

May 18, 2021

Greg Apke, Fish Passage Program Lead  
Oregon Department of Fish and Wildlife - Fish Division  
Statewide Fish Passage Program Leader  
4034 Fairview Industrial Drive SE  
Salem, Oregon 97302  
ODFW.Passagerules@odfw.oregon.gov

**RE: OAR 635-412-0005 ODFW Fish Passage Administrative Rule Revision**

Dear Greg:

Thank you for the opportunity to provide comments on the scope of the update to OAR 635-412-0005 – the ODFW Fish Passage Administrative Rule. I am a professional fish habitat biologist with over twenty-five years professional experience. I have conducted fish passage assessments at road-stream crossings and consulted with landowners on their culverts and fish passage requirements – mostly in Washington State. I believe that I have some insight into Oregon’s system of identifying and correcting the numerous fish passage barriers that exist across the State.

Below, I provide comments by line number, where feasible. In other instances, I discuss general concerns about issues that are not reflected in the current OAR 635-412 fish passage administrative rules.

Definitions

At lines 74-76 and 109-144: the definition of “Fish passage” requires that the Department identify the weakest native migratory fish and life history stage from a specific list of “Native migratory fish.” This places undue burden on ODFW, and it is too narrow in scope. Please require unimpeded passage for all species of adult and juvenile fishes, not just the migratory species identified.

Alternatively, ODFW should at least consider identifying a design target fish size/life stage for the various species. In Washington State, in most small stream situations, proponents must meet the minimum fish passage requirements for a 6-inch resident trout.

Fish Passage Task Force

The 71<sup>st</sup> Oregon Legislative Assembly House Bill 2102 Fish Passage Task Force report mentions that the composition of the Fish Passage Task Force might include Tribal representation. Given the Tribes Treaty-reserved fish and wildlife resource protection interests in Oregon, there is an urgent need to include representation on the FPTF of a Tribal perspective. Please add at least 2-3 positions for Tribes at lines 187-189.

Public Process and Notification

There is no mention of public notification and noticing of FPTF meetings or activities (like revision to the administrative rules). The OAR at lines 208-209 simply mention that the task force shall meet at such times and places as the chair or a majority determine appropriate. Please add a requirement that all meetings of the FPTF be properly announced at least 30 days in advance via public notices. The FPTF should maintain a public email list of interested parties and enable members of the public to sign up on

this list similar to other ODFW email notification systems. The FPTF website should have information posted on how to join FPTF meetings via video conferencing or telephone.

In addition, for updates to the administrative code, certain basic minimum public process requirements should be included. In this present administrative code update, a member of the public who was not on ODFW's informal list of interested parties or on the ODFW press releases listserv had no way of learning about the rule change. The last time the administrative rule was revised was twenty years ago in 2000-01. More care is needed with regard to public notification and creating opportunities for the public to engage, since important public resources are at stake. I believe that there is a requirement for what I am describing under ODFW's administrative rule, OAR 635-001.

For the purpose of planning and designing the present public process, I would encourage ODFW to look at what Washington State is concluding now for their fish passage rule revision, which included an extensive public outreach and engagement process. Please see <https://wdfw.wa.gov/species-habitats/habitat-recovery/fish-passage/rule-making> to understand what they undertook. This could serve as a model for ODFW: A series of public meetings, presentations, and listening sessions with invited parties (like the Tribes) were held.

#### Fish Passage Protests

At lines 386-389, only an owner or operator of an artificial obstruction may file an objection to a determination by ODFW. ODFW serves as the representative of the general public, and it is the general public who is harmed when an improper determination for fish passage is made. I would request that the language here change so that 'any person' not just 'the owner or operator of the artificial obstruction' may object to a determination by ODFW and file a protest.

#### Fish Passage Criteria

Please include an explicit design requirement that bridges pass the 100-year flood flows and account for expected lateral migration of stream channels to minimize the need for bank armoring. I believe that previous commenters suggested that ODFW use the 50-year flood as a suitable design criteria. I believe that the 50-year flood is insufficient and inconsistent with the precautionary principle that ODFW must follow under the new 635-900 rule. Please use the 100-year flood.

For culvert design: Please retain and make more explicit the stream simulation design requirements similar to what Washington State does in WAC 220-660-190. For culverts and other road-stream crossings, the fish passage criteria should specify that passage structures should have a similar slope and a similar cross section to the natural channel conditions in the reach.

In certain circumstances, ODFW biologists may be called upon to consult on fish passage on a stream where there is insufficient fish distribution data. In these instances, especially, it would be good to have default criteria for water depth, velocity, and other hydraulic considerations. In Washington State in these circumstances, biologists require that culverts be designed to be passable to a 6-inch native trout. Oregon could do something similar here, instead of placing the burden on an ODFW biologists to declare what species and life-stage is appropriate when it may be unclear or unknown.

#### Missing But Needed

There are several elements that are missing from OAR 635-412-0005 that would greatly strengthen the ODFW fish passage administrative rules. In particular, I would like to see ODFW include a requirement that the Department will:

- Develop a State protocol for identification and assessment of fish passage barriers
- Host free trainings on use of the protocol,
- Develop a more robust fish passage database, to augment and quality check information contained therein, and
- Develop (or at least reference) detailed water crossing design guidelines.

By comparison, Washington State does all of these things. Please see <https://wdfw.wa.gov/species-habitats/habitat-recovery/fish-passage/assessment> for an example of a website that better supports the public with regard to fish passage concerns. Beyond just updating a priority fish passage barriers list every seven years, there is an urgent need for ODFW technical staff to quality check and refine the list. The current ODFW fish passage barrier inventory contains data that is old and out-of-date. There are no ODFW resources to investigate and clean up data errors, nor to develop a better representation of the true extent of the problem. Washington has 19,000 known barriers State-wide, and Oregon has only 590 in its latest 2019 inventory of fish passage barriers. This is likely a large under-count of the true number of fish passage barriers in Oregon.

Though ODFW may not at present have sufficient resources to develop this type of program, it could strengthen its approach by developing a better website with links to available resources. There are free technical tools like the U.S. Forest Service FishXing software <https://www.fs.fed.us/biology/nsaec/products-tools.html#tools-fishxing> that could be provided or linked to. At a minimum, the ODFW fish passage website should provide a description of the standard fish passage design guidelines in use and how landowners can learn more or get advice from the appropriate ODFW biologist, especially for those without sufficient resources to hire a technical expert or hydraulic engineer.

#### Incorporation of Climate Change Considerations

In 2020, Washington State completed an administrative rule revision that included explicit considerations of expected changes in stream channels from climate change. As part of this work WDFW developed models to predict where and to what extent stream bankfull widths would increase. In most places of the state stream bankfull widths are expected to increase, putting culverts and stream crossings at increased risk from being under-sized and further jeopardizing fish passage. To plan for this change and assist landowners and fish passage crossing designers, WDFW developed a 'Climate Adapted Culverts' web application.

I would urge ODFW to consider development of a similar approach for Oregon.

This approach is consistent with the new ODFW rule 635-900-015 on climate change key principles of science that require the Department to:

- Use appropriate analytic approaches to determine how species, biological communities, and habitats may respond to the changes in climate,
- Conduct ongoing research to reduce key uncertainties related to the response of fish, wildlife, or their habitats to climate and ocean change, and
- Communicate clearly about the uncertainty involved in predicting both the likely changes in climate and ocean conditions and the impacts on fish and wildlife to allow decision makers to take action in an informed way.

In addition, the new ODFW rule 635-900-017 and -020 highlights the need for ODFW to use the precautionary principle in its management and decision-making. This rule has special significance for fish passage and habitat conservation. Since many cold-water refugia lie isolated above impassable culverts and other barriers to fish migration, ODFW needs to determine how it can accelerate remedies and repair of these barriers so that native coldwater-dependent fish species can adapt to shifting climate regimes.

I look forward to participating actively in the administrative rule revision. Please keep me on your mailing list. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Labbe". The signature is written in a cursive, flowing style.

Ted Labbe

3011 NE Hoyt St Unit A  
Portland, OR 97232  
503-758-9562  
ted.labbe@gmail.com