

## **DRAFT**

### **Fish Screening Exemptions Guidance Document**

#### ***ORS 498.316 Exemption from screening or by-pass devices***

*ORS 498.306 (Screening or by-pass devices for water diversions) does not require the installation of screening or by-pass devices in those water diversions for which the State Fish and Wildlife Commission, by contract or other form of agreement\* with the person diverting the water, has made such other provision as the Commission determines is adequate for the protection of the game fish in the body of water from which water is being diverted. [Formerly 498.262; 2007 c.625 §6]*

\*Note to the Task Force: See ODFW Fish Screening Payment in Lieu Pilot Program document for a current example of an agreement approved by the commission for the adequate protection of game fish.

#### **Guidelines Purpose.**

The following guidelines are intended to provide a framework for the Fish Screening Task Force to use when considering a recommendation to the Oregon Fish and Wildlife Commission on a fish screening exemption request as allowed by ORS 498.316.

#### **Guidelines Exemption Section:**

- (1) The Commission may grant exemptions from the requirement to install fish screening or by-pass devices if the Commission finds that mitigation rather than fish screening proposed by the person owning or operating the water diversion provides a net benefit to game fish or native migratory fish.
- (2) Net benefit to game fish or native migratory fish is determined by comparing the benefit to game fish or native migratory fish that would occur if the water diversion had a department approved screening or by-pass device to the benefit to game fish or native migratory fish that would occur as a direct result of the proposed mitigation actions. To qualify for an exemption of the requirement to install a fish screening or by-pass device, proposed mitigation must result in a benefit to game fish or native migratory fish greater than the benefit to such species that would be provided by fish screening at the water diversion. The net benefit determination shall be based upon conditions that exist at the time of comparison and should consider future conditions (e.g., climate change).
- (3) Exemptions shall be valid so long as the owner or operator continues to provide the agreed-upon mitigation or until the Commission determines that circumstances have changed such that the exemption requirements no longer apply.
- (4) To obtain an exemption from fish screening requirements, an owner or operator of a water diversion shall apply in-writing to the department.
- (5) Based on application review, verification of the information in the application and of site-specific knowledge, Department staff shall provide a written benefit analysis of whether the proposal in the application meets the applicable requirements.
- (6) To receive an exemption, an owner or operator of a water diversion shall enter an agreement with the Commission that clearly describes timelines, duties, responsibilities, and options regarding the required mitigation. The agreement shall state that the mitigation shall be completed prior to the action which triggered fish screening requirements unless the Commission finds that additional time is necessary and appropriate.

(7) The Commission may require additional mitigation associated with an exemption if the mitigation cannot be or is not completed within the required time frame set forth in the agreement prescribed by subsection (6) of this rule.

(8) Once the application, Department's written benefit analysis, and a draft agreement are completed, the exemption determination shall be made by the Commission with a recommendation from the Fish Screening Task Force.

(9) The Department may amend or approve changes to the agreement if the changes do not affect the benefit analysis and after a public review and recommendation by the Fish Screening Task Force.

(10) In addition to the Fish Screening Task Force, the Department shall notify the public and provide an opportunity to review and comment on the owner or operator's request at least three weeks prior to an exemption recommendation.

(11) The Commission may provide further public comment prior to a decision on whether an exemption should be granted.

(12) The Department shall maintain a record of the locations of exempted water diversions and mitigation.

**Guidelines Mitigation Criteria Section:**

(1) Mitigation options include:

(a) Providing a fish screen or by-pass device at another pre-existing water diversion which does not have a state or federal requirement to address fish screening.

(b) Restoration or enhancement of native migratory fish habitat.

(c) Implementing measures that directly increase naturally produced native migratory fish populations, especially sensitive or state or federally listed species through implementation of fish management measures; and

(d) Implementation of other actions specifically approved by the Commission.

(2) Mitigation shall not include any activity that is a requirement or condition of any other agreement, law, permit, or authorization except if it is also for fish screening mitigation at the water diversion for a different level of government.

(3) Mitigation activities shall not be completed prior to a decision regarding a fish screening exemption application.

(4) The Department shall approve final mitigation plans, including designs as applicable, in writing prior to implementation. However, mitigation actions/measures/activities or concepts, absent specific designs, can be approved at the time an exemption decision is made.

(5) Mitigation actions that provide fish passage shall meet the fish passage criteria contained in OAR 635-412-0035.

(6) An owner or operator of a water diversion is responsible for maintaining, monitoring, evaluating the effectiveness of, and reporting on mitigation.

(7) Mitigation:

(a) Shall be conducted in-proximity to the unscreened water diversion, with respect to geographic scope;

(b) Shall have habitat type and quality which is more beneficial than that affected by the water diversion, if mitigation is passage into, restoration of, or enhancement of habitat;

(c) Shall at least benefit the same game fish or native migratory fish species affected at the unscreened water diversion;

- (d) Shall have a clear benefit for those native migratory fish species affected at the unscreened water diversion if their status is listed as "threatened" or "endangered" under the state or federal Endangered Species Act;
  - (e) Shall have standards for monitoring and evaluating, and include adaptive management approved by the Department, that assure that the goal of the mitigation is achieved and maintained, and which are detailed in the agreement required in subsection 6 of exemption section of these guidelines.
  - (f) Shall attempt to restore or enhance historic conditions;
  - (g) To the extent possible, shall be consistent with existing native migratory fish or watershed management plans;
  - (h) Shall be consistent with the purpose and goals of the Oregon Plan.
- (8) The Commission, in determining the sufficiency of proposed mitigation:
- (a) May require quantification of baseline conditions before a decision regarding a fish screening exemption is made in situations with no existing information or situations which have no clear benefit to native migratory fish species;
  - (b) May require data collection and evaluation as directed by the Department, by the owner or operator before a decision regarding a fish screening exemption is made in situations with no existing information, which require recent information, or which have no clear benefit;
  - (c) Shall consider the extent to which the proposed mitigation is likely to occur independent of a fish screening exemption; and
  - (d) Shall consider actions that anticipate the expected effects of climate change, which may include but is not limited to effects to streamflows, water temperatures, sediment transport, biological responses, risk and uncertainty, and the importance of protecting and restoring habitat for native migratory fish.

**Guidelines Definitions Section:**

- (1) "Commission" means the Oregon Fish and Wildlife Commission.
- (2) "Department" means the Oregon Department of Fish and Wildlife.
- (3) "Exemption" means not providing fish screening at a water diversion when the Commission, by contract or other form of agreement with a person diverting water, has made such other provision as the Commission determines is adequate for the protection of the game fish in the body of water from which water is being diverted or determines that alternatives to fish screening at a water diversion, as proposed by the owner or operator of the water diversion, provides a net benefit to native migratory fish.
- (4) "Fish passage" means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, minimal delay, and without physical or physiological injury upstream and downstream of an artificial obstruction.
- (5) "In-proximity" means within the same watershed or water basin, as defined by the Oregon Water Resources Department, and having the highest likelihood of benefiting the native migratory fish populations, as determined by the Department, directly affected by a water diversion.
- (6) "Mitigation" means alternatives to providing fish screening at a water diversion that provide a net benefit to native migratory fish.

(7) "Native migratory fish" means naturally or hatchery produced native fish (as defined under OAR 635-007-0501) indigenous (i.e., not introduced) to Oregon that migrate for their life cycle needs. These fish include all sub-species and life history patterns of the species of fish listed in OAR 635-412-0005.

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

(9) "Oregon Plan" means the guidance statement and framework described in ORS 541.898.

(10) "Volitionally" means with minimal delay and without being trapped, transferred, or handled by any person, unless specifically allowed under OAR 635-412-0035(6).