



December 14, 2022

Oregon Fish and Wildlife Commission
4034 Fairview Industrial Drive SE
Salem, OR 97032

RE: Comments on OAR 635-800-0110 and 635-800-0120

Dear Commissioners:

The proposed rules violate Oregon statutes and threaten vulnerable species. Oregon's Wildlife Statute and Administrative Procedures Act prohibit the Oregon Fish and Wildlife Commission ("Commission") from delegating to tribes its authority to set fishing rules, including those that govern the time and manner in which fish may be taken from Oregon waters. ORS 496.112, ORS 183.325. Oregon statutes also prohibit the Commission from adopting rules that treat steelhead, a state game fish that may only be fished for recreationally, as a food fish that may be harvested for subsistence or, potentially, commercial use. ORS 509.031. Furthermore, unlike states like Alaska, Oregon does not have statutes that permit subsistence fishing and therefore the Commission does not have statutory authority to adopt rules that permit subsistence harvest. It is concerning that the Oregon Department of Fish and Wildlife ("ODFW") is recommending rules to the Commission that invent Oregon subsistence fishing law, transfer the state's responsibilities to another government, and increase harvest of species without providing any evidence they can withstand those impacts. It is especially alarming because Oregon Coast summer steelhead are a state sensitive species and Oregon Coast Chinook are the subject of a federal Endangered Species Act ("ESA") listing petition. The Commission should not adopt these rules, which would be invalidated by the Oregon Court of Appeals. ORS 183.400(4)(b).

The Conservation Angler urges the Commission to submit these proposed rules for additional legal review by the Oregon Department of Justice and to conduct a biological evaluation of the potential impacts of these rules on vulnerable species. Neither the fish nor the public will be harmed by the state taking these steps to ensure it fulfills its public trust responsibilities to the citizens of Oregon. There is no biological or legal rush to pass these rules.

To be clear, The Conservation Angler does not oppose these rules because of the groups they benefit (i.e., tribes) or potentially harm (e.g., non-tribal anglers). The Conservation Angler supports the rights of all citizens to enjoy the state's fish and wildlife resources, so long as those uses are supported by law and the best available science. The Conservation Angler opposes these rules because they are inconsistent with Oregon statutes and ODFW has not demonstrated how

they protect vulnerable fish species, which are already experiencing increasing impacts from climate change. It is frustrating to say the least that ODFW is forcing conservation organizations to oppose rules that would benefit a historically mistreated group of people, Native Americans, in order to protect vulnerable species.

The Rules Unlawfully Delegate Authority to Other Governments

Oregon law is clear: the Commission may only delegate its authority to the Director of ODFW.

“The commission may delegate to the director any of the powers and duties granted to or imposed upon it by law, except to revoke or refuse to issue licenses issued pursuant to the commercial fishing laws.”

ORS 496.112(3). The director may only delegate to ODFW employees the authority to exercise the director’s duties in the director’s name. ORS 496.118(4). Nowhere in Oregon’s statutes has the legislature inserted terms that authorize the Commission or the director to transfer their responsibilities to anyone else, including other governments.

Under Oregon law, the Commission sets the rules on when, where, and how fish may be taken from Oregon waters. ORS 496.162(1).

“After investigation of the supply and condition of wildlife, the State Fish and Wildlife Commission, at appropriate times each year, shall by rule: (a) Prescribe the times, places and manner in which wildlife may be taken by angling, hunting, trapping or other method and the amounts of each of those wildlife species that may be taken and possessed. (b) Prescribe such other restrictions or procedures regarding the angling, taking, hunting, trapping or possessing of wildlife as the commission determines will carry out the provisions of wildlife laws.”

Id. The Commission may delegate this responsibility to the director of ODFW. ORS 496.112(3). It cannot delegate it to anyone else. *Id.*

The proposed rules unlawfully delegate the Commission’s authority to set these rules to other governments. The proposed rules incorporate the following memoranda of agreements:

1. Memorandum of Agreement to Define Exercise of Hunting, Fishing, Trapping and Gathering of the Siletz Tribe and its Members and Setting Out Principles of Cooperative Management of Wildlife Resources between The Confederated Tribes of Siletz Indians and the State of Oregon, by and through the Oregon Department of Fish and Wildlife (the “Siletz Tribe MOA”); and
2. Memorandum of Agreement to Define Exercise of Hunting, Fishing, Trapping and Gathering by the Cow Creek Band of Umpqua Tribe of Indians and Its Members and for Cooperative Management of Natural Resources between The Cow Creek Band of

Umpqua Tribe of Indians and the State of Oregon, through the Oregon Department of Fish and Wildlife (the “Cow Creek Band of Umpqua Tribes of Indians MOA”).

Under the MOAs, the tribes have “exclusive” authority to select the methods of harvest. Siletz MOA, section 5.d.; Cow Creek Band of Umpqua Tribes of Indians MOA, section 3.c. The Siletz MOA provides that the “[m]ethod of harvest shall be subject exclusively to tribal decision,” except in areas of special concern identified in the agreement, such as marine reserves. Siletz MOA, at section 5.d. The Cow Creek Band of Umpqua Tribes of Indians MOA provides that the “method and time of *** harvest shall be subject to the exclusive decision and regulation of the Tribe, subject to any documented conservation necessity concerns.” Cow Creek Band of Umpqua Tribes of Indians MOA, at section 3.c. These provisions, which are incorporated in the proposed rules, violate Oregon statutes because only the Commission and the director have the authority to set rules regarding the time and methods of harvest. ORS 496.162(1), ORS 496.112(3). Therefore, the Commission cannot and should not adopt these invalid rules.

The Rules Authorize the Unlawful Harvest of Salmon and Steelhead

The rules are unlawful because they allow subsistence harvest, which is not authorized by Oregon statute. Unlike Alaska, Oregon does not have statutes that authorize subsistence fishing for any species, including steelhead. *See e.g.*, AK Stat § 16.05.094.¹ Alaska has statutes that establish systems for evaluating subsistence fishing needs and developing subsistence fishing regulations. *Id.* Oregon does not have similar statutes. Oregon law provides for two types of fishing: (1) recreational and (2) commercial. Because there are no Oregon statutes that provide for subsistence harvest of any fish, including steelhead, the Commission has no authority to adopt rules that allow subsistence harvesting. Because the proposed rules provide for such harvest, they are unlawful.

The rules are especially unlawful as they pertain to steelhead. Steelhead are an Oregon game fish, which the Commission may only manage for two purposes: (1) to provide recreational angling and (2) to protect wild native stocks. ORS 509.031.

¹ Unlike Oregon, Alaska has subsistence harvest statutes. The following is an example of a subsistence fishing and hunting statute: “The section of subsistence hunting and fishing shall (1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state; (2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing; (3) make information gathered available to the public, appropriate agencies, and other organized bodies; (4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods; (5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department; (6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment, and repeal of regulations affecting subsistence hunting and fishing; (7) participate with other divisions in the preparation of statewide and regional management plans so that those plans recognize and incorporate the needs of subsistence users of fish and game.” AK Stat § 16.05.094.

“It shall be the policy of the State of Oregon that rainbow trout, *Oncorhynchus mykiss*, including steelhead trout are game fish, and shall be managed to provide recreational angling for the people and to protect wild native stocks.”

ORS 509.031(1). Steelhead that are not caught recreationally must be released unharmed. ORS 509.031(2). The only groups that these restrictions do not apply to are tribes who hold “Indian fishing rights as granted in federal treaties.” ORS 509.031(3). None of the Oregon Coast tribes hold these rights. *See* NMFS. 2017. Final Environmental Impact Statement to Analyze Impacts of NOAA’s National Marine Fisheries Service Proposed Approval of the Continued Operation of 10 Hatchery Facilities for Trout, Salmon, and Steelhead along the Oregon Coast, as Described in Oregon Department of Fish and Wildlife Hatchery and Genetic Management Plans, Pursuant to Section 4(d) of the Endangered Species Act (the “FEIS”), at 3-56 (“Five Native American Tribes are in the analysis area: Cow Creek Band of Umpqua Tribe of Indians; Coquille Indian Tribe; The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians; Confederated Tribes of Siletz Indians; and The Confederated Tribes of Grand Ronde *** none of these tribes have established fishery-related treaty rights ***.”). Therefore, the Commission can only adopt rules that manage steelhead for recreational angling and wild fish protection; but those rules do not apply to tribes with federal treaty-based fishing rights, which do not include the affected tribes.

Steelhead are not a food fish. ORS 509.031. Only food fish can be taken from the waters of this state for commercial purposes with a license. ORS 508.025(1)(a). Because steelhead are not a food fish, they cannot be caught for commercial purposes by anyone, except certain treaty tribes, which do not include the tribes affected by the proposed rules. Therefore, the provisions in the MOAs that permit the affected tribes to propose commercial harvest plans to ODFW should exclude steelhead because they can never be harvested for commercial use.

The Rules Put Sensitive Species at Risk

ODFW has not provided any evidence that Oregon Coast salmon and steelhead can withstand the impacts of subsistence harvest. Oregon Coast summer steelhead are listed as a state sensitive species, indicating that they are at risk of becoming a state threatened or endangered species.² OAR 635-100-0040(1). NMFS is evaluating whether Oregon Coast Chinook should be added to the federal ESA list.³ Does ODFW seriously think now is the time to start harvesting these species for subsistence and, potentially, commercial purposes? The fact that ODFW would propose such harvest without proper evaluation further demonstrates that existing state regulatory mechanisms are inadequate to protect Oregon Coast Chinook, something NMFS will consider while evaluating that petition. 50 C.F.R. 424.11(c)(iv).

Before the Commission authorizes ODFW to operate this unlawful management regime (which it should not), it should at least require ODFW to present to the public on risks these rules

² The state’s sensitive species list, which can be accessed at:

https://www.dfw.state.or.us/wildlife/diversity/species/docs/Sensitive_Species_List.pdf. *See* bottom of page 7. *See also* ODFW. 2022. Assessment of Naturally Produced Summer Steelhead in the Umpqua River Basin, at 5 (“Coastal summer steelhead have been designated a sensitive species by the Oregon Department of Fish and Wildlife (ODFW) (ODFW 2021), and summer steelhead are an Oregon Conservation Strategy species (ODFW 2016a)”).

³ *See* https://media.fisheries.noaa.gov/2022-08/2022%20Chinook%20Petition%20080422_508-compliant.pdf

pose to fish species and how it plans to manage those risks. As demonstrated by the development of the Coastal Multi-Species Conservation and Management Plan (“CMP”), the public has a strong interest in how these species are managed and it deserves to be fully informed on how these rules will affect them. For example, The Conservation Angler would like to know whether ODFW has escapement goals for Oregon Coast salmon and steelhead. Are they the same as the desired abundance or critical abundance goals set by the CMP? If they are something else, how did ODFW set them? How did ODFW set them when it lacks sufficient abundance, productivity, spatial distribution, and diversity data for these species? How will ODFW monitor populations to ensure they meet these goals? How will ODFW account for incidental take of fish that are not harvested (e.g., mortality from net dropout)? Did ODFW estimate incidental mortality rates of wild native fish when it apparently authorized the Coquille Indian Tribe to allow its members (potentially up to 200-250 anglers) to harvest up to five hatchery salmon and steelhead a day with no annual bag limit? See https://dfw.state.or.us/tribal_relations/Coquille/docs/ODFW_Coquille_Agreement_Talking_Points.pdf, at 1, 3. These are just some the questions that ODFW should answer before it embarks on a new venture of managing the subsistence and, potentially, commercial harvest of state sensitive species and those that may soon be ESA listed.

Conclusion

The proposed rules are not consistent with the fish management regime established by the Oregon Legislature. The rules exceed the Commission’s statutory authority and would be invalidated if challenged. ORS 183.400(4)(b). Additionally, ODFW has not demonstrated how these rules will protect state sensitive species or those proposed for listing under the federal ESA. The Commission cannot and should not adopt these invalid rules, especially when they put vulnerable species at greater risk. The Conservation Angler urges the Commission to conduct a biological evaluation of the potential impacts of these rules on sensitive species and engage in additional legal review of these rules. There is no legal or biological reason to rush this process. The Commission must get this right for the fish.

Thank you for considering our comments.

Sincerely,



Dave Moskowitz
Executive Director

cc: Curt Melcher, Director, ODFW
Jason Miner, Oregon Governor’s Office
Anika Marriot, Assistant Attorney General, Oregon Department of Justice

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