

IN THE COURT OF APPEALS OF 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, AND NEZ PERCE TRIBE, a federally recognized Indian tribe, Petitioners,

v.

OREGON FISH AND WILDLIFE COMMISSION, Respondent.

CA No. _____

PETITION FOR JUDICIAL REVIEW

1.

Pursuant to ORS 183.400, Petitioners Columbia Riverkeeper, Northwest Environmental Defense Center, Native Fish Society, Oregon Wild, Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources, The Conservation Angler, and the Nez Perce Tribe, a federally recognized Indian tribe, (collectively, “Petitioners”) seek review of Oregon’s fish passage rules adopted by Respondent Oregon Fish and Wildlife Commission (“Respondent” or “Commission”) on December 16, 2022.

2.

The parties to this review are:

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Petitioners

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

Respondent

Oregon Fish and Wildlife Commission

3.

Petitioners are represented by:

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5.

Petitioners seek review of the Oregon Department of Fish and Wildlife’s (“ODFW”) fish passage rules adopted by the Commission on December 16, 2022. A copy of the final adopted rules, as published in the Oregon Secretary of State’s bulletin, is attached to the petition as Exhibit A. The new rules took effect on January 1, 2023. Also attached to this petition as Exhibit B, is a copy of the draft proposed rules that were published in the Secretary of State’s bulletin on October 21, 2022, following a nearly two-year public process. The rules adopted on December 16, 2022, fundamentally altered substantive fish passage policies and protections (dating back to the 2006 inception of Oregon’s fish passage rules

implementing Oregon’s 2001 fish passage statutes), through changes made after October 21, 2022, without public notice.

6.

In 2021, ODFW began a “Fish Passage Task Force” public process to revise Oregon’s fish passage rules. Throughout 2021 and 2022 there were 20 rules subcommittee meetings and additional Task Force meetings where rule amendments were discussed. All were public meetings. There were two public comment periods on draft rule amendments. One initiated the Task Force process in 2021, and a second was opened with distribution of an August 30, 2022, “final draft” of the rule amendments for a 30-day comment period near the close of the Task Force process. ODFW received 175 comments on the August 30 draft rule amendments. 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 (Ex. B).

7.

The purpose of ODFW’s fish passage rules (OAR Ch. 635 div. 412) is to clarify and implement Oregon’s fish passage statutes (ORS 509.585–645). To that end, the rules provide definitions, policy, and requirements for installing fish passage for native migratory fish at artificial obstructions throughout Oregon.

The published October 21, 2022, 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 an artificial obstruction.” (Amendment in underline.) Ex. B at 5. The definition of “volitionally” was unchanged. Ex. B at 8. The published October 21 rules thus maintained long-standing fish passage policies and protections.

Sometime between October 21 and December 16, 2022, fundamental new changes were made to the proposed rules and the implementation of fish passage. The definition of "fish passage" (OAR 635-412-0005(20)) was changed to add, as an alternative to volitional passage, “trap collection and transport if consistent with requirements of OAR 635-412-0035(6).” *See* Ex. A at 3–4.

This was accompanied by a fundamental change in the referenced rule at OAR 635-412-0035(6). That section had long been a set of passage criteria authorizing non-volitional trapping and handling of fish at traps as a category of obstruction distinct from other obstructions such as dams and culverts.¹ *See* Ex. B

¹ The prior definition of “volitionally” made this plain by allowing, through reference to OAR 635-412-0035(6) and thus at traps alone as a type of obstruction, the exact actions of “trapping, transferring, and handling” otherwise prohibited. Ex. B at 8. The 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

at 21. 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 Ex. B at 21 with Ex. A at 20. Traps were thus changed – without public notice – from a type of passage obstruction to a new form of fish passage.

At the same time, a new subsection was added to OAR 635-412-0035(6), creating a new ODFW authority to use 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.

OAR 635-412-0035(6)(g). Ex. A at 20.

These fundamental rule changes did not appear in the August 30, 2022, final draft released by the Fish Passage Task Force for public comment. They were not included in the proposed rule amendments filed by ODFW with the Secretary of State for publication as a proposed rulemaking on October 21, 2022. Ex. B. Nor were they included in the "Notice of Proposed Rulemaking" or "Agenda Item

"volitionally" – a reference deleted in the suite of post-October 21 changes – but the changes then made to the core purpose of OAR 635-412-0035(6) fundamentally altered the rule reference and the effect of the new "fish passage" definition.

Summary" or "Presentation" documents provided for the Commission's December 16, 2022, meeting.

8.

These are fundamental changes – made without public notice – to Oregon's fish passage rules that give ODFW an entirely new authority to use “trap collection and transport” as a form of fish passage at dams and other obstructions throughout Oregon. Under the challenged rules, the core policy and presumptive requirement of volitional passage can be circumvented through a newly created procedure whenever ODFW decides that its trap and transport “professional judgment” is satisfied. OAR 635-412-0035(6)(g); Ex. A at 20. That this was done without notice to the public, after a two-year public input process, is unlawful and frankly disturbing. As a result, the installation of volitional fish passage will be less common, which will harm native migratory fish throughout Oregon's watersheds, and undermine the core legislative purpose of Oregon's fish passage statutes. The adopted rules have significant adverse impacts on the Petitioners' interests.

9.

Petitioner Columbia Riverkeeper is a non-profit organization with over 16,000 members and supporters. Columbia Riverkeeper maintains offices in Portland and Hood River, Oregon. Columbia Riverkeeper's 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. Columbia Riverkeeper utilizes legal advocacy and community organizing to stop pollution, fight fossil fuels, save salmon, and protect the Columbia River Basin's precious resources. The Columbia River is the lifeblood of the Pacific Northwest—people depend on the Columbia for clean water, salmon, recreation, transportation, and much more. Columbia Riverkeeper and its members will be adversely impacted by ODFW's new definition of fish passage which will increase the frequency of trap and haul facilities and harm Oregon's migratory fish.

10.

Petitioner Native Fish Society is an Oregon non-profit organization that has worked for 25 years to advocate, based on the best available science, for the recovery of wild, native fish and to promote the stewardship of the habitats that sustain us all. Native Fish Society activates place-based volunteers through its river steward program, skills-based volunteers through its Native Fish Fellowship Program and increases the circle of women advocating for wild fish through its Women for Wild Fish initiative. Native Fish Society River Stewards engage in policy making, coalition building, watershed monitoring, community outreach, habitat protection, and serve on local watershed councils and other entity groups to advocate for wild fish. The challenged rules will adversely affect Native Fish Society's work to protect native fish populations throughout Oregon.

11.

Petitioner Northwest Environmental Defense Center (NEDC) is a non-profit organization based in Portland, Oregon, that works to protect and conserve the natural resources of the Pacific Northwest. NEDC has approximately 1,000 members and supporters. NEDC's work includes protecting salmon, trout, and other important fish species that inhabit Oregon's waterways. The challenged rules will affect NEDC's efforts to conserve fish populations throughout Oregon.

12.

Petitioner Oregon Wild is a non-profit organization with approximately 20,000 members and supporters throughout the state of Oregon and the Pacific Northwest. Oregon Wild is headquartered in Portland, Oregon, and maintains offices in Bend, Eugene, and Enterprise, Oregon. Oregon Wild's mission is to protect and restore Oregon's wildlands, wildlife, and waters as an enduring legacy. Oregon Wild's wilderness, old-growth forest, and clean rivers/watershed programs protect pristine drinking water, unparalleled recreation opportunities, and vital fish and wildlife habitat across Oregon. Oregon Wild and its members' efforts to protect Oregon's rivers, watersheds, and fish habitat will be adversely impacted by the challenged rules.

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13.

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's headquarters are in San Francisco, California, with a Northwest Regional office in Eugene, Oregon. PCFFA is a coalition of 17 different commercial fishermen's port associations and commercial fishing vessel owners' associations who operate in ocean waters from San Diego, California, throughout Oregon and Washington and up to Southeast Alaska, with a combined membership of about 750 commercial fishing businesses, mostly family-owned and operated. Many of those commercial fishing operations are dependent upon the ocean harvest of salmon for all or a significant portion of their livelihoods, including harvesting highly migratory salmon that originate in Oregon's river systems. PCFFA took part in the Oregon agency process of developing the regulation that is the subject of this action.

The Institute for Fisheries Resources (IFR) is a non-profit, public benefit corporation headquartered in San Francisco, California. IFR was originally founded by PCFFA in 1993, with which it is still closely affiliated. IFR also shares a common Pacific Northwest office in Eugene, Oregon, and has overlapping staff with PCFFA. IFR has the same port-association membership structure as PCFFA, and members of PCFFA are also considered members of IFR. The Board of

Directors of PCFFA and IFR also have considerable overlap. Since its origins in 1993, IFR has been carrying out the fisheries research and related fisheries conservation programs developed by PCFFA. IFR conducts research on a broad spectrum of fisheries conservation projects and policy issues but has a particular focus on the restoration of Northern California and Pacific Northwest salmon fisheries, including those salmon runs originating in Oregon. Consistent with these efforts, IFR has teamed up with PCFFA on many of its research and advocacy activities regarding protection and restoration of the water quality and the productivity of salmon-bearing watersheds throughout the Pacific Northwest, including in Oregon. IFR has also been very active in a number of dam removal projects in Oregon in which the type and effectiveness of fish passage is a major issue. IFR also took part in the agency process of developing the regulation that is the subject of this action.

Each of PCFFA's fishing industry members depends upon viable ocean fisheries (particularly salmon fisheries) for his or her livelihood, and IFR dedicates its ongoing efforts in scientific research, habitat and watershed conservation, public education and advocacy toward restoring and protecting these same fisheries, in particular restoring and protecting habitat for the region's valuable (but now seriously depressed) salmon fisheries. The challenged rules will

adversely impact PCFFA and IFR's members whose livelihoods depend on fishing as well as the both organizations' interest in fisheries conservation and protection.

14.

Petitioner The Conservation Angler ("TCA"), a subsidiary of Wild Salmon Rivers, is a 501(c)(3) non-profit organization originally registered in the state of Washington and licensed in both Oregon and Washington, with an office located in Multnomah County, Oregon. TCA's mission is to protect and conserve wild steelhead, salmon, trout, and char throughout their range in North America and the Russian Far East. TCA operates science, policy, and legal programs to enhance scientific knowledge about these fish, advocate for policies that conserve them, and hold agencies accountable under the laws that protect wild fish and their habitat. The challenged rules will adversely affect TCA's interests in protecting and conserving wild fish populations.

15.

Petitioner Nez Perce Tribe is federally recognized Indian tribe and a co-manager of fisheries resources, pursuant to the federal case of U.S. v. Oregon, throughout Oregon, Washington, and Idaho. In the Nez Perce Treaty of June 11, 1855, with the United States, the Tribe reserved all rights not expressly ceded to the United States and – in partial consideration for ceding land that became parts of the future states of Oregon, Washington, and Idaho – specifically reserved rights it

has exercised since time immemorial, including the right to take fish at all usual and accustomed places, and to hunt, gather, and pasture animals on all open and unclaimed lands. The Tribe's treaty-reserved fishing rights extend throughout much of the Pacific Northwest, including much of present-day Oregon. These rights are continually exercised by the Tribe's members, and are critical to the present-day culture, religion, and economy of the Tribe. The challenged rules will adversely affect the Tribe's rights and interests in native migratory fish restoration in Oregon.

16.

Each Petitioner is a corporation, association, private organization, or tribal government. Each Petitioner is a "person" under ORS 183.310(8). Under ORS 183.400(1), "any person" may challenge the validity of an agency rule by filing a petition for review before the Oregon Court of Appeals. Thus, Petitioners have standing to file this petition on their own or on behalf of their members pursuant to ORS 183.400(1).

17.

Petitioners are not willing to stipulate that the agency record may be shortened.

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18.

Petitioners are entitled to their attorneys' fees and costs pursuant to ORS 183.497(1).

DATED: September 5, 2023.

CRAG LAW CENTER

s/ Maura C. Fahey

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NEZ PERCE TRIBE

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Exhibit A

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PERMANENT ADMINISTRATIVE ORDER

DFW 154-2022

CHAPTER 635
DEPARTMENT OF FISH AND WILDLIFE

FILED

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RULES:

635-412-0001, 635-412-0005, 635-412-0010, 635-412-0015, 635-412-0020, 635-412-0025, 635-412-0030, 635-412-0035, 635-412-0040

ADOPT: 635-412-0001

RULE TITLE: Purpose of the Fish Passage Policy

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

(1) The purpose of these rules is to further clarify and implement the State's fish passage statutes (ORS 509.580 through 509.910) and the Department's Climate and Ocean Change Policy (OAR 635-900-0001 through 635-900-0020) through the application of consistent standards.

(2) It is the policy of the State of Oregon to provide for upstream and downstream passage of native migratory fish at artificial obstructions.

(3) Changes in Oregon's future climate make fish passage even more critical, and a lack of fish passage within watersheds may threaten the existence of some native migratory fish species.

(4) It is therefore the intent of these rules to promote fish passage while recognizing cooperation and collaboration between public and private entities are necessary to accomplish the policy goal of providing fish passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native migratory fish populations, as envisioned by the Oregon Plan (ORS 541.898).

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0005

RULE TITLE: Definitions

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

- (1) For the purposes of OAR 635-412-0010 through 635-412-0065 the following definitions shall apply.
- (2) "Abandonment" means to surrender, decommission, no longer use for an authorized purpose, or give up control.
- (3) "Active channel width" means the naturally occurring cumulative stream width(s) between the ordinary high water lines, or at the channel bankfull elevation if the ordinary high water lines are indeterminate.
- (4) "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. Preventing the migration of native migratory fish includes causing a significant delay in the time taken for passage of native migratory fish.
- (5) "Attraction flow" means water that flows from or near a fishway entrance in sufficient quantity, velocity, and location to attract fish as they migrate upstream into the fishway, which can consist of gravity flow from the fish ladder and auxiliary water system flow added in or near the fishway entrance.
- (6) "Bankfull elevation" means the point on a stream bank at which overflow into a floodplain begins.
- (7) "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.
- (8) "Channel" means that portion of a natural (perennial or intermittent) waterway that periodically or continuously contains moving waters of this state and has a definite bed and banks that serve to confine the water.
- (9) "Commission" means the Oregon Fish and Wildlife Commission.
- (10) "Construction" with respect to artificial obstructions subject to these rules, means:
 - (a) Original construction;
 - (b) Major replacement, which includes:
 - (A) For existing dams and diversions, either a single or cumulative:
 - (i) Excavation or replacement of 30 percent by structure volume;
 - (ii) Repairs, patches, or modifications to over 30 percent of the area of the upstream, downstream, or top face of the dam (measured above the natural ground gradeline that is used to impound water); or
 - (iii) Repairs, patches, or modifications different than the original configuration and that reduce, as determined by the Department, the adequacy of fish passage including periodic or seasonal replacements, unless only checkboards are replaced, or in the case of existing seasonal dams or diversions, the artificial obstruction is in compliance with a water right(s), other regulatory requirements, and the artificial obstruction maintains an open channel connection with adequate water flow and depth conditions that meet OAR 635-412-0035 (2) when instream water is available and between the fish passage design streamflow range.
 - (B) For existing tide gates and flood gates, either a single or cumulative:
 - (i) Replacement of over 50 percent of the gate material, including hinges and the gate itself if detached;
 - (ii) Removal, fill, replacement, or addition of over 50 percent of the structure supporting the gate, excluding road-stream crossing structures; or
 - (iii) Replacements, repairs, patches, or modifications different than the original configuration and that reduce the adequacy of fish passage, as determined by the Department.
 - (C) For existing dikes, berms, levees, roads, culverts, bridges, or other artificial obstructions that segment estuaries, floodplains, or wetlands, either a single or cumulative:
 - (i) Activity or activities defined under OAR 635-412-0005(10)(d) in all locations where current channels cross the artificial obstruction segmenting the estuary, floodplain, or wetland; or

- (ii) 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 existing artificial obstructions, the single or cumulative removal, fill, replacement, or addition of over 50 percent of the device that impedes fish passage;
- (c) Structural modifications that increase storage or diversion capacity; or
- (d) Installation or replacement of a roadbed, culvert, or bridge that includes any activity that:
 - (A) Creates a road or bridge that crosses a channel;
 - (B) Widens a roadfill footprint within a channel;
 - (C) 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;
 - (D) Installs or constructs a new road, culvert, bridge, overflow pipe, apron, or wingwall within a channel;
 - (E) 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;
 - (F) Makes either single or cumulative repairs, patches, or modifications to over 50 percent of the linear length of a culvert;
 - (G) Makes either single or cumulative repairs, patches, or modifications to over 50 percent of the structural volume of a bridge or its elements except when this volume is exclusively composed of the traveling surface of a bridge deck;
 - (H) Replaces any part of a culvert, except ends that become misaligned, detached, or eroded and are replaced to their original configuration;
 - (I) At any point along the linear length of an existing culvert, reduces the entire inside perimeter of the culvert; or
 - (J) Makes replacements, repairs, patches, or modifications to an existing culvert or bridge that are different than the original configuration and reduce, as determined by the Department, the adequacy of fish passage.

NOTE: see Department Memorandum for clarification of fish passage triggers and guidelines for bridges.

- (11) "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.
- (12) "Department" means the Oregon Department of Fish and Wildlife.
- (13) "Director" means the Director of the Oregon Department of Fish and Wildlife.
- (14) "Design streamflow range" means the range of flows within a stream, between the Low Fish Passage Design Flow and the High Fish Passage Design Flow, for which a fishway or other structure shall provide fish passage.
- (15) "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.
- (16) "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.
- (17) "Exclusion barrier" means a structure placed that prevents fish passage for the benefit of native migratory fish.
- (18) "Exemption" means not providing fish passage at an artificial obstruction when either mitigation in lieu of providing fish passage through a waiver as defined in ORS 509.585(9)(a)(A) is authorized, an artificial obstruction has been granted a legal waiver as defined in ORS 509.585(9)(a)(B), or a finding that there is no appreciable benefit to providing fish passage at the artificial obstruction as defined in ORS 509.585(9)(a)(C).
- (19) "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.
- (20) "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 either volitionally or by trap collection and transport if consistent

with 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.

(21) "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.

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

(23) "Fishway entrance" means the component of a fishway that discharges attraction flow into the waterway downstream of an artificial obstruction where upstream migrant fish enter the fishway.

(24) "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.

(25) "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.

(26) "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 the action involves construction or abandonment of an artificial obstruction.

(27) "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 native migratory fish require fish passage.

(28) "Historically" means before 1859 (statehood).

(29) "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.

(30) "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 determined by the Department, directly affected by an artificial obstruction.

(31) "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 native migratory fish require fish passage.

(32) "Mitigation" means alternatives to providing fish passage at an artificial obstruction that provide a net benefit to native migratory fish.

(33) "Native migratory fish" means naturally or hatchery produced native fish (as defined under OAR 635-007-0501) indigenous (i.e., not introduced) to Oregon 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 2022. 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 rhodoterus* — Redtail surfperch;
- (d) *Catostomus columbianus* — Bridgelip sucker;
- (e) *Catostomus macrocheilus* — Largescale sucker;
- (f) *Catostomus microps* — Modoc sucker;
- (g) *Catostomus occidentalis* — Goose Lake sucker;
- (h) *Catostomus platyrhynchus* — Mountain sucker;
- (i) *Catostomus rimiculus* — Klamath smallscale sucker;

- (j) *Catostomus snyderi* — Klamath largescale sucker;
 - (k) *Catostomus tahoensis* — Tahoe sucker;
 - (l) *Catostomus tsiltcoosensis* — Tyee sucker;
 - (m) *Catostomus warnerensis* — Warner sucker;
 - (n) *Chasmistes brevirostris* — Shortnose sucker;
 - (o) *Deltistes luxatus* -- Lost River sucker;
 - (p) *Entosphenus folletti* -- Northern California brook lamprey;
 - (q) *Entosphenus lethophagus* -- Pit-Klamath brook lamprey;
 - (r) *Entosphenus minimus* -- Miller Lake lamprey;
 - (s) *Entosphenus similis* -- Klamath River lamprey;
 - (t) *Entosphenus tridentatus* -- Pacific lamprey;
 - (u) *Hypomesus pretiosus* — Surf smelt;
 - (v) *Lampetra ayresii* — Western river lamprey;
 - (w) *Lampetra pacifica* -- Pacific brook lamprey;
 - (x) *Lampetra richardsoni* -- Western brook lamprey;
 - (y) *Oncorhynchus clarkii* — Cutthroat trout;
 - (z) *Oncorhynchus gorbuscha* -- Pink salmon;
 - (aa) *Oncorhynchus keta* — Chum salmon;
 - (bb) *Oncorhynchus kisutch* — Coho salmon;
 - (cc) *Oncorhynchus mykiss* — Steelhead, Rainbow and Redband trout;
 - (dd) *Oncorhynchus nerka* — Sockeye/Kokanee salmon;
 - (ee) *Oncorhynchus tshawytscha* — Chinook salmon;
 - (ff) *Prosopium williamsoni* — Mountain whitefish;
 - (gg) *Ptychocheilus oregonensis* — Northern pikeminnow;
 - (hh) *Ptychocheilus* sp. -- Siuslaw pikeminnow;
 - (ii) *Ptychocheilus umpqua* — Umpqua pikeminnow;
 - (jj) *Salvelinus confluentus* — Bull trout;
 - (kk) *Spirinchus thaleichthys* — Longfin smelt;
 - (ll) *Thaleichthys pacificus* — Eulachon.
- (34) "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.
- (35) "No Appreciable Benefit to Providing Fish Passage" means, as determined by the Department using its best professional judgement, fish habitat that would be made accessible, or more accessible, in the reach upstream or downstream of the artificial obstruction, does not currently provide, and will not foreseeably provide before a review occurs in seven years pursuant to ORS 509.585(9)(b), habitat of the type, duration, frequency, quality, or quantity necessary to support one or more life history stages of the native migratory fish that are present, or will foreseeably be present before a review occurs in seven years pursuant to ORS 509.585(9)(b), upstream or downstream of the artificial obstruction.
- (36) "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.

(37) "Oregon Plan" means the guidance statement and framework described in ORS 541.898.

(38) "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.

(39) "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.

(40) "Roadfill footprint" means the area occupied by soil, aggregate, or other materials or structures necessary to support a road, including, but not limited to, wing walls, retaining walls, headwalls, bridge supports, abutments, piers, or scour protection countermeasures.

(41) "Roughened channel" means a fishway designed to provide fish passage which encompasses the entire stream channel and may be over-steepened relative to the long-channel streambed profile, including but not limited to nature-like rock, rock ramp, or engineered-streambed fishways.

(42) "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.

(43) "Structure volume" means volumetric calculation of an existing dam or other artificial obstruction and its elements or components.

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

(45) "Tailrace" means the water immediately downstream of an instream structure discharging flow to a receiving water body.

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

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

(48) "Trash rack" means a human built or placed measure used to prevent unwanted materials from entering a fishway, culvert, bridge, water diversion or other structures.

(49) "Trigger" means any event or activity that qualifies as construction, abandonment, or a fundamental change in permit status pursuant to Division 412 rules associated with or at any artificial obstruction that requires an owner or operator of that artificial obstruction to provide fish passage or alternatives to fish passage consistent with such rules. A trigger at one artificial obstruction physically connected to another artificial obstruction requires passage be addressed at both connected structure(s).

(50) "Unforeseen circumstances" means:

(a) An event that causes an existing human-made structure in the waters of this 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.

(51) "Volitionally" means with minimal delay and without being trapped, transferred, or handled by any person.

(52) "Waiver" means a fish passage exemption specifically allowed under OAR 635-412-0025 (1)(a) or (b) if the Commission or Department, as applicable, determines that alternatives to providing fish passage at an artificial obstruction, as proposed by the owner or operator of the artificial obstruction, provides a net benefit to native migratory fish.

(53) "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.

(54) "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.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0010

RULE TITLE: Fish Passage Task Force

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

- (1) The Fish Passage Task Force has nine members who are appointed by the Director.
- (2) Three members represent interests subject to the obligation to install fish passage at facilities they install, own or operate; three members represent fishing, environmental or conservation interests, and three members represent the general public.
- (3) Members serve four year terms and are eligible for reappointment.
- (4) The Task Force shall:
 - (a) Serve as the public advisory committee and advise the Director, Department, and Commission regarding rulemaking to implement the fish passage and exemption requirements consistent with applicable law;
 - (b) Prioritize projects from the statewide inventory of artificial obstructions for purposes of restoration and enforcement;
 - (c) Recommend to the Director, Department, and Commission appropriate levels of funding and special conditions applicable to projects installing fish passage or alternatives to fish passage resulting in a net benefit to native migratory fish;
 - (d) Select one of its members to serve as chair and one as vice chair;
 - (e) Review and recommend to the Department or Commission, as applicable, which projects should be exempt;
 - (f) Report semiannually to the joint legislative committee created under ORS 171.551, or to the appropriate interim legislative committee with responsibility for salmon restoration or species recovery, advising the committee on matters related to fish passage;
 - (g) After public review and comment, review applications for exemptions of the fish passage requirement, and advise the Commission or Department, as applicable, as to whether an artificial obstruction should be deemed exempt pursuant to ORS 509.585(9);
 - (h) Perform such other duties relating to fish passage as requested by the Director or Commission;
 - (i) The Task Force shall meet at such times and places as may be determined by the chair or by a majority of members.
- (5) The Department's Fish Passage Coordinator serves as staff for the Task Force.
- (6) The chair of the Task Force conducts the meetings of the Task Force, serves as the main contact point between the Department or Commission and the Task Force, and performs other duties as the Task Force sets. The vice chair of the Task Force shall serve as chair if the chair is unavailable to carry out their duties.
- (7) Task Force members may not receive compensation for services as a member of the Task Force; however, in accordance with ORS 292.495, a member of the Task Force may receive reimbursement for actual and necessary travel or other expenses incurred in the performance of official duties.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0015

RULE TITLE: Prioritization

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

- (1) The Department shall establish a list of priority artificial obstructions at which fish passage would provide the greatest benefit to native migratory fish for restoration and enforcement purposes.
- (2) The priority list may exclude artificial obstructions where a legal agreement with the Department or Commission specifically indicates fish passage is not required.
- (3) The Department will prioritize working collaboratively with the owners or operators of artificial obstructions on the priority list to establish fish passage.
- (4) The priority list shall be based on the current and future needs of native migratory fish.
- (5) When determining placement of an artificial obstruction on the priority list, the Department may use existing Department information or professional judgment.
- (6) When determining placement of an artificial obstruction on the priority list, the Department shall consider the following factors relative to each artificial obstruction for all native migratory fish currently or historically in waters of this state where the artificial obstruction is located. These factors include but may not be limited to:
 - (a) The current and future quantity of native migratory fish habitat which is inaccessible;
 - (b) The current and future quality of native migratory fish habitat which is inaccessible;
 - (c) The reasonably foreseeable future quantity and quality of native migratory fish habitat given known trends in climate change (e.g., changes in timing and quantity of streamflow and stream temperatures);
 - (d) Unique or limited native migratory fish habitat which is inaccessible, or should remain inaccessible for fish management purposes;
 - (e) The biological status of the native migratory fish;
 - (f) The level of fish passage currently provided at the artificial obstruction;
 - (g) The presence of other artificial obstructions upstream or downstream and the timeframe native migratory fish will be able to use restored passage; and
 - (h) Existing agreements with the Department regarding fish passage.
- (7) The Department shall field verify the information used for prioritization prior to initiating any enforcement action.
- (8) The Department shall make changes to the priority list using the most recent information after enforcement occurs at five priority artificial obstructions or as directed by the Commission.
- (9) The Commission shall review and amend the priority list when the Department changes the ranking of barriers on the list, and at least once every five years.
- (10) The Department may order an owner or operator of 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 within a defined timeframe under any of the following circumstances:
 - (a) The owner or operator of an artificial obstruction refuses to work cooperatively with the Department;
 - (b) 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; or
 - (c) The artificial obstruction is ranked in the top ten within a Department Region on the priority list.
- (11) 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 of an artificial obstruction has two years from the Department's order 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.

(12) The relative position of an artificial obstruction on the priority list should not be used as a basis for approving or denying an application for an exemption.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0020

RULE TITLE: Fish Passage Approval

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

(1) No artificial obstruction may be constructed or maintained 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 a trigger, an owner or operator of an artificial obstruction shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters of this state where the artificial obstruction is located, 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 of this state where the artificial obstruction is located, prior to a trigger the owner or operator of the artificial obstruction shall either:

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

(b) Obtain Department 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 subject to the programmatic approval meet and adhere to criteria determined by the Department;

(B) The owner, operator, or agent demonstrates, as determined by 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 subject to the programmatic approval at reasonable times; and

(E) The owner, operator, or agent agrees to expeditiously remedy all fish passage structures subject to the programmatic approval which the Department finds do not meet the applicable criteria or conditions of that 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 that the Department concurs meet the purposes of the Department's fish passage program; or

(d) 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) of this rule unless:

(a) An owner or operator demonstrates to the Department an imminent or immediate threat to human safety exists 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 as determined by the Department (providing passage at the time of construction is preferred);

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

(c) Installation begins within the same in-water work period as the action that triggered fish passage 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 given the terms and conditions of a negotiated settlement for a federal proceeding or to ensure coordination with other federal requirements.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0025

RULE TITLE: Fish Passage Waivers and Exemptions

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

(1) 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.

(2) 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.

(3) 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 as a direct result of the proposed mitigation actions. To qualify for a waiver of the requirement to install fish passage, proposed mitigation must result in a benefit to native migratory fish greater than the benefit to such species that would be provided by fish passage at the artificial obstruction. The net benefit determination shall be based upon conditions that exist at the time of comparison and should consider future conditions (e.g., climate change).

(4) Waivers shall be valid so long as the owner or operator continues to provide the agreed-upon mitigation until the next fish passage trigger at the artificial obstruction or until the Commission or Department determines that circumstances have changed such that the waiver requirements no longer apply, pursuant to ORS 509.585(9)(b).

(5) Exemptions granted under subsection (1)(c) of this rule shall be valid only so long as conditions that justified that exemption do not change, except if:

(a) That exemption has expired;

(b) A trigger occurs with respect to the artificial obstruction subject to that exemption; or

(c) The Commission or Department determines that exemption should not be renewed.

(6) At least once every seven years, the Department shall review, exemptions under subsection (1)(c) of this rule to determine whether such exemptions should be renewed. 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. Prior to a seven-year review, exemptions under subsection (1)(c) of this rule may be reviewed by the Commission or Department.

(7) To obtain 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 either a waiver under subsection (1)(a) or an exemption under section 1(c) of this rule.

(8) Based on application review, verification of the information in the application and of site-specific knowledge, Department staff shall provide a written benefit analysis of whether the proposal in the application meets the applicable requirements. If there is some level of passage at the artificial obstruction, but it does not meet the requirements of OAR 635-412-0035, the effective level of passage shall be factored into the Department's benefit analysis as a reduction in required mitigation measures.

(9) To receive a waiver, 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 required mitigation. The 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, unless the Commission or Department finds that additional time is necessary and appropriate given the size and

scope of the project; or to coordinate with requirements of federal proceedings.

(10) The Commission or Department may require additional mitigation associated with a waiver if the mitigation cannot be or is not completed within the required time frame set forth in the agreement prescribed by subsection (9) of this rule.

(11) Once the application, Department's written benefit analysis, and a draft agreement are completed, the exemption determination 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 exemption under section 1(a) and 1(b) is being sought is less than or equal to 1 mile of current native migratory fish distribution;

(B) For all exemptions proposed to have no appreciable benefit under section 1(c) of this rule; and

(C) For re-authorization of an existing hydroelectric project subject to ORS 543A.030 to 543A.055 and not subject to federal hydroelectric relicensing; or

(b) The Commission:

(A) In all other instances; or

(B) If the Department refers a decision to the Commission.

(12) The decision to grant an exemption shall include the determination described in subsection (8) of this rule as well as approval of the agreement documenting applicable exemption conditions.

(13) The Department may amend or approve changes to the agreement if the changes do not affect the benefit analysis and after a public review and recommendation by the Fish Passage Task Force.

(14) In addition to the Fish Passage Task Force, the Department shall notify the public and provide an opportunity to review and comment on the owner or operator's request at least three weeks prior to an exemption determination.

(15) The Commission or Department, as applicable may provide further public comment prior to a decision on whether an exemption should be granted.

(16) The Department shall maintain a database of the locations of exempted artificial obstructions and mitigation.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0030

RULE TITLE: Fish Passage Protests

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

(1) A person owning or operating an artificial obstruction may request alternative dispute resolution at any point in the process of determining fish passage requirements.

(2) The owner or operator of the artificial obstruction who objects to a determination made by the Department under these rules may file a protest with the Commission. Protests must be submitted in writing within 30 days from the date the Department posts the determination on its website and must include the grounds for protesting that determination.

(3) The Commission may approve, deny, or modify the Department's proposed or final determination after sufficient opportunity for public review and comment.

(4) If a protest is not filed within 30 days from the date the Department posts the determination from the Department, the Commission's or Department's determination becomes a final order.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0035

RULE TITLE: Fish Passage Criteria

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

(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) The native migratory fish that are currently or were historically present at the site that must be provided fish passage;

(B) The life history stages the required fish passage must accommodate; and

(C) The periods of the year and any conditions relevant to when fish passage shall be provided for such 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 for the Department to efficiently evaluate whether the design will meet fish passage criteria including a description of how climate change impacts have been incorporated into the final design;

(c) If site-specific circumstances indicate that the fish passage criteria are not adequate to provide fish passage at the artificial obstruction, the Department may require in writing that additional fish passage criteria be met;

(d) If the Department determines that the existing or historically present native migratory species or site-specific circumstances warrant an exception to any specific fish passage criterion then the Department may approve such an exception in writing as long as it finds that fish passage will likely still be provided at the artificial obstruction;

(e) All fish passage structures shall be designed considering their upstream and downstream connection and prevent undesirable impacts to fish passage, including but not limited to scour and headcuts;

(f) If federal approval of a fish passage plan is required, the Department shall take into account federal requirements during its review and determination;

(g) The Department may require monitoring and reporting to determine if a fish passage structure meets applicable criteria and is providing fish passage as intended and designed; and

(h) The owner or operator of 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 and should be analyzed using estimates for the projected life expectancy of the structure;

(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 adult salmon or steelhead 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, except vertical slot weir width may be 6 inches where the Department has determined the artificial obstruction is required to provide fish passage only for juvenile native migratory fish;

(g) Fishway pools shall:

(A) Be sized according to the applicable native migratory fish and life history stages and to avoid over-crowding;

(B) Have $V \sqrt{wQH/4}$ 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 changes direction 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, or into a water diversion;

(i) Fishway trash racks shall:

(A) Allow for easy maintenance and debris removal;

(B) Be maintained and cleaned as necessary to provide fish passage;

(C) Have a minimum clear space between vertical members of 10 inches, except at least 4 inches shall be provided if only juveniles are present; and

(D) Have a minimum clear space between horizontal members of 24 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 surfaces, edges and fasteners which fish may contact ground smooth or chamfered;

(D) Not have protrusions that extend into the flow path of the fishway;

(E) Not expose fish to any moving parts;

(F) Be designed to avoid turbulence and hydraulic transition flow conditions as much as possible;

(G) Have as much ambient lighting as possible and avoid lighting transitions;

(H) 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;

(I) 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; and

(B) All fishways of a specific type with accepted configurations shall comply with those configurations.

(l) Requirements for fishways which encompass the entire channel include:

(A) Roughened channels or nature-like fishway designs shall:

- (i) Meet the requirements of OAR 635-412-0035(3)(a)(A) (ii), (iv), (v)(II through VII), or OAR 635-412-0035(3)(b);
 - (ii) Not have a slope that exceeds 6 percent, unless the average natural stream slope exceeds 6 percent; and
 - (iii) Contain partially buried over-sized boulder or boulder clusters to provide structural integrity and localized areas of lower water velocity.
- (B) Stream channel-spanning weirs shall:
- (i) Rise toward each bank from a low flow section centered along the thalweg of the channel;
 - (ii) Have a downstream jump pool with a minimum depth of 2 feet;
 - (iii) Have a maximum difference in elevation of 6 inches between the lowest point on the weir and the downstream pool's water surface control point;
 - (iv) Be sealed if fish passage during low flows is required;
 - (v) Be spaced at least 1.5 active channel widths apart if there are multiple weirs and recommend consideration of wider spacing when appropriate; and
 - (vi) Extend into the streambank a sufficient distance to protect against flanking;
- (C) All fishway entrances or flow outlets shall be designed to provide passage or be designed to only be used during a period(s) defined by the Department.
- (D) Fish passage plans for hybrid fishways that may combine features of several established fishway types shall have criteria established by the Department on a case-by-case basis and shall clearly demonstrate how water depths, water velocities, water surface jump height differentials or energy dissipation provides hydraulic conditions that achieves fish passage;
- (m) For downstream fish passage:
- (A) Fish passage structures shall have an open water surface, except a submerged or enclosed conduit or orifice may be used 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 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 or other artificial obstructions shall be greater than 4 inches during all flows.
- (D) Fish screening and bypass devices installed to protect downstream migrating fish should be constructed to Department specifications and must meet Department criteria when installation is required.
- (3) Requirements for fish passage at road-stream crossing structures such as bridges and culverts are:
- (a) Stream Simulation Option (preferred design alternative) where:
- (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 multiplied by 1.2 plus 2 feet, 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;

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

(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;

(VI) Considers bed scour and stability of the bed material due to the confined flow through the crossing structure. Major structural components within the crossing should be designed for structural stability at the 100 year flood flow; and

(VII) Contains a low flow thalweg.

(B) Trash racks shall:

(i) Allow for easy maintenance and debris removal;

(ii) Be maintained, monitored, and cleaned as necessary to provide fish passage;

(iii) Not extend below the active channel width elevation;

(iv) Have a minimum of 10 inches clear spacing between vertical members; and

(v) Have a minimum clear space between horizontal members of 12 inches.

(C) Beaver exclusion culvert protection devices shall:

(i) Allow for easy maintenance and debris removal;

(ii) Be maintained, monitored, and cleaned as necessary to provide fish passage;

(iii) Have a minimum clear space between vertical and horizontal members of 6 inches when only resident trout, Entosphenus and Lampetra species (lamprey) species are present;

(iv) Be approved on a case by case basis in areas with salmon, steelhead, bull trout, or other large bodied species.

(D) Unvented and vented ford crossings shall meet the requirements of OAR 635-412-0035(2) and 635-412-0035(3)(b); and

(i) Be located outside of all known or suspected fish spawning areas such as pool tail-outs;

(ii) Be constructed perpendicular to the stream flow;

(iii) Minimize the width (perpendicular to streamflow);

(iv) Maintain similar water depths and flow velocities as surrounding stream during the design stream flows; and

(v) Have a low flow channel constructed within the crossing.

(E) Unvented ford crossings shall meet design criteria in OAR 635-412-0035(3)(a) and be constructed using materials approved by the Department that shall:

(i) Not be comprised of broken concrete, pavement or other debris;

(ii) Be comprised of clean washed gravel and rock;

(iii) Be countersunk and vertically align with the existing stream channel profile and gradient;

(iv) Be designed to allow natural bedload transportation;

(v) Be designed to withstand overtopping flood events;

(vi) Be used during periods of no or low stream flow; and

(vii) Be regularly inspected and maintained to provide fish passage.

(F) The Department may authorize construction of new fords in limited situations when it is the least impacting water crossing option. The following are examples of situations where the Department may authorize an unvented ford:

(i) The stream has extreme seasonal flow variations and low flows during anticipated ford use;

(ii) The channel has low bank height and low gradient approaches;

(iii) The stream has dynamic flood plains, such as alluvial fans; or

- (iv) The stream is subject to mass wasting events, debris transport, or extreme peak flows.
- (b) Alternative Option: the Department may approve road-stream crossing structures for which clear justification, based on fish performance, fish behavior data, and proposed post treatment hydraulic conditions (e.g., water depths, water velocities, and gate time open) is provided that demonstrates that the alternative design provides 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:
 - (A) Be a minimum of 4 feet wide unless the natural channel conditions are less than 4 feet wide;
 - (B) Consist of an aluminum tide gate door or other equivalent light weight material;
 - (C) Be a side hinged door configuration;
 - (D) Meet the requirements of OAR 635-412-0035(2) or 635-412-0035(3)(b) within the design streamflow range and for an average of at least 51 percent of tidal cycles, excluding periods when the channel is not passable under natural conditions;
 - (i) Design streamflow range shall include tidal exchange, freshwater stream discharge and water storage volumes draining to the tide gate;
 - (ii) Design streamflow range should consider sub-surface flows if appropriate at the project location;
 - (E) Design invert elevation of tide gate and associated structure to be placed at 1 foot below Mean Lower Low Water elevation or as otherwise appropriate for the site to prevent perched low flow fish passage conditions and allow proper tide gate function;
 - (F) Consider the use of pet doors, mitigators, self-managed and self-regulating tide gate devices to maximize fish passage, time of tide gate door openness, water exchange, and tidal inundation if the tide gate is associated with high priority restoration habitat; and
 - (G) Submit a water management plan for projects implementing self-managed or self-regulating devices.

NOTE: Alternative self-regulating design features that meet the design criteria of this section will be considered for fish passage.

- (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 shall be provided:
 - (A) After any inflow which contains native migratory fish;
 - (B) Until water has drained from the estuary, floodplain, or wetland, or through the period determined by the Department that shall be based on one, or more 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; or
 - (v) Some other reasonable measure; and
 - (C) Egress delays may be approved by the Department based on expected inflow frequency and suitable habitat exists 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)(l)(B);

- (G) If egress flow is provided by a pump, it shall be appropriately screened;
 - (H) The water depth and width through or across the point of egress shall be at least 4 inches;
 - (I) The ground surface above the artificial obstruction shall be sloped toward the point(s) of egress to eliminate isolated pools and topographic conditions that may entrain native migratory fish; 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 shall be provided:
- (A) If the Department determines there is current or historic native migratory fish spawning or rearing habitat within the estuary, floodplain, or wetland area impounded by the artificial obstruction; and
 - (B) During the period determined by the Department.
- (6) Requirements for fish passage by trap collection and transport include:
- (a) A permit issued by the Department is required to take fish when operating traps;
 - (b) Traps shall be constructed and operated 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) Traps should be constructed and operated so native migratory fish proceed through traps with minimal delay and are removed from traps as frequently as necessary to avoid over-crowding;
 - (f) All native migratory fish, excluding those which have approved take authorization from the Department and that 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 Department; and
 - (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.
- (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;
 - (C) Non-volitional transport within a watered container may only be allowed with Department approval; and
 - (D) Turning pools within the fish passage structure must be designed to allow for fish passage of a native migratory species at least 2 body lengths of the largest individual native migratory species currently or historically in the waters affected by the artificial obstruction.
 - (b) Catostomus, Chasmistes, and Deltistes species (suckers):
 - (A) The fish passage structure shall not require fish to jump when entering, within, or exiting the structure;
 - (B) Fishways shall:
 - (i) Have a maximum water velocity of 4 feet per second;
 - (ii) Have a minimum water depth of 12 inches;
 - (iii) Maximize downstream flow between pools to avoid back eddies;
 - (iv) Have curved walls within turning pools; and
 - (v) Have a slope less than 4 percent.
 - (c) Entosphenus and Lampetra species (lamprey):
 - (A) Fishways and associated structures (e.g., dams and spillways) shall have 4 to 6 inch smooth rounded radii edge

- surfaces (floors, aprons, walls, and weir crests) over which Entosphenus and Lampetra species may pass;
- (B) Fishways shall not have water surface to water surface jumps or overhanging surfaces unless fishway surfaces have a 4 to 6 inch smooth rounded radii (floors, walls and weir crests) over which Entosphenus and 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, continuous, 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) Denil fishways shall not be used unless an alternative passage route is provided;
- (E) Traps, picketed leads, picket weirs, auxiliary water supply grating or any other fishway grating shall have a spacing of less than 0.7 inches to preclude lamprey passage, or greater than 1.0 inch to allow lamprey to pass through;
- (F) Fishway wall diffusers for auxiliary water supply shall be located at least 6 inches above finish floor of fishway pool;
- (G) Auxiliary water floor diffusers shall be avoided if possible, but if necessary shall be located to provide at least 12 inches width of continuous smooth floor passage route along fishway floor;
- (H) Fishway designs shall consider orifice flow if Entosphenus or Lampetra species are present.
- (I) Orifices shall be positioned flush with the fishway floor and flush along one fishway wall; and
- (J) Lamprey Passage Structures (Lamprey Ramps) shall be considered when retrofitting existing artificial obstructions to improve conditions for upstream migration of Entosphenus and Lampetra species.
- (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 the required 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) When fish passage is not required or is provided by other means, exclusion barriers shall only be placed in the following situations:
 - (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 Department approved site-specific in-water work period;
 - (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 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 outside of the areas of project impacts by an authorized person with an ODFW Fish Rescue Salvage Authorization issued by and following the guidance of the Department; and

(f) After construction, the construction site shall be re-watered slowly and in a controlled 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 this state after:

(A) Laboratory testing with native migratory fish or similar species indicates that the structure provides 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 will 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 and approved by the Department:

(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 once met will require owner or operator to 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, unless the Department determines additional time is necessary;

(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; and

(e) The Department may consider a fish passage structure to no longer constitute an experimental fish passage structure after the Department finds three such structures of the same design concept placed in waters of this state effectively provide fish passage.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

AMEND: 635-412-0040

RULE TITLE: Mitigation Criteria

NOTICE FILED DATE: 10/21/2022

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

RULE TEXT:

- (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) Implementing measures that directly increase naturally-produced native migratory fish populations, especially sensitive or state or federally listed species through implementation of fish management measures; and
 - (d) Implementation of other actions specifically approved by the Commission or Department.
- (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 plans, including designs as applicable, in writing prior to implementation.

NOTE: Mitigation actions/measures/activities 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 or Department may require the posting of a bond or other financial instrument to cover the cost of mitigation actions or providing fish passage at the artificial obstruction if implementation of the mitigation action or providing fish passage does not achieve its goals.
- (8) An owner or operator of 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;
 - (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 and evaluating, and include adaptive management approved by the Department, that assure that the goal of the mitigation is achieved and maintained, and which are detailed in the 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) Shall attempt to restore or enhance historic conditions;
 - (h) To the extent possible, shall be consistent with existing native migratory fish or watershed management plans;

(i) May qualify for financial incentives or grants issued by the Department. The Department will not factor into its written benefit analysis the owner's or operator's cost for mitigation or fish passage at an artificial obstruction, nor any financial incentives or grants issued by the Department;

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

(10) The Department or Commission, as applicable, in determining the sufficiency of proposed mitigation:

(a) 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 or updated information, or situations which have no clear benefit to native migratory fish species;

(b) May require data collection and evaluation as directed by the Department, by the owner or operator 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;

(c) Shall consider the extent to which the proposed mitigation is likely to occur independent of a fish passage waiver; and

(d) Shall consider actions that anticipate the expected effects of climate change, which may include but is not limited to effects to streamflows, water temperatures, sediment transport, fish passage facility performance, biological responses, risk and uncertainty, and the importance of protecting and restoring habitat for native migratory fish.

STATUTORY/OTHER AUTHORITY: ORS 496.138, ORS 509.585

STATUTES/OTHER IMPLEMENTED: ORS 496.012, ORS 509.585

Exhibit B

OFFICE OF THE SECRETARY OF STATE

SHEMIA FAGAN
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

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

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 635
DEPARTMENT OF FISH AND WILDLIFE

FILED

10/21/2022 4:00 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Fish Passage Rule Amendments

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/16/2022 5:00 PM

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

CONTACT: Lisa Kingsley

503-947-6233

Lisa.M.Kingsley@ODFW.Oregon.gov

4034 Fairview Industrial Dr SE

Salem, OR 97302

Filed By:

Lisa Kingsley

Rules Coordinator

HEARING(S)

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

DATE: 12/16/2022

TIME: 8:00 AM

OFFICER: Oregon Fish and Wildlife Commission

ADDRESS: Sheraton Portland Airport Hotel

8235 NE Airport Way

Portland, OR 97220

SPECIAL INSTRUCTIONS:

Because of the rapidly changing situation with COVID-19, all or portions of this hearing may be conducted virtually.

Information will be posted on our website at <https://www.dfw.state.or.us/agency/commission/minutes/>

NEED FOR THE RULE(S)

These rules are needed to implement 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.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

1. Staff report prepared for the Oregon Fish and Wildlife Commission hearing on 12/16/2022.

2. Fish Passage Task Force Recommendation from 10/7/2022.

A copy of the rules and the other documents relied upon for this rulemaking [the above document(s)] are available from the Oregon Department of Fish and Wildlife, Fish Division, 4034 Fairview Industrial Drive SE, Salem, Oregon 97302-1142. Contact Lisa Kingsley at 503-947-6233 or lisa.m.kingsley@odfw.oregon.gov to view by appointment between the hours of 8:00 a.m. and 4:00 p.m., on normal working days, Monday through Friday.

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

The Department has solicited input from representatives of underrepresented communities likely to be affected on

whether the proposed rule will have a fiscal impact on the community, the extent of the fiscal impact, and whether the rules will have significant impact on underrepresented communities. <https://www.dfw.state.or.us/OARs/index.asp>

FISCAL AND ECONOMIC IMPACT:

There is a potential for fiscal or economic effects that may impact future construction costs of culverts that could result from the adoption of these proposed rule amendments. These impacts are discussed further in section (1) below.

COST OF COMPLIANCE:

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

The proposed rules will affect state agencies, units of local government, and the public, respectively, as discussed below:

A. The state agencies that have the potential to be affected by these proposed rule amendments includes the Oregon Department of Fish and Wildlife (ODFW), the Oregon Department of Transportation (ODOT) and the Oregon Department of Forestry (ODF). The impact to ODOT and ODF would be both direct and indirect in nature as the agency works together with ODFW and ODF to install and repair fish passage projects. These proposed rule amendments modify existing rules to provide further clarity to existing standards, establish new standards, and ensure the fish passage rules are consistent with ODFW's current Climate and Ocean Change Policy. The Climate and Ocean Change Policy was adopted by the Oregon Fish and Wildlife Commission (OFWC) into rule by a unanimous vote in July of 2020. This Climate and Ocean Change Policy provides the Department and OFWC guidance on delivering a coordinated, effective, and efficient response to changing climate and ocean conditions. Aligning the Climate and Ocean Change Policy with the fish passage rules will facilitate proactive solutions to address fish passage issues that are magnified by changing climate and ocean conditions. No significant changes from the current levels of ODFW's staffing, expenditures, or revenues are expected because of these rule amendments.

B. Units of local government may be affected by the proposed rule amendments if they are involved in fish passage operation, maintenance and construction activities. To achieve compliance with the new fish passage proposed rule changes, the size of culverts and in some cases bridges or other water control facilities, is proposed to slightly increase. This may result in an incremental cost increase to purchase and install larger fish passage-compliant structures. These larger structures will also increase hydraulic capacity and may decrease future maintenance costs for the owner/operator of the facility. ODFW is not able to provide cost estimates of these revisions at this time since the impact to the cost of future fish passage projects would be project- and site-specific.

C. The general public is not anticipated to experience any direct fiscal impacts as a result of these proposed rule amendments. However, members of the public who are directly involved with or own and manage fish passage structures and are associated with construction activities may be indirectly impacted by these revisions. To achieve compliance with the new fish passage proposed rule changes, the size of culverts and in some cases bridges or other water control facilities, is proposed to slightly increase. This may result in an incremental cost increase to purchase and install larger fish passage compliant structures. These larger structures will also increase hydraulic capacity and may decrease future maintenance costs for the owner/operator of the facility. ODFW is not able to provide cost estimates of these revisions at this time since the impact to the cost of future fish passage projects would be project and site specific.

(2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s);

No significant effects on small businesses are expected as a result of the proposed amendments.

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

No significant changes in these types of compliance costs are expected.

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

No significant changes in these types of compliance costs are expected.

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

In 2021 ODFW conducted a public comment period to kick off this rule making process and an additional public comment period on the final proposed rule changes. During 2021 and 2022 there were 20 rules subcommittee meetings and additional Fish Passage Task Force Meetings where rule changes were discussed. Each meeting was open to the public and had a designated public comment period. Meeting agendas and minutes were and continue to be posted online for public review. ODFW received comments from the timber industry, agricultural representatives, and members of the public that likely qualify as small businesses.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The Fish Passage Task Force, and a subset of the Task Force, acted as a Rules Subcommittee for the creation of these proposed rule revisions. Under OAR 635-412-0010(4)(a), the Task Force is directed to act as public advisory committee regarding rulemaking associated with fish passage. The Task Force and subcommittee were involved in public meetings to draft rules and address public comments received during the administrative rule development process. Additional public correspondence and testimony is accepted into the record as part of the rulemaking process during the Commission hearing.

RULES PROPOSED:

635-412-0001, 635-412-0005, 635-412-0010, 635-412-0015, 635-412-0020, 635-412-0025, 635-412-0030, 635-412-0035, 635-412-0040

ADOPT: 635-412-0001

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

635-412-0001

Purpose of the Fish Passage Policy

(1) The purpose of these rules is to further clarify and implement the State's fish passage statutes (ORS 509.580 through 509.910) and the Department's Climate and Ocean Change Policy (OAR 635-900-0001 through 635-900-0020) through the application of consistent standards.¶

(2) It is the policy of the State of Oregon to provide for upstream and downstream passage of native migratory fish at artificial obstructions.¶

(3) Changes in Oregon's future climate make fish passage even more critical, and a lack of fish passage within watersheds may threaten the existence of some native migratory fish species.¶

(4) It is therefore the intent of these rules to promote fish passage while recognizing cooperation and collaboration between public and private entities are necessary to accomplish the policy goal of providing fish passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native migratory fish populations, as envisioned by the Oregon Plan (ORS 541.898).

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS 496.012, ORS 509.585

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

635-412-0005

Definitions ¶¶

(1) For the purposes of OAR 635-412-0010 through 635-412-0040~~65~~ the following definitions shall apply.¶¶

~~(2) "Active channel width" means the~~ abandonment" means to surrender, decommission, no longer use for an authorized purpose, or give up control.¶¶

~~(3) "Active channel width" means the naturally occurring cumulative~~ stream width(s) between the ordinary high water lines, or at the channel bankfull elevation if the ordinary high water lines are indeterminate.¶¶

~~(34)~~ "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~~ significantly delays or prevents the migration of native migratory fish.¶¶

~~(45)~~ "Attraction flow" means ~~the flow that emanate~~ water that flows from or near a fishway entrance in sufficient quantity, velocity, and location to attract ~~upstream migrants~~ fish as they migrate upstream 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~~ fishway entrance.¶¶

~~(56)~~ "Bankfull elevation" means the point on a stream bank at which overflow into a floodplain begins.¶¶

~~(67)~~ "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.¶¶

~~(78)~~ "Channel" means ~~at that portion of a natural (perennial or intermittent)~~ waterway that periodically or continuously contains moving waters of this state and has a definite bed and banks that serve to confine the water.¶¶

~~(89)~~ "Commission" means the Oregon Fish and Wildlife Commission.¶¶

~~(910)~~ "Construction" with respect to artificial obstructions subject to these rules, means:¶¶

(a) Original construction;¶¶

(b) Major replacement, which includes:¶¶

(A) ~~For existing dams and diversions, either a single or cumulative:~~¶¶

~~(i) Excavation or replacement of 30 percent by structure volume of the dam;~~¶¶

~~(ii) Repairs, patches, or modifications to over 30 percent of the area of either the upstream or downstream face of the dam (measured above the natural ground gradeline that is used to impound water); or~~¶¶

~~(iii) Repairs, patches, or modifications different than the original configuration and that reduce, as determined by the Department, the adequacy of fish passage 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 in the case of existing seasonal dams or diversions, the artificial obstruction is in compliance with a water right(s), other regulatory requirements, and the artificial obstruction maintains an open channel connection with adequate water flow and depth conditions that meet OAR 635-412-0035 (2) when instream water is available and between the fish passage design streamflow range.~~¶¶

~~(B) For existing tide gates and flood gates:~~¶¶

~~(i) C, either a single or cumulative r;~~¶¶

~~(i) Replacement of over 50 percent of the gate material; or~~¶¶

~~(ii) Cumulative r, including hinges and the gate itself if detached;~~¶¶

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

~~(C) For: or~~¶¶

~~(iii) Replacements, repairs, patches, or modifications different than the original configuration and that reduce the adequacy of fish passage, as determined by the Department.~~¶¶

~~(C) For existing dikes, berms, levees, roads, culverts, bridges, or other artificial obstructions that segment estuaries, floodplains, or wetlands, either a single or cumulative:~~¶¶

~~(i) Activity or activities defined under OAR 635-412-0005(910)(d) in all locations where current channels cross the artificial obstruction segmenting the estuary, floodplain, or wetland; or~~¶¶

~~(ii) The cumulative r~~ 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 existing artificial obstructions, the single or cumulative removal, fill, replacement, or addition of over 50 percent of the structure comprising the artificial obstruction to native migratory fish migration device that impedes fish passage;¶

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

(d) ~~For purposes of culverts, i~~Installation or replacement of a roadbed ~~or~~, culvert, further defined as:¶

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

~~(iA) Creates a road which or bridge that crosses a channel;~~¶

~~(iiB) Widens a roadfill footprint within a channel; or¶~~

~~(iii)¶~~

~~(C) 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:~~¶

~~(iD) Installs or constructs a new road, culvert, bridge, overflow pipe, apron, or wingwall within a channel;~~¶

~~(iiE) 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;~~¶

~~(F) Makes either single or cumulative repairs, patches, or modifications to over 50 percent of the linear length of a culvert;~~¶

~~(G) Makes either single or cumulative repairs or patches, or modifications to over 50 percent of the linear length of a culvert structural volume of a bridge or its elements except when this volume is exclusively composed of the traveling surface of a bridge deck;~~¶

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

~~(vI) At any point along the linear length of an existing culvert, reduces the entire inside perimeter of the culvert; or¶~~

~~(viJ) Makes replacements, repairs, patches, or modifications to an existing culvert or bridge 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 culverts determined by the Department, the adequacy of fish passage.~~¶

NOTE: see Department Memorandum for clarification of fish passage triggers and guidelines for bridges.¶

(101) "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.¶

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

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

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

(145) "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.¶

(156) "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.¶

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

(178) "Exemption" means not providing fish passage at an artificial obstruction when either mitigation in lieu of providing fish passage through a waiver as defined in ORS 509.585(7)(a) is authorized, an artificial obstruction has been granted a legal waiver as defined in ORS 509.585(7)(b), or a finding that there is no appreciable benefit to providing fish passage at the artificial obstruction as defined in ORS 509.585(7)(c).¶

(19) "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.¶

~~(1820) "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.~~¶

~~(219) "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.~~¶

~~(202) "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~~primary purpose of providing upstream or downstream fish passage at artificial or natural obstructions which create a discontinuity between upstream and downstream water or bed surface elevations.¶

(213) "Fishway entrance" means the component of a fishway that discharges attraction flow into the ~~tailrace~~and waterway downstream of an artificial obstruction where upstream migrant fish enter the fishway.¶

(224) "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.¶

(235) "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.~~¶

(256) "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 action involves construction or abandonment of an artificial obstruction.¶

(267) "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.¶

(278) "Historically" means ~~prior to~~before 1859 (statehood).¶

(289) "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.¶

(2930) "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 ~~determined~~by the Oregon Department of Fish and Wildlife, directly affected by an artificial obstruction.¶

(301) "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.¶

(312) "Mitigation" means alternatives to providing fish passage at an artificial obstruction as per ORS 509.585 that provide a net benefit to native migratory fish.¶

(323) "Native migratory fish" means naturally or hatchery produced native fish (as defined under OAR 635-007-0501) indigenous (i.e., not introduced) to Oregon 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 200522. 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 rhodoterus - 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 rimiculus - Klamath smallscale sucker;¶

(k) Catostomus snyderi - Klamath largescale sucker;¶

(l) Catostomus tahoensis - Tahoe sucker;¶

(m) Catostomus tsiltcoosensis - Tyee sucker;¶

(n) Catostomus warnerensis - Warner sucker;¶

(o) ~~Hypomesus pretiosus~~ - Surf smelt;¶

(p) ~~Lampetra ayresii~~ - River Deltistes luxatus -- Lost River sucker;¶

(q) Entosphenus folletti -- Northern California brook lamprey;¶

(r) ~~Lampetra~~Entosphenus lethophagus -- Pit-Klamath brook lamprey;¶

(s) ~~Lampetra~~Entosphenus minima-us -- Miller Lake lamprey;¶

(t) ~~Lampetra~~Entosphenus simileis -- Klamath River lamprey;¶

(u) ~~Lampetra~~Entosphenus tridentate-us -- Pacific lamprey;¶

(v) ~~Oncorhynchus clarki~~ - Coastal, Lahontan and West Slope cutthroat trout;¶

(w) ~~Hypomesus pretiosus~~ - Surf smelt;¶

(x) Lampetra ayresii - Western river lamprey;¶

(w) Lampetra pacifica -- Pacific brook lamprey;¶

(x) Lampetra richardsoni -- Western brook lamprey;¶

(y) Oncorhynchus clarkii - Cutthroat trout;¶

(z) Oncorhynchus gorbuscha -- Pink salmon;¶

(aa) Oncorhynchus keta - Chum salmon;¶

(~~w~~bb) Oncorhynchus kisutch - Coho salmon;¶

(~~x~~cc) Oncorhynchus mykiss - Steelhead, Rainbow and Redband trout;¶

(~~y~~dd) Oncorhynchus nerka - Sockeye/Kokanee salmon;¶

(~~z~~ee) Oncorhynchus tshawytscha - Chinook salmon;¶

(~~a~~ff) Prosopium williamsoni - Mountain whitefish;¶

(~~b~~gg) Ptychocheilus oregonensis - Northern pikeminnow;¶

(~~e~~hh) Ptychocheilus sp. -- Siuslaw pikeminnow;¶

(ii) Ptychocheilus umpquae - Umpqua pikeminnow;¶

(~~d~~jj) Salvelinus confluentus - Bull trout;¶

(~~e~~kk) Spirinchus thaleichthys - Longfin smelt;¶

(~~f~~ll) Thaleichthys pacificus - Eulachon.¶

(334) "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.¶

Exhibit B

(345) "No Appreciable Benefit to Providing Fish Passage" means, as determined by the Department using its best professional judgement, fish habitat that would be made accessible, or more accessible, in the reach upstream or downstream of the artificial obstruction, does not currently provide, and will not foreseeably provide before a review occurs in seven years pursuant to ORS 509.585(9)(b), habitat of the type, duration, frequency, quality, or quantity necessary to support one or more life history stages of the native migratory fish that are present, or will foreseeably be present before a review occurs in seven years pursuant to ORS 509.585(9)(b), upstream or downstream of the artificial obstruction.¶

(36) "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.¶

(357) "Oregon Plan" means the guidance statement and framework described in ORS 541.405898.¶

(368) "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.¶

(379) "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.¶

(3840) "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~~ wing walls, retaining walls, headwalls, bridge supports, abutments, piers, or scour protection countermeasures such as wing walls, retaining walls, or headwall.¶

(41) "Roughened channel" means a fishway designed to provide fish passage which encompasses the entire stream channel and may be over-steepened relative to the long-channel streambed profile, including but not limited to nature-like rock, rock ramp, or engineered-streambed fishways.¶

(3942) "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.¶

(403) "Structure volume" means volumetric calculation of an existing dam or other artificial obstruction and its elements or components.¶

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

(415) "Tailrace" means the water immediately downstream of an instream structure discharging flow to a receiving water body.¶

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

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

(448) "Trash rack" means a human built or placed measure used to prevent unwanted materials from entering a fishway, culvert, bridge, water diversion or other structures.¶

(49) "Trigger" means any event or activity that qualifies as construction, abandonment, or a fundamental change in permit status pursuant to Division 412 rules associated with or at any artificial obstruction that requires an owner or operator of that artificial obstruction to provide fish passage or alternatives to fish passage consistent with such rules. A trigger at one artificial obstruction physically connected to another artificial obstruction requires

passage be addressed at both connected structure(s).¶

(50) "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.¶

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

(4652) "Waiver" means a fish passage exemption specifically allowed under OAR 635-412-0025 (1)(a) or (b) if the Commission or Department, as applicable, determines that alternatives to providing fish passage at an artificial obstruction, as proposed by the owner or operator of the artificial obstruction, provides a net benefit to native migratory fish.¶

(53) "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.¶

(547) "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.

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS ~~509.580, 509.585, 509.610, 509.624~~496.012, ORS 509.585

AMEND: 635-412-0010

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

635-412-0010

Fish Passage Task Force ¶¶

(1) ~~The Director shall appoint nine members to constitute the Fish Passage Task Force.~~ Fish Passage Task Force has nine members who are appointed by the Director. ¶

(2) ~~Three members shall represent interests subject to the obligation to install fish passage at facilities they install, own or operate; three members shall represent fishing, environmental or conservation interests, and three members shall represent the general public.~~ ¶

(3) ~~Members shall serve four year terms; and shall be eligible for reappointment to the task force, except that the initial designation of members shall appoint members of each interest group to a three year, four year or five year term to establish a staggered system of new appointments for each interest group's members.~~ Members are eligible for reappointment. ¶

(4) The Task Force shall: ¶

(a) ~~Serve as the public advisory committee and advise the Director, Department, and Commission regarding rulemaking to implement the fish passage and waiver/exemption requirements consistent with applicable law;~~ ¶

(b) ~~Prioritize projects from the statewide inventory of artificial dams and obstructions for purposes of restoration and enforcement;~~ ¶

(c) ~~Recommend to the Director, Department, and Commission appropriate levels of funding and special conditions applicable to projects installing fish passage or alternatives to fish passage resulting in a net benefit to native migratory fish;~~ ¶

(d) ~~Select one of its members to serve as chair and one as vice chair of the Task Force;~~ ¶

(e) ~~Review and recommend to the Commission which projects should be exempt, and changes to the list of projects exempt from passage requirements under section 8 of Section 2 of HB 3002 (2001).~~ Department or Commission, as applicable, which projects should be exempt; ¶

(f) ~~Report semiannually to the joint legislative committee created under ORS 171.551, or to the appropriate interim legislative committee with responsibility for salmon restoration or species recovery, advising the committee on matters related to fish passage;~~ ¶

(g) ~~After public review and comment, review applications for waiver/exemptions of the fish passage requirement, and advise the Commission as to whether alternative measures result in a net benefit to native migratory fish or~~ Department, as applicable, as to whether an artificial obstruction should be deemed exempt pursuant to ORS 509.585(9); ¶

(h) ~~Perform such other duties relating to fish passage as requested by the Director or Commission;~~ ¶

(i) ~~The Task Force shall meet at such times and places as may be determined by the chair or by a majority of members of the task force.~~ ¶

(5) ~~The Department's Fish Passage Coordinator shall serve as staff for the Task Force.~~ ¶

(6) ~~The chair of the Task Force shall conduct the meetings of the Task Force, serve as the main contact point between the Department and/or Commission and the Task Force, and perform such other duties as the Task Force shall set. The vice chair of the Task Force shall serve as chair if the chair is unavailable to carry out their duties of chair.~~ ¶

(7) ~~Members of the~~ ¶

(7) Task Force members may not receive compensation for services as a member of the Task Force; however, in accordance with ORS 292.495, a member of the Task Force may receive reimbursement for actual and necessary travel or other expenses incurred in the performance of official duties.

Statutory/Other Authority: ~~HB 3002~~ ORS 496.138, ORS 509.585

Statutes/Other Implemented: ~~HB 3002~~ ORS 496.012, ORS 509.585

AMEND: 635-412-0015

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

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) for restoration and enforcement purposes.¶¶~~

(2) The priority list may exclude artificial obstructions where a legal agreement with the Department or Commission specifically indicates fish passage is not required.¶¶

(3) The Department will prioritize working collaboratively with the owners or operators of artificial obstructions on the priority list to establish fish passage.¶¶

(4) The priority list shall be based on the current and future needs of native migratory fish.¶¶

~~(a) The prioritization~~ (5) When determining placement of an artificial obstruction on the priority list, the Department may use existing Department information or professional judgment.¶¶

(6) When determining placement of an artificial obstruction on the priority list, the Department shall consider the following factors relative to each artificial obstruction for all native migratory fish currently or historically present at the artificial obstruction in waters of this state where the artificial obstruction is located. These factors include but may not be limited to:¶¶

(Aa) The current and future quantity of native migratory fish habitat which is inaccessible;¶¶

(Bb) The current and future quality of native migratory fish habitat which is inaccessible;¶¶

(Cc) The reasonably foreseeable future quantity and quality of native migratory fish habitat given known trends in climate change (e.g., changes in timing and quantity of streamflow and stream temperatures);¶¶

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

~~(De)~~ (e) The biological status of the native migratory fish;¶¶

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

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

(Gh) 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.¶¶~~

~~(d) ¶¶~~

(7) The Department shall field verify the information used for prioritization prior to initiating any enforcement actions.¶¶

~~(e8)~~ The Department shall re-evaluate make changes to the priority list with using the most recent information after enforcement occurs at five priority artificial obstructions or as directed by the Commission.¶¶

~~(39) The Commission shall review, approve, or amend the priority list after the initial priority list is developed, when the Department re-prioritizes when the Department changes the ranking of barriers on the list, and not less frequently than at once every five years.¶¶~~

~~(4) Once the Commission has approved the priority list, t10) The Department may order a person owning or operating or of 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) within a defined timeframe under any of the following circumstances:¶¶~~

(a) The owner or operator of an artificial obstruction refuses to work cooperatively with the Department;¶¶

(b) 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/or¶¶

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

~~(511) 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 of an artificial obstruction has two years from the Department's order 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.¶
(12) The relative position of an artificial obstruction on the priority list should not be used as a basis for approving or denying an application for an exemption.

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS 509.585, 496.012, ORS 509.62585

AMEND: 635-412-0020

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

635-412-0020

Fish Passage Approval ¶

- (1) ~~No person shall~~ artificial obstruction may be constructed or maintain ~~any artificial obstruction~~ ed 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~~ a trigger, an owner or operator of an artificial obstruction shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters of this state where the artificial obstruction is located, 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 of this state where the artificial obstruction is located, prior to a trigger the owner or operator of 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~~ subject to the programmatic approval meet and adhere to criteria determined by the Department; ¶
- (B) The owner, operator, or agent demonstrates ~~to, as determined by~~ 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~~ subject to the programmatic approval at reasonable times; and ¶
- (E) The owner, operator, or agent agrees to expeditiously remedy all fish passage structures ~~placed under~~ subject to the programmatic approval which the Department finds do not meet the applicable 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 that the Department concurs meet the purposes of the Department's fish passage program;~~ or ¶
- (ed) 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); of this rule unless: ¶
- (a) An owner or operator demonstrates to the Department an imminent or immediate threat to human safety exists 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. ~~As determined by the Department (providing passage at the time of construction is preferred);~~ ¶
- (b) The Department or Commission finds ~~that~~ additional time is necessary and appropriate given the size and scope of the project; ¶
- (c) Installation begins within ~~this period~~ the same in-water work period as the action that triggered fish passage 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~~given the terms and conditions of a negotiated settlement for a federal proceeding; or ~~into ensure~~ coordination with other federal requirements.

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ~~ORS 509.585, 496.012, ORS 509.64585~~

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

635-412-0025

Fish Passage ~~Waivers and Exemptions~~ ¶

~~(1) 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.¶~~

~~(2) 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.¶~~

~~(23) 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 as a direct result of the proposed mitigation actions. To qualify for a waiver of the requirement to install fish passage, proposed mitigation shall must result in a benefit to native migratory fish greater than that provided by benefit to such species that would be provided by fish passage at the artificial obstruction with fish passage. The net benefit to fish-determination shall be based upon conditions that exist at the time of comparison and should consider future conditions (e.g., climate change).¶~~

~~(34) 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) Until the next fish passage trigger at the artificial obstruction or until 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 determines that circumstances have changed such that the waiver requirements no longer apply, pursuant to ORS 509.585(9)(b).¶~~

~~(5) For eExemptions granted under subsection (41)(ac) and (4)(b), the exemption continues only so long as the original benefit of the mitigation is maintained. of this rule shall be valid only so long as conditions that justified that exemption do not change, except if:¶~~

~~(6a) The Commissat exemption shall review, at least once every seven years, exempts expired;¶~~

~~(b) A trigger occurs with respect to the artificial obstructions that do not have exemption expiration date to determine whether the exemption should continue. The Commission ma subject to that exemption; or¶~~

~~(c) The Commission or Department determines that exemption should not be renewed.¶~~

~~(6) At least once every rsevoke or amend an exemption if it finds that circumstances have changed such that the basis for the exemption no longer appliesen years, the Department shall review, exemptions under subsection (1)(c) of this rule to determine whether such exemptions should be renewed. 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. Prior to a seven-year review, exemptions under subsection (1)(c) of this rule may be reviewed by the Commission or Department.¶~~

~~(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 either a waiver or exemption under subsection (1)(a) or an exemption under section 1(c) of this rule.¶~~

~~(8) Based on application review, verification of the information in the application and of 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)proposal in the application meets the applicable requirements. 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 effective level of passage shall be factored into the Department's net-benefit analysis, allowing a reduction in required mitigation measures.¶~~

~~(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 required mitigation. The 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 or Department finds that additional time is necessary and appropriate:¶

(a) ~~G~~ given the size and scope of the project; or¶

(b) ~~T~~ to coordinate with requirements of federal proceedings.¶

(10) ~~Once the application,~~The Commission or Department may require additional mitigation associated with a waiver if the mitigation cannot be or is not completed within the required time frame set forth in the agreement prescribed by subsection (9) of this rule.¶

(11) ~~Once the application, Department's written benefit analysis, and a draft agreement are completed, a decision on whether the waiver or exemption shall be granted~~the exemption determination 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~~exemption under section 1(a) and 1(b) is being sought is less than or equal to 1 mile to a natural barrier;¶

(B) ~~If the request is for an exemption of current native migratory fish distribution;~~¶

(B) For all exemptions proposed to have no appreciable benefit under subsection (4)(a) or (4)(b); or 1(c) of this rule; and¶

(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/or¶

(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.~~¶

(112) The decision to grant a ~~waiver or n~~ exemption shall include the determination described in subsection (18) or (4) of this rule 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~~documenting applicable exemption conditions.¶

(13) The Department may amend or approve changes to the agreement if the changes do not affect the benefit analysis and ~~wafter~~ conservation district(s), identified stakeholders, and others who have expressed an interest in ~~fa~~ public review and recommendation by the Fish Passage Task Force.¶

(14) ~~In addition to the Fish p~~Passage issues or the specific waiver or exemption request Task Force, the Department shall notify the public and provide an opportunity to review and comment on the owner or operator's request at least three weeks prior to a decision on whether the waiver or exemption should be granted ~~n~~ exemption determination.¶

(135) The Commission (or Department, as applicable) may ~~requir~~provide further public comment prior to a decision on whether a ~~waiver or n~~ exemption should be granted.¶

(146) The Department shall maintain a database of the locations of ~~waived and~~exempted artificial obstructions and mitigation.

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS ~~509.585,496.012,~~ ORS 509.64585

AMEND: 635-412-0030

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

635-412-0030

Fish Passage Protests ¶¶

(1) A person owning or operating an artificial obstruction may request alternative dispute resolution at any point in the process of determining fish passage requirements.¶¶

(2) The owner or operator of the artificial obstruction who objects to a determination made by the Department under these rules may file a protest with the Commission. Protests must be submitted in writing within 30 days of receipt of a written determination from the Department from the date the Department posts the determination on its website and must include the grounds for protesting the Department's at determination.¶¶

(3) The Commission may approve, deny, or modify the Department's proposed or final determination after sufficient opportunity for public review and comment.¶¶

(4) If a protest is not filed within 30 days of receipt of a written determination from the Department, the Commission's or Department's determination ~~shall~~ becomes a final order.

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS ~~509.585~~, 496.012, ORS 509.64585

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

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) ~~N~~The native migratory fish that are currently or were historically present at the site which require that must be provided fish passage;¶

(B) ~~L~~The life history stages which the required fish passage must accommodate; and ¶

(C) ~~D~~ateThe periods of the year and/or any conditions when relevant to when fish passage shall be provided for the such 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 for the Department to efficiently evaluate whether the design will meet fish passage criteria including a description of how climate change impacts have been incorporated into the final design;¶

(c) If site-specific circumstances indicate that the fish passage criteria are not adequate to provide fish passage at the artificial obstruction, the Department may require in writing that additional fish passage criteria be met;¶

(d) If the Department determines that the existing or historically present native migratory fish species or site-specific circumstances warrant ~~it, the Department may provide~~ an exception to any specific fish passage criterion ~~if then the Department determines in writing may approve such an exception in writing as long as it finds~~ that fish passage ~~shall~~ will likely still be provided at the artificial obstruction;¶

(e) All fish passage structures shall be designed ~~to take into consideration~~ ing 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 of a fish passage plan~~ 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, its review and determination;~~¶

(g) The Department may require monitoring and reporting to determine if a fish passage structure meets applicable criteria and/or is providing fish passage as intended and designed; and ¶

(h) The ~~person owning~~ owner or ~~operator~~ or of 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 and should be analyzed using estimates for the projected life expectancy of the structure;¶

(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 adult 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, except vertical slot weir

width may be 6 inches where the Department has determined the artificial obstruction is required to provide fish passage only for juvenile native migratory fish;¶

(g) Fishway pools shall:¶

(A) Be sized according to the applicable native migratory fish and life history stages requiring passage and to avoid over-crowding;¶

(B) Have $V \leq wQH/4$ 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 changes direction 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 steppasses and denils;¶

(h) The fishway exit should be located to minimize the risk of fish unintentionally falling downstream of the artificial obstruction, or into a water diversion;¶

(i) Fishway trash racks shall:¶

(A) Allow for easy maintenance and debris removal;¶

(B) Be maintained and cleaned as necessary to provide fish passage;¶

(C) Have a minimum clear space between vertical members of 9 1/2 inches, except:¶

(i) 10 inches shall be provided if adult chinook are present; and¶

(ii) A at least 4 inches shall be provided if only juveniles are present; and¶

(D) Have a minimum clear space between horizontal members of 4 1/4 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 surfaces, edges and fasteners which fish may contact ground smooth or chamfered;¶

(D) Not have protrusions that extend into the flow path of the fishway;¶

(E) Not expose fish to any moving parts;¶

(F) Be designed to avoid turbulence and hydraulic transition flow conditions as much as possible;¶

(G) Have as much ambient lighting as possible and avoid lighting transitions;¶

(H) 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¶

(I) 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 steppasses and denils, shall not be used in areas where downstream passage will occur through the baffled-chute fishway; and¶

(B) All fishways of a specific type with accepted configurations shall comply with those configurations; and¶

(C) Fish passage plan Requirements for fishways which encompass the entire channel include:¶

(A) Roughened channels 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 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 precaunature-like fishway designs shall;¶

(i) Meet the requirements of OAR 635-412-0035(3)(a)(A) (ii), (iv), (v) (II through VII), or OAR 635-412-0035(3)(b);¶

(ii) Not have a slope that exceeds 6 percent, unless the average natural stream slope exceeds 6 percent; and¶

(iii) Contain partially buried over-sized boulder or boulder clusters to provide structural integrity and localized areas of lower water velocity.¶

(B) Stream channel-spanning weirs shall:¶

(i) Rise toward each bank from a low flow section centered along the thalweg of the channel;¶

(ii) Have a downstream jump pool with a minimum depth of 2 feet;¶

(iii) Have a maximum difference in elevation of 6 inches between the lowest point on the weir and the downstream pool's water surface control point;¶

(iv) Be sealed if fish passage during low flows is required;¶

- (v) Be spaced at least 1.5 active channel widths apart if there are multiple weirs and recommend consideration of wider spacing when appropriate; and¶
- (vi) Extend into the streambank a sufficient distance to protect against flanking;¶
- (C) All fishway entrances or flow outlets shall be designed to provide passage or be designed to only be used during a period(s) defined by the Department.¶
- (D) Fish passage plans for hybrid fishways that may combine features of several established fishway types shall have criteria established by the Department on a case-by-case basis and shall clearly demonstrate how water depths, water velocities, water surface jump height differentials or energy dissipation provides hydraulic conditions that shall provide achieves fish passage.;¶
- (m) 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 or other artificial obstructions shall be greater than 4 inches during all flows.¶
- (D) Fish screening and bypass devices installed to protect downstream migrating fish should be constructed to Department specifications and must meet Department criteria when installation is required.¶
- (3) Requirements for fish passage at road-stream crossing structures such as bridges and culverts are:¶
- (a) Stream Simulation Option (preferred design alternative) where:¶
- (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 multiplied by 1.2 plus 2 feet, 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;¶
- (VI) Considers bed scour and stability of the bed material due to the confined flow through the crossing structure. Major structural components within the crossing should be designed for structural stability at the 100 year flood flow; and¶
- (VII) Contains a low flow thalweg.¶
- (B) Trash racks shall:¶
- (i) Allow for easy maintenance and debris removal;¶
- (ii) Be maintained, monitored, and cleaned as necessary to provide fish passage;¶

- (iii) Not extend below the active channel width elevation;
- (iv) Have a minimum of 10 inches clear spacing between vertical members; and
- (v) Have a minimum clear space between horizontal members of 12 inches.
- (C) Beaver exclusion culvert protection devices shall:
 - (i) Allow for easy maintenance and debris removal;
 - (ii) Be maintained, monitored, and cleaned as necessary to provide fish passage;
 - (iii) Have a minimum clear space between vertical and horizontal members of 96 inches clear-spacing between vertical members; or when only resident trout, Entosphenus and Lampetra species (lamprey) species are present;
 - (iv) Be approved on a case by case basis in areas with salmon, steelhead, bull trout, or other large bodied species.
- (D) Unvented and vented ford crossings shall meet the requirements of OAR 635-412-0035(2) and 635-412-0035(3)(b); and
 - (i) Be located outside of all known or suspected fish spawning areas such as pool tail-outs;
 - (ii) Be constructed perpendicular to the stream flow;
 - (iii) Minimize the width (perpendicular to streamflow);
 - (iv) Maintain similar water depths and flow velocities as surrounding stream during the design stream flows; and
 - (v) Have a low flow channel constructed within the crossing.
- (E) Unvented ford crossings shall meet design criteria in OAR 635-412-0035(3)(a) and be constructed using materials approved by the Department that shall:
 - (i) Not be comprised of broken concrete, pavement or other debris;
 - (ii) Be comprised of clean washed gravel and rock;
 - (iii) Be countersunk and vertically align with the existing stream channel profile and gradient;
 - (iv) Be designed to allow natural bedload transportation;
 - (v) Be designed to withstand overtopping flood events;
 - (vi) Be used during periods of no or low stream flow; and
 - (vii) Be regularly inspected and maintained to provide fish passage.
- (F) The Department may authorize construction of new fords in limited situations when it is the least impacting water crossing option. The following are examples of situations where the Department may authorize an unvented ford:
 - (i) The stream has extreme seasonal flow variations and low flows during anticipated ford use;
 - (ii) The channel has low bank height and low gradient approaches;
 - (iii) The stream has dynamic flood plains, such as alluvial fans; or
 - (iv) The stream is subject to mass wasting events, debris transport, or extreme peak flows.
- (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; proposed post treatment hydraulic conditions (e.g., water depths, water velocities, and gate time open) is provided that demonstrates that the alternative design shall provides 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) Be a minimum of 4 feet wide and shall unless the natural channel conditions are less than 4 feet wide;
 - (B) Consist of an aluminum tide gate door or other equivalent light weight material;
 - (C) Be a side hinged door configuration;
 - (D) Meet the requirements of OAR 635-412-0035(2) or 635-412-0035(3)(b) within the design streamflow range and for an average of at least 51%percent of tidal cycles, excluding periods when the channel is not passable under natural conditions;
 - (i) Design streamflow range shall include tidal exchange, freshwater stream discharge and water storage volumes draining to the tide gate;
 - (ii) Design streamflow range should consider sub-surface flows if appropriate at the project location;
- (E) Design invert elevation of tide gate and associated structure to be placed at 1 foot below Mean Lower Low Water elevation or as otherwise appropriate for the site to prevent perched low flow fish passage conditions and allow proper tide gate function;
- (F) Consider the use of pet doors, mitigators, self-managed and self-regulating tide gate devices to maximize fish passage, time of tide gate door openness, water exchange, and tidal inundation if the tide gate is associated with high priority restoration habitat; and
- (G) Submit a water management plan for projects implementing self-managed or self-regulating devices.

NOTE: Alternative self-regulating design features that meet the design criteria of this section will be considered

for fish passage.

(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 a:~~

~~(A) After any inflow which may contains native migratory fish;~~

~~(B) Downstream fish passage shall be provided u~~Until water has drained from the estuary, floodplain, or wetland, or through the period determined by the Department ~~which~~that shall be based on one, or a ~~combination~~more 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; and~~

~~(C) Egress delays may be approved by the Department based on expected inflow frequency if there is and suitable habitat exists 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)(l)(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 at least 4 inches;~~

~~(I) The ground surface above the artificial obstruction shall be sloped toward the point(s) of egress to eliminate isolated pools and topographic conditions that may entrain native migratory fish; 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)(l)(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 shall be provided.~~

~~(A) If the Department if determines there is current or historic native migratory fish spawning or rearing habitat within the estuary, floodplain, or wetland area impounded by the artificial obstruction; and~~

~~(B) During the period determined by the Department.~~

~~(6) Requirements for fish passage collection and transport at traps are include:~~

~~(a) A collections per ORS 506.006(12), a permit issued by the Department is required to take fish when operate alling traps;~~

~~(b) Traps shall be constructed and operated 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) N Traps should be constructed and operated so native migratory fish shall be processed through traps with minimal possible delay and are removed from traps 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 that 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 Department.~~

~~(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 may only be allowed with Department approval; and~~

~~(D) Turning pools within the fish passage structure must be designed to allow for fish passage of a native migratory species at least 2 body lengths of the largest individual native migratory species currently or historically in the waters affected by the artificial obstruction.~~

~~(b) Catostomus and, Chasmistes, and Deltistes species (suckers):~~

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

- (B) Fishways shall ~~h~~ ii
- (i) Have a maximum water velocity of 4 feet per second; ii
- (C) ~~Fishways shall hii~~ Have a minimum water depth of 12 inches; ii
- (D) ~~Fishways shall miii~~ Maximize downstream flow between pools to avoid back eddies; ii
- (E) ~~Fishways shall hij~~ Have curved walls within turning pools; and ii
- (F) ~~Fishways shall hH~~ Have a slope less than 4 percent. ii
- (c) Entosphenus and Lampetra species (lamprey): ii
- (A) Fishways shall ~~not have overhanging surface and associated structures (e.g., dams and spillways) shall have 4 to 6 inch smooth rounded radii edge surfaces (floors, aprons, walls, and weir crests) over which Entosphenus and Lampetra species may pass;~~ ii
- (B) Fishways shall ~~not have rounded or chamfered edge surfaces over which water surface to water surface jumps or overhanging surfaces unless fishway surfaces have a 4 to 6 inch smooth rounded radii (floors, walls and weir crests) over which Entosphenus and Lampetra species may pass;~~ ii
- (C) Fishways shall, in locations with water velocities greater than 2 feet per second, have a passage route that: ii
- (i) Has a smooth, continuous, impermeable, uninterrupted surface or a simulated streambed; ii
- (ii) Has water velocities over the structure's surface less than 8 feet per second; and ii
- (iii) Is wetted; ii
- (D) ~~Denil fishways shall not be used unless an alternative passage route is provided;~~ ii
- (E) ~~Traps, picketed leads, picket weirs, auxiliary water supply grating or any other fishway grating shall have a spacing of less than 0.7 inches to preclude lamprey passage, or greater than 1.0 inch to allow lamprey to pass through;~~ ii
- (F) ~~Fishway wall diffusers for auxiliary water supply shall be located at least 6 inches above finish floor of fishway pool;~~ ii
- (G) ~~Auxiliary water floor diffusers shall be avoided if possible, but if necessary shall be located to provide at least 12 inches width of continuous smooth floor passage route along fishway floor;~~ ii
- (H) ~~Fishway designs shall consider orifice flow if Entosphenus or Lampetra species are present.~~ ii
- (I) ~~Orifices shall be positioned flush with the fishway floor and flush along one fishway wall; and~~ ii
- (J) ~~Lamprey Passage Structures (Lamprey Ramps) shall be considered when retrofitting existing artificial obstructions to improve conditions for upstream migration of Entosphenus and Lampetra species.~~ ii
- (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. ii
- (e) Ptychocheilus species (pikeminnow): fish passage structures shall meet the requirements of OAR 635-412-0035(7)(a). ii
- (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 the required passage criteria. ii
- (8) Requirements for artificial obstruction removal are: ii
- (a) Artificial obstruction removals shall follow the requirements of OAR 635-412-0035(10); ii
- (b) If not completely removed, no parts of the remaining artificial obstruction shall: ii
- (A) Constrict the stream channel; or ii
- (B) Cause low flow depths less than the surrounding stream channel. ii
- (c) After an artificial obstruction is removed the stream channel shall be restored; and ii
- (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. ii
- (9) Requirements for exclusion barriers are: ii
- (a) ~~When fish passage is not required or is provided by other means, exclusion barriers shall only be placed in the following situations, when fish passage is not required or is provided by other means:~~ ii
- (A) To guide fish to an approved fish passage structure or trap; ii
- (B) To prevent fish from leaving waters of this state and entering human-made water supply conduits; ii
- (C) To prevent fish from entering waters of this state associated with operations of another artificial obstruction that could lead to fish injury; or ii
- (D) To achieve other fish management objectives approved in writing by the Department; and ii
- (b) Exclusion barriers shall comply with National Marine Fisheries Service or U.S. Fish and Wildlife Service criteria. ii
- (10) Requirements for fish passage during construction of fish passage structures and periods when temporary artificial obstructions are in place are: ii
- (a) All fish passage structures shall be constructed and temporary artificial obstructions shall be in place only during the Department approved site-specific in-water work period defined or approved by the Department; ii
- (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 outside of the areas of project impacts~~ by an authorized person with an ODFW Fish Rescue Salvage Authorization issued by and following the guidance of the Department; and¶

(f) After construction, the construction site shall be re-watered ~~in a slowly and in a controlled~~ 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 is state after:¶

(A) Laboratory testing with native migratory fish or similar species indicates that the structure ~~is feasible to~~ provides 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 will~~ will 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 and approved by 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 once met will require owner or operator to~~ will require owner or operator to 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, unless the Department determines additional time is necessary;¶

(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; and¶

(e) ~~If the Department determines that the experimental may consider a 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 to no longer constitute an experimental fish passage structure after the Department finds three such structures of the same design concept are placed in waters of the is state and deemed to provide fish passage by the Department, the experimental fish passage structure shall no longer be considered experimental effectively provide fish passage.~~

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS ~~509.585~~, 496.012, ORS ~~509.610~~ 585

AMEND: 635-412-0040

RULE SUMMARY: These rule amendments implement the State of Oregon's fish passage policy by establishing new standards and clarifying existing regulations.

CHANGES TO RULE:

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~~ Implementing measures ~~to that~~ directly increase naturally-producing, ~~wild, ed~~ native migratory fish populations; ~~and~~¶

~~(d) O, especially sensitive or state or federally listed species through implementation of fish management measures; and~~¶

(d) Implementation of other actions specifically approved by the Commission or Department.¶

(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~~ plans, including designs as applicable, in writing prior to implementation.¶

NOTE: Mitigation actions/measures/activities 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 or Department 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 implementation of the mitigation action or providing fish passage does not achieve its goals.¶

(8) A ~~person owner~~ owner or operator of 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;¶

(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, ~~and~~ evaluating, and include adaptive management ~~which are~~ approved by the Department, ~~which that~~ 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 Department will not factor into its written benefit analysis the owner's or operator's cost for mitigation or fish passage at the an artificial obstruction shall not be a factor in the Department's net benefit determination, nor any financial incentives or grants issued by the Department;¶

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

(10) The Department or Commission, as applicable, in determining the sufficiency of proposed mitigation;¶

(a) 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 or updated information, or situations which have no clear benefit to native migratory fish species;¶

(b) May require data collection and evaluation as directed by the Department, by the owner or operator 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;¶

(c) Shall consider the extent to which the proposed mitigation is likely to occur independent of a fish passage waiver; and¶

(d) Shall be consistent with the purpose and consider actions that anticipate the expected effects of climate change, which may include but is not limited to effects to streamflows, water temperatures, sediment transport, fish passage facility performance, biological response and goals of the Oregon Plans, risk and uncertainty, and the importance of protecting and restoring habitat for native migratory fish.

Statutory/Other Authority: ORS 496.138, ORS 509.585

Statutes/Other Implemented: ORS 509.580, 509.585, 509.610, 496.012, ORS 509.585

CERTIFICATE OF FILING AND SERVICE

I certify that on September 5, 2023 the original foregoing Petitioners' Petition for Judicial Review was filed with the Appellate Court Administrator by using the Appellate Courts eFiling System.

I further certify that on September 5, 2023, a true and correct copy of the foregoing Petition for Judicial Review was served by the United States Post Office, certified mail, return receipt requested, on:

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DATED: September 5, 2023

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