Background

The fish passage statute adopted in 2001 authorizes the Oregon Fish and Wildlife Commission (OFWC) to excuse the requirements to install fish passage at artificial obstructions by two methods. The OFWC can grant a "waiver" if an alternative to fish passage is provided that results in a net benefit to native migratory fish. The OFWC can also grant an "exemption" if it, 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. The OFWC adopted administrative rules for waivers and exemptions (OAR 635-412-0025) in March 2003, with minor revisions in January 2006, which delegated some authority for decisions to Oregon Department of Fish and Wildlife (ODFW) staff, primarily based on the distance of affected stream.

Longview Fibre is requesting a waiver from fish passage requirements for three culverts being replaced in three un-named tributaries of the North Fork Nehalem River. The stream distance affected by each of these three sites, individually and in total, is less than 1 mile, but Longview Fibre is requesting, with the support of ODFW, to implement their mitigation one year after the triggering culverts are replaced. Based on affected stream distance alone, the ODFW would normally make a decision on a waiver like this, but administrative rules require the OFWC to approve or deny waivers with delayed mitigation.

Public Involvement

- The waiver request was presented to the Fish Passage Task Force (Task Force) at their May 18, 2007 meeting in Tillamook. The Task Force is composed of nine members. Water users, fishing/conservation interests, and the public-at-large are each represented by three members. Task Force meetings are open to the public. The Task Force supported the delayed mitigation because it may leverage grant funds for other projects to benefit native migratory fish.

- As required by administrative rule, in addition to the Task Force, the Lower Nehalem Watershed Council and the Tillamook Soil and Water Conservation District, will be notified of the waiver request at least three weeks prior to the OFWC meeting, provided information on the requests and given the opportunity to comment.

- The OFWC meeting at which approval is being sought (July 13, 2007 in Lincoln City) is a public meeting. OFWC meetings are announced to interested individuals on the web and through the media. OFWC meetings are open to the public and the public has the opportunity to testify about this request.
**ISSUE 1**
Longview Fibre Request for a Fish Passage Waiver on North Fork Nehalem River Tributaries

**ANALYSIS**
Longview Fibre's waiver application (Attachment 2) describes the three waiver sites. ORS 509.585(7)(a) authorizes the OFWC to approve waivers of fish passage if the proposed alternative to fish passage (i.e., mitigation) provides a net benefit to native migratory fish. As indicated in the Benefit Analysis completed by staff (Attachment 3), the proposed mitigation action (providing passage at a single culvert) would be a net benefit over providing fish passage at the three waiver locations. Thus, a waiver is appropriate.

**OPTIONS**
1. Approve Longview Fibre’s request for a fish passage waiver on unnamed tributaries of Grassy Lake, Buchanan and Gravel Creeks in exchange for mitigation on an unnamed tributary of Gods Valley Creek and authorize ODFW to enter into a Fish Passage Waiver Agreement with Longview Fibre to this effect.

2. Deny Longview Fibre’s request for a fish passage waiver.

**STAFF RECOMMENDATION**
Option 1. Staff recommends the OFWC approve Longview Fibre's fish passage waiver request and allow the ODFW to enter into an agreement with Longview Fibre for a fish passage waiver.

**ISSUE 2**
Longview Fibre Request for Providing Mitigation Subsequent to Construction at the Waiver Sites

**ANALYSIS**
The attached waiver application indicates the desire to replace the waiver culverts during the 2007 in-water work period. Mitigation is planned for the 2008 in-water work period. OFWC adopted rules indicate that “mitigation shall be completed prior to completion of or by the end of the same in-water work period as the (trigger)…unless the OFWC finds that additional time is necessary and appropriate…given the size and scope of the project” (OAR 635-412-0025(9)(a).

ODFW and Tillamook Estuaries Partnership are working toward restoring passage at other sites in Gods Valley Creek, where the mitigation is proposed. ODFW learned that Longview Fibre's proposed mitigation can be used as match for grant proposals for these other sites. However, grant decisions will not be made until January 2008, match dollars can't be spent prior to availability of grant funds, and this will be beyond the 2007 in-water work period. Thus, Longview Fibre was asked to delay their mitigation for one year in order to potentially leverage the cost of mitigation as match for grant applications for the larger passage project in Gods Valley Creek. The larger passage project is for replacement of six other culverts and access to about 1.5 more miles of stream for native migratory fish. For this waiver decision, the net benefit of Longview Fibre's single mitigation site stands alone and is not dependent on receiving the grant funds or doing the other projects in Gods Valley Creek.
Given the scope of the other projects which may benefit from delayed mitigation, and the multiple benefits of the stand alone mitigation site, ODFW feels that a delay in mitigation implementation will not affect the net benefit of the mitigation and recommends approving this request.

**OPTIONS**

1. Allow replacement of the waiver culverts in 2007 and mitigation to be provided in the 2008 in-water work period.

2. Require mitigation and trigger action to occur during the same in-water work period.

**STAFF RECOMMENDATION**

Option 1. Allow replacement of the waiver culverts in 2007 and mitigation to be provided in the 2008 in-water work period.

**DRAFT MOTION**

<table>
<thead>
<tr>
<th>DRAFT MOTION</th>
<th>I move to a) grant Longview Fibre a waiver from providing fish passage at the culverts described in exchange for the proposed mitigation, b) authorize Oregon Department of Fish and Wildlife to enter into an agreement with Longview Fibre to this effect, and c) allow Longview Fibre to provide mitigation in 2008.</th>
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<tbody>
<tr>
<td>EFFECTIVE DATE</td>
<td>July 13, 2007</td>
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