

ODFW-ODOT FISH PASSAGE MITIGATION BANKING PILOT PROJECT AGREEMENT

The parties to this Fish Passage Mitigation Banking Pilot Project Programmatic Agreement, (hereafter "Agreement") are the Oregon Department of Fish and Wildlife (ODFW), and the Oregon Department of Transportation (ODOT), both agencies of the State of Oregon herein referred to individually or collectively as "Party" or "Parties."

RECITALS

By the authority granted in Oregon Revised Statutes (ORS) 190.110 and 283.110, state agencies may enter into agreements with units of local government or other state agencies for the performance of any or all functions and activities that a party to the agreement, its officers, or agents have the authority to perform.

I. PURPOSE AND GOALS

1. It is the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish in all waters of this state in which they are currently or have historically been present, as described in Oregon Revised Statute (ORS) 509.585, Oregon Administrative Rule (OAR) 635-412-0020, and envisioned by the Oregon Plan for Salmon and Watersheds (Executive Order 99-01).
2. It is the Mission of ODOT to provide a safe, efficient transportation system that supports economic opportunity and livable communities for Oregonians.
3. Pursuant to ORS 509.585 and OAR 635-412-0020, certain actions, or "trigger events,"¹ at "artificial obstructions"² where native migratory fish (as defined in OAR 635-412-0005(32)) are currently or were historically present require the review and approval of fish passage by ODFW or the Oregon Fish and Wildlife Commission (OFWC) prior to those trigger events occurring. OAR 635-412-0020(3)(b) allows ODFW to grant "programmatic approval" of a fish passage plan for multiple artificial obstructions of the same type.
4. Pursuant to ORS 509.585(7) and OAR 635-412-0025(1), fish passage waivers shall be granted for artificial obstructions if the Commission or Department determines that mitigation rather than fish passage at the obstruction provides a net benefit to native migratory fish.
5. For the purpose of this Agreement the Fish Passage Pilot Project Mitigation Banking Instrument (Attachment A) is attached and hereby incorporated into this Agreement.
6. This three year Fish Passage Mitigation Banking Pilot Project (Pilot Project) will allow ODOT to test a programmatic approach to the current waiver process outlined in the

¹ "Trigger events" for the purposes of this Agreement shall mean, with respect to an "artificial obstruction" (defined in OAR 635-412-0005(3)) located where native migratory fish are currently or were historically present: "construction" activities (defined in OAR 635-412-0005(9)), "fundamental changes in permit status" (defined in OAR 635-412-0005(25)), or "abandonment".

² "Artificial obstruction" means any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.

state's fish passage law within the ODFW North Coast Watershed District. ODOT will provide waiver mitigation by addressing high priority fish passage barrier(s) on the ODFW Statewide Fish Passage Priority List. This high priority fish passage project will function as a Fish Passage Mitigation Bank for the Pilot Project. A mitigation banking approach for fish passage presents an opportunity to advance priority large scale fish passage conservation and restoration projects and open up significant habitat for native migratory fish.

7. ODOT will apply for waivers at impact sites that will be debited out of the newly created banking site(s). ODOT's typical waiver requests include repairing or replacing failing highway culverts on small streams with poor quality habitats that are expensive to bring up to fish passage criteria standards. These sites often provide minimal benefit for native migratory fish. A Fish Passage Mitigation Bank approach will focus mitigation at the highest priority fish passage barriers on the North Coast rather than at smaller individual mitigation projects associated with individual ODOT waiver requests.
8. The goals of the Pilot Project include:
 - Provide greater net benefits for native migratory fish than providing passage at individual waiver sites;
 - Streamline the waiver process for fish passage banking to ensure the ODFW approval process is transparent and defensible; and
 - Use ODOT resources more efficiently to provide greater benefits to native migratory fish over the traditional project specific waiver approach.

II. PROVISIONS OF THE AGREEMENT

1. This Agreement applies to ODOT inclusively for this Pilot Project. It does not apply to other State, local agencies, or private persons.
2. This Agreement applies to culverts and other passage structures located within the ODFW North Coast Watershed District.
3. ODOT will be permitted to implement the mitigation banking process as part of this Pilot Project. After the end of this 3-year Pilot Project, the banking site(s) will be closed, regardless of the amount of remaining credit or debit.
4. The Net Benefit Analysis Tool will be used to account for the quantity and quality of upstream habitat for fish above the banking and waiver sites. The Net Benefit Analysis Tool will be tested, evaluated, and improved during the Pilot Project. The project partners will analyze, evaluate, and verify the Net Benefit Analysis tools accuracy, sensitivity, repeatability, and usability.
5. For this Agreement, ODOT is the credit developer and will be generating credits as mitigation by providing fish passage at priority barrier(s). ODOT is also the applicant to ODFW, requesting the fish passage waivers. ODFW will be operating the program and managing the debit-credit transaction process. These roles and responsibilities are documented in the Mitigation Banking Instrument.
6. A set of side boards will be implemented in conjunction with the Pilot Project to ensure that the Pilot Project will result in a net benefit to native migratory fish. These Pilot Project sideboards (defined in Attachment A) include:
 - a. a 3:1 credit to debit ratio,

- b. a maximum of 12 waiver sites will be allowed,
 - c. waiver sites will have a half mile (1/2) or less of habitat above the culvert, and
 - d. a minimum debit transaction value of 1.0 credit per site.
7. The credit accounting process will track habitat value benefits and impacts to all species and life-stages of Native Migratory Fish (NMF). Some NMF may benefit more than others given the banks benefit to the full assemblage of NMF and the limited impacts at the waiver sites. Based on the above sideboards and the recognition that the mitigation banking project provides a substantial net benefit to Native Migratory Fish, the credit and debit ledger will be zeroed out at the end of the pilot project. In other words, unused species credits will be retired and any unfilled species credit obligation will be considered met.
 8. During the Pilot Project testing phase, ODOT and ODFW will conduct up to 12 mitigation banking transactions to offset waiver projects. The review of these transactions will allow ODFW to evaluate the potential for future expansion of the Pilot Project's geographic scope and scale.
 9. ODOT will fund the action(s) to address fish passage at high priority fish passage project(s), regardless of ODOT ownership, within the North Coast to establish the fish passage mitigation bank site.
 10. ODOT will provide annual monitoring and evaluation reports for the Pilot Project. Reports shall be submitted by December 1st.
 11. At the conclusion of the Pilot Project each agency shall provide a final report. All project success criteria will be reviewed, evaluated, and documented within this report. The habitat calculators as part of the Net Benefit Analysis Tool will be thoroughly vetted to verify and track the net benefit(s) created for native migratory fish.
 12. Staff from ODOT and ODFW affected by this Agreement will meet annually, or as otherwise deemed appropriate, to collaboratively review projects implemented under this Agreement and evaluate adaptive management measures, as appropriate.

III. GENERAL PROVISIONS

1. Notice. The Parties' contact persons for all notices provided for under this Agreement, except as specifically provided otherwise, are as follows:

Agency	ODFW	ODFW Technical	ODOT	ODOT Technical
Name	Greg Apke	Dave Stewart	John Raasch	Bill Warncke
Title	Fish Passage Coordinator	ODFW/ODOT Liaison	ODOT Environmental Resource Unit Manager	ODOT Fish Passage Program Team Leader
Address	4034 Fairview Industrial Dr SE Salem, OR 97302	4034 Fairview Industrial Dr SE Salem, OR 97302	4040 Fairview Industrial Dr SE Salem, OR 97302	4040 Fairview Industrial Dr SE MS #6 Salem, OR 97302-1142
Phone	503-947-6228	503-947-6234	503-986-3459	(503) 986-3860
E-Mail	greg.d.apke@state.or.us	Dave.stewart@state.or.us	john.raasch@odot.state.or.us	william.m.warncke@odot.state.or.us

Either party may change a designated contact person at any time by providing written notice to the other party.

2. Amendments. Amendments to this Agreement may be made within applicable laws at the mutual agreement and signature of the ODFW Fish Screens and Passage Program Manager and the ODOT Environmental Resources Unit Manager.
3. Term. This Agreement is entered into on the date of last signature by and between ODFW and ODOT, both representing the State of Oregon. This Agreement expires Dec 31, 2018 unless extended by a fully executed amendment.
4. Termination. This Agreement may be terminated at any time through mutual agreement by the parties or by either party after a 30-day written notice.
5. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
6. The Parties agree that any tort liability claim, suit, or loss resulting from or arising out of the Parties' performance of and activities under this Agreement shall be allocated, as between the state agencies, in accordance with law by Oregon Department of Administrative Services' (DAS) Risk Management, for purposes of their respective loss experiences and subsequent allocation of self-insurance assessments under ORS 278.435. Each Party to this Agreement agrees to notify the DAS Risk Management Division and the other agency in the event it receives notice or knowledge of any claims arising out of the performance of, or the agencies' activities under this Agreement.
7. The Parties understand that each is insured with respect to tort liability by the State of Oregon Insurance Fund, a statutory system of self-insurance established by ORS 278, and subject to the Oregon Tort Claims Act (ORS 30.260-30.300). Each Party agrees to accept that coverage as adequate insurance of the other Party with respect to personal injury and property damage.
8. The Parties that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Employers Liability insurance with coverage limits of not less than \$500,000 must be included. The Parties shall ensure that each of its contractors complies with these requirements.
9. The Parties acknowledge and agree that the Parties, the Oregon Secretary of State's Office, the federal government, and their duly authorized representatives shall have access to the books, documents, papers, and records of the Parties which are directly pertinent to the specific Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of six (6) years after final payment. Copies of applicable records shall be made available upon request. Payment for costs of copies is reimbursable by the requesting Party.
10. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
11. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either

Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either Party to enforce any provision of this Agreement shall not constitute a waiver by either Party of that or any other provision.

12. The Parties certify and represent that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of Agency, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind Agency.

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

XXXXXXXXXXXXXXXXXXXX
Paul Mather, Oregon Department of
Transportation

Date

XXXXXXXXXXXXXXXXXXXX
Chair, Oregon Fish and Wildlife Commission

Date