



## AGENDA ITEM SUMMARY

### BACKGROUND

There is a long legislative history of protecting fish passage in Oregon. In 1848, prior to statehood, the United States Congress established the territorial government of Oregon and included in the Act that created it a provision that the rivers and streams in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams. In 2001, the Oregon Legislature adopted the current fish passage policy into law through Oregon Revised Statute (ORS) 509.580 through 509.910. This policy remains in effect today, and, except as provided in ORS chapter 509, a person owning or operating an artificial obstruction (fish passage barrier) may not construct or maintain any artificial obstruction across waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish. In 2006, the Oregon Fish and Wildlife Commission (Commission) adopted Administrative Rules (OAR) 635-412-0005 through -0040 which presently continue to govern fish passage.

The fish passage statutes and rules require any person owning or operating an artificial obstruction to address fish passage prior to certain “trigger events”. The intent of waiting to require fish passage until a trigger event was to allow owners and operators time to plan and prepare for fish passage at artificial obstructions they own and manage.

The Department is requesting the Commission adopt several revisions to the existing rules to improve the Department’s ability to implement fish passage solutions throughout the state, consistent with governing statutes.

### PUBLIC INVOLVEMENT

The fish passage rule revision was initiated in March 2021 with a public meeting. Throughout 2021 and 2022, there has been extensive public involvement, participation, and stakeholder engagement associated with the development of the proposed fish passage rule revisions.

The majority of the public process was convened through an 8-member rules subcommittee consisting of members of the Fish Passage Task Force. Subcommittee member representation included public-at-large; owners and operators of artificial obstructions; and fishing, environmental and conservation interests. This subcommittee, along with Department staff, developed subcommittee operating ground rules, identified stakeholder and interest groups, and initiated a public comment solicitation process to identify issues, challenges, and needs associated with the existing fish passage rules (See Attachment 4 for a description of the subcommittee process).

A general summary of the public engagement process directly associated with this fish passage rule revision initiative includes:

- Kick off – virtual public meeting on March 9, 2021
- Two public comment solicitation periods:
  - April 9, 2021 to May 18, 2021 (251 total comments)

- o August 31, 2022 to September 29, 2022 (175 total comments)
- o See Attachment 5 for a summary of comments and Department response
- An ODFW webpage was established and maintained as a clearing house for all materials related to the rulemaking effort including public meeting dates, agendas, meeting minutes, public comments and proposed draft rules ([https://www.dfw.state.or.us/fish/passage/admin\\_rules\\_init.asp](https://www.dfw.state.or.us/fish/passage/admin_rules_init.asp))
- The Department hosted more than 20 public stakeholder meetings in 2021 and 2022 to help identify issues, consider public comment, and develop the draft rules
- Six Fish Passage Task Force public meetings were held in 2021 and 2022
- A final Fish Passage Task Force meeting on October 7, 2022, was held to consider and make a recommendation to the Department and the Commission
- The Department initiated coordination with the nine federally recognized tribes in Oregon and the Nez Perce Tribe.
- Staff held numerous meetings with individuals and organizations and issued a number of news releases and opportunities for public participation
- 58 stakeholder and interest group representatives provided written comment or verbal testimony between March 9, 2021 to September 29, 2022

At its October 7, 2022 public meeting, the Fish Passage Task Force (Task Force) adopted the Fish Passage Rules Revision Sub-Committee’s motion to support the proposed draft fish passage administrative rules as modified during the October 7, 2022 meeting (*6 yes votes – 1 no vote*). The Task Force identified a number of issues requiring future consideration as noted in Attachment 4.

## ISSUE

The Department continues to administer, and enforce, as appropriate, the fish passage rules that were effective since 2006. Through the course of authorizing a combined total of approximately 2,000 fish passage approvals, waivers, and exemptions, the Department has recognized the need to provide clarity and make changes to the state’s fish passage design criteria, standards, and administrative procedures. Also, in 2020, the Department adopted the *Climate and Ocean Change Policy* (OAR 635-900-0001 through -0020). The proposed fish passage rule revisions will provide clarity to the public, update design criteria, better align criteria with federal standards, and integrate the *Climate and Ocean Change Policy* into these rules.

Specifically, the Department determined a need to address the following:

*Rule clarity.* During the past 16 years, the Department has received and documented feedback from barrier owners and the public regarding areas where the rules create confusion or are ambiguous.

*Trigger avoidance.* The Fish Passage Statutes clearly intended for barrier owners to address fish passage over time. While the majority of barrier owners have adhered to this intent and incorporated fish passage into their planning, the Department has observed several instances where some dam owners or operators conduct work in an attempt to avoid a trigger by exploiting ambiguity in the existing rules. These repairs/upgrades prolong the life of the structure while continuing to block or restrict fish passage as well as creating inequity among barrier owners.

*Updated Design Criteria, Standards, and Procedures:* The Department recognizes a need to incorporate the best available science on fish behavior, swimming ability, engineering and construction methods, and environmental conditions into revisions of design criteria, standards, and procedures. The Department also recognizes that addressing fish passage can be costly for barrier owners, so there is a need to provide a range of alternatives and associated design criteria that can be tailored to a particular site.

*Incorporating multi-species needs.* At the time the rules were developed, little was known about the criteria that would allow for optimal lamprey passage. The Department recognizes the need to address this new information in rule revisions.

*Program efficiency.* The Fish Passage program is responsible for overseeing implementation of fish passage rules in Oregon. This involves providing public education and outreach; technical assistance; reviewing and authorizing fish passage design plans, exemptions, and waivers; effectiveness monitoring; administration of Department's cost-share program; and project prioritization and inspection. Additionally, the program works to proactively secure voluntary fish passage by working with barrier owners and nongovernmental organizations.

While the Department has been very successful at carrying out these functions, there are process inefficiencies that prevent the Department being able to prioritize resources into areas of greatest benefit to fish. As part of the rule revision process the Department reviewed areas where significant amounts of time were being invested by staff with little functional benefit for fish passage. Rule revisions are proposed to promote program efficiency with particular emphasis to exemption requests where there would be no appreciable benefits to providing passage.

## ANALYSIS

The proposed rule revisions are consistent with fish passage statutes (ORS Chapter 509), the Department's mission, and other policy or guidance documents such as the *Oregon Plan for Salmon and Watersheds*, *Oregon Conservation Strategy*, the *Native Fish Conservation Policy*, the *Climate and Ocean Change Policy*, the *Habitat Mitigation Policy* and other Department management, conservation, and recovery plans.

The proposed rule revisions include amendments that reflect the heightened importance of fish passage and habitat connectivity, particularly given the predicted effects of climate change on local watersheds. One of the most cost-effective tools for mitigating the impacts of climate change is to provide connectivity to refuge habitats during periods of high temperatures/low flows, and to provide access to additional spawning and rearing habitat – thereby improving the productivity and resilience of fish populations. The intent of these rule revisions is to promote fish passage while recognizing cooperation and collaboration between public and private entities is necessary to accomplish the policy goal of providing fish passage to enhance and restore Oregon's native migratory fish populations, as envisioned by the *Oregon Plan* (ORS 541.898). The most significant rule revisions for barrier owners are outlined below.

### **Rule Clarity and Trigger Avoidance**

Since the current rules were adopted in 2006, the Department has received feedback from barrier owners and the public regarding confusion or lack of clarity associated with existing definitions. A significant portion of the public process was devoted to reducing confusing language and

clarifying intent where possible. As a result, numerous changes were made in the definitions section. The most significant changes are noted below.

***Fish Passage Triggers.*** Proposed changes to existing definitions and new definitions were created to provide more clarity for the public to identify activities that “trigger” or invoke the requirement to address fish passage. The impact of these changes will be to increase the frequency at which fish passage is restored or otherwise addressed at these structures. The rule changes still allow barrier owners ample time to plan for the necessary improvements and retain the flexibility to apply for a waiver or exemption.

- I. Clarification of what constitutes an “artificial obstruction.” This term is defined in statute as meaning 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. This definition was discussed at length and an addition is proposed to clarify that “prevents” includes instances where passage of native migratory species is significantly delayed.
- II. “Abandonment” is a new term that is defined. This term is used in statute and is presently undefined. A definition is proposed to more clearly define when this trigger applies.
- III. The Department proposes several changes to the definitions of a trigger at dams to increase the likelihood of fish passage being addressed when work is occurring to repair or upgrade a dam. Addressing this issue was a common theme both in Task Force meetings and in many public comments.
  - a. Account for cumulative repairs/upgrades. This is intended to ensure that fish passage is addressed when barrier owners implement significant repairs/upgrades over the course of multiple years. Adding “cumulative” to the definition of construction of existing dams was discussed and debated at great length by the Subcommittee and Task Force. The addition of “cumulative” to triggers for existing dams is consistent with the cumulative nature of triggers for other artificial obstructions.
  - b. Specify that activities subject to a threshold for triggering fish passage review apply to excavation or replacement of 30% by structure volume of the dam **or** modifications to over 30% of the area of the upstream, downstream or top face of the dam. Current rules based on structure volume have allowed a new dam face surfaces to be installed without triggering fish passage due to the large volume of the existing dam. Such repairs extend the life of the dam while continuing to prevent or limit fish passage in a manner inconsistent with governing statutes.
  - c. More clearly defining specific activities associated with the trigger at the 30% threshold for dam repairs, patches, or modifications.

#### ***Other Clarifications.***

- I. “Exemption” and “Waiver” are more clearly defined to better align with governing statutes and to clarify the duration of time such approvals of fish passage alternatives are valid. An additional change is proposed to more clearly identify that the public will be notified and provided an opportunity to review and comment on exemption requests and determinations.
- II. A new term “No Appreciable Benefit to Providing Fish Passage” was added to help identify conditions where a fish passage exemption under 635-412-0025(1)(C) may be

authorized. Members of the public expressed a need to clearly define conditions when fish passage exemptions may be considered.

**Road Crossings.** Road crossings are by far the most numerous type of barrier in Oregon. Significant progress has been made addressing fish passage at these structures since the rules were adopted. However, the current rules require the size of a culvert to align with the width of the stream channel, which at higher stream flows can create sub-optimal passage conditions, localized scour, site instability, and maintenance issues for the owner/operator. Additionally, climate projections indicate a higher frequency of large storm events and flooding. Such events will require larger sizing to pass the increased volume of water and prevent blockage or failure. The Department proposes several revisions to address these issues, including:

- I. Increasing the requirement for “Stream Simulation Design Standards” from the current (spanning the stream’s Active Channel Width within the crossing structure) to spanning the Active Channel Width times 1.2 plus 2 feet. This standard is consistent with those in the recently adopted Private Forest Accord rules by the Oregon Board of Forestry.
- II. Direction to consider predicted future conditions in design/sizing of structures.

These changes will ensure that the stream will function at a more natural grade and width, thereby improving the efficiency of fish passage. While the initial cost of construction will be higher, it is expected that these larger structures will be more cost effective in the long term because of reduced maintenance needs (e.g., clearing blockages) and a lower failure rate following large storm events.

**Beaver Co-Existence.** In many locations, beaver provide important ecosystem benefits by constructing dams. However, beavers can also have negative impacts at structures such as culverts. In some cases, this can result in removal of beaver to prevent dam building activities, which then may reduce the likelihood of positive impacts accruing elsewhere in the watershed. To address this, devices are often installed around such structures to exclude beaver. Because these are human-installed structures, these structures are subject to fish passage laws. The Department proposes the following additions to promote co-existence while ensuring fish passage needs are met:

- I. Apply standard design criteria when only resident trout and lamprey are present. Provide flexibility for approval in locations where salmon, steelhead, bull trout, and other larger-bodied fish are present.
- II. Require appropriate monitoring and maintenance of exclusion devices to ensure they are functioning as intended.

The proposed rules are intended to promote beaver co-existence while also ensuring fish passage needs are met. Solutions that can allow passage of larger-bodied fish but still effectively exclude beaver are currently in development. Hence, the rule affords flexibility to approve those methods that achieve both outcomes, potentially via adoption and adherence to best management practices.

**Alternative Fish Passage Solutions.** Since the Fish Passage rules were first adopted there have been advances and refinements in several methodologies. In recognition of this and to provide alternative designs for barrier owners, the Department proposes to add design criteria for roughened channels and channel spanning weirs.

These structures have been shown to provide fish passage and, in some instances, may provide a more effective or cheaper solution, or both, for barrier owners. For example, these structures may be used in place of push up-dams that require annual installation and maintenance. The design criteria provides clarity on the expectations associated with these design alternatives.

**Incorporating Multispecies Needs.** The Department proposes the following changes that reflect an improved understanding of how lamprey pass through artificial obstructions:

- I. Include revised lamprey specific design criteria to ensure that surfaces and corners are constructed in a way that allows lamprey to safely pass.

These changes are expected to improve lamprey passage efficiency with limited, if any, additional cost to barrier owners.

### **Program Efficiency.**

The Department proposes the following change to help prioritize Department resources on tasks of highest benefit to fish populations:

- I. Revise rules to give Department authority to approve all exemptions where there is no appreciable benefit to providing fish passage at the relevant artificial obstruction.

Currently, projects involving greater than 1 mile historical habitat require Commission approval. While such projects are rare, the Commission process requires significant investment of staff resources. Given there is no appreciable benefit to providing fish passage in these instances, the Department concludes resources would be better allocated in other areas (e.g., working on voluntary passage projects, permit review, education, and outreach). Public input on exemptions would be maintained through public Fish Passage Task Force meetings and Task Force recommendations.

**Other Changes.** Since the October 7, 2022, Task Force recommendation, the Department, after Department of Justice review, made additional changes to the draft proposed rules, including removal of the following proposed revisions:

- A proposed dam safety exemption clause was removed from the “fundamental change in permit status” definition. This proposed language would have provided an exemption for actions at existing dams that were required under federal or state dam safety jurisdictions. The Department determined that the language presented in the proposed rule revision conflicted with the statutory definition in ORS 509.580(4).
- A new definition of “Person” was removed from the proposed revisions and replaced with “owner or operator.” Throughout the existing rules, the owner or operator of an artificial obstruction is referred to as a "person owning or operating an artificial obstruction." The draft reviewed by the Task Force included a proposed definition of "person" that was problematic as the term person is used in the rules in several locations and defining the word would have unintended consequences.
- A revision to OAR 635-412-0030 was recommended to allow any person to formally protest any determination by the Department. This revision was removed due to concerns related to increased workload to process formal protests on any Department determination. All members of the public presently can speak to issues of concern before the Task Force or Commission. Proposed protest language in this section is consistent with ORS 509.645.

**Summary.** The Department proposes a number of changes based upon lessons learned over the past 22 years. While some of these changes did not have consensus, the Department believes the changes are necessary to continue to make meaningful progress in addressing fish needs, while not being overly burdensome to barrier owners. The revised rules do retain the important element of flexibility for barrier owners to apply for an exemption from requiring fish passage at a structure, to introduce new alternative designs, and the rules also increase consistency with other regulatory entities (e.g., Oregon Department of Forestry and federal agencies).

The overall impact of the proposed rule changes is expected to be an improvement in the resilience of fish populations to climate change. This is achieved both by increasing the pace at which fish passage is provided at barriers (trigger definitions), by ensuring barrier owners have more options to achieve compliance and structures are more resilient to higher storm flows, and by encouraging co-existence with beavers to advance nature-based restoration.

## **OPTIONS**

- Option 1. Adopt the proposed rule changes as recommended by staff in Attachment 3.
- Option 2. Modify the proposed rule changes.
- Option 3. Make no rule change at this time.

## **STAFF RECOMMENDATION**

- Option 1. Adopt the proposed rule changes as recommended by staff in Attachment 3.

## **DRAFT MOTION**

I move to adopt OAR 635-412-0001 and amend OARs 635-412-0005, 635-412-0010, 635-412-0015, 635-412-0020, 635-412-0025, 635-412-0030, 635-412-0035, and 635-412-0040 as proposed by staff in Attachment 3.

EFFECTIVE DATE: January 1, 2023.