

Mitigation Criteria Section 0040 (sorted by line 6-3-2021)

137 na Deschutes TU Lines 678-684: mitigation options 678 "Lines 678-684: This section addresses mitigation options. Based on the experience from the Bowman dam waiver request process, it would be worthwhile to include in mitigation options a provision for on-going monetary support. For example, supporting a local watershed council in their efforts to restore or enhance native migratory fish habitat could be specifically identified as an option. This is along the lines of establishing a conservation fund dedicated to the watershed or sub-basin affected by the artificial obstruction."

120 na Lambert TU Lines 678-684: Mitigation Fund 678 "TU recommends that the mitigation options include a provision for on-going monetary support that is linked to meeting quantitative goals that are biologically likely to lead to an increased number of native migratory fish in the affected watershed. TU recommends the following language: "Establishment of a conservation fund by the owner or operator or contribution to an existing conservation fund in an amount sufficient to implement mitigation actions likely to lead to an increased number of native migratory fish in the affected watershed as determined by the Department. Mitigation in the form of a fund contribution should include a commitment of a fixed portion of annual hydropower revenue and should clearly articulate guidelines for how money will be distributed, pursuant to what method and how effectiveness will be assessed. All mitigation measures that are implemented with money from the fund should include quantifiable metrics and effectiveness monitoring to demonstrate how such actions are likely to lead to an increased number of native migratory fish in the affected area. Quantifiable metrics should be S.M.A.R.T. (Specific, Measurable, Achievable, Relevant, and Timebound)."

128 na Rogers TU Line 680: Additional Mitigation options. 678 Lines 680: Add additional mitigation options: Fund a mitigation project through an unaffiliated organization or government agency or conservation trust fund. "Line 680: passage under OAR 635-412-0015 or 635-412-0020. Mitigation may include, if approved by the Task Force or Commission, direct funding of a mitigation project through an unaffiliated organization or government agency or the establishment of conservation trust fund that will award grants to fund conservation projects in the subject watershed."

82 na CCFB 635-412-0040 (2)(a) (lines 678 to 684) 678 This section pertains to mitigation criteria. This section places an unreasonable burden on small farmers and ranchers who have had tide gates in place for over 100 years. CCFB recommends the mitigation requirements be waived for replacement of smaller tide gates where other fish passage compliant tide gates have been install in the same area. Email

229 na ODOT "635 – 412 – 0040, Mitigation Criteria, Line 681;" 681 "Provide reference to guidance / criteria in OAR. It is recommended that this include sideboards

including what constitutes enhancement and restoration (metrics?). Also, a formula or ratio is recommended as well. Similar to DSL."

138 na Deschutes TU Line 682 (more of a question): single use of the term "wild" throughout OAR 682 "Line 682: This section contains the single reference in the entire fish passage OAR to "wild" fish. This is in the context of mitigation criteria which include "fish management measures to directly increase naturally producing wild, native migratory fish populations". This is really a question about rulemaking intent and whether this is meant to expand acceptable mitigation measures to include BOTH wild fish (e.g. brown trout, brook trout) that reproduce naturally and native migratory fish as named in lines 113 – 144." "Line 683: Establishment of a conservation fund by the owner or operator dedicated to mitigating the impacts of the artificial obstruction on native migratory fish habitat or other actions determined to provide benefit to native migratory fish in the area affected by the artificial obstruction. This fund shall provide money to support the agreed upon mitigation actions to be taken by the designated conservation group as established in a written conservation plan executed among the owner/operator, Department and conservation group."

162 na PacifiCorp Mitigation Criteria (-0040 (2)(b)); Line 682 682
Edit: Restoration or enhancement of native migratory fish habitat that fulfills obligate requirements of a migratory life-stage;

42 48 Portland PacifiCorp 635-412- 682 "PacifiCorp owns over 3,000 megawatts of renewable energy generating facilities, including several hydroelectric projects on waters of the state of Oregon inhabited by native migratory fish. The company is also expanding its renewable generation portfolio to address climate change impacts and ultimately achieve net zero greenhouse gas emissions in service of over 2 million customers across six western states. Therefore, PacifiCorp hereby expresses its support and interest in Oregon Department of Fish and Wildlife (ODFW)'s current review and revision of the fish passage administrative rules (Oregon Administrative Rules (OAR) 635-412-) as motivated, in part, by ODFW's new Climate and Ocean Change Policy (OAR 635-900-). Addressing climate change will require prudent, near-term actions to support ODFW's mission to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations. PacifiCorp supports science-based decision-making regarding fish passage in Oregon for the purposes of achieving recovering and sustainable populations of native migratory fish. PacifiCorp also notes that hydropower has a significant role to play in moving towards carbon-neutral operations in Oregon and ameliorating the causes and effects of climate change. Therefore, the climate change benefits of hydroelectricity should be considered in net benefit analyses of fish passage at hydropower facilities. PacifiCorp has gained experience implementing fish passage solutions at our federally-licensed hydroelectric projects, and we have learned that site-specific information on current and, to the extent possible, future conditions must be considered in implementation of the administrative rules to maximize long-term net benefits to native migratory fish. In certain cases, biological research has concluded that there may be little value to local fish populations in light of the expense of constructing, operating, and maintaining fish passage at an artificial obstruction. Off-site mitigation projects with

lower costs than implementing fish passage at an artificial obstruction can provide a greater net benefit to at-risk fish populations, including some that may not be present at the site. The revised administrative rules should clarify that it is the intent of the state to achieve the highest net benefit to fish populations when considering the impacts of an artificial obstruction and any proposed mitigation measures. " "Mitigation Criteria (-0040 (2)(b)); Line 682 Edit: Restoration or enhancement of native migratory fish habitat that fulfills obligate requirements of a migratory life-stage; Mitigation Criteria (-0040 (3)); Lines 686-688 As noted in a previous comment, all proposed mitigation measures should be considered. Edit: Mitigation shall not include may include any activity that is a requirement or condition of any other agreement, law, permit, or authorization except if the activity results from a judicial proceeding or settlement to address violations in state or federal law. if it is also for fish passage mitigation of the same action at the artificial obstruction for a different level of government. Mitigation Criteria (-0040 (9)(c)); Line 705 To provide the greatest opportunity for mitigation value, revise text to: "Shall benefit the same native fish species affected at the artificial obstruction or provide greater relative benefit to migratory (e.g., anadromous), endangered, and/or threatened species not affected at the artificial obstruction than to those non-migratory, non-endangered, or non-threatened species affected at the artificial obstruction. " 2021-05-04 14:06:40

230 na ODOT "635 – 412 – 0040, Mitigation Criteria, Line 684"684 Are these defined anywhere? If there are such actions there needs to be something on the ODFW Fish Passage website. Recommend OARs direct applicants to source of these.

163 na PacifiCorp Mitigation Criteria (-0040 (3)); Lines 686-688 686
"As noted in a previous comment, all proposed mitigation
measures should be considered.

Edit:

Mitigation shall not include may include any activity that is a requirement or condition of any other agreement, law, permit, or authorization except if the activity results from a judicial proceeding or settlement to address violations in state or federal law. if it is also for fish passage mitigation of the same action at the artificial obstruction for a different level of government."

42 48 Portland PacifiCorp 635-412- 686 "PacifiCorp owns over 3,000 megawatts of renewable energy generating facilities, including several hydroelectric projects on waters of the state of Oregon inhabited by native migratory fish. The company is also expanding its renewable generation portfolio to address climate change impacts and ultimately achieve net zero greenhouse gas emissions in service of over 2 million customers across six western states. Therefore, PacifiCorp hereby expresses its support and interest in Oregon Department of Fish and Wildlife (ODFW)'s current review

and revision of the fish passage administrative rules (Oregon Administrative Rules (OAR) 635-412-) as motivated, in part, by ODFW's new Climate and Ocean Change Policy (OAR 635-900-). Addressing climate change will require prudent, near-term actions to support ODFW's mission to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations. PacifiCorp supports science-based decision-making regarding fish passage in Oregon for the purposes of achieving recovering and sustainable populations of native migratory fish. PacifiCorp also notes that hydropower has a significant role to play in moving towards carbon-neutral operations in Oregon and ameliorating the causes and effects of climate change. Therefore, the climate change benefits of hydroelectricity should be considered in net benefit analyses of fish passage at hydropower facilities. PacifiCorp has gained experience implementing fish passage solutions at our federally-licensed hydroelectric projects, and we have learned that site-specific information on current and, to the extent possible, future conditions must be considered in implementation of the administrative rules to maximize long-term net benefits to native migratory fish. In certain cases, biological research has concluded that there may be little value to local fish populations in light of the expense of constructing, operating, and maintaining fish passage at an artificial obstruction. Off-site mitigation projects with lower costs than implementing fish passage at an artificial obstruction can provide a greater net benefit to at-risk fish populations, including some that may not be present at the site. The revised administrative rules should clarify that it is the intent of the state to achieve the highest net benefit to fish populations when considering the impacts of an artificial obstruction and any proposed mitigation measures. " "Mitigation Criteria (-0040 (3)); Lines 686-688 As noted in a previous comment, all proposed mitigation measures should be considered. Edit: Mitigation shall not include may include any activity that is a requirement or condition of any other agreement, law, permit, or authorization except if the activity results from a judicial proceeding or settlement to address violations in state or federal law. if it is also for fish passage mitigation of the same action at the artificial obstruction for a different level of government. " 2021-05-04 14:06:40

68 74 Portland Mitigation Criteria (-0040 (3)); Lines 686-688 686 "As noted in a previous comment, all proposed mitigation measures should be considered - we see nothing in statute that prohibits considering mitigation that is required as result of a permit condition (or anticipated permit condition). To exclude these is arbitrary and could lead to gamesmanship -- for example requiring habitat-related measures as a mandatory condition under Section 401 certification would nullify an applicant's proposal. A benefit is benefit and should be counted as such - this is consistent with how Federal action agencies consider developmental benefits of a proposed action. " "Mitigation Criteria (-0040 (3)); Lines 686-688 Mitigation shall may include any activity that is a requirement or condition of any other agreement, law, permit, or authorization except if the activity results from a judicial proceeding or settlement to address violations in state or federal law. " 2021-05-07 08:53:25

90 na Water Watch Line 687 687 To ensure consideration of an important factor for mitigation. "Add subsection similar to (3) to clarify mitigation shall not include any activity previously planned to be completed by the owner/operator or another person or entity. If the

mitigation is something that would have been done independent of the waiver, it cannot be said to provide a ""net benefit"" to native migratory fish (since it would have been done anyway)."

231 na ODOT "635 – 412 – 0040, Mitigation Criteria, Line 688;" 688
"Reword to include "mitigation completed ahead of a waiver approval will be done at the applicants own risk, and will not sway an assessment of net benefit"."

91 na Water Watch Lines 688-89 688 "To provide more clarity, simplicity and consistency with meaning/purpose of mitigation to provide a ""net benefit."" "Delete or reword subsection (4). Current language is confusing. Why would someone be seeking a ""decision regarding a fish passage waiver"" if there is already a waiver for the site. If the intent is to say mitigation can't be something you already did, suggest phrasing that more clearly and include (as not qualifying) things that the owner/operator or a third party were already planning/likely to do."

139 na Deschutes TU Lines 698-699: reporting on mitigation 698 "Lines 698-699: The OAR states that the person owning or operating an artificial obstruction shall report on the maintenance, monitoring and evaluation of mitigation. This appears to allow a fairly wide-open reporting format. Most important, there is no mention of reporting frequency or the ability for public review of these monitoring reports. These provisions should be added to the OAR." "Lines 698-699: (8) A person owning or operating an artificial obstruction is responsible for maintaining, monitoring, and evaluating the effectiveness of mitigation measures and reporting on completed and planned mitigation actions. These reports shall be submitted to the Department on an annual basis and be made available to the public."

121 na Lambert TU Lines 698-699: Annual Reporting 698 "The OAR states that the person owning or operating an artificial obstruction shall report on the maintenance, monitoring and evaluation of mitigation. Reporting frequency and public access to the reports is not addressed. These provisions should be added to the OAR."

TU recommends the following language. "A person owning or operating an artificial obstruction is responsible for maintaining, monitoring, and evaluating the effectiveness of mitigation measures and reporting on completed and planned mitigation actions. These reports shall be submitted to the Department on an annual basis and be made available to the public."

129 na Rogers TU Lines 698-699: Mitigation reporting schedule. 698 Lines 698-699: Define the schedule for reporting on evaluating the effectiveness of mitigation. Lines 698-699: effectiveness of mitigation and submitting an annual report to the Department. Reports will be posted on the Department website for public review. (We recommend that the Department set a date for these

reports that will work best for the Department or at the end of the calendar year or on the annual date of the barrier project approval.)

232 na ODOT "635 – 412 – 0040, Mitigation Criteria, Line 702"702
Recommend clarification on need to provide MORE benefit compared to providing passage at trigger location

69 75 Portland Mitigation Criteria (-0040 (9)(c)); Line 705 705
Important to maximize mitigation opportunities "Mitigation Criteria (-0040 (9)(c)); Line 705
revise text to: "Shall benefit the same native fish species affected at the artificial obstruction or provide greater relative benefit to migratory (e.g., anadromous), endangered, and/or threatened species not affected at the artificial obstruction than to those non-migratory, non-endangered, or non-threatened species affected at the artificial obstruction."
2021-05-07 08:55:27

164 na PacifiCorp Mitigation Criteria (-0040 (9)(c)); Line 705 705
"To provide the greatest opportunity for mitigation value, revise text to: "Shall benefit the same native fish species affected at the artificial obstruction or provide greater relative benefit to migratory (e.g., anadromous), endangered, and/or threatened species not affected at the artificial obstruction than to those non-migratory, non-endangered, or non-threatened species affected at the artificial obstruction."

42 48 Portland PacifiCorp 635-412- 705 "PacifiCorp owns over 3,000 megawatts of renewable energy generating facilities, including several hydroelectric projects on waters of the state of Oregon inhabited by native migratory fish. The company is also expanding its renewable generation portfolio to address climate change impacts and ultimately achieve net zero greenhouse gas emissions in service of over 2 million customers across six western states. Therefore, PacifiCorp hereby expresses its support and interest in Oregon Department of Fish and Wildlife (ODFW)'s current review and revision of the fish passage administrative rules (Oregon Administrative Rules (OAR) 635-412-) as motivated, in part, by ODFW's new Climate and Ocean Change Policy (OAR 635-900-). Addressing climate change will require prudent, near-term actions to support ODFW's mission to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations. PacifiCorp supports science-based decision-making regarding fish passage in Oregon for the purposes of achieving recovering and sustainable populations of native migratory fish. PacifiCorp also notes that hydropower has a significant role to play in moving towards carbon-neutral operations in Oregon and ameliorating the causes and effects of climate change. Therefore, the climate change benefits of hydroelectricity should be considered in net benefit analyses of fish passage at hydropower facilities. PacifiCorp has gained experience implementing fish passage solutions at our federally-licensed hydroelectric projects, and we have learned that site-specific information on current and, to the extent possible, future conditions must be considered in implementation of the administrative rules to maximize long-term net benefits to native migratory fish. In certain cases, biological research has

concluded that there may be little value to local fish populations in light of the expense of constructing, operating, and maintaining fish passage at an artificial obstruction. Off-site mitigation projects with lower costs than implementing fish passage at an artificial obstruction can provide a greater net benefit to at-risk fish populations, including some that may not be present at the site. The revised administrative rules should clarify that it is the intent of the state to achieve the highest net benefit to fish populations when considering the impacts of an artificial obstruction and any proposed mitigation measures. " "Mitigation Criteria (-0040 (9)(c)); Line 705 To provide the greatest opportunity for mitigation value, revise text to: "Shall benefit the same native fish species affected at the artificial obstruction or provide greater relative benefit to migratory (e.g., anadromous), endangered, and/or threatened species not affected at the artificial obstruction than to those non-migratory, non-endangered, or non-threatened species affected at the artificial obstruction. " 2021-05-04 14:06:40

92 na Water Watch Lines 710-11 710 To provide consistency with statutory language and intent and ensure consistency with surrounding subsections. Delete subsection (f). This subsection suggests the Department has an obligation to consider a waiver/mitigation based on a belief of the owner/operator as opposed to a specific request/application for a waiver as an alternative to passage.

118 na Lambert TU Mitigation Criteria Line 710: 635-412-0040(9)(f) 710 "Recommend deletion of this line or clarification. Consideration and approval of a mitigation package is based on whether a net benefit to species can be secured not whether a dam owner or operator believes it is more feasible. If such language is retained, it should be clarified to more closely match the statute which allows the consideration of "equitable factors" (ORS 509.585(5) when negotiating the terms and conditions of fish passage or alternatives. Any information regarding feasibility that is considered as part of this discussion should be required to be from an objective, verifiable source."

119 na Lambert TU Line 712: 635-412-0040(9)(g) 712 "This section seems to narrow the circumstances where the Commission/Department may require additional information to support a net benefit determination. TU recommends clarification that explicitly allows ODFW/Commission to require compilation of existing information or gathering of new information required to make a net benefit determination. Additionally, TU recommends that quantification of baseline conditions be required to inform a net benefit determination. This information is necessary to facilitate a determination that an "increase" of native migratory fish is likely to occur with the proposed mitigation."

93 na Water Watch Lines 712-13 712 To provide more clarity. "Delete or revise (g). Language is not clear. To the extent this says a net benefit determination may require the gathering of information, that seems clear without a rule saying that."

94 na Water Watch Lines 716-17 716 To provide more clarity and consistency with purpose and intent. "Delete or revise subsection (j). This seems to say: (a) mitigation in exchange for passage waiver can use public funds from the Department; and (b) relative costs of passage v. mitigation can't be considered (i.e., no consideration of how the amount to be spent on mitigation would compare to the cost of passage). As to (a), this seems inconsistent with intent and with good public policy. An owner/operator required by law to provide passage or mitigation should not be able to use public funds to do that. Public funds should be saved for situations where the Department does not have enforcement authority. As to (b), a reasonable person would consider relative costs in determining if fish received a ""net benefit."" If providing passage would cost \$1,000,000 and the proposed mitigation will cost \$100, that seems like a relevant factor (though not decisive). Also, addressing a high-cost fish passage problem may provide more benefit than addressing a low-cost problem because the latter is more likely to be addressed independent of a fish passage waiver at another site. Also, we do not see a statutory basis to exclude relative cost as a consideration in determining if the mitigation provides a net benefit."

95 na Water Watch Lines 718-19 718 To provide more clarity. "Delete or revise (k). Language is not clear. To extent it's saying a net benefit determination may require gathering of information, that probably goes without saying. If reworded, consider combining with subsection (g) for clarity/simplicity."

96 na Water Watch Line 721 721 To ensure that mitigation in fact provides a net benefit relative to providing passage. "Add a subsection to subsection (9): ""Shall take into account the extent to which the proposed mitigation is likely to occur independent of a fish passage waiver, through an event at the mitigation site triggering fish passage requirements, through public or private restoration activities, or otherwise."" If this factor is not taken into account, fish passage may be waived without any actual long-term positive effect for fish. A barrier that would have had passage (at the waiver site) will continue to not have passage while the compensation for that is something fish would likely have received regardless."

97 na Water Watch Line 721 721 "To ensure transparency, accountability and opportunities for public engagement." "We agree (as suggested in 2021 Potential DRAFT Rule Change Concepts for Consideration and Discussion) that not all waiver and exemption decisions require review by the Fish Passage Task Force. However, notice and opportunity to comment should be provided for all applications for fish passage approvals, waivers and exemptions, and notice and a copy of the decision document should be provided (without requiring a special request) for all passage, waivers and exemptions. An analogy - with significantly greater volume and frequency than we would expect here - is the weekly public notice from the Water Resources Department. This could be a simple email notice limited to people who sign up to receive it."

98 na Water Watch Line 721 721 To help achieve stated purpose of consistency with Climate and Ocean Change Policy "A new rule: ""All decisions under fish passage laws and rules, including decisions regarding whether passage would provide an appreciable benefit, whether mitigation for a waiver will result in a net benefit, and whether proposed fish passage complies with criteria in the rules, shall take into account the expected effects of climate change, including effects to streamflows, water temperatures and the importance of protecting and restoring habitat for native migratory fish.""

122 na Lambert TU Line 721: Addition of Language regarding other mitigation obligations 721 "Add a subsection to subsection (9): ""Shall take into account the extent to which the proposed mitigation is likely to occur independent of a fish passage waiver."" Such a provision ensures that mitigation implemented is truly additive and that fish passage at a site is not waived without ensuring an actual long-term positive effect for native migratory fish."

123 na Lambert TU Line 721: Addition of Language regarding climate change 721 "When undertaking a net benefit determination and considering the adequacy of mitigation proposals, the Department should consider climate change implications including anticipated future hydrologic and water quality conditions.

Add a subsection to subsection (9): "Shall take into account the State's climate change goals and the best available information on predicted future conditions under climate change conditions when assessing whether mitigation will provide a net benefit to native migratory fish."

110 na Mary-Ann Farm Bureau 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."