

# ODFW Fish Passage Rule Revision Parking Lot Issues for Additional Discussion

Draft Feb. 22, 2022 Rules Sub-committee Meeting

**Blue Shaded Sections – Highlight Section Specific Issues to Discuss During Meeting**

## 635-412-0005 - Definitions (*Existing Rule Lines 1- 183*)

- **Water Issues related to Triggers**
  - Triggers and non-physical barriers (flow, temperature, DO)
  - Water Over Allocation and Dry Stream Channels as barriers
  - Water Rights vs Fish Passage Law
    - Pushup Dams with water right, yet fish passage law pre-dates statehood (Sept 28, 2021 Mtg)
  
- **Fish Passage Triggers at Dams and Bridges**
  - Dams – 30% volume application to only elements within or above the channel for volume calculations
    - Show vertical prism defining channel (see bridge guidance document figures)

*“Structure Volume” means volumetric calculation of an existing dam or other AO or its elements measured within, above and below beds and banks of waters of the state.*

- Bridges & Bridge Elements (Rip Rap) add in reference to rules to existing/revised design guidance document
  - ODOT Issues with longitudinal extent of rip rap
  - Update 2008 Bridge Design Guidance to reflect rule changes
  
- **“Net Benefit” -vs- “No Appreciable Benefit” for purpose of passage exemption & waivers determination clarification**
  - Estuarine ecosystem & determination of habitats viable for exemptions for tide gates and culverts
  - proposed definition from 6-29-2021 meeting:

**Existing proposed rule change – new definition:**

- *“No Appreciable Benefit” means that accessible fish habitat in the reach upstream or downstream of the artificial obstruction does not currently provide and, with best professional judgement, will not foreseeably provide within the seven year duration of a fish passage exemption, habitat of the type, duration, frequency, quality, and quantity needed to support one or more self-sustaining, healthy populations of one or more life history stages of those native migratory fish that are present upstream or downstream of the artificial obstruction at the time of the exemption request.*

**635-412-0010 - Task Force (Existing Rule Lines 184- 220)**

- Tribal Participation on Task Force – two options from previous meetings
  1. New 10<sup>th</sup> member to represent “Tribal Interests”, or
  2. Aggregate Tribal Participation in non- public-at-large stakeholder groups
    - Emphasize “Tribal Participation” Language
    - Engage Tribes in advance of rule revision notification
    - Formal request to determine tribal engagement on future FPTF Vacancies.

**635-412-0025 - Waivers and Exemptions (Existing Rule Lines 315- 381)**

- Compensation for Temporal Loss Associated With Time Delays & Mitigation Implementation – Passage Waivers Actions (Nov. 2021 Mtg)
  - Existing rules 635-421-0025(9) require waiver actions (mitigation) “shall occur concurrent with Waiver Action or by the end of the same in-water work window as the action which triggered passage, unless OFWC finds that additional time is necessary and appropriate.
  - In not achieved within this temporal component, additional mitigation requirements to offset temporal loss
    - Develop metric (% factor or multiplier)
    - Linear mile for mile mitigation strategies
    - non-linear mitigation strategies (NMF production potential)
    - Keep the science baked into the multiplier
      - standard 20% additional mitigation multiplier per year of delay
      - Special species status (sensitive, threatened, endangered)
        - 50% additional multiplier per year of delay
      - Other concepts?
      - Leverage time efficient mitigation

**635-412-0030 - Fish Passage Protests (Existing Rule Lines 382- 396)**

- Protests and “any persons” may preclude tribal participation (Nov. 2021 Mtg)
    - Add “Tribal Government” or “Tribal Representative”
    - See below proposed language
- Yellow font below are proposed language changes*
- (Lines 384 - 385)
    - (1) A person owning or operating an artificial obstruction *or any private citizen, organization, government agency or official, or Tribal Representative* may request

alternative dispute resolution at any point in the process of determining fish passage requirements.

- (Lines 386 - 389)
  - (2) The owner or operator of the artificial obstruction or any private citizen, organization, government agency or official, or Tribal Representative who objects to a determination made by the Department under these rules may file a protest with the Commission. Protests must be submitted in writing within 30 days of receipt of a written determination from the Department and must include the grounds for protesting the Department's determination.

**635-412-0035 - Fish Passage Criteria (Existing Rule Lines 397- 673)**

- Forestry and Forest Practices Act and alignment with Forest Accord
  - 1. New Culvert Size Requirements for Stream Simulation Treatments (ACW\*1.2 + 2feet)
    - a. Statewide requirement for stream simulation actions
  - 2. Requirement of larger oversized substrate (rocks) to be included in all treatments independent of culvert length to provide areas of low velocity, stable bed from, dissipate energy
    - Placement of large oversized rocks leading into, through and exiting structures (culverts & bridges)
    - SB 1501 & timing and implication to OAR's and Private Forest Accord Report
    - Timing of FPA & MOU & new rules
    - Actions covered and not covered by FPA
    - Site specific design exceptions (inherent flexibility when appropriate)

**635-412-0040 - Mitigation Criteria (Existing Rule Lines 674- 723)**

- Alternative mitigation language that allows additional credit be provided for classes of fish that are more imperiled than others (Jan 11, 2022 Mtg)
  - Opportunity to allow mitigation to be provided for some species, but also providing opportunity for species affected by the trigger to not be addressed by the mitigation
  - Listed NMF -vs- resident only mitigation strategies
    - Example 2 miles of trout habitat mitigated with 1 mile of coho habitat
  - No changes to In-proximity requirement
- Temporal Loss for delays in mitigation implementation
  - consider temporal loss in this section instead of 635-412-0025