

Agenda Item Summary

BACKGROUND

Oregon Revised Statute (ORS) 509.585(7a) authorizes the Oregon Fish and Wildlife Commission (Commission) to waive the requirements to install fish passage at artificial obstructions in exchange for agreed-upon alternatives that provide a net benefit to native migratory fish. As per this authority, the Coos Bay North Bend Water Board (Applicant) requests a fish passage waiver for the existing dam on Lower Pony Creek and to amend an existing Passage Waiver Memorandum of Understanding (MOU) for the existing dam on Upper Pony Creek in Coos County, Oregon.

The Applicant provides the water supply for the cities of Coos Bay and North Bend, and outlying areas. They operate two dams: Upper Pony Creek Dam (UPCD) and Lower Pony Creek Dam (LPCD; a.k.a. Merritt Dam), for storage of water and release to the municipal water supply. LPCD has been in operation since the 1920's, and was re-built in 1988, and was authorized without providing fish passage. Passage of native migratory fish into the basin above LPCD has essentially been blocked since the 1920's. UPCD was constructed in 1952, and subsequently expanded in height/storage capacity in 2001. This expansion triggered Oregon fish passage policy and resulted in an MOU between the Applicant and the Commission requiring mitigation in lieu of fish passage and for habitat impacts associated with the reservoir expansion. The mitigation required physical habitat improvement measures which have been completed within the Pony and Willanch Creek drainages. In addition to these habitat improvements the MOU required flow releases from LPCD to benefit native cutthroat trout in Lower Pony Creek. These flow releases included:

- Continuous year round 1 cubic feet per second (cfs) flow releases
- Supplemental flow releases in the amounts of:
 - 1 cfs – November, 2 cfs - December, 3 cfs - January, 3 cfs - February,
 - 2 cfs - March, 2 cfs - April, and 1 cfs - May.

The Applicant requests to replace the supplemental flow release requirement of the existing fish passage waiver MOU for UPCD with a new habitat enhancement project in the South Arm of Matson Creek, a tributary to Catching Slough. The 1 cfs continuous flow release requirement defined by the MOU would continue year-round in Pony Creek, and will continue to support instream uses in Lower Pony Creek. The Applicant seeks this modification because of the increased water storage required to meet the flow releases which reduces the life of the dam expansion project due to increasing municipal water demand.

In conjunction with this request to modify the existing fish passage waiver MOU at UPCD, the Applicant also plans to seismically retrofit the LPCD to bring the dam up to present day seismic standards. This retrofit and spillway reconstruction activity will likely trigger the requirements to

address the state's fish passage policy at LPCD. In advance of these activities, the Applicant seeks a waiver from the requirement to provide fish passage at this existing dam.

PUBLIC INVOLVEMENT

A three week public comment period on the two actions was initiated on September 23, 2014 through an ODFW news release. This news release was distributed to statewide media and the ODFW electronic e-mail list which contains approximately 800 interested members of the public and local watershed councils. The public comment period concluded October 15, 2014. Comments received during the three week public solicitation have been compiled and will be presented to the Commission at the December 5, 2014 meeting, at which the public will also be able to testify.

The Department and the Applicant co-presented the requests to the Fish Passage Task Force at its October 17, 2014 meeting in Salem. The Task Force is composed of nine members who represent water users, fishing/conservation interests, and the public-at-large. Task Force meetings are open to the public. The Task Force was provided all comments received during the public comment solicitation. The Task Force, through a unanimous vote of 6-0, recommended the approval of these two fish passage waiver requests.

Public review and comment on the final Commission draft of the Waiver Agreements will be accepted prior to, and during, December 5th, 2014 Commission meeting, when the waiver requests will be presented to the Commission for final consideration.

ISSUE 1

THE COOS BAY NORTH BEND WATER BOARD REQUESTS TO AMEND THE EXISTING MOU WAIVER TO FISH PASSAGE AT THE EXISTING UPPER PONY CREEK DAM IN PONY CREEK NEAR COOS BAY, OREGON.

ACTION #1 -- Upper Pony Creek Dam Fish Passage Waiver/MOU—Amendment of Mitigation; This action would amend the waiver MOU to eliminate the requirement for supplemental flow releases at LPCD. Instead, the Applicant will substitute an obligation to install and maintain stream and habitat restoration in the South Arm of Matson Creek.

- Sub-action (a): Concurrent with the alternative mitigation for UPCD, the Applicant is proposing to change the measuring point for the ongoing continuous release to the release point at the outlet of LPCD, rather than the MOU-stipulated measurement point just downstream of the Pony Creek-AAA Fork confluence (a distance of approx. 300 ft. downstream of LPCD).
- Sub-action (b) (ODFW): Additionally, this action would eliminate the need for ODFW to continue pursuing a water right to transfer water from Joe Ney Reservoir to UPCD Reservoir to maintain the supplemental flow release below LPCD.

ANALYSIS

At the time of the development of the UPCD dam expansion project and the MOU with the Commission, fish passage waiver rules required mitigation to be “in-place”, meaning in the Pony Creek watershed. This was a challenge for the Applicant and ODFW biologists to establish meaningful mitigation, due to the urbanized condition of the lower Pony Creek watershed. Water flow releases from the dam were established as one of the mitigation requirements of the MOU. This included a release of continuous year-round flow of 1.0 cubic feet per second (CFS) below LPCD and supplemental flows ranging from 1.0 to 3.0 CFS (depending on the month) from November through May.

These supplemental flow releases were established to enable waters stored by the Applicant in Upper Pony Creek Reservoir under a storage water right to be secured by ODFW for fisheries enhancement and supplied through natural flows of Pony Creek and pumped flows from the adjoining Joe Ney watershed. The supplemental flows were to be maintained annually to protect a resident population of cutthroat trout. This request to amend the MOU asks to replace the supplemental water releases and to withdraw the ODFW’s water right transfer application for Pony Creek with alternate mitigation in the form of stream and habitat restoration in the South Arm of Matson Creek. This alternative mitigation is designed restore lost function in Matson Creek and will provide year round rearing habitat for coho, chinook, winter steelhead, chum, pacific and western brook lamprey, and sea-run cutthroat. The continuous year round flow releases in Pony Creek are unchanged by this amendment request.

A description of the fish passage waiver site (Upper Pony Creek) and the mitigation site (Matson Creek South Arm) are contained in the waiver application for Upper Pony Creek Dam (Attachment 2). Pony Creek is a direct Tributary of Coos Bay and Matson Creek is in the Catching Slough Coos River basin. An ODFW net benefit analysis is included in this packet (Attachment 3), as is the current MOU Waiver Agreement between ODFW and the Applicant (Attachment 7).

As described in the fish passage waiver application, this mitigation would provide the target species (cutthroat trout) as well as additional salmonid (coho, chinook, winter steelhead, chum and sea-run cutthroat) and lamprey species with year round rearing habitat within a protected valley previously restored for wetland mitigation.

To facilitate the ODFW net benefit analysis, the Applicant included data from Aquatic Habitat Inventory (AHI) surveys conducted in both Pony and Matson creeks. In order to complete a preliminary habitat assessment, the Water Board contracted with Coos Watershed Association (CWA) to evaluate the existing and proposed mitigation activities utilizing the Willamette Partnerships Salmon Credit Calculator. While limitations to this approach have been acknowledged, the results of the application provide some measure of quantitative comparison of habitat and mitigation values from which to inform the proposed

mitigation design. The design of proposed mitigation on Matson Creek is intended to bring the function of Matson Creek up to 100% functionality. By contrast, the Applicant and ODFW have exhausted efforts to identify additional mitigation measures on Pony Creek that would result in improvements to that streams functionality. Both the raw survey data sets and the salmon credit calculators conducted by CWA have been included in the net benefit analysis.

The Applicant's proposed mitigation for UPCD have the potential to greatly improve the production potential for multiple native migratory fish species in the Coos Basin (Matson Creek South Arm), including Coastal Cutthroat Trout, Coho Salmon, Chinook Salmon, Chum Salmon, winter steelhead, and lamprey species. Due to the poor quality and degraded conditions of and lack of future potential habitat in the lower Pony Creek watershed, habitat will at best continue to harbor a minimal population of Coastal Cutthroat Trout. The Department concludes, as presented in the benefit analysis, that the mitigation for the amended fish passage waiver at UPCD provides an appreciable benefit for multiple native migratory fish species in the South Arm of Matson Creek, where little potential occurs for future improvement in the Pony Creek watershed. The Applicant and ODFW have attempted, but exhausted, efforts to implement measures in lower Pony Creek that would improve stream functionality.

As currently occurs with the Applicant's existing fish passage waiver, the new habitat mitigation requirements at the South Arm of Matson Creek will be monitored and reported annually to ODFW. The mitigation shall be remediated as appropriate and necessary to ensure the restored habitat functions as per its design and to guarantee the long-term success of the mitigation actions. The Applicant's proposed mitigation actions are legally protected by a perpetual conservation easement with The Wetlands Conservancy on Matson Creek.

OPTIONS

1. Determine the amended MOU would provide a net benefit to native migratory fish and approve the fish passage waiver amendment.
2. Modify and approve the fish passage waiver amendment to achieve a net benefit to native migratory fish.
3. Deny the fish passage waiver amendment.

STAFF RECOMMENDATION

ODFW staff recommends Option 1.

DRAFT MOTION

I move to determine the proposed amendment in Attachment 6 to the current MOU would result in a net benefit to native migratory fish and approve the Coos Bay North Bend Water Board fish passage waiver amendment at Upper Pony Creek Dam in exchange for the proposed mitigation in the South Arm of Matson Creek, and to authorize the chair of the Oregon Fish and Wildlife Commission to enter into the Amended MOU with the Applicant on the Commission's behalf.

EFFECTIVE DATE

December 5, 2014

ISSUE 2

THE COOS BAY NORTH BEND WATER BOARD REQUESTS A WAIVER FOR FISH PASSAGE AT THE EXISTING LOWER PONY CREEK DAM IN PONY CREEK NEAR COOS BAY, OREGON.

ACTION #2 -- Lower Pony Creek Dam Fish Passage Waiver (Merritt Dam — New Passage Waiver; This action would establish a new fish passage waiver where none has previously existed for the LPCD. In lieu of providing passage, the Applicant will install and maintain stream and habitat restoration in the North Arm of Matson Creek. The Applicant requests this fish passage waiver pre-emptively, in anticipation that the seismic and spillway upgrades to the dam will likely trigger Oregon's fish passage policy in the near future.

ANALYSIS

Lower Pony Creek Dam (LPCD), also known as Merritt Lake Dam, was originally constructed during the 1920's on Pony Creek near River Mile 3.2. Since that time it has blocked fish passage to the upper portions of Pony Creek. The LPCD was reconstructed in 1988, at which time consultation with USACE, Oregon DSL, and ODFW resulted in approval of the project without fish passage. The application for a waiver of fish passage at LPCD proposes mitigation through the stream and habitat restoration of the North Arm of Matson Creek.

A description of the fish passage waiver site (Lower Pony Creek) and the mitigation site (North Arm of Matson Creek) are contained in the attached waiver application for Lower Pony Creek Dam (Attachment 2). Pony Creek is a direct Tributary of Coos Bay and Matson Creek is in the Catching Slough Coos River basin. An ODFW net benefit analysis is included in this packet (Attachment 3), as is the Waiver Agreement between ODFW and the Applicant (Attachment 5).

As described in the waiver application, this mitigation would provide the target species (cutthroat trout) as well as additional salmonid (coho, chinook, winter steelhead, chum and sea-run cutthroat) and lamprey species with year round rearing habitat within a protected valley previously restored for wetland mitigation.

The lower Pony Creek watershed below LPCD is highly urbanized/residential and provides only marginal habitat for a small population of Coastal Cutthroat Trout. Although they were potentially present in the basin historically, prior to the installation of the dam, Coho Salmon and winter steelhead are not currently present, and attempts by the ODFW through the Salmon Trout Enhancement Program (STEP) to re-establish these species have been unsuccessful. Conversely, an alternate site for mitigation in the Catching Slough subbasin, namely the Matson Creek drainage, has great potential for restoration of former ditched/drained agricultural lands back to naturally-functioning stream/wetland habitat conditions, and greater benefits to multiple native fish species.

Although the Applicant received approval to re-build the LPCD in 1988 without fish passage, there has never been a formal fish passage waiver for this structure. The Applicant anticipates spillway and seismic upgrades to the dam will be necessary sometime in the next 5-7 years. These construction activities would likely invoke the state's fish passage policy and trigger the need to address fish passage. The Applicant requests a new fish passage waiver with mitigation at this time, in advance of the future trigger event at LPCD. This preemptive request on behalf of the applicant to waive the requirement of fish passage is consistent with policy defined in ORS 509.585(8).

The Applicant's proposed mitigations for LPCD has the potential to greatly improve the production potential for multiple native migratory fish species in the Coos Basin (Matson Creek North Arm), including Coastal Cutthroat Trout, Coho Salmon, Chinook Salmon, Chum Salmon, winter steelhead, and lamprey species. Due to the poor quality, degraded conditions, and lack of future potential habitat in the lower Pony Creek watershed, habitat will at best continue to harbor a minimal population of Coastal Cutthroat Trout. The Department concludes, as presented in the net benefit analysis, that the mitigation in lieu of providing fish passage at LPCD provides a benefit for multiple native migratory fish species at the North Arm of Matson Creek, where little potential occurs for future improvement in the Pony Creek watershed. The Applicant and ODFW have attempted, but exhausted, efforts to implement measures in lower Pony Creek that would improve stream functionality.

The new habitat mitigation requirements at the North Arm of Matson Creek will be monitored and reported annually to ODFW. The mitigation shall be remediated as appropriate and necessary to ensure the restored habitat functions as per its design and to guarantee the long-term success of the mitigation actions. The Applicant's proposed mitigation actions are legally protected by a perpetual easement with The Wetlands Conservancy on Matson Creek.

OPTIONS

1. Determine there is a net benefit to native migratory fish and approve the fish passage waiver.
2. Modify and approve the fish passage waiver to achieve a net benefit to native migratory fish.
3. Deny the fish passage waiver.

**STAFF
RECOMMENDATION**

ODFW staff recommends Option 1.

DRAFT MOTION

I move to determine that there would be a net benefit to native migratory fish, as shown in Attachment 3, and approve the Coos Bay North Bend Water Board fish passage waiver at Lower Pony Creek Dam in exchange for the proposed mitigation in the North Arm of Matson Creek and to authorize the chair of the Oregon Fish and Wildlife Commission to enter into an Agreement with the Applicant on the Commission's behalf.

EFFECTIVE DATE

December 5, 2014