

**IN THE COURT OF APPEALS IN THE STATE OF OREGON**

COLUMBIA RIVERKEEPER, NATIVE FISH SOCIETY, NORTHWEST  
ENVIRONMENTAL DEFENSE CENTER, OREGON WILD, PACIFIC COAST  
FEDERATION OF FISHERMEN’S ASSOCIATIONS AND INSTITUTE FOR  
FISHERIES RESOURCES, THE CONSERVATION ANGLER, NEZ PERCE  
TRIBE, a federally recognized Indian tribe, and CONFEDERATED TRIBES OF  
THE UMATILLA INDIAN RESERVATION,  
Petitioners,

v.

OREGON FISH AND WILDLIFE COMMISSION,  
Respondent,

Court of Appeals No. A182213 (Control)  
A182217

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**PETITIONERS’ JOINT OPENING BRIEF  
AND EXCERPT OF RECORD**

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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Proceedings and Relief Sought**

On December 16, 2022 the Oregon Fish and Wildlife Commission (the “Commission”) adopted amendments to the Oregon Department of Fish and Wildlife’s (“ODFW”) administrative rules governing Oregon’s Fish Passage Program at OAR Chapter 635, division 412 (“Fish Passage Rules” or “Rules”). The purpose and policy of the Fish Passage Rules is to “further clarify and implement the State’s fish passage statutes (ORS 509.585 through ORS 509.910)” and “provide for upstream and downstream passage of native migratory fish at artificial obstructions.” OAR 635-412-0001. To that end, the Rules provide definitions, policy, and requirements for installing fish passage for native migratory fish at artificial obstructions throughout Oregon. The adopted Rules are included in the Excerpt of Record at ER-124.<sup>1</sup>

The majority of the adopted amendments to the Rules were developed through a nearly two-year public stakeholder and rulemaking process and were publicly noticed through the Secretary of State on October 21, 2022. ER-1. However, the Commission adopted several significant revisions to the Rules that were not included in the October 21, 2022, notice.

Specifically, the Rules adopted without notice include a change to the definition of “fish passage” to add, as an alternative to volitional passage, “trap collection and transport if consistent with requirements of OAR 635-412-0035(6).”

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<sup>1</sup> The final adopted version of the Rules was not included in the Agency Record. A mark-up draft of the adopted Rules is included in the Agency Record at Item 5.3. ER-38.

ER-126–27 (OAR 635-412-0005(20)). The Rules also include a change to the definition of “volitionally” to remove reference to OAR 635-412-0035(6) as providing the sole exception in the Rules for trapping, transferring or handling fish as they pass. ER-129 (OAR 635-412-0005(51)). The referenced rule at OAR 635-412-0035(6) was also altered such that its core purpose was changed from “requirements for fish collection and transport *at traps*” to “requirements for *fish passage by trap collection and transport*.” ER-143 (emphasis added). Finally, a new subsection was added to OAR 635-412-0035(6), creating a new discretionary authority for ODFW to approve traps as a form of fish passage at other artificial obstructions. ER-143 (OAR 635-412-0035(6)(g)).

Pursuant to ORS 183.400, Petitioners challenge the Rules because the Commission failed to provide adequate notice of the last-minute changes to the Rules, as required under ORS 183.335. ORS 183.400(4)(c). Accordingly, Petitioners respectfully request that this Court declare invalid those provisions of the Rules at OAR 635-412-0005(20) and (51), and OAR 635-412-0035(6).

### **B. Nature of the Rule Under Review**

Under Oregon’s fish passage statutes, a person owning or operating an artificial obstruction,<sup>2</sup> or barrier to fish passage, is prohibited from constructing or maintaining any artificial obstruction across waters of the state that are inhabited, or were historically inhabited, by native migratory fish without providing passage for those native migratory fish, except as provided by state law. ORS 509.585(2).

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<sup>2</sup> “Artificial obstruction” is defined as “any dam, diversion, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.” ORS 509.580(1).

Since 2006, the Fish Passage Rules have implemented Oregon’s fish passage policy and have governed fish passage throughout the state. The stated purpose of the Fish Passage Rules (OAR Ch. 635 div. 412) is to clarify and implement Oregon’s fish passage statutes (ORS 509.580–.910). OAR 635-412-0001(1). The Rules provide key definitions for implementing the fish passage statutes (OAR 635-412-0005), establish the requirements for fish passage approval (OAR 635-412-0020), provide criteria for obtaining waivers and exemptions from fish passage requirements (OAR 635-412-0025), and establish general fish passage requirements and specific criteria for fish passage at various categories of artificial obstructions (OAR 635-412-0035), among other provisions.

The Fish Passage Rules implement the State’s fish passage policy. ER-124. Oregon’s fish passage policy is “to provide for upstream and downstream passage of native migratory fish at artificial obstructions.” OAR 635-412-0001(2). The stated need for the noticed Rules was to “provide clarity on existing standards, establish new standards, and ensure alignment with the ODFW Climate and Ocean Change Policy.” ER-1.

The published October 21, 2022, notice of the proposed rule amendments included a two-word revision to the definition of “fish passage:” “Fish passage means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, minimal delay, and without physical or physiological injury upstream and downstream of any artificial obstruction.” ER-5 (OAR 635-412-0005(20)) (Amendment in underline). The definition of “volitionally” was

unchanged in the noticed Rules. ER-8 (OAR 635-412-0005(51)) (“‘Volitionally’ means with minimal delay and without being trapped, transferred, or handled by any person unless specifically allowed under OAR 635-412-0035(6)’”).

Additionally, the noticed Rules included an introductory purpose change for OAR 635-412-0035(6) from “requirements for fish passage at traps,” to “requirements for fish collection and transport at traps.” ER-21 (OAR 635-412-0035(6)) (Amendment in underline). “Trap” is defined as “the set of human-built or operated facilities, structures, devices, or measures that hold fish and prevent them from passing volitionally.” OAR 635-412-0035(47). The noticed Rules also included many other proposed revisions that are not at issue in this case.

Sometime between the published October 21, 2022, notice of proposed rulemaking and the Commission’s December 16, 2022, meeting, further changes were made to the proposed rules without additional public notice. Those changes include revisions to the definition of “fish passage” (OAR 635-412-0005(20)), the definition of “volitionally” (OAR 635-412-0005(51)), and alterations and additions to the requirements and allowances for fish passage at the specific artificial obstruction of traps (OAR 635-412-0035(6)).<sup>3</sup>

First, the definition of “fish passage” in the adopted Rules was revised from the noticed draft as follows:

the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move either volitionally or by trap collection and transport if consistent with

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<sup>3</sup> These revisions were included in an attachment to the agenda for the Commission’s December 16, 2022 meeting, which was published on the Commission website at some point prior to the meeting. ER-30, ER-38–66.



requirements of OAR 635-412-0035(6), with minimal stress, minimal delay, and without physical or physiological injury upstream and downstream of an artificial obstruction.

ER-41 (OAR 635-412-0005(20)) (Amendment in underline). The definition of “volitionally” was also revised from the noticed Rules to remove the prior reference to OAR 635-412-0035(6) as the sole exception to the prohibition on trapping, transferring or handling fish. *See* ER-45 (showing mark-up of OAR 635-412-0005(51)). The definition of volitionally in the adopted Rules is “with minimal delay and without being trapped, transferred, or handled by any person.” ER-129 (OAR 635-412-0005(51)).

Further, OAR 635-412-0035(6), which provided requirements and allowances for fish passage at the specific artificial obstruction of traps, was revised without notice from the published Rules. The introductory purpose of OAR 635-412-0035(6) was changed from “requirements for fish collection and transport at traps” to “requirements for fish passage by trap collection and transport[.]” ER-60 (OAR 635-412-0035(6)) (Amendment in underline); *see* ER-143. Traps were thus changed from one category of artificial obstruction within OAR 635-412-0035, alongside dams and culverts, into a new form of fish passage to be used at other artificial obstructions.

At the same time, a new subsection was added to OAR 635-412-0035(6), creating, without notice, an entirely *new authority* for ODFW to approve the use of traps as a form of fish passage at other categories of artificial obstructions:

(g) Traps shall be utilized where the feasibility of other fish passage structures or other site-specific considerations warrant use of trap collection and transport, or otherwise, the Department determines, using its professional judgment, trap collection and transport will result

in an effective means of ensuring access to habitat above or below the artificial obstruction by native migratory species.

ER-60–61 (OAR 635-412-0035(6)(g)).

These revisions to the Rules did not appear in the proposed rule amendments filed by ODFW with the Secretary of State for publication as a proposed rulemaking on October 21, 2022. ER-1–25. They were not included in the “Agenda Item Summary” or “Presentation” documents provided to the public for the Commission’s December 16, 2022, meeting. ER-31–37; ER-85–98. Nor does the agency record show that they were ever mentioned in person by ODFW staff to the Commission at its December 16, 2022, meeting. ER-99–123.

Under the adopted, but un-noticed, revisions to the Rules, ODFW may authorize trap collection and transport, or “trap-and-haul,” in lieu of volitional fish passage at other artificial obstructions, such as dams, based solely on ODFW’s “professional judgment.” This is a significant alteration of the long-standing and fundamental requirement under the noticed Rules to provide volitional fish passage at dams and other artificial obstructions absent a waiver or exemption.

### **C. Basis for Appellate Jurisdiction**

This Court has jurisdiction under ORS 183.400(1), which states, in part, that “[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals \* \* \*.” Each Petitioner is a corporation, association, private organization, or Tribal government and is therefore a “person” under ORS 183.310(8). Thus, Petitioners have standing to petition this Court to determine the validity of the Rules pursuant to ORS 183.400(1).

The individual Petitioners are as follows:

- Columbia Riverkeeper is non-profit organization with over 16,000 members and supports. Its mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean.
- Native Fish Society is an Oregon non-profit organization that advocates, based on the best available science, for the recovery of wild, native fish and to promote stewardship of the habitats that sustain us all.
- Northwest Environmental Defense Center is a non-profit organization based in Portland, with approximately 1,000 members and supporters, that works to protect and conserve the natural resources of the Pacific Northwest.
- Oregon Wild is a non-profit organization whose mission is to protect and restore Oregon's wildlands, wildlife, and waters as an enduring legacy. Oregon Wild has approximately 20,000 members and supporters throughout Oregon and the Pacific Northwest.
- The Pacific Coast Federation of Fishermen's Associations ("PCFFA") is a non-profit, tax-exempt corporation, and the largest trade association of commercial fishing families on the U.S. west coast. PCFFA is a coalition of 17 different commercial fishermen's port associations and commercial fishing vessel owners' associations who operate off the U.S. Pacific Coast, with a combined membership of

about 750 commercial fishing businesses, mostly family-owned and operated.

- Institute for Fisheries Resources is a non-profit, public benefit corporation that carries out the fisheries research and related fisheries conservation programs developed by PCFFA.
- The Conservation Angler is a non-profit organization with a mission to protect and conserve wild steelhead, salmon, trout, and char throughout their range in North America and the Russian Far East.
- The Nez Perce Tribe is a federally recognized Indian tribe and a co-manager of fisheries resources throughout Oregon, Washington, and Idaho, with Treaty-reserved fishing rights that extend throughout much of the Pacific Northwest, including much of present-day Oregon.
- The Confederated Tribes of the Umatilla Indian Reservation (“CTUIR”) is a federally recognized Indian tribe located in Eastern Oregon with Treaty-protected rights to natural resources including but not limited to fish and wildlife throughout the Columbia Basin and beyond, including the Willamette and Snake River sub-basins.

The challenged Rules alter the long-standing and fundamental requirement to provide volitional fish passage at dams and other artificial obstructions absent a waiver or exemption, with the ability to authorize trap collection and transport in lieu of volitional fish passage based solely on ODFW’s “professional judgment.” This will necessarily result in fewer dams and other obstructions being required to

install volitional fish passage, which allows native migratory fish to move freely to upstream and downstream habitat, restoring aquatic habitat connectivity rather than introducing long-term trapping and trucking of migratory fish. The challenged Rules will harm Petitioners' interests in protecting and restoring native migratory fish and their habitats throughout Oregon, as well as their interests and Treaty-reserved rights to harvest fish that migrate through Oregon's rivers and streams.

#### **D. Timeliness of Petitions**

The consolidated Petitions for Judicial Review are timely. ORS 183.400 does not prescribe a deadline for substantive review of administrative rules and imposes a two-year deadline for certain procedural challenges. ORS 183.400(6). The Commission adopted the Rules on December 16, 2022, with an effective date of January 1, 2023. ER-124. Petitioners filed their respective petitions on September 5, 2023.

#### **E. Jurisdictional Basis for Agency Action**

The Commission cites ORS 496.138, ORS 496.012, and ORS 509.585 as the statutory basis for the challenged Rules. ER-124.

#### **F. Question Presented for Judicial Review**

Are the challenged Rule revisions at OAR 635-412-0005(20) and (51), and OAR 635-412-0035(6) invalid where the Commission adopted significant and fundamental changes to those sections of the Rules, after ODFW published its notice of proposed rule amendments, without providing any additional notice, as required by ORS 183.335?

## **G. Summary of the Argument**

The challenged Rules include extraordinary last-minute substantive revisions to a version of the Rules that had already been publicly noticed, commented on, and filed as proposed amendments with the Secretary of State following a two-year public input process. The revisions — made weeks after the noticed version of the proposed Rules — inserted a set of edits that altered volitional fish passage requirements state-wide: 1) changing the core definition of “fish passage” itself to add “trap collection and transport” as a new alternative to volitional fish passage; 2) converting the existing section addressing fish traps as a category of artificial *obstruction* into a section addressing the use of traps as a form of *fish passage* at other obstructions; and 3) inserting a new subsection giving ODFW discretionary authority to allow trap and haul in lieu of volitional fish passage subject only to its “professional judgment.” These are fundamental changes that would have drawn immediate critical scrutiny and opposition from Petitioners during the prior two-year public input process. Instead, they were inserted without notice only after that public process had concluded.

The Oregon Administrative Procedures Act (“APA”) imposes strict requirements that agencies must follow in adopting and amending administrative rules. ORS 183.325–.410. In particular, an agency is required to provide notice of its intended rulemaking action that includes sufficient detail of the subject matter and purpose of the intended action in order to adequately inform the public that their interests may be affected. ORS 183.335. Here, the notice of proposed rule amendments that was filed with the Secretary of State was inadequate to put the public on notice that the Commission would adopt Rules with these challenged

last-minute revisions. The last-minute revisions could not have reasonably been understood to be included within the scope of the notice and thus, did not prompt Petitioners or the public to provide any input to the Commission on the regulation and use of fish traps as an alternative form of fish passage at other artificial obstructions. The challenged Rules were not adopted in compliance with the rulemaking procedures under the APA and are thus invalid. ORS 183.400(4)(c).

## **H. Statement of Facts**

### **1. History of Oregon's Fish Passage Statutes**

Oregon has a long history of requiring fish passage at man-made artificial obstructions, such as dams. Dating back to pre-statehood, Oregon law has prioritized fish passage. In the 1848 Act establishing the territorial government of Oregon, the United States Congress declared:

That the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass *freely* up and down such rivers and streams.

App-16 (quoting *An Act to Establish the Territorial Government of Oregon*, Section 12) (emphasis added). That law remained in effect upon the adoption of the Oregon Constitution and formation of statehood in 1859. *Id.* (citing Or. Const. Art. XVIII, Sec. 7). Early Oregon criminal statutes prohibited any person or corporation from constructing dams or other obstructions without providing fish passage. *Id.*

Beginning in the early 1900s, the Oregon legislature began passing laws that bifurcated the regulations of game fish and food fish<sup>4</sup> and established different requirements for fish passage. App-17. With respect to streams used by game fish, the laws prohibited “any person to construct any \* \* \* artificial obstruction across any stream[.]” *Id.* (quoting Or Laws 1921, ch 153, § 62). The game fish laws did not provide for any authority to waive fish passage requirements. *Id.* (citing Or Laws 1921, ch 153, § 2(n)). In contrast, the laws governing food fish authorized the Fish Commission to waive the fish passage requirement where it was impracticable. *Id.* (citing Or Laws 1921, ch 105, § 49). In exchange for a waiver, dam owners would convey land to the state to establish a fish hatchery. *Id.* (citing Oregon Code Annotated, §§ 40-215, 40-216 (1930), recodified at OCLA §§ 83-314, 83-316 (1940)).

During the 1950s through 1970s, the fish passage laws were recodified at ORS 498.730 (game fish) and ORS 509.605 (food fish), and were amended several times. App-17–18. Throughout this period, fish passage remained a requirement for construction of artificial obstructions generally, but there were alternatives allowed for food fish through waivers and hatchery production. *Id.*; see ORS 498.351(1) (1995) (game fish); ORS 509.605(1) (1995) (food fish). However, beginning in the 1950s, Oregon’s fish passage laws were inconsistently enforced and applied, resulting in waivers of fish passage requirements in instances where it is not clear why agency staff had authorized such a waiver. App-18. Thus, in 1997 the legislature formed the fish passage task force to prepare a proposal to update

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<sup>4</sup> “Food fish” is understood to include anadromous salmonids.



the fish passage laws. *Id.* (citing Or Laws 1997, ch 730). During the task force process, the legislature temporarily amended the laws to grant the Commission the authority to waive food or game fish passage requirements to allow for alternative mitigation. *Id.*

In 2001, the legislature adopted the current fish passage policy and laws, which are now reflected in ORS 509.580 through 509.910. Or Laws 2001, ch. 923, § 2. The updated laws removed any distinction between game fish and food fish and instead focused on fish passage requirements for all “native migratory fish.” ORS 509.585. The legislature established the policy of the State to “provide for upstream and downstream passage for native migratory fish” and “to achieve the enhancement and restoration of Oregon’s native salmonid populations, as envisioned by the Oregon Plan.” ORS 509.585(1). The statute prohibits any “person owning or operating an artificial obstruction” from “construct[ing] or maintain[ing] any artificial obstruction across any waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish.” ORS 509.585(2).

The statute provides for an exception to the requirement to provide fish passage where the owner or operator of an artificial obstruction seeks a waiver from the Commission and where the Commission determines that the proposed alternative to fish passage will provide a net benefit to migratory fish. ORS 509.585(4), (7), (8). “Alternatives to fish passage must result in a benefit to fish greater than that provided by the artificial obstruction with fish passage.” ORS 509.585(7)(b). An artificial obstruction may also be exempt from the fish passage

requirements if the Commission: “(A) Finds that a lack of fish passage has been effectively mitigated; (B) Has granted a legal waiver for the artificial obstruction; or (C) Finds there is no appreciable benefit to providing fish passage.” ORS 509.585(9). The legislature directed the ODFW Director to develop rules establishing the criteria for determining the adequacy of fish passage and alternatives to fish passage. ORS 509.585(7)(c).

## **2. 2006 Fish Passage Rules.**

In 2006, the Commission adopted rules implementing the objectives set forth in the fish passage statutes. App-19. The 2006 Rules established definitions for key terms related to fish passage regulation, design, and implementation. Specifically, as relevant to the Rules on review, the 2006 Rules provided the following definitions:

“Fish passage” means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, and without physical or physiological injury upstream and downstream of an artificial obstruction. OAR 635-412-0005(18).

“Fish passage structure” means any human-built structure that allows fish passage past an artificial obstruction, including, but not limited to, fishways and road-stream crossing structures such as culverts and bridges. OAR 635-412-0005(19).

“Fishway” means the set of human-built and/or operated facilities, structure, devices, and measures that together constitute, are critical to the success of, and were created for the sole purpose of providing upstream fish passage at artificial or natural obstructions which create a discontinuity between upstream and downstream water or bed surface elevations. OAR 635-412-0005(21).

“Trap” means the set of human-built and/or operated facilities, structures, devices, and measures that hold fish and prevent them from passing volitionally. OAR 635-412-0005(43).

“Volitionally” means with minimal delay and without being trapped, transferred, or handled by any person, unless specifically allowed under OAR 635-412-0035(6). OAR 635-412-0005(45).

App-19–20.

As with the fish passage statutes, the 2006 Rules imposed a requirement to provide fish passage at any artificial obstruction located in waters that are or were historically inhabited by native migratory fish. OAR 635-412-0020. The 2006 Rules established several means by which the owner or operator of an artificial obstruction could comply with the fish passage requirement. *Id.* These include:

(a) Obtain from the Department an approval determination of a fish passage plan that meets the requirements of OAR 635-412-0035 for the specific artificial obstruction.

(b) Obtain from the Department a programmatic approval of a fish passage plan for multiple artificial obstructions of the same type. \* \* \*

\* \* \* \* \*

(c) Pursuant to ORS 527.710(6), install and maintain road-stream crossing structures on non-federal forestlands in compliance with State Board of Forestry, through the Oregon Department of Forestry, rules and guidelines.

(d) Obtain a waiver from fish passage requirements for the artificial obstruction as provided in OAR 635-412-0025; or

(e) Obtain an exemption from fish passage requirements for the artificial obstruction as provided in OAR 635-412-0025.

App-21 (OAR 635-412-0020(3) (2006)).

The Rules also detailed the criteria for obtaining waivers and exemptions to the fish passage requirements, generally mirroring the statute, and established additional procedural requirements. App-21–22 (OAR 635-412-0025 (2006)); *see* ORS 509.585(7), (8), & (9). The 2006 Rules established the application, review and decision-making process for ODFW and the Commission to grant waivers or exemptions to the fish passage requirements. In particular, the 2006 Rules required a written analysis of the net benefit analysis for a waiver, a decision by the Commission or Department, and notification and opportunity to comment provided to the fish passage task force and other interested stakeholders. App-21–22 (OAR 635-412-0025(8), (10), (11), & (12)).

OAR 635-412-0035 (2006) established the general criteria for fish passage, as well as specific criteria for various categories of artificial obstructions, such as dams, culverts, and traps. App-22–24. For fish passage at dams and other similar obstructions, the 2006 Rules established fishways as the only allowed form of upstream fish passage and set out numerous design criteria for fishways. App-22–23 (OAR 635-412-0035(2) (2006)). OAR 635-412-0035(6) (2006) provided the “requirements for fish passage at traps,” which included criteria for traps as a specific artificial obstruction:

- (a) A collection permit issued by the Department is required to operate all traps;
- (b) Traps shall be constructed to prevent physical or physiological injury to native migratory fish;
- (c) Traps shall meet all requirements of OAR 635-412-0035(2)(g);
- (d) Traps located within a fishway (i.e., “in ladder” traps) shall not inhibit native migratory fish from entering the fishway or trap and shall

be removed if the Department determines that fish are not entering the trap;

(e) Native migratory fish shall be processed through traps with minimal possible delay and as frequently as necessary to avoid over-crowding;

(f) All native migratory fish, excluding those which have approved take authorization from the Department and which do not require fish passage as per OAR 635-412-0035(1)(a), shall be returned to the stream by one of the following methods:

(A) Movement from the trap to immediately-adjacent water which has fish passage; or

(B) Transport within a watered container, including but not limited to lifts, hoppers, locks, trucks, from the trap to a location approved by the Commission.

App-23.

Traps were thus treated as a separate category of artificial obstruction, distinct from other obstructions such as dams and culverts, where non-volitional trapping and handling of fish would be allowed given the nature and purpose of a fish trap. This was made clear in the 2006 definition of “volitionally,” which allowed, through reference to OAR 635-412-0035(6) and at traps alone *as a specific type of obstruction*, the precise actions of “trapping, transferring, and handling” otherwise prohibited by that definition. App-20 (OAR 635-412-0005(45) (2006)).

### **3. Fish Passage Rules Amendment Process**

In 2021, ODFW requested the Commission “adopt several revisions to the existing rules to improve the Department’s ability to implement fish passage solutions throughout the state, consistent with governing statutes.” ER-31. More specifically, the Department determined a need to address rule clarity, trigger

avoidance, multi-species needs, and program efficiency as well as update design criteria, standards, and procedures. ER-32–33.

In March 2021, ODFW began a “Fish Passage Task Force” public process to revise Oregon’s fish passage rules. ER-31. Throughout 2021 and 2022 there were 20 rules subcommittee meetings and additional Task Force meetings where rule amendments were discussed. ER-32. All were public meetings. *Id.* None of those meetings appear to have included discussion of changes to the rules governing the use or purpose of fish traps, or related changes to the central definition of “fish passage.” ER-68–72. There were two public comment periods on draft rule amendments. ER-31–32. One initiated the Task Force process in 2021, and a second was noticed on August 30, 2022, and circulated a “final draft” of the rule amendments subject to a 30-day comment period near the close of the Task Force process. ODFW received 175 comments on the August 30, 2022 draft rule amendments. ER-32. None of those comments raised any issues regarding the regulation and use of fish traps, indicating there was nothing in the draft rule amendments that suggested substantive changes to those provisions. ER-73–84.

The Task Force adopted final proposed rule amendments at a meeting on October 7, 2022, and on October 21, 2022, ODFW filed with the Secretary of State for publication a formal “Notice of Proposed Rulemaking” for the fish passage rule amendments. ER-1; ER-32. The published October 21, 2022, rules included a two-word revision to the definition of “fish passage:” “Fish passage means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal

stress, minimal delay, and without physical or physiological injury upstream and downstream of an artificial obstruction.” ER-5 (Amendment in underline). The definition of “volitionally” was unchanged. ER-8. With respect to the fish passage criteria, there were minimal revisions proposed to the requirements for installing fishways at dams and other similar obstructions, with fishways remaining as the only form of allowed upstream fish passage at dams. ER-17–19 (OAR 635-412-0035(2)). Regarding traps as a specific category of artificial obstruction under OAR 635-412-0035, the proposed rules included minor revisions to the existing criteria and revised the introductory purpose of the section from “requirements for fish passage at traps” to “requirements for fish collection and transport at traps.” ER-21 (OAR 635-412-0035(6)).

The published October 21, 2022, proposed rules thus maintained long-standing fish passage policies and protections.

#### **4. The Adopted 2022 Fish Passage Rules.**

Sometime between October 21 and December 16, 2022, fundamental new changes were made to the proposed rules and the implementation of fish passage without notice. These revisions were never formally noticed or mentioned publicly, but were included within an extensive redline attachment to the agenda packet for the Commission’s December 16, 2022 meeting, along with a copy of the formal October 21, 2022, notice of proposed rulemaking. ER-30; ER-38–66. The definition of “fish passage” (OAR 635-412-0005(20)) had been changed to add, as an alternative to volitional passage, “trap collection and transport if consistent with requirements of OAR 635-412-0035(6).” ER-41. This new language added to the

definition of “fish passage” has a reference to OAR 635-412-0035(6) in common with the prior definition of “volitionally.” *See* App-20 (OAR 635-412-0005(45) (2006)). That reference had now been removed from the definition of “volitionally” in the un-noticed version of the rule amendments provided to the Commission. ER-45.

However, these revisions were accompanied by critical changes to OAR 635-412-0035(6). That section had long been a set of passage criteria and allowances authorizing non-volitional trapping and handling of fish at traps as a *specific category of artificial obstruction distinct from other obstructions* such as dams and culverts. OAR 635-412-0035(6)’s core purpose was now altered: “Requirements for fish collection and transport *at traps*” was changed to “Requirements for *fish passage by trap collection and transport.*” (Emphasis added.) *Compare* ER-21 *with* ER-60 *and* ER-143. Fish traps were thus changed from a type of obstruction into a new form of fish *passage*. This change to the core purpose of OAR 635-412-0035(6) fundamentally altered the effect of that rule reference in the new definition of “fish passage.” *See* ER-126–27 (OAR 635-412-0005(20)).

At the same time, a new subsection was added to OAR 635-412-0035(6), creating an entirely new ODFW discretionary authority to use fish traps *as a form of passage at other categories of obstructions* such as dams:

(g) Traps shall be utilized where the feasibility of other fish passage structures or other site-specific considerations warrant use of trap collection and transport, or otherwise, the Department determines, using its professional judgment, trap collection and transport will result



in an effective means of ensuring access to habitat above or below the artificial obstruction by native migratory species.

ER-61 (OAR 635-412-0035(6)(g)).<sup>5</sup>

These critical changes were not included in the proposed rule amendments filed by ODFW with the Secretary of State for publication as a notice of proposed rulemaking on October 21, 2022. ER-1–25. They were not included in the "Agenda Item Summary" or "Presentation" documents provided for the Commission's December 16, 2022, meeting. ER-31–37; ER-85–98. Nor does the record show that they were ever even mentioned in person by the ODFW staff to the Commission at its December 16, 2022, meeting. ER-99–123. Nonetheless, the Commission adopted the last-minute revisions to the Rules at its December 16, 2022, meeting and established an effective date of January 1, 2023. ER-124.

## **II. ARGUMENT**

### **A. Assignment of Error**

The Commission erred by failing to comply with the applicable rulemaking procedures in adopting the Rules, because the Commission failed to provide notice of the last-minute revisions to the Rules as required by ORS 183.335.

#### **1. Preservation of Error**

ORS 183.400(1) provides, in part, that “[t]he court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the

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<sup>5</sup> The definition of “fish passage structure” clearly does not include traps, as that term is defined as “any human-built structure that allows fish passage past an artificial obstruction, including, but not limited to, fishways and road-stream crossing structures such as culverts and bridges, OAR 635-412-0005(19) (2006); whereas, a “trap” is a structure “that hold[s] fish a prevent[s] them from passing volitionally.” OAR 635-412-0005(43) (2006). App-19–20.

agency to pass upon the validity of the rule in question \* \* \*.” Thus, no preservation of error is required in this proceeding.

## **2. Standard of Review**

Pursuant to ORS 183.400(4)(c), this Court shall invalidate an administrative rule if the rule was adopted “without compliance with applicable rulemaking procedures.” A rule is not valid unless adopted in “substantial compliance” with the notice provisions of ORS 183.335. *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 365 Or 371, 377 (2019). Substantial compliance requires “compliance in respect to the essential matters necessary to assure every reasonable object of the statute and depends on the particular facts of each case.” *McComas v. Employment Dep’t*, 133 Or App 577, 580 (1995).

Judicial review of a rule shall be limited to an examination of: (a) the rule on review; (b) the statutory provisions authorizing the rule; and (c) copies of all documents necessary to demonstrate compliance with all applicable rulemaking procedures. ORS 183.400(3). An agency’s interpretation of its own rule is entitled to deference if that interpretation is “plausible, that is, if it is not inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law.” *Noble v. Department of Fish & Wildlife*, 355 Or 435, 448–49 (2013) (quotation omitted).

## **3. Argument**

ORS 183.335(1) provides that “prior to the adoption, amendment, or repeal of any rule, [an] agency shall give notice of its intended action[.]” The required notice must include “[a]n objective, simple and understandable statement

summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person’s interests may be affected, and the time, place, and manner in which interested persons may present their views on the intended action.” ORS 183.335(2)(a)(B). The notice shall also include “a statement of the need for the rules and how the rule is intended to meet the need,” and a list of the documents, reports, or studies “prepared by or relied upon by the agency in considering the need for and in preparing the rule.” ORS 183.335(2)(b)(C), (D).

Additionally, for parties that specifically request notice of the agency’s intended action under ORS 183.335(8), the agency must provide notice of its action at least 28 days before the effective date. ORS 183.335(1)(c). ODFW’s administrative rules also require the agency to provide a copy of the notice to the list of persons established under ORS 183.335(8). OAR 635-001-0000(2)<sup>6</sup>; *see also* ORS 183.335(1)(a).<sup>7</sup> The notice provided under subsection (1)(c) must include “a copy of the rule that the agency proposes to adopt, amend, or repeal, or an explanation of how the person may acquire a copy of the rule.” ORS 183.335(2)(d). Additionally, the copy of the proposed rule revisions provided under ORS 183.335(2)(d) “shall show all changes to the rule by striking through

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<sup>6</sup> OAR 635-001-0000 was adopted in 1994 and refers to an earlier version of ORS 183.335, where the provision allowing persons to request to receive copies of an agency’s notices was included at subsection (7) of the statute. ORS 183.335(7) was renumbered to subsection (8) in 2001. *See* House Bill (HB) 2665, § 1 (2001).

<sup>7</sup> ODFW’s rules appear to treat the required notice to interested persons under ORS 183.335(1)(a) as equivalent to the notice required by ORS 183.335(1)(c) by including a cross reference to ORS 183.335(8) in OAR 635-001-0000. *See id.*

materials to be deleted and underlining all new material, or by any other method that clearly shows all new and deleted material.”

The notice requirements of ORS 183.335 serve two primary functions: (1) to inform the interested public about intended agency action, and (2) as a trigger for an agency’s opportunity to receive public feedback on the proposed action. *Basset v. State Fish & Wildlife Comm’n*, 27 Or App 639, 642 (1976). Here, ODFW’s notice of the proposed revisions to the Rules did not satisfy the core functions of the notice requirements. The October 21, 2022, notice was plainly inadequate to put Petitioners or the public on notice that the Commission would subsequently adopt a wholly new authority and procedure for bypassing the fundamental requirement under the Rules to provide volitional fish passage at dams and other artificial obstructions absent a waiver or exemption. The notice did not inform Petitioners or the public of the agency’s intended action nor did it provide the public with an opportunity to provide feedback to ODFW on fundamental revisions to the Rules concerning the use of trap and haul in lieu of volitional fish passage. The Commission did not provide any notice of the last-minute revisions to the Rules as is required under ORS 183.335 and thus, did not “substantially comply” with the notice requirements. ORS 183.335(11)(a).

**i. The last-minute revisions to the Rules were fundamental and substantive changes to the requirements for fish passage.**

The challenged Rules include fundamental changes — made without public notice — to Oregon’s long-standing fish passage rules that give ODFW an entirely new authority to allow “trap collection and transport” in lieu of volitional fish

passage at dams and other artificial obstructions throughout Oregon, based solely on ODFW’s “professional judgment.”

Under the 2006 Rules, the owner or operator of a dam was required to provide fish passage through a fishway. App-22–23.<sup>8</sup> The plain text of the prior version of the Rules demonstrates that fish traps were defined and regulated as a distinct type of artificial *obstruction* with unique requirements and allowances for fish handling, not as a form of fish passage to be used at other obstructions, such as dams. The 2006 Rules required that “prior to construction, fundamental change in permit status, or abandonment” of an artificial obstruction, the owner or operator shall “obtain from the Department an approval determination of a fish passage plan that meets the requirements of *OAR 635-412-0035 for the specific artificial obstruction.*” App-21 (OAR 635-412-0020(3)(a) (2006)) (emphasis added). “Artificial obstruction” was defined as “any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert, or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.” App-19 (OAR 635-412-0005(3) (2006)).

OAR 635-412-0035 provides both the general fish passage criteria and specific requirements for fish passage *at specified types of artificial obstructions*: dams, culverts, estuary obstructions, and — critically here — fish traps. App-22–

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<sup>8</sup> “Fishway” as defined in the 2006 version of the Rules means “the set of human-built and/or operated facilities, structures, devices, and measures that together constitute, are critical to the success of, and were created for the sole purpose of providing upstream fish passage at artificial or natural obstructions which create a discontinuity between upstream and downstream water or bed surface elevations.” App-19 (OAR 635-412-0005(20) (2006)). Fishways are not trap and haul systems, but are instead fish ladders or alternate passage channels.

24. For dams and “other artificial obstructions which create a discontinuity between upstream and downstream water surface or streambed elevations,” the 2006 Rules required that “fishways shall provide fish passage at all flows within the design streamflow range” and provided numerous criteria for the design of fishways at dams. App-22 (OAR 635-412-0035(2) (2006)). Nowhere in this section of the Rules was there any reference to using fish traps as a form of fish passage at *other* obstructions such as dams.

OAR 635-412-0035(6) governed the requirements for “fish passage *at traps*” and included specific criteria for the operation of traps as a category of artificial obstruction. App-23 (emphasis added). “Trap” was defined as “the set of human-built and/or operated facilities, structures, devices, and measures to hold fish and prevent them from passing volitionally.” App-20 (OAR 635-412-0005(43) (2006)). Fish traps are a unique form of obstruction that necessarily require the handling of fish.

Originally, the Rules defined “fish passage” as “the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, and without physical or physiological injury upstream and downstream of an artificial obstruction.” App-19 (OAR 635-412-0005(18) (2006)). “Volitionally” was defined as “with minimal delay and *without being trapped, transferred, or handled* by any person, unless specifically allowed under OAR 635-412-0035(6).” App-20 (OAR 635-412-0005(45) (2006)) (emphasis added). The reference to OAR 635-412-0035(6) in the definition of “volitionally” provided a unique exception to the

requirement that fish not be “trapped, transferred or handled,” at the one type of obstruction where those actions are precisely what must occur: fish traps. It did not create an alternative to the requirement to provide volitional fish passage *at other types of obstructions*, such as dams, through the use of trap and haul. There was no provision in the 2006 Rules that would have allowed ODFW to authorize trap and haul as an alternative to volitional fish passage at dams or other obstructions.

The version of the proposed rules that was published in the October 21, 2022, notice—following a two-year public input process—included minimal adjustments to the provisions governing fish traps. The definition of “fish passage” included a two-word revision to add “minimal delay” to the definition. ER-5. The definition of “volitionally” was unchanged. ER-8. The provisions at OAR 635-412-0035(6) included a revision to change the introductory purpose of the rule from “requirements for fish passage at traps” to “requirements for fish collection and transport at traps.” ER-21. If anything, this proposed revision indicated ODFW’s recognition that fish traps were not an authorized form of fish passage at other types of obstructions. They were instead a specific type of obstruction under OAR 635-412-0035 with special requirements and allowances for fish handling and other actions otherwise prohibited by the definition of “volitionally.” Other proposed revisions to OAR 635-412-0035(6) were minor and did not change the effect or operation of the rule. ER-21.

In contrast, under the adopted version of the Rules, the owner or operator of a dam may now use trap and haul as a form of fish passage, instead of installing a fishway that meets the detailed criteria in the Rules. ER-143. The adopted Rules

now define “fish passage” to include, as an alternative to volitional passage, “trap collection and transport if consistent with requirements of OAR 635-412-0035(6).” ER-126–27. The introductory purpose of OAR 635-412-0035(6) was simultaneously altered from the noticed rules to provide “requirements for *fish passage by trap collection and transport*.” ER-143 And at the same time, a new subsection was added to OAR 635-412-0035(6), creating an entirely new ODFW discretionary authority to approve the use of fish traps *as a form of fish passage at other categories of obstructions* such as dams:

(g) Traps shall be utilized where the feasibility of other fish passage structures or other site-specific considerations warrant use of trap collection and transport, or otherwise, the Department determines, using its professional judgment, trap collection and transport will result in an effective means of ensuring access to habitat above or below the artificial obstruction by native migratory species.

*Id.* (OAR 635-412-0035(6)(g)). This new authority is a significant departure from the 2006 Rules and the noticed version of the proposed rules, which only authorized exceptions to fish passage requirements through the waiver or exemption process. *See* App-23, ER-21 (OAR 635-412-0035).

Under the challenged last-minute Rule revisions, the core policy and presumptive requirement of volitional fish passage can be circumvented through a newly created authority and procedure whenever ODFW decides that its “professional judgment” is satisfied. This is a fundamental change to the substantive requirements and procedures for fish passage that could not have been anticipated or understood from the October 21, 2022, notice. The last-minute



revisions were required to be separately noticed under the provisions of ORS 183.335.

**ii. The Commission’s October 21, 2022, Notice was inadequate under ORS 183.335(2).**

The notice of proposed rulemaking for ODFW’s proposed revisions to the Rules was filed with the Secretary of State’s office on October 21, 2022. ER-1. The caption for the proposed rules, as required under ORS 183.335(2)(a)(A), was stated as: “Fish Passage Rule Amendments.” *Id.* The notice identified the need for the proposed rules as follows:

These rules are needed to implement [the] State’s fish passage policy that requires fish passage throughout the state for native migratory fish. These revised rules will provide clarity on existing standards, establish new standards, and ensure alignment with the ODFW Climate and Ocean Change Policy.

*Id.*; *see* ORS 183.335(2)(b)(C). For each section of the Rules that was proposed to be amended, the notice provided the same “rule summary:” “These rule amendments implement the State of Oregon’s fish passage policy by establishing new standards and clarifying existing regulations.” ER-3, 4, 9, 10, 12, 14, 16, 17, 24. The notice referenced two documents that were relied upon in preparing the proposed Rules, including (1) a staff report prepared for the Commission’s December 16, 2022, hearing, and (2) the Fish Passage Task Force Recommendation dated October 7, 2022. ER-1; *see* ORS 183.335(2)(b)(D). The notice also included the complete text of the proposed rule amendments showing where language was proposed to be deleted and inserted with strikethrough and underline, respectively. ER-1–25.

The October 21, 2022, notice was inadequate to notify the public and Petitioners of the version of the Rules that was subsequently adopted by the Commission on December 16, 2022. Nothing in the notice indicated that ODFW intended to change the central definition of “fish passage” or create a new authority for ODFW to allow trap and haul to be used in lieu of volitional fish passage. Neither the notice, the proposed rules, nor the referenced supporting documents provided any indication that these changes would be included as part of the amendments to the Rules that would be considered and voted on by the Commission at its December 16, 2022, meeting.

First, the statement of need in the notice was not adequate to put the public on notice that the Commission would later adopt revisions to the very definition of “fish passage” or create an entirely new exception to the requirement to provide volitional fish passage at dams and other obstructions. *See* ORS 183.335(2)(b)(C) (the agency “shall include the with notice of intended action . . . A statement of the need for the rule and a statement of how the rule is intended to meet that need.”) “[T]he legislature added the statement-of-need requirement to ensure that interested persons could meaningfully participate in the public comment period by submitting data and arguments that were responsive to the agency’s concerns in proposing the rule or rule change.” *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 366 Or 78, 86 (2020) (quotation omitted).

The statement of need in the notice was written so broadly that it could theoretically cover any change to any provision of the Rules, in their entirety. Petitioners and the public had no reasonable basis to understand that they would

need to provide data and argument to the Commission concerning the benefits of volitional fish passage and the drawbacks of using trap and haul as an alternative to volitional fish passage. To find that such a statement of need is sufficient to put the public on notice of the last-minute revisions to the Rules would effectively eviscerate the purpose of the notice requirements. *See City of Cornelius v. Dep't of Land Conservation*, 331 Or App 349, 355 (2024) (“The purpose of the notice is to provide ‘the subject matter and purpose of the intended action in sufficient detail to inform a person that the person’s interests may be affected.’”) (quoting ORS 183.335(2)(a)(B)).

Second, the “rule summary” provided for each section of the proposed rule amendments did not include “sufficient detail” to inform Petitioners that their interests in seeing volitional fish passage maintained as the standard at artificial obstructions would be affected by the proposed rules. ORS 183.335(2)(a)(B). Petitioners had no reason to understand that the Commission would consider revising the noticed rule amendments to fundamentally change the default requirement of volitional fish passage for native migratory fish, by establishing an entirely new authority and procedure for ODFW to authorize the use of “trap collection and transport” as a newly defined form of fish passage, subject only to ODFW’s “professional judgment.” As with the statement of need, the rule summary was a broad and generic statement that could not have put the public on notice that the Commission would later adopt additional fundamental changes to the Rules that had never before been discussed or proposed throughout the nearly two-year public rulemaking process.

Finally, the supporting documents referenced in the notice did not include any reference to proposed changes to the definition of “fish passage” or the creation of an entirely new agency authority to allow “trap collection and transport” in lieu of volitional fish passage. ER-31–37; ER-67–72. The “fish passage task force recommendation” does not make any reference to changes to the definition of “fish passage” or to how traps are regulated under the Rules. ER-67–72. The staff report provides a detailed summary of the rulemaking process and an analysis of the primary issues that the agency sought to resolve through the rule revisions. ER-31–37. Nowhere in the staff report document is there any reference to revisions to the definition of “fish passage” or the creation of a new ODFW authority to authorize trap and haul in lieu of volitional passage. *Id.*

Based on the generic and broad October 21, 2022, notice, Petitioners could not reasonably have understood that the Rules would include the last-minute changes that were adopted by the Commission on December 16, 2022. Nor could Petitioners have reasonably understood that their interests in seeing volitional fish passage maintained as the standard under the Rules would have been affected by the Commission’s decision. The October 21, 2022, notice was inadequate to put Petitioners on notice of the version of the Rules that were adopted on December 16, 2022. *See Watson v. Oregon State Penitentiary*, 90 Or App 85, 88 (1988) (finding notice inadequate where nothing in it suggested that challenged rule revision would be considered).

**iii. The Commission’s Notice Under ORS 183.335(1)(c) was inadequate to inform Petitioners of the adopted Rules.**

ODFW sent its notice to “interested parties” pursuant to ORS 183.335(1)(c) via email on October 25, 2022. ER-26–29. Petitioners CTUIR and Native Fish Society were included on the October 25, 2022 notice as interested parties. ER-26. The notice to interested parties included as an attachment the October 21, 2022, Hearing Notice and Fiscal Impact Statement that was submitted to the Secretary of State, which included a copy of the proposed rule revisions showing the changes in strikethrough and underline. ER-26; ER-1–25; *see also* ORS 183.335(2)(d).

The copy of the proposed rule revisions provided to interested parties on October 25, 2022, did not include the last-minute changes that were ultimately adopted by the Commission on December 16, 2022. Specifically, the copy of the proposed rule revisions provided to “interested parties” included only the minor addition to the definition of “fish passage” to add the words “minimal delay” that was shown in the October 21, 2022, notice. ER-5. Additionally, the copy of the proposed revisions did not show any proposed changes to the definition of “volitionally.” ER-8. Nor did the copy of the rules include the wholly new provision at OAR 635-412-0035(6)(g) allowing ODFW discretion to authorize trap collection and transport in lieu of volitional fish passage based solely on the Department’s “professional judgment.” ER-21.

Based on the copy of the proposed rules that was provided to interested parties, Petitioners CTUIR and Native Fish Society could not have reasonably understood the proposed rule revisions to include changes to the core definition of “fish passage” and an entirely new authority for ODFW to allow the use of fish

traps as a form of fish passage in lieu of volitional fish passage. ODFW's notice to interested parties pursuant to ORS 183.335(1)(c) and (2)(d) was inadequate to provide notice the Commission's intent to adopt the last-minute revisions to the Rules.

**iv. The Commission failed to provide the required notice of the last-minute revisions to the Rules.**

The version of the Rules that was adopted by the Commission on December 16, 2022, was not properly noticed under the requirements of ORS 183.335(1). As discussed above, the October 21, 2022, notice was inadequate to notify Petitioners and the public of the last-minute revisions that the Commission adopted and was inadequate to notify Petitioners that their interests in volitional fish passage could be affected by the proposed revisions. Because the October 21, 2022, notice was inadequate, ODFW's last minute revisions to the Rules required additional notice under ORS 183.335(1) in order for the agency to satisfy its procedural obligations under the APA. Further, because ODFW was required to issue additional notice under ORS 183.335(1), the agency was also required to provide additional notice under ORS 183.335(2)(d) by providing an updated copy of the Rules that clearly showed the last-minute proposed revisions. *See Friends of the Columbia Gorge v. Energy Facility Siting Council*, 365 Or 371, 386 (2019) ("To establish that those later notices were subject to the requirements of paragraph (2)(d), petitioners would have to establish that those notices were required by subsection (1).").

The last-minute revisions to the Rules were not published in the Secretary of State's bulletin at least 21 days before the effective date of the Rules, as required under ORS 183.335(1)(b). Similarly, the agency did not provide notice of the last-

minute revisions to interested parties, including CTUIR and Native Fish Society, at least 28 days before the effective date of the rules — or at any other point, as is required under ORS 183.335(1)(a) and (c) and OAR 635-001-0000. Therefore, the Commission failed to comply with its procedural obligations under the APA by failing to provide notice of the version of the Rules adopted on December 16, 2022, as required under ORS 183.335.

**v. The Commission did not substantially comply with the requirements of ORS 183.335.**

ORS 183.335(11)(a) provides that “a rule is not valid unless adopted in substantial compliance with the provisions of this section[.]” The Supreme Court has established that an agency’s compliance with the notice requirements in ORS 183.335 are reviewed for “substantial compliance,” rather than strict compliance. *Friends of the Columbia Gorge*, 365 Or at 377–78. “Substantial compliance can ‘be defined only in general language,’ but at bottom it ‘requires compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.’” *N.W. Natural Gas Co. v. Environ. Quality Comm.*, 329 Or App 648, 665 (2023) (quoting *Rogers v. Roberts*, 300 Or 687, 691 (1986) (additional internal quotation omitted)). “What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.” *Id.* (internal quotation omitted).

As stated above, the key purposes of the APA notice provisions are to (1) inform the interested public of the agency’s intended action, and (2) to trigger an opportunity for the public to provide feedback to the agency on the proposed action. *Bassett*, 27 Or App at 642. Throughout the nearly two-year public process

of considering revisions to the Rules, there was no indication from ODFW that it intended to revise the central definition of “fish passage” or to create a new authority for ODFW to authorize the use of trap and haul in lieu of volitional fish passage. Based on the agency’s notice that was published on October 21, 2022, Petitioners likewise had no reasonable understanding that ODFW intended to adopt the last-minute revisions to the central definition of “fish passage” or to create a new ODFW authority authorizing fish traps to be used as an alternative form of fish passage at other obstructions, such as dams. Thus, Petitioners and the public had no basis to provide any feedback to the agency regarding the treatment of trap and haul as a newly defined form of fish passage, subject to an entirely new ODFW discretionary authority. Accordingly, the rulemaking record is entirely devoid of any information regarding the impacts of trap and haul on native migratory fish populations, as compared to volitional fish passage. The Commission proceeded with adopting the last-minute revisions without having received any feedback from the public on these critical changes to the Rules.

The Commission did not “substantially comply” with the notice requirements of ORS 183.335, because it did not comply at all. The version of the Rules that was adopted on December 16, 2022, was not provided to the public or interested parties through any of the means provided in ORS 183.335. The notice that was provided for the October 21, 2022, version of the Rules did not adequately inform the public of the agency’s intended action and did not trigger an opportunity for public feedback on the subject matter of the last-minute revisions. The October 21, 2022, notice simply did not satisfy “every reasonable objective of



the statute.” *N.W. Natural*, 329 Or App at 665. The Rules were not adopted in “substantial compliance” with the requirements of ORS 183.335.

### III. CONCLUSION

For the forgoing reasons, Petitioners respectfully request that the Court declare the challenged Rules at OAR 635-412-0005(20) and (51), and OAR 635-412-0035(6) invalid.

DATED this 6<sup>th</sup> day of May, 2024.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS**

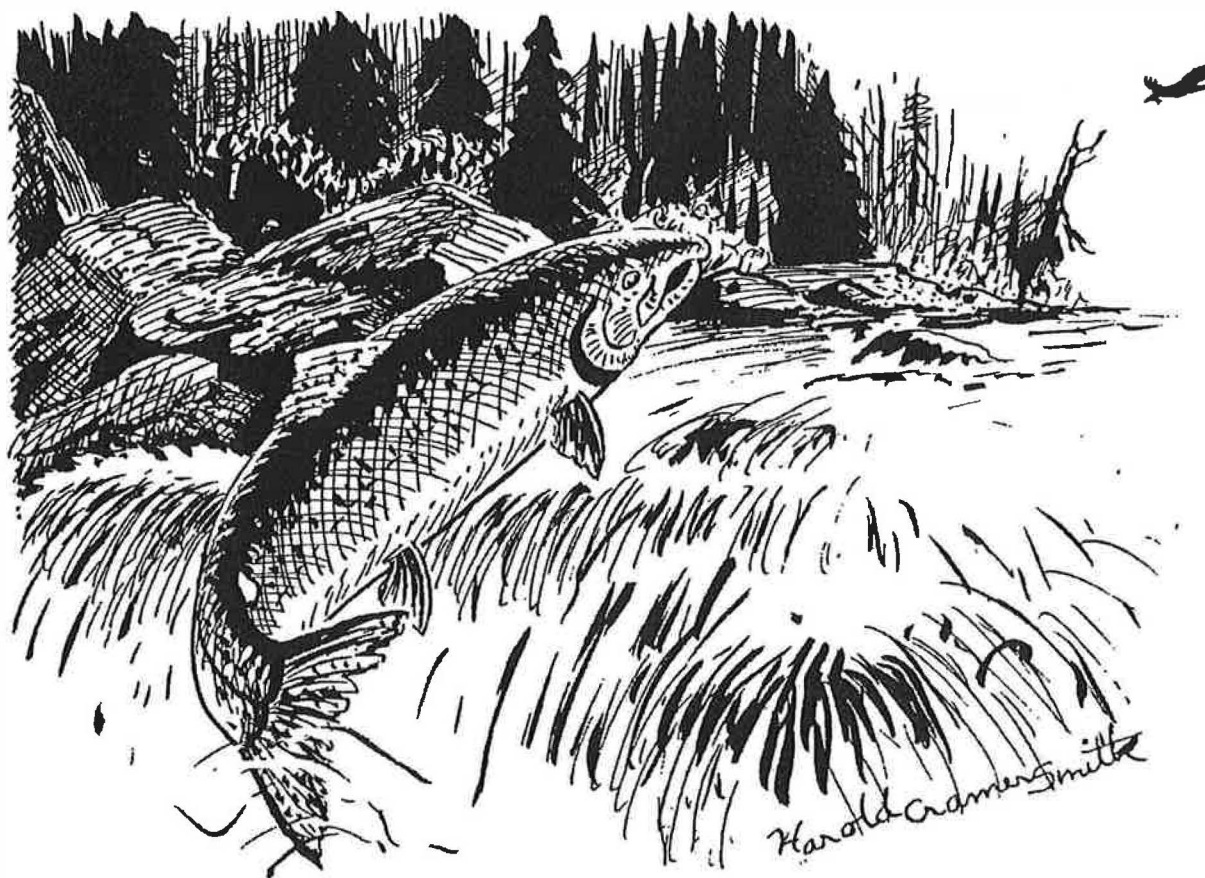
I certify that (1) this brief complies with the word-count limitation in ORAP 5.02(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 9,428 words. I further certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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# APPENDIX

**REPORT TO THE**  
**71<sup>ST</sup> OREGON LEGISLATIVE ASSEMBLY**

**HOUSE BILL 2102**  
**FISH PASSAGE TASK FORCE**



**REPORT TO THE 71<sup>ST</sup> OREGON LEGISLATIVE ASSEMBLY  
HOUSE BILL 2102**

**FISH PASSAGE TASK FORCE**

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# **REPORT TO THE 71<sup>ST</sup> OREGON LEGISLATIVE ASSEMBLY**

## **HOUSE BILL 2102 FISH PASSAGE TASK FORCE**

### **EXECUTIVE SUMMARY**

The 70<sup>th</sup> Legislative Assembly enacted House Bill 2102 directing the Oregon Department of Fish and Wildlife (Department or ODFW) to convene a Fish Passage Task Force to "develop recommendations, including suggested legislative changes, necessary to improve the benefits to fish resulting from fish passage, fishway and alternative mitigation requirements." The statute specified 12 groups to be represented on the Task Force, and required an invitation to federal agencies affected by the fishway or fish passage requirements. This is the second Task Force to attempt such recommendations. The 69<sup>th</sup> Legislative Assembly enacted House Bill 2607, which required a similar task force. That Task Force was unable to complete all of its work, but did submit a report and some recommendations to the 70<sup>th</sup> Legislative Assembly. The new Task Force was reconstituted following the 1999 legislative session pursuant to House Bill 2102.

This report summarizes the latest Fish Passage Task Force's work from its first meeting on June 13, 2000, through development of this report and recommendation. The Task Force's consensus recommendations are in the form of draft legislation, attached as Appendix I to this report, and were subsequently drafted by legislative counsel into an amendment to House Bill 2540. The recommendations as drafted by the Task Force generally provide for:

- Integrating and making consistent provisions of the two former statutes (one for food or commercially caught fish and one for game or sport caught fish) relating to fish passage;
- Requiring installation of fish passage or alternatives at the owner/operator's expense at all artificial obstructions (in bodies of water in which migratory native fish are currently or have historically been present) at the time of:
  - construction (which includes major replacement or structural modifications at existing structures),
  - abandonment, or
  - "fundamental" changes in permit status
- Requiring installation of fish passage or alternatives at the owner/operator's expense at any existing artificial obstruction when the Oregon Fish and Wildlife Commission (Commission) determines that an emergency exists, which because of adverse impacts to a fish population, calls for immediate action;

- Requiring installation of fish passage at the owner/operator's expense at any existing obstruction constructed illegally;
- ODFW to inventory and maintain a list of existing artificial obstructions and to prioritize enforcement action based on the needs of migrating fish populations;
- ODFW working with owners/operators to find cost share funding for installation of fish passage or alternatives at other existing obstructions. Those that are not otherwise required to install passage under one of the above requirements and have a legal water right, but do not have an existing exemption from passage requirements, may be required to install passage if non-owner/non-operator funding of 60% or more can be provided;
- Waivers or alternatives to fish passage on a showing of a net benefit to the habitat quality or quantity which would lead to an increase in the production of migratory native fish;
- Opportunities for exemptions that are reviewed every <sup>5 or 10</sup> five years in cases where the Commission finds there is no appreciable benefit to providing passage;
- Establishing a permanent Fish Passage Task Force to advise the Department and Commission on matters related to fish passage;
- Encouraging collaboration between ODFW and owners/operators of artificial obstructions to achieve maximum fish passage throughout the state;
- Coordination of fish passage requirements through the State's Hydroelectric Application Review Team (HART) process for federally licensed hydroelectric projects.

## BACKGROUND

In Oregon, the issue of providing fish passage over man-made dams and diversions pre-dates its 1859 statehood. Oregonians have long sought to strike a balance between survival of species and the developments of humans. For a discussion of the history of the Fish Passage statutes please refer to the memo in Appendix IV.

Information regarding the current number of dams and diversions throughout the state that lack fish passage facilities, and the extent of the fish habitat problems that this situation creates, is limited. The Oregon Water Resources Department has a database of over 3,500 dam structures in the state that meet minimum state dam safety review requirements (includes all dams 10 feet or more in height, or that impound 9.2 acre-feet of water or more). This database, however, is not designed to reference or include fish or fish passage information.

ODFW estimates that there are currently at least 750 dams and diversions that impact fish habitat in Oregon, with less than half of these facilities providing adequate fish passage. Many of these



diversions are under the minimum state dam safety review requirements. There is also information to suggest that many of the existing fish passage facilities are in disrepair.

Most recently, the continual decline and eventual federal ESA listings of a number of salmonid species (steelhead, salmon and trout) has brought new emphasis to the fish passage issue. A 1996 Oregon Department of Justice letter of advice interpreted current state fish passage statutes as providing no agency discretion to grant a waiver of fish passage requirements. This analysis pushed the 1997 and 1999 Oregon Legislatures and the Governor's Office to craft House Bill 2607 and House Bill 2102, respectively. (*Appendix V*). These temporary statutes (scheduled to sunset on June 30, 2001) gave the Oregon Fish and Wildlife Commission authority to grant a waiver of fish passage requirements for new, or for the modification of existing, projects in return for alternative mitigation measures that would "provide a net benefit to wild anadromous and other migratory native fish." Both statutes provided for a Fish Passage Task Force to develop recommendations for a permanent fish passage statute.

#### **TASK FORCE MEMBERSHIP AND OPERATION**

The 2000-2001 Task Force membership initially included the following representatives of organizations and agencies:

<u>Interest/Group/Government</u>	<u>Representative</u>
Oregon Dept. of Fish & Wildlife	Roy Elicker, Deputy Director, Fish Div. Stephanie Burchfield, HD/Hydro
Office of the Governor	Roy Hemmingway, GNRO
Water Resources Dept.	Bev Hayes, Hydro Task Force
Oregon Counties	Ron Yockim, Douglas County
Oregon Cities	Willie Tiffany, League of OR Cities Steve Kucas, Portland Water Bureau
Special Districts	Kevin Hanway, Assoc. of Special Districts
Water Utilities	Jason Green, OR Assoc. Water Utilities Dave Anderson, OR Water Utility Council Rob Schab, Coos Bay-N. Bend Water Board
Water User Organizations	Pete Test, Oregon Farm Bureau John Youngquist, Small Water Users
Water Suppliers	Jan Lee, OR Water Resources Congress

Environmental Organizations	Mark Riskedahl, NW Environmental Defense Center
Hydroelectric Project Operators	Cliff Bentz, Idaho Power Todd Olson, PacifiCorp
Angling & Fish Conservation	Jim Myron, Oregon Trout Phil Donovan, NW Sport Fishing Assoc. Glen Spain, Pacific Coast Federation of Fishermen's Associations
Indian Tribal Governments	Bobby Brunoe or Patty O'Toole, Confederated Tribes of the Warm Springs Carl Merkle, Confederated Tribes of the Umatilla Indian Reservation

Tribal representatives were invited and encouraged to participate. They were kept informed of all meetings, meeting summaries and drafts developed during the work of the Task Force. However, no Tribal representatives actually participated in the Task Force deliberations nor in the resulting consensus. Mark Riskedahl of the Northwest Environmental Defense Center was able to participate only occasionally. He therefore, did not take part in the consensus recommendation, neither opposing nor supporting it.

Representatives of Federal agencies and staff from ODFW and the Attorney General's office also participated as resource advisors. Advisors participated in discussions, but were not considered official members for purposes of consensus.

To accomplish its tasks, the Task Force developed a set of Working Agreements (attached as Appendix II) which set out the protocols for its work. Through the working agreements the Task Force committed to reach consensus on any recommendations submitted to the legislature. If no consensus were reached, the group would simply report the differing views without making a Task Force recommendation to the legislature. Consensus was agreed to mean "the willingness to go along with the recommendation either in active support of it or in not opposing it."

Each meeting of the task force was professionally facilitated. The facilitators drafted summaries of each meeting to capture the major areas of discussion, tentative agreements and the range of views on issues discussed. Draft meeting summaries were corrected by the members and revised into final summaries. These final meeting summaries are attached in Appendix III. Meeting summaries represent the views and the discussions at the particular time of that meeting. They may reflect tentative agreements that were not reflected in the actual agreement on the final recommendations, as all agreements were treated as tentative until the full package was put together.

## **DISCUSSION OF THE RECOMMENDATIONS AND RELATED ISSUES**

The following discussion follows the general outline of the proposed statute, but does not attempt to summarize each and every provision. It is intended to highlight the major elements of the legislation and point out the Task Force's view of their application.

### **1. Integration of two former statutes and Policy Statement**

As noted above, the two Oregon laws that dealt with fish passage had inconsistencies that lead to both confusion and a lack of enforcement of either law. In 1996 the Attorney General determined that the current statute did not give the Commission authority to waive fish passage, even though some owners and operators believed they had been given a waiver by the agency. The Legislature subsequently gave short term authorization for the Commission to grant waivers to fish passage requirements.

One of the main objectives of the task force was to craft legislation that combined the existing statutes into one meaningful piece of legislation, was reasonable for owners/operators, benefited fish that migrate for their lifecycle and had enough flexibility for the Commission to waive passage requirements under appropriate circumstances. At its early meetings, the group agreed that finding a way to protect Oregon's native migratory fish populations is very important. Doing this in a way that encouraged cooperation and minimized the burden to owners and operators of artificial obstructions, while maintaining the authority of the Fish and Wildlife Commission to enforce its laws, proved to require a great deal of creativity and flexibility from the Task Force. This proposed legislation is intended to complement, not to abrogate, any related authority under other state and federal laws.

As a state policy, the Task Force members agreed that upstream and downstream passage should be required at all artificial obstructions in those Oregon waters in which migratory native fish are currently or have historically been present, except under certain clearly defined circumstances (laid out below). The Task Force agreed that the primary method for implementing this policy should be through active collaboration and cooperation between the Department of Fish and Wildlife and owners or operators of artificial obstructions. Collaboration is important because increased compliance and efficiency with an overall goal of more and safer passage is first and foremost, not an increase in enforcement orders from the Department.

### **2. Installation of fish passage or alternatives at the time of construction, abandonment or fundamental change in permit status**

The Task Force recommendation contains the basic premise that fish passage would be required for both new and existing artificial obstructions, which include dams, diversions and culverts. Under certain limited circumstances described below (Section 4) the passage requirement may be waived or exempted. The Task Force believed that for any new obstruction, the cost of fish passage or alternatives would be built in to the cost of the project from the outset and included in

whatever financing arrangements were made. The most difficult area for the Task Force was to determine how to find a practicable way to get fish passage in existing obstructions that do not have a legal waiver of the passage requirement. To this end, the group set out to establish certain events or opportunities that would both logically and financially be best suited for the requirement of fish passage to apply. After much discussion and exploration, the Task Force determined events that would "trigger" the requirement for fish passage. These events include: "construction", "abandonment", or a fundamental change in permit status of any artificial obstruction.

"Construction" was purposefully defined to include original construction, major replacement, or structural modifications that increase storage or diversion capacity. For culverts it means culvert or roadbed installation or replacement. Major replacement was used to refer to a true replacement of a large portion of the original diversion structure, such as would occur following a catastrophic failure of the original facility. Construction was not intended to refer to upgrades of an existing facility undertaken solely for the purposes of increasing dam safety, for example seismic upgrades or spillway enhancements or enlargements. Structural modifications, to become a trigger for fish passage, must increase the storage or diversion capacity of a given obstruction, not simply be a maintenance repair or a modification for public safety requirements.

The Task Force chose these triggers because it assumed an owner or operator could most easily build the costs of fish passage into the costs of a major structural upgrade, original or replacement construction, or a request for a significant change to the obstruction's permit (such as seeking a license, re-license, reauthorization or new water rights). When these events occur, fish passage is to be constructed at the owner/operator's expense. Costs would have to be built in before an owner or operator could abandon an obstruction.

### **3. Determination of presence of migratory native fish**

Prior to the occurrence of any of these "triggers", the owner or operator must obtain a determination from the Department as to whether migratory native fish are or historically have been present in the body of water affected by the obstruction. If they are, the owner or operator must submit a proposal for fish passage or alternatives to passage to ODFW. Approval of the plans for passage must be obtained prior to proceeding with the action. It is anticipated that at this stage negotiations between the Department and the owner/operator will take place. Indeed, the Task Force recommendation requires the Department to seek cooperative partnerships, and encourages negotiation of the terms and conditions of passage or alternative requirements. Equitable factors are to be considered in this negotiation. The Task Force had considerable discussion about the equity of requiring owners or operators of older existing structures that thought they had been given permission to build without fish passage to now install passage. Since the circumstances existing at the time such projects were built vary considerably, and the documentation of approvals may or may not be clear, consideration should be given on a case by case basis. If no legal waiver exists, the equities of the situation, in the context of the purpose of

the project, the difficulties and costs of retrofitting will all have to be considered in determining the required passage or alternatives.

The Task Force expects that, as a matter of practical application, the Department will develop a simple action plan with each existing artificial obstruction for which it is seeking fish passage or alternatives to passage. A specific time line for compliance should be within the action plan. To the extent feasible, the State should coordinate its review and requirements with those of the Federal agencies reviewing for compliance with Endangered Species Act.

#### **4. ODFW inventory of existing artificial obstructions and prioritization of enforcement actions**

The Task Force recommends that, as a first step, the Oregon Department of Fish and Wildlife complete and maintain a statewide inventory of artificial obstructions. The group agreed that information is needed regarding the number and extent of fish passage problems in the state in order to prioritize enforcement action based on the needs of migrating fish populations. This information should include: the proposed statewide inventory and an evaluation of existing barriers to fish passage, the fish species impacted, the extent of lost fish habitat, opportunities to restore fish passage, and other important biological and economic factors.

Once the inventory and evaluation have been completed, the Task Force recommends that the Department prioritize its enforcement actions and funding efforts based on the degree of impact of the artificial obstruction on the migrating fish, the biological status of the stocks in question and other factors established by rule. This prioritization will not only help guide the agency's efforts, but also will provide a level of certainty to owners and operators of artificial obstructions as to when and where such efforts will be focused. The Task Force recommends this focused guide to ODFW efforts as a practical solution to making real progress on priority obstructions. Prioritization will serve as a guide for directing available funding, as well as a guide to well-meaning owner/operators in their efforts to come into voluntary compliance with the overall policy of fish passage. It will not affect owners' or operators' responsibility to address fish passage when a "trigger" event occurs.

The Task Force noted that a survey a few years ago listed a number of state hatcheries that block passage to native migratory fish. The Task Force believes that ODFW should set an example for other project owners/operators by resolving existing passage problems at state hatcheries or providing mitigation that provides a net benefit to native migratory fish within a reasonable period of time. These state owned obstructions should be included in the prioritization process.

The Task Force also acknowledged the historical waiver or non-enforcement of fish passage requirements that resulted in numerous dams and diversions without fish passage. These dams and diversions need to be reviewed to ascertain which have truly been granted a waiver and/or have provided the required alternatives so that no future requirements should apply, and those

which may have been "overlooked" or predate the types of requirements necessitated by current conditions.

The Task Force anticipates that the department will maintain a list of dams and diversions that have been approved as having adequate fish passage. Those so listed will not have to be reviewed or subject to any other requirements beyond the monitoring, evaluation and maintenance requirements in current law.

##### **5. Waivers, Exemptions and Alternatives to Fish Passage**

The Task Force recommends that the requirement for fish passage should be waived if alternatives to passage provide a net benefit to fish. The proposed legislation spells out the way the net benefit comparison is made, and that it is based upon conditions as they exist at the time of the comparison. It is expected that this determination would be made at the time of the original permitting for any new obstruction. The determination for an existing obstruction would be made at the time of one of the triggers requiring fish passage, or if the obstruction was on the priority list and a cost share became available. However, the owner or operator of an existing obstruction may petition for a waiver in exchange for agreed upon alternatives at any time. It is expected that the Commission would allow a waiver or alternative mitigation on a showing of net benefit to the habitat quality or quantity within the same watershed or basin ("in-proximity"), which would lead to an increase in the production of migratory native fish. It is intended that the term "basin" used in the definition of "in-proximity" refers to the planning basins as identified by the Water Resources Department.

The Task Force clarified that artificial obstructions without fish passage are exempt from any further fish passage requirements (and therefore not in violation of the law) if the lack of passage has been effectively mitigated (alternatives provided), if the Commission has granted a legal waiver of the requirement, or if the Commission finds there is no benefit to providing fish passage. The recommended statute provides that the Commission may further define by rule what no benefit means, but it is expected to include such things as obstructions that are upstream of other obstructions not permitting passage, or obstructions that have no usable habitat upstream of them. Exemptions other than a permanent legal waiver are to be reviewed every seven years unless they have an established exemption expiration date. Exemptions that are not legal waivers may be amended or revoked on review. This is to take into consideration such situations as an obstruction upstream of another obstruction (whether natural or man-made). If the downstream obstruction is removed or passage provided, then the upstream obstruction may need to provide passage as well.

The department and the owner/operators are encouraged to negotiate the fish passage requirements, including appropriate cost sharing and other equitable factors. The word "equitable" was deliberately used and is intended to be somewhat vague. This vagueness would allow consideration of cost-benefit, logistics, technology, past history of approval without



passage and other factors in light of the overall project purpose, when negotiating the conditions or alternatives to passage.

The owner or operator is responsible for maintaining, monitoring and evaluating the effectiveness of passage or alternatives to passage. The Task Force expects that the requirements will make the applicant accountable to the goals of mitigation, and they will be expected to use adaptive management to achieve and maintain the net benefit standard in quantifiable goals such as habitat units.

**6. Installation of fish passage or alternatives at any existing artificial obstruction when the Commission determines that an emergency exists, which because of adverse impacts to a fish population, calls for immediate action**

The Task Force recommends that the Fish and Wildlife Commission be given authority to require installation of fish passage at the owner/operator's expense if a population of native migratory fish is adversely impacted, the impact is materially related to or affected by the artificial obstruction, and immediate action is necessary. This emergency authority would apply at any artificial obstruction whether or not it has met one of the above triggers or would otherwise qualify under the cost share provisions described below.

The Task Force acknowledged that an "emergency" declaration is to be limited to situations that are posing a critical danger to a migratory native fish population because of the lack of passage. These rules apply to "passage emergencies" related to the structure. Task Force members felt that under certain unforeseen circumstances directly related to or affected by an artificial obstruction, the Commission should have the authority to require fish passage at the owner/operator's expense if a population of migratory fish were believed to be adversely impacted. Task Force members also felt strongly that this authority should not be used as a method for avoiding the cost share provisions of the proposed statute that are noted below. It is not intended to make a project ineligible for cost share or outside funding, but rather to provide a means of action when biologically needed and when cost share funding may not be readily available. The Association of Oregon Counties remains concerned that funding issues related to an emergency declaration will raise Measure 30 concerns (unfunded mandates).

**7. Cost Sharing Opportunities for Existing Priority Obstructions if Passage is Deemed Necessary and no "Trigger" has been Met**

As a practical approach for achieving the policy of fish passage, the Task Force recommends that the Fish and Wildlife Commission be allowed to require fish passage at existing priority obstructions if it can find funds (from any source other than the owner/operator) to help share 60% or more of the cost of providing fish passage facilities or alternatives to fish passage. This required cost sharing provision in the proposed statute applies only to those artificial obstructions that are on the Department's priority list, and have a water right or were lawfully constructed pursuant to whatever land use or other regulatory measures that applied at the time of

construction, and are not subject to the triggering events or emergency declaration noted above. Lack of cooperation will cause forfeit of the cost share opportunity. An owner or operator of a legally constructed artificial obstruction may voluntarily opt into the cost share provisions even if his/her obstruction is not on the priority list.

This cost share portion of the proposed statute is intended to provide an incentive to owners and operators for building fish passage facilities at their obstructions. It is also intended to foster the cooperation and collaboration that the Task Force suggests is necessary to achieve the overall goal of fish passage on a statewide basis. The cost share aspects of the proposed statute are intended to create a balance between the importance of the state's outright enforcement of its laws with the need for voluntary compliance with those same laws. It is anticipated that obstructions listed on the priority list would be eligible for funding sources (such as OWEB grants) prior to any enforcement action.

After much discussion and debate, the Task Force recommends the cost sharing approach as the only viable means of achieving success of any statewide fish passage program. Members noted the reality that some older obstructions are not going to be retrofitted for fish passage until there is financial assistance available and the equitable argument that some may have pre-dated the types of requirements necessitated by current conditions. Fortunately, the Department expects to access such funding through federal and other programs, with proper budget limitation granted by the legislature. The Association of Counties remains concerned that funding issues may raise Measure 30 (unfunded mandates) concerns, and is not completely comfortable with the language regarding the cost share (lower than is typical for culvert construction).

#### **8. Installation of fish passage or alternatives required at owner/operator expense at all other existing artificial obstructions**

Any artificial obstructions that are not covered in any of the above categories may be ordered to install fish passage or alternatives at the owner or operator's expense. The direction to the Department to focus its enforcement efforts at obstructions on its priority list still applies. This overall provision is intended to catch any obstructions that were constructed without fish passage in a clearly unlawful manner. This would include those that did not get water rights, did not obtain appropriate permits, etc. It reiterates the basic policy that fish passage is required at all artificial obstructions.

#### **9. Hydroelectric projects**

The Fish Passage Task Force had members who also serve on the Task Force on Hydroelectric Issues established under section 39, chapter 449, Oregon Laws 1997. These members formed a sub-committee to address issues affecting hydroelectric projects, and discussed fish passage issues with the Hydro Task Force. The Fish Passage Task Force incorporated recommendations of the sub-committee into the proposed statute that would allow integration of fish passage review with the current state and federal re-licensing processes. The Task Force



recommendation is not intended to weaken the state's Hydroelectric Application Review Team (HART) process. A unified state position is still the goal of the state's involvement in Federal Energy Regulatory Commission (FERC) licensing. Furthermore, the Task Force recognizes the importance of the timing of the Commission decision to grant a waiver for fish passage on FERC licensed projects. ODFW staff involved with the HART processes are encouraged to work with the FERC applicant to get Commission action on a waiver early enough in the development of a unified state position that other issues important to the state are given maximum opportunity to be resolved in the conditions requested by the state in the new FERC license.

The recommended statute recognizes that federally licensed hydroelectric projects are exempt from this statute "to the extent preempted under federal law by the Federal Power Act or by the laws governing projects located on bi-state waters." Task Force members disagree over the extent of federal preemption in the area of federally licensed hydroelectric projects, recognizing that the extent of federal preemption is presently uncertain and may be subject to court interpretation. The Task Force does agree that the exemption acknowledged in the proposed statute is intended to apply only to the extent that federal law actually does preempt the state's regulatory authority over such projects. The Task Force encourages the mutual resolution of the issues surrounding fish passage rather than engaging in disputes regarding preemption.

Idaho Power Company believes that the area of regulation covered by this authority is subordinate to the Federal Power Act and that such preemption should be clearly reflected in the statute itself. Specifically, Idaho Power believes that the authority given the Federal Energy Regulatory Commission (FERC) under the Federal Power Act with respect to navigable streams, as discussed in First Iowa Hydroelectric Coop vs. Federal Power Commission, 328 US 152, 66 S.Ct. 906 (1946) fully occupies this area of regulation. There is not consensus on this issue. Therefore, Idaho Power has asked that this Legislative Report reflect its position concerning preemption. Subject to this position, and retaining the right to challenge, on a constitutional basis, this bill or any part hereof should it become law, Idaho Power Company does not object to this proposed legislation as currently drafted.

#### **10. Fish Passage Task Force**

Finally, the Task Force recommends that a standing advisory "Fish Passage Task Force", similar to the existing task force for the ODFW fish screening program (ORS 496.085), be established to advise the Department and Commission in rule-making, funding, and other program matters related to fish passage. It is anticipated that there will be a wide range of issues on which the input of an outside group familiar with the practical application and competing interests would be of considerable assistance to the department in achieving the goals of actually expanding and improving fish passage in the state.

The Task Force discussed the possibility of combining this fish passage task force with the current fish screening task force, but decided to recommend a separate task force with the idea that the two could be combined later if the department and the task forces feel it would save

resources to do so. It was recognized that both task forces have considerable issues to cover and, even though there is some overlap, adding fish passage to the duties of the fish screening task force would considerably expand its workload.

## **CONCLUSION**

Protecting Oregon's migratory native fish continues to be an important issue for Oregonians just as it was prior to statehood. The diversity of interests represented on this 2000-2001 Fish Passage Task Force made it clear that finding a practical way to protect these fish is a necessary step in the state's evolution. Members of the Task Force, while not agreeing on all issues all the time, were dedicated to the notion of finding a common sense and common ground solution that meets the challenge of protecting species, while making advances in the 21<sup>st</sup> Century.

With that in mind, the members of the 2000-2001 Fish Passage Task Force respectfully submit this report and its recommendations to the 71<sup>st</sup> Oregon Legislature as a consensus of its members.

**APPENDIX IV.**

**MEMO ON FISH PASSAGE HISTORY**

**DEPARTMENT OF JUSTICE**  
**INTEROFFICE MEMO**

DATE: March 15, 2001

TO: Steve Sanders, AAG

FROM: David Taylor, Paralegal 2  
 Natural Resources Section

SUBJECT: History of Laws Governing Fish Passage in Oregon

Oregon laws mandating fish passages over obstructions date back before statehood. On August 14, 1848, the United States Congress established the territorial government of Oregon. *An Act to Establish the Territorial Government of Oregon*, Section 1 (reprinted in *Organic and Other General Laws of Oregon*, p. 52 (Deady and Lane, 1843-72) and in *Statutes at Large and Treaties of the United States of America*, 9 Stat. 323). The Act provides "[t]hat the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams." *Id.* at Section 12.

The Oregon Constitution was approved in 1857 and went into effect on February 14, 1859. Oregon Constitution Article XVIII, Section 7 provides that all laws in force in the Territory of Oregon when the Oregon Constitution took effect continue until altered or repealed. The fish passage requirements enacted by Congress therefore remained in effect.

From statehood through the present, the Oregon legislature passed laws governing fish passage.<sup>1</sup> Early criminal statutes required any "person or corporation" constructing dams or obstructions to provide for fish passage, defining "person" to include corporations.<sup>2</sup>

In the 1890's, however, the legislature passed acts making fish passage requirements and their enforcement less clear. In 1895, the legislature charged the state's Fish and Game Protector with enforcement of fish passage requirements.<sup>3</sup> At the same time, however, the legislature gave the Commissioner of Fisheries the duty to require construction of fishways in all streams used by salmon for spawning.<sup>4</sup>

<sup>1</sup> See, General Laws of Oregon, ch VIII, §700 (Deady & Lane 1843-1874); Annotated Laws of Oregon, v I, ch VII, title II, §1950 (Lane 1892); General Laws of Oregon, HB 40, §7, p 102 (Leeds, 1895); The Codes and Statutes of Oregon, v II, title XXXVI, ch LXXVI, §4085 (Bellenger & Cotton, 1901); Lord's Oregon Laws, v II, title XXXVIII, ch V, §5288, p 1970 (1910); Oregon Laws, v II, title XLII, ch I, §7496, p 2963 (1920); Oregon Code Annotated, §39-427 (1930); OCLA §82-426 (1940); Or Laws 1955, ch 707, §§44, 49; Or Laws 1973, ch 723, §101.

<sup>2</sup> General Laws of Oregon, ch VIII, §§700, 781 (Deady & Lane 1843-1874).

<sup>3</sup> General Laws of Oregon, §23, p. 96 (1895).

<sup>4</sup> General Laws of Oregon, §7, p. 102 (1895).

Steve Sanders, AAG  
 March 15, 2001  
 Page 2

From 1901 to 1910, the legislature split the regulation of game and food fish, charging the Game and Forestry Warden with regulation of game fish and the Fish Commission with commercial fishing oversight.<sup>5</sup>

From 1911 to 1920, the legislature consolidated fish passage enforcement for both food and game fish under the Fish and Game Commission.<sup>6</sup>

In 1921, the legislature again split regulation of game and food fish, with the Game Commission overseeing regulation of game fish and the Fish Commission regulating food fish.<sup>7</sup> The statutory distinction between game fish and food fish has remained in effect through today.

With this split, the legislature also created different provisions for fish passage requirements. Game fish statutes made it "unlawful for any person to construct any \* \* \* artificial obstruction across any stream in this state frequented by \* \* \* game fish[.]"<sup>8</sup> Game fish statutes defined "person" to include "any \* \* \* individuals, firms, partnerships or corporations."<sup>9</sup> The game fish provisions did not authorize the Game Commission to waive fish passage requirements.<sup>10</sup> Food fish statutes, however, appeared to authorize the Fish Commission to waive the requirement where dam construction would make fish passage impracticable.<sup>11</sup> In return, the dam builder would convey land to the state for a fish hatchery.<sup>12</sup>

In the early 1950s, Fish passage requirements were recodified for game fish at ORS 498.730 and food fish ORS 509.605.<sup>13</sup> In 1955, the legislature amended ORS 509.640 to clarify that the Fish Commission could accept a hatchery in lieu of a fishway for food fish.<sup>14</sup>

In 1963, food fish statutes were amended to provide that no "municipal corporation, political subdivision or governmental agency" could construct an artificial obstruction without providing fish passage" unless permitted by statute.<sup>15</sup> This change was based on the agency's understanding that governmental entities were not included within the definition of persons.

In 1965, the legislature amended both food and game fish statutes regarding pre-construction approval of dams. Under food fish statute revisions, builders had the burden of obtaining pre-construction approval of fish passage.<sup>16</sup> Game fish amendments did not place the burden on dam builders, instead simply authorizing the Game Commission to inspect the dam's plans and specifications before construction to determine whether passage was required.<sup>17</sup>

<sup>5</sup> The Codes and Statutes of Oregon, v II, title XXXVI, ch LXXVI, §4085 (Bellenger & Cotton, 1901); Lord's Oregon Laws, v II, title XXXVIII, ch V, §5288, p 1970 (1910); Report of the Legislative Interim Committee on Natural Resource Agencies, p. 26 (October 15, 1960).

<sup>6</sup> Oregon Laws 1913, ch 232, §43.

<sup>7</sup> Oregon Laws 1921, chs 105, 153.

<sup>8</sup> Oregon Laws 1921, ch 153, §62.

<sup>9</sup> Oregon Laws 1921, ch 153, §2(n).

<sup>10</sup> Oregon Code Annotated, §39-427 (1930), recodified at OCLA §82-426 (1940).

<sup>11</sup> Oregon Laws 1921, ch 105, §49.

<sup>12</sup> Oregon Code Annotated, §§ 40-215, 40-216 (1930), recodified at OCLA §§83-314, 83-316 (1940).

<sup>13</sup> Oregon Laws 1955, ch 707, §§44, 49.

<sup>14</sup> Oregon Laws 1955, ch 707, §54.

<sup>15</sup> Oregon Laws 1963, ch 178.

<sup>16</sup> Oregon Laws 1965, ch 570, §131.

<sup>17</sup> Oregon Laws 1965, ch 167.

The legislature revised food and game fish provisions again in 1973. Game fish provisions (ORS 498.730) were repealed and replaced by ORS 498.268 (requiring fish passage for game fish "in such location and of such design as the [Fish] commission determines will provide adequate passage[.]").<sup>18</sup> In 1995, ORS 498.268 was renumbered to the current ORS 498.351. The 1973 changes to ORS 509.605 simply referenced the changes to the game fish statute.<sup>19</sup>

After the 1950's, the commission did not strictly enforce the fish passage requirements, although it is not perfectly clear why. Evidently, staff thought that compliance with the chapter 509 fish passage requirements (that allowed the operator of a facility to provide hatchery production in place of passage) also satisfied the requirements of chapter 498 (that did not allow hatcheries to substitute for passage). In some cases, the records do not show why the staff waived the fish passage requirements. In 1996, the Department of Justice advised the commission that compliance with one set of statutes did not automatically satisfy the other statutory fish passage requirements, and that the staff did not have authority to waive fish passage requirements.

In 1997, the legislature temporarily amended fishway statutes to grant the State Fish and Wildlife Commission authority to waive food or game fish passage requirements in lieu of alternative mitigation and formed a fish passage task force to prepare a proposal to update the fish passage laws.<sup>20</sup> The 1999 legislature extended the sunset provision of the 1997 legislation until June 30, 2001. The task force prepared the draft legislation to which this legislative report is attached.

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<sup>18</sup> Oregon Laws 1973 ch 723, §101.

<sup>19</sup> Oregon Laws 1973, ch 23, §123.

<sup>20</sup> Oregon Laws 1997, ch 730.

## ADMINISTRATIVE RULES

(2) The Department may initiate civil proceedings to recover damages as authorized by ORS 506.720 where the value of any food fish unlawfully taken exceeds \$300, except for food fish taken by trawl in the groundfish fishery where the trip limit has not been exceeded by more than 15%.

Stat. Auth.: ORS 506.119

Stats. Implemented: ORS 506.109 & 506.720

Hist.: FWC 160, f. & ef. 11-25-77; FWC 18-1978, f. & ef. 4-7-78, Renumbered from 635-036-0605; FWC 33-1982, f. & ef. 6-2-82; FWC 9-1988, f. & cert. ef. 3-3-88; DFW 6-2003, f. 1-21-03, cert. ef. 2-1-03; DFW 3-2004, f. 1-14-04, cert. ef. 2-1-04; DFW 1-2005, f. & cert. ef. 1-7-05; DFW 1-2005, f. & cert. ef. 1-7-05; DFW 1-2006, f. & cert. ef. 1-9-06

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**Rule Caption:** Adoption of fish passage rules to define requirements and to clarify and streamline process.

**Adm. Order No.:** DFW 2-2006

**Filed with Sec. of State:** 1-9-2006

**Certified to be Effective:** 1-9-06

**Notice Publication Date:** 12-1-05

**Rules Adopted:** 635-412-0005, 635-412-0015, 635-412-0035, 635-412-0040

**Rules Amended:** 635-412-0020, 635-412-0025

**Subject:** It is the policy of the State to provide for upstream and downstream passage for native migratory fish. Consistent with this purpose, these rules address statutory needs, establish criteria for fish passage and alternatives to fish passage, streamline the fish passage approval process, and provide clarification of actions (i.e., "triggers") that require an owner or operator of an artificial obstruction to address fish passage.

**Rules Coordinator:** Tina Edwards—(503) 947-6033

#### 635-412-0005

##### Definitions

(1) For the purposes of OAR 635-412-0010 through 635-412-0040 the following definitions shall apply.

(2) "Active channel width" means the stream width between the ordinary high water lines, or at the channel bankfull elevation if the ordinary high water lines are indeterminate.

(3) "Artificial obstruction" means any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.

(4) "Attraction flow" means the flow that emanates from or near a fishway entrance in sufficient quantity, velocity, and location to attract upstream migrants into the fishway, which can consist of gravity flow from the fish ladder and auxiliary water system flow added in or near the lower ladder.

(5) "Bankfull elevation" means the point on a stream bank at which overflow into a floodplain begins.

(6) "Bed" or "bed and banks" means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and on bays and estuaries by the limits of the highest measured tide.

(7) "Channel" means a waterway that periodically or continuously contains moving waters of this state and has a definite bed and banks that serve to confine the water.

(8) "Commission" means the Oregon Fish and Wildlife Commission.

(9) "Construction" means:

(a) Original construction;

(b) Major replacement, which includes:

(A) for dams and diversions, excavation or replacement of 30 percent by structure volume of the dam, including periodic or seasonal replacements, unless:

(i) Only checkboards are replaced; or

(ii) Fish passage approval has already been obtained in writing from the Department for expected replacement.

(B) For tide gates and flood gates:

(i) Cumulative replacement of over 50 percent of the gate material; or

(ii) Cumulative removal, fill, replacement, or addition of over 50 percent of the structure supporting the gate, excluding road-stream crossing structures.

(C) For dikes, berms, levees, roads, or other artificial obstructions that segment estuaries, floodplains, or wetlands:

(i) Activities defined under OAR 635-412-0005(9)(d) in all locations where current channels cross the artificial obstruction segmenting the estuary, floodplain, or wetland; or

(ii) The cumulative removal, fill, replacement, or addition of over 50 percent by volume of the existing material directly above an historic channel or historically-inundated area; and

(D) For other artificial obstructions, the cumulative removal, fill, replacement, or addition of over 50 percent of the structure comprising the artificial obstruction to native migratory fish migration;

(c) Structural modifications that increase storage or diversion capacity; or

(d) For purposes of culverts, installation or replacement of a roadbed or culvert, further defined as:

(A) Roadbed installation or replacement at culverts includes any activity that:

(i) Creates a road which crosses a channel;

(ii) Widens a roadfill footprint within a channel; or

(iii) Fills or removes over 50 percent by volume of the existing roadbed material directly above a culvert, except when this volume is exclusively composed of the top 1 foot of roadbed material.

(B) Culvert installation or replacement includes any activity that:

(i) Installs or constructs a new culvert, overflow pipe, apron, or wing-wall within a channel;

(ii) Extends existing culverts, aprons, or wingwalls within a channel, except one-time placements of culvert ends which do not extend greater than 1 foot beyond the adjacent road footprint in place prior to August 2001;

(iii) Cumulatively through time makes significant repairs or patches to over 50 percent of the linear length of a culvert;

(iv) Replaces any part of a culvert, except ends which become misaligned or eroded and which are replaced to their original configuration;

(v) At any point along the linear length of a culvert, reduces the entire inside perimeter of the culvert; or

(vi) Makes replacements, repairs, patches, or modifications to an existing culvert that are different than the original configuration and which reduce any level of fish passage for native migratory fish with current access, as determined by the Department, to the culvert.

(10) "Dam" means a structure, or group of structures with different functions, spanning or partially-spanning a stream in one location in order to pool water, facilitate the diversion of water, or raise the water surface elevation.

(11) "Department" means the Oregon Department of Fish and Wildlife.

(12) "Director" means the Director of the Oregon Department of Fish and Wildlife.

(13) "Design streamflow range" means the range of flows within a stream, bracketed by the Low Fish Passage Design Flow and the High Fish Passage Design Flow, for which a fishway shall provide fish passage.

(14) "Emergency" means unforeseen circumstances materially related to or affected by an artificial obstruction that, because of adverse impacts to a population of native migratory fish, requires immediate action.

(15) "Estuary" means a body of water semi-enclosed by land and connected with the open ocean within which salt water is usually diluted by fresh water derived from the land. "Estuary" includes all estuarine waters, tidelands, tidal marshes and submerged lands extending upstream to the head of tidewater. However, for the purposes of these rules, the Columbia River Estuary extends to the western edge of Puget Island.

(16) "Exclusion barrier" means a structure placed that prevents fish passage for the benefit of native migratory fish.

(17) "Experimental fish passage structure" means a fish passage structure based on new ideas, new technology, or unique, site-specific conditions determined by the Department to not be covered by existing fish passage criteria but to have a reasonable possibility of providing fish passage.

(18) "Fish passage" means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, and without physical or physiological injury upstream and downstream of an artificial obstruction.

(19) "Fish passage structure" means any human-built structure that allows fish passage past an artificial obstruction, including, but not limited to, fishways and road-stream crossing structures such as culverts and bridges.

(20) "Fishway" means the set of human-built and/or operated facilities, structures, devices, and measures that together constitute, are critical to the success of, and were created for the sole purpose of providing upstream fish passage at artificial or natural obstructions which create a discontinuity between upstream and downstream water or bed surface elevations.

(21) "Fishway entrance" means the component of a fishway that discharges attraction flow into the tailrace and where upstream migrant fish enter the fishway.



## ADMINISTRATIVE RULES

(22) "Fishway pools" means discrete sections within a fishway separated by overflow weirs or non-overflow walls that create incremental water surface elevation gains and dissipate energy.

(23) "Floodplain" means that portion of a river valley, adjacent to the channel, which is built of sediments deposited during the present regimen of the stream and which is covered with water when the waterway overflows its banks at flood stage.

(24) "Forebay" means the water impounded immediately upstream of an artificial obstruction.

(25) "Fundamental change in permit status" means a change in regulatory approval for the operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not including water right transfers or routine maintenance permits unless they involve construction or abandonment of an artificial obstruction.

(26) "High fish passage design flow" means the mean daily average stream discharge that is exceeded 5 percent of the time during the period when the Department determines that native migratory fish require fish passage.

(27) "Historically" means prior to 1859 (statehood).

(28) "Inflow" means surface movement of waters of this state from a lower ground surface elevation to a higher ground surface elevation or away from the ocean.

(29) "In-proximity" means within the same watershed or water basin, as defined by the Oregon Water Resources Department, and having the highest likelihood of benefiting the native migratory fish populations, as defined by the Oregon Department of Fish and Wildlife, directly affected by an artificial obstruction.

(30) "Low fish passage design flow" means the mean daily average stream discharge that is exceeded 95 percent of the time, excluding days with no flow, during the period when the Department determines that native migratory fish require fish passage.

(31) "Mitigation" means alternatives to providing fish passage at an artificial obstruction as per ORS 509.585.

(32) "Native migratory fish" means native fish (as defined under OAR 635-007-0501) that migrate for their life cycle needs. These fish include all sub-species and life history patterns of the following species listed by scientific name in use as of 2005. Common names are provided for reference but are not intended to be a complete listing of common names, sub-species, or life history patterns for each species.

- (a) *Acipenser medirostris* — Green Sturgeon;
- (b) *Acipenser transmontanus* — White Sturgeon;
- (c) *Amphistichus rhodotus* — Redtail surfperch;
- (d) *Catostomus columbianus* — Bridgelip sucker;
- (e) *Catostomus luxatus/Deltistes luxatus* — Lost River sucker;
- (f) *Catostomus macrocheilus* — Largescale sucker;
- (g) *Catostomus microps* — Modoc sucker;
- (h) *Catostomus occidentalis* — Goose Lake sucker;
- (i) *Catostomus platyrhynchus* — Mountain sucker;
- (j) *Catostomus rrimiculus* — Klamath smallscale sucker;
- (k) *Catostomus snyderi* — Klamath largescale sucker;
- (l) *Catostomus tahoensis* — Tahoe sucker;
- (m) *Catostomus warnerensis* — Warner sucker;
- (n) *Chasmistes brevirostris* — Shortnose sucker;
- (o) *Hypomesus pretiosus* — Surf smelt;
- (p) *Lampetra ayresi* — River lamprey;
- (q) *Lampetra lethophaga* — Pit-Klamath lamprey;
- (r) *Lampetra minima* — Miller Lake lamprey;
- (s) *Lampetra similes* — Klamath River lamprey;
- (t) *Lampetra tridentata* — Pacific lamprey;
- (u) *Oncorhynchus clarki* — Coastal, Lahontan and West Slope cutthroat trout;
- (v) *Oncorhynchus keta* — Chum salmon;
- (w) *Oncorhynchus kisutch* — Coho salmon;
- (x) *Oncorhynchus mykiss* — Steelhead, Rainbow and Redband trout;
- (y) *Oncorhynchus nerka* — Sockeye/Kokanee salmon;
- (z) *Oncorhynchus tshawytscha* — Chinook salmon;
- (aa) *Prosopium williamsoni* — Mountain whitefish;
- (bb) *Ptychocheilus oregonensis* — Northern pikeminnow;
- (cc) *Ptychocheilus umpqua* — Umpqua pikeminnow;
- (dd) *Salvelinus confluentus* — Bull trout;
- (ee) *Spirinchus thaleichthys* — Longfin smelt;
- (ff) *Thaleichthys pacificus* — Eulachon.

(33) "Net benefit" means an increase in the overall, in-proximity habitat quality or quantity that is biologically likely to lead to an increased number of native migratory fish after a development action and any subsequent mitigation measures have been completed.

(34) "Ordinary high water line" (OHWL) means the line on the bank or shore to which the high water ordinarily rises annually in season.

NOTE: see OAR 141-085-0010 for physical characteristics that can be used to determine the OHWL in the field.

(35) "Oregon Plan" means the guidance statement and framework described in ORS 541.405.

(36) "Over-crowding" means fish density within a pool's wetted volume is such that there is less than 0.25 cubic feet of water per pound of fish for the maximum number of fish expected to be present within the pool at the same time, as determined by the Department.

(37) "Road" means a cleared or built surface, and associated materials or measures for support and safety, used for the purpose of motorized or non-motorized movement between different locations.

(38) "Roadfill footprint" means the area occupied by soil, aggregate, and/or other materials or structures necessary to support a road, including, but not limited to, appurtenant features such as wing walls, retaining walls, or headwalls.

(39) "Stream" means a body of running waters of this state moving over the surface of the land in a channel or bed including stream types classified as perennial or intermittent and channelized or relocated streams.

(40) "Sub-basin" means a 4th-field hydrologic unit as defined by the U.S. Geological Survey.

(41) "Tailrace" means the water immediately downstream of an instream structure.

(42) "Temporary" means in place less than the in-water work period defined by the Department for a particular location.

(43) "Trap" means the set of human-built and/or operated facilities, structures, devices, and measures that hold fish and prevent them from passing volitionally.

(44) "Unforeseen circumstances" means:

(a) An event that causes an existing human-made structure in the waters of the state which provides fish passage to become an artificial obstruction; or

(b) New fish population information indicating that an existing artificial obstruction is placing a local native migratory fish population in jeopardy.

(45) "Volitionally" means with minimal delay and without being trapped, transferred, or handled by any person, unless specifically allowed under OAR 635-412-0035(6).

(46) "Waters of this state" means natural waterways including all tidal and non-tidal bays, intermittent and perennial streams, constantly flowing streams, lakes, wetlands and other bodies of water in this state, navigable and non-navigable, including that portion of the Pacific Ocean that is within the boundaries of Oregon.

(47) "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.

Stat. Auth.: ORS 496.138

Stats. Implemented: ORS 509.580, 509.585, 509.610 & 509.625

Hist.: DFW 2-2006, f. & cert. ef. 1-9-06

## 635-412-0015

## Prioritization

(1) The Department shall establish for enforcement purposes a list of priority artificial obstructions at which fish passage would provide the greatest benefit to native migratory fish.

(2) The priority list shall be based on the needs of native migratory fish.

(a) The prioritization shall consider the following factors relative to each artificial obstruction for all native migratory fish currently or historically present at the artificial obstruction:

(A) The quantity of native migratory fish habitat which is inaccessible;

(B) The quality of native migratory fish habitat which is inaccessible;

(C) Unique or limited native migratory fish habitat which is inaccessible, or should remain inaccessible for fish management purposes;

(D) The biological status of the native migratory fish;

(E) The level of fish passage currently provided at the artificial obstruction;

(F) The presence of other artificial obstructions upstream and downstream and the timeframe native migratory fish will be able to utilize restored passage; and

(G) Existing agreements with the Department regarding fish passage.

(b) The prioritization may utilize existing Department information or professional judgment in the absence of information specific to a given site.

(c) The priority list shall contain one artificial obstruction per Oregon sub-basin, which shall be ranked across the state.



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(d) The Department shall field verify the information used for prioritization prior to enforcement actions.

(e) The Department shall re-evaluate the priority list with the most recent information after enforcement occurs at five priority artificial obstructions or as directed by the Commission.

(3) The Commission shall review, approve, or amend the priority list after the initial priority list is developed, when the Department re-prioritizes, and no less frequently than once every five years.

(4) Once the Commission has approved the priority list, the Department may order a person owning or operating an artificial obstruction on the priority list who has been issued a water right, owns a lawfully installed culvert or owns another lawfully installed obstruction to install fish passage or to provide mitigation if:

(a) The Department can arrange for non-owner or non-operator funding of at least 60 percent of the cost for fish passage design, construction, and installation; and

(b) The artificial obstruction is ranked in the top ten for the state or highest within a Department Region on the priority list.

(5) Once the Department has arranged for non-owner or non-operator funding of at least 60 percent of the cost for fish passage design, construction, and installation at an artificial obstruction the owner or operator has two years to:

(a) Install a fish passage structure according to a fish passage plan approved by the Department; or

(b) Provide mitigation that the Commission determines is a net benefit to native migratory fish.

Stat. Auth.: ORS 496.138  
Stats. Implemented: ORS 509.585 & 509.625  
Hist.: DFW 2-2006, f. & cert. ef. 1-9-06

### 635-412-0020

#### Fish Passage Approval

(1) No person shall construct or maintain any artificial obstruction across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without providing passage for native migratory fish.

(2) Prior to construction, fundamental change in permit status or abandonment of an artificial obstruction in any waters of this state, a person owning or operating an artificial obstruction shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters, unless the owner or operator assumes the presence of native migratory fish.

(3) If the Department determines, or the owner or operator assumes, that native migratory fish are or were historically present in the waters, prior to construction, fundamental change in permit status, or abandonment of the artificial obstruction the person owning or operating the artificial obstruction shall either:

(a) Obtain from the Department an approval determination of a fish passage plan that meets the requirements of OAR 635-412-0035 for the specific artificial obstruction.

(b) Obtain from the Department a programmatic approval of a fish passage plan for multiple artificial obstructions of the same type. The Department may also grant programmatic approval to an agent for multiple owners or operators of artificial obstructions of the same type. Programmatic approvals are only valid so long as the owner or operator complies with the conditions of the programmatic approval. The Department shall only provide programmatic approval if:

(A) Fish passage structures placed under the programmatic approval meet criteria determined by the Department;

(B) The owner, operator, or agent demonstrates to the Department prior experience providing or approving acceptable fish passage structures;

(C) The owner, operator, or agent reports installation information annually to the Department, including but not limited to the location and installation date of all fish passage structures placed under the programmatic approval;

(D) The owner or operator allows, or the agent requires owners or operators to allow, the Department to inspect fish passage structures placed under the programmatic approval at reasonable times; and

(E) The owner, operator, or agent agrees to expeditiously remedy all fish passage structures placed under the programmatic approval which the Department finds do not meet the criteria or conditions of the programmatic approval.

(c) Pursuant to ORS 527.710(6), install and maintain road-stream crossing structures on non-federal forestlands in compliance with State Board of Forestry, through the Oregon Department of Forestry, rules and guidelines. These rules and guidelines require concurrence by the Oregon Department of Fish and Wildlife that they meet the purposes of the Department's fish passage program;

(d) Obtain a waiver from fish passage requirements for the artificial obstruction as provided in OAR 635-412-0025; or

(e) Obtain an exemption from fish passage requirements for the artificial obstruction as provided in OAR 635-412-0025.

(4) Fish passage plans shall provide for and be implemented such that fish passage is installed at the artificial obstruction prior to completion of or by the end of the same in-water work period as the action which triggered fish passage requirements under subsection (2), unless:

(a) An owner or operator demonstrates to the Department an imminent or immediate threat to human safety which requires construction at a failed artificial obstruction prior to being able to complete the requirements of subsection (3), and the Department approves a fish passage plan in which the requirements of subsection (3) shall be met by the end of the next in-water work period or as soon as practicable. Providing passage at the time of construction is preferred;

(b) The Commission finds that additional time is necessary and appropriate given the size and scope of the project;

(c) Installation begins within this period and the Department finds that additional time to complete installation is necessary and appropriate given the size and scope of the project; or

(d) The Department finds that additional time is necessary and appropriate as part of the terms and conditions of a negotiated settlement for a federal proceeding, or in coordination with other federal requirements.

Stat. Auth.: ORS 496.138

Stats. Implemented: ORS 509.585 & 509.645

Hist.: DFW 23-2003, f. & cert. ef. 3-26-03; DFW 2-2006, f. & cert. ef. 1-9-06

### 635-412-0025

#### Fish Passage Waivers and Exemptions

(1) Waivers from fish passage requirements shall be granted for an artificial obstruction if the Commission (or Department, as applicable) determines that mitigation rather than fish passage proposed by the person owning or operating the artificial obstruction provides a net benefit to native migratory fish.

(2) Net benefit to native migratory fish is determined by comparing the benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur using the proposed mitigation. To qualify for a waiver of the requirement to install fish passage, mitigation shall result in a benefit to fish greater than that provided by the artificial obstruction with fish passage. The net benefit to fish determination shall be based upon conditions that exist at the time of comparison.

(3) Waivers shall be valid so long as the owner or operator continues to provide the agreed-upon mitigation measures and until the waived artificial obstruction undergoes further construction, a fundamental change in permit status, or abandonment.

(4) The Commission (or Department as applicable) may grant exemptions from fish passage requirements at an artificial obstruction if it is determined that:

(a) A lack of fish passage has been effectively mitigated;

(b) The owner or operator has received a legal waiver for the artificial obstruction from the Commission or the Department; or

(c) There is no appreciable benefit to providing fish passage.

(5) For exemptions granted under subsection (4)(a) and (4)(b), the exemption continues only so long as the original benefit of the mitigation is maintained.

(6) The Commission shall review, at least once every seven years, exempt artificial obstructions that do not have exemption expiration date to determine whether the exemption should continue. The Commission may revoke or amend an exemption if it finds that circumstances have changed such that the basis for the exemption no longer applies. An exemption granted as a result of an action which triggered fish passage requirements under OAR 635-412-0020(2) tolls the trigger event until the exemption is revoked.

(7) To obtain a waiver or an exemption from fish passage requirements, an owner or operator of an artificial obstruction shall obtain from and submit to the Department an application for the waiver or exemption.

(8) Based on application review, verification and site-specific knowledge, Department staff shall provide a written benefit analysis of whether the waiver request meets the requirements of subsection (1) or the exemption request meets the requirements of subsections (4) and (5). If there is some level of fish passage at the artificial obstruction, but it does not meet the requirements of OAR 635-412-0035, that passage shall be factored into the Department's net benefit analysis, allowing a reduction in required mitigation.

(9) To receive a waiver, or an exemption under subsection (4)(a), an owner or operator of an artificial obstruction shall enter an agreement with the Commission (or Department as applicable) that clearly describes timelines, duties, responsibilities, and options regarding the mitigation. The

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agreement shall state that the mitigation shall be completed prior to completion of or by the end of the same in-water work period as the action which triggered fish passage requirements under OAR 635-412-0020(2), unless the Commission finds that additional time is necessary and appropriate:

- (a) Given the size and scope of the project; or
  - (b) To coordinate with requirements of federal proceedings.
  - (10) Once the application, analysis, and a draft agreement are completed, a decision on whether the waiver or exemption shall be granted shall be made by:
    - (a) The Department:
      - (A) If it determines that the total stream distance, including tributaries, affected by the artificial obstruction for which the waiver or exemption is being sought is less than or equal to 1 mile to a natural barrier;
      - (B) If the request is for an exemption under subsection (4)(a) or (4)(b); or
      - (C) For re-authorization of an existing hydroelectric project subject to ORS 543A.030 to 543A.055 and not subject to federal hydroelectric relicensing; and
    - (b) The Commission:
      - (A) In all other instances; or
      - (B) If the Department refers a decision to the Commission; or
      - (C) If the owner or operator files a protest of the Department's determination to the Commission.
  - (11) The decision to grant a waiver or exemption shall include the determination described in subsection (1) or (4) as well as approval of the agreement required in subsection (9).
  - (12) In addition to the Fish Passage Task Force as prescribed in OAR 635-412-0010(4)(e) and (g), the Department shall notify local watershed council(s), local soil and water conservation district(s), identified stakeholders, and others who have expressed an interest in fish passage issues or the specific waiver or exemption request and provide an opportunity to comment on the request at least three weeks prior to a decision on whether the waiver or exemption should be granted.
  - (13) The Commission (or Department, as applicable) may require further public comment prior to a decision on whether a waiver or exemption should be granted.
  - (14) The Department shall maintain a database of the locations of waived and exempted artificial obstructions and mitigation.
- Stat. Auth.: ORS 496.138  
 Stats. Implemented: ORS 509.585 & 509.645  
 Hist.: DFW 23-2003, f. & cert. ef. 3-26-03; DFW 2-2006, f. & cert. ef. 1-9-06
- 635-412-0035**  
**Fish Passage Criteria**
- (1) General requirements for fish passage are:
    - (a) Unless the owner or operator of an artificial obstruction chooses to provide year-round fish passage for all native migratory fish and life history stages, the Department shall determine:
      - (A) Native migratory fish currently or historically present at the site which require fish passage;
      - (B) Life history stages which require fish passage; and
      - (C) Dates of the year and/or conditions when passage shall be provided for the life history stages and native migratory fish.
    - (b) The person submitting the fish passage plan to the Department for approval shall submit all information necessary to efficiently evaluate whether the design will meet fish passage criteria;
    - (c) If site-specific circumstances indicate that the fish passage criteria are not adequate to provide fish passage, the Department may require in writing that additional fish passage criteria be met;
    - (d) If native migratory fish- or site-specific circumstances warrant it, the Department may provide an exception to any specific fish passage criterion if the Department determines in writing that fish passage shall still be provided;
    - (e) All fish passage structures shall be designed to take into consideration their upstream and downstream connection and prevent undesirable impacts to fish passage, including but not limited to scour and headcuts;
    - (f) If joint state and federal approval is required, the Department shall take into account federal requirements during approval;
    - (g) Primarily at sites with little existing site information or questionable design solutions, the Department may require monitoring and reporting to determine if a fish passage structure meets applicable criteria and/or is providing fish passage; and
    - (h) The person owning or operating an artificial obstruction shall maintain the fish passage structure in such repair and operation as to provide fish passage of native migratory fish at all times required by the Department.
  - (2) Requirements for fish passage at dams and other artificial obstructions which create a discontinuity between upstream and downstream water surface or streambed elevations are:

- (a) Fishways shall provide fish passage at all flows within the design streamflow range;
- (b) The fishway entrance shall be located and adequate attraction flow shall be provided at one or more points where fish can easily locate and enter the fishway;
- (c) Fishway water velocities shall:
  - (A) Range between 1 and 2 feet per second in transport channels;
  - (B) Average no greater than 5 feet per second in baffled-chute fishways, including but not limited to Alaska steeppasses and denils; and
  - (C) Not exceed 8 feet per second in discrete fishway transitions between the fishway entrance, pools, and exit through which fish must swim to move upstream, including but not limited to slots, orifices, or weir crests.
- (d) At any point entering, within, or exiting the fishway where fish are required to jump to move upstream, the maximum difference between the upstream and downstream water surface elevations shall be 6 inches, except it shall be 12 inches if only salmon or steelhead adults require fish passage;
- (e) In fishway locations through which fish must swim, water depths shall be a minimum of 6 inches where only juveniles require passage and 12 inches where adults require passage, except:
  - (A) Baffled-chute fishways, including but not limited to Alaska steeppasses and denils, shall have a minimum flow depth of 2 feet throughout the length of the fishway; and
  - (B) Water depths shall be a minimum of 2 feet within jump pools which shall be located downstream of any point entering, within, or exiting the fishway where fish are required to jump to move upstream.
- (f) All fishway locations through which fish must swim shall be at least 12 inches wide;
- (g) Fishway pools shall:
  - (A) Be sized according to the native migratory fish and life history stages requiring passage and to avoid over-crowding;
  - (B) Have  $V \geq wQH/4$  at all flows within the design streamflow range, where:
    - (i) "V" is the water volume in cubic feet;
    - (ii) "w" is 62.4, the unit weight of water, in pounds per cubic foot;
    - (iii) "Q" is the fish ladder flow in cubic feet per second;
    - (iv) "H" is the energy head of pool-to-pool flow in feet; and
    - (v) 4 has a unit of foot-pounds per second per cubic foot.
- (C) Where the fishway bends 90 degrees or more, have turning pools with a flowpath centerline double the length of non-turning pools; and
- (D) Be placed at least every 25 feet of horizontal distance in baffled-chute fishways, including but not limited to Alaska steeppasses and denils;
- (h) The fishway exit should be located to minimize the risk of fish unintentionally falling downstream of the artificial obstruction;
- (i) Fishway trash racks shall:
  - (A) Allow for easy maintenance and debris removal;
  - (B) Have a minimum clear space between vertical members of 9 inches, except:
    - (i) 10 inches shall be provided if adult chinook are present; and
    - (ii) At least 4 inches shall be provided if only juveniles are present; and
  - (C) Have a minimum clear space between horizontal members of 12 inches;
- (j) The fishway shall:
  - (A) Have water temperatures which are within 1 degree Fahrenheit of the water entering the fishway;
  - (B) Be designed to assure that fish do not leap out of the fishway;
  - (C) Have all edges and fasteners which fish may contact ground smooth or chamfered;
  - (D) Not have protrusions extend into the flow path of the fishway;
  - (E) Have as much ambient lighting as possible;
  - (F) Have fishway components which are not detailed in OAR 635-412-0035(2), including but not limited to auxiliary water systems, designed considering the most recent National Marine Fisheries Service or U.S. Fish and Wildlife Service fish passage criteria and guidelines; and
  - (G) Meet the species-specific requirements in OAR 635-412-0035(7) if any of those native migratory fish require fish passage.
- (k) Requirements for specific types of fishways include:
  - (A) Baffled-chute fishways, including but not limited to Alaska steeppasses and denils, shall not be used in areas where downstream passage will occur through the baffled-chute fishway;
  - (B) All fishways of a specific type with accepted configurations shall comply with those configurations; and
  - (C) Fish passage plans for stream channel-spanning weirs, roughened channels (including but not limited to nature-like, rock, or engineered-stream fishways), and hybrid fishways (including but not limited to pool-and-chute ladders) which may combine criteria elements of natural streams

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and/or established fishway types (including but not limited to pool-and-weir, vertical slot, and baffled-chute fishways) shall clearly demonstrate how water depths, water velocities, water drops, jump pools, structure sizing, and fish injury precautions shall provide fish passage.

(I) For downstream fish passage:

**NOTE:** fish screening and bypass requirements for diverted water are separate from these requirements.

(A) Fish passage structures shall have an open water surface, except a submerged or enclosed conduit or orifice may be utilized if:

- (i) Acceptable guidance or collection mechanisms are used and kept free from debris;
- (ii) Water depth is greater than 4 inches during all flows;
- (iii) Water velocity is greater than 2 feet per second during all flows;
- (iv) Water is not pumped;
- (v) Conduits have smooth surfaces and avoid rapid changes in direction to preclude fish impact and injury; and
- (vi) Conduits are at least 10 inches wide.

(B) Plunging flow moving past an artificial obstruction via spillways, outlet pipes, or some other means which may contain fish shall:

- (i) At all flows, fall into a receiving pool of sufficient depth, depending on impact velocity and quantity of flow, to ensure that fish and flow shall not impact the stream bottom or other solid features; and
- (ii) Have a maximum impact velocity into a receiving pool, including vertical and horizontal velocity components, less than 25 feet per second; and

(C) Water depth over spillways shall be greater than 4 inches during all flows.

(3) Requirements for fish passage at road-stream crossing structures such as bridges and culverts are:

(a) Stream Simulation Option:

(A) Open-bottomed and closed-bottom road-stream crossing structures shall have beds under or within the structure that:

(i) Are equal to or greater than the active channel width, as measured at sufficient locations outside the influence of any artificial or unique channel constrictions or tributaries both upstream and downstream of the site;

(ii) Are equal to the slope of, and at elevations continuous with, the surrounding long-channel streambed profile, unless the Department approves maintaining a pre-existing road-impounded wetland;

(iii) Have, for open-bottomed road-stream crossing structures, a minimum of 3 feet vertical clearance from the active channel width elevation to the inside top of the structure;

(iv) Maintain average water depth and velocities that simulate those in the surrounding stream channel; and

(v) Are composed of material that:

(I) Assures the bed under or within the road-stream crossing structure is maintained through time;

(II) Is either natural (similar size and composition as the surrounding stream) or supplemented to address site-specific needs including, but not limited to, bed retention and hydraulic shadow;

(III) Contains partially-buried, over-sized rock if the road-stream crossing structure is greater than 40 feet in length;

(IV) Is mechanically placed during structure installation rather than allowed to naturally accumulate, unless the surrounding streambed is primarily bedrock; and

(V) Excluding partially-buried over-sized rock, is, for closed-bottom road-stream crossing structures, at a minimum depth of 20 percent of the structure height and a maximum depth of 50 percent of the structure height; and

(B) Trash racks shall not extend below the active channel width elevation and shall have a minimum of 9 inches clear spacing between vertical members; or

(b) Alternative Option: the Department may approve road-stream crossing structures for which clear justification is provided, based on fish performance and/or fish behavior data and hydraulic conditions, that the alternative design shall provide fish passage.

(4) Requirements for fish passage at artificial obstructions in estuaries, and above which a stream is present, are:

(a) Fish passage shall be provided at all current and historic channels;

(b) Fish passage structures shall meet the criteria of OAR 635-412-0035(2) or (3), except fish passage structures shall be sized according to the cumulative flows or active channel widths, respectively, of all streams entering the estuary above the artificial obstruction; and

(c) Tide gates and associated fish passage structures shall be a minimum of 4 feet wide and shall meet the requirements of OAR 635-412-0035(2) within the design streamflow range and for an average of at least 51% of tidal cycles, excluding periods when the channel is not passable under natural conditions.

(5) Requirements for fish passage at artificial obstructions in estuaries, floodplains, and wetlands, and above which no stream is present, are:

(a) Downstream Fish Passage:

(A) Downstream fish passage shall be provided after inflow which may contain native migratory fish;

(B) Downstream fish passage shall be provided until water has drained from the estuary, floodplain, or wetland, or through the period determined by the Department which shall be based on one, or a combination of, the following:

(i) A specific date;

(ii) Water temperature, as measured at a location or locations determined by the Department;

(iii) Ground surface elevation;

(iv) Water surface elevation; and/or

(v) Some other reasonable measure.

(C) Egress delays may be approved by the Department based on expected inflow frequency if there is suitable habitat and as long as passage is provided by the time the conditions in OAR 635-412-0035(5)(a)(B) occur;

(D) A minimum egress flow of 0.25 cubic feet per second (cfs) at one point of egress shall be provided;

(E) Egress flow of 0.5 cfs per 10 surface acres, for at least the first 100 surface acres of impounded water, shall be provided;

(F) All plunging egress flows shall meet the requirements of OAR 635-412-0035(2)(I)(B);

(G) If egress flow is provided by a pump, it shall be appropriately screened;

(H) The minimum water depth and width through or across the point of egress shall be 4 inches;

(I) The ground surface above the artificial obstruction shall be sloped toward the point(s) of egress to eliminate isolated pools; and

(J) An uninterrupted, open connection with a minimum water depth of 4 inches shall be present from the point of egress to the downstream waters of this state, unless another connection is provided as per OAR 635-412-0035(2)(I)(A).

(b) Upstream Fish Passage: a fishway or road-stream crossing structure with or without a tide gate shall be provided during the period determined by the Department if there is current or historic native migratory fish spawning or rearing habitat within the estuary, floodplain, or wetland area impounded by the artificial obstruction.

(6) Requirements for fish passage at traps are:

(a) A collection permit issued by the Department is required to operate all traps;

(b) Traps shall be constructed to prevent physical or physiological injury to native migratory fish;

(c) Traps shall meet all requirements of OAR 635-412-0035(2)(g);

(d) Traps located within a fishway (i.e., "in-ladder" traps) shall not inhibit native migratory fish from entering the fishway or trap and shall be removed if the Department determines that fish are not entering the trap;

(e) Native migratory fish shall be processed through traps with minimal possible delay and as frequently as necessary to avoid over-crowding;

(f) All native migratory fish, excluding those which have approved take authorization from the Department and which do not require fish passage as per OAR 635-412-0035(1)(a), shall be returned to the stream by one of the following methods:

(A) Movement from the trap to immediately-adjacent water which has fish passage; or

(B) Transport within a watered container, including but not limited to lifts, hoppers, locks, and trucks, from the trap to a location approved by the Commission.

(7) Additional requirements for specific native migratory fish are:

(a) *Acipenser* species (sturgeon):

(A) The fish passage structure shall not require fish to jump when entering, within, or exiting the structure;

(B) The fish passage structure, including trash racks, shall be sized to accommodate the largest individual expected to require fish passage; and

(C) Non-volitional transport within a watered container shall be allowed with Department approval.

(b) *Catostomus* and *Chasmistes* species (suckers):

(A) The fish passage structure shall not require fish to jump when entering, within, or exiting the structure;

(B) Fishways shall have a maximum water velocity of 4 feet per second;

(C) Fishways shall have a minimum water depth of 12 inches;

(D) Fishways shall maximize downstream flow between pools to avoid back eddies;

(E) Fishways shall have curved walls within turning pools; and

(F) Fishways shall have a slope less than 4 percent.

(c) *Lampetra* species (lamprey):

(A) Fishways shall not have overhanging surfaces;



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(B) Fishways shall have rounded or chamfered edge surfaces over which *Lampetra* species may pass;

(C) Fishways shall, in locations with water velocities greater than 2 feet per second, have a passage route that:

(i) Has a smooth, impermeable, uninterrupted surface or a simulated streambed;

(ii) Has water velocities over the structure's surface less than 8 feet per second; and

(iii) Is wetted.

(d) *Oncorhynchus* species (trout and salmon): fish passage structures for *Oncorhynchus keta* (chum) shall not require fish to jump when entering, within, or exiting the structure.

(e) *Ptychocheilus* species (pikeminnow): fish passage structures shall meet the requirements of OAR 635-412-0035(7)(a).

(f) If more than one native migratory fish species requires passage at a site and the requirements for the different species are mutually exclusive, the Department shall determine passage criteria.

(8) Requirements for artificial obstruction removal are:

(a) Artificial obstruction removals shall follow the requirements of OAR 635-412-0035(10);

(b) If not completely removed, no parts of the remaining artificial obstruction shall:

(A) Constrict the stream channel; or

(B) Cause low flow depths less than the surrounding stream channel.

(c) After an artificial obstruction is removed the stream channel shall be restored; and

(d) The stream channel restoration shall address impacts to stream habitat caused by the artificial obstruction while in place and by its removal, including but not limited to upstream and downstream channel degradation, and provisions shall be made to address unexpected fish passage issues resulting from removal.

(9) Requirements for exclusion barriers are:

(a) Exclusion barriers shall only be placed in the following situations, when fish passage is not required or is provided by other means:

(A) To guide fish to an approved fish passage structure or trap;

(B) To prevent fish from leaving waters of this state and entering human-made water supply conduits;

(C) To prevent fish from entering waters of this state associated with operations of another artificial obstruction that could lead to fish injury; or

(D) To achieve other fish management objectives approved in writing by the Department; and

(b) Exclusion barriers shall comply with National Marine Fisheries Service or U.S. Fish and Wildlife Service criteria.

(10) Requirements for fish passage during construction of fish passage structures and periods when temporary artificial obstructions are in place are:

(a) All fish passage structures shall be constructed and temporary artificial obstructions shall be in place only during the site-specific in-water work period defined or approved by the Department;

(b) At times indicated by the Department as per OAR 635-412-0035(1)(a), downstream fish passage shall be provided and:

(A) The outfall of a stream flow bypass system shall be placed to provide safe reentry of fish into the stream channel; and

(B) If downstream fish passage during construction is not required and stream flow is pumped around the site, the site shall meet Department screening and/or bypass requirements.

(c) At times indicated by the Department as per OAR 635-412-0035(1)(a), upstream fish passage shall be provided and shall be based on the wetted-width or flows of the stream during the period of construction or temporary obstruction;

(d) In-stream construction sites shall be isolated from stream flow and fish;

(e) Prior to in-stream construction activities, all fish shall be safely collected, removed from the construction site or de-watered reach, and placed in the flowing stream by an authorized person with a collection permit issued by the Department; and

(f) After construction, the construction site shall be re-watered in a manner to prevent loss of downstream surface water as the construction site's streambed absorbs water.

(11) Requirements for experimental fish passage structures are:

(a) Experimental fish passage structures shall only be allowed in waters of the state after:

(A) Laboratory testing with native migratory fish or similar species indicates that the structure is feasible to provide fish passage;

(B) Field testing with a prototype structure, at a location where existing fish passage will not be compromised and where fish passage does not need to be addressed under OAR 635-412-0020(2) and (3), indicates that the structure is likely to provide fish passage; and

(C) In addition to information needed to evaluate the structure's design for the specific location, the following are submitted to the Department and approved:

(i) A written summary of the laboratory and field testing and how the results indicate that fish passage shall be provided;

(ii) A monitoring and reporting plan to determine if the installed experimental fish passage structure meets applicable design objectives and is providing fish passage; and

(iii) A modification plan for the experimental fish passage structure if monitoring indicates that fish passage is not being provided, including standard thresholds that will initiate these modifications.

(b) If at any time an experimental fish passage structure is deemed by the Department in writing to not provide fish passage, the owner or operator, in consultation with the Department, shall make such modifications to the structure or operation as are necessary to provide fish passage, and, after a reasonable period, if modifications are deemed by the Department in writing to not provide fish passage, a fish passage structure that meets the standard criteria of OAR 635-412-0035 shall be installed as soon as practicable but no later than the end of the next complete in-water work period after notification by the Department;

(c) The owner or operator of an experimental fish passage structure shall allow the Department to inspect experimental fish passage structures at reasonable times;

(d) Five years after the experimental fish passage structure is installed and fish are present to attempt passage a final monitoring report shall be submitted to the Department and the Department shall determine if the experimental fish passage structure provides fish passage;

(e) If the Department determines that the experimental fish passage structure does not provide fish passage, a fish passage structure that meets the standard criteria of OAR 635-412-0035 shall be installed as soon as practicable but no later than the end of the next complete in-water work period after notification by the Department; and

(f) After three experimental fish passage structures of the same design concept are placed in waters of the state and deemed to provide fish passage by the Department, the experimental fish passage structure shall no longer be considered experimental.

Stat. Auth.: ORS 496.138

Stats. Implemented: ORS 509.585 & 509.610

Hist.: DFW 2-2006, f. & cert. ef. 1-9-06

### 635-412-0040

#### Mitigation Criteria

(1) Mitigation shall not be allowed for artificial obstructions located in, or which would prevent access to, "Habitat Category 1" habitat for native migratory fish as described in OAR 635-415-0025(1).

(2) Mitigation options include:

(a) Providing fish passage at another pre-existing artificial obstruction which is not required to address fish passage under OAR 635-412-0015 or 635-412-0020;

(b) Restoration or enhancement of native migratory fish habitat;

(c) Fish management measures to directly increase naturally-producing, wild, native migratory fish populations; and

(d) Other actions specifically approved by the Commission.

(3) Mitigation shall not include any activity that is a requirement or condition of any other agreement, law, permit, or authorization except if it is also for fish passage mitigation of the same action at the artificial obstruction for a different level of government.

(4) Unless a fish passage waiver for a site has already been obtained and mitigation has been provided, mitigation activities shall not be completed prior to a decision regarding a fish passage waiver.

(5) The Department shall approve final mitigation designs in writing prior to implementation.

NOTE: mitigation actions or concepts, absent specific designs, can be approved at the time a waiver decision is made.

(6) Mitigation actions that provide fish passage shall meet the fish passage criteria contained in OAR 635-412-0035.

(7) The Commission may require the posting of a bond or other financial instrument acceptable to the Commission to cover the cost of mitigation actions or providing fish passage at the artificial obstruction if the mitigation action does not achieve its goals.

(8) A person owning or operating an artificial obstruction is responsible for maintaining, monitoring, evaluating the effectiveness of, and reporting on mitigation.

(9) Mitigation:

(a) Shall be conducted in-proximity to the artificial obstruction, with respect to geographic scope;

(b) Shall have habitat type and quality which is more beneficial than that affected by the artificial obstruction, if mitigation is passage into, restoration of, or enhancement of habitat;

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(c) Shall at least benefit the same native migratory fish species affected at the artificial obstruction;

(d) Shall have a clear benefit for those native migratory fish species affected at the artificial obstruction if their status is listed as “threatened” or “endangered” under the state or federal Endangered Species Act;

(e) Shall have standards for monitoring, evaluating, and adaptive management which are approved by the Department, which assure that the goal of the mitigation is achieved and maintained, and which are detailed in the waiver agreement required in OAR 635-412-0025(9);

(f) Shall be considered if the owner or operator of the artificial obstruction believes the feasibility of fish passage at the artificial obstruction is less than that for mitigation;

(g) May require quantification of baseline conditions before a decision regarding a fish passage waiver is made in situations with no existing information, which require recent information, or which have no clear benefit;

(h) Shall attempt to restore or enhance historic conditions;

(i) To the extent possible, shall be consistent with existing native migratory fish or watershed management plans;

(j) May qualify for financial incentives or grants issued by the Department and the owner’s or operator’s cost for mitigation or passage at the artificial obstruction shall not be a factor in the Department’s net benefit determination;

(k) May require data collection and evaluation before a decision regarding a fish passage waiver is made in situations with no existing information, which require recent information, or which have no clear benefit; and

(l) Shall be consistent with the purpose and goals of the Oregon Plan.

Stat. Auth.: ORS 496.138

Stats. Implemented: ORS 509.580, 509.585 & 509.610

Hist.: DFW 2-2006, f. & cert. ef. 1-9-06

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## Department of Forestry Chapter 629

**Rule Caption:** Requires a preliminary certificate application fee used to administer the Underproductive Forestland Tax Credit program.

**Adm. Order No.:** DOF 1-2006(Temp)

**Filed with Sec. of State:** 1-3-2006

**Certified to be Effective:** 1-3-06 thru 6-29-06

**Notice Publication Date:**

**Rules Amended:** 629-023-0410, 629-023-0420, 629-023-0430, 629-023-0440, 629-023-0450, 629-023-0460, 629-023-0490

**Subject:** Amends the rules for the 50% Underproductive Forestland Conversion Tax Credit consistent with the 2005 Legislative Assembly HB 2122 amending the governing ORS 315.106. HB 2122 requires an application fee for filing a written request for a preliminary certificate. Fees collected will fund the Oregon Department of Forestry’s administration of the reforestation tax credit program.

**Rules Coordinator:** Gayle Birch—(503) 945-7210

### 629-023-0410

#### Purpose of the Rules

(1) Under ORS 315.104 certain taxpayers may claim a tax credit for 50 percent of the reasonable costs of forestation of underproductive commercial forestland.

(2) Under ORS 315.106 the State Forester will establish and collect a tax credit application fee for the administration of the reforestation tax credit program.

(3) The purposes of administrative rules 629-023-0410 to 629-023-0490 are to establish fees for the administration of the program, to clarify administration of the tax credit by the State Forester and to define an applicant’s appeal rights under this credit.

(4) The State Forester may periodically change the tax credit application fee so that revenue generated by the fee will be adequate to recover the costs to administer the tax credit program.

(5) The State Forester will make available a copy of the fee schedule upon request by a taxpayer.

Stat. Auth.: ORS 315 & 526

Stats. Implemented: ORS 315.104 & 315.106

Hist.: FB 5-1980, f. & ef. 3-5-80; FB 8-1982, f. & ef. 9-10-82; FB 2-1986, f. & ef. 1-10-86;

FB 9-1990, f. & cert. ef. 10-25-90; FB 6-1996, f. 7-9-96, cert. ef. 7-15-96; DOF 4-2002 f. & cert. ef. 6-18-02; DOF 1-2006(Temp), f. & cert. ef. 1-3-06 thru 6-29-06

### 629-023-0420

#### Definitions

(1) “Appropriate sites” means those sites capable of producing a commercial hardwood or softwood stand which meet the definition of commercial forestland and are planted with suitable forest tree species.

(2) “Commercial forestland” means land for which a primary use is the growing and harvesting of forest tree species.

(3) “Forest tree species” means those species that are ecologically suited to the planting site, capable of producing commercial forest products, and marketable in the future as determined by the State Forester.

(4) “Hardwood harvests conducted for the purpose of converting underproductive forestland” means the harvest of an area occupied by a low volume and low value stand in which significant commercial harvest of forest tree species is not possible as defined in OAR 629-023-0440(2), or the landowner can demonstrate that the stand is or was unmerchantable by showing a negative economic return.

(5) “Negative economic return” means the costs that result from the harvest, such as logging, taxation and reforestation costs, exceed the market value received or to be received.

(6) “Project Costs” mean costs paid by the taxpayer to afforest underproductive forestland. The tax credit application fee is not a project cost.

(7) “Reasonable costs” mean:

(a) Costs that a prudent person in the field of forestry would be willing to pay for a product or service; and

(A) Are competitive; and

(B) Associated with generally accepted practices listed in OAR 629-023-0440(3)–(9); or

(b) Costs that are otherwise approved by the State Forester.

(8) “Reasons beyond the control of the taxpayer” means:

(a) Natural disaster including fire, flood, landslides, unusual weather conditions, and other natural incidents as determined by the State Forester; or,

(b) Failure that occurs though the project was completed in accordance with the specifications of OAR 629-023-0440 as determined by the State Forester.

(9) “Reasons under the control of the taxpayer” means the reforestation project was not completed in accordance with the specifications of OAR 629-023-0440 as determined by the State Forester.

(10) “Tax credit application fee” means a nonrefundable fee which must be paid by the taxpayer at the time the written request for preliminary certificate is filed with the State Forester.

Stat. Auth.: ORS 526

Stats. Implemented: ORS 315.104 & 315.106

Hist.: FB 9-1990, f. & cert. ef. 10-25-90; FB 6-1996, f. 7-9-96, cert. ef. 7-15-96; DOF 4-2002 f. & cert. ef. 6-18-02; DOF 1-2006(Temp), f. & cert. ef. 1-3-06 thru 6-29-06

### 629-023-0430

#### Eligible Project Costs

Forestation project and plantation establishment costs incurred by the taxpayer to forest underproductive forestland may include labor (does not include labor performed by the taxpayer), supervision, material, and equipment operating costs for the following:

(1) Site preparation;

(2) Planting, or with State Forester approval, seeding;

(3) Release;

(4) Moisture conservation;

(5) Erosion control;

(6) Animal damage control.

Stat. Auth.: ORS 526

Stats. Implemented: ORS 315.104 & 315.106

Hist.: FB 9-1990, f. & cert. ef. 10-25-90; FB 6-1996, f. 7-9-96, cert. ef. 7-15-96; DOF 4-2002 f. & cert. ef. 6-18-02; DOF 1-2006(Temp), f. & cert. ef. 1-3-06 thru 6-29-06

### 629-023-0440

#### Standards and Specifications

To qualify for a credit, the State Forester must determine that the forestland, prior harvest, and project comply with the following standards and specifications:

(1) Forestland must be capable of producing at least 20 cubic feet of wood fiber per acre at culmination of mean annual increment. Site productivity can be determined directly by tree growth and stocking measurements within the operation area, or determined indirectly using applicable USDA Natural Resources Conservation Service soil survey information, USDA Forest Service plant association guides, Oregon Department of Revenue western Oregon site class maps, or other sources.

(2) Prior to harvest the area contains no more than an allowable average of 80 square feet of basal area per acre. Measurable trees are those softwood species, 6 inches dbh and larger, and hardwood species, 11 inches and larger. Conifers may amount to no more than 50 percent of the allowable basal area.

## **CERTIFICATE OF FILING AND SERVICE**

I certify that on May 6, 2024, I filed the foregoing **PETITIONERS' JOINT  
OPENING BRIEF AND EXCERPT OF RECORD** with the Appellate Court  
Administrator, Appellate Court Records Section, using the Appellate Court  
Electronic Filing System.

I further certify that on May 6, 2024, I served a copy of the same using the  
Appellate Court Electronic Filing System on:

Dustin Buehler  
Kate E. Morrow  
Oregon Department of Justice  
*Attorneys for Respondent*

CRAG LAW CENTER

*s/ Maura C. Fahey*

Maura Fahey, OSB # 133549

*Attorney Petitioners Columbia  
Riverkeeper, et al.*