

Considerations for the Rules Advisory Committee (RAC) on construction definition and triggers for dams.

The RAC has in multiple meetings addressed possible revisions of the definition of dam construction as that relates to a trigger for fish passage. While there seems to have been agreement that revising the current OAR from "30% structural volume" to "30% cumulative structural volume" would conceptually eliminate an acknowledged loophole in the current OAR, there has been no consensus as to what an effective OAR revision would be. Debate has addressed the question of how cumulative is defined and how that would be administered in any specific case, and how the 30% number was derived. Even deeper disagreement has emerged over the definition or determination of "structural volume". This problem has been flagged in multiple public comments going back to the spring of 2021. After this was discussed again in depth by the RAC on September 28th, the issue was once again returned to the "parking lot", no recommendation for revision of this OAR or other initiatives followed. These discussions exemplify the unresolved problems in the OARs on fish passage at dams.

1) Committee discussion on this challenge as well as several other OARs has emphasized that OARs are meant to provide a basis for an agency to execute statutes. Logically then a revised OAR should focus on administrative processes that facilitate execution of statutory intent.

The statutes pertaining to dam construction triggers frames objectives broadly:
On the ODFW website under

"Fish Passage Legislative Background

.HB 3002: 2001 Fish Passage Statute"

The summary states that

"The Task Force chose the "triggers" as the time to address fish passage because it assumed an owner or operator couldbuild the costs of fish passage into the costs of a major structural upgrade, "

.....the summary later states

" consideration should be given on a case-by-case basis".

Is the RAC committee able to reach consensus on the intent of the pertinent statutes? To memorialize the intent of the statutes as pertains to requirements triggered by dam construction is arguably a necessary step for meaningful OAR revisions on dam construction passage triggers.

2) Committee discussion to date supports the conclusion that no simple single metric or combination of simple metrics provides a sufficient or workable basis for definition of when repairs, maintenance, patches, or modifications (language used for tide or flood gates (line 29) and with reference to culverts and bridges (line 54)) should trigger construction rules for fish passage correction at a dam. Is it not time for the RAC to make this a conclusion for the record?

3) it seems self-evident that every dam has unique specific factors related to its construction, function, location on a given river, and characteristics of that river and its fisheries. It is for this reason that I and others, as noted in my public comment of August 24, have suggested that professional judgment of the department be one workable provision for identifying a trigger for fish passage when considering whether work on a specific dam offers opportunity for correction of fish passage. It is understandable however that the department might consider such an open-ended OAR administratively unwieldy, and in fact considering the debates over "volume", "judgement" is an inappropriate word for what was envisioned. The concept was that "decisions", rather than judgements, could be made which take into account factors unique for a given dam or proposed project. The decisions, to have functionality, need to be objectively based.

Assessing work at a dam (repairs, maintenance..etc.)within the framework of possible fish passage remedies for that specific dam could weigh various factors objectively. Departmental decisions as to opportunity for passage in the context of a proposed project would then be objective rather than subjective in character. "Structural volume", even with disputed interpretations, could be one of several factors, but one with little significance in some cases.

Recent collaborative work on the Mirror Pond dam in Bend illustrates this point. This year, stakeholders including Pacific Power have looked at options for construction of fish passage at this dam. This effort has led to the conclusion that there are two locations within the multi-component dam complex which are feasible possibilities. Considerations such as volume of repair work for the dam overall has secondary pertinence for these possible sites. Agreement has been reached to pursue a first level engineering study to objectively frame further planning and passage remedy work.

How to create such baseline analyses for other dams? Any such effort needs to acknowledge the large number of passage obstructions that exist within the state. For dams, accommodation of that reality has been formalized in the passage priority list statutes and rules. Could a process be initiated that would work towards a goal of creating such a first level assessment of options for dams in the top 15 or group 1 categories of the priority list? Would not such an effort be consistent with, and facilitate, the purpose of the prioritization process, which is to direct departmental and stakeholder work towards correction of passage obstruction at the prioritized facilities?

What about proposed work at a dam that has not had a first level study of passage correction completed? One approach could be to revise the construction OAR to specify that departmental authority could be exercised to require not necessarily a trigger for full passage correction, but that, based alternatively, on "*a case by case basis*", to require completion of a first level assessment of passage correction options before DSL or other permitting agencies grant permits for the proposed work. Per the department's summary (see above) the statutes identify "*triggers as the time to address fish passage*", not necessarily or explicitly a black or white requirement for remedy of an obstruction. This step would then allow more objective

framing of subsequent "*cooperative and collaborative*" efforts, as called for in statute, for resolution of obstruction at that site, at modest additional expense for the project proponents. This OAR revision could lead to completion of a base level passage assessment at the given dam without getting into the formal complexities of a full passage trigger with options to pursue waivers or mitigation. This would in many cases likely be to the advantage of an operator or owner of an artificial obstruction, as the first level assessment would provide objective guidance for present and future work at that dam. It would provide objective information for further departmental decisions, which could in some cases be that passage correction be required for the specific dam under consideration, if that be consistent with statutes. It could also facilitate efforts by other stakeholders to resolve passage obstruction at a given dam as well.

Such work will require authorization and funding for the department. One can envision that RAC support for this in the format of an OAR revision would be a constructive step, following on memorialization of points [1] & [2] above. Subsequent refinement through the Passage Task Force and subsequently Commission evaluation could result in a flexible adaptive process for correction of passage obstacles at dams.