

More Thoughts on Fish Passage

Statutory Intent

509.585 Fish passage required for artificial obstructions; statewide inventory; waiver of requirement by commission; rules; exemptions. (1) *It is the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish* and the Legislative Assembly finds that cooperation and collaboration between public and private entities is necessary to accomplish the policy goal of providing passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native salmonid populations, as envisioned by the Oregon Plan. Therefore, ***except as provided in ORS chapter 509, fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present.***

(2) Except as otherwise provided by this section or ORS 509.645, a person owning or operating an artificial obstruction ***may not construct or maintain any artificial obstruction*** across any waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish.

(4) A person owning or operating an artificial obstruction shall, prior to ***construction, fundamental change in permit status or abandonment*** of the artificial obstruction in any waters of this state, obtain a determination from the department as to whether native migratory fish are or historically have been present in the waters. If the department determines that native migratory fish are or historically have been present in the waters, the person owning or operating the artificial ***obstruction shall either submit a proposal for fish passage to the department or apply for a waiver*** pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the alternatives to fish passage must be obtained from the department prior to construction, permit modification or abandonment of the artificial obstruction. Fish Passage

A Way to Interpret the Statute

1. Accept the policy language in ORS 509.585 (1) that ***“fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present.”*** as meaning that fish passage is a state requirement regardless of current conditions.
2. Interpret ORS 509.585 (2) as ***“a person owning or operating an artificial obstruction may not ... maintain any artificial obstruction across any waters of this state...”*** as any artificial obstruction that does not allow fish passage is in violation of the statute.
3. Interpret the authority of ODFW to require passage, waiver or when ***“construction, fundamental change in permit status or abandonment of the artificial obstruction...”*** is involved.
4. Use the discretionary authority to require fish passage in all other instances where the artificial obstruction prevents the passage of native migratory fish regardless of construction, permit change, or abandonment.

Administrative Rule Consequences

The rules could retain the current thresholds for regulation when construction, permit change, or abandonment occur (dams 30% cumulative structural volume, others as specified). To interpret the broad authority to address the policy intent of having fish passage “in all waters of the state”, language

could be crafted around the circumstances when the Agency could, at their discretion, require the consideration of fish passage “considering equitable factors”. This would be a major change from the current operating situation but could address the policy intent established by the Legislature.

Such language could look like:

The Department may request from the owner or operator of an artificial obstruction that acts as a barrier to the passage of native migratory fish to evaluate the potential for fish passage that considers:

- a) The relative cost of fish passage to the cost of the artificial obstruction,*
- b) The relative cost of potential mitigation if a waiver is proposed,*
- c) The effect of passage or mitigation on the productivity of native migratory fish affected by the artificial obstruction.*

All evaluations of native migratory fish population effects are subject to the determination by department staff.

This language is discretionary allowing for judgement on the significance of the consequences of engaging in the dialog. There is not a specified outcome, just the requirement to consider the possibility. This approach tries to address the statutory policy at ORS 509.585 (5).