

February 9, 2023

The Oregon Fish and Wildlife Commission  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

Sent via email to: [odfw.commission@odfw.oregon.gov](mailto:odfw.commission@odfw.oregon.gov)

**Re: Lack of public process for important changes to Oregon’s fish passage rules**

Dear Chair Wahl, Vice Chair Zarnowitz, and Fish and Wildlife Commissioners,

Columbia Riverkeeper, American Rivers, Association of Northwest Steelheaders, The Conservation Angler, Institute for Fisheries Resources, Native Fish Society, Natural Resources Defense Council, Northwest Environmental Defense Center, Northwest Sportfishing Industry Association, Oregon Chapter of the Sierra Club, Oregon Wild, Pacific Coast Federation of Fishermen’s Associations, Save Our Wild Salmon Coalition, WaterWatch of Oregon, and Willamette Riverkeeper write to express serious concern about recent rule changes that decrease the likelihood that volitional fish passage will be constructed at dams, culverts, and diversions in Oregon, thereby hindering efforts to recover Oregon’s migratory fish.

Despite a successful multi-year public process to revise aspects of the regulations implementing Oregon’s Fish Passage Law, material changes to the definition of “fish passage” occurred just days before the rule was adopted and did not undergo appropriate public process or tribal consultation. Accordingly, we ask the Commission to undo the last-minute revisions to OAR 635-412-0005(18) (defining “fish passage”), OAR 635-412-0005(45) (defining “volitionally”), and OAR 635-412-0035(6) adopted at the Commission’s December 16, 2022, meeting by adopting the rules that ODFW proposed in the [Notice of Proposed Rulemaking](#) filed with the Oregon Secretary of State on October 21, 2022.<sup>1</sup>

The rules implementing Oregon’s Fish Passage Law have long defined “fish passage” to mean only “volitional” passage. *See previous version of OAR 635-412-0005(18)*. However, the newly adopted rules erode the long-standing focus on volitional fish passage by:

- adding “trap collection and transport” to the definition of fish passage;
- revising other rules to support the expanded definition of fish passage; and

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<sup>1</sup> This request does not indicate support for all aspects of the October 21, 2022, rule package filed with the Secretary of State. If the Fish and Wildlife Commission reopens the rulemaking process to explore additional changes to the October 21, 2022, rule package, undersigned organizations reserve the right to oppose or provide additional input on any aspect of the fish passage rules.

- giving ODFW staff absolute discretion to approve either volitional or trap-and-haul passage at any barrier.

At the very least, these revisions should have undergone proper public process and tribal consultation.

Oregon’s rules have traditionally favored “volitional” fish passage for good reason: volitional fish passage is biologically preferable to so-called trap-and-haul or other mechanized transport methods that add cumulative stress to fish that are already enduring challenging migrations to or from their natal waters. However, because trap-and-haul is often significantly cheaper to install at pre-existing structures, ODFW’s new discretion to approve either passage type invites pressure from dam owners on ODFW to approve inferior trap-and-haul facilities. In the real world, these rule changes can only make the installation of high-quality volitional fish passage less common, with predictable harm to Oregon’s native migratory fish and the people whose cultural and economic well-being depend on Oregon’s fisheries.

Expanding the definition of “fish passage” to include trap-and-haul fundamentally altered ODFW’s authority. **Under the previous rules—which explicitly and exclusively defined “fish passage” as “volitional”—ODFW did not have unfettered discretion to approve trap-and-haul in response to every fish passage barrier.**<sup>2</sup> Now ODFW does. Nevertheless, ODFW staff contend that the recent rule changes do not affect ODFW’s authority because the previous version of OAR 635-412-0035(6) allegedly implicitly authorized trap-and-haul passage. The recent joint letter from Nez Perce Tribe and the Confederated Tribes of the Umatilla Indian Reservation to the Commission explains, in detail, why staff’s reliance on OAR 635-412-0035(6) is misplaced. Moreover, overhauling OAR 635-412-0035(6) to support adding trap-and-haul into the definition of fish passage belies staff’s position. Finally, neither the original version of OAR 635-412-0035(6) nor any other section of the previous rules addressed traps or collection devices for *out-migrating juvenile* fish, further undermining staff’s contention that the previous rules gave ODFW implied authority to authorize such facilities instead of volitional fish passage. Despite staff’s assertions, these revisions materially change ODFW’s authority to authorize trap-and-haul when Oregon’s Fish Passage Law is triggered.

We commend ODFW staff, the Fish Passage Task Force, and the Commission on your multi-year public process to update and improve the rules implementing Oregon’s Fish Passage Law; most of the changes contained in the recent rule revision are positive and will benefit Oregon’s native migratory fish. However, the last-minute changes expanding the definition of fish passage to include trap-and-haul will not. At a minimum, these changes and the important

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<sup>2</sup> We are not suggesting that trap-and-haul can never be used to address fish passage barriers. However, volitional fish passage should remain the presumptive and primary focus of Oregon’s Fish Passage Law, with approval of trap-and-haul facilities only available through waivers or exemptions pursuant to OAR 635-412-0025.

legal and policy considerations discussed above should have been thoroughly vetted through public notice and comment, as well as tribal consultation. We therefore ask the Commission to undo the last-minute revisions to OAR 635-412-0005(18), -0005(45), and -0035(6) by adopting the rules ODFW proposed in the [Notice of Proposed Rulemaking](#) filed with the Oregon Secretary of State on October 21, 2022.

Sincerely,



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On behalf of the following organizations:

American Rivers  
Association of Northwest Steelheaders  
Columbia Riverkeeper  
The Conservation Angler  
Institute for Fisheries Resources  
Native Fish Society  
Natural Resources Defense Council  
Northwest Environmental Defense Center  
Northwest Sportfishing Industry Association  
Oregon Chapter of the Sierra Club  
Oregon Wild  
Pacific Coast Federation of Fishermen's Associations  
Save Our Wild Salmon Coalition  
WaterWatch of Oregon  
Willamette Riverkeeper

*Cc'd via email:*

- Shaun Clements, Deputy Fish Division Administrator, ODFW