

Line Number (Start) in Current Rules [0=General; 1000=New Section/Issue]	Topic (Current Work Products)	Comments
0	General	On the website and in other communications, describe the general nature of the rules review. The website still says: "Aligning the state's passage rules with the ODFW Climate and Ocean Change Policy is a driving force behind this initiative." Documents posted to the website and proceedings to date suggest the rules review is more comprehensive. Communications regarding the review should reflect that so the public is fully informed of the potential for changes and grounds for changes.
0	General	The Department's fish passage rules need to be consistent with the fish passage statutes. They should implement the policy choices as reflected in the statutes, not make new policy choices. <i>Marolla v. DPSST</i> , 245 Or. App. 226, 230 (2011) ("An administrative rule * * * must be consistent with the legislative directive; it exceeds the agency's statutory authority if it 'depart[s] from a legal standard expressed or implied in the particular law being administered, or [if it] contravene[s] some other applicable statute.' " (Quoting <i>Planned Parenthood Assn. v. Dept. of Human Res.</i> , 297 Or. 562 (1984); brackets in <i>Marolla</i>)).
6	Definitions	Define "appreciable benefit" in a way that includes incremental progress toward restoration of access to historic habitat if there is a reasonable possibility of full restoration in the foreseeable future. The fish passage statutes require passage where native migratory fish were historically present, not just where they are currently present, and the requirement for passage based on historic presence is not limited to locations where fish can immediately use the passage or immediately gain access to historic habitat that is not presently used. Thus, the statutes imply that passage in locations of historic fish presence is an appreciable benefit even if it won't immediately expand use by native migratory fish. If an impassable barrier downstream, or an impassable barrier immediately upstream, always justify an exemption, there will be no progress toward restoration as one barrier justifies an exemption at another and the exempted barrier than justifies an exemption at the former. We understand exemptions may be revoked but wonder whether that is likely to occur (is there any history of revoked exemptions?). Keep in mind that this suggested definition would not require passage where it isn't justified on a cost-benefit basis. The owner of the obstruction could still seek a waiver in exchange for mitigation that provides a "net benefit." If the benefits from passage are in fact small, the mitigation would not be onerous and fish would receive at least something in exchange for the owner of the obstruction not providing passage at the trigger site.

6	Definitions	Expressly include in the definition of "[a]rtificial obstruction" reservoir pools, low flows and high water temperatures caused by a "dam, diversion, culvert or other human-made device placed in the waters of this state." If such barriers are caused by the human-made devices, they should be sufficiently within the terms of the statute to address under the fish passage laws.
6	Definitions	Add to definition of "artificial obstruction": "including devices not intended to be permanent." Non-permanent structures (e.g., "push up dams" and some BDAs) can also interfere with fish migration and cause significant detrimental impacts to fish. Rules should clearly apply to them. (To avoid confusion, we suggest not using the term "temporary" because that's a defined term in the rules that's narrower than the concept suggested here.)
22	Definitions	Clarify that percentage replacement can included cumulative work for all obstruction types (not just tidegates and floodgates). We suggest a 30 percent threshold for all obstructions on grounds that constitutes "major replacement."
109	Definitions	Add definition of "native fish" (same as OAR 635-007-0501(36)) so people don't need to go find the cross-reference to understand the rules: " 'Native fish' means indigenous to Oregon, not introduced. This includes both naturally produced and hatchery produced fish." Do not narrow the range of species requiring passage (andromous, wild, salmonid, etc.). Statutes require passage for all "native fish" that migrate; Commission does not have authority to narrow the range of species for which the statutes require passage.
109	Definitions	Existing fish passage statutes and rules apply to all "native migratory fish" regardless of anadromy and/or listing status. We would oppose any change to that. All native fish species are important and all should have passage up and down a stream system. A fish species should not have to be a risk of extinction, or migrate to the ocean and back, before its migration and habitat needs are protected.
161	Definitions	Include "ephemeral" in definition of stream. Some may consider this different from "intermittent," but both should be included if currently or historically used by native migratory fish.
175	Definitions	Include "ephemeral" streams in defintion - or just refer to "streams" since its been defined (along with other types of water bodies described), which may be better to ensure consistency. Some may consider different from "intermittent" but all should be covered if native migratory fish currently or historically present.
687	Mitigation Criteria	Add subsection similar to (3) to clarify mitigation shall not include any activity previously planned to be completed by the owner/operator or another person or entity. If the mitigation is something that would have been done independent of the waiver, it cannot be said to provide a "net benefit" to native migratory fish (since it would have been done anyway).

688	Mitigation Criteria	Delete or reword subsection (4). Current language is confusing. Why would someone be seeking a "decision regarding a fish passage waiver" if there is already a waiver for the site. If the intent is to say mitigation can't be something you already did, suggest phrasing that more clearly and include (as not qualifying) things that the owner/operator or a third party were already planning/likely to do.
710	Mitigation Criteria	Delete subsection (f). This subsection suggests the Department has an obligation to consider a waiver/mitigation based on a belief of the owner/operator as opposed to a specific request/application for a waiver as an alternative to passage.
712	Mitigation Criteria	Delete or revise (g). Language is not clear. To the extent this says a net benefit determination may require the gathering of information, that seems clear without a rule saying that.
716	Mitigation Criteria	Delete or revise subsection (j). This seems to say: (a) mitigation in exchange for passage waiver can use public funds from the Department; and (b) relative costs of passage v. mitigation can't be considered (i.e., no consideration of how the amount to be spent on mitigation would compare to the cost of passage). As to (a), this seems inconsistent with intent and with good public policy. An owner/operator required by law to provide passage or mitigation should not be able to use public funds to do that. Public funds should be saved for situations where the Department does not have enforcement authority. As to (b), a reasonable person would consider relative costs in determining if fish received a "net benefit." If providing passage would cost \$1,000,000 and the proposed mitigation will cost \$100, that seems like a relevant factor (though not decisive). Also, addressing a high-cost fish passage problem may provide more benefit than addressing a low-cost problem because the latter is more likely to be addressed independent of a fish passage waiver at another site. Also, we do not see a statutory basis to exclude relative cost as a consideration in determining if the mitigation provides a net benefit.
718	Mitigation Criteria	Delete or revise (k). Language is not clear. To extent it's saying a net benefit determination may require gathering of information, that probably goes without saying. If reworded, consider combining with subsection (g) for clarity/simplicity.
721	Mitigation Criteria	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, through an event at the mitigation site triggering fish passage requirements, through public or private restoration activities, or otherwise." If this factor is not taken into account, fish passage may be waived without any actual long-term positive effect for fish. A barrier that would have had passage (at the waiver site) will continue to not have passage while the compensation for that is something fish would likely have received regardless.

262	Passage Approval	We agree not all waiver and exemption decisions require review by the Fish Passage Task Force. There could be some cut by the agency as to those where the application and/or comments seem to raise issues requiring discussion and input from stakeholders. However, notice and opportunity to comment should be provided for all applications for fish passage approvals, waivers and exemptions, and notice and a copy of the decision document should be provided (without requiring a special request) for all passage, waivers and exemptions. An analogy - with significantly greater volume and frequency than we would expected here - is the weekly public notice from the Water Resources Department. This could be a simple email notice limited to people who sign up to receive it.
1000	New Section/Issue	A new rule: "All decisions under fish passage laws and rules, including decisions regarding whether passage would provide an appreciable benefit, whether mitigation for a waiver will result in a net benefit, and whether proposed fish passage complies with criteria in the rules, shall take into account the expected effects of climate change, including effects to streamflows, water temperatures and the importance of protecting and restoring habitat for native migratory fish."