

Chapter 509 — General Protective Regulations

2009 EDITION

FISH PASSAGE; FISHWAYS; SCREENING DEVICES; HATCHERIES NEAR DAMS

509.580 Definitions for ORS 509.580 to 509.590, 509.600 to 509.645 and 509.910;**rules.** As used in ORS 509.580 to 509.590, 509.600 to 509.645 and 509.910:

(1) “Artificial obstruction” means any dam, diversion, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.

(2) “Construction” means:

(a) Original construction;

(b) Major replacement;

(c) Structural modifications that increase storage or diversion capacity; or

(d) For purposes of culverts, installation or replacement of a roadbed or culvert.

(3) “Emergency” means unforeseen circumstances materially related to or affected by an artificial obstruction that, because of adverse impacts to a population of native migratory fish, requires immediate action. The State Fish and Wildlife Director may further define the term “emergency” by rule.

(4) “Fundamental change in permit status” means a change in regulatory approval for the operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not including water right transfers or routine maintenance permits.

(5) “In-proximity” means within the same watershed or water basin and having the highest likelihood of benefiting the native migratory fish populations directly affected by an artificial obstruction.

(6) “Native migratory fish” means those native fish that migrate for their life cycle needs and that are listed in the rules of the State Fish and Wildlife Director.

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

34 (8) “Oregon Plan” means the guidance statement and framework described in ORS
35 541.405. [2001 c.923 §1]

36

37 **Note:** 509.580 to 509.595 were enacted into law by the Legislative Assembly but
38 were not added to or made a part of ORS chapter 509 or any series therein by legislative
39 action. See Preface to Oregon Revised Statutes for further explanation.

40

41 **509.585 Fish passage required for artificial obstructions; statewide inventory;**
42 **waiver of requirement by commission; rules; exemptions.** (1) It is the policy of the
43 State of Oregon to provide for upstream and downstream passage for native migratory
44 fish and the Legislative Assembly finds that cooperation and collaboration between
45 public and private entities is necessary to accomplish the policy goal of providing
46 passage for native migratory fish and to achieve the enhancement and restoration of
47 Oregon’s native salmonid populations, as envisioned by the Oregon Plan. Therefore,
48 except as provided in ORS chapter 509, fish passage is required in all waters of this state
49 in which native migratory fish are currently or have historically been present.

50 (2) Except as otherwise provided by this section or ORS 509.645, a person owning or
51 operating an artificial obstruction may not construct or maintain any artificial obstruction
52 across any waters of this state that are inhabited, or historically inhabited, by native
53 migratory fish without providing passage for native migratory fish.

54 (3) The State Department of Fish and Wildlife shall complete and maintain a
55 statewide inventory of artificial obstructions in order to prioritize enforcement actions
56 based on the needs of native migratory fish. This prioritization shall include, but need not
57 be limited to, the degree of impact of the artificial obstruction on the native migratory
58 fish, the biological status of the native migratory fish stocks in question and any other
59 factor established by the department by rule. The department shall establish a list of
60 priority projects for enforcement purposes. Priority artificial obstructions are subject to
61 the State Fish and Wildlife Commission’s authority as provided in ORS 509.625. Unless

62 requested by persons owning or operating an artificial obstruction, the department shall
63 primarily direct its enforcement authority toward priority projects, emergencies and
64 projects described in subsection (4) of this section. The priority project list shall be
65 subject to periodic review and amendment by the department and to formal review and
66 amendment by the commission no less frequently than once every five years.

67 (4) A person owning or operating an artificial obstruction shall, prior to construction,
68 fundamental change in permit status or abandonment of the artificial obstruction in any
69 waters of this state, obtain a determination from the department as to whether native
70 migratory fish are or historically have been present in the waters. If the department
71 determines that native migratory fish are or historically have been present in the waters,
72 the person owning or operating the artificial obstruction shall either submit a proposal for
73 fish passage to the department or apply for a waiver pursuant to subsection (7) of this
74 section. Approval of the proposed fish passage facility or of the alternatives to fish
75 passage must be obtained from the department prior to construction, permit modification
76 or abandonment of the artificial obstruction.

77 (5) Consistent with the purpose and goals of the Oregon Plan, the department shall
78 seek cooperative partnerships to remedy fish passage problems and to ensure that
79 problems are corrected as soon as possible. The department and the person owning or
80 operating the artificial obstruction are encouraged to negotiate the terms and conditions
81 of fish passage or alternatives to fish passage, including appropriate cost sharing. The
82 negotiations may include, but are not limited to, consideration of equitable factors.

83 (6) The department shall submit a proposed determination of the required fish passage
84 or alternatives to fish passage to the commission for approval. The determination may be
85 the result of the negotiations described in subsection (5) of this section or, if no
86 agreement was reached in the negotiations, a determination proposed by the department.
87 If a protest is not filed within the time period specified in ORS 509.645, the proposed
88 determination shall become a final order.

89 (7)(a) The commission shall waive the requirement for fish passage if the commission
90 determines that the alternatives to fish passage proposed by the person owning or
91 operating the artificial obstruction provide a net benefit to native migratory fish.

92 (b) Net benefit to native migratory fish is determined under this subsection by
93 comparing the benefit to native migratory fish that would occur if the artificial
94 obstruction had fish passage to the benefit to native migratory fish that would occur using
95 the proposed alternatives to fish passage. Alternatives to fish passage must result in a
96 benefit to fish greater than that provided by the artificial obstruction with fish passage.
97 The net benefit to fish shall be determined based upon conditions that exist at the time of
98 comparison.

99 (c) The State Fish and Wildlife Director shall develop rules establishing general
100 criteria for determining the adequacy of fish passage and of alternatives to fish passage.
101 The general criteria shall include, but not be limited to:

- 102 (A) The geographic scope in which alternatives must be conducted;
- 103 (B) The type and quality of habitat;
- 104 (C) The species affected;
- 105 (D) The status of the native migratory fish stocks;
- 106 (E) Standards for monitoring, evaluating and adaptive management;
- 107 (F) The feasibility of fish passage and alternatives to fish passage;
- 108 (G) Quantified baseline conditions;
- 109 (H) Historic conditions;
- 110 (I) Existing native migratory fish management plans;
- 111 (J) Financial or other incentives and the application of incentives;
- 112 (K) Data collection and evaluation; and
- 113 (L) Consistency with the purpose and goals of the Oregon Plan.

114 (d) To the extent feasible, the department shall coordinate its requirements for
115 adequate fish passage or alternatives to fish passage with any federal requirements.

116 (8) A person owning or operating an artificial obstruction may at any time petition the
117 commission to waive the requirement for fish passage in exchange for agreed-upon
118 alternatives to fish passage that provide a net benefit to native migratory fish as
119 determined in subsection (7) of this section.

120 (9)(a) Artificial obstructions without fish passage are exempt from the requirement to
121 provide fish passage if the commission:

- 122 (A) Finds that a lack of fish passage has been effectively mitigated;

123 (B) Has granted a legal waiver for the artificial obstruction; or
124 (C) Finds there is no appreciable benefit to providing fish passage.

125 (b) The commission shall review, at least once every seven years, the artificial
126 obstructions exempted under this subsection that do not have an exemption expiration
127 date to determine whether the exemption should be renewed. The commission may
128 revoke or amend an exemption if it finds that circumstances have changed such that the
129 relevant requirements for the exemption no longer apply. The person owning or operating
130 the artificial obstruction may protest the decision by the commission pursuant to ORS
131 509.645.

132 (10) If the fundamental change in permit status is an expiration of a license of a
133 federally licensed hydroelectric project, the commission's determination shall be
134 submitted to the Federal Energy Regulatory Commission as required by ORS 543A.060
135 to 543A.410.

136 (11) To the extent that the requirements of this section are preempted by the Federal
137 Power Act or by the laws governing hydroelectric projects located in waters governed
138 jointly by Oregon and another state, federally licensed hydroelectric projects are exempt
139 from the requirements of this section.

140 (12) A person subject to a decision of the commission under this section shall have
141 the right to a contested case hearing according to the applicable provisions of ORS
142 chapter 183. [2001 c.923 §2]

143

144 **Note:** See note under 509.580.

145

146 **509.590 Fish Passage Task Force; reports to legislature.** (1) The State Fish and
147 Wildlife Director shall establish a Fish Passage Task Force to advise the director and the
148 State Department of Fish and Wildlife on matters related to fish passage in Oregon,
149 including but not limited to funding, cost sharing and prioritization of efforts. The
150 director shall determine the members and the specific duties of the task force by rule.

151 (2) The department shall provide staff necessary for the performance of the functions
152 of the task force.

153 (3) A member of the task force may not receive compensation for services as a
154 member of the task force. In accordance with ORS 292.495, a member of the task force
155 may receive reimbursement for actual and necessary travel or other expenses incurred in
156 the performance of official duties.

157 (4) The task force shall report semiannually to the appropriate legislative committee
158 with responsibility for salmon restoration or species recovery, to advise the committee on
159 matters related to fish passage. [2001 c.923 §3; 2007 c.354 §17]

160

161 **Note:** See note under 509.580.

162

163 **509.595 Director to report on fish passage rules, adequacy and implementation.**

164 The State Fish and Wildlife Director shall report to the Governor, the Speaker of the
165 House of Representatives, the President of the Senate and the appropriate legislative
166 committee with responsibility for salmon restoration or species recovery:

167 (1) Prior to the adoption of rules relating to fish passage;

168 (2) Prior to the establishment of the general criteria for determining the adequacy of
169 fish passage and of alternatives to fish passage required to be established under ORS
170 509.585 (7)(c); and

171 (3) Semiannually on the progress that the director has made in implementing ORS
172 509.580 to 509.590. [2001 c.923 §20; 2007 c.354 §18]

173

174 **Note:** See note under 509.580.

175

176 **509.600 Destroying, injuring or taking fish near fishway; permits to take fish. (1)**

177 A person may not willfully or knowingly destroy, injure or take fish within 600 feet of
178 any fishway, except as permitted by subsection (2) of this section. Actions that violate
179 this section include, but are not limited to:

180 (a) Hindering, annoying or disturbing fish entering, passing through, resting in or
181 leaving such fishway, or obstructing the passage of fish through the fishway at any time
182 or in any manner.

183 (b) Placing anything in the fishway.

- 184 (c) Using any fishing gear within 600 feet of the fishway.
185 (d) Taking fish at any time anywhere within 600 feet of the fishway.
186 (e) Doing any injury to the fishway.
187 (2) The State Fish and Wildlife Commission may by rule or by issuance of permits
188 authorize the taking of fish within 600 feet of any fishway. [1965 c.570 §104; 1973 c.723
189 §122; 1981 c.646 §6; 2001 c.923 §8]

190

191 **509.605** [Amended by 1955 c.707 §49; 1963 c.178 §1; 1965 c.570 §131; 1973 c.723
192 §123; repealed by 2001 c.923 §21]

193

194 **509.610 Maintenance of fish passage required.** (1) Subject to ORS 509.645, when
195 the State Department of Fish and Wildlife requires fish passage to be provided pursuant
196 to ORS 509.585, the person owning or operating an artificial obstruction shall keep the
197 fish passage in such repair as to provide adequate fish passage of native migratory fish at
198 all times.

199 (2) Each day of neglect or refusal to comply with subsection (1) of this section, after
200 notification in writing by the department, constitutes a separate offense.

201 (3) A person owning or operating an artificial obstruction is responsible for
202 maintaining, monitoring and evaluating the effectiveness of fish passage or alternatives to
203 fish passage. [Amended by 1955 c.707 §52; 1965 c.570 §132; 2001 c.923 §9]

204

205 **509.615** [Amended by 1957 c.135 §1; 1963 c.111 §1; 1965 c.570 §135; 1987 c.488
206 §2; 1993 c.478 §9; 1995 c.426 §6; repealed by 2007 c.625 §16]

207

208 **509.620 Condemning inadequate or nonfunctioning fish passage; requiring new**
209 **fish passage.** If, in the judgment of the State Department of Fish and Wildlife, fish
210 passage is not functioning as intended or is inadequate, as constructed under ORS
211 509.585, the State Fish and Wildlife Commission may condemn the fish passage and
212 order new fish passage installed in accordance with plans and specifications determined
213 by the department. [Amended by 2001 c.923 §10]

214

215 **509.625 Power of department to inspect artificial obstructions and have fish**
216 **passage constructed or remove obstruction.** (1) The State Department of Fish and
217 Wildlife may determine or ascertain by inspection of any artificial obstruction whether it
218 would be advisable to construct fish passage, or order the construction pursuant to ORS
219 509.585 of fish passage, at the artificial obstruction. Without affecting other remedies to
220 enforce the requirement to install fish passage, if the State Fish and Wildlife Commission
221 determines that an emergency exists, the commission may order the construction,
222 pursuant to ORS 509.585, of fish passage in the waters of this state inhabited by native
223 migratory fish as deemed adequate to provide passage for native migratory fish.

224 (2) Where fish passage has previously been constructed with or without the approval
225 of the commission and has proved useless or inadequate for the purposes for which it is
226 intended, the commission may improve or rebuild such fish passage. However, such
227 construction or reconstruction shall not interfere with the prime purpose of the artificial
228 obstruction. This subsection may not be construed to require the improvement or
229 rebuilding of fish passage by the commission.

230 (3)(a) The commission may order a person owning or operating an artificial
231 obstruction on the priority list created pursuant to ORS 509.585 who has been issued a
232 water right, owners of lawfully installed culverts or owners of other lawfully installed
233 obstructions to install fish passage or to provide alternatives to fish passage if the
234 commission can arrange for nonowner or nonoperator funding of at least 60 percent of
235 the cost.

236 (b) Notwithstanding paragraph (a) of this subsection, the commission may order
237 installation of fish passage or alternatives to fish passage without regard to funding
238 sources:

239 (A) If the person owning or operating the artificial obstruction is already subject to an
240 obligation to install fish passage or to provide alternatives to fish passage under ORS
241 509.585;

242 (B) If the commission declares an emergency under this section; or

243 (C) If the person owning or operating the artificial obstruction has not been issued a
244 water right or if the artificial obstruction has been otherwise unlawfully installed.

245 (4) If a person who owns or operates an artificial obstruction and who is required to
246 provide fish passage under ORS 509.585 fails to provide fish passage in the manner and
247 time required by the State Department of Fish and Wildlife, the commission may remove,
248 replace or repair the artificial obstruction or any parts of the obstruction at the expense of
249 the owner or operator. [Amended by 1955 c.707 §53; 1963 c.232 §1; 1965 c.570 §133;
250 2001 c.923 §11]

251

252 **509.630 Power of department to establish fish passage in natural stream**
253 **obstructions.** The State Department of Fish and Wildlife may determine or ascertain by
254 inspection of any natural obstruction whether it would be advisable to construct fish
255 passage over or around such natural obstruction. If it is deemed advisable the State Fish
256 and Wildlife Commission may construct fish passage that provides adequate passage for
257 native migratory fish in the waters of this state inhabited by native migratory fish.
258 [Amended by 1965 c.570 §134; 2001 c.923 §12]

259

260 **509.635 Oregon City fishway under control of commission; removal of**
261 **obstructions.** (1) The fishways over the falls in the Willamette River, near Oregon City,
262 are under the care and control of the State Fish and Wildlife Commission, which may
263 make any extensions, additions, alterations or repairs to the same that become necessary.
264 (2) The commission, or its duly authorized representatives, may remove any artificial
265 obstructions placed in the Willamette River above the falls which would prevent the free
266 passage of fish up the river. [Amended by 1965 c.570 §136]

267

268 **509.640** [Amended by 1955 c.707 §54; repealed by 2001 c.923 §21]

269

270 **509.645 Filing protest with commission; review and determination by**
271 **commission; alternative dispute resolution.** (1) A person owning or operating an
272 artificial obstruction may request alternative dispute resolution at any point in the process
273 of determining fish passage requirements.

274 (2) A person owning or operating an artificial obstruction may file a protest with the
275 State Fish and Wildlife Commission within 30 days from the receipt of the State

276 Department of Fish and Wildlife determinations under ORS 509.585. The person shall
277 identify the grounds for protesting the department's determinations.

278 (3) The commission may, after sufficient opportunity for public review and comment,
279 approve, deny or modify the proposed determinations. [1955 c.707 §51; 1973 c.723 §124;
280 2001 c.923 §13]

281

282 ENFORCEMENT

283

284 **509.910 Injunction to prevent certain violations; jurisdiction; service on**
285 **corporation.** (1) The State Fish and Wildlife Commission may maintain an action for an
286 injunction to enjoin and restrain any person, municipal corporation, political subdivision
287 or governmental agency of this state from violating any of the provisions of ORS
288 509.130, 509.140, 509.505, 509.585, 509.610 and 509.625.

289 (2) Any action authorized by this section shall be tried in the circuit court of the
290 county in which the violation occurs or in Marion or Multnomah County.

291 (3) If the defendant is a corporation with its principal office and place of business in a
292 county other than in which the waters flow or are situated, such action shall be deemed an
293 action of local nature and service of summons made on a corporation in any county
294 where the corporation has its principal office and place of business. If it is a foreign
295 corporation, service may be made on the statutory agent but if there is no such statutory
296 agent then upon the Secretary of State as in other cases provided by law. [1963 c.303 §1;
297 1977 c.242 §8; 1979 c.284 §16; 2001 c.923 §14; 2007 c.625 §10]

298

299 **509.990** [Subsection (8) of 1963 Replacement Part enacted as 1955 c.477 §2;
300 subsection (10) of 1963 Replacement Part enacted as 1957 c.152 §8; repealed by 1965
301 c.570 §152]

302

303 **509.991** [1965 c.570 §59e; repealed by 1969 c.675 §21]

304

305 **509.992** [1969 c.675 §15; repealed by 1977 c.242 §10]

306