

ODFW Draft Rule Revision Proposals

Task Force Section OAR 635-412-0010

11-2-2021 **DRAFT**

Italicized text indicates new propose language.

Strikethrough red text indicates text to be removed.

Lines 184 to 220 (from existing rules)

Revision to Existing:

(Lines 187 - 189)

(1) The Director shall appoint nine members to constitute the Fish Passage Task Force.

(2) Three members shall represent interests subject to the obligation to install passage at facilities they install, own or operate; three members shall represent fishing, environmental or conservation interests, and three members shall represent the general public *with a focused effort made for one general public member to represent tribal interests.*

ODFW Draft Rule Revision Proposals
Prioritization Section OAR 635-412-0015

11-02-2021 **DRAFT**

Italicized text indicates new propose language.

Strikethrough red text indicates text to be removed.

Lines 221 to 260 (from existing rules)

Revision to Existing:

(Lines 223)

(1) The Department shall establish for *restoration and* enforcement purposes a list of priority artificial obstructions at which fish passage would provide the greatest benefit to native migratory fish.

New Proposed New Rule:

(To be included into Lines 225)

(2) *The priority list shall exclude artificial obstructions where a legal agreement with the Department or Commission indicates passage is not required or where there is another legal requirement to address fish passage.*

(3) *The Department shall work cooperatively with the owners or operators of artificial obstructions on the priority list to establish fish passage.*

New Revision to Existing:

(Lines 225 - 229)

~~(24)~~ The priority list shall be based on the *current and future* needs of native migratory fish.

(a) The prioritization shall consider the following factors relative to each artificial obstruction for all native migratory fish currently or historically present at the artificial obstruction:

(A) The *current and future* quantity of native migratory fish habitat which is inaccessible;

(B) The *current and future* quality of native migratory fish habitat which is inaccessible;

New Revision to Existing:

(Lines 244)

(3) The Commission shall review, approve, or amend the priority list ~~after the initial priority list is developed,~~ when the Department re-prioritizes, and no less frequently than once every five years.

New Revision to Existing:

(Lines 246 - 252)

(4) ~~Once the Commission has approved the priority list,~~ The Department may order a person owning or operating an artificial obstruction on the *approved* priority list ~~who has been issued a water right, owns a lawfully installed culvert or owns another lawfully installed obstruction~~ to install fish passage or to provide mitigation *within a defined timeframe* if:

- (a) *The owner or operator refuses to work cooperatively with the Department;*
- (b) *The Department has field verified the information used for prioritization of the artificial obstruction;*
- (~~a~~c) The Department can arrange for non-owner or non-operator funding of at least 60 percent of the cost for fish passage design, construction, and installation; ~~or~~ **and**
- (~~b~~d) The artificial obstruction is ranked in the top ten ~~for the state or highest~~ within a Department Region on the priority list.

New Revision to Existing:

(New Lines after 257)

The Department shall re-evaluate the priority list after passage is provided through cooperation or by order at an artificial obstruction or as directed by the Commission.

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Fish Passage Approval Section OAR 635-412-0020

11-2-2021 DRAFT

Italicized text indicates new propose language.

Strikethrough red text indicates text to be removed.

Lines 261 to 314 (from existing rules)

Revision to Existing:

(Lines 266)

(2) Prior to ~~construction, fundamental change in permit status or abandonment~~ of a trigger of an artificial obstruction in any waters of this state, a person owning or operating an artificial obstruction shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters, unless the owner or operator assumes the presence of native migratory fish.

Revision to Existing:

(Lines 270 - 272)

(3) If the Department determines, or the owner or operator assumes, that native migratory fish are or were historically present in the waters, prior to ~~construction, fundamental change in permit status, or abandonment~~ a trigger event of the artificial obstruction the person owning or operating the artificial obstruction shall either:

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Waivers - Exemption Section OAR 635-412-0025

11-2-2021 **DRAFT**

Italicized text indicates new propose language.

Strikethrough red text indicates text to be removed.

Lines 315 to 381 (from existing rules)

Revision to Existing:

(Lines 325 - 327)

(3) Waivers shall be valid so long as the owner or operator continues to provide the agreed-upon mitigation measures and until the waived artificial obstruction undergoes **further construction, a fundamental change in permit status, or abandonment** *another trigger.*

Revision to Existing:

(Lines 336 - 340)

(6) The Commission *or Department* shall review, at least once every seven years, exempt artificial obstructions that do not have exemption expiration dates to determine whether the exemption should continue. The Commission *or Department* may revoke or amend an exemption if it finds that circumstances have changed such that the basis for the exemption no longer applies. An exemption granted as a result of an action which triggered fish passage requirements under OAR 635-412-0020(2) ~~to~~ *satisfies* the trigger event until the exemption is revoked *or another trigger at the artificial obstruction.*

Revision to Existing:

(Lines 348 - 353)

(9) To receive a waiver, or an exemption under subsection (4)(a), an owner or operator of an artificial obstruction shall enter an agreement with the Commission (or Department as applicable) that clearly describes timelines, duties, responsibilities, and options regarding

the mitigation. The agreement shall state that the mitigation shall be completed prior to completion of or by the end of the same in-water work period as the action which triggered fish passage requirements under OAR 635-412-0020(2), unless the Commission *or Department* finds that additional time is necessary and appropriate:

Revision to Existing:

(Lines 356 - 361)

(10) Once the application, analysis, and a draft agreement are completed, a decision on whether the waiver or exemption shall be granted shall be made by:

(a) The Department:

(A) If it determines that the total stream distance, including tributaries, affected by the artificial obstruction for which the waiver ~~or exemption~~ is being sought is less than or equal to 1 mile ~~to a natural barrier~~ of current native migratory fish distribution;

(B) If the request is for an exemption under subsection (4)~~(a) or (4)(b)~~; or

Revision to Existing:

(Lines 367)

(b) The Commission:

(A) In all other instances; or

(B) If the Department refers a decision to the Commission; or

(C) If the owner or operator *or other interested party* files a protest of the Department's determination to the Commission.

Revision to Existing:

(Lines 368 -369)

(11) The decision to grant a waiver or exemption shall include the determination described in subsection (1) or (4) as well as approval of the agreement required in subsection (9). *The Department may amend or approve changes to the agreement if the changes do not affect the benefit analysis.*