil and vegetative soil and hydrologic conditions that are naturally present, regardless of whether or not the soil or hydrology has been recently altered or the natural without regard to whether the vegetation has been removed or altered. "Normal circumstances" includes a consideration of the permanence of any change to the site; for example, if several feet of fill material are placed on a wetland, the new "normal circumstances" may be non-wetland. In such a situation, the Department may determine if the placement of fill material required a fill permit.¶

~~(228)~~ "Off-site Determination" means a determination by the Department or any other person that is conducted without a site visit using maps, aerial photographs resources such as maps, remotely sensed imagery, observations from adjacent areas, or interviews with persons familiar with the site. An off-site determination is considered to be a Preliminary Jurisdictional Determination (PJD) unless otherwise stated in writing by the Department.¶

~~(239)~~ "On-site Determination" means a determination by the Department or any other person that includes a site visit to collect relevant data. An on-site determination by the Department may be either a PJD or a JD.¶

~~(2430)~~ "Other Waters" means all waters of this state other than wetlands regardless of jurisdiction.¶

~~(2531)~~ "Person" means an individual, corporation, firm, partnership, estate, association, body of government, or other legal entity.¶

~~(326)~~ "Preliminary Jurisdictional Determination" (PJD) means an advisory determination issued orally or in writing stating that wetlands or other waters of this state are present or not present on a parcel of land within a study area. Because a PJD is advisory in nature, it has no specified duration or expiration and is not subject to appeal. PJDs include all wetland determinations by any person other than the Department, and may also include wetlands mapped on the NWI or on an LSWI.¶

~~(2733)~~ "Primary Contact" means the person or firm designated by the landowner, agent, or applicant to serve as the Department's contact for the purpose of the review and approval of a wetland delineation report.¶

~~(2834)~~ "Removal" means the taking of more than 50 cubic yards of material (or its equivalent weight in tons) in any waters of this state in any calendar year; or the movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation. However, in designated ESH areas (OAR 141-102) and in designated State Scenic Waterways (OAR 141-100) the 50-cubic-yard minimum threshold does not apply.¶

~~(35)~~ "Removal-Fill Law" means ORS 196.800 through 196.990 and rules adopted thereunder relating to the filling and/or the removal of material in waters of this state.¶

~~(2936)~~ "Report" means a wetland delineation or determination report.¶

~~(307)~~ "Sample Plot" means an area portion on a parcel of land study area within which environmental data (e.g., soils, hydrology, and vegetation) are collected that is representative of that area and documented on a wetland determination data form.¶

~~(318)~~ "Site-specific methods" means what the field investigator actually did in order to conduct the wetland sampling, delineation, and investigative procedures used to address the unique circumstances at a site. Boilerplate content from the manual and determination or delineation and prepare the wetland delineation report; for example, the offsite resources actually consulted, why certain portions of a study area were or were not selected for field sampling, actual plot sizes for vegetation sampling, and explanation of best professional judgment relied upon. A generic description of methods the field investigator generally employs is not site-specific generic procedures are not site-specific.¶

~~(39)~~ "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 waterways and is continually revised as additional digital mapping information is received or obtained by the Department.¶

~~(3240)~~ "Study Area" means the area that was investigated for the presence of waters of this state (e.g., usually a portion of a tax lot(s), parcel or other legally defined geographic area) wetlands and other waters.¶

~~(41)~~ "Upland" means any land that is not a wetland or other water.¶

~~(3342)~~ "Waters of this state" means all natural waterways, all 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, and all other navigable and non-navigable bodies of water in this state and those portions of the ocean shore, as defined in ORS 390.605, (ORS 196.800(14) and OAR 141-085-0010 and 141-085-0015), 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.¶

~~(343)~~ "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions (ORS 196.800(167) and OAR 141-085-00510(110)).¶

~~(3544)~~ "Wetland Boundary" means a line marked on the ground and on a map that identifies the boundary line between wetlands and non-wetlands.¶

~~(3645)~~ "Wetland Delineation Report" means a written document that contains the methods, data, conclusions, and maps used to determine if wetlands and other waters of this state are present on a land parcel within a study area and, if so, describes and maps their locations and geographic extent. A wetland determination report documenting wetland the presence or absence of waters of this state is included within this definition.¶

~~(37)~~ "Wetland Map" means a map included in a Wetland Delineation Report or provided with a JD by the Department that shows the parcel(s) and/or study area(s) investigated and the location, size and boundaries of any wetlands and other waters.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0025

RULE SUMMARY: Revised for clarity.

CHANGES TO RULE:

141-090-0025

Procedures for Determinations Conducted Entirely by the Department ¶¶

- (1) The Department shall make a determination (PJD or JD) according to the procedures in this section.¶¶
- (2) The Department may make a determination for a number of reasons, including but not limited to:¶¶
 - (a) A written request from any person (e.g., a landowner or their agent) requesting a determination for a ~~particular parcel or parcels~~ one or more tax lots or any portion thereof;¶¶
 - (b) A Wetland Land Use Notice from a local government as required by ORS 196.676;¶¶
 - (c) A site development notice from a local government;¶¶
 - (d) A request from a local government or other government entity acting in its capacity to conduct site assessments for project or planning purposes;¶¶
 - (e) A removal-fill authorization application, request for a pre-application meeting or a compliance investigation;¶¶
 - (f) A request to review and approve a wetland delineation report (see additional requirements and procedures in OAR 141-090-0030, 141-090-0032 and 141-090-0035); or¶¶
 - (g) In conjunction with its authority and responsibilities under ORS 196.600 to 196.962, 196.800 to 196.990, and any applicable rules of the Department.¶¶
- (3) The Department may prioritize the completion of determinations based upon the availability of staff and budget resources.¶¶
- (4) A request to the Department to provide a wetland determination apart from an authorization application, wetland delineation report submittal, or local government notice shall include:¶¶
 - (a) A written request on a form provided by the Department;¶¶
 - (b) Landowner ~~/ or agent~~ permission to conduct a site visit if an on-site determination is desired;¶¶
 - (c) ~~Landowner or agent~~ Applicant name, company or agency, mailing address and phone number and contact information;¶¶
 - (d) A site location map, such as a city map, showing the ~~precise parcel~~ location with respect to nearest streets and ~~parcels~~ site address, if any;¶¶
 - (e) A detailed site map ~~such as a tax map or hand-drawn parcel map~~ plan showing, as appropriate, such features as the tax lot boundaries, location of streets, roads, buildings, streams, and area of any planned development or ~~fill or excavation~~ removal or fill, if known; and¶¶
 - (f) The legal location from the tax map (Township, Range, Section, Quarter-Quarter Section and Tax Lot numbers).¶¶
- (5) A request for a determination may include additional helpful information, such as:¶¶
 - (a) A ~~large~~ n appropriately-scaled topographic map of the site (e.g., 1 inch = 50 feet);¶¶
 - (b) A large-scale aerial photograph of the site; or¶¶
 - (c) ~~P~~ Ground photographs of the site.¶¶
- (6) A wetland determination request as described in section (4) and (5) of this rule may not be used to obtain agency review and approval of a wetland delineation report (see OAR 141-090-0032 and 141-090-0040).¶¶
- (7) The Department will review the information provided with the request along with other available maps and information and provide a PJD or a JD.¶¶
- (8) The Department may request additional information and may conduct a site visit to ensure an accurate determination. The Department shall contact the applicant or primary contact prior to conducting a site visit.¶¶
- (9) An on-site determination conducted by the Department to make a JD or PJD shall include at a minimum:¶¶
 - (a) A location map showing the location of the ~~parcel(s)~~ study area with respect to major roads;¶¶
 - (b) A ~~parcel~~ tax lot map showing property boundaries;¶¶
 - (c) The legal location from the tax map (Township, Range, Section, Quarter-Quarter Section and Tax Lot numbers);¶¶
 - (d) The ~~NWI map or, if available, the~~ appropriate LSWI mapping with the site located;¶¶
 - (e) The ~~county~~ Natural Resources Conservation Service soil survey map with site located and soil type(s) mapped ~~on the site identified~~;¶¶
 - (f) A sketch map showing the approximate location of any waters of this state on the ~~parcel(s)~~ tax lot(s) or within a defined study area;¶¶
 - (g) At least one data form ~~(or equivalent notes)~~ documenting any wetlands identified or possible wetlands determined not to meet wetland criteria; and¶¶
 - (h) Conclusions and recommendations regarding additional requirements (e.g., the need for a delineation or

permit), as appropriate to the determination request and the situation.¶

(10) After review of the information and the site visit, if conducted, the Department may:¶

(a) Provide a written PJD or JD in accordance with section (11) of this rule; or¶

(b) Provide a written PJD and recommend that the landowner, agent, or applicant obtain a wetland ~~determination and delineation~~ that meets the requirements in OAR 141-090-0030 and 141-090-0035.¶

(11) A written PJD or JD by the Department shall include at a minimum:¶

(a) A letter or form addressed to the applicant, landowner or agent that includes the location of the ~~parcel(s)~~tax lot(s) or study area investigated, a file number for future reference, and the expiration date of the JD, or a response on or attached to a wetland land use notice form or other site development notice submitted by a local government;¶

(b) Comments regarding the ~~precision or~~ use of the PJD or JD, as appropriate;¶

(c) Additional requirements or recommendations, such as the need for a wetland delineation;¶

(d) A determination of the requirements or exemptions in accordance with OAR 141-085, 141-089, 141-093, 141-0100, and 141-0102 that apply to any waters of this state identified on the ~~parcel~~tax lot(s) and/or the proposed activity, if the information provided to or obtained by the Department is sufficient to make such determination; and¶

(e) A map or reference to a map showing the ~~parcel(s)~~tax lot(s) or study area investigated and the approximate location of any identified waters of this state ~~identified on the parcel(s)~~, unless the information provided to or obtained by the Department is not sufficient to make or refer to such a map.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0030

RULE SUMMARY: Revised for clarity.

CHANGES TO RULE:

141-090-0030

Technical Requirements ¶

(1) Wetland determinations and delineations shall be conducted in accordance with the ~~1987 U.S. Army Corps of Engineers Wetlands Delineation Manual ("the manual"), including regional supplements and applicable guidance manual,~~ and any supporting technical or guidance documents issued by the Department.¶

(2) ~~The jurisdictional limits of~~All other waters (e.g., streams, estuaries) ~~are, ditches) shall be delineated at the~~ jurisdictional limits described in OAR 141-085-0515.¶

(3) In addition to the requirements in this section, wetland delineation reports submitted to the Department for review and approval shall meet the standards and requirements in OAR 141-090-0035.¶

[Publications: Publications referenced are available from the agency.]

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0035

RULE SUMMARY: Rule revised for clarity and to emphasize digital submittals in place of paper hard copies. Added requirements for submitting GIS files, classifying wetlands by Cowardin and HGM, and identifying and mapping Aquatic Resources of Special Concern when present.

CHANGES TO RULE:

141-090-0035

Standards and Requirements for Wetland Delineation Reports Submitted to the Department ¶

(1) Report Submittal: All wetland delineation reports ("reports") submitted to the Department for review, approval, and a JD shall meet the technical requirements in OAR 141-090-0030 as well as the minimum standards and requirements in this rule. Reports must conform to the report format provided by the Department. ¶

(2) All wetlands and other waters on the ~~parcel~~tax lot(s) or study area shall be included; the Department will determine whether or not they are "waters of this state", subject to jurisdiction under OAR 141-085, 141-089, 141-093, 141-100, and 141-102. ¶

(3) All report text, maps, ~~aerial photographs~~remotely sensed imagery, ground photographs, and data forms must be legible. ¶

(4) Reports must be submitted as: ¶

(a) A single, unlocked PDF file with minimum resolution of 300 dpi and searchable text for the text portion of the report; or ¶

~~(b) Paper hard copies, reproduced in color as applicable, unbound and, with the exception of photographs, must copy legibly on a black and white copier; or~~ ¶

~~(b) Digital single PDF files with minimum resolution of 300 dpi and searchable text for the text portion of the report.~~ ¶

~~(5) Submitting Geographic Information System (GIS) data is optional but recommended for reports covering large study areas and must conform to the GIS format provided by the Department~~ must copy legibly. ¶

(5) Required GIS data are described in the Delineation GIS Template and Data Description provided by the Department. ¶

(a) Effective two years after this rule takes effect, applicants are required to submit GIS data for Cowardin, HGM, Highest Measured Tide Line, Stream Centerline, Stream Ordinary High Water Line, Study Area Polygon, Tax Lot Polygon, Water Polygon, and Wetland Polygon, as applicable. ¶

(b) Effective five years after this rule takes effect, applicants are required to submit GIS data for all applicable layers in the Delineation GIS template and Data description. ¶

(6) All submittals must include a fully completed and signed "Wetland Delineation Report Cover Form" (current form provided by the Department). ¶

(7) Field Methods: The field investigation methods and level of detail required for making and documenting a PJD or JD and mapping wetlands and other waters of this state will vary by site. At a minimum: ¶

(a) ~~The entire parcel (study area whether a tax lot) or study area portion thereof must be investigated during a field investigation. If only a portion of a parcel is investigated, the study area with respect to parcel boundaries must be made clear in the report text and shown on the wetland maps.~~ ¶

~~(b) All waters of this state in addition to wetlands must be identified, described, supported by data as appropriate, and mapped.~~ ¶

(b) All wetlands and other waters must be identified, supported by data as appropriate, mapped, described, and classified to Cowardin system and class, HGM class, and ARSC type, as applicable. Separate polygons are required when more than one adjoining Cowardin class are present within the same wetland and when ARSCs are a portion of a larger wetland. ¶

(c) Sufficient data and additional information shall be collected for any wetlands and other waters of this state to enable the Department to: make a JD and also to determine if removal-fill permit requirements apply or if the feature identified may be specifically exempt from permit requirements; determine location and size of ARSCs within mapped features; and determine if removal-fill permit requirements or exemptions apply. ¶

(d) The wetland delineation must include sample plots that: represent the characteristics of each wetland present; represent each adjacent non-wetland(s); are paired and located close enough to either side of the wetland boundary to accurately substantiate the wetland boundary location; and are sufficient to characterize long or irregular boundaries. ¶

(e) Wetland determination sample plot data must be provided for any portion of the study area where there is significant deviation from wetlands ~~mapped~~shown on the ~~NWI or LSWI~~ unless the deviation is due to development that is so significant that it precludes data collection. ¶

- (f) At least one sample plot must be placed in all mapped hydric soil units within the study area.¶
- (g) At least one sample plot must be placed in the lowest topographic areas or other locations most likely to contain wetlands.¶
- (8) Study area boundaries, wetland and other water boundaries, and sample plots shall be identified on the ground. For actively managed sites, such as agricultural fields, golf courses, or recreational fields, where it may be impractical to leave the boundary and plot markers on the ground until the JD is issued, their precisely mapped location must be readily relocated in the field by the applicant or consultant during a site visit by the Department.¶
- (9) Because sites are highly variable and JD needs also vary, some situations may warrant deviation from the Field Methods requirements outlined in OAR 141-090-0035(7), for example large geographic areas, linear projects, mosaics, and difficult wetland sites. In such situations, persons conducting wetland delineations are encouraged to consult with the Department prior to field work regarding appropriate methods.¶
- (10) For farmed sites, field work should be guided by multiple information sources including at least three aerial photos from three different years (early growing season if possible), a detailed topographic survey, and information about site management activities such as irrigation schedules, subsurface drainage systems and plowing frequency and depth.¶
- (a) Wetland determination and delineation on farmed sites ~~shall~~ may need to follow procedures outlined in the Difficult Wetland Situations ~~Chapter~~ of the appropriate regional supplement to the manual.¶
- (b) On sites where the hydrology indicators may be missing or misleading due to natural or hydrologic manipulation, hydrologic monitoring may be needed to verify the absence or presence of wetland hydrology. When a hydrology monitoring method alternative to the manual standard is being pursued, the proposed method shall be submitted to the Department in writing for prior approval.¶
- (11) ~~Wetland and other water boundaries, and samples plots, and study area boundary locations~~ must be mapped to the standards described in subsection (a) and (b) of this section.¶
- (a) Except as provided in subsection (b) of this section, the map ~~precision~~ accuracy standard (~~precision of transferring boundaries of features for wetland and other water boundaries and sample plot located on the ground to a map~~) for wetland boundaries, data plots and study area boundaries is within one meter (3.28 feet); ions is within 3.28 feet (one meter) or as otherwise approved by the Department. The accuracy standard is not intended to establish a requirement for authoritative mapping, such as by a professional land surveyor, as described in ORS Chapter 672.¶
- (b) The minimum delineation mapping accuracy and map precision standard for voluntary wetland ecosystem restoration projects (see OAR 141-089-0800 through 141-089-0815) that do not include compensatory mitigation activities or payment-in-lieu is 50 feet (14.8 meters).¶
- (c) Mapping procedures may include professional land survey, GPS, measurements made from permanent features identified on ~~the~~ a map or on an aerial photo included with the report, or approximated. For most intensive development activities, such as subdivision planning or commercial development, a professional land survey may be necessary. The from a georeferenced aerial photograph or other remotely sensed imagery included with the report, or appropriate map precision for removal-fill permitting is subject to the judgment of ximated when approved by the Department.¶
- (12) Report Text: The report text must include:¶
- (a) A detailed description of the site, its landscape setting, and previous and current land uses;¶
- (b) A description, including the approximate year and extent, of any site alterations that likely affected the presence, location or geographic boundaries of any wetlands or other waters on the site (e.g., surface drainage ditches or fill material);, grading).¶
- (c) Precipitation for the day(s) of and 2-week period preceding the field investigation(s), observed and percent of normal rainfall for the water year to date, and for the observed rainfall compared to the NRCS WETS table 30% and 70% chance exceedance values for each of the three months preceding the field investigation; An acceptable replacement for the NRCS WETS table is the Antecedent Precipitation Tool output (Environmental Protection Agency, USACE).¶
- (d) The date(s) of the field investigation and site-specific methods used to conduct the field investigation, define study area boundaries, select sample plot locations, determine boundaries of wetlands and other waters, interpolate boundaries between paired plots, and make PJDs;¶
- (e) A description of any || wetlands and other waters, including whether or not polygons identified, including but not limited to:¶
- (A) Area, in acres, for wetlands, ponds, reservoirs, and lakes; length and width, in feet, of streams, ditches, and reservoirs;¶
- (B) Whether they extend off-site, and the characteristics of the wetland and other water boundaries on the site;¶
- (C) Cowardin classification to the system and class level (describe if more than one adjoining class occur within the same wetland);¶

(D) Dominant HGM class;¶

(E) Stream flow duration of other waters;¶

(F) Deviation from NWI mapping, LWI mapping, or previous DSL-approved delineations Type, size, and location of ARSCs that constitute a portion or all of a mapped feature;¶

(G) Whether it is a State-approved compensatory mitigation, if known;¶

(f) Deviation from the SWI, supported by wetland determination data or explanation of development in area mapped previously as wetland; or other waters.¶

(g) An explanation of how the location of the parcel boundaries, data plots study area or tax lot boundaries, sample plot locations, wetlands, and other feature waters depicted on the delineation map(s) were mapped. A statement of precision must be included with each method used to generate the map.¶

(h) All preliminary jurisdictional determinations shall be supported with Explanation must be provided for each method used for mapping and to which features each method applies.¶

(h) Additional information and rationale for all PJDs sufficient to demonstrate jurisdiction based on OAR 141-085-0515 criteria. This information can include, but is not limited to:¶

(A) Documentation of fish presence or absence in a stream or ditch, using published maps or reports or information from an authoritative source (e.g., Oregon Department of Fish and Wildlife field staff, StreamNet);¶

(B) Information sufficient to determine whether or not an identified water feature is artificially created entirely from upland and the purpose for which it was created;¶

(C) Information about the water feature's wetland status, size, average water depth at ordinary high water line, topographic and geomorphological location, mapped soil series and hydric status, and evidence of drainage (e.g., drain tiles or ditching);¶

(D) Hydrology monitoring data;¶

(E) Historical aerial photographs imagery;¶

(F) Data or other information on pre-disturbance conditions, such as excavation to an original (formed in situ) soil surface or identification of a former stream course;¶

(G) A detailed topographic survey;¶

(H) Data collected at a certain time of year;¶

(I) Additional plant species identification; or¶

(J) Documentation from a Removal-fill permit including permit number.¶

(i) The Results and conclusions of the investigation; including a table summarizing details in (12)(e) and (h).¶

(j) The following disclaimer: "This report documents the investigation, best professional judgment and conclusions of the investigator. It is correct and complete to the best of my knowledge. It should be considered a Preliminary Jurisdictional Determination of wetlands and other waters and used at your own risk unless it has been reviewed and approved in writing by the Oregon Department of State Lands in accordance with OAR 141-090-0005 through 141-090-0055." and¶

(k) Appendices, as needed.¶

(13) Report Figures and Maps: All reports shall include the figures and maps listed in (13)(a) through (13)(g). All maps must include an outline of the study area boundary, a north arrow, a scale bar, and legend of all map elements.¶

(a) A location map, such as a city map, Any inset maps must include a scale bar.¶

(a) A location map, clearly naming geographical places, waterways, and major roads in the vicinity.¶

(b) Assessors tax lot map(s), which include for the entire study area, either downloaded as PDFs from the Oregon Department of Revenue's "ORMAP" website.¶

(c) The appropriate LWI map(s) or if no LWI has been completed, or from a County Tax Assessor's Office GIS data. Maps produced from GIS data must label each tax lot with the Assessors tax map number and tax lot number.¶

(c) The appropriate wetland mapping from the NSWI map(s), provided delineations, LWI, NWI).¶

(d) The NRCS county soil survey map including the map unit symbol, name, and hydric status for all soil series mapped within the study area;¶

(e) At least one recent aerial photograph, preferably taken early in the growing season or during other periods of peak hydrology, that includes the month and year of the photo (include at least three aerial photos from three different years for farmed sites).¶

(f) One or more wetland and other waters delineation maps comprising the wetland and other waters determination or delineation, as appropriate, that meets the requirements in sections (14) through (16) of this rule.¶

(g) Ground-level color photographs of the site.¶

(14) The wetland and other waters map(s) must include:¶

(a) The boundaries of the entire parcel(s) subject to investigation; or delineation map(s) must be legible and include:¶

(a) The boundaries of the tax lot(s) including tax map and tax lot label(s).¶

(b) The study area boundary in relation to the parcel tax lot boundaries, if only a portion of the parcel(s) was investigated. For large parcel tax lots with small study areas, a map in addition to the wetland delineation map may be required to show the relationship between the study area and parcel tax lot boundaries.¶

(c) An index map if a large project study area needs to be divided into more than one detail map for clarity or map scale issues. The Full-page index map(s) shall show the precise exact location and extent of the areas shown on the detail maps in relationship to the larger study area.¶

(d) Locations of existing structures (unless clearly visible on a current aerial photo included in as the report map's base map), such as culverts, bridges, tidegates, fence lines, powerlines, and roads, where practicable.¶

(e) Locations of fill, removals, water diversions, or other major alterations;¶

(f) ~~The boundaries of all wetlands and other waters and where they extend off-site;~~ Boundaries and labeling for mapped features, including:¶

(A) Boundaries of all wetlands and other waters;¶

(B) Where features extend off-site;¶

(C) Area, in acres, for wetlands, ponds, reservoirs, and lakes; length and width, in feet, of streams ditches, and reservoirs;¶

(D) Cowardin classification to system and class (map separately when more than one adjoining class is present within the same wetland) and HGM class;¶

(E) ARSC boundaries; and¶

(F) State-approved compensatory mitigation site boundaries, if known.¶

(g) Numbered sample plots corresponding to data forms (see section (176) of this rule);¶

(h) Photograph locations and direction of view.¶

(i) A statement of the all mapping methods used and estimated mapping precision for the study area boundary, accuracy for the wetland and non-wetland/other waters boundaries; and data plot points, for example the GPS post-processing error estimate.¶

(15) ~~The wetlands and other waters identified must be accurately transferred to a linework basemap, legible on a black and white photocopy. An aerial photo base layer may be used but the image shall be lightened to maintain map legibility.~~ sample plot locations. Include statement of sources of remotely sensed imagery, topography, and tax lot data provided.¶

(16) ~~The wetland delineation map(s) shall be at a scale suitable for the study area size and for legibility. For most purposes, an appropriate map scale is 1 inch = 100 feet. For large study areas, a scale of 1 inch = 250 feet may be sufficient. Minimum map scale for a JD and for permitting purposes is subject to Department approval.~~¶

(17) ~~Data Form Requirements: All reports shall include a wetland determination data form for each sample plot. The data form used must be that~~ current version ~~provided with~~ for the appropriate regional supplement to the manual, ~~or other form provided by the Department.~~ All wetland determination data forms must:¶

(a) Be fully completed;¶

(b) Include only data collected from a single sample plot on a single date (additional dates of hydrology data may be reported in the comments section or provided in a table) and for a single location (identifying latitude and longitude on data form);¶

(c) Include the full Latin botanical name and wetland indicator status of all plant species listed per the current National Wetland Plant List;¶

(d) Use standard soils terminology and abbreviations as established by the U.S. Department of Agriculture, Natural Resources Conservation Service; and¶

(e) Provide remarks for each disturbed or problematic wetland parameter per procedures outlined in the Difficult Wetland Situations Chapter of the appropriate regional supplement to the manual.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: 196.800 - 196.990, 196.600 - 196.665, 196.668 - 96.692, 197.279

AMEND: 141-090-0040

RULE SUMMARY: Rule revised for clarity, and an additional example of a reason why a report can be rejected was added to OAR 141-090-0040(f)(C).

CHANGES TO RULE:

141-090-0040

Procedures for Review and Approval of a Wetland Delineation Report Submitted to the Department for a Jurisdictional Determination ¶¶

(1) When a wetland delineation report is submitted to the Department for review, approval and a JD, the Department shall review the report (according to its established priorities) to ensure that:¶¶

(a) The work meets the technical requirements in OAR 141-090-0030;¶¶

(b) The report meets the standards and requirements in OAR 141-090-0035;¶¶

(c) There is sufficient information for the Department to make a JD, including the geographic extent and characteristics of any waters identified, as appropriate; and¶¶

(d) There is sufficient information for the Department to determine the removal-fill authorization requirements or exemptions that apply to the wetlands or other waters identified and/or the activities proposed.¶¶

(2) The Department shall complete an initial review of the report within 120 calendar days from receipt of the report and the fee.¶¶

(3) During or upon completion of the Department's review, the Department may take the following actions:¶¶

(a) Approve all or a portion of the report and PJD by providing a written JD to the landowner, agent, or applicant and the consultant, if any, in accordance with OAR 141-090-0025(10).¶¶

(b) Request missing information (report incomplete), clarification, or additional data (see OAR 141-090-0035(9), (10), and (12)(h)).¶¶

(A) The request will be made to the primary contact orally by telephone or in writing by, e-mail or regular U.S. Mail.¶¶

(B) If the Department makes a written request to the primary contact, the Department will copy the request to the consultant, landowner, agent, and applicant, as appropriate.¶¶

(C) The primary contact shall be responsible for promptly informing the Department of any change in the primary contact during the Department's review process.¶¶

(c) Conduct a site visit to ~~confirm~~verify the report findings or obtain additional information;¶¶

(d) Withdraw the report from further review if missing payment, ~~additional or clarifying information, or requested revisions, are not provided within 60 calendar days of~~ if the landowner, agent, or applicant requests withdrawal or if otherwise determined by the Department's written request;¶¶

(e) Require revisions of the wetland delineation map(s) and the PJD based upon the report review, any additional information requested, and a site visit, (if conducted,) and provide a JD accordingly after consulting with the primary contact and report author, if different; or¶¶

(f) Reject the report, ~~along~~ with a written explanation to the applicant, consultant, landowner, and agent, as appropriate. Examples of reasons for rejecting a report include, but are not limited to:¶¶

(A) The work has not been completed according to the technical requirements in OAR 141-090-0030.¶¶

(B) The report does not, in the judgment of the Department, accurately reflect site conditions or provide sufficient information for a JD;¶¶

(C) The report contains major errors, omissions, or inconsistencies according to the standards and requirements in OAR 141-090-0035, such as but not limited to:¶¶

(i) On-site data ~~is~~are not collected (e.g., an off-site or reconnaissance level report);¶¶

(ii) No paired plots, or number of paired plots is clearly inadequate for length and complexity of wetland boundaries;¶¶

(iii) Data forms with major gaps (e.g., no soils data collected);¶¶

(iv) Wrong data form used;¶¶

(v) Clearly erroneous data or conclusions;¶¶

(vi) All water features are not mapped;¶¶

(vii) Permission for a requested site visit is not granted;¶¶

(viii) Standard report format is not followed (OAR 141-090-0035(1));¶¶

(ix) Report cannot be field-verified because site preparation or construction has already commenced;¶¶

(x) The Department requests and conducts a site visit and the wetland boundaries and sample plots are not identified on the ground or cannot be accurately ~~re~~located by the consultant or applicant (see OAR 141-090-0035(8)); ~~or~~¶¶

(xi) After the second written request for information or revisions, the resubmitted information does not address

all of the Department's comments or requests; or introduces new errors; or

(xii) Additional clarifying information, requested revisions, or communication requesting additional time are not provided within 60 calendar days of the Department's written request.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0045

RULE SUMMARY: Revised for clarity.

CHANGES TO RULE:

141-090-0045

Duration, Revision, Expiration and Reissuance of Jurisdictional Determinations ¶

(1) All JDs by the Department shall be in writing and, except as provided in section (2) of this rule, shall remain valid for a period of five years from the date of issuance. A JD may be revised by the Department prior to the expiration date if:¶

(a) A field investigation or new information reveals that site conditions or the geographic extent of waters of this state are not consistent with the information in a report or permit application submitted to the Department;¶

(b) Additional site information or data is provided voluntarily by an applicant, agent, or landowner to the Department;¶

(c) Additional information is provided to or obtained by the Department in conjunction with a request for reconsideration (OAR 141-090-0050), a contested case hearing associated with an authorization application (ORS 196.825(6) and OAR 141-085-0575); or a contested case hearing provided under 141-090-0050(4)(a), or an independent review provided under OAR 141-090-0050(4)(b).¶

(d) Information is provided to or obtained by the Department in conjunction with an appeal to the U.S. Army Corps of Engineers of an Approved Jurisdictional Determination (33 CFR Parts 320, 326 and 331); or¶

(e) New information obtained by or provided to the Department shows a change in circumstances resulting in a change in the jurisdictional area.¶

(2) JDs that are issued in the form of a removal-fill authorization or those will expire after the project is complete or withdrawn. JDs made for an enforcement action are not subject to the five-year expiration will expire after the case is closed.¶

(3) Upon expiration, a report and JD are no longer valid for determining whether a state removal-fill authorization may be required.¶

(4) If agency approval is still needed or desired, and a wetland professional determines that the wetland boundaries have not changed, the Department may reissue the JD one time for ~~up to~~ five years within one year of the expiration date.¶

(5) To request the reissuance of a JD within one year of the expiration date, the landowner, agent, or applicant with landowner permission must submit information prepared by a wetland professional to the Department, as listed in (a) through (i).¶

(a) A new fully completed wetland delineation/determination report cover form referencing the recently expired and a request for reissuance of a jurisdictional determination form, referencing the previously approved wetland delineation number.¶

(b) Date of the field inspection and the name of the person conducting the field inspection.¶

(c) A concise description of any changes in land use, hydrology, and management of the site and surrounding area relevant to the location and extent of the wetlands and other waters within the study area since the last JD.¶

(d) A summary of any relevant changes to the manual that have occurred since the most recent JD was issued and a discussion of those changes on the JD.¶

(e) A description of the method used to re-locate the wetland and other waters boundary(ies) in the field and a summary of the supporting evidence used to conclude that the location and extent of wetlands and other waters is the same.¶

(f) A wetland delineation map(s) that meets the requirements in OAR 141-090-0035. The ~~presently expired~~ previously approved map can be used if the current mapping requirements are met and the study area boundary is the same.¶

(g) A recent aerial photograph with the study area boundary identified.¶

(h) Any figures that may have changed from the ~~presently expired~~ previously approved wetland delineation report, such as a smaller study area.¶

(i) Completed data sheets from representative ~~data~~ sample plots illustrating the unchanged wetland and other waters conditions.¶

(6) Upon receipt of the reissuance information outlined in subsections (5)(a) through (i), the Department shall review the information within 120 days of receipt and may take the following actions:¶

(a) Reissue the original report for ~~up to~~ another 5 years;¶

(b) Request missing information, clarification, or additional information;¶

(c) Conduct a site visit to confirm the report's findings or to collect additional information;¶

(d) Withdraw the request for reissuance from further review if determined to be ineligible, missing additional or

clarifying information, or requested information is not provided within 60 calendar days of the Department's written request; or¶

(e) Disagree with the conclusion that the wetland and other waters boundaries have not changed and require a new report that satisfies the requirements of OAR 141-090-0035 and payment of the fee described in OAR 141-090-0032 for review of a new delineation report.¶

(7) At the discretion of the Department and within staffing ability, a landowner can request the Department to conduct a site visit to determine if a recently expired JD can be reissued or if a new report is required. If only minor boundary changes have occurred, new boundaries may be flagged at the discretion of staff during a site visit and the landowner shall produce and submit a new map that reflects the changes and meets the mapping requirements in OAR 141-090-0035.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279

AMEND: 141-090-0050

RULE SUMMARY: Revised for clarity. A portion of the rule describing an independent panel review process was removed because Oregon Laws 2012, c. 108, § 2, which expired January 2022. The expired portion was replaced with an appeal to the Director process to provide applicants with an alternative to the contested case process to pursue disputes.

CHANGES TO RULE:

141-090-0050

Request for Reconsideration, Contested Case, and Independent Review Appeal ¶

- (1) A JD by the Department may be reconsidered upon written request to the Department by the landowner, agent, or applicant with landowner approval within six months of the date of the JD (date the letter or form was signed by the Department). The request for reconsideration initiates an informal review process.¶
- (2) New information may be provided by the ~~applicant~~, landowner, agent, applicant, or the Department, or may be requested by the Department, as part of the reconsideration process.¶
- (3) A reconsideration may result in a modified JD or in the reaffirmation of the original JD.¶
- (4) In the event that the landowner, agent, or applicant with landowner permission disagrees with the reconsideration decision, the ~~applicant, landowner or agent~~ at person 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 independent review per Oregon Laws 2012, c. 108, § 2 appeal by submitting a written request so that it is received by the Department within 21 calendar days of the reconsideration decision. The independent review appeal option is available only when the disagreement is over a wetland determination or delineation that has been the subject of reconsideration decision by the Department. The independent review appeal option is not available for ordinary high water line or highest measured tide determinations and does not involve a review of whether the wetland or other water is subject to state regulation.¶
- (5A) ~~The Department will maintain a list of persons that are qualified under Oregon Laws 2012, c. 108, § 2 to be independent reviewers and that have qualified through a contract solicitation. If there are no such persons, the list shall be blank.¶~~
- (6) Upon receipt of the written request for an independent review, the Department will contact all of the persons on the list maintained by the Department under section (5) of this rule and request that they either disclose all prior knowledge of the land parcel that is the subject of the review and any potential or actual conflicts of interests, or state that they will not serve as an independent reviewer in the review. The person shall sign the disclosure to certify that the disclosure is accurate. The Department will develop a list of persons that made the required disclosures and that have not identified any interest in the land parcel that is the subject of the review. The Department shall provide the list and the signed disclosures to the requestor of the request for an independent review.¶
- (7) The requestor and the Department shall each select one person from the list developed by the Department under section (6) of this rule.¶
- (8) The two selected independent reviewers shall select a third person from the list developed by the Department under section (6) of this rule. If the two selected reviewers do not jointly agree on the selection of a third reviewer, the Department shall request the US Army Corps of Engineers to provide a reviewer who has at least five years of experience with wetland delineation ~~per the man~~ irector shall decide the appeal within 60 calendar days after the date of delivery of the appeal.¶
- (9B) The panel of independent reviewers shall submit to the Department and the requestor a written itemized estimate of the costs of the independent review, including all expenses and fees.¶
- (10) Upon selection of three independent reviewers, the Department shall enter agreements with each of the independent reviewers, except for an independent reviewer provided by the U.S. Corps of Engineers. The agreements shall include but not be limited to the following:¶
 - (a) A maximum compensation amount not to exceed 120% of the sum of the written itemized estimates of the costs of the independent review provided to the Department by the panel of independent reviewers under section (9) of this rule;¶
 - (b) A maximum term for performance of the independent review of 60 calendar days from the date on which all three independent reviewers were selected; and¶
 - (c) A requirement that the panel of independent reviewers shall determine the cost of the review, subject to the maximum compensation amount.¶
- (11) The Department will enter into a written agreement with the requestor which includes the following:¶

- (a) The list of the three independent reviewers selected;¶
 - (b) A promise by the requestor to deliver a deposit to the Department within 5 calendar days in the amount of 60% of the sum of the written itemized estimate;¶
 - (c) A provision stating that the determination of the panel of independent reviewers shall be final and binding, with no opportunity for a contested case or any judicial review;¶
 - (d) A provision that the panel of independent reviewers will review the record, conduct a site visit and gather additional information if needed, write a decision that includes findings of fact, and a conclusion that either affirms or modifies the wetland determination or delineation issued by the Department after reconsideration; and¶
 - (e) A promise by the requestor to pay 60% of the cost of the independent review, including all expenses and fees, regardless of the outcome of the review. If 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 amount exceeds the deposit provided under section 9, the requestor shall pay the excess amount to the Department within 15 calendar days of the issuance of the decision by the panel of independent reviewers. If the amount is less than the deposit provided under section 9, the Department will return the excess deposit to the requestor within 15 calendar days of the issuance of the decision by the panel of independent reviewers.¶
- (12) The criteria by which the panel of independent reviewers will evaluate the wetland delineation or determination shall include only the following:¶
- (a) OAR 141-090-0005 through 141-090-0020, 141-090-0030, and 141-090-0035;¶
 - (b) OAR 141-090-0045, if the wetland delineation was reissued by the Department; and¶
 - (c) The manual, as defined in OAR 141-090-0020(17).¶
- (13) The record for the independent review consists of the following:¶
- (a) The original report submitted per OAR 141-090-0035;¶
 - (b) All documents related to the JD per OAR 141-090-0025 or OAR 141-090-0040; and¶
 - (c) All documents related to the Department's reconsideration per OAR 141-090-0050.¶
- (14) The panel will take the following actions:¶
- (a) Review the record;¶
 - (b) Gather additional information and conduct a site visit, if needed; and¶
 - (c) Draft findings of fact and a conclusion that either affirms or modifies the wetland determination or delineation that the Department issued after reconsideration.¶
- (15) Within 60 days of the date on which all three independent reviewers were selected, the panel will submit a decision in writing to the Department and to the Requestor that includes findings of fact, a conclusion, and a decision that either affirms or modifies the wetland determination or delineation that the Department issued after reconsiderationn 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.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279, 2012 OL Ch. 108

AMEND: 141-090-0055

RULE SUMMARY: The effective date has been updated.

CHANGES TO RULE:

141-090-0055

Effective Date 1

These rules become effective on ~~January~~ June 1, 201~~2~~3.

Statutory/Other Authority: ORS 196.845, 196.692

Statutes/Other Implemented: ORS 196.800 - 196.990, 196.600 - 196.665, 196.668 - 196.692, 197.279