

Fish Passage Rule Revision Public Comment

The table below summarizes public comments received prior to the Oct. 7, 2022 Joint Fish Passage Rule Revision Subcommittee --- Fish Passage Task Force Meeting and provides ODFW general response to those comments including any resulting changes to the Fish Passage Rules (which appear in the Draft Oregon Administrative Rules [Attachment 3]). This summary is not intended to represent all comments received and many comments have been paraphrased or excerpted to summarize the principal themes or points. ODFW received many letters with similar or identical comments regarding some of the topics below as noted in the table. The full set of comments is available upon request.

ODFW received 175 public comments during a public comment period that extended from August 31 through September 29, 2022. The comments were either individual correspondences or two general types of individually submitted form letters. 13 of the 175 total comments received were submitted on behalf of the following groups. These included: Nehalem Marine MFG., Coos-Curry Farm Bureau, PacifiCorp, Oregon Cattlemen's Association, Native Fish Society, Trout Unlimited, The Beaver Coalition, US Fish and Wildlife Service, Oregon Water Resources Congress, WaterWatch of Oregon, Oregon Forest & Industries Council, NOAA Fisheries and WHOOSHH. General summaries of all comments including individual correspondences, form letter and letters representing the 13 stakeholders identified above are included below.

ODFW Fish Passage Rule Revision Initiative website can be found at: https://www.dfw.state.or.us/fish/passage/admin_rules_init.asp

Comments		
Commenter	Comment	ODFW Proposed Rule Change
~ 51 individuals	Individuals did not request a specific change and were supportive of fish passage and encouraged the Department to update fish passage rules to improve the ability of our native fish to survive and flourish.	None
~ 114 individuals	Support rule revisions that will: <ul style="list-style-type: none"> Improve events that "trigger" requirements to add or upgrade fish passage, 	Proposed changes include changes to triggers associated with existing dams. Clarified rules to identify where public have opportunities to provide input on

	<ul style="list-style-type: none"> • Provide the public with opportunities to comment on any fish passage exemption request, and • Enable the public and tribes to protest a fish passage waiver or exemption. 	fish passage exemptions and waivers and proposed changes to clarify protest procedures.
Nehalem Marine Mfg. <i>Leo Kuntz</i>	The 50% 2 fps rule is probably the largest inhibitor of affordable and practical tide gate small scale installations.	Proposed tide gate design criteria that provide opportunities for mitigator and pet door design options and flexibility through existing design criteria specific design exceptions.
Coos-Curry County Farm Bureau <i>Marc Van Camp, President</i>	<ul style="list-style-type: none"> • The proposed OAR changes adversely impact our members and lack a fair and balanced approach to fish passage. • The 2001 legislation (HB 3002 Section 2(5) includes the words “appropriate cost sharing” when seeking fish passage problems solving. ODFW has ignored this provision in the statute and any fish passage matters should include “appropriate cost sharing”. • Opposition to many existing and additional rules and recommends many sections are eliminated. • Delete reference to NAVD88 (North American Vertical Datum of 1988). • Opposed to any addition of “cumulative” triggers. 	Removed proposed rule reference to NAVD88.

<p>PacifiCorp <i>Todd Olson, Director Licensing and Compliance</i></p>	<ul style="list-style-type: none"> • Hydropower’s role in combating climate change should be defined in triggers and analyzing benefits of mitigation measures. • Opposed to triggers for dams that are more inclusive than 50%. • Opposed to triggers that include repairs, patches or modifications of dams and the cumulative nature of the 30% language. • Supportive of dam safety exemptions to triggers. • Supports many definition changes (Fish Passage, Fishway Entrance, Forebay, Native Migratory Fish, Tailrace. • Supports adding Tribal Representation to Task Force. • Opposed to requiring passage at dams where hydroelectric (renewable energy) is proposed by project proponents that are not the dam owner or operator and where only using stream flow releases are proposed. • All proposed mitigation measures should be considered for mitigation, regardless of other regulatory requirements. • Provide clarity for exemption and waiver expiration. 	<p>Dam safety proposed changes were removed due to conflicts with statutes.</p> <p>Definition changes made to some key terms.</p> <p>Clarification of exemption and waiver expiration and public comment opportunities.</p>
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	<ul style="list-style-type: none"> • Mitigation measures should be scaled to threatened or endangered species even if they are not affected by the artificial obstruction for which a waiver is sought. 	
<p>Oregon Cattlemen’s Association <i>Todd Nash & Tammy Dennee</i></p>	<ul style="list-style-type: none"> • ODFW has ignored “appropriate cost sharing” referenced in statute. • Opposes the proposed Purpose of Fish Passage Policy section. • Opposes definition changes to artificial obstruction, fundamental change in permit status, in-proximity and native migratory fish. • Opposed to triggers that include repairs, patches or modifications dams and the cumulative nature of the 30% language. • Opposes many existing and additional rules and recommends many sections are eliminated. • Opposed to any addition of “cumulative” triggers. • Opposed to definition change for major replacement of tide gates, culverts, bridges or other artificial obstructions. • Opposed to addition of bridges to artificial obstructions. • Opposed to “No Appreciable Benefit” definition and contends that unless a barrier is on the statewide priority list 	<p>ODFW will highlight existing cost-share opportunities in passage design manual to better inform and educate the public and owners/operators of artificial obstructions.</p>

	it has no appreciable benefit to fish passage.	
Native Fish Society <i>Jennifer Fairbrother</i>	<ul style="list-style-type: none"> • Supports updates that strengthen fish passage rules. • Supports changes that clarify triggers for dams. • Supports aligning ODFW Ocean and Climate Change Policy explicitly in the proposed changes. • Supports cumulative trigger changes to address loopholes in rules for dams. • Supports the timeframe associated with cumulative begins at the time of original construction or previous trigger events. • Supports the addition of “any person or tribal representative” to the ability to protest a passage determination and supports a clear timeline and public notification process for all passage determinations. 	<p>Proposed changes include changes to triggers associated with existing dams.</p> <p>Clarified rules to identify where public have opportunities to provide input on fish passage exemptions and waivers and proposed changes to clarify protest procedures.</p> <p>Proposed revisions to make cumulative triggers effective January 1, 2023.</p>
Trout Unlimited <i>James Fraser, Mark Rogers, Michael Tripp</i>	<ul style="list-style-type: none"> • Supports updates that strengthen fish passage rules. • Supports changes that clarify for dams. • Supports addition of bridges to the road crossing triggers. • Supports cumulative trigger changes and the addition of structure volume 	<p>Proposed changes include changes to triggers associated with existing dams.</p> <p>Clarified rules to identify where public have opportunities to provide input on fish passage exemptions and waivers and proposed changes to clarify protest procedures.</p>

	<p>to more clearly define triggers for existing dams</p> <ul style="list-style-type: none"> • Supports the timeframe associated with cumulative begins at the time of original construction or previous trigger events. • Supports adding “delay” to definition of artificial obstruction. • Request the addition of exemption and waiver to definitions to provide additional clarity. • Supports the addition of “restoration” to the prioritization section. • Supports an ODFW website for exemptions and waivers and the public comment notification. • Supports the proposed protest language and the acknowledgement of the date of determination to start a protest. • Supports the alignment of stream simulation design standards for road-stream crossing structures and the larger design standard for culverts. • Supports the proposed changes to the mitigation section in particular the addition of stating mitigation must consider whether a mitigation action would occur independently of a waiver as well as considering the 	<p>Proposed revisions to make cumulative triggers effective January 1, 2023. Added “significant delay” to definition of artificial obstruction.</p> <p>Added new definitions for exemption and waiver.</p> <p>Added “restoration” to the prioritization section.</p> <p>Proposed changes to ODFW website where exemption and waivers will be tracked and posted for public comment for new requests to promote more transparency to public and stakeholder groups.</p> <p>Proposed revision for stream simulation design standards to account for climate change effects.</p> <p>Proposed changes to mitigation section to consider climate effect into mitigation alternatives.</p>
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	effects of climate change in mitigation alternatives.	
Beaver Coalition <i>Jakob Shockey</i>	<ul style="list-style-type: none"> • Supports the majority of the “beaver exclusion device requirements where the exclusion device spacing is no larger than 6-inch by 6-inch, but not supportive of exclusion device spacing larger than this because large spacing will not exclude beaver from building dams inside of culverts. • Supports adaptively managed rules for beaver exclusion and water management devices that allow for improvements as field information evolves. • Believes the rules for beaver exclusion and water management devices are premature and request the reference to exclusion devices be struck. 	<p>Proposed rules for beaver exclusion devices in streams where small-bodied fish reside that achieve spacing that meets size necessary to preclude beaver from building inside problematic culverts.</p> <p>Proposed new rule that allows case by case authorizations for large-bodied fish.</p> <p>Existing rules include design criteria exceptions that provide flexibility.</p>
US Fish and Wildlife Service	<ul style="list-style-type: none"> • Supports additional species in the Native Migratory Fish Definition and the correction of scientific name. Also supports inclusion of <i>Peamouth Chub</i> in this list. • Supports the changes made for to the fish passage design criteria section for lamprey species. • Supports stream simulation design criteria changes but recommend a standard Active Channel Width multiplied by 1.5 to meet climate 	<p>Proposed added species to the native migratory fish definition and changed taxonomy to lamprey species where appropriate.</p> <p>Proposed many design changes specific to fishways and lamprey.</p> <p>Continue work with federal and state partners to collaboratively develop best management practices for beaver devices to promote beaver and fish passage.</p>

	<p>change standards and to increase design standard flood flows from 50-year flood flows to 100-year flood flows.</p> <ul style="list-style-type: none"> • Suggest beaver exclusion device size limitations until the collaborative review process for best management practices for beaver exclusion devices is complete. • Suggests numerous changes to fishway design criteria for lamprey species. 	
<p>Oregon Water Resources Congress <i>April Snell</i></p>	<ul style="list-style-type: none"> • Suggest proposed rule revisions are not ready for adoption and should be further revised to better align with existing statutory authority. • Rules should be further revised and discussed with impacted stakeholders. • Contends rules are extensions of existing statutes and do not provide an opportunity to expand agency authority. • Suggests revisions to definition section to better reflect existing department authority (active channel width, construction, fundamental change in permit status, no appreciable benefit, structure volume, and trigger). 	<p>Dam safety proposed changes were removed due to conflicts with statutes.</p> <p>Department will develop “fish passage design guidance document” to educate public on new rules and provide a “how to” successfully implement passage projects.</p>

	<ul style="list-style-type: none"> • Suggests there currently is a void of communication and collaboration between the Department and owners/operators of obstructions on the statewide priority list and there needs to be more transparency on when the priority list is updated. • Suggests the Department should have convened a Rulemaking Advisory Committee (RAC) and using a sub-committee as a surrogate may have fallen short of the agencies authority and have yet to see a process as opaque and unbalanced as this one. • Suggests the Ocean and Climate Change Policy was not fully discussed in the context of rule revisions. • Proposed revisions seem to ignore that additional or expanded water storage is likely necessary to adopt to and mitigate climate change impacts in Oregon. 	
<p>WaterWatch of Oregon <i>Brian Posewitz</i></p>	<ul style="list-style-type: none"> • Rules must be consistent with statutes. • The Ocean and Climate Change Policy calls for a precautionary approach thus aligning rule changes to more likely to require fish passage and more likely to err on the side of protecting fish passage and the proposed “Purpose of the Fish 	<p>Made changes to rules to be consistent with statutes.</p> <p>Proposed numerous changes to better align rules with Ocean and Climate Change Policy.</p> <p>Proposed changes throughout rules to add clarity and transparency.</p>

	<p>Passage Policy” section appropriately includes a statement to that effect.</p> <ul style="list-style-type: none"> • Supports the cumulative nature of the triggers for existing dams. • Supports defining a time period over which repairs are cumulatively considered and suggest the period run from the original construction or from any previous trigger event. • Opposes rule changes that exclude federal or state dam safety actions. Dam safety exclusions would conflict with statutes. • Supports the proposed definition of “no appreciable benefits”. • Proposed changes to the existing Waiver and Exemption section are unclear and may generate uncertainty and confusion and may have unintended consequences. • Supports revisions to public participation and suggests notification of public is timely in relation to a determination. • Supports changes to the protest period that should run from the public notice or the notice to that person, whichever is later, not from the date of notice to the owner of the obstruction. 	<p>Proposed changes to exemption and waiver section to provide clarity.</p> <p>Proposed new definitions for waiver and exemptions.</p> <p>Proposed changes to Protest Section to provide clarity and certainty and a more transparent public notification and comment process for future exemption and waiver request.</p>
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	<ul style="list-style-type: none"> • Provided many proposed rule change revisions. 	
<p>Oregon Forest & Industries Council <i>Seth Barnes</i></p>	<ul style="list-style-type: none"> • Fish passage should only be required after a cost-benefit analysis has been done to determine if a project is worth the costs in terms of benefit to the species. • Rules should recognize more flexibility. • Propose a cost share program for projects on private lands to appropriately balance the financial burden of fish passage. • Recognizes the existing ODFW cost share program and recommend the existing 60% non-owner funding be increased and the program expanded to projects on the priority list. • Opposes the construct of the rule advisory committee assigned to this process, notably the absence of forest landowner or forest engineer. 	<p>Rules presently have design exception to provide flexibility when site specific constraints preclude specific design criteria compliance.</p> <p>Proposed new stream simulation design standards to align with Private Forest Accord.</p>
<p>NOAA Fisheries</p>	<ul style="list-style-type: none"> • Suggests changes to transport channel definition and increasing the velocity design criteria for transport channels. • Suggests clarifying the maximum water velocity criteria for discrete features like weirs. 	<p>Proposed rule changes incorporate roughened channel and ford design criteria to better align with federal standards.</p> <p>Design guidance document will clarify tide gates and tidal cycles used to develop design stream flows.</p>

	<ul style="list-style-type: none"> • Recommends adopting NOAA, WDFW, and CDFG criteria for roughened channel design solutions. • Recommends clarifying tide gate tidal cycles (51% tidal cycle). • Suggests state should consider actions that anticipate the expected effects of climate change and recommends the person submitting fish passage plans shall submit all information necessary to evaluate how climate change was incorporated into the design. • Recommends design streamflows consider effects from climate change. • Inquire how sea level rise is incorporated into the design of tide gates. • Recommend rules identify and clarify design exceptions to velocity criteria when baseline streamflow conditions exceed standards. 	<p>Proposed rules consider climate change effects.</p> <p>Proposed rule revisions for tide gates better align with the addition of water management plans for self-managed or self-regulating tide gate projects located in high priority conservation and recovery sites.</p> <p>Proposed rule revisions clarify design stream flow ranges and identify these ranges consider climate change effects.</p> <p>Clarify in rule revision and future design guidance document how baseline/existing streamflow velocities can be used to support post-treatment velocity design exceptions.</p>
<p>WHOOSHH <i>Steve Dearden, Vice President</i></p>	<ul style="list-style-type: none"> • Suggest the Department revise the experimental language to include fish passage emergencies. • Suggest using experimental passage technologies in a time of climate change and to allow new passage technologies be used and not considered experimental. 	<p>Proposed revision to allow flexibility on timelines associated with experimental passage solutions.</p>