



Submitted via email to Greg Apke and Kregg Smith @ ODFW 5-7-21

The Board of the Deschutes Redbands Chapter of Trout Unlimited appreciates this opportunity to participate in the process the Oregon Department of Fish and Wildlife (ODFW) is undertaking regarding revisions to its Oregon Administrative Rule (OAR) pertaining to Fish Passage (OAR 635-412-005 through OAR 635-412-0040). We will follow the comment format established by ODFW and hope that these comments are useful:

Overall Comment

The phrase “artificial obstruction” (*impedes or prevents passage*) is used throughout the OAR. However, its definition in the rules clearly describes an artificial barrier (*prevents movement or access*). The phrase throughout the OAR should be changed to artificial barrier.

What Rules Should be Revised (include specific line numbers)

Lines 6-8: definition of artificial obstruction

Lines 22-23: excavation or replacement of 30% structure volume of dam

Lines 95-96: change in permit status

Lines 109-111: definition of native migratory fish

Line 253-257: 60% funding provision by the Department

Lines 320-324: net benefit analysis

Lines 678-684: mitigation options

Line 682 (*more of a question*): single use of the term “wild” throughout OAR

Lines 698-699: reporting on mitigation

Why Changes are Important

Lines 6-8: The use of the term “precludes” (meaning = prevent from happening) is redundant and confusing. If the intention is to include some qualifying language short of “prevents” then that should be more clearly stated, otherwise the term “precludes” can be deleted. Also see the above overall comment.

Lines 22-23: There is general consensus among involved conservation groups in the Bend area that this provision was not properly applied in the case of the major rehabilitation work done on the Mirror Pond dam. The 30% factor specified in OAR was reached at Mirror Pond but fish passage requirements were not triggered. This indicates a lack of clarity in the current language with specific reference to the phrase “by structure volume” which is pivotal in applying this rule. Structure volume should be defined and included in the definitions section of the OAR.

The phrase “structure volume” is not readily found in a search of terms related to dam engineering. The closest was provided by Stanford University in their National Performance of Dams Program where *“the volume of a dam is the total space occupied by the materials forming the dam structure computed between abutments and from the top to the bottom of the dam. No deduction is made for small openings such as galleries, adits, and operating chambers within the dam structure. Portions of powerhouses, locks, spillways etc. may be included only if they are necessary for the structural stability of the dam.”* This may not be the best definition for “structure volume” but highlights the need that something more specific be included in the OAR to better define the context of the 30% factor.

Lines 95-96: The definition for “fundamental change in permit status” should be broadened to include a provision allowing some form of after-the-fact review of prior decisions regarding actions or nonactions taken by the Department. Again, citing the situation at Mirror Pond, it is necessary to have a remedy for prior decisions/nondecisions affecting fish passage where information pertaining to the 30% trigger and structure volume was either not available, inaccurate or misapplied in reaching a decision on fish passage status.

Lines 109-111: The OAR defines “native migratory fish” by including a reference to a related OAR 635-007-0501 which defines “native fish as meaning indigenous to Oregon, not introduced. This includes both naturally produced and hatchery produced fish.” This indicates that hatchery stock produced from fish native to Oregon are included in the “native migratory fish” definition. This is an important component that should be clearly stated in the definition, not simply referenced.

Line 253 - 257: This OAR is in the context of the Department arranging at least 60% funding for the design, construction and installation of fish passage at an owner or operator’s artificial obstruction. The owner/operator then has two years to either get the fish passage installed OR “provide mitigation that the Commission determines is a net benefit to native migratory fish”. Question: why would the Department go to the time and effort of negotiating a 60% funding arrangement with the owner/operator to install fish passage yet still leave the mitigation option on the table?

Lines 320-324: The determination of “net benefit to native migratory fish” is a static or single moment in time evaluation under the current OAR. In lines 323 and 324 the OAR reads, “The net benefit to fish determination shall be based upon conditions that exist at the time of comparison”. This provides no ability to adjust the net benefit determination in the future once monitoring data is available to validate the original comparison. The OAR should include some flexibility to review the net benefit analysis down the road when, based on actual monitoring of mitigation strategies, there is hard data to evaluate the accuracy of the original comparison.

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

Line 682: This section contains the single reference in the entire fish passage OAR to “wild” fish. This is in the context of mitigation criteria which include “fish management measures to directly increase naturally producing wild, native migratory fish populations”. This is really a question about rulemaking intent and whether this is meant to expand acceptable mitigation measures to include BOTH wild fish (e.g. brown trout, brook trout) that reproduce naturally and native migratory fish as named in lines 113 – 144.

Lines 698-699: The OAR states that the person owning or operating an artificial obstruction shall report on the maintenance, monitoring and evaluation of mitigation. This appears to allow a fairly wide-open reporting format. Most important, there is no mention of reporting frequency or the ability for public review of these monitoring reports. These provisions should be added to the OAR.

Suggested Rule Changes (include specific line numbers)

Line 7: ...human-made device, placed in the waters of this state that ~~precludes or~~ prevents the migration of native migratory...

Lines 22-23: Note: to add some clarity for this section, a definition should be added after the current line 161. This suggested language is offered as a starting point, there may be a better definition available:

“Structure volume” means the volume of a dam as the total space occupied by the materials forming the dam structure computed between abutments and from the top to the bottom of the dam. No deduction is made for small openings such as galleries, adits, and operating chambers within the dam structure. Portions of powerhouses, locks, spillways etc. may be included only if they are necessary for the structural stability of the dam.

Lines 95-96: ...construction or abandonment of an artificial obstruction. This provision for change in permit status shall include conditions where it is determined that the original decision, including opting not to take action, may be subsequently reviewed by the Department where findings of fact materially affecting that action/inaction decision, were either unavailable, inaccurate or misapplied.

Lines 109-111: “Native migratory fish” means native fish as defined under OAR 635-007-0501 to be fish indigenous to Oregon, not introduced. This includes both naturally produced and hatchery produced fish that migrate for their life cycle needs.

Line 257: ~~b) Provide mitigation that the Commission determines is a net benefit to native migratory fish.~~

Lines 323-324: The net benefit to fish determination shall initially be based upon conditions that exist at the time of comparison. Provided that, if future field monitoring data regarding the efficacy of the implemented mitigation strategies shows the net benefit analysis to be obsolete, then the Department will initiate a review and update of the original analysis based on this current data.

Line 683: Establishment of a conservation fund by the owner or operator dedicated to mitigating the impacts of the artificial obstruction on native migratory fish habitat or other actions determined to provide benefit to native migratory fish in the area affected by the artificial obstruction. This fund shall provide money to support the agreed upon mitigation actions to be taken by the designated conservation group as established in a written conservation plan executed among the owner/operator, Department and conservation group.

Lines 698-699: (8) A person owning or operating an artificial obstruction is responsible for maintaining, monitoring, ~~and~~ evaluating the effectiveness of mitigation measures and reporting on completed and planned mitigation actions. These reports shall be submitted to the Department on an annual basis and be made available to the public.

Sincerely,

A handwritten signature in blue ink, appearing to read "Shaun Pigott". The signature is fluid and cursive, with the first name "Shaun" written in a larger, more prominent script than the last name "Pigott".

Shaun Pigott, President
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