



May 7, 2021

Greg Apke
ODFW Fish Passage Program Coordinator
greg.d.apke@state.or.us

Re: Fish Passage Rule Revisions

Dear Mr. Apke,

Trout Unlimited (TU) appreciates the opportunity to provide comments on the Fish Passage Administrative Rule Revision process. TU has structured our comments to mirror the public comment form by identifying rules recommended for revision, the rationale for the proposed revision and suggested rule change language.

(1) Definition of “Appreciable Benefit”: Does not currently exist but could be included in OAR 635-412-005: Line 6

TU proposes that a definition be included for the term “appreciable benefit.” We assume that the inclusion of “appreciable” was intended to facilitate exemption of fish passage requirements for projects that would have a de minimus biological effect on native migratory fish. However, the fish passage statutes require fish passage where native migratory fish were “historically present” in addition to where they are currently present. Accordingly, to ensure consistency with the statutory directives, TU recommends that the definition consider fish passage benefit in the context of other reasonably foreseeable future conditions and projects. In many systems, there are multiple fish passage barriers and a project should not be approved without fish passage obligations solely because other barriers are present especially if it is reasonably foreseeable that the other barriers will also be addressed in the future.

Proposed Definition: “Appreciable benefit” means “meaningful biological benefit to native migratory fish based on present or reasonably foreseeable future conditions.”

(2) Definition of Artificial Obstruction: OAR 635-412-0005 (3): Lines 6-8

TU understands that the artificial obstruction definition is contained in statute. However, we recommend that the definition be modified to clarify that it includes human-made devices/structures/operations that constitute physical barriers (dams, diversions, culverts, levees etc.) or contribute to environmental barriers (poor water quality, temperature, excess sediment, low flow). There are many different scenarios that can produce conditions that impede movement of fish (increased sediment that changes the habitat such that it becomes impassable, change in temperature conditions that prevent movement of fish, change in flow velocity, volume or quality that can prevent movement of fish).

Proposed Definition: "Artificial obstruction" means "any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert, or other human-made device, placed in the waters of this state that precludes or prevents the migration of native migratory fish by physical means or by contributing to poor water quality, flow, or habitat conditions that are significant enough to impede or delay fish movement."

(3) Definition of "Native Migratory Fish": OAR 635-412-0005 (32): Line 109

The regulations define "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.

TU recommends the following definition: "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."

(4) Definition of "Construction" and "Major Replacement": OAR 635-412-0005 (9): Lines 21-23/36-38

In reviewing the legislative history, it is clear that the goal of the fish passage statute was to ensure that fish passage was secured on all new *and existing* structures. However, it was acknowledged that this was significantly more challenging to do in the context of existing structures given the amount of investment it might take. Accordingly, the concept of "triggers" was established to ensure that owners/operators would take fish passage costs into account as part of a larger project/expenditure but not for minor maintenance. Unfortunately, the structure of the existing rule has created a system that upends this goal by allowing project owner/operators to avoid fish passage obligations by breaking up investments such that the trigger amounts are never exceeded but are cumulatively considerable over time. This is contrary to the goals of the statute.

Accordingly, we recommend that the trigger definition be modified to clarify that a "major replacement" occurs when a cumulative threshold of 30 percent is reached for all obstruction types, including dams. Additionally, we recommend that "major replacement" be defined by "percent of dam volume or by professional judgment of ODFW." This would help address circumstances where significant repairs occur that effectively replace a dam but result in only minor changes to volume. Defining what constitutes "structure volume" could also help address this point.

TU recommends the following definition: "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."

(5) Fish Passage Waiver and Exemptions Review (OAR 635-412-0025(6))

635-412-0025(6):

The fish passage statutes contemplate that the Commission will periodically review (*at least* once every seven years) fish passage exemptions to determine if changed circumstances support a change to exemption status. Outside stakeholders, organizations and individuals are often in a position to understand changed conditions and circumstances in specific geographies. Accordingly, it makes sense for the rules to delineate a more formal process whereby such stakeholders can bring this information to the Commission to be utilized in reviewing the continued applicability of specific exemptions and waivers.

Proposed 635-412-0025(6)(a) new subsection: Line 341: “Any private citizen, organization or government agency may submit a petition to the Commission requesting a review of an existing fish passage exemption or waiver due to changed circumstances. Within 60 days of receipt of the petition, the Commission shall direct the Department and/or the Task Force to review the information in the petition and any other relevant information to make a recommendation to the Commission regarding whether the exemption or waiver should continue. The Commission may revoke or amend an exemption or waiver, if it finds that circumstances have changed such that the basis for the exemption or waiver no longer applies.”

(6) Mitigation Criteria: OAR 635-412-0040

Line 710: 635-412-0040(9)(f)

Recommend deletion of this line or clarification. Consideration and approval of a mitigation package is based on whether a net benefit to species can be secured not whether a dam owner or operator believes it is more feasible. If such language is retained, it should be clarified to more closely match the statute which allows the consideration of “equitable factors” (ORS 509.585(5)) when negotiating the terms and conditions of fish passage or alternatives. Any information regarding feasibility that is considered as part of this discussion should be required to be from an objective, verifiable source.

Line 712: 635-412-0040(9)(g)

This section seems to narrow the circumstances where the Commission/Department may require additional information to support a net benefit determination. TU recommends clarification that explicitly allows ODFW/Commission to require compilation of existing information or gathering of new information required to make a net benefit determination. Additionally, TU recommends that quantification of baseline conditions be required to inform a net benefit determination. This information is necessary to facilitate a determination that an “increase” of native migratory fish is likely to occur with the proposed mitigation.

Lines 678-684: Mitigation Fund

TU recommends that the mitigation options include a provision for on-going monetary support that is linked to meeting quantitative goals that are biologically likely to lead to an increased number of native migratory fish in the affected watershed.

TU recommends the following language: “Establishment of a conservation fund by the owner or operator or contribution to an existing conservation fund in an amount sufficient to implement mitigation actions likely to lead to an increased number of native migratory fish in the affected watershed as determined by the Department. Mitigation in the form of a fund contribution should include a commitment of a fixed portion of annual hydropower revenue and should clearly articulate guidelines for how money will be distributed, pursuant to what method and how effectiveness will be assessed. All mitigation measures that are implemented with money from the fund should include quantifiable metrics and effectiveness monitoring to demonstrate how such actions are likely to lead to an increased number of native migratory fish in the affected area. Quantifiable metrics should be S.M.A.R.T. (Specific, Measurable, Achievable, Relevant, and Timebound).”

Lines 698-699: Annual Reporting

The OAR states that the person owning or operating an artificial obstruction shall report on the maintenance, monitoring and evaluation of mitigation. Reporting frequency and public access to the reports is not addressed. These provisions should be added to the OAR.

TU recommends the following language. “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.”

Line 721: Addition of Language regarding other mitigation obligations

Add a subsection to subsection (9): "Shall take into account the extent to which the proposed mitigation is likely to occur independent of a fish passage waiver." Such a provision ensures that mitigation implemented is truly additive and that fish passage at a site is not waived without ensuring an actual long-term positive effect for native migratory fish.

Line 721: Addition of Language regarding climate change

When undertaking a net benefit determination and considering the adequacy of mitigation proposals, the Department should consider climate change implications including anticipated future hydrologic and water quality conditions.

Add a subsection to subsection (9): “Shall take into account the State’s climate change goals and the best available information on predicted future conditions under climate change conditions when assessing whether mitigation will provide a net benefit to native migratory fish.”

Thank you for the opportunity to provide comments on the Fish Passage Rule Revision process. TU looks forward to continued discussions on this topic.



Chrysten Lambert

Oregon Director