

ODFW FISH PASSAGE ADMINISTRATIVE RULE REVISION INITIATIVE

August 31, 2022

ODFW is accepting public comment on the final draft of the proposed fish passage rule revisions. **Public comment period has been extended and must be received by 11:59 pm Thursday September 29th, 2022 to be considered by the Oregon Fish Passage Task Force.** To submit public comment on the proposed draft rule revisions, please identify the specific line number where your comment applies. Send your comments by email to ODFW.Passagerules@state.or.us .

The following pages of this documents contain the proposed rule revisions for you to review and consider providing comment on. **Please note the format of the proposed revisions.** There text format where proposed changes occur include the following:

- **Bold font underlined text** indicates proposed new revisions.
- [~~Bracketed and strikethrough text~~] indicates proposed text deletions.

All public comments received by the date identified above will be provided to the Oregon Fish Passage Task Force at their next scheduled meeting October 7, 2022. This public meeting and will be held at the ODFW Headquarters Office in Salem.

Additional information on the this rule revision initiative, the proposed rule changes and supporting documents are available on the ODFW [website](#) or by contacting Greg Apke, ODFW Fish Passage Program Coordinator, at (503) 947-6228 or ODFW.Passagerules@state.or.us .

Proposed OAR Sections and Line Numbers for Reference:

- 635-412-0001 *Policy Intent (proposed new section Lines 1 - 12)*
- 635-412-0005 *Definitions (Lines 14 - 273)*
- 635-412-0010 *Task Force (Lines 275 - 316)*
- 635-412-0015 *Prioritization (Lines 318 - 370)*
- 635-412-0020 *Fish Passage Approval (Lines 372 - 433)*
- 635-412-0025 *Exemptions (Lines 435 - 535)*
- 635-412-0030 *Fish Passage Protests (Lines 537 - 555)*
- 635-412-0035 *Fish Passage Criteria (Lines 557 - 999)*
- 635-412-0040 *Mitigation Criteria (Lines 1001 - 1064)*

###



1 **635-412-0001 Purpose of the Fish Passage Policy**

2 **(1) The purpose of these rules is to further clarify and implement the States fish passage statutes (ORS**
3 **509.580 through 509.910) and the Department's Climate and Ocean Change Policy (OAR 635-900-0001**
4 **through 635-900-0020) through the application of consistent standards.**

5 **(2) It is the policy of the State of Oregon to provide for upstream and downstream passage of native**
6 **migratory fish at artificial obstructions.**

7 **(3) Changes in Oregon's future climate make fish passage even more critical, and a lack of fish passage**
8 **within watersheds may threaten the existence of some native migratory fish species.**

9 **(4) It is therefore the intent of these rules to promote fish passage while recognizing cooperation and**
10 **collaboration between public and private entities is necessary to accomplish the policy goal of providing**
11 **fish passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native**
12 **migratory fish populations, as envisioned by the Oregon Plan (ORS 541.898).**

13
14 **635-412-0005**

15 **Definitions**

16 (1) For the purposes of OAR 635-412-0010 through 635-412-00[40]65 the following definitions shall apply.

17 (2) **"Abandonment" means to surrender, decommission, no longer use for an authorized purpose, or give**
18 **up control.**

19 (3) "Active channel width" means the **naturally occurring cumulative** stream width(s) between the ordinary high
20 water lines, or at the channel bankfull elevation if the ordinary high water lines are indeterminate.

21 ([3]4) "Artificial obstruction" means any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert or other
22 **physically attached** human-made device placed in the waters of this state that precludes or prevents the migration
23 of native migratory fish.

24 ([4]5) "Attraction flow" means [the flow] **water** that [emanates] **flows** from or near a fishway entrance in sufficient
25 quantity, velocity, and location to attract upstream migrants into the fishway, which can consist of gravity flow from
26 the fish ladder and auxiliary water system flow added in or near the [lower ladder] **fishway entrance**.

27 ([5]6) "Bankfull elevation" means the point on a stream bank at which overflow into a floodplain begins.

28 ([6]7) "Bed" or "bed and banks" means the physical container of the waters of this state, bounded on freshwater
29 bodies by the ordinary high water line or bankfull stage, and on bays and estuaries by the limits of the highest
30 measured tide.

31 ([7]8) "Channel" means [a] **that portion of a natural (perennial or intermittent stream)** waterway that periodically
32 or continuously contains moving waters of this state and has a definite bed and banks that serve to confine the
33 water.

34 ([8]9) (8) "Commission" means the Oregon Fish and Wildlife Commission.

35 ([9]10) "Construction" **with respect to artificial obstructions subject to these rules,** means:

36 (a) Original construction;

37 (b) Major replacement, which includes:



(A) ~~[f]For~~ **existing** dams and diversions, ~~[excavation or replacement of 30 percent by structure volume of the dam, including periodic or seasonal replacements, unless]~~ **either a single or cumulative:**

- (i) **Excavation or replacement of 30 percent by structure volume; or**
 - (ii) **Repairs, patches, or modifications to over 30% of its linear length (measured perpendicular to stream flow); or**
 - (iii) **Repairs, patches, or modifications that are different than the original configuration and that reduce, as determined by the Department, the adequacy of fish passage including periodic or seasonal replacements, unless [Q]only checkboards are replaced[:], or in the case of existing seasonal dams or diversions, the artificial obstruction is in compliance with a water right(s), other regulatory requirements and the artificial obstruction maintains an open channel connection with adequate water flow and depth conditions that meet OAR 635-412-0035 (2) when instream water is available and between the fish passage design streamflow range.**
- ~~[(ii) Fish passage approval has already been obtained in writing from the Department for expected replacement.]~~

(B) For **existing** tide gates and flood gates, **either a single or cumulative:**

- (i) ~~[Cumulative r]~~ **Replacement of over 50 percent of the gate material, including hinges and the gate itself if detached;[-or]**
- (ii) ~~[Cumulative r]~~ **Removal, fill, replacement, or addition of over 50 percent of the structure supporting the gate, excluding road-stream crossing structures[-]; or**
- (iii) **Replacements, repairs, patches, or modifications that are different than the original configuration and that reduce, as determined by the Department, the adequacy of fish passage.**

(C) For **existing** dikes, berms, levees, roads, **culverts, bridges,** or other artificial obstructions that segment estuaries, floodplains, or wetlands, **either a single or cumulative:**

- (i) **Activity or [A]activities** defined under OAR 635-412-0005(~~[9]~~**10**)(d) in all locations where current channels cross the artificial obstruction segmenting the estuary, floodplain, or wetland; or
- (ii) ~~[The cumulative r]~~ **Removal, fill, replacement, or addition of over 50 percent by volume of the existing material directly above an historic channel or historically-inundated area; and**

(D) For other **existing** artificial obstructions, the **single or** cumulative removal, fill, replacement, or addition of over 50 percent of the structure ~~[comprising the artificial obstruction to native migratory fish migration]~~ **that impedes fish passage as the term is defined in these rules;**

(c) Structural modifications that increase storage or diversion capacity; or

(d) For purposes of **roads,** culverts, ~~[installation or replacement of a roadbed or culvert, further defined as]~~ **and bridges:**



(A) ~~Roadded~~ Installation or replacement ~~at culverts~~ **of a roadbed, culvert, or bridge** includes any activity that:

- (i) Creates a road ~~which~~ **or bridge that** crosses a channel;
- (ii) Widens a roadfill footprint within a channel; ~~or~~
- (iii) Fills or removes over 50 percent by volume of the existing roadbed material directly above a culvert, except when this volume is exclusively composed of the top 1 foot of roadbed material~~[-];~~

~~[(B) Culvert installation or replacement includes any activity that:]~~

- ~~(iv)~~ **(iv)** Installs or constructs a new **road, culvert, bridge, overflow pipe, apron, or wingwall** within a channel;
- ~~(v)~~ **(v)** Extends existing culverts, aprons, or wingwalls within a channel, except one-time placements of culvert ends which do not extend greater than 1 foot beyond the adjacent road footprint~~[in place prior to August 2004];~~
- ~~(vi)~~ **(vi)** ~~[Cumulatively through time m]~~ **Makes [significant] either single or cumulative repairs, patches, or modifications to over 50 percent of the linear length of a culvert;**
- (vii) Makes either single or cumulative repairs, patches, or modifications to over 50 percent of the structural volume of a bridge or its elements except when this volume is exclusively composed of the traveling surface of a bridge deck;**
- ~~(viii)~~ **(viii)** Replaces any part of a culvert, except ends ~~which~~ **that** become misaligned, **detached,** or eroded and ~~which~~ **that** are replaced to their original configuration;
- ~~(ix)~~ **(ix)** At any point along the linear length of an **existing** culvert, reduces the entire inside perimeter of the culvert; or
- ~~(x)~~ **(x)** Makes replacements, repairs, patches, or modifications to an existing culvert **or bridge** that are different than the original configuration and ~~which reduce any level of fish passage for native migratory fish with current access, as determined by the Department, to the culvert]~~ **that reduce, as determined by the Department, the adequacy of fish passage.**

(e) A trigger at one artificial obstruction physically connected to another artificial obstruction requires passage also be addressed at both connected structure(s).

NOTE: see Department Memorandum for clarification of fish passage triggers and guidelines for bridges.

(1[0]1) "Dam" means a structure, or group of structures with different functions, spanning or partially-spanning a stream in one location in order to pool water, facilitate the diversion of water, or raise the water surface elevation.

(1[1]2) "Department" means the Oregon Department of Fish and Wildlife.

(1[2]3) "Director" means the Director of the Oregon Department of Fish and Wildlife.

(1[3]4) "Design streamflow range" means the range of flows within a stream, ~~bracketed by~~ **between** the Low Fish Passage Design Flow and the High Fish Passage Design Flow, for which a fishway **or other structure** shall provide fish passage.



- 114 (1[4]5) "Emergency" means unforeseen circumstances materially related to or affected by an artificial obstruction
115 that, because of adverse impacts to a population of native migratory fish, requires immediate action.
- 116 (1[5]6) "Estuary" means a body of water semi-enclosed by land and connected with the open ocean within which
117 salt water is usually diluted by fresh water derived from the land. "Estuary" includes all estuarine waters, tidelands,
118 tidal marshes and submerged lands extending upstream to the head of tidewater. However, for the purposes of
119 these rules, the Columbia River Estuary extends to the western edge of Puget Island.
- 120 (1[6]7) "Exclusion barrier" means a structure placed that prevents fish passage for the benefit of native migratory
121 fish.
- 122 (1[7]8) "Experimental fish passage structure" means a fish passage structure based on new ideas, new technology,
123 or unique, site-specific conditions determined by the Department to not be covered by existing fish passage criteria
124 but to have a reasonable possibility of providing fish passage.
- 125 (1[8]9) "Fish passage" means the ability, at the times of year and by the weakest native migratory fish and life
126 history stages determined by the Department to require passage at the site, to move volitionally, with minimal
127 stress, delay, and without physical or physiological injury upstream and downstream of an artificial obstruction.
- 128 ([4]20) "Fish passage structure" means any human-built structure that allows fish passage past an artificial
129 obstruction, including, but not limited to, fishways and road-stream crossing structures such as culverts and
130 bridges.
- 131 (2[0]1) "Fishway" means the set of human-built [~~and~~] or operated facilities, structures, devices, and measures that
132 together constitute, are critical to the success of, and were created for the [~~sole~~] primary purpose of providing
133 upstream or downstream fish passage at artificial or natural obstructions which create a discontinuity between
134 upstream and downstream water or bed surface elevations.
- 135 (2[4]2) "Fishway entrance" means the component of a fishway that discharges attraction flow into the tailrace and
136 where upstream migrant fish enter the fishway.
- 137 (2[2]3) "Fishway pools" means discrete sections within a fishway separated by overflow weirs or non-overflow walls
138 that create incremental water surface elevation gains and dissipate energy.
- 139 (2[3]4) "Floodplain" means that portion of a river valley, adjacent to the channel, which is built of sediments
140 deposited during the present regimen of the stream and which is covered with water when the waterway overflows
141 its banks at flood stage.
- 142 (2[4]5) "Forebay" means the water impounded immediately upstream of an artificial obstruction.
- 143 (2[5]6) "Fundamental change in permit status" means a change in regulatory approval for the operation of an
144 artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant,
145 including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not
146 including water right transfers[~~or~~], routine maintenance permits, or required Federal and State dam safety
147 actions, unless the[~~y~~] action involves s construction, [~~or~~] abandonment, or modifications that increase storage or
148 diversion capacity of an artificial obstruction.
- 149 (2[6]7) "High fish passage design flow" means the mean daily average stream discharge that is exceeded 5 percent
150 of the time during the period when the Department determines that native migratory fish require fish passage.
- 151 (2[7]8) "Historically" means prior to 1859 (statehood).



152 (2[8]9) "Inflow" means surface movement of waters of this state from a lower ground surface elevation to a higher
153 ground surface elevation or away from the ocean.

154 ([29]30) "In-proximity" means within the same watershed or water basin, as defined by the Oregon Water
155 Resources Department, and having the highest likelihood of benefiting the native migratory fish populations, as
156 [defined] **determined** by the Oregon Department of Fish and Wildlife, directly affected by an artificial obstruction.

157 (3[0]1) "Low fish passage design flow" means the mean daily average stream discharge that is exceeded 95
158 percent of the time, excluding days with no flow, during the period when the Department determines that native
159 migratory fish require fish passage.

160 (3[4]2) "Mitigation" means alternatives to providing fish passage at an artificial obstruction **that provide a net**
161 **benefit to native migratory fish** as per ORS 509.585.

162 (3[2]3) "Native migratory fish" means native fish (as defined under OAR 635-007-0501) **indigenous to Oregon**
163 **that are naturally or hatchery produced** that migrate for their life cycle needs. These fish include all sub-species
164 and life history patterns of the following species listed by scientific name in use as of 20[05]22. Common names are
165 provided for reference but are not intended to be a complete listing of common names, sub-species, or life history
166 patterns for each species.

- 167 (a) *Acipenser medirostris* — Green [S]sturgeon;
- 168 (b) *Acipenser transmontanus* — White [S]sturgeon;
- 169 (c) *Amphistichus rhodoterus* — Redtail surfperch;
- 170 (d) *Catostomus columbianus* — Bridgelip sucker;
- 171 (e) [*Catostomus luxatus*/*Deltistes luxatus*] — Lost River sucker;
- 172 (f) [*Catostomus macrocheilus*] — Largescale sucker;
- 173 (g) [*Catostomus microps*] — Modoc sucker;
- 174 (h) [*Catostomus occidentalis*] — Goose Lake sucker;
- 175 (i) [*Catostomus platyrhynchus*] — Mountain sucker;
- 176 (j) [*Catostomus rimiculus*] — Klamath smallscale sucker;
- 177 (k) [*Catostomus snyderi*] — Klamath largescale sucker;
- 178 (l) [*Catostomus tahoensis*] — Tahoe sucker;
- 179 **(l) *Catostomus tsitcoosensis* – Tyee sucker,**
- 180 (m) *Catostomus warnerensis* — Warner sucker;
- 181 (n) *Chasmistes brevirostris* — Shortnose sucker;
- 182 **(o) *Deltistes luxatus* -- Lost River sucker;**
- 183 **(p) *Entosphenus folletti* -- Northern California brook lamprey;**
- 184 **(q) *Entosphenus lethophagus* -- Pit-Klamath brook lamprey;**
- 185 **(r) *Entosphenus minimus* -- Miller Lake lamprey;**
- 186 **(s) *Entosphenus similis* -- Klamath River lamprey;**
- 187 **(t) *Entosphenus tridentatus* -- Pacific lamprey;**
- 188 (u) [*Hypomesus pretiosus*] — Surf smelt;
- 189 (v) [*Lampetra ayresi*] — **Western** [R]river lamprey;



- 190 [(q) *Lampetra lethophaga* — Pit-Klamath lamprey;
- 191 (r) *Lampetra minima* — Miller Lake lamprey;
- 192 (s) *Lampetra similes* — Klamath River lamprey;
- 193 (t) *Lampetra tridentata* — Pacific lamprey;]
- 194 **(w) *Lampetra pacifica* -- Pacific brook lamprey;**
- 195 **(x) *Lampetra richardsoni* -- western brook lamprey;**
- 196 ([u]y) *Oncorhynchus clarkii* — Coastal, Lahontan and West Slope cutthroat trout;
- 197 **(z) *Oncorhynchus gorbuscha* -- Pink salmon;**
- 198 ([v]aa) *Oncorhynchus keta* — Chum salmon;
- 199 ([w]bb) *Oncorhynchus kisutch* — Coho salmon;
- 200 ([x]cc) *Oncorhynchus mykiss* — Steelhead, Rainbow and Redband trout;
- 201 ([y]dd) *Oncorhynchus nerka* — Sockeye/Kokanee salmon;
- 202 ([z]ee) *Oncorhynchus tshawytscha* — Chinook salmon;
- 203 ([aa]ff) *Prosopium williamsoni* — Mountain whitefish;
- 204 ([bb]gg) *Ptychocheilus oregonensis* — Northern pikeminnow;
- 205 **(hh) *Ptychocheilus sp.* -- Siuslaw pikeminnow;**
- 206 ([ee]ii) *Ptychocheilus umpqua* — Umpqua pikeminnow;
- 207 ([dd]jj) *Salvelinus confluentus* — Bull trout;
- 208 ([ee]kk) *Spirinchus thaleichthys* — Longfin smelt;
- 209 ([ff]ll) *Thaleichthys pacificus* — Eulachon.

210 (3[3]4) "Net benefit" means an increase in the overall, in-proximity habitat quality or quantity that is biologically likely
211 to lead to an increased number of native migratory fish after a development action and any subsequent mitigation
212 measures have been completed.

213 **(35) "No Appreciable Benefit to Providing Fish Passage" means that fish habitat that would be made**
214 **accessible, or more accessible, in the reach upstream or downstream of the artificial obstruction, does not**
215 **currently provide and, with best professional judgement, will not foreseeably provide within the seven year**
216 **duration of a fish passage exemption as per OAR 635-412-0025(1)(c), habitat of the type, duration,**
217 **frequency, quality, or quantity necessary to support one or more life history stages of those native**
218 **migratory fish that are present, or will foreseeably be present within the seven year duration of the fish**
219 **passage exemption, upstream or downstream of the artificial obstruction.**

220 (3[4]6) "Ordinary high water line" (OHWL) means the line on the bank or shore to which the high water ordinarily
221 rises annually in season.

222 NOTE: See OAR 141-085-0010 for physical characteristics that can be used to determine the OHWL in the field.

223 (3[5]7) "Oregon Plan" means the guidance statement and framework described in ORS [541.405] **541.898**.

224 (3[6]8) "Over-crowding" means fish density within a pool's wetted volume is such that there is less than 0.25 cubic
225 feet of water per pound of fish for the maximum number of fish expected to be present within the pool at the same
226 time, as determined by the Department.



- 227 **(39) "Person" means any person, partnership, corporation, association, municipal corporation, political**
228 **subdivision or governmental agency.**
- 229 ([37]40) "Road" means a cleared or built surface, and associated materials or measures for support and safety,
230 used for the purpose of motorized or non-motorized movement between different locations.
- 231 ([38]41) "Roadfill footprint" means the area occupied by soil, aggregate, [and/]or other materials or structures
232 necessary to support a road, including, but not limited to, appurtenant features such as wing walls, retaining walls,
233 or headwalls, **bridge supports, abutments, piers, or scour protection countermeasures.**
- 234 **(42) "Roughened channel" means a fishway designed to provide fish passage and which encompasses the**
235 **entire stream channel and may be over-steepened relative to the long-channel streambed profile, including**
236 **but not limited to nature-like, rock, rock ramp, or engineered-streambed fishways.**
- 237 ([39]43) "Stream" means a body of running waters of this state moving over the surface of the land in a channel or
238 bed including stream types classified as perennial or intermittent and channelized or relocated streams.
- 239 **(44) "Structure Volume" means volumetric calculation of an existing dam or other artificial obstruction and**
240 **its elements or components.**
- 241 (4[0]5) "Sub-basin" means a 4th-field hydrologic unit as defined by the U.S. Geological Survey.
- 242 (4[4]6) "Tailrace" means the water immediately downstream of an instream structure.
- 243 (4[2]7) "Temporary" means in place less than the in-water work period defined by the Department for a particular
244 location.
- 245 (4[3]8) "Trap" means the set of human-built [and/]or operated facilities, structures, devices, [and/]or measures that
246 hold fish and prevent them from passing volitionally.
- 247 **(49) "Trash Rack" means a human built or placed measure used to prevent unwanted materials from**
248 **entering a fishway, culvert, bridge, water diversion or other structures.**
- 249 **(50) "Trigger" means any event or activity that qualifies as construction, abandonment, or a fundamental**
250 **change in permit status pursuant to Division 412 rules that is associated with or at any artificial obstruction**
251 **that requires a person owning or operating that artificial obstruction to provide fish passage or alternatives**
252 **to fish passage consistent with such rules.**
- 253 ([44]51) "Unforeseen circumstances" means:
- 254 (a) An event that causes an existing human-made structure in the waters of th[e]is state which provides
255 fish passage to become an artificial obstruction; or
- 256 (b) New fish population information indicating that an existing artificial obstruction is placing a local native
257 migratory fish population in jeopardy.
- 258 ([4]52) "Volitionally" means with minimal delay and without being trapped, transferred, or handled by any person,
259 unless specifically allowed under OAR 635-412-0035(6).
- 260 **(53) "Waiver" means a fish passage exemption specifically allowed under OAR 635-412-0025 (1)(a) or (b) if**
261 **the Commission or Department, as applicable, determines that mitigation rather than fish passage, as**
262 **proposed by the person owning or operating the artificial obstruction, provides a net benefit to native**
263 **migratory fish.**



264 ([46]54) "Waters of this state" means natural waterways including all tidal and non-tidal bays, intermittent and
265 perennial streams, constantly flowing streams, lakes, wetlands and other bodies of water in this state, navigable
266 and non-navigable, including that portion of the Pacific Ocean that is within the boundaries of Oregon.

267 ([47]55) "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency
268 and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation
269 typically adapted for life in saturated soil conditions.

270 Statutory/Other Authority: ORS 496.138

271 Statutes/Other Implemented: ORS 509.580, 509.585, 509.610 & 509.625

272 History:

273 DFW 2-2006, f. & cert. ef. 1-9-06

274

275 **635-412-0010**

276 **Fish Passage Task Force**

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

278 (2) Three members shall represent interests subject to the obligation to install fish passage at facilities they install,
279 own or operate; three members shall represent fishing, environmental or conservation interests, and three
280 members shall represent the general public.

281 (3) Members shall serve four year terms~~[;]~~ and shall be eligible for reappointment to the ~~[t]Task [f]Force[-except-~~
282 ~~that the initial designation of members shall appoint members of each interest group to a three year, four year or~~
283 ~~five year term to establish a staggered system of new appointments for each interest group's members].~~

284 (4) The Task Force shall:

285 (a) Serve as the public advisory committee and advise the Director, Department and Commission
286 regarding rulemaking to implement the fish passage and ~~[waiver]~~exemption requirements consistent with
287 applicable law;

288 (b) Prioritize projects from the statewide inventory of artificial ~~[dams and]~~obstructions for purposes of
289 restoration and enforcement;

290 (c) Recommend to the Director, Department and Commission appropriate levels of funding and special
291 conditions applicable to projects installing fish passage or alternatives to fish passage resulting in a net
292 benefit to native migratory fish;

293 (d) Select one of its members to serve as chair and one as vice chair of the Task Force;

294 (e) Review and recommend to the Commission or Department which projects should be exempt~~[-and~~
295 ~~changes to the list of projects exempt from passage requirements under section 8 of Section 2 of HB 3002-~~
296 ~~(2004)] from the requirement to provide fish passage pursuant to ORS 509.585(9)(a);~~

297 (f) Report semiannually to the joint legislative committee created under ORS 171.551, or to the appropriate
298 interim legislative committee with responsibility for salmon restoration or species recovery, advising the
299 committee on matters related to fish passage;

300 (g) Review applications for waivers of the fish passage requirement, and advise the Commission or
301 Department as to whether proposed alternative measures result in a net benefit to native migratory fish;



- 302 (h) Perform such other duties relating to fish passage as requested by the Director or Commission;
- 303 (i) The ~~task~~ Force shall meet at such times and places as may be determined by the chair or by a
- 304 majority of members of the task force.
- 305 (5) The Department's Fish Passage Coordinator shall serve as staff for the ~~task~~ Force.
- 306 (6) The chair of the Task Force shall conduct the meetings of the ~~task~~ Force, serve as the main contact point
- 307 between the Department ~~and~~or Commission and the Task Force and perform such other duties as the Task Force
- 308 shall set. The vice chair of the ~~task~~ Force shall serve as chair if the chair is unavailable to carry out the duties
- 309 of chair.
- 310 (7) Members of the Task Force may not receive compensation for services as a member of the Task Force;
- 311 however, in accordance with ORS 292.495, a member of the Task Force may receive reimbursement for actual and
- 312 necessary travel or other expenses incurred in the performance of official duties.
- 313 Statutory/Other Authority: HB 3002
- 314 Statutes/Other Implemented: HB 3002
- 315 History:
- 316 DFW 10-2002, f. & cert. ef. 2-4-02

317

318 **635-412-0015**

319 **Prioritization**

- 320 (1) The Department shall establish for **restoration and** enforcement purposes a list of priority artificial obstructions
- 321 at which fish passage would provide the greatest benefit to native migratory fish.
- 322 **(2) The priority list may exclude artificial obstructions where a legal agreement with the Department or**
- 323 **Commission specifically indicates fish passage is not required.**
- 324 **(3) The Department will prioritize working collaboratively with the owners or operators of artificial**
- 325 **obstructions on the priority list to establish fish passage.**
- 326 ~~(2)~~**4** The priority list shall be based on the **current and future** needs of native migratory fish.
- 327 **(5) When determining placement of an artificial obstruction on the priority list, the Department may utilize**
- 328 **existing Department information or professional judgment.**
- 329 **(6) When determining placement of an artificial obstruction on the priority list, the Department** ~~[(a) The~~
- 330 ~~prioritization]~~ shall consider the following factors relative to each artificial obstruction for all native migratory fish
- 331 currently or historically ~~at~~ **in waters of this state** where the artificial obstruction **is located. These factors include**
- 332 **and may not be limited to:**
- 333 ~~(A)~~**a** The **current and future** quantity of native migratory fish habitat which is inaccessible;
- 334 ~~(B)~~**b** The **current and future** quality of native migratory fish habitat which is inaccessible;
- 335 ~~(C)~~**c** Unique or limited native migratory fish habitat which is inaccessible, or should remain inaccessible for
- 336 fish management purposes;
- 337 ~~(D)~~**d** The biological status of the native migratory fish;
- 338 ~~(E)~~**e** The level of fish passage currently provided at the artificial obstruction;



339 (~~F~~**f**) The presence of other artificial obstructions upstream [~~and~~**or**] downstream and the timeframe native
340 migratory fish will be able to utilize restored passage; and
341 (~~G~~**g**) Existing agreements with the Department regarding fish passage.
342 [~~(b) The prioritization may utilize existing Department information or professional judgment in the absence of~~
343 ~~information specific to a given site.]~~
344 (~~e~~**7**) The priority list shall contain **at least** one artificial obstruction per Oregon sub-basin, which shall be ranked
345 across the state.
346 (~~d~~**8**) The Department shall field verify the information used for prioritization prior to **initiating any** enforcement
347 action~~s~~.
348 (~~e~~**9**) The Department shall [~~re-evaluate~~]**make changes to** the priority list [~~with~~]**utilizing** the most recent
349 information after enforcement occurs at five priority artificial obstructions or as directed by the Commission.
350 (~~3~~**10**) The Commission shall review[, approve, or]**and** amend the priority list [~~after the initial priority list is~~
351 ~~developed,~~] when the Department [~~re-prioritizes~~]**changes the ranking of barriers on the list**, and no less
352 frequently than once every five years.
353 (~~4~~**11**) [~~Once the Commission has approved the priority list, t~~]**The Department may order a person owning or**
354 **operating an artificial obstruction on the priority list who has been issued a water right, owns a lawfully installed**
355 **culvert or owns another lawfully installed obstruction to install fish passage or to provide mitigation [~~if~~**within a****
356 **defined timeframe under any of the following circumstances:**
357 **(a) The owner or operator of an artificial obstruction refuses to work cooperatively with the Department;**
358 **(~~a~~**b**) The Department can arrange for non-owner or non-operator funding of at least 60 percent of the cost for**
359 **fish passage design, construction, and installation; [~~and~~**or****
360 **(~~b~~**c**) The artificial obstruction is ranked in the top ten [~~for the state or highest~~] within a Department Region on**
361 **the priority list.**
362 (~~5~~**12**) Once the Department has arranged for non-owner or non-operator funding of at least 60 percent of the
363 cost for fish passage design, construction, and installation at an artificial obstruction the owner or operator **of an**
364 **artificial obstruction** has two years **from the Department's order** to:
365 (a) Install a fish passage structure according to a fish passage plan approved by the Department; or
366 (b) Provide mitigation that the Commission determines is a net benefit to native migratory fish.
367 Statutory/Other Authority: ORS 496.138
368 Statutes/Other Implemented: ORS 509.585 & 509.625
369 History:
370 DFW 2-2006, f. & cert. ef. 1-9-06
371
372 **635-412-0020**
373 **Fish Passage Approval**
374 (1) No person shall construct or maintain any artificial obstruction across any waters of this state that are inhabited,
375 or were historically inhabited, by native migratory fish without providing passage for native migratory fish.



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

381 (3) If the Department determines, or the owner or operator assumes, that native migratory fish are or were
382 historically present in the waters **of this state where the artificial obstruction is located**, prior to ~~[construction,~~
383 ~~fundamental change in permit status, or abandonment of the artificial obstruction]~~ **a trigger** the person owning or
384 operating the artificial obstruction shall either:

385 (a) Obtain ~~[from the]~~Department ~~[an]~~approval ~~[determination]~~ of a fish passage plan that meets the
386 requirements of OAR 635-412-0035 for the specific artificial obstruction[-];

387 (b) Obtain ~~[from the]~~Department ~~[a]~~programmatic approval of a fish passage plan for multiple artificial
388 obstructions of the same type. The Department may also grant programmatic approval to an agent for
389 multiple owners or operators of artificial obstructions of the same type. Programmatic approvals are only
390 valid so long as the owner or operator complies with the conditions of the programmatic approval. The
391 Department shall only provide programmatic approval if:

392 (A) Fish passage structures placed ~~[placed under]~~**subject to** the programmatic approval meet **and**
393 **adhere to** criteria determined by the Department;

394 (B) The owner, operator, or agent demonstrates~~[-to]~~, **as determined by** the Department, prior
395 experience providing or approving acceptable fish passage structures;

396 (C) The owner, operator, or agent reports installation information annually to the Department,
397 including but not limited to the location and installation date of all fish passage structures placed
398 under the programmatic approval;

399 (D) The owner or operator allows, or the agent requires owners or operators to allow, the
400 Department to inspect fish passage structures ~~[placed under]~~**subject to** the programmatic approval
401 at reasonable times; and

402 (E) The owner, operator, or agent agrees to expeditiously remedy all fish passage structures
403 ~~[placed under]~~**subject to** the programmatic approval which the Department finds do not meet the
404 **applicable** criteria or conditions of th[e]at programmatic approval.

405 (c) Pursuant to ORS 527.710(6), install and maintain road-stream crossing structures on non-federal
406 forestlands in compliance with State Board of Forestry, through the Oregon Department of Forestry, rules
407 and guidelines~~[-. These rules and guidelines require concurrence by the Oregon]~~ **that the** Department ~~[of~~
408 ~~Fish and Wildlife that they]~~**concurs** meet the purposes of the Department's fish passage program; **or**

409 (d) Obtain an ~~[waiver]~~**exemption** from fish passage requirements for the artificial obstruction as provided in
410 OAR 635-412-0025~~[-or~~

411 ~~(e) Obtain an exemption from fish passage requirements for the artificial obstruction as provided in OAR-~~
412 ~~635-412-0025].~~



413 (4) Fish passage plans shall provide for and be implemented such that fish passage is installed at the artificial
414 obstruction prior to completion of or by the end of the same in-water work period as the action which triggered fish
415 passage requirements under subsection (2)[,] **of this rule** unless:

416 (a) An owner or operator demonstrates to the Department an imminent or immediate threat to human safety
417 **exists** which requires construction at a failed artificial obstruction prior to being able to complete the
418 requirements of subsection (3), and the Department approves a fish passage plan in which the requirements of
419 subsection (3) shall be met by the end of the next in-water work period or as soon as practicable **as**
420 **determined by the Department**[,] **(providing passage at the time of construction is preferred)**;

421 (b) The **Department or** Commission finds that additional time is necessary and appropriate given the size
422 and scope of the project;

423 (c) Installation begins within ~~[this period]~~ **the same in-water work period as the action that triggered fish**
424 **passage** and the Department finds that additional time to complete installation is necessary and
425 appropriate given the size and scope of the project; or

426 (d) The Department finds that additional time is necessary and appropriate ~~[as part of]~~ **given** the terms and
427 conditions of a negotiated settlement for a federal proceeding[,], or ~~[in]~~ **to ensure** coordination with other
428 federal requirements.

429 Statutory/Other Authority: ORS 496.138

430 Statutes/Other Implemented: ORS 509.585 & 509.645

431 History:

432 DFW 2-2006, f. & cert. ef. 1-9-06

433 DFW 23-2003, f. & cert. ef. 3-26-03

434

435 **635-412-0025**

436 **Fish Passage ~~[Waivers and]~~Exemptions**

437 (1) **The Commission (or Department as applicable) may grant exemptions from fish passage requirements**
438 **at an artificial obstruction if it is determined that:**

439 **(a) A lack of fish passage has been effectively mitigated;**

440 **(b) The owner or operator has received a legal waiver for the artificial obstruction from the Commission**
441 **or the Department; or**

442 **(c) There is no appreciable benefit to providing fish passage.**

443 **(2)** Waivers from fish passage requirements shall be granted for an artificial obstruction if the Commission (or
444 Department, as applicable) determines that mitigation rather than fish passage proposed by the person owning or
445 operating the artificial obstruction provides a net benefit to native migratory fish.

446 ~~[(2)]~~**3** Net benefit to native migratory fish is determined by comparing the benefit to native migratory fish that would
447 occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur ~~[using]~~ **as a**
448 **direct result of the** proposed mitigation. To qualify for a waiver of the requirement to install fish passage,
449 mitigation shall result in a benefit to **native migratory** fish greater than ~~[that]~~ **the benefit to such species that**



450 ~~would be~~ provided by fish passage at the artificial obstruction~~[-with fish passage]~~. The net benefit ~~[to fish]~~
451 determination shall be based upon conditions that exist at the time of comparison.

452 ~~[(3)4]~~ Waivers shall be valid consistent with the terms of the agreement described in 635-412-0025(9) so long
453 as the owner or operator continues to provide the agreed-upon mitigation~~[-measures and until the waived artificial-~~
454 ~~obstruction undergoes further construction, a fundamental change in permit status, or abandonment]~~.

455 (a) For waivers without an expiration date, the date of the next fish passage trigger at the artificial
456 obstruction for which the waiver was granted will be considered the expiration date, unless;

457 (b) The Commission or Department determines that circumstances have changed such that the waiver
458 requirements no longer apply.

459 ~~[(4) The Commission (or Department as applicable) may grant exemptions from fish passage requirements at an-~~
460 ~~artificial obstruction if it is determined that:~~

461 ~~(a) A lack of fish passage has been effectively mitigated;~~

462 ~~(b) The owner or operator has received a legal waiver for the artificial obstruction from the Commission or~~
463 ~~the Department; or~~

464 ~~(c) There is no appreciable benefit to providing fish passage.]~~

465 ~~(5) [For exemptions granted under subsection (4)(a) and (4)(b), the exemption continues only so long as the~~
466 ~~original benefit of the mitigation is maintained]~~ Exemptions granted under subsection (1)(a) shall be valid

467 consistent with the terms of the waiver agreement described in 635-412-0025(9) and exemptions granted
468 under subsection (1)(c) shall be valid so long as conditions that justified the exemption do not change,
469 unless:

470 (a) The exemption has expired;

471 (b) A trigger occurs with respect to the artificial obstruction subject to the exemption; or

472 (c) The exemption does not have an expiration date and the Commission or Department determines
473 that either:

474 (A) Circumstances have changed such that relevant requirements for the exemption no longer
475 applies; or

476 (B) Upon review, the Commission or Department determines that the exemption should not be
477 renewed.

478 (6) The ~~[Commission]~~ Department shall review, at least once every seven years, exempt artificial obstructions ~~[that~~
479 ~~do not have exemption expiration date]~~ granted under subsection (1)(c) to determine whether the exemption
480 should continue. ~~[The Commission may revoke or amend an exemption if it finds that circumstances have changed~~
481 ~~such that the basis for the exemption no longer applies. An exemption granted as a result of an action which~~
482 ~~triggered fish passage requirements under OAR 635-412-0020(2) tolls the trigger event until the exemption is~~
483 ~~revoked.]~~ Prior to a seven-year review and upon the request by any person or Tribal Representative,
484 exemption decisions may be reviewed by the Commission or Department.

485 (7) To obtain a waiver or an exemption from fish passage requirements, an owner or operator of an artificial
486 obstruction shall obtain from and submit to the Department an application for ~~[the]~~ a waiver or exemption.



487 (8) Based on application review, verification **of the information in the application** and **of** site-specific knowledge,
488 Department staff shall provide a written benefit analysis of whether the waiver request meets the requirements of
489 subsection ([4]2) or the exemption request meets the requirements of subsection[s] ([4]1) and (5). If there is some
490 level of [fish] passage at the artificial obstruction, but it does not meet the requirements of OAR 635-412-0035,
491 ~~that~~**the level of** passage shall be factored into the Department's ~~net~~ benefit analysis **as**,~~allowing~~ a reduction in
492 required mitigation.

493 (9) To receive a waiver,~~or an exemption under subsection (4)(a),~~ an owner or operator of an artificial obstruction
494 shall enter an agreement with the Commission (or Department as applicable) that clearly describes timelines,
495 duties, responsibilities, and options regarding the **required** mitigation. The agreement shall state that the mitigation
496 shall be completed prior to completion of or by the end of the same in-water work period as the action which
497 triggered fish passage requirements under OAR 635-412-0020~~(2)~~, unless the Commission **or Department** finds
498 that additional time is necessary and appropriate:

- 499 (a) Given the size and scope of the project; or
- 500 (b) To coordinate with requirements of federal proceedings.

501 **(10) The Commission or Department may require additional mitigation if the mitigation cannot be or is not**
502 **completed within the required time frame set forth in the agreement prescribed by subsection (9) of this**
503 **rule.**

504 (1~~0~~**1**) Once the application, **Department's written benefit** analysis, and a draft agreement are completed, [~~a~~
505 ~~decision on whether the waiver or~~**the** exemption **determination** shall be granted shall be made by:

506 (a) The Department:

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

510 (B) [~~If the request is for an exemption under subsection (4)(a) or (4)(b);~~] **For all exemptions under**
511 **section 1(c) of this rule; and**

512 (C) For re-authorization of an existing hydroelectric project subject to ORS 543A.030 to 543A.055
513 and not subject to federal hydroelectric relicensing; [~~and~~]**or**

514 (b) The Commission:

515 (A) In all other instances; or

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

517 ~~(C) If the owner or operator files a protest of the Department's determination to the Commission].~~

518 (1~~4~~**2**) The decision to grant an [~~waiver or~~] exemption shall include the determination described in **this** [~~sub~~]section
519 [~~(4) or (4)]~~ as well as approval of the agreement required in subsection (9) **of this rule.**

520 **(13) The Department may amend or approve changes to the agreement if the changes do not affect the**
521 **benefit analysis and after a public review by the Fish Passage Task Force.**

522 (1~~2~~**4**) In addition to the Fish Passage Task Force~~as prescribed in OAR 635-412-0010(4)(e) and (g)],~~ the
523 Department shall notify [~~local watershed council(s), local soil and water conservation district(s), identified-~~
524 ~~stakeholders, and others who have expressed an interest in fish passage issues or the specific waiver or exemption~~



525 request] **the public** and provide an opportunity to comment on the **owner or operator's** request at least three
526 weeks prior to ~~[a decision on whether the waiver or exemption should be granted]~~ **an exemption determination**.
527 (1)~~[3]~~**5** The Commission ~~[for Department, as applicable]~~ may ~~[require]~~ **provide** further public comment prior to a
528 decision on whether an ~~[waiver or]~~ exemption should be granted.

529 (1)~~[4]~~**6** The Department shall maintain a database of the locations of ~~[waived and]~~ exempted artificial obstructions
530 and mitigation.

531 Statutory/Other Authority: ORS 496.138

532 Statutes/Other Implemented: ORS 509.585 & 509.645

533 History:

534 DFW 2-2006, f. & cert. ef. 1-9-06

535 DFW 23-2003, f. & cert. ef. 3-26-03

536

537 **635-412-0030**

538 **Fish Passage Protests**

539 (1) A person owning or operating an artificial obstruction may request alternative dispute resolution at any point in
540 the process of determining fish passage requirements.

541 (2) ~~[The owner or operator of the artificial obstruction]~~ **Any person or Tribal Representative** who objects to a
542 determination made by the Department under these rules may file a protest with the Commission. Protests must be
543 submitted in writing within 30 days **from the date the person owning or operating the artificial obstruction** ~~[of]~~
544 recei~~[pt]~~**yes** ~~[of a]~~ **the Department's** ~~[written]~~ determination ~~[from the Department]~~ and must include the grounds for
545 protesting ~~[the Department's]~~ **that** determination.

546 (3) The Commission may approve, deny, or modify the Department's **proposed or final** determination after
547 sufficient opportunity for public review and comment.

548 (4) If a protest is not filed within 30 days **from the date the person owning or operating the artificial**
549 **obstruction** ~~[of]~~ recei~~[pt]~~**yes** ~~[of a]~~ ~~[written]~~ determination from the Department, the Department's determination
550 shall become a final order.

551 Statutory/Other Authority: ORS 496.138

552 Statutes/Other Implemented: ORS 509.585 & 509.645

553 History:

554 DFW 112-2004, f. & cert. ef. 11-17-04

555 DFW 23-2003, f. & cert. ef. 3-26-03

556

557 **635-412-0035**

558 **Fish Passage Criteria**

559 (1) General requirements for fish passage are:

560 (a) Unless the owner or operator of an artificial obstruction chooses to provide year-round fish passage for
561 all native migratory fish and life history stages, the Department shall determine:



- 562 (A) ~~Which~~ ~~[N]~~native migratory fish **that are** currently or **were** historically present at the site ~~[which~~
563 ~~require]~~ **must be provided** fish passage;
- 564 (B) ~~Which~~ ~~[L]~~life history stages ~~[which]~~**the** required fish passage **must accommodate**; and
- 565 (C) ~~[Dates]~~**Periods** of the year and~~[/or]~~ **any** conditions **relevant to** when **fish** passage shall be
566 provided for ~~[the]~~**such** life history stages and native migratory fish.
- 567 (b) The person submitting the fish passage plan to the Department for approval shall submit all information
568 necessary **for the Department** to efficiently evaluate whether the design will meet fish passage criteria;
- 569 (c) If site-specific circumstances indicate that the fish passage criteria are not adequate to provide fish
570 passage **at the artificial obstruction**, the Department may require in writing that additional fish passage
571 criteria be met;
- 572 (d) If **the Department determines that the specific existing or historically present** native migratory
573 ~~[fish-]~~**species** or site-specific circumstances warrant ~~[it, the Department may provide]~~ an exception to any
574 specific fish passage criterion ~~[if]~~**then** the Department ~~[determines]~~**may approve such an exception** in
575 writing **as long as it finds** that fish passage ~~[shall]~~**will** still be provided **by the artificial obstruction**;
- 576 (e) All fish passage structures shall be designed to take into consideration their upstream and downstream
577 connection and prevent undesirable impacts to fish passage, including but not limited to scour and
578 headcuts;
- 579 (f) If ~~[joint]~~ state and federal approval **of a fish passage plan** is required **by law**, the Department shall take
580 into account federal requirements during ~~[approval]~~**its review and determination**;
- 581 (g) ~~[Primarily a]~~**At** sites with little existing site information or questionable design solutions, the Department
582 may require monitoring and reporting to determine if a fish passage structure meets applicable criteria
583 and~~[/or]~~ is **in fact** providing fish passage **as intended and designed**; and
- 584 (h) The person owning or operating an artificial obstruction shall maintain the fish passage structure in such
585 repair and operation as to provide fish passage of native migratory fish at all times required by the
586 Department.
- 587 (2) **Additional** ~~[R]~~requirements for fish passage at dams and other artificial obstructions which create a
588 discontinuity between upstream and downstream water surface or streambed elevations are:
- 589 (a) Fishways shall provide fish passage at all flows within the design streamflow range;
- 590 (b) The fishway entrance shall be located and adequate attraction flow shall be provided at one or more
591 points where fish can easily locate and enter the fishway;
- 592 (c) Fishway water velocities shall:
- 593 (A) Range between 1 and 2 feet per second in transport channels;
- 594 (B) Average no greater than 5 feet per second in baffled-chute fishways, including but not limited to
595 Alaska steeppasses and denils; and
- 596 (C) Not exceed 8 feet per second in discrete fishway transitions between the fishway entrance,
597 pools, and exit through which fish must swim to move upstream, including but not limited to slots,
598 orifices, or weir crests.



- 599 (d) At any point entering, within, or exiting the fishway where fish are required to jump to move upstream,
600 the maximum difference between the upstream and downstream water surface elevations shall be 6
601 inches, except it shall be 12 inches if only salmon or steelhead adults require fish passage;
- 602 (e) In fishway locations through which fish must swim, water depths shall be a minimum of 6 inches where
603 only juveniles require passage and 12 inches where adults require passage, except:
- 604 (A) Baffled-chute fishways, including but not limited to Alaska steeppasses and denils, shall have a
605 minimum flow depth of 2 feet throughout the length of the fishway; and
- 606 (B) Water depths shall be a minimum of 2 feet within jump pools which shall be located
607 downstream of any point entering, within, or exiting the fishway where fish are required to jump to
608 move upstream.
- 609 (f) All fishway locations through which fish must swim shall be at least 12 inches wide, **except vertical slot**
610 **width may be 6 inches where the Department has determined the artificial obstruction is required to**
611 **provide fish passage only for juvenile native migratory fish;**
- 612 (g) Fishway pools shall:
- 613 (A) Be sized according to the **applicable** native migratory fish and life history stages [~~requiring-~~
614 ~~passage-~~]and to avoid over-crowding;
- 615 (B) Have $V \geq wQH/4$ at all flows within the design streamflow range, where:
- 616 (i) "V" is the water volume in cubic feet;
- 617 (ii) "w" is 62.4, the unit weight of water, in pounds per cubic foot;
- 618 (iii) "Q" is the fish ladder flow in cubic feet per second;
- 619 (iv) "H" is the energy head of pool-to-pool flow in feet; and
- 620 (v) 4 has a unit of foot-pounds per second per cubic foot.
- 621 (C) Where the fishway bends 90 degrees or more, have turning pools with a flowpath centerline
622 double the length of non-turning pools; and
- 623 (D) Be placed at least every 25 feet of horizontal distance in baffled-chute fishways, including but
624 not limited to Alaska steeppasses and denils;
- 625 (h) The fishway exit should be located to minimize the risk of fish unintentionally falling downstream of the
626 artificial obstruction, **or into a water diversion;**
- 627 (i) Fishway trash racks shall:
- 628 (A) Allow for easy maintenance and debris removal;
- 629 (B) **Be maintained and cleaned as necessary to provide fish passage;**
- 630 **(C)** Have a minimum clear space between vertical members of **9]10** inches, except[
631 ~~(i) 10 inches shall be provided if adult chinook are present; and~~
632 ~~(ii) A]at least 4 inches shall be provided if only juveniles are present; and~~
- 633 **([C]D)** Have a minimum clear space between horizontal members of 12 inches;
- 634 (j) The fishway shall:
- 635 (A) Have water temperatures which are within 1 degree Fahrenheit of the water entering the
636 fishway;



- 637 (B) Be designed to assure that fish do not leap out of the fishway;
- 638 (C) Have all edges and fasteners which fish may contact ground smooth or chamfered;
- 639 (D) Not have protrusions extend into the flow path of the fishway;
- 640 (E) Have as much ambient lighting as possible;
- 641 (F) Have fishway components which are not detailed in OAR 635-412-0035(2), including but not
- 642 limited to auxiliary water systems, designed considering the most recent National Marine Fisheries
- 643 Service or U.S. Fish and Wildlife Service fish passage criteria and guidelines; ~~and~~
- 644 (G) Meet the species-specific requirements in OAR 635-412-0035(7) if any of those native
- 645 migratory fish require fish passage ~~and~~ **and**
- 646 **(H) Fishway flows shall be laminar and designed to minimize turbulence.**
- 647 (k) Requirements for specific types of fishways include:
- 648 (A) Baffled-chute fishways, including but not limited to Alaska steeppasses and denils, shall not be
- 649 used in areas where downstream passage will occur through the baffled-chute fishway; **and**
- 650 (B) All fishways of a specific type with accepted configurations shall comply with those
- 651 configurations; ~~and~~
- 652 ~~(C) Fish passage plans for stream channel spanning weirs, roughened channels (including but not~~
- 653 ~~limited to nature-like, rock, or engineered stream fishways), and hybrid fishways (including but not~~
- 654 ~~limited to pool and chute ladders) which may combine criteria elements of natural streams and/or~~
- 655 ~~established fishway types (including but not limited to pool and weir, vertical slot, and baffled-chute~~
- 656 ~~fishways) shall clearly demonstrate how water depths, water velocities, water drops, jump pools,~~
- 657 ~~structure sizing, and fish injury precautions shall provide fish passage].~~
- 658 **(l) Requirements for fishways which encompass the entire channel include:**
- 659 **(A) Roughened channels or nature-like fishway designs shall:**
- 660 **(i) Meet the requirements of OAR 635-412-0035(3)(a)(A);**
- 661 **(ii) Not have a slope that exceeds 6%; and**
- 662 **(iii) Shall contain partially buried over-sized boulder or boulder clusters to provide**
- 663 **structural integrity and areas of low water velocity.**
- 664 **(B) Stream channel-spanning weirs shall:**
- 665 **(i) Rise toward each bank from a low flow section centered along the thalweg of the**
- 666 **channel;**
- 667 **(ii) Have a downstream jump pool with a minimum depth of 2 feet;**
- 668 **(iii) Have a maximum difference in elevation of 6 inches between the lowest point on**
- 669 **the weir and the downstream pool's water surface control point;**
- 670 **(iv) Be sealed if fish passage during low flows is required;**
- 671 **(v) Be spaced at least 1 active channel width apart if there are multiple weirs;**
- 672 **(vi) Multiple boulder weirs shall be spaced at least 1.5 to 2.0 active channel widths**
- 673 **apart; and**



674 (vii) Shall extend into the streambank a sufficient distance to protect against
675 flanking;

676 (C) All fishway entrances or flow outlets shall be designed to provide passage or be
677 designed to only be used during a period(s) defined by the Department.

678 (D) Fish passage plans for hybrid fishways that may combine features of several
679 established fishway types shall have criteria established by the Department on a case-by-
680 case basis and shall clearly demonstrate how water depths, water velocities, water surface
681 jump height differentials or energy dissipation provides hydraulic conditions that achieves
682 fish passage;

683 ([f]m) For downstream fish passage:

684 [~~NOTE: Fish screening and bypass requirements for diverted water are separate from these requirements.~~]

685 (A) Fish passage structures shall have an open water surface, except a submerged or enclosed
686 conduit or orifice may be utilized if:

- 687 (i) Acceptable guidance or collection mechanisms are used and kept free from debris;
- 688 (ii) Water depth is greater than 4 inches during all flows;
- 689 (iii) Water velocity is greater than 2 feet per second during all flows;
- 690 (iv) Water is not pumped;
- 691 (v) Conduits have smooth surfaces and avoid rapid changes in direction to preclude fish
692 impact and injury; and
- 693 (vi) Conduits are at least 10 inches wide.

694 (B) Plunging flow moving past an artificial obstruction via spillways, outlet pipes, or some other
695 means which may contain fish shall:

- 696 (i) At all flows, fall into a receiving pool of sufficient depth, depending on impact velocity
697 and quantity of flow, to ensure that fish ~~[and flow]~~ shall not impact the stream bottom or
698 other solid features; and
- 699 (ii) Have a maximum impact velocity into a receiving pool, including vertical and horizontal
700 velocity components, less than 25 feet per second; and

701 (C) Water depth over spillways or other artificial obstructions shall be greater than 4 inches
702 during all flows.

703 **(D) Fish screening and bypass devices installed to protect downstream migrating fish**
704 **should be constructed to Department specifications and must meet Department criteria**
705 **when installation is required.**

706 (3) Requirements for fish passage at road-stream crossing structures such as bridges and culverts are:

707 (a) Stream Simulation Option (preferred design alternative) where:

708 (A) Open-bottomed and closed-bottom road-stream crossing structures shall have beds under or
709 within the structure that:



- 710 (i) Are equal to or greater than the active channel width **multiplied by 1.2 plus 2 feet**, as
- 711 measured at sufficient locations outside the influence of any artificial or unique channel
- 712 constrictions or tributaries both upstream and downstream of the site;
- 713 (ii) Are equal to the slope of, and at elevations continuous with, the surrounding long-
- 714 channel streambed profile, unless the Department approves maintaining a pre-existing
- 715 road-impounded wetland;
- 716 (iii) Have, for open-bottomed road-stream crossing structures, a minimum of 3 feet vertical
- 717 clearance from the active channel width elevation to the inside top of the structure;
- 718 (iv) Maintain average water depth and velocities that simulate those in the surrounding
- 719 stream channel; and
- 720 (v) Are composed of material that:
 - 721 (I) Assures the bed under or within the road-stream crossing structure is
 - 722 maintained through time;
 - 723 (II) Is either natural (similar size and composition as the surrounding stream) or
 - 724 supplemented to address site-specific needs including, but not limited to, bed
 - 725 retention and hydraulic shadow;
 - 726 (III) Contains partially-buried, over-sized rock~~[if the road-stream crossing structure~~
 - 727 ~~is greater than 40 feet in length]~~;
 - 728 (IV) Is mechanically placed during structure installation rather than allowed to
 - 729 naturally accumulate, unless the surrounding streambed is primarily bedrock;~~[-and]~~
 - 730 (V) Excluding partially-buried over-sized rock, is, for closed-bottom road-stream
 - 731 crossing structures, at a minimum depth of 20 percent of the structure height~~[-and~~
 - 732 ~~a maximum depth of 50 percent of the structure height]~~; ~~[-and]~~
 - 733 **(VI) Considers bed scour and stability of the bed material due to the confined**
 - 734 **flow through the crossing structure. Major components within the crossing**
 - 735 **structure should be designed for channel stability at the 100 year flood flow;**
 - 736 **and**
 - 737 **(VII) Contains a low flow thalweg.**

738 (B) Trash racks shall:

- 739 **(i) Allow for easy maintenance and debris removal;**
- 740 **(ii) Be maintained and cleaned as necessary to provide fish passage;**
- 741 **(iii) N[ot] extend below the active channel width elevation;**
- 742 **(iv) [and shall h]ave a minimum of [9]10 inches clear spacing between vertical members;**
- 743 **[er]and**
- 744 **(v) Have a minimum clear space between horizontal members of 12 inches.**

745 (C) Beaver exclusion devices shall:

- 746 **(i) Allow for easy maintenance and debris removal;**
- 747 **(ii) Be maintained and cleaned as necessary to provide fish passage;**



748 (iii) Have a minimum clear space between vertical and horizontal members of 6
749 inches when only resident trout, *Entosphenus* and *Lampetra* species (lamprey)
750 species are present;

751 (iv) Have a minimum clear space between vertical members of 9 inches, except:

752 (v) 10 inches shall be provided if adult chinook are present; and

753 (vi) Have a minimum clear space between horizontal members of 12 inches;

754 (D) Unvented and vented Ford crossings shall meet the requirements of OAR 635-412-
755 0035(2) and 635-412-0035(3)(b); and

756 NOTE: The Department may authorize construction of new fords in limited situations when
757 it is the least impacting water crossing option. The following are examples of situations
758 where the Department may authorize an unvented ford: (i) The stream has extreme seasonal
759 flow variations and low flows during anticipated ford use; (ii) The channel has low bank
760 height and low gradient approaches; (iii) The stream has dynamic flood plains, such as
761 alluvial fans; or (vi) The stream is subject to mass wasting events, debris transport, or
762 extreme peak flows.

763 (i) Be located outside of all known or suspected fish spawning areas such as pool tail-
764 outs;

765 (ii) Be constructed perpendicular to the stream flow;

766 (iii) Minimize the width (perpendicular to streamflow);

767 (iv) Maintain similar water depths and flow velocities as surrounding stream during the
768 design stream flows; and

769 (v) Have a low flow channel constructed within the crossing.

770 (E) Unvented ford crossings shall meet design criteria in 635-412-0035(3)(a) and be
771 constructed using materials approved by the Department that shall:

772 (i) Not be comprised of broken concrete, pavement or other debris;

773 (ii) Be comprised of clean washed gravel and rock;

774 (iii) Be countersunk and vertically align with the existing stream channel profile and
775 gradient;

776 (iv) Be designed to allow natural bedload transportation;

777 (v) Be designed to withstand overtopping flood events;

778 (vi) Be used during periods of no or low stream flow; and

779 (vii) Be regularly inspected and maintained to provide fish passage.

780 (b) Alternative Option: the Department may approve road-stream crossing structures for which clear
781 justification~~[is provided]~~, based on fish performance, ~~[and/or]~~ fish behavior data, and **proposed post**
782 **treatment** hydraulic conditions (e.g., water depths and water velocities)~~[-]~~ **is provided that**
783 **demonstrates** that the alternative design ~~[shall]~~provides fish passage.

784 (4) Requirements for fish passage at artificial obstructions in estuaries, and above which a stream is present, are:

785 (a) Fish passage shall be provided at all current and historic channels;



- 786 (b) Fish passage structures shall meet the criteria of OAR 635-412-0035(2) or (3), except fish passage
787 structures shall be sized according to the cumulative flows or active channel widths, respectively, of all
788 streams entering the estuary above the artificial obstruction; and
- 789 (c) Tide gates and associated fish passage structures shall:
- 790 **(A) Be a minimum of 4 feet wide unless the natural channel conditions are less than 4 feet wide;**
- 791 **(B) Consist of an aluminum tide gate door or other equivalent light weight material;**
- 792 **(C) Be a side hinged door configuration;**~~[and shall]~~
- 793 **(D) Meet the requirements of OAR 635-412-0035(2) or 635-412-0035(3)(b) within the design streamflow**
794 **range and for an average of at least 51% of tidal cycles, excluding periods when the channel is not**
795 **passable under natural conditions;**
- 796 **(i) Design streamflow range shall include tidal exchange, freshwater stream discharge and**
797 **water storage volumes draining to the tide gate;**
- 798 **(ii) Design streamflow range should consider sub-surface flows if appropriate at the project**
799 **location;**
- 800 **(E) Design invert elevation of tide gate and associated fish passage structure to be placed at 1 foot**
801 **(NAVD88) below Mean Low Low Water elevation or as otherwise appropriate for the site to prevent**
802 **perched low flow fish passage conditions and allow proper tide gate function;**
- 803 **(F) Consider the use of pet doors, mitigators, self-managed and self-regulating tide gate devices to**
804 **maximize fish passage, time of tide gate door openness, water exchange, and tidal inundation if the**
805 **tide gate is associated with high priority restoration habitat; and**
- 806 **(G) Submit a water management plan for projects implementing self-managed or self-regulating**
807 **devices.**
- 808 **NOTE: Alternative self-regulating design features that meet the design criteria of this section will be**
809 **considered for fish passage.**
- 810 (5) Requirements for fish passage at artificial obstructions in estuaries, floodplains, and wetlands, and above which
811 no stream is present, are:
- 812 (a) Downstream Fish Passage **shall be provided:**
- 813 (A) ~~[Downstream fish passage shall be provided a]~~After **any** inflow which ~~[may]~~contains **native**
814 migratory fish;
- 815 (B) ~~[Downstream fish passage shall be provided u]~~Until water has drained from the estuary,
816 floodplain, or wetland, or through the period determined by the Department ~~[which]~~**that** shall be
817 based on one, or ~~[a combination]~~**more** of, the following:
- 818 (i) A specific date;
- 819 (ii) Water temperature, as measured at a location or locations determined by the
820 Department;
- 821 (iii) Ground surface elevation;
- 822 (iv) Water surface elevation; ~~[and]~~or
- 823 (v) Some other reasonable measure~~[-];~~ **and**



- 824 (C) Egress delays may be approved by the Department based on expected inflow frequency [if-
825 ~~there is]~~**and** suitable habitat **exists** and as long as passage is provided by the time the conditions
826 in OAR 635-412-0035(5)(a)(B) occur;
- 827 (D) A minimum egress flow of 0.25 cubic feet per second (cfs) at one point of egress shall be
828 provided;
- 829 (E) Egress flow of 0.5 cfs per 10 surface acres, for at least the first 100 surface acres of impounded
830 water, shall be provided;
- 831 (F) All plunging egress flows shall meet the requirements of OAR 635-412-0035(2)(l)(B);
- 832 (G) If egress flow is provided by a pump, it shall be appropriately screened;
- 833 (H) The minimum water depth and width through or across the point of egress shall be 4 inches;
- 834 (I) The ground surface above the artificial obstruction shall be sloped toward the point(s) of egress
835 to eliminate isolated pools **and topographic conditions that may entrain native migratory fish**;
836 and
- 837 (J) An uninterrupted, open connection with a minimum water depth of 4 inches shall be present
838 from the point of egress to the downstream waters of this state, unless another connection is
839 provided as per OAR 635-412-0035(2)(l)(A).
- 840 (b) Upstream Fish Passage **shall be provided**: [~~a fishway or road-stream crossing structure with or without~~
841 ~~a tide gate shall be provided during the period determined by]~~
- 842 **(A) If** the Department [if] **determines** there is current or historic native migratory fish spawning or
843 rearing habitat within the estuary, floodplain, or wetland area impounded by the artificial
844 obstruction[-]; **and**
- 845 **(B) During the period determined by the Department.**
- 846 (6) Requirements for fish [~~passage]~~**collection and transport** at traps [~~are]~~**include**:
- 847 (a) A [~~collection-]~~**s** per **ORS 506.006(12), a permit** issued by the Department is required to **take fish when**
848 operat[e]ing [all]traps;
- 849 (b) Traps shall be constructed **and operated** to prevent physical or physiological injury to native migratory
850 fish;
- 851 (c) Traps shall meet all requirements of OAR 635-412-0035(2)(g);
- 852 (d) Traps located within a fishway (i.e., "in-ladder" traps) shall not inhibit native migratory fish from entering
853 the fishway or trap and shall be removed if the Department determines that fish are not entering the trap;
- 854 (e) **Traps should be constructed and operated so** [N]native migratory fish [~~shall be processed]~~**proceed**
855 through traps with minimal [~~possible]~~ delay and **removed from traps** as frequently as necessary to avoid
856 over-crowding;
- 857 (f) All native migratory fish, excluding those which have approved take authorization from the Department
858 and [~~which]~~**that** do not require fish passage as per OAR 635-412-0035(1)(a), shall be returned to the
859 stream by one of the following methods:
- 860 (A) Movement from the trap to immediately-adjacent water which has fish passage; or



- 861 (B) Transport within a watered container, including but not limited to lifts, hoppers, locks, and
862 trucks, from the trap to a location approved by the ~~[Commission]~~**Department**.
- 863 (7) Additional requirements for specific native migratory fish are:
- 864 (a) Acipenser species (sturgeon):
- 865 (A) The fish passage structure shall not require fish to jump when entering, within, or exiting the
866 structure;
- 867 (B) The fish passage structure, including trash racks, shall be sized to accommodate the largest
868 individual expected to require fish passage;~~[-and]~~
- 869 (C) Non-volitional transport within a watered container shall be allowed with Department
870 approval~~[-];~~ **and**
- 871 **(D) Turning pools within the fish passage structure must be designed to allow for fish**
872 **passage of a native migratory species at least 2 body lengths of the largest individual native**
873 **migratory species currently or historically in the waters affected by the artificial obstruction.**
- 874 (b) *Catostomus* and *Chasmistes* species (suckers):
- 875 (A) The fish passage structure shall not require fish to jump when entering, within, or exiting the
876 structure;
- 877 (B) Fishways shall have a maximum water velocity of 4 feet per second;
- 878 (C) Fishways shall have a minimum water depth of 12 inches;
- 879 (D) Fishways shall maximize downstream flow between pools to avoid back eddies;
- 880 (E) Fishways shall have curved walls within turning pools; and
- 881 (F) Fishways shall have a slope less than 4 percent.
- 882 (c) **Entosphenus and Lampetra** species (lamprey):
- 883 (A) Fishways shall ~~[not have overhanging surfaces;~~
- 884 ~~(B) Fishways shall]~~ **have 4 to 6 inch smooth rounded [or chamfered]radii edge surfaces (floors,**
885 **walls, and weir crests)** over which **Entosphenus and [Lampetra]Lampetra** species may pass;
- 886 **(B) Fishways shall have no water surface to water surface jumps or overhanging surfaces**
887 **unless fishway surfaces have a 4 to 6 inch smooth rounded radii (floors, walls and weir**
888 **crests) over which Entosphenus and Lampetra species may pass;**
- 889 (C) Fishways shall, in locations with water velocities greater than 2 feet per second, have a
890 passage route that:
- 891 (i) Has a smooth, **continuous,** impermeable, uninterrupted surface or a simulated
892 streambed;
- 893 (ii) Has water velocities over the structure's surface less than 8 feet per second; and
- 894 (iii) Is wetted~~[-];~~
- 895 **(D) Denil fishways shall not be used unless an alternative passage route is provided;**
896 **(E) Traps, picketed leads, picket weirs, auxiliary water supply grating or any other fishway**
897 **grating shall have a spacing of less than 0.7 inches to preclude lamprey passage, or greater**
898 **than 1.0 inch to allow lamprey to pass through;**



899 (F) Fishway wall diffusers for auxiliary water supply shall be located at least 6 inches above
900 finish floor of fishway pool;

901 (G) Auxiliary water floor diffusers shall be located to provide at least 12 inches width of
902 continuous smooth floor passage route along fishway floor;

903 (H) Fishway designs shall consider orifice flow if *Entosphenus* or *Lampetra* species are
904 present.

905 (I) Orifices shall be positioned flush with the fishway floor and flush along one fishway wall;
906 and

907 (J) Lamprey Passage Structures (Lamprey Ramps) shall be considered when retroffing
908 existing artificial obstructions to improve conditions for upstream migration of
909 *Entosphenus* and *Lampetra* species.

910 (d) Oncorhynchus species (trout and salmon): fish passage structures for *Oncorhynchus keta* (chum) shall
911 not require fish to jump when entering, within, or exiting the structure.

912 (e) *Ptychocheilus* species (pikeminnow): fish passage structures shall meet the requirements of OAR 635-
913 412-0035(7)(a).

914 (f) If more than one native migratory fish species requires passage at a site and the requirements for the
915 different species are mutually exclusive, the Department shall determine **the required** passage criteria.

916 (8) Requirements for artificial obstruction removal are:

917 (a) Artificial obstruction removals shall follow the requirements of OAR 635-412-0035(10);

918 (b) If not completely removed, no parts of the remaining artificial obstruction shall:

919 (A) Constrict the stream channel; or

920 (B) Cause low flow depths less than the surrounding stream channel.

921 (c) After an artificial obstruction is removed the stream channel shall be restored; and

922 (d) The stream channel restoration shall address impacts to stream habitat caused by the artificial
923 obstruction while in place and by its removal, including but not limited to upstream and downstream
924 channel degradation, and provisions shall be made to address unexpected fish passage issues resulting
925 from removal.

926 (9) Requirements for exclusion barriers are:

927 (a) **When fish passage is not required or is provided by other means,** [E]exclusion barriers shall only
928 be placed in the following situations[~~-, when fish passage is not required or is provided by other means~~]:

929 (A) To guide fish to an approved fish passage structure or trap;

930 (B) To prevent fish from leaving waters of this state and entering human-made water supply
931 conduits;

932 (C) To prevent fish from entering waters of this state associated with operations of another artificial
933 obstruction that could lead to fish injury; or

934 (D) To achieve other fish management objectives approved in writing by the Department; and

935 (b) Exclusion barriers shall comply with National Marine Fisheries Service or U.S. Fish and Wildlife Service
936 criteria.



- 937 (10) Requirements for fish passage during construction of fish passage structures and periods when temporary
938 artificial obstructions are in place are:
- 939 (a) All fish passage structures shall be constructed and temporary artificial obstructions shall be in place
940 only during the **Department approved** site-specific in-water work period~~[defined or approved by the~~
941 ~~Department]~~;
- 942 (b) At times indicated by the Department as per OAR 635-412-0035(1)(a), downstream fish passage shall
943 be provided and:
- 944 (A) The outfall of a stream flow bypass system shall be placed to provide safe reentry of fish into
945 the stream channel; and
- 946 (B) If downstream fish passage during construction is not required and stream flow is pumped
947 around the site, the site shall meet Department screening ~~[and]~~or bypass requirements.
- 948 (c) At times indicated by the Department as per OAR 635-412-0035(1)(a), upstream fish passage shall be
949 provided and shall be based on the wetted-width or flows of the stream during the period of construction or
950 temporary obstruction;
- 951 (d) In-stream construction sites shall be isolated from stream flow and fish;
- 952 (e) Prior to in-stream construction activities, all fish shall be safely collected, removed from the construction
953 site or de-watered reach, and placed in the flowing stream **outside of the areas of project impacts** by an
954 authorized person with an ~~[collection permit]~~**ODFW Fish Rescue Salvage Authorization** issued by **and**
955 **following the guidance of** the Department; and
- 956 (f) After construction, the construction site shall be re-watered **slowly and** in a **controlled** manner to
957 prevent loss of downstream surface water as the construction site's streambed absorbs water.
- 958 (11) Requirements for experimental fish passage structures are:
- 959 (a) Experimental fish passage structures shall only be allowed in waters of th~~e~~**is** state after:
- 960 (A) Laboratory testing with native migratory fish or similar species indicates that the structure ~~[is~~
961 ~~feasible to]~~provides fish passage;
- 962 (B) Field testing with a prototype structure, at a location where existing fish passage will not be
963 compromised and where fish passage does not need to be addressed under OAR 635-412-0020(2)
964 and (3), indicates that the structure ~~[is likely to]~~**will** provide fish passage; and
- 965 (C) In addition to information needed to evaluate the structure's design for the specific location, the
966 following are submitted to **and approved by** the Department~~[-and approved]~~:
- 967 (i) A written summary of the laboratory and field testing and how the results indicate that
968 fish passage shall be provided;
- 969 (ii) A monitoring and reporting plan to determine if the installed experimental fish passage
970 structure meets applicable design objectives and is providing fish passage; and
- 971 (iii) A modification plan for the experimental fish passage structure if monitoring indicates
972 that fish passage is not being provided, including standard thresholds that **once met** will
973 **require owner or operator to** initiate these modifications.



974 (b) If at any time an experimental fish passage structure is deemed by the Department in writing to not
975 provide fish passage, the owner or operator, in consultation with the Department, shall make such
976 modifications to the structure or operation as are necessary to provide fish passage, and, after a
977 reasonable period, if modifications are deemed by the Department in writing to not provide fish passage, a
978 fish passage structure that meets the standard criteria of OAR 635-412-0035 shall be installed as soon as
979 practicable but no later than the end of the next complete in-water work period after notification by the
980 Department, **unless the Department determines additional time is necessary;**

981 (c) The owner or operator of an experimental fish passage structure shall allow the Department to inspect
982 experimental fish passage structures at reasonable times;

983 (d) Five years after the experimental fish passage structure is installed and fish are present to attempt
984 passage a final monitoring report shall be submitted to the Department and the Department shall determine
985 if the experimental fish passage structure provides fish passage; **and**

986 ~~[(e) If the Department determines that the experimental fish passage structure does not provide fish-~~
987 ~~passage, a fish passage structure that meets the standard criteria of OAR 635-412-0035 shall be installed-~~
988 ~~as soon as practicable but no later than the end of the next complete in-water work period after notification-~~
989 ~~by the Department; and~~

990 ~~(f) After three experimental fish passage structures of the same design concept are placed in waters of the~~
991 ~~state and deemed to provide fish passage by the Department, the experimental fish passage structure shall~~
992 ~~no longer be considered experimental.]~~

993 **(e) The Department may consider a fish passage structure to no longer constitute an experimental**
994 **fish passage structure after the Department finds three such structures of the same design concept**
995 **placed in waters of the state effectively provide fish passage.**

996 Statutory/Other Authority: ORS 496.138

997 Statutes/Other Implemented: ORS 509.585 & 509.610

998 History:

999 DFW 2-2006, f. & cert. ef. 1-9-06

1000

1001 **635-412-0040**

1002 **Mitigation Criteria**

1003 (1) Mitigation shall not be allowed for artificial obstructions located in, or which would prevent access to, "Habitat
1004 Category 1" habitat for native migratory fish as described in OAR 635-415-0025(1).

1005 (2) Mitigation options include:

1006 (a) Providing fish passage at another pre-existing artificial obstruction which is not required to address fish
1007 passage under OAR 635-412-0015 or 635-412-0020;

1008 (b) Restoration or enhancement of native migratory fish habitat;

1009 (c) ~~[Fish management measures to d]~~Directly increase naturally-product~~ing~~~~ed~~~~[, wild,]~~ native migratory fish
1010 populations, **especially sensitive or state or federally listed species through implementation of fish**

1011 **management measures;** and



- 1012 (d) **Implementation of** [Q] other actions specifically approved by the Commission.
- 1013 (3) Mitigation shall not include any activity that is a requirement or condition of any other agreement, law, permit, or
1014 authorization except if it is also for fish passage mitigation of the same action at the artificial obstruction for a
1015 different level of government.
- 1016 (4) Unless a fish passage waiver for a site has already been obtained and mitigation has been provided, mitigation
1017 activities shall not be completed prior to a decision regarding a fish passage waiver.
- 1018 (5) The Department shall approve final mitigation **plans, including** designs **as applicable**, in writing prior to
1019 implementation.
- 1020 NOTE: Mitigation actions or concepts, absent specific designs, can be approved at the time a waiver decision is
1021 made.
- 1022 (6) Mitigation actions that provide fish passage shall meet the fish passage criteria contained in OAR 635-412-
1023 0035.
- 1024 (7) The Commission may require the posting of a bond or other financial instrument acceptable to the Commission
1025 to cover the cost of mitigation actions or providing fish passage at the artificial obstruction if **implementation of the**
1026 mitigation action **or providing fish passage** does not achieve its goals.
- 1027 (8) A person owning or operating an artificial obstruction is responsible for maintaining, monitoring, evaluating the
1028 effectiveness of, and reporting on mitigation.
- 1029 (9) Mitigation:
- 1030 (a) Shall be conducted in-proximity to the artificial obstruction, with respect to geographic scope;
- 1031 (b) Shall have habitat type and quality which is more beneficial than that affected by the artificial
1032 obstruction, if mitigation is passage into, restoration of, or enhancement of habitat;
- 1033 (c) Shall at least benefit the same native migratory fish species affected at the artificial obstruction;
- 1034 (d) Shall have a clear benefit for those native migratory fish species affected at the artificial obstruction if
1035 their status is listed as "threatened" or "endangered" under the state or federal Endangered Species Act;
- 1036 (e) Shall have standards for monitoring[, and evaluating, and **include** adaptive management~~[-which~~
1037 ~~are]~~approved by the Department, ~~[which]~~**that** assure that the goal of the mitigation is achieved and
1038 maintained, and which are detailed in the ~~[waiver]~~agreement required in OAR 635-412-0025(9);
- 1039 (f) Shall be considered if the owner or operator of the artificial obstruction believes the feasibility of fish
1040 passage at the artificial obstruction is less than that for mitigation;
- 1041 (g) May require quantification of baseline conditions before a decision regarding a fish passage waiver is
1042 made in situations with no existing information, which require recent **or updated** information, or **situations**
1043 which have no clear benefit **to native migratory fish species**;
- 1044 (h) Shall attempt to restore or enhance historic conditions;
- 1045 (i) To the extent possible, shall be consistent with existing native migratory fish or watershed management
1046 plans;
- 1047 (j) May qualify for financial incentives or grants issued by the Department~~[-and the owner's or operator's-~~
1048 ~~cost for mitigation or passage at the artificial obstruction shall not be a factor in the Department's net-~~
1049 ~~benefit determination]. **The Department will not factor into its written benefit analysis the owner's or**~~



1050 **operator's cost for mitigation or fish passage at an artificial obstruction, nor any financial**
1051 **incentives or grants issued by the Department;**
1052 (k) May require data collection and evaluation, **as directed by the Department, by the owner or operator**
1053 before a decision regarding a fish passage waiver is made in situations with no existing information, which
1054 require recent information, or which have no clear benefit;[~~and~~]
1055 **(l) Shall consider the extent to which the proposed mitigation is likely to occur independent of a fish**
1056 **passage waiver;**
1057 **(m) Shall consider actions that anticipate the expected effects of climate change, which include**
1058 **effects to streamflows, water temperatures and the importance of protecting and restoring habitat**
1059 **for native migratory fish; and**
1060 (~~l~~n) Shall be consistent with the purpose and goals of the Oregon Plan.
1061 Statutory/Other Authority: ORS 496.138
1062 Statutes/Other Implemented: ORS 509.580, 509.585 & 509.610
1063 History:
1064 DFW 2-2006, f. & cert. ef. 1-9-06