

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701**NOTICE OF PROPOSED RULEMAKING**
INCLUDING STATEMENT OF NEED & FISCAL IMPACTCHAPTER 635
DEPARTMENT OF FISH AND WILDLIFE**FILED**12/13/2022 9:15 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Authorize Grass Carp Placement in Devil's Lake and Authorizing Special Districts to Request Exceptions

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 02/17/2023 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: John Seabourne
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Salem, OR 97302

John.D.Seabourne@ODFW.Oregon.gov

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: 02/17/2023

TIME: 8:00 AM - 5:00 PM

OFFICER: Oregon Fish and Wildlife Commission

HEARING LOCATION

ADDRESS: The Benson Hotel, 309 SW Broadway, Portland, OR 97205

SPECIAL INSTRUCTIONS:

This hearing will be conducted as a hybrid meeting, providing an opportunity to give testimony either in person or virtually. Additional information regarding participation will be posted on our website at www.dfw.state.or.us/agency/commission/minutes/. The meeting can be viewed at www.youtube.com/user/IEODFW. Any changes to the meeting format (to virtual only if emergency arises) will be posted to our website as soon as possible.

NEED FOR THE RULE(S)

This rule modification is needed to allow the Devil's Lake Water Improvement District to re-stock sterile grass carp for the purposes of weed management in Devil's Lake, subject to Department permit terms and conditions, to improve recreational opportunities for swimming and boating. In addition, a change is made to allow any special district to seek an exception from controlled species regulation.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

1. Staff report prepared for the Oregon Fish and Wildlife Commission hearing on 02/17/2023.

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 John Seabourne at 503-947-6207 or John.D.Seabourne@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. For a complete list of persons, the department has invited to provide pre-notice comments please contact John Seabourne at 503-947-6207 or John.D.Seabourne@ODFW.Oregon.gov.

FISCAL AND ECONOMIC IMPACT:

No major negative fiscal and or economic impacts are expected to result from this proposed rule amendment. There is a potential for benefits from improvements to water-based recreational opportunities for public use.

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).

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

The state entities that could potentially be affected by this rule amendment is the Oregon Department of Fish and Wildlife (ODFW) and the Oregon State Police (enforcement costs). No significant changes from the current levels of the agency's staffing, expenditures, or revenues are expected because of this rule amendment.

It is not anticipated that units of local governments would be negatively affected by the proposed rule amendment. Management of the weeds may result in resumption of boating, swimming and other forms of recreation on the lake which could have economic benefits for small business serving these activities.

This specific exemption is intended to authorize grass carp placement in Devil's Lake for the purpose of weed management. The stocking of grass carp may result in a decreased habitat availability for warm water fish species and potential reduction of recreational fishing in the area. Invasive plant species control through weed management can provide positive benefits to fish, wildlife, and their habitats. In a discussion on the economics of invasive species authors Cusack et al. (2009) summarize previous studies show there is a high benefit to cost ratio when early action is taken. Allowing weed removal has a potential provide spillover benefits to the public. Benefits may include improved conditions for swimming, paddling, boating, and other water-based recreation activities. Due to limited information ODFW is currently not able to quantify these benefits.

References

Cusack, C., Harte, M., Chan, C, 2009. The Economics of Invasive Species. Prepared for the Oregon Invasive Species Council. Oregon State University.

<https://seagrant.oregonstate.edu/sites/seagrant.oregonstate.edu/files/sgpubs/onlinepubs/g09001.pdf>

Retrieved December 12, 2022

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

Management of the weeds may result in resumption of boating, swimming and other forms of recreation on the lake which could have economic benefits for small business serving these activities.

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

rule(s);

No changes to these types of costs are expected.

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

No changes to these types of costs are expected.

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

Small businesses were not directly involved with the development of this amendment.

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

The Administrative Rule Advisory Committee was not consulted. The agency is engaging with the public through this noticed rulemaking process. Public correspondence will also be part of the Commission meeting for February 2023, when this amendment will be decided upon.

AMEND: 635-056-0075

RULE SUMMARY: This rule will authorize placement of grass carp in Devil's Lake and make an amendment to those entities that may seek exception from controlled species regulation.

CHANGES TO RULE:

635-056-0075

Controlled Fish Species ¶

(1) Controlled Fish ¶

(a) Grass carp (*Ctenopharyngodon idella*): Grass carp may be released into water bodies within Oregon only pursuant to the issuance of a permit from the Department under sub-section (1)(a)(A) or if identified in sub-section (1)(a)(B). Complete permit applications shall be submitted to Department headquarters at least 60 days before proposed stocking. A fee of \$250.00 (plus a \$2.00 license agent fee) shall be charged for each Grass carp permit issued. ¶

(A) The following restrictions and standards will govern the issuance of grass carp permits: ¶

(A*i*) Stocking will occur only in water bodies which are: ¶

(i) Completely within private land; or ¶

(ii) On land owned or controlled by ~~irrigation~~ special districts or drainage districts defined in ORS 198.010. ¶

(B*ii*) Stocking will occur only in the following types of water bodies: (i) Lakes, ponds, or reservoirs less than 10 acres; or (ii) Ditches and canals. ¶

(C*iii*) Public use of the water body must be restricted to prevent removal of grass carp (by angling or otherwise) by unauthorized persons. At a minimum, the water body must be closed to angling and other use by the general public. ¶

(D*iv*) Stocking shall not detrimentally affect any population of species listed as threatened or endangered by the federal or state government. ¶

(E*v*) Stocking shall occur only in water bodies with fish screens approved by the Department. Such screens shall have screen openings 1 inch or less for fish 12-19 inches total length and screen openings 2 inches or less for fish over 19 inches total length. Screens shall be inspected and approved by the Department before a permit will be issued. The applicant must comply with fish passage requirements (OAR 635, division 412); given grass carp screening requirements, this entails applying for and receiving a waiver or exemption from passage requirements if grass carp will be stocked into waters where native migratory fish are or were historically present. ¶

(F*vi*) Stocking will not be allowed in water bodies within 100-year floodplains (as delineated by the Federal Emergency Management Agency on federal Flood Insurance Rate Maps) during times of potential flood. Times of potential flood are January 1 through July 31 in watersheds east of the Cascades and October 15 through May 31 in watersheds west of the Cascades. Grass carp will be removed from water bodies in a 100-year floodplain and held or disposed of during times of potential flood. If grass carp will be held and not disposed of, they shall be held at a permitted site outside the 100-year floodplain. Applications for sites within a 100-year floodplain shall contain a detailed removal plan which shall receive Department approval. ¶

(Gvii) Grass carp may only be purchased and imported from approved suppliers outside Oregon. Grass carp may not be propagated or held for further distribution within Oregon. Department pathologists shall approve suppliers. Approval will be based on ability to provide grass carp free of Asian tapeworms and meet health and disease requirements according to OAR 635-007-0555 through 635-007-0585.¶

(Hviii) Grass carp imported into Oregon shall be:¶

(i) (2) Sterile triploids. Documentation from the U.S. Fish and Wildlife Service that each fish is triploid must be submitted to the Department prior to release;¶

(ii) At least 12 inches long;¶

(iii) Tagged with a Passive Integrated Transponder (PIT) tag of frequency 134.2-kilohertz. Each tag shall be programmed with a unique identification number. A list of unique tag numbers shall be submitted to the Department prior to release; and¶

(iv) Stocked at a rate not exceeding 22 per affected acre.¶

(ix) In addition to documentation relating to the restrictions above, each permit application shall include:¶

(i) Applicant's name, address and daytime telephone number. All property owners of the water body to which grass carp will have unrestricted access must be party to the application and permit;¶

(ii) Location of the water body, including township, range, section and quarter section, with map including written directions for access;¶

(iii) Map of the water body including, vegetation present in the water body, all inlets and outlets, and screen locations;¶

(iv) Description of emergency procedures for responding to fish escapes from approved sites;¶

(v) Description of how fish will be removed and disposed of at the end of the proposed project.¶

(x) An application becomes the management plan upon approval. Permits and management plans shall be specific to particular sites and particular stocking projects. Permittees shall not deviate from permit conditions and management plans without prior written approval from the Department. No person may remove grass carp from one site (as identified in a management plan) and transport them to any other site without prior written approval from the Department.¶

(xi) An Oregon Department of Fish and Wildlife fish transport permit shall accompany grass carp imported into and transported within Oregon. If transport is required within the management plan and occurs entirely on the permittee's property, a transport permit is not needed. Any other permit or documentation required for fish import, transport, or stocking shall also be obtained prior to importation and stocking.¶

(xii) Permittees shall, as a condition of the permit, allow employees of the Department or the Oregon State Police to inspect at reasonable times the permitted water body, permit, and associated records. Inspection may take place without warrant or notice, but, unless prompted by emergency or other exigent circumstances, shall be limited to regular and usual business hours, including weekends. Nothing in these rules is intended to authorize or allow the warrantless search or inspection of property other than the water bodies or fish holding facilities on the permittee's property.¶

(xiii) Permits are revocable at any time for violation of any wildlife statute or rule of the Department. Upon revocation, if stocking has already occurred, the permittee shall remove all grass carp within two weeks at her/his own cost.¶

(xiv) Grass carp which escape a permitted water body are subject to seizure or destruction by the Department at the expense of the permit holder. The permit holder shall be held liable for incidental kill of any other species due to or during destruction of escaped grass carp.¶

(xv) The Commission may grant an exception to OAR 635-056-0075(1)(a)(A) or (1)(a)(B). Exception requests must be submitted in writing in addition to the normal application and must address the requirements in this section. Unless the Commission determines that an alternative provides equivalent protection to fish and wildlife resources and their habitats, exceptions shall have the following additional requirements:¶

(i) If the water body into which grass carp will be stocked is greater than or equal to 10 acres a professional topographic survey by a licensed surveyor must be provided for the entire perimeter of the water body showing all points of water movement in and out of the water body. A topographic survey completed by a state or federal agency within five years from the date of application for the water body may be used. The Department shall determine screening requirements from the survey;¶

(ii) Grass carp may remain in a water body within the 100-year floodplain year-round if a professional plan or drawing that is certified by a licensed engineer is provided which indicates that the entire perimeter of the water body is protected from 100-year floods. In order to prevent grass carp escape, screens, dikes, and devices protecting the water body must be able to remain structurally sound within 100-year floods and not be overtopped by a 100-year flood. The Department reserves the right to have a licensed engineer retained by the agency review and approve or deny the plan or drawing submitted by the applicant.¶

(B) Grass carp were legally stocked in Devils Lake (Lincoln County) prior to 1993 and may continue to be stocked subject to terms and conditions determined by the Department.¶

(b) Tilapia (Mozambique tilapia *Oreochromis mossambicus*, Nile tilapia *O. niloticus*, Wami tilapia *O. urolepsis*, Blackchin tilapia *Sarotherodon melanotheron*, and hybrids thereof): The possession, propagation, transportation, sale, purchase, exchange and disposition of these tilapia is controlled according to the following restrictions and standards:¶

(A) A person intending to sell, barter or exchange must apply for and receive an approved propagation license from the Oregon Department of Fish and Wildlife Fish Propagation Program prior to commencing production. A person may raise tilapia in-doors (a house, greenhouse, or other enclosed structure capable of excluding predators) for personal consumption without an Oregon Department of Fish and Wildlife-Fish Propagation license;¶

(B) Propagation outdoors must occur in ponds or tanks covered with nets or screens adequate to prevent the capture or transport of cultured fish by predators or other animals;¶

(C) Access to production facilities must be through secure locked gates;¶

(D) Only animals certified as disease-free by the vendor may be purchased;¶

(E) Permittees must provide adequate veterinary care to identify and minimize the spread of diseases originating from the animals being held;¶

(F) No live tilapia or their gametes, fertilized eggs, or larvae may be released into waters of this State, as defined in ORS 506.006; and¶

(G) An Oregon Department of Fish and Wildlife fish transport permit shall accompany live tilapia imported into and transported within Oregon. If transport occurs entirely on the permittee's property, a transport permit is not needed.¶

(c) Tiger muskellunge (*Esox lucius* X *Esox masquinongy*): tiger muskellunge are classified as a controlled species for the specific purpose of stocking into Phillips Reservoir (Baker County) for fish management purposes according to the following restrictions and standards:¶

(A) Stocking will occur only in Phillips Reservoir located in Baker County. No other public or private water bodies will be stocked with tiger muskellunge unless approved by the Commission. Tiger muskellunge will be stocked into Phillips Reservoir at a rate not to exceed the adult density required to achieve the objectives of the introduction; control abundance of yellow perch to restore the rainbow trout fishery.¶

(B) Tiger muskellunge may only be obtained and imported from approved suppliers outside of Oregon. Tiger muskellunge may not be propagated or held for further distribution within Oregon. Department pathologists shall approve suppliers. Approval will be based on the ability to provide tiger muskellunge which meet health and disease requirements according to OAR 635-007-0960 through 635-007-0995.¶

(C) Allowable catch and release only based on management objectives.¶

(D) Department will establish a monitoring plan and program prior to release which shall include:¶

(i) Creel monitoring.¶

(ii) Population monitoring.¶

(iii) Plans to eradicate or suppress any illegal introductions of pike or muskellunge introductions to Phillips Reservoir.¶

(iv) Education and outreach.¶

(E) In conjunction with fish monitoring activities all live tiger muskellunge handled of suitable marking size shall be tagged with a Passive Integrated Transponder (PIT) tag. Each tag shall be programmed with identification number. A list of the PIT tag identification numbers shall be maintained by the District Fish Biologist and submitted to the Invasive Species Wildlife Integrity Coordinator.¶

(F) Any permit(s) or documentation(s) required for fish import, transport, or stocking shall be obtained prior to and accompany importation and stocking.¶

(G) Department will develop an environmental monitoring plan for Phillips Reservoir which should include:¶

~~(i) B~~ basic limnological characterization of the reservoir (nutrient concentrations, light penetration, vertical profiles of physical and chemical characteristics of reservoir water, zooplankton, and phytoplankton composition and densities).¶

(d) Barramundi (*Lates calcarifer*) the possession, propagation, transportation, sale, purchase, exchange and disposition of Barramundi are controlled according to the following restrictions and standards:¶

(A) A person must apply for and receive an approved propagation license from the Oregon Department of Fish and Wildlife Fish Propagation Program prior to commencing production;¶

(B) An Oregon Department of Fish and Wildlife fish transport permit shall accompany live Barramundi imported into and transported within Oregon. If transport occurs entirely on the permittee's property, a transport permit is not needed;¶

(C) Fish health certification must be reviewed and found acceptable by ODFW Fish Health personnel or veterinary staffs before fish are purchased or transported;¶

(D) Possession of live Barramundi outside of an approved facility or without a transport permit is prohibited;¶

(E) No live Barramundi or their gametes, fertilized eggs, or larvae may be released into water of the State, as

defined in ORS 506.006;¶

(F) Propagation must occur indoors (enclosed structure capable of excluding predators) and only in closed recirculating systems;¶

(G) Access to production facilities must be through secure locked gates;¶

(H) Permittee must provide adequate veterinary care as directed by a veterinarian and adhere to Fish Health Management Policy OAR 635-007-0960 through 635-007-0995 to identify and minimize the spread of disease originating from the animals being held;¶

(I) Effluent water may not be discharged directly into any waters of the state.¶

(2) Controlled Mollusks:¶

(a) Suminoe oysters (*Crassostrea ariakensis*), Pacific oysters (*C.gigas*), Kumamoto oysters (*C. sikamea*), Eastern oysters (*C. virginica*), and European flat oysters (*Ostrea edulis*) may be purchased and imported from outside Oregon (or from other estuaries within Oregon) for release into estuaries in Oregon pursuant to the terms of a permit issued by the department. Complete permit applications must be submitted to the department's Marine Resources Program Headquarters (2040 SE Marine Science Drive, Newport, Oregon 97365) at least 15 days before proposed stocking. Oysters may be commercially harvested and sold pursuant to OAR 635-005.¶

(b) Softshell clam (*Mya arenaria*), Japanese varnish clam (*Nuttalia obscuratai*), and Japanese littleneck clam (*Venerupis philipinnarum*) may be harvested, possessed and sold commercially pursuant to OAR 635-005 or harvested and possessed recreationally pursuant to OAR 635-039.¶

(3) Controlled Crustaceans:¶

(a) Green crabs (*Carcinus maenas*) may be harvested recreationally pursuant to OAR 635-039. Once harvested, it is unlawful to return green crab to state waters. It is unlawful to take green crab for commercial purposes.¶

(b) Whiteleg shrimp (*Litopenaeus vannamei*): The possession, propagation, transportation, sale, purchase, exchange and disposition of whiteleg shrimp is controlled according to the following restrictions and standards:¶

(A) A person must apply for and receive an approved propagation license from the Oregon Department of Fish and Wildlife Fish Propagation Program prior to commencing production;¶

(B) Propagation must occur in ponds covered with nets or screens adequate to prevent the capture or transport of cultured shrimp by predators or other animals;¶

(C) Access to production facilities must be through secure locked gates;¶

(D) Only animals certified as disease-free by the vendor may be purchased;¶

(E) Permittees must provide adequate veterinary care to identify and minimize the spread of diseases originating from the animals being held;¶

(F) No live whiteleg shrimp or their gametes, fertilized eggs, or larvae may be released into waters of this State, as defined in ORS 506.006; and¶

(G) An Oregon Department of Fish and Wildlife fish transport permit shall accompany live whiteleg shrimp imported into and transported within Oregon. If transport occurs entirely on the permittee's property, a transport permit is not needed.¶

(c) Giant river prawns (*Macrobrachium rosenbergii*): The possession, propagation, transportation, sale, purchase, exchange and disposition of giant river prawns is controlled according to the following restrictions and standards:¶

(A) A person must apply for and receive an approved propagation license from the Oregon Department of Fish and Wildlife Fish Propagation Program prior to commencing production;¶

(B) Propagation must occur in ponds covered with nets or screens adequate to prevent the capture or transport of cultured prawns by predators or other animals;¶

(C) Access to production facilities must be through secure locked gates;¶

(D) Only animals certified as disease-free by the vendor may be purchased;¶

(E) Permittees must provide adequate veterinary care to identify and minimize the spread of diseases originating from the animals being held;¶

(F) No giant river prawns or their gametes, fertilized eggs, or larvae may be released into waters of this State, as defined in ORS 506.006; and¶

(G) An Oregon Department of Fish and Wildlife fish transport permit shall accompany live giant river prawns imported into and transported within Oregon. If transport occurs entirely on the permittee's property, a transport permit is not needed.¶

(d) Crayfish - *Cambaridae* and *Parastacidae* - All species: The importation, possession, propagation, transportation, sale, purchase, exchange and disposition of non-native crayfish is controlled according to the following restrictions and standards.¶

(A) Non-native crayfish may be harvested, possessed and sold commercially pursuant to OAR 635-005-0855 through 635-005-0885 or harvest recreationally pursuant to ORS 496.162 from waters of the State as defined in ORS 503.006;¶

(B) Live non-native crayfish may not be used as bait except in the waterbody in which they were taken;¶

(C) Non-native crayfish or their gametes, fertilized eggs, or larvae may not be released into waters of the State, as defined in ORS 503.006;¶

(D) Propagation is not allowed;¶

(E) Non-native crayfish may not be imported except by recognized educational institutions or for immediate consumption (Immediate consumption means within one week from date of delivery):¶

(i) Prior to purchase and importation; must apply for and receive authorization from Oregon Department of Fish and Wildlife;¶

(ii) Crayfish must be euthanized after educational section is completed.¶

(iii) Non-native crayfish must remain in an indoor secure facility and can only be removed when transporting for immediate preparation for consumption;¶

(iv) An Oregon Department of Fish and Wildlife fish transport permit shall accompany non-native crayfish imported into Oregon.¶

(F) Fish health certification must be reviewed, found acceptable and be on file by ODFW Fish Health personnel or veterinary staffs before crayfish are imported into the State.

Statutory/Other Authority: ~~SB 247 (2015), ORS 496.012, 496.138, 496.146, 496.16~~ ORS 496.012

Statutes/Other Implemented: ~~ORS 497.308, 497.318, 498.022, 6.138,~~ ORS 498.052, ORS 498.222