

Chapter 509 — General Protective Regulations

2015 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.

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

(8) “Oregon Plan” means the guidance statement and framework described in ORS 541.898. [2001 c.923 §1]

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

509.585 Fish passage required for artificial obstructions; statewide inventory; waiver of requirement by commission; rules; exemptions. (1) It is the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish and the Legislative Assembly finds that cooperation and collaboration between public and private entities is necessary to accomplish the policy goal of providing passage for native migratory fish and to achieve the enhancement and restoration of Oregon’s native salmonid populations, as envisioned by the Oregon Plan. Therefore, except as provided in ORS chapter 509, fish passage is required

in all waters of this state in which native migratory fish are currently or have historically been present.

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

(3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory of artificial obstructions in order to prioritize enforcement actions based on the needs of native migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of the artificial obstruction on the native migratory fish, the biological status of the native migratory fish stocks in question and any other factor established by the department by rule. The department shall establish a list of priority projects for enforcement purposes. Priority artificial obstructions are subject to the State Fish and Wildlife Commission's authority as provided in ORS 509.625. Unless requested by persons owning or operating an artificial obstruction, the department shall primarily direct its enforcement authority toward priority projects, emergencies and projects described in subsection (4) of this section. The priority project list shall be subject to periodic review and amendment by the department and to formal review and amendment by the commission no less frequently than once every five years.

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

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

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

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

(b) Net benefit to native migratory fish is determined under this subsection by comparing the benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur using the proposed alternatives to fish passage. Alternatives to fish passage must result in a benefit to fish greater than that provided by

the artificial obstruction with fish passage. The net benefit to fish shall be determined based upon conditions that exist at the time of comparison.

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

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

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

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

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

- (A) Finds that a lack of fish passage has been effectively mitigated;
- (B) Has granted a legal waiver for the artificial obstruction; or
- (C) Finds there is no appreciable benefit to providing fish passage.

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

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

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

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

Note: See note under 509.580.

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

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

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

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

Note: See note under 509.580.

509.592 Task force advice to department regarding project funding; department report on deposits and expenditures. (1) The Fish Passage Task Force established pursuant to ORS 509.590 shall provide advice to the State Department of Fish and Wildlife regarding the projects to be funded and the expenditures to be made from the Fish Passage Restoration Subaccount created under ORS 497.141.

(2) The department shall maintain a record of all moneys deposited to or expended from the subaccount. The department shall make an annual report of the deposits and expenditures available to the public on the department's website. [2013 c.674 §2]

Note: 509.592 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 509 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

509.595 Director to report on fish passage rules, adequacy and implementation. The State Fish and Wildlife Director shall report to the Governor, the Speaker of the House of Representatives, the President of the Senate and the appropriate legislative committee with responsibility for salmon restoration or species recovery:

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

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

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

Note: See note under 509.580.

509.600 Destroying, injuring or taking fish near fishway; permits to take fish. (1) A person may not willfully or knowingly destroy, injure or take fish within 600 feet of any fishway,

except as permitted by subsection (2) of this section. Actions that violate this section include, but are not limited to:

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

(b) Placing anything in the fishway.

(c) Using any fishing gear within 600 feet of the fishway.

(d) Taking fish at any time anywhere within 600 feet of the fishway.

(e) Doing any injury to the fishway.

(2) The State Fish and Wildlife Commission may by rule or by issuance of permits authorize the taking of fish within 600 feet of any fishway. [1965 c.570 §104; 1973 c.723 §122; 1981 c.646 §6; 2001 c.923 §8]

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) If a person who owns or operates an artificial obstruction and who is required to provide fish passage under ORS 509.585 fails to provide fish passage in the manner and time required by the State Department of Fish and Wildlife, the commission may remove, replace or repair the artificial obstruction or any parts of the obstruction at the expense of the owner or operator.

[Amended by 1955 c.707 §53; 1963 c.232 §1; 1965 c.570 §133; 2001 c.923 §11]

509.630 Power of department to establish fish passage in natural stream obstructions.

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

509.635 Oregon City fishway under control of commission; removal of obstructions. (1)

The fishways over the falls in the Willamette River, near Oregon City, are under the care and control of the State Fish and Wildlife Commission, which may make any extensions, additions, alterations or repairs to the same that become necessary.

(2) The commission, or its duly authorized representatives, may remove any artificial obstructions placed in the Willamette River above the falls which would prevent the free passage of fish up the river. [Amended by 1965 c.570 §136]

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

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

(2) A person owning or operating an artificial obstruction may file a protest with the State Fish and Wildlife Commission within 30 days from the receipt of the State Department of Fish and Wildlife determinations under ORS 509.585. The person shall identify the grounds for protesting the department's determinations.

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

ENFORCEMENT

509.910 Injunction to prevent certain violations; jurisdiction; service on corporation.

(1) The State Fish and Wildlife Commission may maintain an action for an injunction to enjoin and restrain any person, municipal corporation, political subdivision or governmental agency of this state from violating any of the provisions of ORS 509.130, 509.140, 509.505, 509.585, 509.610 and 509.625.

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

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

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

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

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

CHAPTER 510 [Reserved for expansion]
