

Fish Passage Waivers and Exemptions Section (sorted by line 6-3-2021)

204 na ODOT "635-412-0025, Line 315" 315 "Opportunity for Payment in lieu of providing mitigation for emergency culvert repairs. May be appropriate to allow for this type of program in OARs, with details laid out in agreement outside of OARs:

In the case of culvert emergencies, is there an opportunity to set up and allow for financial compensation in lieu of mitigation project implementation conducted by trigger owner?
Request department consideration of compensation opportunity on small systems where off site mitigation could be delivered by restoration practitioners, resulting in a benefit to NMF.
Potential sideboards:

- Small streams with limited habitat: (< 1 mile of usable habitat, non-ESA listed, moderate or poor habitat quality, etc)
- State sourced funds could be used similar to CRPA compensation fund, where high priority fish passage projects are delivered off the ODOT network.
- Higher priority and more beneficial projects are delivered compared to an applicant shopping for an off-site project that barely meets an NBA.
- Removes time commitment issues to address passage as a result of trigger action. Current timelines difficult to meet due to funding cycles, federal reimbursement, other.
- Could be combined or run similar to existing ODFW CRPA compensation fund / RFP process
- Could be set up as another option to providing mitigation, and not a requirement. Barrier operators could still choose to address passage in other ways (i.e provide passage, implement off-site mitigation through waiver, etc).
- Would need emergency declaration to qualify
- Payment based on simple, transparent habitat calculation similar to 2019 prioritization process. (Cannot be heavily data reliant similar to challenges with North Coast Mitigation bank)
- Same OWRD Basin... simple tracking process to keep funding and mitigation projects in same basin / species"

201 na ODOT "635-412-0025, Line 316" 316 "ODOT supports ODFW District level, or other streamlined process, for straightforward exemptions. Exemptions that are not straightforward should be brought to Task Force for review under current process."

202 na ODOT "635-412-0025, Line 320" 320 ""Net benefit to native migratory fish is determined by comparing the benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur using the proposed mitigation. To qualify for a waiver of the requirement to install fish passage, mitigation shall result in a benefit to fish greater than that provided by the artificial obstruction with fish passage. The net benefit to fish determination shall be based upon conditions that exist at the time of comparison." This statement, or elsewhere in this section, does not address proposed structures that are in poor or critical in structural condition. In the past, the department has interpreted current rules and determined structures in poor or critical condition are not eligible as mitigation opportunities based on condition. Many structures are in poor or critical condition, but do not have plans to address in the near term. More clarity or additional language in this section of the OARs can help applicants that may be proposing mitigation on structures in poor condition."

203 na ODOT "635-412-0025, Line 320:" 320 Include reasons why mitigation needs to have a greater benefit than providing on-site passage. Especially since waivers can be temporary.

136 na Deschutes TU Lines 320-324: net benefit analysis 320 "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 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."

158 na PacifiCorp Fish Passage Waivers and Exemptions (-0025 (2)); Lines 320-324 320 "A discussion of the relative value of anadromous species benefits versus resident species benefits should be provided here or elsewhere.

This analysis needs to consider all benefits to fish from the proposed action including water quality, water quantity, habitat, predator reduction, denial of passing non-native species, etc.

For example, adding generation to an existing dam and thereby increasing DO downstream of the dam should be a counted as benefit to fish. The net benefit analysis should consider both current and future (climate change) conditions."

42 48 Portland PacifiCorp 635-412- 320 "PacifiCorp owns over 3,000 megawatts of renewable energy generating facilities, including several hydroelectric projects on waters of the state of Oregon inhabited by native migratory fish. The company is also expanding its renewable generation portfolio to address climate change impacts and ultimately achieve net zero greenhouse gas emissions in service of over 2 million customers across six western states. Therefore, PacifiCorp hereby expresses its support and interest in Oregon Department of Fish and Wildlife (ODFW)'s current review and revision of the fish passage administrative rules (Oregon Administrative Rules (OAR) 635-412-) as motivated, in part, by ODFW's new Climate and Ocean Change Policy (OAR 635-900-). Addressing climate change will require prudent, near-term actions to support ODFW's mission to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations. PacifiCorp supports science-based decision-making regarding fish passage in Oregon for the purposes of achieving recovering and sustainable populations of native migratory fish. PacifiCorp also notes that hydropower has a significant role to play in moving towards carbon-neutral operations in Oregon and ameliorating the causes and effects of climate change. Therefore, the climate change benefits of hydroelectricity should be considered in net benefit analyses of fish passage at hydropower facilities. PacifiCorp has gained experience implementing fish passage solutions at our federally-licensed hydroelectric projects, and we have learned that site-specific information on current and, to the extent possible, future conditions must be considered in implementation of the administrative rules to maximize long-term net benefits to native migratory fish. In certain cases, biological research has concluded that there may be little value to local fish populations in light of the expense of constructing, operating, and maintaining fish passage at an artificial obstruction. Off-site mitigation projects with lower costs than implementing fish passage at an artificial obstruction can provide a greater net benefit to at-risk fish populations, including some that may not be present at the site. The revised administrative rules should clarify that it is the intent of the state to achieve the highest net benefit to fish populations when considering the impacts of an artificial obstruction and any proposed mitigation measures. " "Fish Passage Waivers and Exemptions (-0025 (2)); Lines 320-324 A discussion of the relative value of anadromous species benefits versus resident species benefits should be provided here or elsewhere. This analysis needs to consider all benefits to fish from the proposed action including water quality, water quantity, habitat, predator reduction, denial of passing non-native species, etc. For example, adding generation to an existing dam and thereby increasing DO downstream of the dam should be a counted as benefit to fish. The net benefit analysis should consider both current and future (climate change) conditions. " 2021-05-04 14:06:40

126 na Rogers TU Lines 322-324: Net benefit analysis. 322 Line 322: The net benefit should be validated by quantifiable measures. Line 324: Allow for reevaluation of a waiver if data indicates that it has not provided the declared net benefit. "Line 322: proposed mitigation. To validate the net benefit of a mitigation proposal, quantifiable measures will be established for each project prior to the final waiver decision. The measures will be applied, as required by the waiver decision, to fulfill the operator's monitoring requirement for each mitigation project. The results will be reported to the Department as required by regulation.

Line 324: determination shall be based upon conditions that exist at the time of comparison. If it is established through post construction monitoring that the mitigation project has not met the net benefit monitoring specifications required in the waiver decision, the waiver may be reviewed for possible revision or revocation."

66 72 Portland Fish Passage Waivers and Exemptions (-0025 (2)); Lines 323-327 323 here is an opportunity to clarify the benefits of the OARs to anadromous versus resident species and should also look forward to future conditions anticipated as a result of climate change -- these may vary depending on the watershed. "Fish Passage Waivers and Exemptions (-0025 (2)); Lines 323-327 To qualify for a waiver of the requirement to install fish passage, mitigation shall result in a benefit to fish greater than that provided by the artificial obstruction with fish passage, after considering all benefits from the proposed action. The net benefit analysis will consider conditions that exist at the time of the comparison, as well as future climate-induced conditions. " 2021-05-07 08:40:03

79 na CCFB 635-412-0025 (4(c) (lines 328 to 333) 328 This section provides for granting of exemptions from fish passage requirements when there is no appreciable benefit. The lands drained by smaller tide gates are quite small and clearly there is no appreciable benefit to requiring fish passage for those smaller tide gates. We recommend that the regulation define "no appreciable benefit" as any tide gate that drains 500 acres or less. Email

42 48 Portland PacifiCorp 635-412- 328 "PacifiCorp owns over 3,000 megawatts of renewable energy generating facilities, including several hydroelectric projects on waters of the state of Oregon inhabited by native migratory fish. The company is also expanding its renewable generation portfolio to address climate change impacts and ultimately achieve net zero greenhouse gas emissions in service of over 2 million customers across six western states. Therefore, PacifiCorp hereby expresses its support and interest in Oregon Department of Fish and Wildlife (ODFW)'s current review and revision of the fish passage administrative rules (Oregon Administrative Rules (OAR) 635-412-) as motivated, in part, by

ODFW’s new Climate and Ocean Change Policy (OAR 635-900-). Addressing climate change will require prudent, near-term actions to support ODFW’s mission to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations. PacifiCorp supports science-based decision-making regarding fish passage in Oregon for the purposes of achieving recovering and sustainable populations of native migratory fish. PacifiCorp also notes that hydropower has a significant role to play in moving towards carbon-neutral operations in Oregon and ameliorating the causes and effects of climate change. Therefore, the climate change benefits of hydroelectricity should be considered in net benefit analyses of fish passage at hydropower facilities. PacifiCorp has gained experience implementing fish passage solutions at our federally-licensed hydroelectric projects, and we have learned that site-specific information on current and, to the extent possible, future conditions must be considered in implementation of the administrative rules to maximize long-term net benefits to native migratory fish. In certain cases, biological research has concluded that there may be little value to local fish populations in light of the expense of constructing, operating, and maintaining fish passage at an artificial obstruction. Off-site mitigation projects with lower costs than implementing fish passage at an artificial obstruction can provide a greater net benefit to at-risk fish populations, including some that may not be present at the site. The revised administrative rules should clarify that it is the intent of the state to achieve the highest net benefit to fish populations when considering the impacts of an artificial obstruction and any proposed mitigation measures. " "Fish Passage Waivers and Exemptions (-0025 (4)); Lines 328-333 Insert these or similar revised statements as subordinates under (4): (x) Climate change negatively impacts the future quality and quantity of fish passage (e.g., where current habitat suitability has been deemed “marginal” upstream of barrier); (y) The exemption aligns with renewable energy policy and ODFW climate and ocean change policy OAR 635-900-0001 to 0020, including provisions for an exemption for fish passage when installing a hydropower unit at an existing artificial obstruction that is not subject to the state’s fish passage OAR (federal ownership) or when hydropower was not an original authorization for the artificial obstruction. " 2021-05-04 14:06:40

159 na PacifiCorp Fish Passage Waivers and Exemptions (-0025 (4)); Lines 328-333 328 "Insert these or similar revised statements as subordinates under (4):

(x) Climate change negatively impacts the future quality and quantity of fish passage (e.g., where current habitat suitability has been deemed “marginal” upstream of barrier);

(y) The exemption aligns with renewable energy policy and ODFW climate and ocean change policy OAR 635-900-0001 to 0020, including provisions for an exemption for fish passage when installing a hydropower unit at an existing artificial obstruction that is not subject to the state’s fish passage OAR (federal ownership) or when hydropower was not an original authorization for the artificial obstruction."

67 73 Portland Fish Passage Waivers and Exemptions (-0025 (4)); Lines 331-335 331 these are important to align exemption conditions with intend of Climate and Ocean policy "Fish Passage Waivers and Exemptions (-0025 (4)); Lines 331-335 Insert these or similar revised statements as subordinates under (4): (x) Climate change negatively impacts the future quality and quantity of fish passage (e.g., where current habitat suitability has been deemed "marginal" upstream of barrier); (y) The exemption aligns with renewable energy policy and ODFW climate and ocean change policy OAR 635-900-0001 to 0020, including provisions for an exemption for fish passage when installing a hydropower unit at an existing artificial obstruction that is not subject to the state's fish passage OAR (federal ownership) or when hydropower was not an original authorization for the artificial obstruction. [note - alternatively this last clause could reference earlier suggested insert under -0020 wherein it was suggested that "Project proponents who are neither the owner or the operator of an artificial obstruction but propose facilities, including renewable energy generating facilities ancillary to an artificial obstruction, are not subject to the fish passage requirements of this section provided such ancillary operation does not conflict with native fish migration.""] 2021-05-07 08:45:36

117 na Lambert TU Fish Passage Waiver and Exemptions Review (OAR 635-412-0025(6)) 336 "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.""

127 na Rogers TU Line 341: Add new section: Request for review of an established exemption or waiver. 341 Line 341: Allow for review and revision of an exemption or waiver decision if circumstances have changed or new information becomes available. "Line 341: Upon request by any private citizen, organization, government agency or official a decision to

grant a fish passage exemption or waiver will be reviewed by the Department, Task Force, or Commission. If the reviewing body determines that the circumstances on which the exemption or waiver decision was based are no longer valid the Department or Commission may revoke or revise the decision."

160 na PacifiCorp Fish Passage Waivers and Exemptions (-0025 (8)); Lines 343-347 343 "All proposed mitigation measures should be considered in the benefits analysis. Typically, mitigation packages address a variety of environmental impacts and provide integrated benefits across resource areas. Values of mitigation measures should not be individually assigned or credited to a single resource. For example, improving dissolved oxygen benefits water quality and the resources (in particular, fish) dependent on that environment.

Edit:

".....whether the waiver request meets the requirements of subsection (1) or the exemption request meets the requirements of subsections (4) and (5), including any biological benefits resulting from conditions of a Clean Water Act Section 401 water quality certification."

42 48 Portland PacifiCorp 635-412- 343 "PacifiCorp owns over 3,000 megawatts of renewable energy generating facilities, including several hydroelectric projects on waters of the state of Oregon inhabited by native migratory fish. The company is also expanding its renewable generation portfolio to address climate change impacts and ultimately achieve net zero greenhouse gas emissions in service of over 2 million customers across six western states. Therefore, PacifiCorp hereby expresses its support and interest in Oregon Department of Fish and Wildlife (ODFW)'s current review and revision of the fish passage administrative rules (Oregon Administrative Rules (OAR) 635-412-) as motivated, in part, by ODFW's new Climate and Ocean Change Policy (OAR 635-900-). Addressing climate change will require prudent, near-term actions to support ODFW's mission to protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations. PacifiCorp supports science-based decision-making regarding fish passage in Oregon for the purposes of achieving recovering and sustainable populations of native migratory fish. PacifiCorp also notes that hydropower has a significant role to play in moving towards carbon-neutral operations in Oregon and ameliorating the causes and effects of climate change. Therefore, the climate change benefits of hydroelectricity should be considered in net benefit analyses of fish passage at hydropower facilities. PacifiCorp has gained experience implementing fish passage solutions at our federally-licensed hydroelectric projects, and we have learned that site-specific information on current and, to the extent possible, future conditions must be considered in implementation of the administrative rules to maximize long-term net benefits to native migratory fish. In certain cases, biological research has concluded that there may be little value to local fish populations in light of the expense of

constructing, operating, and maintaining fish passage at an artificial obstruction. Off-site mitigation projects with lower costs than implementing fish passage at an artificial obstruction can provide a greater net benefit to at-risk fish populations, including some that may not be present at the site. The revised administrative rules should clarify that it is the intent of the state to achieve the highest net benefit to fish populations when considering the impacts of an artificial obstruction and any proposed mitigation measures. " "Fish Passage Waivers and Exemptions (-0025 (8)); Lines 343-347 All proposed mitigation measures should be considered in the benefits analysis. Typically, mitigation packages address a variety of environmental impacts and provide integrated benefits across resource areas. Values of mitigation measures should not be individually assigned or credited to a single resource. For example, improving dissolved oxygen benefits water quality and the resources (in particular, fish) dependent on that environment. Edit: ".....whether the waiver request meets the requirements of subsection (1) or the exemption request meets the requirements of subsections (4) and (5), including any biological benefits resulting from conditions of a Clean Water Act Section 401 water quality certification." " 2021-05-04 14:06:40

198 na ODOT "635-412-0025, General" - "Either provide definitions for "Waiver" and Exemption", or provide high level description in this section. As written, these can be confusing to general applicants on what these are. Process, timeline, identify "who does what" would be helpful."

199 na ODOT "635-412-0025, General" - "Include Service area of mitigation (i.e. OWRD Districts, Watershed, HUC, etc)"

200 na ODOT "635-412-0025, General" - ODFW shall develop and make readily available a guidance manual that defines and makes demonstrable "barrierarity".

106 na Mary-Ann Farm Bureau Waivers - Exemptions - "We would like to work with you on creation of a definition that works for farmers, ranchers and districts statewide."

205 na ODOT 635-412-0025 - "ODFW has indicated that temporal delay in addressing passage at trigger locations may result in "extra mitigation obligation". Recommend defining how this obligation is calculated (i.e compensation fines, additional mitigation need, ect)."

71 77 Oregon City Native Fish Society Fish Passage OARs (comments on suggestions below) - "Fish passage at artificial obstructions is critical to the conservation and recovery of Oregon's native, migratory fish populations. This is made even more important given the information we have and are gaining on the impacts of climate change on the range, distribution, and life-history requirements of species. We urge the advisory committee to consider changes which: 1) Adhere to statute; 2) Align with existing departmental policies, specifically the Native Fish Conservation Policy and Climate and Ocean Change Policy; 3) Have a high level of specificity to provide direction for the task force and clarity for stakeholders." "Thank you for the opportunity to comment. Please reach out if you have any questions or need clarification. If it would be helpful, subsequent comments could be added as track changes. The following comments reference the "Working RAC DRAFT" document: Support adding "Policy and Intent" to clarify the intent of statute and integration of the Climate and Ocean Change Policy. Recommend referencing both the authorizing ORS and OARs including Climate and Ocean Change Policy and Native Fish Conservation Policy. Line 5: delete "Potential" and "may." The Climate and Ocean Change Policy makes clear that there will be changes in Oregon's future climate. Utilizing "Potential" and "may" imply uncertainty which is not consistent with the climate policy language. Line 7-8: statute does not provide discretion for "recognizing and minimizing burdens placed on the owners and/or operators of artificial obstructions." Remove language. Suggest reframing to: "It is therefore the intent of these rules to promote fish passage to conserve and recover the native, migratory fish of the state consistent with the goals of the Native Fish Conservation Plan and Climate and Ocean Change Policy." Line 27: support addition of "has the potential to preclude, delay, or prevent..." This recognizes that native migratory fish could be impacted even if they are not currently present at the obstruction. Line 68: "within, below or above the channel" may narrow the trigger application. Wording should consider how to incorporate any component contributing to an artificial obstruction including those which are outside the channel itself. Lines 223-225: Support adding a definition of trigger event, but current wording is confusing. Recommend refining to ensure clarity. Lines 248-250: Support cleaning up language of task force terms. Lines 283-285: The priority list should include all artificial obstructions whether or not there is an existing legal agreement to waive or other requirement to address passage. The priority list can indicate these aspects, but providing a comprehensive list of passage issues can help focus and drive investments to those basins in other ways (like habitat restoration projects, flow augmentation agreements, etc.) Line 278-279: Integrate consideration of climate change impacts/needs utilizing the best available information in the factors for consideration in prioritization. Suggested wording: "Anticipated range shifts, local extirpations, altered species compositions, and elevated life-stage vulnerabilities in response to climate change of native migratory fish." (This wording reflects the language found in OAR 635-900-0017(2)). Lines 300-301: Add "at least" so as to read "The priority list shall contain at least one artificial obstruction per Oregon sub-basin..." Statute does not specify the number or geography of artificial obstructions on the priority list. Amending to include "at least one" provides the department the opportunity to focus on areas where populations have the greatest biological

need for passage if multiple barriers in a subbasin are the major factors limiting conservation and recovery goals. Obstructions can still be prioritized within the subbasin as well. Line 307: In statute, only the Commission may order construction/installation of passage. Line 311: Remove; no mention in statute and creates confusion. What does the owner or operator have to work cooperatively with the department on? What qualifies as reasonable cooperation? Lines 307-325 are not wholly consistent with statute at present. The Commission has authority to also require fish passage even if the artificial obstruction is not on the priority list. Suggest creation of new section to better align with ORS 509.625, Suggestions for alignment include: Suggest amending the “prioritization” section (starting at line 280) and retitle: Prioritization and authority to require passage construction or remove obstruction. Suggest including the following to better align with statute: (#)The commission may order the owner and/or operator of an artificial obstruction to install, improve, rebuild or mitigate fish passage within a defined timeframe if: (a) An emergency exists and the department has field verified the information used to make the emergency determination; (b) The artificial obstruction has existing fish passage, whether previously approved or not, that is now useless or inadequate for the purposes for which it is intended, though such construction may not interfere with the prime purpose of the artificial obstruction; or (c) The artificial obstruction is on the priority list and the Department can arrange for non-owner or non-operator funding of at least 60 percent of the cost for fish passage design, construction, and installation (##) Notwithstanding paragraph (#)(c) of this subsection, the commission may order installation of fish passage or alternatives to fish passage without regard to funding sources if: (a) The person owning or operating the artificial obstruction is already subject to an obligation to install fish passage or to provide alternatives to fish passage; (b) If the commission declares an emergency; or (c) If the person owning or operating the artificial obstruction has not been issued a water right or if the artificial obstruction has been otherwise unlawfully installed. +Add to definitions section the meaning of “Emergency.” Suggestion: “Emergency means a high likelihood that a native migratory fish population will go extinct or be extirpated from the basin if passage is not provided at an artificial obstruction.” The following comments reference the existing OARs provided by hyperlink on the comment form: Lines 6-8: Include environmental impediments such as water temperatures, reservoir pools, low flows, or flushing flows resulting from “any dam, diversion, dike, berm levee, tide or flood gate, road, culvert of other human-made device...” in the definition of “Artificial obstruction” Line 22: add “cumulative” so as to read: “for dams and diversions, cumulative excavation or replacement of 30 percent....” This provides consistency with other obstruction types while rectifying a problematic loophole that has resulted in the piecemeal repair and maintenance of numerous projects that have resulted in sustained impacts to native fish and aquatic ecosystems. “Fish Passage Approval” section: Integrate consideration of climate change impacts/needs utilizing the best available information in the factors for consideration in fish passage approval. Lines 266-269 suggested wording: “Prior to construction... shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters or are anticipated

to utilize the waters due to climate change-induced range shift of native migratory fish.” Line
333: define “appreciable benefit” " 2021-05-07 16:42:25