

Exhibit (C)

**2023 Culvert Repair
Programmatic Agreement**

**Supplemental
Public Correspondence
received as of
February 17, 2022**



WaterWatch of Oregon

Protecting Natural Flows in Oregon Rivers

February 15, 2022

Oregon Fish and Wildlife Commission
4034 Fairview Industrial Drive SE
Salem, OR 97302

Re: ODOT Culvert Repair Agreement

Chair Wahl and Members of the Commission:

WaterWatch of Oregon is a nonprofit river conservation organization dedicated to protecting and restoring the natural flows, and the free-flowing character, of Oregon's rivers and streams.

Regarding the above matter, WaterWatch incorporates the comments it submitted to the Fish Passage Task Force in December, and to the Commission in 2017 (when the current agreement was approved), both of which are in the online materials for this agenda item. In general, we appreciate the practical purpose of the program and recognize that it has helped fund valuable fish passage projects (including a project led by WaterWatch). However, given the importance of fish passage to the survival of native fish in a time of climate change, we believe the Oregon Department of Transportation (ODOT) should do more than the proposed agreement would require – both in terms of providing fish passage at the culvert repair projects and in terms of paying compensation for not fully complying with fish passage requirements at the projects. To the extent it is not practical to obtain those commitments from ODOT now, we suggest shortening the term of the agreement to two years and exploring the potential for a more significant commitment from ODOT before any further extension of the program is approved.

To summarize our main points (and a few additional points):

- The Commission should not lose sight of the fact that the program is fundamentally about ODOT doing *less* for fish passage than it would otherwise be required to do (i.e., to bring its culverts into compliance with fish passage criteria when it repairs them unless it can meet the criteria for a waiver or an exemption). Presentations on the program tend to focus on the fish passage work that got done under the program (sometimes work that might have been done with other funds anyway), without adequate acknowledgement of

the work that didn't get done, or on the fish habitat left partially or wholly inaccessible, often on small but important tributary streams, because ODOT was not required to bring its culverts up to current fish passage criteria when it repaired them.

- The amount of money ODOT would dedicate to fish passage under the program (either directly or through ODFW) may seem like a lot, but by most metrics it isn't. It's less than one percent of [ODOT's highway maintenance budget](#), less than five percent of what ODOT is saving by not meeting fish passage criteria at the culverts,¹ and less than two percent of what the [Washington State Department of Transportation](#) plans to spend per year through 2030 to provide fish passage at its culverts, in part to honor treaty obligations to Native Americans. These percentages also assume that, but for this agreement, ODOT would not spend any money on fish passage, which we hope is not the case. That makes the amount paid in exchange for non-enforcement of fish passage laws at culvert repair projects even smaller.
- While the agreement would require some effort to improve fish passage at the repaired culverts – albeit less than the statutes and rules would otherwise require – it would not have any performance-based standard. Thus, a culvert could qualify for the program, and therefore not need to meet fish passage criteria, even if it provides little or no passage after the repairs. The agreement should instead require that a culvert provide some minimum amount of passage – for example, passage during at least some portion of the migration season for each species of native migratory fish currently or historically present at the site.
- We question whether there is statutory authority for the program. The basic structure of the fish passage statutes is that an “obstruction” (including a culvert) must provide fish passage, and that ODFW enforces that requirement whenever there is a “triggering” event (as it is commonly known), unless the owner of the obstruction obtains a “waiver” (requiring mitigation that provides a “net benefit” to fish) or an “exemption” (requiring a finding that passage would provide “no appreciable benefit” to fish). ORS 509.585. Under the proposed agreement, even when fish passage requirements are triggered by repairs at ODOT culverts, ODOT would not be required to meet those requirements, or to

¹ See 2021 Annual Report, p. 5. In 2021, according to the report, ODOT saved about \$4.5 million per culvert. Extended to 150 culverts (the number of planned repairs under the proposed agreement), the savings would be about \$666 million. Even adjusting for the different life cycle of a repair v. a replacement (about one-third), the savings would be about \$222 million, or about \$1.5 million per culvert. In contrast, under the draft agreement, ODOT would pay \$58,800 per culvert into the compensation fund, or about \$8.8 million total. Admittedly, these are very rough numbers, but we are seeking only to make a very general point – that ODOT isn't paying much compared to what it is likely to save.

obtain a waiver or an exemption either. The draft agreement claims it constitutes “programmatic approval” of multiple similar structures, (p. 1 ¶ 3), but the culverts are likely not sufficiently similar for that, and there is no basis for finding passage requirements or the waiver or exemption criteria met on any kind of programmatic basis.² If the Commission has not already done so, it should seek an explicit determination from counsel that the culvert repair program is legal.

- The program could set a bad precedent. It essentially says ODOT doesn’t need to fully comply with fish passage requirements when it repairs culverts because it believes doing so is too expensive and/or impractical. Surely other parties could make a similar claim. ODOT should instead be sending the message that fish passage is important and should be provided even when it’s expensive.
- As a technical/legal point, ODFW is asking the Commission to approve the agreement. However, the agreement says it can be amended or terminated by agency staff. (Page 6, ¶¶ 2, 4.) Thus, there is an inconsistency with respect to who has authority over the policy judgments reflected in the agreement, including how much money ODOT should pay.

Thank you for considering our comments.

Sincerely,

Brian Posewitz

Brian Posewitz
Staff Attorney

² The repairs admittedly do not meet all fish passage requirements (that is why the program exists). A typical waiver analysis by ODFW makes a specific comparison of the habitat lost by not providing passage (quantity and quality) to the habitat gained through a mitigation project (quality and quantity) and requires the mitigation to meet other criteria, including an “in-proximity” requirement (same basin, same fish). ORS 509.580(5), (7). As far as we know, that full analysis has not been done to compare the habitat lost by not requiring full passage at repaired culverts to habitat gained through ODOT funding commitments, even though the Department claims in its agenda item summary that the program provides a “net benefit” to fish.