



May 7, 2021

Mr. Greg Apke
Statewide Fish Passage Program Leader
4034 Fairview Industrial Drive SE
Salem, Oregon 97302

SENT VIA EMAIL: ODFW.Passagerules@odfw.oregon.gov

Re: Fish Passage Rule Revisions

Mr. Apke,

Thank you for the opportunity to submit initial comments on the Oregon Department of Fish and Wildlife's fish passage regulations. Our organizations are writing to express our goals for this revision process and to ask you to ensure that we are closely engaged in the updates as they move forward. As an initial matter, we support and incorporate herein the comments from the forestry sector that were submitted today.

The fish passage statutes were originally enacted as part of the Oregon Plan for Salmon and Watersheds in the 1990s, which enacted a number of programmatic changes to Oregon programs to prevent listing of salmonid species in that state. Since that time, Oregon producers have engaged in millions of dollars of habitat restoration project, partnering with state and federal partners and investing millions of their own dollars, time, and energy into salmonid restoration and recovery. These efforts have been very successful, particularly is it relates to coastal coho, which have met or exceeded recovery goals in the state, and are ready for delisting. That said, as available data from Washington suggests, it is not clear that the fish passage program is responsible for that successful recovery, or that fish passage is the highest priority salmonid recovery investment.

Our members are deeply impacted by the fish passage program – fish passage requirements are one of the driving factors in the costs of many agricultural and forestry projects, and impact everything from our ability to do needed infrastructure upgrades to our ability to manage our water rights. Further, those requirements are becoming more onerous over time, despite the extensive work done in our sector and across Oregon on salmonid recovery. In many cases, these mandates are going to make many upgrade

projects cost prohibitive (which have a benefit for fisheries species vs. the current structures), and put landowners and districts in the difficult position of not doing important modernization and improvement work because fish passage is simply too expensive. Further, these requirements are being imposed in many water bodies where there are not and have not historically been native migratory fish, and to “obstructions” that in no way impede fish passage. Put simply, this program is broken and needs comprehensive fixes to ensure it’s achieving its objectives and not being used to fund restoration or updates that go beyond facilitating passage.

Based on the initial discussions that happened at the March fish passage rulemaking meeting, we are very concerned that the proposed rules are moving in the wrong direction. We understand that the impetus for these revisions is the Department’s Climate and Ocean Change Policy. However, we are concerned that many of the initial changes flagged in the initial meeting far exceed the statutory scope of the program, will increase the burden on landowners, and will not ultimately improve the resiliency of our state’s salmonid populations in light of climate change scenarios. While we agree that improving climate resiliency is important, we do not believe that broadening the application of the fish passage statutes, making the statutes more onerous or triggering the fish passage requirements for more projects will improve climate resiliency in our state’s salmonid populations. Further, we do not believe that the base statutes authorize many of these changes.

We have several examples recently of projects that are designed to improve climate resiliency, improve fish habitat, reduce water use and improve water quality which were not able to clear the very high hurdle of the fish passage statutes, and that will no longer pencil if the fish passage statutes are applied in the manner contemplated by the Department. This means that good projects which meet our state’s climate resiliency objectives are not happening due directly to the application of these statutes. This result is contrary to the state’s climate resiliency goals and ultimately harms our salmonid recovery efforts. Further, even when funding can be found for a project, resources spent by the state and landowners on meeting the state’s overly broad fish passage statutes are resources that will not be invested in other more critical salmonid recovery efforts.

Given our limited state dollars and the huge investments already made by landowners, the state should be looking to make compliance with its statutes cheaper and easier for landowners – and focus on actually providing fish passage only in those areas where it’s needed, not on furthering the broader restoration goals of the state. If the state is not going to relax its standards, the state needs to do a far better job of funding the passage portions of a project. Sometimes, meeting the Department’s fish passage requirements can increase the cost of a project tenfold. This is an alleged benefit that is born by the public as a whole, but is often placed solely on the backs of landowners.

Finally, while we appreciate the addition of April Snell with the Oregon Water Resources Congress to the Fish Passage Task Force, the Task Force still remains woefully under

representative of agricultural and forestry interests, who after the Oregon Department of Transportation and other road agencies, are among the most deeply impacted by fish passage regulations. Having only one voice representing these interests at the table – and none at the table when this process kicked off – will put a tremendous amount of pressure on that single voice and make it very difficult for us to have the level of engagement we need across the different impacted interests, including forestry, coastal tidewater owners, and others. We strongly encourage you to structure the process to give these interests the direct ability to address and discuss their issues with the full task force.

With that background, we offer the following specific comments on the fish passage rules, and reserve the right to offer additional comments in the future as additional issues are brought forward from our membership:

635-412-0005 Definitions

- The definition of “artificial obstruction” is too broad, and we strongly object to the addition of language that would list a feature as an artificial obstruction if it “has the potential” to impact fish passage. This definition is at odds with the statutory authority of the program, and would give the agency nearly unlimited authority over state waterways. That is unacceptable.
- We object to the inclusion of bridges in this program, and fail to see how they meet the definition of an obstruction that requires fish passage given that they do not impede the passage of fish.
- The definition of “major replacement” should be narrowed – is has been used to capture very minor repairs, which do not significantly alter the structure or change its relationship to fish passage. Routine maintenance should not trigger application of this statute. We strongly object to the introduction of a cumulative standard for determining if something is a major replacement.
- The definition of “in proximity” is inconsistent with the statute and should be changed to reflect the statutory language. We recommend that the reference to “directly affected by an artificial obstruction” be removed from the definition of in-proximity. It is too subjective and allow for too much agency interpretation and inconsistent application.
- We would like you to revise the definition of “net benefit” to avoid its unintended application of killing projects that actually improve fish habitat versus the current project. We also strongly encourage adopting a definition and view of “in proximity” that is more in line with the statutory view of proximity as being within the same watershed or water basin and having the highest likelihood of benefiting the native migratory fish populations directly affected by an artificial obstruction. It is simply not necessary for every single obstruction of provide fish passage, and a net benefit analysis should account for where other passage is in

the watershed and passage is most needed, as appears to happen with ODOT frequently.

- We also recommend that ODFW create a path to work with farmers and ranchers on solutions and exemptions for artificial obstructions such as dams and tide gates.

635-412-0025 Fish Passage Waivers and Exemptions

- This section of the regulation provides for granting an exemption from fish passage requirements when there is no appreciable benefit. The Fish Passage Task Force has never provided guidance as to what no appreciable benefit to fish passage is or when an exemption is appropriate. The current regulation includes many definitions, but there is no definition for “no appreciable benefit”.
- We would like to work with you on creation of a definition that works for farmers, ranchers and districts statewide.

635-412-0035 Fish Passage Criteria

- We recommend that the requirement in 635-412-0035(4)(b) that tide gates should comply with OAR 635-412-0035(2) or (3) be removed. If there are factors in those section that may apply to tide gates, then those factors should be detailed in OAR 635-412-0035(4)(b)
- We strongly encourage ODFW to revisit the width and height requirements of this section – they are not based in the reality of what we see on the ground and result in arbitrary and expensive replacements that go beyond what’s mandated in the fish passage statutes.
- The requirements for an “experimental fish passage structure” to move from an experimental status to a no longer experimental structure are unreasonable, particularly for tidegates. ODFW must provide for an approve alternative methods of compliance. Specifically, we recommend that the criteria for evaluation and approval of experimental tide gates be considerably reduced. This will allow for approval of more affordable options to small ranchers and farmers. We also recommend that ODFW make a real effort to develop and approve inexpensive tide gate options that a farmer or rancher can install themselves.

635-412-0040 Mitigation Criteria

- Mitigation options include restoration or enhancement of native migratory fish habitat. We recommend that mitigation should be waived where other fish passage projects are providing sufficient fish passage in a basin, particularly as it relates to small tide gates and dams.

Thank you for the opportunity to submit comments, and please let us know if you have any questions.

Sincerely,



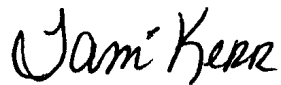
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