



AGENDA ITEM SUMMARY

BACKGROUND

It is the policy in the State of Oregon to provide for upstream and downstream passage for native migratory fish. The Oregon Department of Fish and Wildlife (Department) administers Oregon Fish Passage Statutes (ORS 509.580 through 509.910) and corresponding Administrative Rules (OAR 635-412-0005 through 0040). With some exceptions, a person may not construct a new artificial obstruction or modify an existing artificial obstruction across waters of this state that are inhabited, or historically inhabited, by native migratory fish (NMF) without obtaining fish passage approval. Projects that construct, replace, repair, or abandon artificial obstructions are triggers to Oregon's passage rules and invoke the Department's fish passage authority. Prior to these activities, owners/operators of projects are required to submit fish passage plans to the Department for review and approval.

Oregon Department of Transportation's (ODOT) mission is to provide a safe, efficient transportation system that supports economic opportunity and livable communities for Oregonians. ODOT has a proven record of enhancing fish passage and contributing to the Oregon Plan for Salmon and Watersheds.

The Culvert Repair Programmatic Agreement (CRPA) allows ODOT to make specific repairs to failing culverts that meet certain criteria only if fish passage improvements are incorporated into the project (Attachment 2). This agreement also requires ODOT to contribute funds into the ODFW administered Fish Passage Compensation Fund that is used to address high priority fish passage issues statewide. In making the specified repairs and contributing funds to the mitigation program, the trigger for culvert replacement is delayed to allow ODOT time to plan for replacement. In future years when the culvert is proposed for replacement, full fish passage requirements apply. The results of the previous Culvert Repair Programmatic Agreements (Attachment 5: 2015 and 2018; CRPA reports can also be found here: <https://www.oregon.gov/odot/GeoEnvironmental/Pages/Fish-Passage.aspx>) have shown this program to benefit both native migratory fish and the state highway system.

Through the agreement, ODOT will continue to fund two ODFW/ODOT Fish Passage Liaison Positions to assist in implementation of the agreement and other ODOT fish passage responsibilities.

PUBLIC INVOLVEMENT

On November 19, 2021, the Department published a press release requesting public comments on the draft 2023 Culvert Repair Programmatic Agreement in preparation for the December 3, 2021 Fish Passage Task Force (FPTF) meeting. Prior to this meeting, the Fish Passage Task Force was provided a copy of the draft Agreement and the comments received through the public comment solicitation. The Department and ODOT jointly presented information on the proposed 2023 Agreement to the FPTF. After reviewing public comments and discussion, the FPTF recommended approval of the ODOT Culvert Repair Programmatic Agreement in a unanimous 7-0 vote.

ISSUE

Approval of the 2023 Culvert Repair Programmatic Agreement

ANALYSIS

Oregon's fish passage legislation (ORS 509.580 -509.910), enacted in 2001, requires the installation of fish passage or alternatives to fish passage at all artificial obstructions at the time of specific trigger events. These include:

- construction (which includes major replacement or structural modifications) of an artificial obstruction
- abandonment of an artificial obstruction
- fundamental change in permit status at an artificial obstruction

The premise of this fish passage legislation was to craft laws that provide fish passage for fish that migrate for their lifecycle needs, were reasonable for owners of passage obstructions (allow time to plan for the financial burden of future passage trigger events), and allow flexibility for the Commission to waive passage requirements under appropriate circumstances. This CRPA meets the intent of Oregon's fish passage policy. Fish passage restoration is implemented at existing statewide priority barriers. ODOT is authorized to make specific short-term culvert repairs while maintaining the integrity of Oregon's passage policy and the authority of the Commission to enforce this policy. It is important to note that eligible repairs, such as resurfacing a damaged bottom surface, are described in the CRPA. Culvert replacements or actions that mimic the life cycle of a new culvert, such as slip-lining, are not eligible. Projects not eligible under the CRPA agreement represent a full trigger of fish passage requirements.

Oregon Administrative Rule (OAR) 635-412-0020(3)(b) provides the Department with the authority to grant a programmatic approval of fish passage for multiple obstructions of the same type (e.g., culverts). The subsequent subsections of this rule (A-E) provide the framework for this Culvert Repair Agreement. As noted above, the CRPA precludes culvert replacements and structural repairs that extend the culvert life beyond its original life expectancy. The CRPA provides ODOT a fish passage trigger delay at culvert sites repaired during the 10-year project duration. In lieu of providing full criteria fish passage as would be expected with a culvert replacement project, ODOT will improve fish passage conditions at each site and fulfill all other conditions of the CRPA. The Department will review each culvert proposed for repair in advance of the construction season to ensure proposed repairs meet the eligibility requirements of the CRPA. Additionally, ODOT is responsible to monitor and report on pre and post treatment culvert repairs and fish passage improvements. Annual monitoring and reporting will ensure that the improved levels of fish passage at the culvert repair sites were achieved.

The fish passage restoration fund committed on behalf of ODOT as part of this CRPA, will offset the delay in full fish passage at the culverts repaired. These funds will be managed and administered by the Department to specifically address high priority fish passage restoration projects identified by the Department. These fish passage restoration projects will be independent of ODOT ownership and geographic location of the culvert repairs. Fish passage restoration projects are typically voluntary in nature and require outside entities to assist with project design and implementation.

This fish passage restoration fund provides the Department a mechanism to make improvements expeditiously and efficiently at statewide high priority passage locations, consistent with the Commission’s Climate and Ocean Change Policy, while providing ODOT more flexibility to implement short-term repairs at failing culverts. Monitoring of this program since 2015 has shown the CRPA provides a net benefit to native migratory fish through fish passage improvements at each culvert repaired and through the investments made by ODOT at passage restoration projects identified on the Commission approved Statewide Fish Passage Priority List. One example of this is the construction of a fish ladder at Opal Springs on the Crooked River. At the time this barrier was number two on the statewide barrier priority list. A fish ladder meeting state and federal fish passage criteria was installed with partial funding from the funds created by the CRPA. Many other priority barriers have also had fish passage restored thanks to the funds created under the CRPA.

OPTIONS

1. Approve the Culvert Repair Programmatic Agreement
2. Modify and approve the Culvert Repair Programmatic Agreement
3. Deny the Culvert Repair Programmatic Agreement

STAFF RECOMMENDATION

1. Staff recommend the Commission approve the 10-year Culvert Repair Programmatic Agreement.

DRAFT MOTION

I move to approve the 2023 Culvert Repair Programmatic Agreement as proposed by staff in Attachment 2.

EFFECTIVE DATE:

Date of last signature by the Chair of the Oregon Fish and Wildlife Commission and the Deputy Director of the Oregon Department of Transportation.