



OAR 141-089, General Authorizations

RAC Meeting #5 Summary

September 14, 2023; 1:00 – 3:00 p.m.

Overview

The OAR 141-089 Rulemaking Advisory Committee was convened by the Oregon Department of State Lands on September 14, 2023, via Zoom. The purpose of the RAC is to provide input on proposed amendments to the administrative rules governing Division 089, General Authorizations.

RAC Members and Attendance

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

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

Welcome and Introductions/Meeting Protocols

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

Meeting #4 Follow-Up

- Reviewed Meeting 4 Comments and Response log.

141-089-0780

- DSL had meetings with ODFW last fall to discuss this GA and potential changes to the GA.
- Can the term “waters” be used instead of “waterway”. Waters means wetlands and waterways in DSL definitions, therefore that term couldn’t be used.
- Timothy states “AOC/OACES supports this modification and appreciates the distinction re: purpose vs effect”.

- Brad Livingston welcomes the proposed changes in this section.

141-089-0785

- Brad Livingston recommends clarifying “naturalness or ecological integrity”. Recommends language that it improves the waterway’s function and values. He doesn’t recommend a required functions and values assessment. ODFW supports this change. Melinda Butterfield recommends being thorough and careful regarding the wording so that we inadvertently require function and value assessments or penalize people if some functions increase and others decrease. Kirk Jarvie to review language to see if this can be clarified.

141-089-0790

- Nancy Taylor has concerns about section (1) off-channel / alcove habitat wording because habitat this is important winter refuge habitat. Project impacting these areas warrant ODFW review. In addition, of the language is confusion to some of the fish habitat staff. Kirk Jarvie welcomes proposed wording changes.
- Tommy Cianciolo has question about (1)(b). Is this for high flow, base flow, etc. When is water not supposed to flow? DSL clarifies that under any flow condition, it should not capture the mainstem flow; it shouldn’t become part of the thalweg. Can we change wording to make this clearer? DSL to think about proposed language changes. Nancy Taylor states that clarifying this would address some of ODFW’s concerns mentioned in the bullet above. Kirk Jarvie to review language to see if this can be clarified.
- Brian Cook has concern about section (5) and the 40% channel width.
 - His understanding is the most weirs are channel spanning, which means these wouldn’t qualify for the exemption. Kirk Jarvie stated that weirs covering more than 40% need more review.
 - Brian Cook states weirs are often used as grade control structure, which doesn’t have this requirement. He is concerned that weirs for grade control structures may not be authorized because they span more than 40%. Can clarify that use as a grade control structure that is channel spanning would be allowed? When is it considered a grade control structure verses porous weir structure? Kirk will review language to see if this can be clarified.
- Nancy Taylor said staff had concerns about (6). ODFW recommends an experienced construction or ODFW staff onsite during construction if possible. DSL could ask that they contact ODFW for their availability onsite. Lauren Poor is concerned about this due to staffing availability and the potential delays this could result on projects. Timothy Sautter is states that this is a request that should be made in ODFW regulations not DSL regulations. This language could cause landowners hesitancy. Kirk asked if ODFW condition fish passage approval to state ODFW staff is present, or construction specialist is available on-site during construction? Nancy will contact ODFW staff and find out.

- Lauren Poor has question about section (7).
 - Are there restrictions regarding how much slowing of water can occur? Kirk stated the limitations is fish passage. Enough water must flow to allow fish passage at all life stages.
 - There are concerns about debris washing downstream. How will downstream landowners be protected from the impacts of debris washed downstream? Kirk said there is currently nothing in rule that addresses this. The only thing Kirk is aware of is if a downstream owner wanted to pursue a tort claim. Kirk is open to reviewing language to help address this concern.
- Tommy Cianciolo appreciates seeing BDA in the GA. Could we make the 100 cyd per ½ mile to be consistent with other activities. Nancy Taylor would like to have ODFW staff review this proposed change.
- Nancy Taylor recommends updating language in section (8) to be more outcome based; update language for consistency. Kirk Jarvie will review and update the language.

141-089-0795

- Chris Gannon asked for clarification regarding the Post-Project Reporting requirement. OWEB has a database where they track the restoration GA. This is a short online form that is completed after the project is complete.

141-089-0800

- No comments.

141-089-0805

- No comments.

141-089-0810

- Nancy Taylor had a comment regarding (7). ODFW has incentive programs and wants to make sure that what people are doing under this GA is consistent with Wetland Conservation Plan “and any habitat incentive agreements with ODFW”. Kirk Jarvie will make language clarifications.
- Chris Gannon recommended the word “temporary” be allowed under section (8). Kirk Jarvie will add this language.

141-089-0815

- No comments.

Meeting Summary and Next Steps

- If there are any outstanding items not covered, email Kirk Jarvie those comments.
- Kirk Jarvie will create final proposed language, which will be emailed to everyone.
- The next RAC meeting is to go over the materials that will go into the proposed rulemaking notice. Drafts of these documents will be sent out next week.

Interested Party Comments

- No comments.

Division 141-089 Rulemaking: Meeting #5 RAC Comments Summary and Response Log

(Note: Yellow highlighted text will be updated after further input is received and discussed at Meeting #6)

| Affected Rule Section | RAC Comment | Response |
|--|---|--|
| Waterway Habitat Improvement GA | | |
| 141-089-0785 | The terms “naturalness” and “ecological integrity” are vague and undefined. Consider something like “functions” and “values” but that does not trigger the requirement for a Functions and Values Assessment. | The Department concurs that these terms are vague and not measurable as eligibility standards. The same is true with the terms “functions” and “values” since there is no requirement that they be measured. Therefore, the Department opts to remove this eligibility standard and simply replace it with: <i>“Activities are limited to the nine authorized activities described in OAR 141-089-0790 within a waterway for the entire project.”</i> |
| 141-089-0790 (1)(b) | Unclear if term “capture mainstem flow” is intended to mean any flow. | Language modified as follows: <i>“...and the reconnection cannot result in de-watering mainstem flow; and,”</i> |
| 141-089-0790 (5)(e) | Consider allowing porous weirs to be channel spanning in some circumstances – similar to grade control structures where channel spanning is allowed. | Language modified as follows: <i>“The structure must not exceed 100 cubic yards and 40 percent of the channel cross-section width unless otherwise approved by the Department; and,”</i> |
| 141-089-0790(6) | Can we condition this activity to require ODFW on-site (or other “qualified person”) for the culvert or tidegate work? | ODFW reports that they can condition their fish passage approval in this way so no change for -0790 (6). |
| 141-089-0790 (7) | What recourse is there if a structure fails and damages downstream water users? | Placeholder for response. |
| 141-089-0790 (7)(a) | Consider volume limit that is consistent with other activities in this GA (that is, 100 cy <u>per one-half mile</u>). | Language modified as follows: <i>“Cumulative removal-fill volume may not exceed 100 cubic yards for every one-half mile of waterway unless otherwise...”</i> |

| Affected Rule Section | RAC Comment | Response |
|--------------------------------------|--|---|
| 141-089-0790 (8)(a) | Change the sizing requirement to a performance-based measure similar to large wood sizing change in the Streambank Stabilization GA. | Language modified as follows: <i>"At a minimum, wood pieces, or their cumulative effect, must be of a size sufficient to withstand bankfull rates of flow."</i> Or, do we want to identify a specific flood interval, e.g., 25-year event? |
| 141-089-0790 (8)(b) | Change the wood type requirement similar to the same change made for the Streambank Stabilization GA. | Language modified as follows: <i>"Wood must be of a species native to the riparian zone within the project area or a reference area unless otherwise approved by the Department"</i> |
| Wetland Ecosystem Improvement | | |
| 141-089-0805 | Add an eligibility requirement for ODFW habitat incentive agreements. | Added as a new (8): <i>"Consistent with Habitat Incentive Agreements. If the project is under a Habitat Incentive Agreement with ODFW, the activities must be in conformance with that agreement."</i> Does this language need to be in the Waterway Habitat Improvement GA as well? |
| 141-089-0810(8) | Exclusion fencing should be specified as <u>temporary</u> . | Language modified as follows: <i>"Placement of Temporary Exclusion Fencing in Wetlands. Where necessary...temporary exclusion fencing may be placed in wetlands."</i> |