



Oregon Administrative Rules
Oregon Department of Fish and Wildlife --- Working RAC DRAFT ---

635-412-0001

Policy and Intent

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

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

(3) It is therefore the intent of these rules to promote fish passage recognizing and minimizing burdens placed on the owners and/or operators of artificial obstructions.

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635-412-0005

Definitions

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

(X) "Abandonment" means the act of abandoning an artificial obstruction, water right, water diversion structure point of water diversion, road, culvert, tide gate, dike, etc. that is no longer need or use and give up.

(2) "Active channel width" means the naturally-occurring stream width between the ordinary high water lines, or at the channel bankfull elevation if the ordinary high water lines are indeterminate. In bays and estuaries, active channel width is calculated as the summation of the active channel widths of all freshwater streams entering the bay or estuary upstream of the artificial obstruction.

(3) "Artificial obstruction" means any artificial structure that impedes a stream, bay, or estuary and has some element within or below the channel including the following: dam, diversion, dike, berm, levee, tide or flood gate, road, culvert or other man-made device placed in the waters of this state that has the potential to preclude, delay or prevents the migration of native migratory fish.

(4) "Attraction flow" means the flow of water that emanates from or near a fishway entrance in sufficient quantity, velocity, and location to attract upstream migrants into the fishway, which can consist of gravity flow from the fish ladder and auxiliary water system flow added in or near the lower-ladder fishway entrance.

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

(6) "Bed" means that portion of a waterway that is always covered by water, or, on intermittent streams, the area that carries water when water is present.

(#) "Bed and banks" means the physical container of the waters of this state, bounded on freshwater bodies by the ordinary high water line or bankfull stage, and on bays and estuaries by the limits of the highest measured tide.

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37 (#) "Bridge" means a set of structural elements allowing a road and waters-of-the-state to cross which a) is open-
38 bottomed and has a clear span greater than 20 feet or b) is open-bottomed, does not have earthen fill on top of it,
39 and has a clear span less than or equal to 20 feet.
40 (3) "Element" or "bridge element" means any part of a bridge, that supports or provides a roadway (i.e., is
41 structural) or provides structural protection.
42 (7) "Channel" means a perennial or intermittent waterway that periodically or continuously contains moving waters
43 of this state and has a definite bed and banks that serve to confine the water.
44 (#) "Clear Span" means the open distance between elements, within the horizontal plane of the channel passing
45 below or through the structure.
46 (8) "Commission" means the Oregon Fish and Wildlife Commission.
47 (9) "Construction" means:
48 (a) Original construction;
49 (b) Major replacement, which includes:
50 (A) for dams and diversions, cumulative excavation or replacement of 30 percent by structure volume of the dam
51 or diversion, including periodic or seasonal replacements, unless:
52 (i) Only checkboards are replaced; or
53 (ii) Fish passage approval has already been obtained in writing from the Department for expected replacement.
54 (B) For tide gates and flood gates:
55 (i) Cumulative replacement of over 50 percent of the gate material, including hinges and the gate itself if detached;
56 or
57 (ii) Cumulative removal, fill, replacement, or addition of over 50 percent of the structure supporting the gate,
58 excluding road-stream crossing structures.
59 (iii) For tide or flood gate structures physically attached or connected to a culvert, bridge, or other appurtenance,
60 major replacement of either structure requires passage also be addressed at the adjoining structure.
61 (C) For dikes, berms, levees, roads, bridges or other artificial obstructions that segment estuaries, floodplains, or
62 wetlands:
63 (i) Activities defined under OAR 635-412-0005(9)(d) in all locations where current channels cross the artificial
64 obstruction segmenting the estuary, floodplain, or wetland; or
65 (ii) The cumulative removal, fill, replacement, or addition of over 50 percent by volume of the existing material
66 directly above a historic channel or historically-inundated area; and
67 (D) For other artificial obstructions, the cumulative removal, fill, replacement, or addition of over 50 percent of the
68 structure within, below or above the channel comprising the artificial obstruction to native migratory fish migration;
69 (c) Structural modifications that increase storage or diversion capacity; or
70 (d) For purposes of culverts and bridges, installation or replacement of a roadbed, or culvert or bridge, is further
71 defined as:
72 (A) Roadbed installation or replacement at culverts or bridges includes any activity that:
73 (i) Creates a road which crosses a channel;
74 (ii) Widens a roadfill footprint within a channel; or

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75 (iii) Fills or removes over 50 percent by volume of the existing roadbed material directly above a culvert, except  
 76 when this volume is exclusively composed of the top 1 foot of roadbed material.

77 (B) Culvert or bridge installation or replacement includes any activity that:

78 (i) Installs or constructs a new road, culvert, bridge, overflow pipe, apron, or wingwall within or under a channel;

79 (ii) Extends existing culverts, aprons, or wingwalls within or under a channel, except one-time placements of  
 80 culvert ends which do not extend greater than 1 foot beyond the adjacent road footprint in place prior to August  
 81 2004;

82 (iii) Cumulatively through time makes significant repairs or patches to over 50 percent of the linear length of a  
 83 culvert or over 50 percent of the structural elements of a bridge;

84 (iv) Replaces any part of a culvert, except ends which become misaligned, detached or eroded and which are  
 85 replaced to their original configuration;

86 (v) At any point along the linear length of a culvert, reduces the entire inside perimeter or diameter of the culvert;  
 87 or

88 (vi) Makes replacements, repairs, patches, or other modifications to an existing culvert, bridge or tide or flood gate  
 89 that are different than the original configuration and which reduce any level of fish passage for native migratory fish  
 90 with current access, as determined by the Department, to the culvert or bridge, including additional points of water  
 91 discharge or conveyance appurtenance structure to or within an existing culvert that increases discharge into or  
 92 through the culvert.

93 (e) For purposes of fishways, the installation, modification or replacement of a fishway is further defined as:

94 (A) Creates a new or replacement fishway at an artificial obstruction;

95 (B) Extends a fishway; or

96 (C) Cumulatively through time makes repairs or patches to over 50 percent of the fishway structure or elements.

97

98 (10) "Dam" means a structure, or group of structures with different functions, spanning or partially-spanning a  
 99 stream in one location in order to pool water, facilitate the diversion of water, or raise the water surface elevation.

100 (11) "Department" means the Oregon Department of Fish and Wildlife.

101 (12) "Director" means the Director of the Oregon Department of Fish and Wildlife.

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

105 (14) "Emergency" means unforeseen circumstances materially related to or affected by an artificial obstruction  
 106 that, because of adverse impacts to a population of native migratory fish, requires immediate action.

107 (15) "Estuary" means a body of water semi-enclosed by land and connected with the open ocean within which salt  
 108 water is usually diluted by fresh water derived from the land. "Estuary" includes all estuarine waters, tidelands, tidal  
 109 marshes and submerged lands extending upstream to the head of tidewater. However, for the purposes of these  
 110 rules, the Columbia River Estuary extends to the western edge of Puget Island.

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

**Commented [GDA12]:** Ambiguous, not sure what the importance of "Significant" is. A patch in excess of 50% is a clear line. Remove "Significant".

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- 113 (17) "Experimental fish passage structure" means a fish passage structure based on new ideas, new technology,  
114 or unique, site-specific conditions determined by the Department to not be covered by existing fish passage  
115 criteria but to have a reasonable possibility of providing fish passage.
- 116 (18) "Fish passage" means the ability, by the **best** native migratory fish and life history stages determined by  
117 the Department to require passage at the site, to move volitionally, with minimal stress, and without physical or  
118 physiological injury upstream and downstream of an artificial obstruction.
- 119 (19) "Fish passage structure" means any human-built structure that allows fish passage past an artificial  
120 obstruction, including, but not limited to, fishways and road-stream crossing structures such as culverts and  
121 bridges.
- 122 (20) "Fishway" means the set of human-built and/or operated facilities, structures, devices, and measures that  
123 together constitute, are critical to the success of, and were created for the sole purpose of providing upstream fish  
124 passage at artificial or natural obstructions which create a discontinuity between upstream and downstream water  
125 or bed surface elevations.
- 126 (21) "Fishway entrance" means the component of a fishway that discharges attraction flow into the tailrace and  
127 where upstream migrant fish enter the fishway.
- 128 (22) "Fishway pools" means discrete sections within a fishway separated by overflow weirs or non-overflow walls  
129 that create incremental water surface elevation gains and dissipate energy.
- 130 (23) "Floodplain" means that portion of a river valley, adjacent to the channel, which is built of sediments deposited  
131 during the present regimen of the stream and which is covered with water when the waterway overflows its banks  
132 at flood stage.
- 133 (24) "Forebay" means the water impounded immediately upstream of an artificial obstruction.
- 134 (25) "Fundamental change in permit status" means a change in regulatory approval for the operation of an artificial  
135 obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including  
136 but not limited to permitting, licensing, relicensing, reauthorization or the granting of new water rights, but not  
137 including water right transfers or routine maintenance permits unless they involve construction or abandonment of  
138 an artificial obstruction.
- 139 (26) "High fish passage design flow" means the mean daily average stream discharge that is exceeded 5 percent  
140 of the time during the period when the Department determines that native migratory fish require fish passage.
- 141 (27) "Historically" means prior to 1859 (statehood).
- 142 (28) "Inflow" means surface movement of waters of this state from a lower ground surface elevation to a higher  
143 ground surface elevation or away from the ocean.
- 144 (29) "In-proximity" means within the same watershed or water basin, as defined by the Oregon Water Resources  
145 Department, and having the highest likelihood of benefiting the native migratory fish populations, as defined by the  
146 Oregon Department of Fish and Wildlife, directly affected by an artificial obstruction.
- 147 (30) "Low fish passage design flow" means the mean daily average stream discharge that is exceeded 95 percent  
148 of the time, excluding days with no flow, during the period when the Department determines that native migratory  
149 fish require fish passage.
- 150 (31) "Mitigation" means alternatives to providing fish passage at an artificial obstruction as per ORS 509.585.

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**Commented [GDA16]:** Clarify and settle on a OWRD Basin Delineation (1991) map or another more recent map.



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- 151 (32) "Native migratory fish" means native fish (as defined under OAR 635-007-0501) that migrate for their life cycle  
152 needs. These fish include all sub-species and life history patterns of the following species listed by scientific name  
153 in use as of 200521. Common names are provided for reference but are not intended to be a complete listing of  
154 common names, sub-species, or life history patterns for each species.
- 155 (a) *Acipenser medirostris* -- Green [Sturgeon](#);  
156 (b) *Acipenser transmontanus* -- White [Sturgeon](#);  
157 (c) *Amphistichus rhodoterus* -- Redtail surfperch;  
158 (d) *Catostomus columbianus* -- Bridgelip sucker;  
159 (e) ~~*Catostomus luxatus*~~/*Deltistes luxatus* --- Lost River sucker;  
160 (f) *Catostomus macrocheilus* -- Largescale sucker;  
161 (g) *Catostomus microps* -- Modoc sucker;  
162 (h) *Catostomus occidentalis* -- Goose Lake sucker;  
163 (i) *Catostomus platyrhynchus* -- Mountain sucker;  
164 (j) *Catostomus rimiculus* -- Klamath smallscale sucker;  
165 (k) *Catostomus snyderi* -- Klamath largescale sucker;  
166 (l) *Catostomus tahoensis* -- Tahoe sucker;  
167 (m) *Catostomus warnerensis* -- Warner sucker;  
168 (n) *Chasmistes brevirostris* -- Shortnose sucker;  
169 (o) [Entosphenus folletti](#) -- Northern California brook lamprey;  
170 (p) [Entosphenus lethophagus](#) -- Pit-Klamath brook lamprey;  
171 (q) [Entosphenus minimus](#) -- Miller Lake lamprey;  
172 (r) [Entosphenus similis](#) -- Klamath River lamprey;  
173 (s) [Entosphenus tridentatus](#) -- Pacific lamprey;  
174 (et) *Hypomesus pretiosus* -- Surf smelt;  
175 (pu) [Lampetra ayresii](#) -- western River-river lamprey;  
176 (v) [Lampetra pacifica](#) -- Pacific brook lamprey;  
177 (w) [Lampetra richardsoni](#) -- western brook lamprey;  
178 (q) ~~*Lampetra lethophaga*~~ -- Pit-Klamath lamprey;  
179 (r) ~~*Lampetra minima*~~ -- Miller Lake lamprey;  
180 (s) ~~*Lampetra similes*~~ -- Klamath River lamprey;  
181 (t) ~~*Lampetra tridentata*~~ -- Pacific lamprey;  
182 (ux) *Oncorhynchus clarkii* -- Coastal, Lahontan and West Slope cutthroat trout;  
183 (y) ~~*Oncorhynchus gorboscha*~~ -- Pink salmon;  
184 (yz) *Oncorhynchus keta* -- Chum salmon;  
185 (waa) *Oncorhynchus kisutch* -- Coho salmon;  
186 (xbb) *Oncorhynchus mykiss* -- Steelhead, Rainbow and Redband trout;  
187 (ycc) *Oncorhynchus nerka* -- Sockeye/Kokanee salmon;  
188 (zdd) *Oncorhynchus tshawytscha* -- Chinook salmon;  
189 (aaee) *Prosopium williamsoni* -- Mountain whitefish;



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- 190 (b**bff**) *Ptychocheilus oregonensis* -- Northern pikeminnow;  
191 (e**egg**) *Ptychocheilus umpqua* -- Umpqua pikeminnow;  
192 (e**dhh**) *Salvelinus confluentus* -- Bull trout;  
193 (e**eej**) *Spirinchus thaleichthys* -- Longfin smelt;  
194 (f**fjj**) *Thaleichthys pacificus* -- Eulachon-  
195 (33) "Net benefit" means an increase in the overall, in-proximity habitat quality or quantity that is biologically likely  
196 to lead to an increased number of native migratory fish after a development action and any subsequent mitigation  
197 measures have been completed.  
198 (34) "Ordinary high water line" (OHWL) means the line on the bank or shore to which the high water ordinarily  
199 rises annually in season.  
200 **NOTE:** see OAR 141-085-0010 for physical characteristics that can be used to determine the OHWL in the field.  
201 (35) "Oregon Plan" means the guidance statement and framework described in ORS 541.405.  
202 (36) "Over-crowding" means fish density within a pool's wetted volume is such that there is less than 0.25 cubic  
203 feet of water per pound of fish for the maximum number of fish expected to be present within the pool at the same  
204 time, as determined by the Department.  
205 (37) "Road" means a cleared or built surface, and associated materials or measures for support and safety, used  
206 for the purpose of motorized or non-motorized movement between different locations.  
207 (38) "Roadfill footprint" means the area occupied by soil, aggregate, and/or other materials or structures necessary  
208 to support a road, including, but not limited to, appurtenant features such as wing walls, retaining walls, **ef**  
209 headwalls, **or scour protection countermeasures.**  
210 (X) **gh** "Highened channel" means a fishway which encompasses the entire stream channel and is over-steepend  
211 relative to the long-channel streambed profile, including but not limited to nature-like, rock, rock ramp, or  
212 engineered-streambed fishways.  
213 (39) **Stream** means a body of running waters of this state moving over the surface of the land in a channel or bed  
214 including stream types classified as perennial or intermittent and channelized or relocated streams.  
215 (40) "Sub-basin" means a 4th-field hydrologic unit as defined by the U.S. Geological Survey.  
216 (41) "Tailrace" means the water immediately downstream of an instream structure.  
217 (42) "Temporary" means in place less than the in-water work period defined by the Department for a particular  
218 location.  
219 (43) "Trap" means the set of human-built and/or operated facilities, structures, devices, and measures that hold  
220 fish and prevent them from passing volitionally.  
221 (X) **Trash Rack** means a human built or placed structure, device, or measure used to prevent unwanted  
222 materials from entering a fishway, culvert, bridge, water diversion or other structures.  
223 (X) **Trigger Event** means activities that invoke the state's fish passage authority and compel owners-operators of  
224 artificial obstructions to address fish passage and prior to a trigger event (construction, fundamental change in  
225 permit status, or abandonment of an artificial obstruction).  
226 (44) "Unforeseen circumstances" means:  
227 (a) An event that causes an existing human-made structure in the waters of the state which provides fish passage  
228 to become an artificial obstruction; or

**Commented [GDA17]:** Consistency with DSL for freshwater sites. What about tidal sites?

**Commented [GDA18]:** Consistency with DSL.

**Commented [GDA19]:** Term also related to the purposeful exclusion of nuisance beaver or beaver activity on or around culverts.



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229 (b) New fish population information indicating that an existing artificial obstruction is placing a local native  
230 migratory fish population in jeopardy.

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

233 (46) "Waters of this state" means natural waterways including all tidal and non-tidal bays, intermittent and  
234 perennial streams, constantly flowing streams, lakes, wetlands and other bodies of water in this state, navigable  
235 and non-navigable, including that portion of the Pacific Ocean that is within the boundaries of Oregon.

236 (47) "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and  
237 duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation  
238 typically adapted for life in saturated soil conditions.

239 Stat. Auth.: ORS 496.138

240 Stats. Implemented: ORS 509.580, 509.585, 509.610 & 509.625

241 Hist.: DFW 2-2006, f. & cert. ef. 1-9-06

242 **635-412-0010**

243 **Fish Passage Task Force**

244 (1) The Director shall appoint nine members to constitute the Fish Passage Task Force.

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

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

251 (4) The Task Force shall:

252 (a) Serve as the public advisory committee and advise the Director and Commission regarding rulemaking to  
253 implement the fish passage and waiver requirements;

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

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

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

258 (e) Review and recommend to the Commission which projects should be exempt, and changes to the list of  
259 projects exempt from passage requirements under section 8 of Section 2 of HB 3002 (2001);

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

263 (g) Review applications for waivers of the fish passage requirement, and advise the Commission as to whether  
264 alternative measures result in a net benefit to native migratory fish;

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

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

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- 268 (5) The Department's Fish Passage Coordinator shall serve as staff for the task force.
- 269 (6) The chair of the Task Force shall conduct the meetings of the task force, serve as the main contact point  
270 between the Department and Commission and the Task Force and perform such other duties as the Task Force  
271 shall set. The vice chair of the task force shall serve as chair if the chair is unavailable to carry out the duties of  
272 chair.
- 273 (7) Members of the Task Force may not receive compensation for services as a member of the Task Force;  
274 however, in accordance with ORS 292.495, a member of the Task Force may receive reimbursement for actual  
275 and necessary travel or other expenses incurred in the performance of official duties.
- 276 Stat. Auth.: HB 3002
- 277 Stats. Implemented: HB 3002
- 278 Hist.: DFW 10-2002, f. & cert. ef. 2-4-02
- 279 **635-412-0015**
- 280 **Prioritization**
- 281 (1) The Department shall establish for enforcement purposes a list of priority artificial obstructions at which fish  
282 passage would provide the greatest benefit to native migratory fish.
- 283 [\(2\) The priority list shall exclude artificial obstructions where a legal agreement with the Department or](#)  
284 [Commission indicates passage is not required or where there is another legal requirement to address fish](#)  
285 [passage.](#)
- 286 ~~(23)~~ (2) The priority list shall be based on the needs of native migratory fish.
- 287 (a) The prioritization shall consider the following factors relative to each artificial obstruction for all native migratory  
288 fish currently or historically present at the artificial obstruction:
- 289 (A) The quantity of native migratory fish habitat which is inaccessible;
- 290 (B) The quality of native migratory fish habitat which is inaccessible;
- 291 (C) Unique or limited native migratory fish habitat which is inaccessible, or should remain inaccessible for fish  
292 management purposes;
- 293 (D) The biological status of the native migratory fish;
- 294 (E) The level of fish passage currently provided at the artificial obstruction;
- 295 (F) The presence of other artificial obstructions upstream and downstream and the timeframe native migratory fish  
296 will be able to utilize restored passage; and
- 297 (G) Existing agreements with the Department regarding fish passage.
- 298 (b) The prioritization may utilize existing Department information or professional judgment in the absence of  
299 information specific to a given site.
- 300 (c) The priority list shall contain one artificial obstruction per Oregon sub-basin, which shall be ranked across the  
301 state.
- 302 (d) The Department shall field verify the information used for prioritization prior to enforcement actions.
- 303 (e) The Department shall re-evaluate the priority list with the most recent information after enforcement occurs at  
304 five priority artificial obstructions or as directed by the Commission.
- 305 ~~(34)~~ (3) The Commission shall review, approve, or amend the priority list ~~after the initial priority list is developed~~, when  
306 the Department re-prioritizes, and no less frequently than once every five years.





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307 ~~(44) Once the Commission has approved the priority list, t~~The Commission or the Department may order a person  
308 owning or operating an artificial obstruction on the priority list ~~who has been issued a water right, owns a lawfully~~  
309 ~~installed culvert or owns another lawfully installed obstruction~~ to install fish passage or to provide mitigation within  
310 a defined timeframe if:

- 311 (a) The owner or operator refuses to work cooperatively with the Department;
- 312 (b) The Department has field verified the information used for prioritization of the artificial obstruction;
- 313 (ac) The Department can arrange for non-owner or non-operator funding of at least 60 percent of the cost for fish  
314 passage design, construction, and installation; and
- 315 (bd) The artificial obstruction is ranked in the top ten for the state or highest within a Department Region on the  
316 priority list.

**Commented [GDA22]:** Consider removing this. Unclear on the historical perspective on the expectation that the state should be responsible for funding at a priority barrier.

317 ~~(5) Once the Department has arranged for non-owner or non-operator funding of at least 60 percent of the cost for~~  
318 ~~fish passage design, construction, and installation at an artificial obstruction the owner or operator has two years~~  
319 ~~to:~~

- 320 ~~(a) Install a fish passage structure according to a fish passage plan approved by the Department; or~~
- 321 ~~(b) Provide mitigation that the Commission determines is a net benefit to native migratory fish.~~
- 322 ~~(5) The Department shall work cooperatively with the owners or operators of artificial obstructions on the priority~~  
323 ~~list to establish fish passage.~~

324 (6) The Department shall re-evaluate the priority list after passage is provided through cooperation or by order at  
325 an artificial obstruction or as directed by the Commission.

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327 Stat. Auth.: ORS 496.138  
328 Stats. Implemented: ORS 509.585 & 509.625  
329 Hist.: DFW 2-2006, f. & cert. ef. 1-9-06  
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