

## **Routine Program Change**

### **Updating Oregon's Enforceable Policies Regarding Commercial Fishing and Fisheries**

**O.R.S. §§ 509.001, 509.112-509.155, 509.505-509.510, 509.580-509.585, 509.600-509.910**

**July 24, 2014**

#### **I. Introduction**

The Oregon Coastal Management Program requests that the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) approve updates to the OCMP to reflect changes to Oregon's statutes regarding commercial fishing and fisheries. Oregon requests concurrence that these updates constitute a Routine Program Change.

Section II.A describes the relevant program in ORS Chapter 509 and identifies changes to the statutes since OCRM's previous approvals. Section II.B identifies those sections that state "enforceable policies" that are used in Oregon's federal consistency review determinations. Section II.C shows that the submitted updates are a Routine Program Change under NOAA regulations and guidelines.

#### **II. Analysis of Routine Program Change**

##### **A. Discussion of the Program in Chapter 509**

The OCMP was initially approved by NOAA in 1977. It included sections of ORS Chapter 509, setting fishing and fisheries requirements and prohibitions. In 1987, OCRM approved a routine program change that updated the statutes of ORS Chapter 509 that were incorporated in 1977 and added ORS §§ 509.112-509.155, prohibiting the wasting, injuring, and destroying of fish, ORS § 509.645, detailing the procedure for protesting determinations by the Water Policy Review Board, and ORS § 509.910, authorizing the State Fish and Wildlife Commission to file for injunctions to halt violations of select statutes in the chapter. In 2002, OCRM approved a Routine Program Change reflecting changes made to ORS § 509.615 since 1987 and adding ORS § 509.001, which establishes definitions for terms as used in the chapter. Chapter 509 is administered by the State Fish and Wildlife Commission and the State Department of Fish and Wildlife.

The attached table identifies the statutes within ORS Chapter 509 that are encompassed in this update addressing commercial fishing and fisheries, including those which remain unchanged since prior OCRM approval. This is in order to ensure that the full current program remains part of the OCMP, and establishes the 2013 Edition of the Oregon Revised Statutes as the effective baseline for all of these provisions, should they be further amended in the future. We are also attaching the full current versions of the statutes.

As shown in the attached table, the only changes to many of these sections since their last OCRM approval, whether 1987 or 2002, were simple grammatical edits. Specifically, “fishway” became “fish passage” in multiple instances, “dam or artificial obstruction” simply became “artificial obstruction” in multiple instances, “owner or occupant” became “person owning or operating,” “heretofore” became “previously,” “Where” became “If” in one instance, and a masculine pronoun was removed. In several instances, substantial sections of text were rephrased. “It is unlawful willfully or knowingly to destroy, injure or take food fish” became “A person may not willfully or knowingly destroy, injure or take fish.” “[I]n repair and open and free from obstruction to the passage of anadromous or food fish” became “in such repair as to provide adequate fish passage of native migratory fish.” “[A]ny fishway is inadequate” became “fish passage is not functioning as intended or is inadequate.” “[O]f such number of fishways in any stream inhabited by anadromous or food fish as is deemed adequate to provide a good and sufficient passageway for such fish” became “of fish passage in the waters of this state inhabited by native migratory fish as deemed adequate to provide passage for native migratory fish.” “[I]n any stream inhabited by anadromous or food fish adequate to provide a good and sufficient passageway for such fish” became “that provides adequate passage for native migratory fish in the waters of this state inhabited by native migratory fish.”

Other changes included name clarifications and updates. The term “commission” often was replaced with “State Fish and Wildlife Commission” and “director” with “State Fish and Wildlife Director.” In two instances, “director” was replaced by “State Department of Fish and Wildlife” or “department.” In several instances, “commission” became “State Department of Fish and Wildlife” or “department,” the department being under the commission. Reference to the “Water Policy Review Board,” which was abolished in 1985, was replaced by “State Fish and Wildlife Commission” for purposes of filing protests. Reference to the “Corporation Commissioner” was replaced by “Secretary of State,” whose office houses the Corporation Division.

The legislature also updated several cross-references in the chapter. References to ORS § 509.605, which was repealed in 2001, became ORS § 509.585, which was enacted in 2001; both statutes prescribe fish passage requirements for artificial obstructions. Reference to ORS § 509.640, which concerned hatchery facilities at dams and was repealed in 2001, was deleted. Reference to ORS § 509.615, which concerned fish screens and was repealed in 2007, was deleted. Reference to ORS § 498.216 was removed because changes to the section referencing it made it obsolete (ORS § 498.216 prohibits angling within 200 feet of a fishway unless allowed by commission rule, but ORS § 509.600 prohibits destroying, injuring, or taking fish within 600 feet of a fishway unless allowed by commission rule or permit).

Beyond these editorial changes, further updates are described below:

ORS §§ 509.580-509.585. These sections were enacted in 2001. They restate requirements for fish passages by defining terms and stating basic requirements and procedures. They require fish passage in all waters of the state in which native migratory fish are currently or have historically been present, note exceptions, require the State Fish and Wildlife Director to develop rules establishing general criteria for

fish passage adequacy, and set restrictions on and procedures for artificial obstruction construction, maintenance, and changes.

ORS § 509.610. A third subsection was added to this section requiring owners or operators of artificial obstructions to monitor and evaluate the effectiveness of fish passages or alternatives.

ORS § 509.625. This section, which authorizes the State Department of Fish and Wildlife to inspect any artificial obstruction and order fish passage construction if deemed needed, now authorizes the State Fish and Wildlife Commission to require fish passage construction on lawfully installed artificial obstructions not otherwise required by law to do so, if the commission can arrange for nonowner or nonoperator funding of at least 60 percent of the cost. The funding is not needed to mandate construction of fish passage if the commission declares an emergency, the artificial obstruction has not been issued a water right, or the artificial obstruction is unlawfully installed. The department also may now remove, replace, or repair an artificial obstruction at the expense of the owner or operator if the owner or operator is required by law to provide fish passage fails to do so.

ORS § 509.645. This section, regarding protests of fish passage requirements, has a new subsection allowing an owner or operator of an artificial obstruction to request alternative dispute resolution at any point in the process of determining fish passage requirements. In addition, the period for protest is now 30 days rather than 10, and the grounds for protest are no longer specified only as impairing or being detrimental to the public interest. Also, the details of procedure in subsections (2) through (5) were replaced with a new subsection (3), which merely says that “The commission may, after sufficient opportunity for public review and comment, approve, deny or modify the proposed determinations.”

ORS § 509.910. This section, authorizing the State Fish and Wildlife Commission to maintain an action for an injunction to stop violations of certain sections of this chapter, now allows any such action to be tried in the circuit courts of Marion or Multnomah counties as an alternative to the county in which the violation occurred.

## **B. Enforceable Policies**

OCRM initially approved Oregon’s Coastal Management Program, including entire state statutes as part of the approved program. Subsequently OCRM has requested that states identify enforceable policies within their statutes as updates are submitted. While Oregon seeks to incorporate the entire set of statutes implementing the program of ORS Chapter 509 into the OCMP, we have identified specific sections that define enforceable policies for federal consistency purposes.

Each of the sections identified specifies a substantive enforceable policy; identifies when a permit is required; or provides enforceable mechanisms for implementation of the substantive provisions. Statutory sections not defined as enforceable are those that are purely procedural, that contain only statements of findings, or that merely grant state officials authority to undertake administrative acts not affecting the potential activities of federal actors or licensees.

Thus, statements of policy, requirements for authorizations, lists of conditions for authorizations, provisions for rules that define regulatory requirements, and definitions that specify the content of obligations and requirements are enforceable policies. The sections in this Routine Program Change stating enforceable policies are: 509.001, 509.112, 509.115, 509.120, 509.122, 509.125, 509.130, 509.140, 509.155, 509.505, 509.510, 509.580, 509.585, 509.600, 509.610, 509.620, 509.625, and 509.910. The attached table identifies these with an X and describes the content of each section.

These policies are rendered enforceable by the permits required in 509.140; by the authority of the State Fish and Wildlife Commission to condemn a fish passage and install or order installed a fish passage in 509.620 and 509.625; by the inspection authority in 509.625; by prohibited actions in 509.112, 509.115, 509.120, 509.125, 509.130, 509.505, 509.510, and 509.600; and by required actions in 509.585 and 509.610. Enforcement implementation includes arrest under 509.155 and injunctions under 509.910.

### **C. Action as Routine Program Change**

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this section explains why this update to Oregon's program is a Routine Program Change and does not constitute an amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization; and
- (5) coordination, public involvement and the national interest.

OCRM's 1996 Program Change guidance states that a "substantial change" is a high threshold requiring case-by-case determination. Statutory changes are identified in the attached table. The table relates each change to Oregon's authority as previously approved in the most recent RPC addressing that section, whether 1987 or 2002. Each change is described in detail in the right-hand column of the table.

#### *1. Uses subject to management.*

This submittal does not identify new uses subject to management.

#### *2. Special management areas.*

This submittal does not designate or change special management areas.

#### *3. Boundaries.*

This submittal does not change the boundaries of Oregon's coastal zone.

#### *4. Authorities and organization.*

This submittal does not change Oregon's administration of the OCMP. The same authorities continue to apply these programs.

*5. Coordination, public involvement, and the national interest.*

This submittal does not change any coordination, public involvement, or national interest provisions of the OCMP.

Accordingly, this submittal is a Routine Program Change, and Oregon requests OCRM concurrence.

## Commercial Fishing and Fisheries

### Changes to Statutes in the Program since Last OCRM Approval

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
GENERAL PROVISIONS						
509.001	Definitions	Applies the definitions in ORS 506.001 to 506.025 to this chapter	X	2002		<ul style="list-style-type: none"> <li>• None</li> </ul>
WASTING, INJURING AND DESTROYING FISH						
509.112	Wasting food fish	Prohibits any person from wantonly wasting or destroying any food fish	X	1987		<ul style="list-style-type: none"> <li>• None</li> </ul>
509.115	Placing in waters fish harmful to food fish	Prohibits placing any species or variety of fish that are inimical to or destructive of food fish in any of the waters of the state without written authority from the State Fish and Wildlife Commission	X	1987		<ul style="list-style-type: none"> <li>• Replaced “commission” with “State Fish and Wildlife Commission”</li> </ul>
509.120	Using electricity to disturb food fish	Prohibits using any electrical device, appliance, or current which has a tendency to retard,	X	1987		<ul style="list-style-type: none"> <li>• Replaced “director” with “State Fish and Wildlife Director”</li> </ul>

<sup>1</sup> Oregon is seeking to establish the 2013 Edition of the Oregon Revised Statutes and the 2014 Oregon Laws supplement as the effective baseline for the statutory provisions incorporated into the Oregon Coastal Management Program (OCMP). The year in the “updates adopted and effective” column refers to the year(s) during which the Oregon legislature adopted changes to the statutory provisions incorporated into the OCMP.

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
		scare, frighten, or obstruct any food fish in their migrations or movements in any of the waters of the state without first having obtained a permit from the State Fish and Wildlife Director				
509.122	Definitions for ORS 509.125 to 509.155	Defines “Explosives” and “Substance deleterious to fish” for purposes of ORS 509.125 to 509.155	X	1987		<ul style="list-style-type: none"> <li>• None</li> </ul>
509.125	Placing substances in water to drive fish from closed areas	Prohibits placing in any stream of the state where anadromous or food fish run or exist any substance, matter, or contrivance that will frighten or drive anadromous or food fish out of a stream in which it is unlawful to take such fish	X	1987		<ul style="list-style-type: none"> <li>• None</li> </ul>
509.130	Placing substances in water or using explosives to take or destroy food fish	Prohibits throwing, casting, or passing any substance deleterious to fish in any waters of the state in which food fishes are wont to be; prohibits exploding any explosives in any waters of the state	X	1987		<ul style="list-style-type: none"> <li>• None</li> </ul>
509.140	Placing explosives or harmful substances in waters in course of lawful work; permit	Requires a permit from the State Fish and Wildlife Commission to use explosives or substances deleterious to fish in any waters of the state; allows the	X	1987		<ul style="list-style-type: none"> <li>• Replaced “commission” with “State Fish and Wildlife Commission” in subsection (1)</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
		commission to permit such activity if it finds the use of explosives or other substances necessary and designates the places and period within which the activity may occur and prescribes precautions to save fish from injury				
509.150	Use by commission of explosives or substances to destroy predatory fish	Clarifies that ORS 509.125 to 509.155 do not prevent the State Fish and Wildlife Commission from using any explosives or substances deleterious to fish for the purpose of destroying German carp or any other predatory fish inimical to food fish, or from carrying out any of the commercial fishing laws		1987		<ul style="list-style-type: none"> <li>Replaced “commission” with “State Fish and Wildlife Commission”</li> </ul>
509.155	Possession of fish taken by explosives or harmful substance justifies arrest; burden of proof	Justifies arrest of a person possessing any food fish under circumstances which make it reasonable to believe that the fish were taken by means of explosives or substances deleterious to fish	X	1987		<ul style="list-style-type: none"> <li>Replaced “fish in his possession” with “fish in possession”</li> </ul>
<b>CRABS AND OTHER SHELLFISH</b>						
509.505	Placing in water matter injurious to shellfish	Prohibits depositing or allowing to escape into any public waters of the state any substance which	X	1987		<ul style="list-style-type: none"> <li>None</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
		will injuriously affect the life, growth, or flavor of shellfish in or under such waters				
509.510	Taking shellfish from marked beds without permission; disturbing beds	Prohibits taking shellfish from lawfully and plainly marked beds without the permission of the legal occupants; prohibits willfully disturbing bed surfaces, shellfish, and markers	X	1987		<ul style="list-style-type: none"> <li>• None</li> </ul>
<b>FISH PASSAGE; FISHWAYS; SCREENING DEVICES; HATCHERIES NEAR DAMS</b>						
509.600	Destroying, injuring or taking fish near fishway; permits to take fish	Prohibits willfully or knowingly destroying, injuring, or taking fish within 600 feet of any fishway, unless the State Fish and Wildlife Commission authorizes it by rule or by permit	X	1987	2001	<ul style="list-style-type: none"> <li>• Replaced “It is unlawful willfully or knowingly to destroy, injure or take food fish” with “A person may not willfully or knowingly destroy, injure or take fish” in subsection (1)</li> <li>• Removed “or in the case of angling under ORS 498.216” from the end of the first sentence in subsection (1)</li> <li>• Replaced “commission” with “State Fish and Wildlife Commission” in subsection (2)</li> <li>• Replaced “grant permits to take fish other than those fish classified under the family salmonidae within 600 feet of any fishway in a manner that will not otherwise violate paragraph (a) of subsection (1) of this section” with “by rule or by issuance of permits authorize the taking of fish within</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
						600 feet of any fishway” in subsection (2)
509.610	Maintenance of fish passage required	Requires the person owning or operating an artificial obstruction to keep a fish passage in such repair as to provide adequate passage of native migratory fish at all times, if fish passage is required by the State Department of Fish and Wildlife; requires the owner or operator to maintain, monitor, and evaluate the effectiveness of fish passage or alternatives to fish passage.	X	1987	2001	<ul style="list-style-type: none"> <li>• Replaced “director” with “State Department of Fish and Wildlife” in subsection (1)</li> <li>• Replaced “fishway” with “fish passage” twice in subsection (1)</li> <li>• Replaced reference to ORS 509.605 with ORS 509.585 in subsection (1)</li> <li>• Replaced “owner or occupant of a dam or artificial obstruction” with “person owning or operating an artificial obstruction” in subsection (1)</li> <li>• Replaced “in repair and open and free from obstruction to the passage of anadromous or food fish” with “in such repair as to provide adequate fish passage of native migratory fish” in subsection (1)</li> <li>• Replaced “director” with “department” in subsection (2)</li> <li>• Added subsection (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”</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
509.620	Condemning inadequate or nonfunctioning fish passage; requiring new fish passage	Authorizes the State Fish and Wildlife Commission to condemn a fish passage and order a new fish passage installed if the fish passage is not functioning as intended or is inadequate	X	1987	2001	<ul style="list-style-type: none"> <li>• Replaced “Where” with “If,” at the start of the first sentence</li> <li>• Replaced “commission” with “State Department of Fish and Wildlife” the first time, with “State Fish and Wildlife Commission” the second time, and “department” the third time</li> <li>• Replaced “any fishway is inadequate” with “fish passage is not functioning as intended or is inadequate”</li> <li>• Replaced reference to “ORS 509.605 or otherwise” with ORS 509.585</li> <li>• Replaced “fishway” with “fish passage” two more times</li> </ul>
509.625	Power of department to inspect artificial obstructions and have fish passage constructed or remove obstruction	Authorizes the State Department of Fish and Wildlife to inspect any artificial obstruction and order fish passage construction if deemed needed (with certain restrictions); authorizes the commission to improve or rebuild useless or inadequate fish passages so long as construction does not interfere with the prime purpose of the artificial obstruction; authorizes the commission to remove, replace, or repair an artificial obstruction or any parts of it at the expense of the owner or	X	1987	2001	<ul style="list-style-type: none"> <li>• Replaced “commission” with “State Department of Fish and Wildlife” in subsection (1)</li> <li>• Replaced “dam or artificial obstruction” with “artificial obstruction” in subsection (1)</li> <li>• Replaced “fishway” with “fish passage” and repositioned the term in the sentence in subsection (1)</li> <li>• Replaced reference to ORS 509.605 with ORS 509.585 both times in subsection (1)</li> <li>• Replaced “by the owners thereof” with “of fish passage” in subsection (1)</li> <li>• Replaced “over the dam or</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
		operator if the owner or operator fails to provide fish passage in the manner and time required by the State Department of Fish and Wildlife				<p>obstruction” with “at the artificial obstruction”</p> <ul style="list-style-type: none"> <li>• Added “Without affecting other remedies to enforce the requirement to install fish passage, if the State Fish and Wildlife Commission determines that an emergency exists,” to the start of the second sentence in subsection (1)</li> <li>• Replaced “construct or order the construction” with “or order the construction” in subsection (1)</li> <li>• Replaced “of such number of fishways in any stream inhabited by anadromous or food fish as is deemed adequate to provide a good and sufficient passageway for such fish” with “of fish passage in the waters of this state inhabited by native migratory fish as deemed adequate to provide passage for native migratory fish” in subsection (1)</li> <li>• Replaced “fishway” with “fish passage” all three times in subsection (2)</li> <li>• Replaced “heretofore” with “previously” in subsection (2)</li> <li>• Replaced “dam or obstruction” with “artificial obstruction” in subsection (2)</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
						<ul style="list-style-type: none"> <li>• Replaced “shall not be construed” with “may not be construed” in the last sentence of subsection (2)</li> <li>• Added subsection (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</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
						<p>issued a water right or if the artificial obstruction has been otherwise unlawfully installed.”</p> <ul style="list-style-type: none"> <li>Added subsection (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.”</li> </ul>
509.630	Power of department to establish fish passage in natural stream obstructions	Authorizes the State Department of Fish and Wildlife to inspect any natural obstruction to determine whether it would be advisable to construct fish passage over or around it; authorizes the State Fish and Wildlife Commission to construct fish passage for native migratory fish in the waters of the state inhabited by native migratory fish		1987	2001	<ul style="list-style-type: none"> <li>Replaced “commission” with “State Department of Fish and Wildlife” the first time, with “State Fish and Wildlife Commission” the second time</li> <li>Replaced “fishways” with “fish passage” both times</li> <li>Replaced “in any stream inhabited by anadromous or food fish adequate to provide a good and sufficient passageway for such fish” with “that provides adequate passage for native migratory fish in the waters of this state inhabited by native migratory fish”</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
509.635	Oregon City fishway under control of commission; removal of obstructions	Authorizes the State Fish and Wildlife Commission to make any extensions, additions, alterations, or repairs to the fishways over the falls in the Willamette River, near Oregon City; authorizes the commission, to remove any artificial obstructions placed in the Willamette River above the falls which would prevent the free passage of fish up the river		1987		<ul style="list-style-type: none"> <li>Replaced “commission” with “State Fish and Wildlife Commission”</li> </ul>
509.645	Filing protest with commission; review and determination by commission; alternative dispute resolution	Allows a person owning or operating an artificial obstruction to request alternative dispute resolution at any point in the process of determining fish passage requirements and to file a protest with the State Fish and Wildlife Commission; authorizes the commission to comment, approve, deny, or modify the proposed determinations		1987	2001	<ul style="list-style-type: none"> <li>Added a new subsection (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.”</li> <li>Subsection (1) became subsection (2)</li> <li>Replaced “Any owner or occupant of a dam or artificial obstruction” with “A person owning or operating an artificial obstruction” in the new subsection (2)</li> <li>Replaced “Water Policy Review Board” with “State Fish and Wildlife Commission” in the new subsection (2)</li> <li>Extended the period for protest from 10 to 30 days after receipt</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
						<ul style="list-style-type: none"> <li>• Replaced “notification from the director as provided in ORS 509.605 (2), or within 10 days after receiving notice of the requirement by the commission under ORS 509.640” with “of the State Department of Fish and Wildlife determinations under ORS 509.585” in the new subsection (2)</li> <li>• Replaced “on the ground that providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the commission, as the case may be, would impair or be detrimental to the public interest” with “The person shall identify the grounds for protesting the department’s determinations” in the new subsection (2)</li> <li>• Replaced the details of procedure in subsections (2) through (5) with a new subsection (3): “The commission may, after sufficient opportunity for public review and comment, approve, deny or modify the proposed determinations”</li> </ul>

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>1</sup>	Changes Since Last Approval
ENFORCEMENT						
509.910	Injunction to prevent certain violations; jurisdiction; service on corporation	Authorizes the State Fish and Wildlife Commission to maintain an action for an injunction to enjoin and restrain anyone from violating certain provisions in ORS chapter 509	X	1987	2001 2007	<ul style="list-style-type: none"> <li>Replaced reference to ORS 509.605 with ORS 509.585 in subsection (1)</li> <li>Deleted reference to ORS 509.615 in subsection (1)</li> <li>Added “or in Marion or Multnomah County” to the end of subsection (2)</li> <li>Replaced “Corporation Commissioner” with “Secretary of State” in subsection (3)</li> </ul>

### Statutes Enacted Since Last OCRM Approval

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Statutory History
FISH PASSAGE; FISHWAYS; SCREENING DEVICES; HATCHERIES NEAR DAMS						
509.580	Definitions for ORS 509.580 to 509.590, 509.600 to 509.645	Defines terms for ORS 509.580 to 509.590, 509.600 to 509.645 and 509.910	X		2001	<ul style="list-style-type: none"> <li>Enacted in 2001</li> </ul>

<sup>2</sup> Oregon is seeking to establish the 2013 Edition of the Oregon Revised Statutes and the 2014 Oregon Laws supplement as the effective baseline for the statutory provisions incorporated into the Oregon Coastal Management Program (OCMP). The year in the “updates adopted and effective” column refers to the year(s) during which the Oregon legislature adopted changes to the statutory provisions incorporated into the OCMP.

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective <sup>2</sup>	Statutory History
	and 509.910; rules					
509.585	Fish passage required for artificial obstructions; statewide inventory; waiver of requirement by commission; rules; exemptions	Requires fish passage in all waters of the state in which native migratory fish are currently or have historically been present, except as provided in this chapter; sets restrictions on and procedures for artificial obstruction construction, maintenance, and changes	X		2001	<ul style="list-style-type: none"> <li>Enacted in 2001</li> </ul> <p>ORS 509.585 replaces ORS 509.605, which OCRM approved as part of the OCMP in 1977. The statute contains numerous references to replacing ORS 509.605 with ORS 509.585</p>

Statutes that Were in the Program but Have Been Repealed since Last OCRM Approval

ORS Section	Title at Last Approval	Description	Last OCRM Approval	Changes Since Last Approval
FISH PASSAGE; FISHWAYS; SCREENING DEVICES; HATCHERIES NEAR DAMS				
[509.605]	Fishways required over artificial obstructions; approval by director; failure to complete fishway	Prohibits the construction or maintenance of any artificial obstruction across any stream in the state frequented by anadromous or food fish without providing a passageway for such fish as near as possible to the	1987	<ul style="list-style-type: none"> <li>Repealed in 2001</li> </ul>

		main channel; requires the director to examine all artificial obstructions in all waters of the state frequented by anadromous or food fish; authorizes the director to require the owner or occupant to construct a fishway; requires a determination from the director as to whether a fishway is needed prior to construction		
[509.615]	Commission authorized to require installation of screening or by-pass devices in certain water diversions	Requires water diverters of 30 cfs or more to install, operate, and maintain the fish screening or by-pass devices that the State Department of Fish and Wildlife determines to be necessary to prevent fish from entering the diversion; authorizes the department to install, operate, and maintain the fish screening or by-pass devices if the person fails to do so; authorizes the department to inspect the fish screening or by-pass devices to determine whether they meet department requirements; prohibits interfering with, tampering with, damaging, destroying, or removing fish screens or by-pass devices in a manner not associated with maintenance; defines select	2002	<ul style="list-style-type: none"> <li>• Repealed in 2007</li> </ul>

		terms		
[509.640]	When dams to be provided with hatchery facilities	Authorizes the commission to require the owner of a dam to (if a fishway is impractical due to the height of the dam) convey a site to the state, build a hatchery thereon, furnish the water and light for the hatchery, except for certain dams	1987	<ul style="list-style-type: none"><li>• Repealed in 2001</li></ul>

**Text of ORS Chapter 509 Statutes Included in the July 24, 2014 RPC**  
**2013 Edition Oregon Revised Statutes**

GENERAL PROVISIONS

**509.001 Definitions.** The definitions prescribed by ORS 506.001 to 506.025 apply to this chapter. [1965 c.570 §91]

WASTING, INJURING AND DESTROYING FISH

**509.112 Wasting food fish.** It is unlawful for any person wantonly to waste or destroy any food fish. [Formerly 509.065]

**509.115 Placing in waters fish harmful to food fish.** It is unlawful, without written authority from the State Fish and Wildlife Commission, to place in any of the waters of this state any species or variety of fish whatsoever which are inimical to or destructive of food fish. [Amended by 1965 c.570 §105]

**509.120 Using electricity to disturb food fish.** It is unlawful to use or permit to be used in any of the waters of this state any electrical device, appliance or current which in any manner has a tendency to retard, scare, frighten or obstruct any food fish in their migrations or movements in such waters without first having obtained the consent of and a permit from the State Fish and Wildlife Director. [Amended by 1965 c.570 §106]

**509.122 Definitions for ORS 509.125 to 509.155.** As used in ORS 509.125 to 509.155, unless the context requires otherwise:

(1) “Explosives” means any explosive substances whatever, including but not limited to powder, dynamite and nitroglycerine.

(2) “Substance deleterious to fish” includes but is not limited to any drug, powder, chemical, medicated bait, gas, cocculus indicus or extract therefrom, inimical to fish. [1965 c.570 §110]

**509.125 Placing substances in water to drive fish from closed areas.** It is unlawful to place or cause to be placed in any stream of this state where anadromous or food fish run or exist, within the distance from any dam, fishway or object in which the taking of any anadromous or food fish by means other than angling is prohibited by law, any blood or offal of fish, or any other substance, matter or contrivance that will frighten or drive anadromous or food fish, or with intent to drive or frighten, out of that part of the waters of any stream in which it is unlawful to take such fish. [Amended by 1965 c.570 §111]

**509.130 Placing substances in water or using explosives to take or destroy food fish.** It is unlawful, for the purpose of taking or destroying any food fish, to:

(1) Throw, cast or pass, or cause or permit to be thrown, cast or passed, in any waters of this state in which food fishes are wont to be, any substance deleterious to fish; or

(2) Explode or cause to be exploded in any waters of this state, any explosives. [Amended by 1963 c.112 §1; 1965 c.570 §112]

**509.135** [Repealed by 1965 c.570 §152]

**509.140 Placing explosives or harmful substances in waters in course of lawful work; permit.** (1) Whenever in the course of removing any obstruction in any waters of this state, or in constructing any foundations for dams, bridges or other structures, or in carrying on any trade or business, any person, municipal corporation, political subdivision or governmental agency desires to use explosives or any substances deleterious to fish, such person, municipal corporation, political subdivision or governmental agency shall make application to the State Fish and Wildlife Commission for a permit to use the explosives or substances in such waters.

(2) If the commission finds it necessary that the explosives or substances be used, it may make an order granting such person, municipal corporation, political subdivision or governmental agency the right to use the explosives or substances and shall:

(a) Designate the places and period within which the explosives or substances may be used; and

(b) Prescribe such precautions as will save fish from injury.

(3) It is unlawful to disregard such order or fail to obtain such order or permit before using explosives or substances deleterious to fish. [Amended by 1963 c.112 §2; 1965 c.570 §113]

**509.145** [Repealed by 1965 c.570 §152]

**509.150 Use by commission of explosives or substances to destroy predatory fish.**

Nothing in ORS 509.125 to 509.155 prevents the State Fish and Wildlife Commission from using any explosives or substances deleterious to fish for the purpose of destroying German carp or any other predatory fish inimical to food fish, or from carrying out any of the commercial fishing laws. [Amended by 1965 c.570 §114]

**509.155 Possession of fish taken by explosives or harmful substance justifies arrest; burden of proof.** Having in possession any food fish under circumstances which make it reasonable to believe that they were taken by means of explosives or substances deleterious to fish justifies the arrest of the person having the fish in possession. It is then incumbent upon such person to prove and show that the fish were taken by lawful means. [Amended by 1965 c.570 §115]

## CRABS AND OTHER SHELLFISH

(Shellfish)

**509.505 Placing in water matter injurious to shellfish.** It is unlawful for any person, municipal corporation, political subdivision or governmental agency to deposit or allow to escape into, or cause or permit to be deposited or escape into any public waters of this state, any substance of any kind which will or shall in any manner injuriously affect the life, growth or flavor of shellfish in or under such waters. [Formerly 509.460]

**509.510 Taking shellfish from marked beds without permission; disturbing beds.** It is unlawful, without the permission of the legal occupants, to take up shellfish from natural or

artificially planted beds, which beds have been lawfully and plainly marked. It is unlawful willfully to disturb the shellfish in such beds, the surfaces of such beds, or the markers.  
[Formerly 509.475]

#### 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]

**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]

**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]