

**Exhibit (G)**

**Supplemental  
Public Correspondence  
received as of  
December 13, 2022**

December 12, 2022

Chair Wahl, Vice-Chair Zarnowitz, and Members of the Commission,

I am Michael Tripp, a Bend resident. Thank you for the opportunity to comment on the proposed revisions of administrative rules for fish passage statutes.

I participated in the Task force committee meetings on this issue over the past 1.5 years, and want to share my support for the proposed rules, along with some personal experience on why the revisions are important. I wish to address specifically the proposed revisions for the definition of construction at dams (lines 41-60 in exhibit G in the Commission's meeting packet).

The history of the Mirror Pond Dam on the Deschutes River, as documented in written public comment submissions, exemplifies the reasons for the proposed construction definition revision. Mirror Pond Dam is the primary remaining barrier to fish passage on the mainstem Deschutes River between Wickiup Reservoir and Big Falls above Lake Billy Chinook. ODFW has estimated that resolving obstruction at Mirror Pond would open, with tributaries, 190 stream miles to migrating Redband trout.

The original dam, circa 1910, included fish passage, but passage was removed six decades ago. Independent engineering assessment in 1914 concluded that the dam was at the end of its lifespan. It was then effectively rebuilt in a series of projects which evidently failed to trigger fish passage requirements under the current rules. Simply put, the statutory fish passage obligation is clear, but the current rules were not specific enough to lead to implementation of statutes.

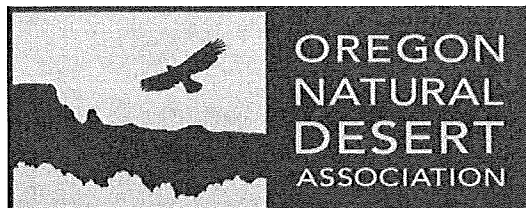
Public awareness of the issue is high. The City of Bend and Bend Park and Recreation District undertook an extensive joint effort between 2013 and 2015 to develop a community vision for the future of Mirror Pond. The concluding "Vision" found greater than 70% of the public supported restoration of fish passage at the dam, which is visible from the Newport bridge in downtown Bend.

These administrative rule revisions may not offer immediate relief for the Mirror Pond problem. But looking to the future, the revision of the definition of construction is necessary to prevent a replay of the Mirror Pond scenario. This same scenario is surely playing out at numerous other sites statewide, albeit in less visible places.

Fish and Wildlife staff are to be commended for the two year long process leading to these proposed revisions. That process was transparent. Public participation was facilitated. It resulted in a constructive balanced proposal for rules revisions.

I encourage the Commission to finalize the proposed rules revisions.  
Thank you for your work on behalf of Oregon citizens.

Michael Tripp M.D.  
1020 NW Foxwood Pl, Bend OR 97703  
email: trippm10@gmail.com



December 9, 2022

Oregon Fish and Wildlife Commission  
Oregon Department of Fish and Wildlife  
61374 Parrell Road  
Bend, OR 97702

Re: Fish Passage Program Rules pertaining to beaver coexistence structures

Chair Wahl and Members of the Commission,

The Oregon Natural Desert Association (“ONDA”) provides these comments in regard to the proposed Fish Passage Program Rules especially as they pertain to beaver coexistence structures

ONDA is a non-profit, public interest organization with more than 10,000 members and supporters dedicated to the conservation of eastern Oregon’s public lands and waters. Founded in 1989, ONDA’s mission is to protect, defend, and restore Oregon’s high desert.

ONDA would like to commend ODFW for their work in beginning to clarify the fish passage rules guiding the construction of beaver coexistence structures such as pond levelers and culvert protection systems. Increased use of these non-lethal coexistence strategies will be critical in helping achieve the ODFW Beaver Working Group (BWG) recommendations in support of increasing beaver managed floodplains on the landscape. The use of non-lethal coexistence strategies also plays a large role in achieving the conservation goals of the recent ground-breaking Private Forest Accord (PFA).

Having clear rules and guidance is critical for ensuring a streamlined and timely permitting process that still results in quality work done in the right places, in the right way, and quickly enough to prevent turning to lethal, or other less desirable strategies. Because of this, ONDA would also like to commend ODFW for their collaborative work and involvement on a recently completed “Best Management Practices for Pond Levelers and Culvert Protection Systems” (BMPs) publication. These BMPS were reviewed not only by many ODFW staff, but multiple National Oceanic and Atmospheric Administration and US fish and Wildlife Staff. Much like the Beaver Restoration Guidebook has proven to be an important reference for the State in terms of Beaver Dam Analogue construction protocols, the coexistence structure BMPs provide a reference for clear expectations to regulators and practitioners.

However, the benefits of non-lethal coexistence structures in the BWG Recommendations and the PFA conservation efforts hinge on the notion that such structures will be able to be installed in a timely fashion (or else lethal methods will be resorted to), and that the permitted structures will actually function.

The problem is that current wording in the proposed Fish Passage regulations is that “(C) Beaver exclusion culvert protection devices shall; Be approved on a case by case basis in areas with salmon, steelhead, bull trout, or other large bodied species.” The proposed rules before the commission provide no guidance as to what characteristics the devices’ approval or disapproval shall be based on in these case-by-case assessments. The current proposed regulatory wording replaced earlier wording which required any enclosure fencing on such instream devices have gaps or holes at least 12-inches or larger. Such

fencing recommendations are out of alignment with recommendations in the collaboratively created BMPs for such structures; because exclosure fencing holes over 6 inches in size allow for easy passage of beavers, and therefore would render the structure useless.

ONDA requests that the commission not approve the current fish passage regulations until further work is done by ODFW and collaborators to better align the beaver coexistence structure regulations to the BMPs document, and clear data or research is shown which would justify including regulatory language that would render such important coexistence devices ineffective in locations where they may be the most needed or beneficial (Salmon habitat). Additionally, concerns raised by Water Watch Oregon, and Trout Unlimited regarding “no appreciable benefit” and the ability for the public to protest decisions must also be resolved by the Department.

Thank you for the opportunity to comment on this important matter. Please feel free to contact me if you have questions or would like additional information.

Sincerely,

Jefferson Jacobs  
Riparian Restoration Manager  
Oregon Natural Desert Association

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**From:** [Brian Posewitz](#)  
**To:** [COMMISSION ODFW \\* ODFW](#)  
**Subject:** Comments on Fish Passage Rule Revisions (Agenda Item G)  
**Date:** Monday, December 12, 2022 6:27:49 PM  
**Attachments:** [221212 Comments - Fish Passage Rules Revisions \(Commission\).pdf](#)

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Greetings,

Please find the attached comments of WaterWatch of Oregon on the above matter. Thank you.

Regards,

Brian Posewitz  
Staff Attorney | WaterWatch of Oregon  
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## WaterWatch of Oregon

### Protecting Natural Flows in Oregon Rivers

December 12, 2022

Oregon Fish and Wildlife Commission  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

#### Re: Proposed Fish Passage Rules Revisions

Chair Wahl and Members of the Commission:

WaterWatch of Oregon (WaterWatch) is a nonprofit river conservation organization dedicated to protecting and restoring natural flows in Oregon's rivers and streams and the free-flowing character of Oregon's rivers and streams.

WaterWatch has followed the work of the Department and its advisory group over the past year and a half to revise Oregon's fish passage rules. WaterWatch attended nearly all meetings on the subject and made comments throughout the process.

WaterWatch offers the following comments on the rules now proposed, which are different in some respects from the rules recommended by the Fish Passage Task Force in October.

1. **In general**, WaterWatch supports the proposed rule revisions. They would improve fish passage requirements in several respects without significant backtracking. For example, the proposed revisions recognize that "major replacement" of barriers, which is one of several "triggers" for Department enforcement of fish passage requirements, can arise from "cumulative" work on a barrier. (Lines 40-68.) The proposed revisions would also recognize that climate change makes fish passage "even more critical" to survival of Oregon's native migratory fish. (Lines 10-11.) That said, WaterWatch has concerns about several provisions in the proposed rules, the most significant of which it discusses below, along with other provisions it supports.

2. WaterWatch opposes a recent change made to the proposed definition of “**No Appreciable Benefit to Providing Fish Passage.**” (Lines 219-25.) This is a proposed new definition for the finding necessary to grant an exemption from fish passage requirements without requiring mitigation (as distinguished from a fish passage “waiver,” which requires mitigation). WaterWatch did not oppose the definition as approved by the Fish Passage Task Force, which included several of WaterWatch’s suggestions, even though the definition could have done more to recognize the value of incremental restoration of degraded streams. **However**, the Department now proposes to qualify the entire definition with the phrase: “**as determined by the Department using its best professional judgement.**” (Lines 219-20.) This could be read to give the Department complete discretion to decide if the criteria for an exemption are met, and to preclude challenges to the Department’s determinations by fish advocates (and by owners of the obstructions). That would give the Department too much power and leave citizens with too little. The definition should be revised, by deleting the quoted phrase, so it simply states the criteria necessary for the finding.<sup>1</sup>

3. WaterWatch opposes removal of a new provision, approved by the Fish Passage Task Force, allowing “[a]ny person” to “**protest**” a determination by the Department under the rules. (Line 543.) As now proposed, only “[t]he owner or operator of the artificial obstruction” could protest a fish passage determination by the Department. The protest right for owners and operators is guaranteed by statute, ORS 509.645, but the Commission could extend it by rule to other parties. In fairness, the Commission should do that.

4. WaterWatch supports the removal, from earlier drafts, of a proposed new exemption for “**dam safety actions.**” Whether such actions trigger enforcement of fish passage requirements should depend on the facts of the situation. If the facts would otherwise trigger enforcement, it likely makes sense to require fish passage along with whatever other work is being done. Moreover, a special exemption for “dam safety actions” would be inconsistent with statute. ORS 509.580(4).

5. To the extent it can be done without impairing fish passage, the rules should accommodate devices that prevent beavers from blocking culverts (i.e., “**beaver exclusion devices**”). Doing so will help reduce pressure to kill beavers, which should help increase the number of beavers and therefore the number of beaver dams, which has been shown to benefit fish, wildlife, and watersheds in numerous ways, including by helping to create healthy,

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<sup>1</sup> The phrase “as determined by the Department” occurs elsewhere in the proposed rules, too. (E.g., lines 106 (whether work at road crossings reduces the adequacy of fish passage), 869-70 (whether circumstances warrant use of trap and haul passage).) It should be eliminated in those places, too, one of which is discussed below, but this instance is particularly troubling given the significance and frequency of exemption determinations.

functioning floodplains and riparian areas. In establishing criteria for beaver exclusion devices to ensure fish passage, (lines 748-55), the Department’s fish passage rules should rely on the best available science from beaver restoration experts and fish-passage experts.<sup>2</sup>

6. The rules should provide clear and specific criteria for when “**trap collection and transport**” is an acceptable alternative to volitional fish passage. Instead, the proposed rules provide only a vague description of when that may be allowed and give too much discretion to the Department.<sup>3</sup> (Lines 868-72.)

7. The terms “naturally occurring” and “natural,” in the definitions of “**active channel width**” and “**channel**,” (lines 24, 38), create potential for confusion and unintended consequences and possible conflict with the definition of “stream,” which includes “channelized or relocated streams.”

Thank you for considering our comments.

Sincerely,

*Brian Posewitz*

Brian Posewitz  
Staff Attorney

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<sup>2</sup> Beaver exclusion devices are essentially wire fencing with wires running both horizontally and vertically. The proposed rules would require spacing of six inches between wires in locations where only resident trout and lamprey are present and leave spacing to “case by case” determinations where “large[-]bodied” fish such as salmon and steelhead are present. The proposal approved by the Fish Passage Task Force had minimum spacing requirements for large-bodied fish that beaver experts said would fail to exclude beavers. Ideally, the rules would provide specific spacing requirements that would both ensure fish passage and exclude beavers. Our understanding from discussions with fish and beaver experts is that it may be possible to do that, which would provide valuable certainty for people wishing to use such devices.

<sup>3</sup> WaterWatch does not take a position in these comments on when, if ever, trap and transport should be allowed to substitute for volitional fish passage.

**From:** James Fraser  
**To:** COMMISSION ODFW \* ODFW  
**Subject:** Trout Unlimited Comments on Fish Passage Rules (12/16 Meeting, Exhibit G)  
**Date:** Monday, December 12, 2022 9:25:43 PM  
**Attachments:** Trout Unlimited re Fish Passage Rules - 20221212.pdf

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Dear Chair Wahl, Vice-Chair Zarnowitz, and Members of the Commission,

On behalf of Trout Unlimited, please accept the attached comments for consideration during the December 16<sup>th</sup> Commission meeting regarding Agenda Exhibit G.

Please let me know if you have any questions.

Sincerely,

James Fraser



James Fraser / Oregon Policy Advisor  
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971-278-8085

Trout Unlimited  
<http://www.tu.org>



December 12, 2022

Oregon Fish and Wildlife Commission  
4034 Fairview Industrial Drive SE  
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[ODFW.Commission@odfw.oregon.gov](mailto:ODFW.Commission@odfw.oregon.gov)

**Re: Support for Fish Passage Rule Revision (December 16, 2022 Meeting, Agenda Exhibit G)**

Dear Chair Wahl, Vice-Chair Zarnowitz, and Members of the Commission,

Trout Unlimited (“TU”) is a non-profit organization dedicated to the conservation of cold-water fish (such as trout, salmon, and steelhead) and their habitats. Our organization has more than 350,000 members and supporters nationwide, including over 3,500 members in Oregon.

**TU supports the proposed rule revisions shown in Attachment 3 of the Commission’s board packet for Agenda Exhibit G, though we have reservations about certain edits made after the Fish Passage Task Force meeting (as described below in “Specific Comments”).**

#### Significance of this Issue

The statutory policy “to provide for upstream and downstream passage for native migratory fish” is clear. *See* ORS 509.585(1). However, the existing rules are not, which creates uncertainty for the public, owners and operators, and agency staff.

One of TU’s key concerns with the current rules is what that Agenda Item Summary refers to as trigger avoidance; the existing rules are not specific about the threshold at which “major replacement” qualifies as “construction” that triggers fish passage requirements. As a result of this ambiguity under the current rules, owners and operators have been able to conduct significant maintenance and upkeep at artificial obstructions in recent decades without being required to add fish passage infrastructure.

Additionally, the existing rules are out-of-touch with priority issues and best available science (e.g., the needs of beavers and lamprey at artificial obstructions, the width of road-stream crossing structure sizes), and this rule revision is an efficient time to address those issues.

#### TU Involvement in the Process

TU volunteers and staff participated in the 21-month stakeholder engagement process that ODFW facilitated regarding this rule revision. During the initial public comment period on these

draft rules (i.e., open through September 25, 2022), TU and its related entities Oregon Council of Trout Unlimited and Deschutes Redbands Chapter of Trout Unlimited submitted written comments to be considered by the Oregon Fish Passage Task Force; a copy of that letter is attached for the Commission's reference.

### Specific Comments about Draft Rules

TU appreciates and supports nearly all of the proposed revisions in this rule package. We mentioned many of the specifics in the attached comment letter and will not repeat those here.

After the public comment period and Fish Passage Task Force meeting this fall, agency staff made another round of edits to the rules and we also support many of those changes. We particularly appreciate that ODFW staff deleted a proposed "dam safety" work exemption from the definition of "fundamental change in permit status" (see lines 150-154), which might have had unintended results (e.g., an owner of a dangerous dam being exempted from fish passage requirements if the government required dam safety improvements).

However, staff made a significant revision to the "protest" provision after the Fish Passage Task Force meeting that TU would encourage the Commission to change prior to approval. Statutes and the current rules allow "a person owning or operating an artificial obstruction" to file a protest regarding ODFW's determinations about fish passage requirements or alternatives. ORS 509.645; OAR 635-412-0030. Presumably, many of those protests will be objections to adding fish passage infrastructure. TU encouraged ODFW staff to also provide a protest process for members of the public, and indeed, the rules reviewed by the Task Force included that (i.e., stating in draft OAR 635-412-0030(2) that "any person or Tribal Representative" may file a protest of a Department determination). TU supported that broadened right of public involvement, but it has been removed in the version before the Commission today (see line 543). Statutes do not *require* ODFW to provide a protest process to the public, but TU feels that a public protest right protects the public interest. Unless the Commission adjusts the language in line 543, the only people who may legally object to a Department determination about fish passage are the regulated entities.

### Conclusion

Overall, the revised rules provide reasonable detail – consistent with the statute – that will allow ODFW staff and regulated entities to fully implement Oregon's fish passage statutes. TU encourages the Commission to approve the proposed rules.

Thank you for considering these comments, and please let me know if you have any questions.

Sincerely,

James Fraser  
Oregon Policy Advisor  
Trout Unlimited  
[james.fraser@tu.org](mailto:james.fraser@tu.org)

**Attachment:**

**Public Comment Letter (dated 9/28/22) from Trout Unlimited, Oregon Council of Trout Unlimited, and Deschutes Redbands Chapter of Trout Unlimited regarding Proposed Rules**

[Note: The line numbers in the following comment letter correspond to a previous version of the draft rules (i.e., the version provided for public comment period and reviewed by the Fish Passage Task Force). TU provides a copy of the letter for the Commission's reference to demonstrate the specific language and concepts that TU supported or opposed at that time.]



September 28, 2022

Greg Apke  
Fish Passage Program Coordinator  
Oregon Department of Fish & Wildlife  
[ODFW.Passagerules@state.or.us](mailto:ODFW.Passagerules@state.or.us)

**Re: Comments on Proposed Fish Passage Rule Revisions**

Dear Mr. Apke and Members of the Fish Passage Task Force,

Trout Unlimited (TU) is a national non-profit organization dedicated to the conservation of coldwater fish species and their habitats. TU members that live in Oregon are affiliated with the Oregon Council of Trout Unlimited (OCTU). The Deschutes Redbands Chapter of Trout Unlimited (Redbands) is the local chapter entity for TU members that live in Central Oregon.

TU, OCTU, and the Redbands are committed to caring for Oregon's trout, salmon, and steelhead. Each of our organizations participated in stakeholder meetings with Oregon Department of Fish & Wildlife (ODFW) staff over the course of the ODFW Fish Passage Administrative Rule Revision Initiative because we wish to ensure effective and efficient administration of ODFW's Fish Passage Program and Division 412 rules.

Fish passage has been required at dams in Oregon since before statehood. And for over 20 years, Oregon statutes have specified that it "is the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish . . . and to achieve the enhancement and restoration of Oregon's native salmonid populations, as envisioned by the Oregon Plan." ORS 509.585(1). Yet, hundreds of dams and other artificial obstructions still block – or significantly hinder – fish passage in Oregon.

Fish passage is indisputably a fundamental component of fishery management, and a requirement of increased importance in the face of climate change. Experience since 2006 with the current version of the Division 412 rules – and the increasing effects of climate change – call for significant revisions to the existing rules.

Overall, we find that the proposed revisions make significant headway towards improving the existing rules, though there are a few areas that still need to be refined. Accordingly, our three entities respectfully offer the following comments on the proposed rule revisions, with references to the specific line numbers where each comment applies (as requested by ODFW staff). For your ease of use in cross-referencing our input with the draft rule language, we have presented our comments chronologically rather than in order of priority, and we have **bolded** our key points:

- Lines 1-12: We support the addition of this policy language that generally mirrors the statutory language. We particularly appreciate the attention to “downstream” passage needs and statement about the importance of fish passage to species’ climate change resilience.
- **Lines 21-22:** We recommend deletion of "physically attached" in this definition. That language provides no helpful detail to the definition that is already provided in statute. Any man made “device” that obstructs fish passage is an artificial obstruction irrespective of whether "physically attached.”
- Line 35: The language “with respect to artificial obstructions subject to these rules” is unnecessary (per that specification in line 16) and should be deleted.
- Lines 40, 54, 63, 70, 89, 91: We support the addition of “cumulative” language in these provisions.
- Lines 74- 82: We support the additions of “road(s)” and “bridge(s)” here.
- **Lines 103-107:** We agree with the concept that a “trigger” at one artificial obstruction should also serve as a trigger at a connected or related structure. Nevertheless, we recommend (i) moving this language out of the “Definitions” section, and (ii) adding identifying information about the referenced “Department Memorandum.” The language in Lines 103-106 is an important operative provision, not a definition, and therefore we suggest placing this language instead in a new OAR 635-412-0020(5).
- Line 127: We support the addition of “delay” because delays in migration are a large problem and key stressor for migratory fish.
- **Lines 213-219:** We support ODFW’s proposal to add a definition for “no appreciable benefit to providing fish passage” and agree with the definition provided. We appreciate the specific time frame for the inquiry of when habitat might provide appreciable benefit, and the objective standard of “best professional judgment” for such analysis.
- Lines 227-228: We recommend revising the definition for “person” to include “trust” and a catch-all “other business entities” because the current language does not currently include all common types of entities that might own fish barriers.
- **Lines 239-240:** We support adding a definition for “structure volume” and agree with this definition.
- **Lines 249-252:** The definition for “trigger” is unnecessarily complicated. The words “that is associated with or at any artificial obstruction” should be deleted.
- **Lines 260-263:** As commented below regarding lines 409-412 and 436-477, the terminology and usage of “waivers” and “exemptions” in these rules are confusing and conflict with current ODFW materials. The simple explanations for waivers and exemptions on the ODFW website (under the heading “Fish Passage Waivers and

Exemptions)<sup>1</sup> are consistent with our understanding of the differences in these mechanisms, and should serve as a model for ODFW staff in making the relevant rule language easier to track. The ODFW website expressly states that “fish passage exemptions are different than a waiver...” However, the definition for “waiver” in these rules explain waivers as “a fish passage exemption...” We respectfully ask that ODFW staff clarify the definition for waiver in lines 260-263, and consider adding a definition for “exemption” so readers can more easily understand the differences between them. Please see our related comments below for lines 409-412 and 436-477.

- Lines 288-289: We support and appreciate the addition of “restoration” here because ODFW and dam owners must proactively collaborate on restoration – not just active enforcement – if the State of Oregon is going to fulfill its policy of providing effective fish passage.
- Lines 324-328: We support the Department’s intention to proactively and collaboratively establish fish passage at obstructions on the priority list. With incoming federal funds from the bipartisan infrastructure legislation, this rule language provides helpful direction to agency staff on addressing high-profile and long-acknowledged fish passage issues.
- Lines 332-334: We support and agree with the clarifying “current and future” language.
- Lines 348-349: We respectfully request that Department staff consider whether the language “after enforcement occurs at five priority artificial obstructions” in this clause is still necessary. It appears to be a vestige of when the existing rules were new and the Department needed direction on when to conduct its first review of the priority list. If the language signals that the priority list must be updated after every five enforcement actions on an ongoing basis, then we recommend clarifying the rule to that effect.
- Lines 353-366: We support and agree with these revisions because the new language provides a roadmap for the State to resolve fish passage barrier issues in instances when an owner does not engage in the preferred collaborative process.
- Lines 409-412: As commented above regarding lines 260-263, and below regarding lines 436-477, these revisions appear to be a departure from current practice and understanding. Prior to the rule revision, waivers and exemptions were treated separately in these provisions. However, these edits suggest that the two mechanisms are the same, with waivers being a subset of exemptions. We do not think this is necessary, and would recommend removing the proposed edits.
- **Lines 436-477:** These provisions are confusing and unnecessarily require significant cross-referencing between sub-sections and defined terms. We respectfully request that ODFW make these simpler and more user-friendly. As commented above on

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<sup>1</sup> Available at: <https://www.dfw.state.or.us/fish/passage/>

lines 260-263, it seems that part of the purpose in revising this section is to designate waivers as a subset or type of exemptions. That is a departure from current practice, and we do not think it is necessary to make this change. Specifying that waivers are a subset of exemptions will confuse interested parties. The ODFW website linked above in our comments for lines 260-263 provides a simple, clear explanation of waivers and exemptions (i.e., waivers require a net benefit to fish, and exemptions require a finding of no appreciable benefit), and we recommend using that as a model in improving this section of the rule revision.

- **Lines 522-526:** We recommend that ODFW establish a homepage for the notices that start the three-week public comment timeline in this provision, as well as the 30-day protest timeline described in lines 541-550. The Oregon Water Resources Department “Water Rights Weekly Public Notice”<sup>2</sup> serves a similar purpose and would be a helpful model for such an ODFW notice platform. This suggestion does not require any further edits to the proposed rules, but rather is intended as a suggestion on how ODFW can implement the public notice and public process requirements in lines 522-526 and 541-550.
- **Lines 541-550:** We recommend changing the date upon which a protest deadline commences because interested parties are unlikely to know “the date the person owning or operating the artificial obstruction receives the Department’s determination.” A better start date for the 30-day protest period would be the date that the Department posts a public notice on its website, as commented above on lines 522-526. The proposed language creates significant risk of disputes over timeliness of protests and issues of fact regarding when an owner received ODFW’s determination.
- **Lines 558-1000:** We generally support and agree with the numerous revisions in this rule section, many of which add specificity and science-based parameters. However, we have a few specific comments and minor edits to recommend, as follows:
  - Line 710: We greatly appreciate that ODFW is moving towards the NOAA standard for road-stream crossing structure sizes (of 1.5x channel width) here. The existing ODFW standard (i.e., for structures to be “equal to or greater than the active channel width”) is not supported by best available science. We believe the revision is an improvement over that outdated metric.
  - Line 754: “Ford” appears to be capitalized in error.
  - Lines 756-762: This “NOTE:” appears to be in the wrong place, falling between the sub (D) and its clauses (i)-(v).
  - Line 921: ODFW should re-write this sentence in active voice so the restoration obligation falls upon a specified party. We recommend revising as follows: “After an artificial obstruction is removed, its owner shall restore the stream channel;”

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<sup>2</sup> Available at: [https://apps.wrd.state.or.us/apps/misc/wrd\\_notice\\_view/?notice\\_id=21](https://apps.wrd.state.or.us/apps/misc/wrd_notice_view/?notice_id=21)

- Lines 1027-1036: The rules require owners that engage in mitigation actions to monitor and report on that mitigation, but there is no specification of related timelines. We recommend adding the following in line 1028: “These reports shall be submitted to the Department on an annual basis and be made available to the public.”
- Lines 1055-1059: We applaud and agree with the importance of stating that mitigation must consider whether a mitigation action would occur independently of a waiver, as well as the effects of climate change. For mitigation to be meaningful to affected fish species, it must be additive to other actions and processes, and long-lasting in the face of changing natural conditions. Both of these factors recognize that in rule and we thank ODFW for including this language.

We appreciate the significant time that ODFW staff have expended in this rule revision endeavor. Thank you for considering these comments, and please let us know if you have any questions.

Sincerely,

James Fraser  
Oregon Policy Advisor  
Trout Unlimited  
[james.fraser@tu.org](mailto:james.fraser@tu.org)

Mark Rogers  
Chair  
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Michael Tripp  
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Deschutes Redbands Chapter  
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**Exhibit (G)**

**Supplemental #2  
Public Correspondence  
received as of  
December 14, 2022**



# CAROLLO LAW GROUP

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Managing Attorney

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December 14, 2022

## Via Email

Oregon Fish and Wildlife Commission  
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Salem, OR 97302  
[ODFW.Commission@odfw.oregon.gov](mailto:ODFW.Commission@odfw.oregon.gov)

RE: Fish Passage Program Rules

Dear Commissioners:

On behalf of the Winchester Water Control District (“District”), please accept the following comments on the Oregon Fish and Wildlife Commission’s (“Commission”) proposed Fish Passage Program Rules (“proposed rules”). The proposed rules are inconsistent with the statutory directives and definitions in ORS 509.580 and 509.585 and therefore exceed the Commission’s statutory authority. Furthermore, the proposed rules pose a significant risk that repairs necessary to ensure dam safety will be dangerously delayed, by redefining the events “triggering” fish passage review to include what would otherwise be routine maintenance, and by applying unreasonably vague definitions certain to result in both litigation and administrative overreach. For these reasons, and the reasons provided herein, Winchester Water Control District requests that the Commission reject the proposed rules.

### **Introduction and Summary**

Artificial instream structures can have a variety of impacts on migratory fish. While many perceive instream structures as unnecessary barriers to fish passage, these same barriers provide opportunities for monitoring, studying, and even assisting, the life stages and populations of migratory fish. The Winchester Dam, managed by Winchester Water Control District, is one such structure. The Winchester Dam and its fishway provide an opportunity for migratory fish populations to be monitored, counted, trapped, and studied, prohibits the upstream movement of non-native predatory gamefish like smallmouth bass, and provides habitat for lampreys reared above the Dam. Unfortunately, the proposed rules would make it prohibitively difficult to maintain the Winchester Dam and its current benefits by defining regular maintenance activities as a “major replacement” of the Dam in a manner that would subject such regular maintenance activities to the strictures of the proposed OAR 635-412-0020. Such a regulation is facially inconsistent with the statutory scheme of ORS 509.580 et seq., governing Oregon’s fish passage laws. Moreover, the regulations represent an ill-advised policy decision which could result in dangerous and arbitrary

delays in the performance of routine maintenance and repairs necessary to ensure dam safety, by redefining minor and moderate repairs to fall within the definition of events triggering Commission review of the fish passage provided. OAR 635-412-0030(2). The regulations further propose unreasonably vague definitions for critical terms including “artificial obstruction” and “fish passage,” which are sure to result in costly delays and unnecessary litigation and create a significant risk of agency overreach.

Therefore, for the reasons provided herein, the Commission should reject the proposed rules.

### **Interests of Winchester Water Control District**

The Winchester Water Control District owns and operates the Winchester Dam, an approximately 450-foot dam which spans the North Umpqua River at Winchester, an unincorporated community approximately four miles north of Roseburg in Douglas County, Oregon. First constructed in 1890, the Winchester Dam is the oldest dam in Douglas County and one of the oldest dams in the state. Originally constructed as a timber crib dam with a seven-foot head, the Winchester Dam has existed largely unchanged since the last substantial modifications were performed in or around 1907, raising the head to fourteen feet and encasing the original timber crib in a larger structure built at least partially of concrete and filled with gravel and other materials. Fish passage is provided by a fish ladder which was first built in its current location sometime in the 1940s and last substantially modified in the early 1980s. The Winchester Water Control District acquired ownership of the Winchester Dam in April of 1969. On June 3, 1996, the National Park Service entered the Winchester Dam into the National Register of Historic Places.

Under Oregon law, water uses initiated prior to February 24, 1909, are protected as vested rights, subject to confirmation through a state adjudication process under ORS Chapter 539. *See Warner Val. Stock Co. v. Lynch*, 215 Or. 523, 549 (1959); *United States v. State of Or.*, 44 F.3d 758 (9th Cir. 1994). As required under ORS 539.240(1), the Winchester Water Control District filed a claim registration statement with the Oregon Water Resources Department (“OWRD”) for a pre-1909 water right for recreational use of the water impoundment created by the Winchester Dam on December 30, 1992. Having filed its registration statement, the District is permitted by law to “continue to appropriate the surface water and apply it to beneficial use to the extent and in the manner disclosed in the recorded registration statement.” ORS 539.240(7). Subject to a final determination in an adjudication by OWRD, the District’s right to appropriate surface water has a tentative priority date from the date claimed in the registration statement. ORS 539.240(8). Adjudications are initiated upon the motion of the OWRD Director or by petition by an interested party with standing. ORS 539.021(1). The North Umpqua basin has not yet been adjudicated. Accordingly, as of the present date, the District has a vested right to use the water impoundment created by the Winchester Dam with a priority date of 1908 at the latest (1900 for the original dam).

### Comments

The Winchester Water Control District offers the following comments on the proposed rules:

#### **1. The Proposed Rules Exceed the Statutory Authority of the Commission.**

ORS 509.580 et seq. give the Commission the authority to regulate artificial instream structures for the maintenance of fish passage in the state of Oregon. In particular, ORS 509.585(4) provides that any person owning or operating an instream artificial obstruction, like a dam, must, prior to engaging in any construction of or on the obstruction, determine whether native fish were historically present in the obstructed stream and, if so, submit a proposal for fish passage or obtain a waiver. “Construction” is defined in ORS 506.580(2) as “[o]riginal construction; [m]ajor replacement; [s]tructural modifications that increase storage or diversion capacity; or [f]or purposes of culverts, installation or replacement of a roadbed or culvert.”

The term “major replacement,” used to define “construction” in ORS 509.580, is itself left undefined. Therefore, the proposed rule OAR 635-412-0005(10) seeks to define “major replacement” as, *inter alia*, “[r]epairs, patches, or modifications to over 30 percent of the area of the upstream, downstream, or top face of [a] dam.” However, this definition is directly inconsistent with the plain meaning of the term “major replacement,” and is therefore inconsistent with the text and context of ORS 509.580. As such, the proposed rules exceed the statutory authority conferred on the Commission by ORS 509.580 et seq.

Determining whether the proposed rules exceed the statutory authority granted by ORS 509.580 et seq. requires an evaluation of the statute. The focus of statutory construction inquiries is what the legislature intended when the statute was enacted. *Holcomb v. Sunderland*, 321 Or. 99, 105, 894 P.2d 457, 460 (1995) (citing *DeFazio v. WPPSS*, 296 Or. 550, 561, 679 P.2d 1316 (1984)). The Oregon Supreme Court articulated an analytical framework for statutory construction in *Portland Gen. Elec. Co. v. Bureau of Lab. & Indus.*, 317 Or. 606, 610–12, 859 P.2d 1143, 1146 (1993), which was subsequently modified by ORS 174.020. *State v. Gaines*, 346 Or. 160, 165, 206 P.3d 1042, 1047 (2009); Hon. Jack Landau, Villella, Anne & Johansen, Steve, *Interpreting Oregon Law, Statutory Interpretation: Overview of General Principles*, §1.5 (2009). When interpreting statutes under this framework courts may look to the text, context, and legislative history to determine the intent of the legislature. *State v. Gaines*, 346 Or. at 171–172. Statutory text refers to the actual words of the statute. *See PGE*, 317 Or. at 610. Context, meanwhile, refers to other provisions of the same statute and other related statutes. *Id.* at 611; *see also State v. Stamper*, 197 Or. App. 413, 417–18, 106 P.3d 172, 174 (2005); *State v. Betts*, 235 Or. 127, 137–38, 384 P.2d 198, 204 (1963); *Daly v. Horsefly Irr. Dist.*, 143 Or. 441, 445, 21 P.2d 787, 789 (1933).

Where “a statute leaves its words undefined, ‘words will be interpreted as taking their ordinary, contemporary, common meaning.’” *United States v. Monday*, 614 F.3d 983, 985 (9th Cir. 2010) (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199

(1979)). The term “replace”—used in ORS 509.580—is frequently given its ordinary meaning. “Replace” commonly means “to take the place of something, or to put something or someone in the place of something or someone else.” *Replace*, Cambridge Dictionary <https://dictionary.cambridge.org/us/dictionary/english/replace> (last visited Dec. 6, 2022). Replacement, meanwhile, means “the process of replacing something with something else.” *Replacement*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/replacement> (last visited Dec. 6, 2022). Courts in Oregon and across the Country have applied these common definitions to the terms “replace” and “replacement” when interpreting statutes and regulations. See, e.g., *Piazza v. Clackamas Water Dist.*, 21 Or. App. 469, 475, 535 P.2d 554, 557 (1975) (“‘Replace’ is generally defined to mean the ‘restoring to a former condition,’ or ‘the providing of an equivalent for’”); *Mexichem Fluor, Inc. v. Env’t Prot. Agency*, 866 F.3d 451, 459 (D.C. Cir. 2017) (“In common parlance, the word “replace” refers to a new thing taking the place of the old.”); *Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996) (“[Regulation] likewise defines ‘replacement’ and ‘acquisition of the equivalent’ as synonymous, meaning ‘the substitution for injured resources with resources that provide the same or substantially similar services.’”); *Weekes v. Ohio Nat. Life Assur. Corp.*, No. 1:10-CV-566-BLW, 2011 WL 5835596, at \*5 (D. Idaho Nov. 21, 2011) (Idaho regulation defines replacement on insurance policy as: “Replacement means any transaction by which new life insurance or a new annuity is to be purchased, and it is known or should be known ... that existing life insurance or an annuity has been or is to be: ... Lapsed, forfeited, surrendered, or otherwise terminated[,] [c]onver[te]d or ... continued as extended term insurance”).

The text of ORS 509.580 is the starting point for determining whether the proposed rules exceed the authority provided by the statute. Because “major replacement” is undefined in ORS 509.580, the term should be given its ordinary meaning. Therefore, “major replacement” as used in ORS 509.580 must mean a construction which takes the place of, or puts something in the place of, a major portion of a dam. *Replace*, Cambridge Dictionary. While proposed OAR 635-412-0005(10)(b)(A)(i) properly encompasses this definition, OAR 635-412-0005(10)(b)(A)(ii) and (iii) define “replace” synonymous with “repair” or “maintain”—stating that a “major replacement” can constitute “[r]epairs, patches, or modifications to over 30 percent of the area of the upstream, downstream, or top face of the dam.” (emphasis added). Under no reasonable interpretation of ORS 509.580 can the term “major replacement” be defined as a major *repair* or *maintenance* or mere *modification* of a dam structure. See, e.g., *Mexichem Fluor, Inc.*, 866 F.3d at 459 (The EPA’s regulation allowing “replace” to be defined every time a certain substitute substance is used, even if used consecutively, “borders on the absurd.”). Therefore, proposed OAR 635-412-0005(10) violates the Commission’s statutory authority by making “replace” synonymous with “repair.”<sup>1</sup> *Guadiana v. State Farm Fire & Cas. Co.*, No. CIV 07326TUCFRZ(GEE), 2009 WL 3763693, at

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<sup>1</sup> “Repair” is commonly defined as “to put something that is damaged, broken, or not working correctly, back into good condition or make it work again.” Repair, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/repair> (last visited Dec. 6, 2022).

\*3 (D. Ariz. Nov. 10, 2009) (“The court agrees that the words repair and replace are not ordinarily synonymous.”)<sup>2</sup>; *Mozingo v. Wellsburg Elec. Light, Heat & Power Co.*, 101 W. Va. 79, 131 S.E. 717 (1926) (“‘Repair’ means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, and is synonymous with ‘mend’ and ‘renovate,’ but, generally, does not mean to alter or change condition or to replace with new or different material”).

The context of ORS 509.580 further establishes that the legislature did not intend “major replacement” to be synonymous with a “repair” of a dam structure. While “replace” and “repair” cannot be considered synonyms, “repair” and “maintain” can be. See *Ferguson v. Rochford*, 84 Conn. 202, 79 A. 177, 178 (Conn. 1911) (“‘Keep in repair’ should be construed as synonymous with the word ‘maintain.’”); *Weatherholt v. Spencer Cnty.*, 639 N.E.2d 354, 356 (Ind. Ct. App. 1994) (“The language of the predecessor statute to Indiana Code § 36–2–2–24 demonstrates that the legislature intended ‘maintain’ to be synonymous with ‘kept in repair.’”); *City of Wilkes-Barre v. Wilkes-Barre Twp.*, 24 Pa. D. & C.2d 271, 274 (Quar. Sess. 1961) (“In a wide variety of situations the word ‘maintain’ has been taken to be synonymous with ‘repair’. This is the usual meaning, the dictionary meaning, and the meaning which must control in the absence of a real expression of a contrary intention[.]”). In ORS 509.580 the legislature drew a distinction between the term “replace” and the term “maintain.” See ORS 509.585(2) (“a person owning or operating an artificial obstruction may not *construct* or *maintain* any artificial obstruction” (emphasis added)). The proposed rules largely eliminate this distinction by making “replace” synonymous with “repair” and other activities that cannot be plausibly be construed to fall under the scope of “replacement.” Under the proposed rules, a “major replacement” could consist of little more than maintenance activities on an existing dam, eliminating the legislature’s intended distinction between maintenance activities and “major replacements”.

The text and context of ORS 509.580 establish that the term “major replacement” cannot be defined as a “major repair,” and instead must be defined as actually replacing a significant portion of an existing dam structure. The definition of “major replacement” in OAR 635-412-0005(10) is incongruous with this clear statutory text and context. Therefore, the Commission would exceed its statutory authority if it adopted the proposed rules. Accordingly, the Commission should not adopt the proposed rules.

## **2. The Proposed Rules Are Vague, Unreasonable, and Certain to Result in Unnecessary and Expensive Litigation**

Since its acquisition of the Winchester Dam in 1969, the District has periodically performed maintenance and repairs on the dam, as is typically required for any in-water structure. In preparation for and the performance of these repairs, as well as the daily operation of the Winchester Dam, the District has worked closely with both federal and state regulatory agencies, including the Oregon Department of Fish and Wildlife (“ODFW”), which operates a fish counting

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<sup>2</sup> The court in *Guardiana* did hold, however, that a repair can be a “replacement” where a repair *requires complete replacement*.

station at the Winchester Dam fish ladder, and OWRD, which has primary jurisdiction to regulate the Winchester Dam since it is not under a federal safety program. *See generally* ORS 540.443-540.491. Following OWRD's annual inspection of the Winchester Dam in October 2019, the District engaged a structural engineering firm to design and execute a project to repair and upgrade the Winchester Dam to address dam safety concerns. Even under state and federal statutes providing a streamlined permitting process for routine maintenance to existing structures, the authorization process for obtaining the permits necessary to perform these repairs is a significant undertaking, requiring coordination with a multitude of federal and state agencies. Despite those hurdles, the District anticipated securing the necessary permits and authorizations in time to perform the needed repairs during the summer of 2022. However, as the District was actively engaged in this permitting process, several environmental groups who have long desired to see the Winchester Dam removed filed a lawsuit against the District claiming that the dam harms migrating fish and that the only remedy is to remove the dam entirely—that, or completely redesign and relocate the fish ladder.

At least one of the plaintiffs, WaterWatch of Oregon (“WaterWatch”), was among the activists who successfully lobbied the ODFW Commission to “up-list” the Winchester Dam as a fish passage priority concern from Group 8 in 2013 to Group 1 in 2019—a decision made without any consultation with the District. In the pending litigation, WaterWatch has actively sought to frustrate and delay the District’s ability to secure the authorizations to perform the repairs—which, ironically, will as designed cure many if not all of the components of the Winchester Dam which those plaintiffs allege cause harm to fish. Having unsuccessfully lobbied OWRD to reject the District’s project plans, the same plaintiffs have actively and vociferously submitted public comments in favor of the proposed rule revisions now under consideration by the Commission. Among the many comments submitted, the plaintiffs have strenuously argued that ODFW should determine whether a “federal and state dam safety action” should trigger fish passage enforcement on a case-by-case basis, and that those determinations should be subject to challenge by individual members of the public. There can be no reasonable doubt that WaterWatch has advocated for these changes specifically with the intent to encourage *ultra vires* rulemaking as a tool to further delay, frustrate and impede the District’s efforts to perform the repairs which OWRD determined necessary for dam safety more than three years ago, and which, if not for the plaintiffs relentless opposition and attacks, would almost certainly have been completed already, in the summer of 2022.

The proposed regulations would expand the events which “trigger” ODFW’s review of fish passage by redefining the term “construction” to include not only “excavation or replacement of 30 percent by structure volume” but also “repairs, patches or modifications to over 30% of the area of the dam face (measured perpendicular to stream flow),” whether “single or cumulative.” OAR 635-412-0005(10), (50). Similar changes are not proposed for tide and flood gates, kikes, berms, levees, roads or culverts. OAR 635-412-0005(10)(b)(B)-(C). While a similar modification is proposed for bridges, the threshold for the repairs, patches and modifications is set at 50%, not

30%, and excludes repairs made exclusively to the traveling surface of the bridge deck. OAR 635-412-0005(10)(d)(G). While the in-water footprint of dams may be larger than other in- or over-water structures, this is not necessarily true and is in any event an arbitrary and capricious distinction. The proposed definition could encompass routine repairs performed on the Winchester Dam by the District, turning what has historically been a nimble response to dam safety concerns into a cumbersome, lengthy multi-agency review process and effectively rendering null the statutory exemptions created precisely for routine maintenance.

The proposed rules would also modify the term “artificial obstruction” to define “preventing migration” to include “significant delay” in fish passage for native migratory fish, OAR 635-412-0005(4), and modify the term “fish passage” to mean the ability of “the weakest native migratory fish” to move with “minimal delay,” OAR 635-412-0005(20). The proposed rules do not, however, define when a delay is so “significant” as to amount to the prevention of migration for the purposes of determining whether a structure is an “artificial obstruction,” nor do they define the term “minimal” for the purposes of determining when “fish passage” is provided. The confusion and tension between these proposed definitions is certain to create confusion and uncertainty among dam owners, and creates the risk of subjective determinations and agency overreach.<sup>3</sup>

The net effect of this uncertainty and the increased cost and time associated with simply acquiring the authorization required to perform even routine maintenance and repairs will almost certainly cause dam owners to delay needed repairs and maintenance, leading to an overall decline in the condition of the dams in this state. Inevitably, the delayed dam safety repairs are likely to lead to a disastrous failure at some point in time.

This would be particularly untenable to the District in light of the fact that during the entirety of its ownership and maintenance of the dam, the District has always understood that ODFW considered the Winchester Dam, essentially, a fish passage neutral dam causing negligible impacts to migrating fish, while providing excellent upstream habitat for lamprey eels and potentially providing an upstream deterrent for unwanted invasive species, such as smallmouth bass. Specifically with respect to wild Oregon Coast Coho (“Coho”), the fish counts recorded at the Winchester Dam as published by ODFW for Coho migrating through the fish ladder have increased dramatically since the the 1990s, and indeed are returning and thriving in such

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<sup>3</sup> In addition, “the weakest native migratory fish” standard is misguided because ODFW has failed to take into account how such a standard could benefit non-native and invasive species and, thereby, actually harm highly valued native species like salmon and steelhead. For example, modifications to fish passage requirements that might marginally benefit a native chub, but be unnecessary for salmon and steelhead passage, makes no sense if those same fish passage specifications would also aid in the passage—and proliferation—of an invasive species like smallmouth bass.

abundance that wild Coho harvest were authorized in four coastal river basins in 2021, and in nine basins—including the Umpqua Basin—in 2022.<sup>4</sup>

In sum, there are significant policy reasons why the performance repairs deemed necessary by the state and federal regulatory agencies charged with dam safety should not be made contingent upon fish passage considerations. The proposed rules would impose an arbitrary distinction in defining qualifying “trigger” events for dams, as opposed to all other in- and over-water structures, and define both “artificial obstruction” and “fish passage” in vague terms likely to cause both uncertainty and unequal application, depending on the prevailing political climate and whether a particular structure has, like the Winchester Dam, been targeted by activist groups.

For the foregoing reasons, the Commission should decline to adopt the proposed rules.

Sincerely,



Dominic M. Carollo

Attorney for Winchester Water Control District

Cc: Ryan Beckley, President for Winchester Water Control District

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<sup>4</sup> Although the District understands from ODFW staff that, if adopted, these proposed rules would not apply to the District’s current repair project, because the project has already been submitted to ODFW for consultation prior to the proposed rules taking effect, the District is concerned that future routine maintenance or repair projects could be improperly construed as “construction” and “trigger” fish passage review by ODFW.