

**UPPER PONY CREEK DAM
FISH PASSAGE WAIVER AGREEMENT AMENDMENT (W-17-0008)**

This Agreement is entered into on the date of last signature by and between State of Oregon through its Oregon Fish and Wildlife Commission, hereinafter referred to as "the Commission", and the Coos Bay North Bend Water Board, hereinafter referred to as "the Applicant".

PREAMBLE

The Applicant seeks authorization from the Commission to amend an existing Memorandum of Understanding (MOU) (Attachment A) which previously waived fish passage requirements (ORS 509.585) at the existing Upper Pony Creek Dam located in Pony Creek, a direct tributary to Coos Bay in Coos County, Oregon. Section VI of the MOU, developed in 1999 and amended in 2004, identifies alternative mitigation measures necessary to fulfill the fish passage waiver requirements for the Upper Pony Creek Dam Expansion project completed in 1999. This new waiver Agreement specifically amends the third and fourth alternative mitigation provision of Section VI of the MOU. The intent of this amendment is to complement, not to abrogate, the existing MOU.

The applicant's Fish Passage Waiver Amendment Application # W-17-0008 (Attachment B) and the Oregon Department of Fish and Wildlife's (Department) benefit analysis, required by ORS 509.585(7)(b) (Attachment C), are attached and hereby incorporated into this agreement.

The Applicant's Board of Directors has authorized full funding for the project and has authorized its General Manager to enter into this waiver agreement with the Commission, as identified in Attachment B.

PROVISIONS OF THE AGREEMENT

1. Pursuant to ORS 509.585 and OAR 635-412-0025(1), (9), and (10)(b)(A), the Commission hereby amends the existing fish passage waiver MOU for fish passage requirements for the artificial obstruction at this location because it determines that the alternative mitigation the Applicant has agreed to results in a net benefit (Attachment C) to native migratory fish relative to providing the previously required supplemental flows in Pony Creek Dam by restoring complex habitat and lost function to the South Arm of Matson Creek located in the Catching Slough subwatershed of the Coos River.
2. The location of the artificial obstruction and proposed mitigation sites shall only be those specified in Attachments B and C.
3. The Applicant shall provide fish passage mitigation by implementing all of the actions identified in Attachment B. The Applicant has authorized the financing that will cover the costs of the mitigation actions of this Agreement.
4. Specific mitigation design plans for the proposed mitigation sites in the South Arm of Matson Creek shall meet Department fish passage criteria and guidelines and shall be approved by the Department prior to installation. The Applicant shall be responsible for obtaining all other necessary permissions and permits as appropriate for the implementation of the mitigation.
5. The mitigation identified in Attachment B shall not be used to comply with any other legal requirements of the Applicant or others, except as allowed in OAR 635-412-0040(3).
6. Mitigation actions identified in this Agreement shall be completed by the end of 2015.
7. All in-water work associated with the mitigation actions shall be completed during the appropriate ODFW in-water work period(s).
8. The Applicant shall maintain, monitor, evaluate the effectiveness of, and report on the mitigation as required under OAR 635-412-0040(8), and shall provide written status reports to the Department annually for the first five (5) years and then once every 5-years thereafter, or as determined by the Department. Reports shall include photographs from established photo-points as part of the evaluation and monitoring. Monitoring and evaluation of the mitigation shall be conducted annually unless problems are observed that may require additional analysis. These reports shall consist of visual observations, as-built and biological surveys particularly with regards to fish habitat function of the mitigation sites identified in Attachment B. Reports shall be submitted to the State Fish Passage Coordinator and Coos Coquille District Fish Biologist. Electronic or hard copy submissions are acceptable.
9. For the duration of this Agreement, the Applicant shall be responsible for all maintenance required such that the fish passage mitigation identified in Attachment B provides adequate habitat improvements for native migratory fish. If monitoring by the Applicant or Department indicates that these habitat improvements are not functioning as designed,

the Applicant, in consultation with the Department, shall determine the cause and, during an in-water work period approved by the Department, shall modify the mitigation to rectify problems as necessary.

10. Failure to maintain mitigation, required by ORS 509.910, for the duration of this Agreement shall constitute a violation of this Agreement and applicable fish passage laws (ORS 509.585). Such failure shall invalidate this fish passage waiver for the Upper Pony Creek Dam and shall require the Applicant to provide fish passage at the artificial obstruction or seek alternative mitigation if not remedied in a reasonable amount of time or mitigated with some other projects acceptable to the Commission. Department shall notify the Applicant of such violation and allow Applicant a reasonable amount of time to rectify such violation.
11. The Department shall be allowed to inspect the mitigation sites at reasonable times for the duration of this Agreement with prior notice, appropriate property owner permission, and with a representative of the Applicant present. Unless prompted by emergency or other exigent circumstances, inspection shall be limited to regular and usual business hours, including weekends.
12. The Applicant may employ or contract with other parties to perform work under this Agreement but remains responsible for the mitigation, monitoring and reporting.
13. This Agreement is solely for the purpose of fulfilling Oregon fish passage statutory requirements and responsibilities administered by the Commission or the Department and does not satisfy any other Department, federal, state, or local laws, rules, or regulations, including but not limited to State or Federal Endangered Species Acts, any applicable water rights, instream flow requirements, approvals, or certificates administered by Oregon Water Resources Department.
14. This Agreement in no way purports or authorizes take of a federally listed species.
15. This Agreement shall be valid and remain in effect until such time and so long as the Applicant fully implements and continues to provide the agreed-upon mitigation measures identified in the MOU and Attachment B and until the waived artificial obstruction triggers (further construction, a fundamental change in permit status, or abandonment) fish passage laws again, as required in OAR 635-412-0025(3) and ORS 509.585.
16. This Agreement amends and does not abrogate, the MOU developed in 1999 and amended in 2004.

Signature:	_____	_____	_____	_____
	Coos Bay North Bend Water Board	Date	Oregon Fish and Wildlife Commission	Date
Name:	<u>Rob Schab</u>		<u>Bobby Levy</u>	
Title:	<u>General Manager</u>		<u>Commission Chair</u>	