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LAVONNE GRIFFIN-VALADE
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CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

STATUTORY MINOR CORRECTION

DOF 6-2024

CHAPTER 629
DEPARTMENT OF FORESTRY

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& LEGISLATIVE COUNSEL

FILING CAPTION: Grammatical correction to replace "and" with "or".

CONTACT: Nicole Stapp
503-983-3396
Nicole.L.Stapp@odf.oregon.gov

2600 State St.
Salem, OR 97310

Filed By:
Nicole Stapp
Rules Coordinator

AGENCY ATTESTS THE FOLLOWING CHANGES HAVE BEEN MADE, ACCORDING TO ORS 183.335(7):

Correcting grammatical mistakes in a manner that does not alter the scope, application or meaning of the rule

AMEND: 629-635-0200

RULE TITLE: Water Classification

RULE SUMMARY: Grammatical correction to replace "and" with "or".

RULE TEXT:

- (1) The purpose of this water classification system is to match the physical characteristics and beneficial uses of a water body to a set of appropriate protection measures.
- (2) For the purposes of applying appropriate protection measures, the State Forester shall classify waters of the state as streams, wetlands, or lakes as described in this rule.
- (3) The State Forester shall further classify streams according to their beneficial uses and size. The department shall incorporate the Department of Fish and Wildlife findings regarding fish use and perenniality into the department's reporting and notification system consistent with sections (11) and (18) of this rule. The department shall work with the Department of Fish and Wildlife to establish procedures for incorporating such findings into the department's reporting and notification system no later than December 31, 2023. The State Forester shall classify domestic water use streams using information from the Water Resources Department. For an operator to apply streamside protection, the State Forester shall make this information publicly available in the department's reporting and notification system.
- (4) To maintain a statewide data layer describing fish distribution and perenniality, the State Forester shall provide Department of Fish and Wildlife information regarding a water body's size and beneficial use.
- (5) For purposes of protection, the State Forester shall further classify streams into one of the following five beneficial use categories, as defined in OAR 629-600-0100:
 - (a) Type F;
 - (b) Type SSBT;
 - (c) Type D;
 - (d) Type Np; or
 - (e) Type Ns.
- (6) For purposes of classification, a stream is considered to have domestic water use only if a water use permit has been issued by the Oregon Water Resources Department.

- (7) A channel is considered to have domestic water use upstream of an intake for the distances indicated below:
- (a) For domestic water use that is a community water system (as defined under OAR 333-061-0020), Type D classification shall initially apply to the length of stream that was designated as Class I under the classification system that was in effect on April 22, 1994, which is that shown on district water classification maps at the time of adoption of this rule.
- (b) For domestic water use that is not a community water system, Type D classification shall be initially applied for the shortest of the following distances:
- (A) The distance upstream of the intake to the farthest upstream point of summer surface flow;
- (B) Half the distance from the intake to the drainage boundary; or
- (C) 3,000 feet upstream of the intake.
- (c) Type D classification shall apply to tributaries off the main channel as long as the conditions of subsections (7)(a) or (b) of this rule apply.
- (d) A representative of a community water system or other domestic use water permit holder may request that the State Forester designate additional lengths of channels upstream of a domestic water intake or reservoir as Type D. The representative or permit holder must present evidence that the additional stream protection is needed. The State Forester will decide whether or not to extend Type D classification to these other channels based on evidence presented by the requesting party showing that protection measures associated with Type N classification would be insufficient to prevent adverse detrimental temperature increases, turbidity increases, or other adverse water quality changes at the domestic water use intake or reservoir.
- (e) The process and criteria described in subsection (7)(a), and the criteria under section (7) of this rule will be used to evaluate the extent of Type D classification for new community water systems.
- (f) The State Forester will decide whether or not to extend the length of Type D classification within 30 days of the presentation of evidence.
- (8) The domestic water use classification may be waived by the State Forester at the request of a landowner who is the sole domestic water use permit holder for an intake and who owns all the land along upstream channels that would be affected by the classification related to that intake. This waiver shall not affect the classification related to downstream domestic water use intakes.
- (9) A stream or lake will be considered to have fish use if inhabited at any time of the year by anadromous or game fish species or fish that are listed as threatened or endangered species under the federal or state endangered species acts.
- (10) The fish use classification does not apply to waters where fish were introduced through a fish stocking permit that includes documentation that the stream had no fish prior to stocking.
- (11) For the purposes of classifying streams for fish use, the State Forester shall use the procedures in this section:
- (a) As of July 1, 2023, the State Forester shall classify streams for fish use according to the fish distribution model developed by using the Fransen (Brian R. Fransen, Steven D. Duke, L. Guy McWethy, Jason K. Walter & Robert E. Bilby. 2006. A Logistic Regression Model for Predicting the Upstream Extent of Fish Occurrence Based on Geographical Information Systems Data, North American Journal of Fisheries Management, 26:4, 960-975) or Penaluna (2022, in publication) models if reviewed by the Department of Fish and Wildlife and is approved based on findings that the model is equal or better than Fransen 2006 upon publication. The State Forester shall make the results of the fish use distribution model publicly available in the department's reporting and notification system.
- (b) If the State Forester has not incorporated Penaluna (2022, in publication) by July 1, 2023, then the State Forester shall incorporate the fish use layer developed pursuant to Penaluna (2022, in publication) after July 1, 2023, upon publication provided the Department of Fish and Wildlife makes the findings required in (a) and requests the modification. Otherwise, the State Forester shall replace the model in (a) with an alternate fish use distribution model if developed pursuant to the adaptive management process described in OAR 629-603-0000 through 629-603-0600, provided that any such model is first reviewed and approved by the Department of Fish and Wildlife.
- (c) The State Forester shall use field surveys to correct the modeled fish distribution under the following conditions:
- (A) A field survey conducted prior to May 1, 2023, and accepted by the department for purposes of informing

compliance with the forest practice rules shall be incorporated into the department's reporting and notification system, provided that either:

(i) The survey is submitted to the Department of Fish and Wildlife prior to January 1, 2023, and not disqualified by May 1, 2023, for failure to meet the criteria in the Private Forest Accord Report (February 2, 2022); or

(ii) The survey is submitted by the landowner or the department to the Department of Fish and Wildlife after January 1, 2023, but no later than January 1, 2028, and not disapproved by the Department of Fish and Wildlife within ninety days following submission for failure to meet the criteria in the Private Forest Accord Report (February 2, 2022).

(B) A field survey conducted prior to January 1, 2023 not yet accepted by the department for purposes of informing compliance with the forest practice rules shall be incorporated into the department's reporting and notification system, provided that either:

(i) The survey is submitted to the Department of Fish and Wildlife prior to January 1, 2023 and not disqualified by May 1, 2023 for failure to meet the requirements of the survey protocol in effect as of the date of the survey; or

(ii) The survey is submitted by the landowner or the department to the Department of Fish and Wildlife after January 1, 2023, but no later than January 1, 2028, and not disapproved by the Department of Fish and Wildlife within ninety days following submission for failure to meet the requirements of the survey protocol in effect as of the date of the survey.

(C) A field survey conducted after May 1, 2023 shall be incorporated into the department's reporting and notification system, provided that either:

(i) The survey is submitted to the Department of Fish and Wildlife and not disqualified within 21 days following submission for failure to satisfy the Department of Fish and Wildlife's protocols for fish use field surveys; or,

(ii) The survey is otherwise reviewed and approved by the Department of Fish and Wildlife.

(D) A field survey submitted to the Department of Fish and Wildlife pursuant to (11)(c)(A)(i) or (11)(c)(B)(i) above, but disapproved after May 1, 2023 for failure to satisfy the relevant criteria shall be removed from the department's reporting and notification system, provided that an operator who submitted a notification in reliance on the survey prior to its removal shall be allowed to continue to rely on such survey for purposes of such notified forest operations.

(E) If the Department of Fish and Wildlife does not approve a field survey submitted pursuant to (11)(c)(C)(i) within twenty-one days for failure to meet the requirements of the survey protocol in effect as of the date of the survey, the survey shall be removed from the department's reporting and notification system. An operator who submitted a notification in reliance on the survey prior to its removal shall be allowed to continue to rely on such survey for purposes of such notified forest operations. Where surveys conflict, the department will use the survey deemed to have the higher level of confidence by the Department of Fish and Wildlife. The selected survey shall control for purposes of the department's reporting and notification system.

(d) For streams that were initially classified as fish use based on the model, an operator may request that the State Forester conduct a fish presence survey 12 to 24 months before an operation's scheduled start date to verify the designation of fish use in stream segments associated with the operation.

(A) The State Forester shall make a good faith effort to conduct the requested surveys and shall prioritize requests from landowners who do not have the financial or technical resources to conduct the surveys themselves.

(B) As an option, the landowner may conduct the fish presence survey as specified in (e).

(C) If neither the landowner nor the State Forester can conduct the survey before the operation begins, the fish use classification based on the model shall apply.

(D) If a field survey is conducted by the State Forester, the Department of Fish and Wildlife shall have a 21-day period to review and approve or object to the field survey. If no objection occurs, the survey shall be accepted and the fish use designation will be updated in the department's notification and reporting system.

(e) To be used for stream classification under this section, field surveys for fish use must be conducted according to the protocol in "Surveying Forest Streams for Fish Use," published by the Department of Forestry and the Department of Fish and Wildlife.

(f) If approved by the Department of Fish and Wildlife, the State Forester may use other information to determine the upstream extent of fish use.

(g) An operator may request an exception to Type F stream classification above an artificial obstruction to fish passage that is documented by field survey as the end of fish use. The State Forester, in consultation with the Department of Fish and Wildlife, shall grant the request after determining that the artificial obstruction is likely to continue to prevent fish passage for a period of time exceeding that needed to regrow trees to a size that would provide key pieces of large wood.

(h) When an exception to Type F stream classification is made above an artificial obstruction to fish passage in accordance with (g), the State Forester shall classify the stream as either Type D or Type N as appropriate and operators must apply the corresponding vegetation retention requirements described in OAR 629-643-0100 through 629-643-0500.

(i) For the purposes of ORS 215.730(1)(b)(C), Type N streams are equivalent to "Class II streams."

(12) For the purposes of stream classification, the State Forester, in consultation with Department of Fish and Wildlife shall use the procedures in this section to determine if a stream has fish use or both fish use and SSBT use.

(a) Streams where the upstream extent of fish use is determined using field methods that also observe SSBT use where those stream segments have not previously been identified as having SSBT use, will be added to the Type SSBT classification in accordance with the Data Standard and Update Protocol referenced in OAR 629-635-0200(13).

(b) For streams where SSBT use is based on observations or habitat, and where that use exists farther upstream than the upstream extent of fish use identified by field methods, the State Forester shall use the farthest upstream segment with SSBT use to reclassify the end of fish use.

(c) For streams where SSBT use is based on observations or habitat, and where that use exists farther upstream than the upstream extent of fish use identified by non-field methods, the State Forester shall use the farthest upstream segment with SSBT use to reclassify the end of fish use.

(d) For streams where SSBT use is based on concurrence of professional opinion, and where that use exists farther upstream than the upstream extent of fish use identified by field methods, the State Forester shall use the farthest upstream segment with fish use to reclassify the end of SSBT use.

(e) For streams where SSBT use is based on concurrence of professional opinion, and where that use exists farther upstream than the upstream extent of fish use identified by non-field methods, the State Forester shall use the farthest upstream segment with SSBT use to reclassify the end of fish use. The State Forester shall re-survey, using field methods, for the upstream extent of fish use upon written request from a landowner whose land immediately adjoins a Type SSBT stream segment described in this subsection.

(f) A landowner may provide evidence to the State Forester that clearly identifies a waterfall or chute type of natural barrier to SSBT use based on field methods described in (11). The State Forester shall evaluate that evidence and make a determination on whether or not to adjust the extent of SSBT use within 30 days of presentation of evidence.

(13) The State Forester will use the standards and procedures in this section to determine if a stream is Type SSBT.

(a) The State Forester will initially classify SSBT use stream segments based on the Fish Habitat Distribution Database on July 1, 2017, excluding historical use stream segments and stream segments identified using habitat evaluation based on modeling according to the Oregon Fish Habitat Distribution Data Standard, Version 3.0, February 2015 (Data Standard) and Oregon Department of Fish and Wildlife Fish Habitat Distribution Data Update Protocol, September 2005 (Update Protocol).

(b) When advised by the Department of Fish and Wildlife that new or higher quality data are available on the distribution of SSBT use, the State Forester will evaluate the need to reclassify SSBT use stream segments. Otherwise, evaluation of new or higher quality data and subsequent reclassification of SSBT use stream segments will occur at least every four years.

(c) As needed, the State Forester will reclassify SSBT use stream segments, except for stream segments added based on concurrence of professional opinion as defined in the Data Standard.

(d) The State Forester will apply SSBT use stream segments to operations described in notifications submitted after the date the stream segments are classified as Type SSBT.

(e) If the Data Standard or Stewardship Plan is revised substantively in any way, the State Forester and the Board of

Forestry will evaluate if changes to this rule are required.

(f) Until the State Forester and the Board of Forestry have reviewed and approved revisions to the Data Standard or Stewardship Plan per subsection (13)(e), the State Forester will not reclassify SSBT use stream segments based on information from the new portions of the Department of Fish and Wildlife Data Standard or Update Protocol.

(14) In Eastern Oregon, the State Forester shall determine the classification of a Type Np stream as lateral type Np stream or terminal type Np stream, as defined in OAR 629-600-0100. The department's reporting and notification system will identify small Type Np streams. Where the location of the modeled end changes based on a valid field survey, as described in (18), then the State Forester shall promptly reclassify upstream segments as lateral or terminal type Np streams.

(15) For each of the five beneficial use categories listed in (4), streams shall be categorized further according to three size categories: large, medium, and small. The size categories are based on average annual flow.

(a) Small streams have an average annual flow of two cubic feet per second or less.

(b) Medium streams have an average annual flow greater than two and less than 10 cubic feet per second.

(c) Large streams have an average annual flow of 10 cubic feet per second or greater.

(16) The assignment of size categories to streams on forestland will be done by the State Forester as follows:

(a) The State Forester will index average annual flow to the upstream drainage area and average annual precipitation.

The methodology is described in Forest Practices Technical Guidance. The State Forester shall calculate average annual flow for streams and publish the appropriate size classes in stream classification maps within the department's reporting and notification system.

(b) Actual measurements of average annual flow may substitute for the calculated flows described in the Forest Practices Technical Guidance.

(c) Any stream with a drainage area less than 200 acres shall be assigned to the small stream category regardless of the flow index calculated in (15)(a).

(17) Wetlands shall be classified further as indicated below:

(a) Significant wetlands, which are:

(A) Wetlands larger than 8 acres;

(B) Estuaries;

(C) Bogs; and

(D) Important springs in Eastern Oregon.

(b) Stream-associated wetlands that are less than 8 acres are classified according to the stream with which they are connected.

(c) All other wetlands, including seeps and springs are classified according to their size as either "other wetlands greater than one-quarter acre" or "other wetlands less than one-quarter acre."

(18) By July 1, 2023, the State Forester shall update all published maps and the department's reporting and notification system to include flow duration for streams in Western Oregon and Eastern Oregon. The State Forester shall maintain in the department's reporting and notification system a map of perennial flow utilizing the following:

(a) Phase 1 Initial Mapping. The State Forester shall initially map perennial flow of Type N Streams using U.S. Geological Survey NHD high resolution data. The NHD stream layer may assist operational field surveys as described in OAR 629-643-0130 or 629-643-0143 but shall not provide for a modeled end. During this phase landowners shall apply the riparian management area prescriptions to all small Type N streams as described in OAR 629-643-0130 and OAR 629-643-0143, whether or not a stream is mapped as perennial. This requirement ends once the State Forester implements the Phase 2 model.

(b) Phase 2 Model. When advised by Department of Fish and Wildlife that an approved flow duration model sufficient for regulatory purposes is available, the State Forester shall promptly publish the information, including the modeled end, in all maps and the department's reporting and notification system, and in no event later than July 1, 2025.

(c) Field Verification. The operator may conduct field surveys for verification of the modeled end in accordance with Department of Fish and Wildlife field protocols for model verification. Once the verified end is approved by the

Department of Fish and Wildlife, the State Forester shall substitute the verified end for the modeled end in all maps and the department's reporting and notification system.

STATUTORY/OTHER AUTHORITY: ORS 527.710, 527.630(3), 527.714, 526.016(4), section 2(1), chapter 33, Oregon Laws 2022

STATUTES/OTHER IMPLEMENTED: ORS 527.714, 527.715, 527.765, section 2(2), chapter 33, Oregon Laws 2022