

Fish Passage Task Force Recommendation
From the 12/3/2021 Fish Passage Task Force Meeting

The Fish Passage Task Force voted unanimously (7-0) to recommend the approval of the agreement with minor modifications on the determination of fish presence to the Commission.

The requested change has been made and is reflected in the Draft 2023 Culvert Repair Programmatic Agreement.



OREGON DEPARTMENT OF FISH AND WILDLIFE
Fish Passage Task Force

***DRAFT* MEETING MINUTES**

December 3, 2021

Oregon Department of Fish and Wildlife
Salem, Oregon

Attending:

The following attended all, or part of, the meeting via phone or Teams:

FPTF

Representing

Zak Toledo	Public-at-Large (Chair)
Ken Bierly	Public-at-Large
Bill Cunningham	Public-at-Large (<i>absent</i>)
Denise Hoffert	Fishing and Conservation (<i>absent</i>)
Fred Messerle	Water Users
Kelly Moore	Fishing and Conservation
April Snell	Water Users
Steve Albertelli	Water Users
Terry Turner	Fishing and Conservation

ODFW

Title

Greg Apke	Statewide Fish Passage Coordinator, Salem
Pete Baki	ODFW-ODOT Fish Passage Liaison, Salem
Katherine Nordholm	Fish Screens and Passage Coordinator, Salem
Alan Ritchey	Fish Screens and Passage Program Manager
Josh Hanson	ODFW-ODOT Fish Passage Liaison, Salem
Kirk Handley	ODFW District Malheur Watershed Assistant District Fish Biologist
Justin Miles	ODFW Lakeview/Klamath Assistant District Fish Biologist
Ben Ramirez	ODFW Klamath District Fish Biologist

ODOT

Title

Allen Gillette	ODOT Biologist
Cash Chesselet	ODOT-NOAA Liaison

ODF

Title

Thomas Whittington	ODF Water Quality Specialist
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Public

Organization

Brian Posewitz	Water Watch
Mike Tripp	Public
Jacob Jefferson	ONDA



OREGON DEPARTMENT OF FISH AND WILDLIFE

Fish Passage Task Force

DRAFT MEETING AGENDA

Dec. 3, 2021 Virtual (Teams) Meeting

---- To join meeting click on link below ----

[Click here to join the meeting](#)

Friday – Dec 3, 2021 @ 0900 to 1200 hrs

- ~ 9:00am ----- Call to Order -----
- ~ 9:05 ^a Review & Approve Agenda and Oct 15, 2021 Meeting Minutes (*Chair Toledo*)
- ~ 9:10 ^a Task Force Member Updates
- ~9:30 ^b Public Comment Period 30 min
**Public Testimony: 48-hour Advance Registration Required*
- ~10:00 ^c HB 2298 - Environmental Weir Administrative Rules – (*Nordholm*) 1 hrs
- ~11:00 ^c 2023 Proposed ODOT Culvert Repair Agreement (*Baki*) 30 min
- ~11:30 ^b Oregon Administrative Rule Revision Initiative Updates (*Apke*) 15 min
- ~11:45 ^b Other Business, Issues, Initiatives (*all*)
- ~11:55 ^a Meeting Recap, Actions Items and Next Meeting Agenda Build (*staff*)
- ~12:00pm ***** Meeting Adjourn *****

*** PUBLIC TESTIMONY 48 HOUR ADVANCED REGISTRATION REQUIRED**

If you wish to provide verbal public comment on any agenda item you must pre-register before 9:00AM Wednesday December 1st, a minimum of 48 hour prior to the meeting. Written comment will be accepted and encouraged.

HOW TO REGISTER TO SPEAK AT THE DECEMBER 3, 2021 TASK FORCE MEETING

When registering to speak please provide your first and last name, which agenda item you wish to speak to, a valid email address and phone number. Two ways that you can register to speak include: 1) send an email at greg.d.apke@odfw.oregon.gov ; the information listed above must be provided in your email, 2) call the Department at 503-931-4361 and provide the information identified above. Submit written comments to the email address identified.

PUBLIC COMMENT

This is a virtual meeting through Microsoft Teams (*see above link*). If pre-registered to speak, you will be recognized by the Task Force Chair during the agenda item through Teams. The Task Force places great value on information received from the public and wants to avoid arbitrary limits on the time or attention allocated to each person. Therefore, persons desiring to provide verbal comment or otherwise present information to the Task Force are encouraged to: 1) limit comments, recognize that substance, not length, determines the value of comment or written information; 2) endorse rather than repeat comment(s) and 3) groups or organizations wishing to comment should designate one spokesperson whenever possible. Written comments are encouraged and will accepted.

- Agenda Item Types:**
- ^a – Business
 - ^b – Information
 - ^c – Recommendation
 - ^d – Work Session

2022 Meeting Dates & Locations TBD:

Feb 25th

May 20-21st (Umpqua Basin)

Oct 7th

Dec 9th

Virtual TEAMS Meeting Called to Order ----- at 9:02am

Chair Toledo called the meeting to order at 9:02 am. This meeting is being recorded.

~ 9:05 Review & Approve Agenda and Oct 15, 2021 Meeting Minutes (Chair Toledo)

Bierly move to approve agenda and minutes. Turner second. None opposed. Motion passed. Apke announced Brian Posewitz was the only person who notified in advance for public comment but may not be able to provide comment because of a conflict. His written comments had been received and distributed to the Task Force.

~ 9:10 Task Force Member Updates

Bierly commented on a 1930s Supreme Court decision on adjudication of the Silvies River and an 1886 appropriation of water from Flat Creek that indicated the system was altered a long time ago.

Snell commented on the Oregon Water Resources Congress's annual conference, upcoming special legislative session, and a recent water supply outlook from NRCS forecasting below average water supply because of above average air temperatures and reduced snowpack.

Albertelli had no update.

Turner announced that Trout Unlimited was participating in a dam removal project on North Fork Eagle Creek that was fully funded, with construction planned for the next in-water work period. Ritchey asked about project permit status, and Turner indicated it was good in a good position. Apke asked if they had been contacted by American Rivers who tracks dam removals nationwide. Turner indicated that he had not heard from them, Apke will forward email.

Moore had no update but asked about the Federal infrastructure bill and what impact it will have on ODOT and ODFW. Toledo commented that prior to finalization of the infrastructure bill a lot of the money appeared to be coming to Oregon for transportation, but very little for safe drinking water and wastewater treatment. But possible that agencies will be well funded for transportation and able to shift existing funding to other priorities like stormwater treatment, water resources, and channel restoration in some of the urban systems. Baki suggested some details on how the bill may affect ODOT could be provided during the CRPA discussion.

Bierly announced that NRCS was hosting a webinar on funding opportunities associated with the infrastructure bill on Dec 6 from 2-4pm and Dec 7 from 10am-12pm. Bierly would provide to Apke to share with other members of the Task Force. Apke indicated that details were unknown, but ODFW was in the process of figuring out how we could take advantage of the possible funding opportunity associated with the bill. Ritchey suggested having Gregg Smith attend the next Task Force meeting and share information on the bill. Ritchey briefly mentioned ARPA funds and indicated DAS is still working on how the funds are going to be allocated, eligibility requirements, and process to administer the funds. And suggested more discussion could be had in the next meeting. Baki announced that ODOT was having a webinar about the infrastructure bill on Dec 7 from 9-10:30 am.

Toledo announced there were 10 minutes until public comment and suggested moving the Rule Revision Update ahead on the agenda.

~ 11:30 Oregon Administrative Rule Revision Initiative Updates (Apke) 15 min

Apke provided rule revision update at ~9:20, indicating the next meeting would be focused on tide gates and low water fords. And possibly the mitigation section if time allowed.

~ 9:30 Public Comment Period 30 min

**Public Testimony: 48-hour Advance Registration Required*

Toledo suggested starting the public comment period a couple minutes early. Public comment period was initiated at ~9:27am and Apke called on Brian Posewitz from WaterWatch.

Mr. Posewitz indicated he submitted written comments and had no additional comments. Baki indicated that comments from Mr. Posewitz would be presented during the CRPA presentation and Apke added that public comments had been distributed to Task Force members. Toledo asked for any additional comments. None were received. Public comment was closed at ~9:30am.

At ~ 9:30am Apke announced that Fred Messerle had joined the meeting

~ 10:00 HB 2298 – Environmental Weir Administrative Rules – (Nordholm) 1 hr

Upon request from Toledo, Apke indicated that Task Force recommendations were being sought for both HB 2298 administrative rules and the CRPA. A Task Force vote would be requested at the conclusion of each agenda item.

Nordholm provided a presentation on environmental restoration weir administrative rules that included background on House Bill 2298, qualifications for the pilot project, rules development process, changes in rule language since last subcommittee meeting, and public comments.

Based on public comment from a private citizen, Nordholm proposed removing the term “voluntary” from the rules and asked if there was opposition to this. None was received. Nordholm discussed WaterWatch’s comment regarding the term “engineered material” and if the language unintentionally excluded the use of untreated fence posts in restoration weirs. Bierly suggested stating, “From wood (including untreated fence posts), earth,”. Toledo supported Bierly’s recommendation.

Nordholm presented and discussed revisions to Eligibility Criteria based on comments from WaterWatch and asked if there were any objections to the suggested edits from the Task Force. Toledo commented that they provided clarification. No other questions or comments were provided by the Task Force.

Nordholm presented HB 2298 language, public comment, and proposed language revision for when structures without fish passage are approved because of fish not being present and fish returning to the system, requiring passage or mitigation. Nordholm discussed comments from Silvies Valley Ranch (SVR) about the requirement to demonstrate economic practicability. She clarified that ODFW would be asking a landowner to demonstrate when something is not economically practicable and not asking them to document when a project is economically practicable, she

suggested the addition of the word “not” would clarify the intention. Bierly indicated that he struggled to understand the thought process associated with the SVR comments, had questions/concerns with the subjectiveness in determining “the economic value of the project to the landowner”, and supported the proposed revision. Nordholm suggested the fourth criteria could be removed and Bierly supported the idea.

Kirk Handley asked about adding conditions in the application that would allow ODFW to monitor for fish returning after weirs are built. Nordholm indicated the bill specified who could monitor the structures and a third party could conduct sampling. Ritchey commented that ODFW always has the ability to ask for permission, but the bill does not grant authority to access property. Discussion continued about third party monitoring and cost not being incurred by the landowner. Handley also had trouble understanding SVR comments about economic practicability and had concerns that it provided a way out for modification if fish returned and asked if we would have the authority to ask for a weir to be removed. Nordholm indicated that we wouldn't, but there would be options if the initial ODFW recommended modifications were not economically practicable, and Ritchey mentioned mitigation as an option.

Bierly provided examples of ODFW statutory authority to inspect AOs under ORS 509.625 and 509.630 and suggested it could be a condition of the authorization of the environmental restoration weir. Nordholm suggested a discussion on monitoring for fish presence may be needed. Moore indicated that checking for fish passage or fish use is a monitoring function of ODFW and felt there was ambiguity in the rule because ODFW is required to monitor and report but monitoring can only occur with permission of the landowner if it is a third party. And suggested it be specified that ODFW be permitted access to do fish monitoring and assist with other reporting requirements. Nordholm indicated adding language into condition of approval to allow ODFW access in specific situations could be considered.

Apke read question from meeting chat provided by Jefferson Jacobs:

[12/3 10:01 AM] Jefferson Jacobs (Guest)

If fish passage is deemed too expensive to install, will that be considered if that same landowner, then proposes installing more dams?

Nordholm was unsure of the need for including it in the rules but thought that it was something that could be considered. Handley asked if determination of fish presence by ODFW would be part of the application process. Nordholm indicated it would be and that the application process would be covered in an upcoming slide.

Snell felt that the public comments and Task Force conversation had raised questions that warranted additional discussion. She commented that there was clear intent in the HB that was discussed by all involved stakeholders and the Task Force needed to be mindful of that. Snell further commented that rules like these, to make something easier for a particular area, need to have boundaries, not take away existing agency authorities, and not grant powers outside the agency's statutory authority. Snell also referenced the SVR comment and benefits of drone footage. Nordholm indicated that additional meetings to discuss these issues were not planned, but could be if needed, and that there would be time for additional discussion at the end of the presentation.

Apke commented on statutory limitation of the department to access and or inspect and referenced ORS 509.625 that enables the department to inspect obstructions statewide to make determinations and decisions, and that prior discussion on language to inspect was not an overreach of authority. Snell clarified her prior comment and indicated that she was concerned with other perspectives she heard that seemed to imply that there should be a broadened authority.

Nordholm discussed SVR comment on beaver presence and drone monitoring. Moore supported drone monitoring and discussed the benefits. Toledo commented the rules did not prevent drone monitoring and was concerned about requiring drone monitoring. Bierly suggested putting language between d and e, may be supplemented by use of drone images. Nordholm asked if that would imply that there is a need for at least some of the photo points to be on the ground. Bierly indicated the requirement is there be on-ground photo points as listed by a through d and the on-ground photo points may be supplemented by drone images. Toledo commented that “may be supplemented” implies in addition to, the language clarifies the rule, doesn’t require drone monitoring, and agreed with Bierly’s suggested language.

From Chat:

[10:23 AM] April Snell (Guest)

I agree with Zak on drone may vs shall is different.

[10:24 AM] Ken Bierly (Guest)

I suggest you add between (d) and (e) you add (d2) may be supplemented by use of drone images.

[10:25 AM] April Snell (Guest)

I like Ken's suggestion

Nordholm continued her presentation and discussed public availability of project applications and monitoring reports. Toledo agreed with the interpretation and proposed action.

Nordholm presented and discussed scope of project and ODFW’s requirement to develop rule for permitting the construction of environmental restoration weirs and SVR’s comment on the conditions of approval specific to removal of brush and trees and the intention of some restoration projects being the removal of upland plants that have invaded the floodplain. Bierly suggested SVR’s concerns could be alleviated by saying “must be replanted with native riparian vegetation”. Toledo announced that Turner had provided a comment in the chat on listing specific species and Toledo supported Bierly’s suggestion.

From Chat:

[10:34 AM] Terry Turner (Guest)

or just exclude juniper from the list of acceptable replacement species

[10:35 AM] Terry Turner (Guest)

I like Ken's better

[10:35 AM] April Snell (Guest)

And if they're an invasive non-native species it wouldn't apply, right?

[10:36 AM] Zak Toledo (Guest)

right. that's why I didn't like the idea of listing species

Nordholm presented and discussed the application process. Bierly commented on SVR's concern about the agency's role in connecting with other agencies and suggested it was something that could be in the Reach Sheet. Nordholm indicated through the application development process other agencies were contacted to determine how they would like to be involved and what information they would need and provided examples using ODOT and OWRD.

Jefferson Jacobs asked if restoring beavers, habitat, or fish presence were not expressed goals of the weirs or are not required goals, what is being restored and for what benefit? And asked if restoration was not a goal was it appropriate to call them restoration weirs in rule?

Nordholm indicated application questions about habitat outcome and beavers would help determine project intent and restoration objectives. And referenced language in the bill, indicating restoring incised and eroded channels as the main restoration outcome. Moore commented the issue had been raised before by other environmental groups and stated there was not a clear linkage between environmental restoration and the revisions of the bill, bill language does not allow for the change, and the issue needed to be addressed outside the Task Force.

Justin Miles talked about restoration weirs being a cost-effective way to stop channel incision and providing benefits to the landowner producing livestock forage and a foundation for broader fish and wildlife restoration outcomes. Nordholm commented on determination of fish presence during the application process being conducted by ODFW. Ben Ramirez commented on the challenges for ODFW to determine fish presence, using fish screening applications as an example, and ODFW being viewed as an obstructionist. Nordholm discussed managing applicant expectations, especially when it came to the amount of time needed to make fish presence determinations.

Toledo announced that 90 minutes was being approached for the agenda item and that the department was asking the Task Force to make a recommendation. Nordholm opened the floor to the Task Force for discussion and questions and recapped the proposed rule revisions. Toledo also provided a recap and asked for a motion.

Bierly made a motion that the Task Force recommends to the Commission the adoption of the proposed rules as amended by Katherine. Toledo asked for a second. Toledo seconded the motion and opened for debate. A roll call vote was conducted, and the motion passed unanimously (7-0).

~ 11:00 2023 Proposed Culvert Repair Agreement (Baki) 30 min

Baki presented CRPA background, outlined the current agreement, changes for the new agreement, provided examples of culvert and compensation fund projects, and shared public comments received.

Toledo asked why 10 years and if the inflationary factor was a one-time thing or would it be done annually? Baki talked about balloon payment, reduction to 15 annual projects, and reevaluation after 5 years. Baki indicated that the programmatic was working well for both agencies and a longer duration is warranted. Ritchey talked about administration needed to renew the agreement, liaison position stability, benefit to both agencies and state of Oregon. Also, that the agreement has an end date and can be cancelled if not working.

Bierly suggested the compensation fund be raised by the same inflation factor as the replacement projects and referenced the federal infrastructure bill. Baki discussed the inflation factor used and indicated that the \$58,800 would go to the compensation fund, and asked Bierly for clarification of his question. Bierly asked if the \$58,800 was for the repair projects. Baki explained that the amount received for the compensation fund for each culvert repair was increasing from \$50,000 to \$58,800 and inflation would be reassessed in 5 years. Bierly asked if that carried over to the compensation fund and if the total fund would increase. Baki indicated it would increase and provided additional details. Ritchey talked about the inflation factor used and impacts to compensation funds based on the number of projects forecasted to be completed under the agreement. Bierly recognized the benefits to both agencies and felt a 10-year agreement warranted a bigger increase in the compensation funds. Toledo restated prior discussion about compensation funds being received based on price per culvert repair. Bierly suggested the replacement cost should be 1.5 to 1 because of the significant benefit to the traveling public. Toledo restated Bierly's suggestion and Bierly reiterated that he felt the longer duration of agreement justified an enhancement of the fish benefit side of the equation. Toledo summarized as a cost of certainty. Baki suggested it could be part of the recommendation to the Commission.

Moore agreed with Bierly's suggestion, didn't think adjusting for inflation was adequate to meet larger ODOT and ODFW goals, spoke about urgency to replace culverts to address climate change, and suggested that timing may be right to ask for money beyond inflationary factors. Ritchey asked for a suggestion on a fair way to assess the need of more compensation funds. Moore suggested determining how many more projects could be done if ODFW had capacity with staff and if ODFW had more money from ODOT to spend on the projects. Bierly felt it was arbitrary to base on the cost of replacing a culvert when predicting across 10 years, talked about likelihood of climate change requiring larger projects, and recognizing increase in future costs is important. Toledo felt the recommendation to ask for more money was vague and discussed factors for cost of certainty and climate change.

Toledo asked about WaterWatch's comment on statutory authority. Baki indicated the two prior agreements were approved by the Commission. Ritchey confirmed. Bierly stated that he presumed the AG had reviewed the agreement. Ritchey indicated that DOJ is present at Commission meetings. Bierly asked if DOJ was part of drafting the agreement. Ritchey indicated that they were not part of drafting the agreement.

Messerle asked about federal permitting requirements. Cash Chesselet and Allen Gillett provided information on federal permitting requirements associated with the CRPA and indicated that the agreement was specific to fish passage rules.

Bierly asked if the goal (I)(6)(e) regarding tracking fish presence and barriers on the second page of the agreement needed to be continued. Baki displayed the draft agreement with Bierly's comments and indicated that requirement was important to ODOT. Bierly asked about the original culvert life expectancy and Baki provided detail from appendix A. Bierly asked if goal e had already been completed. Baki provided detail for ongoing task associated with goal e. Ritchey indicated it would be ongoing indefinitely because of unknown culverts being present on the landscape. Bierly commented on language used for Section II (3) regarding determination of fish presence. Baki explained the language. Bierly suggested it would be clearer if "ODOT may assume...." was

removed from the language. Bierly felt the agreement was put together well and just wanted to see more money.

Allen Gillett provided ODOT perspective on benefits of the CRPA.

Toledo asked Baki if the agreement was ready for Task Force recommendation. Baki indicated it was ready. Ritchey also indicated the agreement was ready, talked specifically to Bierly's suggested revisions regarding removing ODOT from the language in II(3), and options for Task Force recommendation.

Bierly indicated the explanation provided for his comments were helpful and supported agreement language.

Bierly motioned that the FPTF recommend approval of the agreement with the minor modifications on determination of fish presence to the Commission for approval. Toledo asked for a second. Turner seconded the motion. Toledo asked for debate and discussion.

Bierly asked if there was any opportunity to have a conversation with the Commission about continued discussion with ODOT about changing the balance on the compensation fund. Ritchey indicated that could be done.

A roll call vote was conducted, and the motion passed unanimously (7-0).

~ 11:45 Other Business, Issues, Initiative (*all*)

Toledo reminded members about volunteer training, announced the next meeting on Feb 25th, and asked about next meeting being in person. Ritchey indicated that state offices were expected to reopen on Jan 3rd and provided details on mask and vaccination requirements.

Allen Gillette provided information on the infrastructure bill.

~ 11:55 Meeting Recap, Action Items and Next Meeting Agenda Build (*staff*)

Ritchey mentioned discussion on infrastructure bill by Kregg Smith at next meeting.

Virtual Meeting Adjourned at 12:06 pm