

# Fish Passage Banking Pilot Project Mitigation Banking Instrument

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This Fish Passage Banking Pilot Instrument (hereinafter, Instrument), regarding the establishment, use, operation, and maintenance of Pilot Fish Passage Banking Program (hereinafter, Program), is an agreement made and entered into by the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Department of Transportation (ODOT). By signature of this agreement, the following agencies have indicated their acceptance:

## I. Preamble

### A. PURPOSE

The purpose of this Instrument is to establish guidelines, responsibilities, and standards for the establishment, use, operation, and maintenance of pilot fish passage banking sites. Oregon's fish passage statutes (ORS 509.580 through 910) require projects to provide for fish

#### **Net Benefit--Defined**

Net benefit means an increase in the overall, in-proximity habitat quality or quantity that is biologically likely to lead to an increased number of native migratory fish after a development action and any subsequent mitigation measures have been completed (OAR 635-412-0005 (33))<sup>1</sup>.

passage when activities "trigger" the law. Under those statutes and Oregon Department of Fish and Wildlife's (ODFW) Habitat Mitigation Policy (OAR 635, Division 415) and the Fish Passage Rules (OAR 635, Division 412)), there are provisions for providing waivers from fish passage requirements. A waiver is pre-conditioned on the applicant providing mitigation to create a net benefit to the Native Migratory Fish (NMF) at the waiver site (often fish passage at another location). The overall goal of the fish passage waiver is to provide a net benefit to NMF (OAR 635-412-0025 (1)).<sup>2</sup>

This Instrument covers pilot fish passage banks proposed by ODOT and approved by ODFW in the North Coast (North Coast Basin, including the following 4<sup>th</sup>- field watersheds Wilson-Trask-Nestucca (HUC 17100203), Nehalem (HUC 17100202), Necanicum (HUC 17100201), Lower Columbia (HUC 17080006), Lower Columbia-Clatskanie (HUC 17080003)). The intent is to demonstrate a fish passage banking approach, and then adaptively manage its shortcomings, successes, and needed changes before evaluating its appropriateness for broader application across the state.

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<sup>1</sup> Oregon Administrative Rule. Oregon Department of Fish and Wildlife. Division 412. Fish Passage. Definitions 635-412-0005 (33).

<sup>2</sup> Oregon Administrative Rule. Oregon Department of Fish and Wildlife. Division 412. Fish Passage. Fish Passage Waivers and Exemptions 635-412-0025 (1).

## **B. CONTEXT**

Interest in fish passage banking has been growing. Oregon Department of Transportation often encounters high costs of providing fish passage for streams with limited habitat quality and quantity. At the same time, ODFW is interested in finding ways to address the identified priority barriers in the state. A banking approach allows waivers from multiple projects on streams with limited habitat quality and quantity to collectively invest in removing barriers that will open up significant habitat quality and quantity for native migratory fish. The banking approach facilitates the net benefit analysis of ODFW district biologists. Without banking, district biologists need to determine which single mitigation project is “sufficient” to offset a single waiver site. With banking, tools are needed to support decisions on “how much” of a bank’s credits need to be purchased to offset more than one waiver. This Instrument, in combination with a Net Benefit Analysis Tool and its User Manual, provides the guidance needed to support ODFW and ODOT in making that evaluation.

The Instrument is a tool to evaluate potential waiver sites into categories including: those where a waiver is not appropriate and that need to provide fish passage on site, sites where the waiver decision to take a banking approach is straight forward and can be processed quickly, and which ones need more detailed review. Where mitigation is acceptable, the Instrument helps guide the quantification of debits and credits with the Net Benefit Analysis Tool and will provide certainty and transparency that approved actions on the ground really are providing net benefits for native migratory fish.

The Instrument sections are organized to provide the information needed for specific audiences/users:

- ODOT as a permit applicant to ODFW requesting a fish passage waiver;
- ODOT as a credit developer: ODOT generating credits as mitigation by providing fish passage at priority barriers; and
- ODFW: ODFW staff operating the credit and debit program.

### **Fish Passage Banking Instrument: Supporting Documentation**

Instrument Document: Rules, standards, and processes needed to determine who can use credits and who can generate credits.

Net Benefit Analysis Tool: The science-based method to quantify habitat quality and quantity.

This consists of:

- Fish Passage Credit Calculator excel spreadsheet
- Customized GIS interface &
- User Manual

### **C. GOALS AND OBJECTIVES**

All fish passage waiver decisions need to be consistent with relevant laws and policies, especially ODFW's fish passage statutes and habitat mitigation policy.

The broader conservation goals of fish passage banking are to:

1. Provide greater net benefits for native migratory fish than providing passage at the waiver site;
2. Streamline the waiver process for fish passage banking and make approval transparent and defensible; and
3. Use ODOT (applicant) resources more efficiently to provide greater benefit to native migratory fish over the traditional approach while reducing costs for ODOT.

Underneath those broader goals, fish passage banking strives to:

1. Provide fish passage in the most important areas; provide streamlined waiver approvals for highway projects with negligible or no benefit for fish; and concentrate review on development and conservation actions with the highest probability of benefiting fish;
2. Provide criteria for selecting fish passage mitigation sites;
3. Set risk or uncertainty factors that are applied within a credit quantification method
4. Define any requirements for verification, tracking, performance, and reporting for mitigation sites. These help ensure promised benefits are achieved and sustained over time, and help provide transparent information on activity; and
5. Establish adaptive management and effectiveness monitoring frameworks to improve the system over time.

### **D. APPROVAL**

This Instrument is considered fully executed upon the latter date of signature by the authorized representative of ODFW and ODOT.

### **E. ESTABLISHMENT AND USE OF CREDITS**

In accordance with the provisions of this Instrument, credits will be available for use as mitigation in accordance with all applicable requirements for fish passage waivers issued under ODFW's fish passage rules (OAR 635-412-0025)<sup>3</sup>

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<sup>3</sup> Oregon Administrative Rule. Oregon Department of Fish and Wildlife. Division 412. Fish Passage. Fish Passage Waivers and Exemptions 635-412-0025.  
Oregon Department of Fish and Wildlife/Oregon Department of Transportation  
Fish Passage Banking Pilot Program Instrument  
Updated 09/30/14

ODFW will use the Net Benefit Analysis Tool and other information to determine the number of credits available for each project (hereinafter, mitigation project) within a defined service area based on the habitat quantity and quality made accessible by providing passage at the mitigation project, in accordance with the terms and conditions contained herein.

#### **F. DISCLAIMER**

This Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

#### **G. EXHIBITS**

Exhibit A— ODFW's 2013 Statewide Fish Passage Priority List; other lists of barriers considered priorities for local area and approved by ODFW.

Exhibit B—Instrument Modification Procedure

Exhibit C—Mitigation Plans

Exhibit D—Statement of Sale of Credit

Exhibit E – Fish Passage Credit Calculator

Exhibit F – Statement of Sale of Credit

## **II. Program Structure**

Under this Instrument, ODOT is a sponsor of mitigation projects. This Instrument is intentionally broad and sets the framework under which ODOT-sponsored mitigation projects will be identified, funded, operated, maintained and managed. The Instrument provides the authorization for the Program to provide credits to be used as mitigation for waivers. As projects are identified, ODOT will submit site-specific mitigation plans to ODFW staff for review and approval as modifications to the Instrument through the process outlined in Exhibit B, and included in this Instrument as subparts of Exhibit C.

Upon 60 days written notice to ODFW, ODOT may request closure of the Program. In the event that the Program is closed, both ODOT and ODFW will fulfill any remaining obligations for credits sold and/or allow use of any credits issued.

ODOT may work with other partners to create mitigation projects. ODOT is responsible for ensuring all projects are consistent with the Instrument and submit a mitigation plan to ODFW along with a written request for an Instrument modification (Exhibit B).



### **III. Mitigation Project Establishment and Operation**

#### **A. ESTABLISHMENT**

##### *Project Site Selection and Eligibility*

All mitigation projects must address a priority fish passage barrier identified by ODFW. As a default, that includes barriers on ODFW's Statewide Fish Passage Priority List (2013) identified in Exhibit A. If a potential mitigation project is not on ODFW's Priority List, then ODOT working with ODFW staff can use the Net Benefit Analysis Tool to determine that a mitigation project provides a net benefit to native migratory fish. Mitigation projects must meet other eligibility criteria outlined in Table 3A.

**Table 3A. Mitigation Project Eligibility Criteria**

Criterion	Definitions
Credits must be from full fish passage	<p>There is recognition that the quantity of accessible habitat may not be a limiting factor in some basins. Restoration of estuarine habitat, improving flows, and other activities may be more important for fish. At this time, those activities cannot be used to generate fish passage banking credits unless approved on a case-by-case basis.</p> <p>No credit can be given for providing partial fish passage.</p>
Mitigation is consistent with applicable federal, state and local requirements	<p>A mitigation project must produce net benefits for native migratory fish consistent with ODFW rules and statutes. Project actions must be in compliance with all applicable land use restrictions and mandates relevant to the project site and comply with all applicable federal, state, and local laws.</p>
Restricted conservation dollars are not used to generate mitigation credits	<p>Restricted conservation dollars are funds specifically dedicated to net conservation benefit that are prohibited from funding generation of mitigation credits. These include Oregon Watershed Enhancement Board, US Fish and Wildlife Service, and other public conservation dollars. Transportation, utility, County funds, and many other types of funds are not restricted, and can be used for mitigation projects to provide net conservation benefit.</p> <p>Larger projects may use a combination of public conservation dollars and other sources of funds. The number of credits generated by a project should be reduced proportionally by the % of restricted conservation dollars used for the project (e.g., if OWEB funds 60% of the total project cost for land acquisition, and ODOT funds the rest for restoration and maintenance for mitigating its habitat impacts with transportation funds, then 40% of the credits are available for ODOT to use as mitigation).</p>

### *Instrument Modifications*

As mitigation projects are identified, ODOT will submit a written request to ODFW to modify the Instrument. This process is outlined in Exhibit B.

### *Permits*

ODOT and its partners will obtain all appropriate permits and authorizations needed to construct and maintain mitigation projects. This Instrument, mitigation plans, or contracts between ODOT and partners do not substitute for such authorization.

## **B. OPERATION**

### *Service Areas*

Service area is ODFW's North Coast District.

### *Mitigation Plans*

Mitigation plans for each mitigation project will outline measurable objectives, performance standards, and monitoring requirements (Exhibit C). Pre- and post-project implementation habitat assessments using the Net Benefit Analysis Tool and project monitoring will be completed using ODFW-approved techniques. Mitigation plans must include a map that defines the entire project area, which includes newly accessible habitat, and design documents for the proposed fish passage structure/action.

## **C. MONITORING**

ODOT will monitor the project, unless otherwise specified in the mitigation plan. The frequency and duration of monitoring, and specific monitoring methods will also be defined in each mitigation plan specific to the performance standards to be evaluated. In general, ODOT will provide annual monitoring reports for each project to ODFW by December 1 of years defined in the mitigation plan. As a default, monitoring will occur in years 1, 3, and 5. Each report will be submitted in paper and electronic format, and shall follow the specifications as outlined in Exhibit D.

The monitoring duration may be extended at ODFW's discretion if performance standards have not been met. ODFW may also reduce or waive monitoring requirements upon determination that performance standards have been met.

ODOT shall provide ODFW or their agents or designees with access to the project site at reasonable times as necessary to conduct inspections and compliance monitoring with respect to the requirements of this Instrument. Inspecting parties shall not unreasonably disrupt or disturb activities on the property, and will provide written notice within reasonable time prior to the inspection.

#### **D. MANAGEMENT**

##### *Maintenance Provisions*

Mitigation projects will be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. ODOT shall be responsible for maintaining mitigation projects for as long as there are offsetting applicable waivers, consistent with the appropriate mitigation plan, to ensure their long-term viability to provide passage for native fish. ODOT shall retain such responsibility unless and until the long-term project responsibility is formally transferred to an approved long-term steward. The long-term management plan to be developed for each mitigation project will include a description of anticipated management needs with annual cost estimates and an identified funding mechanism.

##### *Contingency Plans/Remedial Actions*

##### Mitigation Projects

If monitoring or other information indicates that a mitigation site is not progressing toward meeting its performance standards in a timely manner, ODOT shall notify ODFW as soon as possible. Likewise, if ODFW determines that terms of the Instrument or mitigation plans have not been met, ODFW may report, in writing, any findings and recommend corrective measures if needed.

In such instances, ODFW, in consultation with ODOT, will determine the appropriate measures ODOT should take to meet the objectives of the mitigation plan. Measures may include, but are not limited to, site replacements or modifications, design changes, revisions to maintenance requirements, and/or revised monitoring requirements. Performance standards may be revised, upon mutual agreement, to reflect the measures taken, or to reflect changes in management strategies and objectives. If the new standards do not provide native fish benefits that are comparable to the approved mitigation project, ODFW may reduce the number of credits available from the project or request ODOT provide a commensurate amount of additional mitigation.

### *Default*

Should ODFW determine that ODOT is in material default of any provision of this Instrument or an approved mitigation plan, ODFW may take appropriate action. Such actions may include, but are not limited to, suspending credits, adaptive management, decreasing available credits, requiring alternative mitigation, taking enforcement actions, or terminating the Instrument.

### *Mitigation Project Closure*

At the end of the monitoring period and approval of the long-term stewardship contract, or upon sale of the last credit, whichever is later, ODFW shall issue a written “project closure certification” to ODOT.

ODOT may request that part of or an entire mitigation project be closed early, and that the associated credits anticipated be forfeited, if it is determined that the performance standards are unattainable or it is otherwise in ODOT’s interest. ODFW shall decide whether to grant such requests. In the case that credits were debited or transferred prior to the early closure, ODOT shall be responsible for fulfilling all related obligations consistent with this Instrument.

### *Long-Term Protection*

ODOT shall be responsible for ensuring long-term protection of each mitigation site so long as the site is offsetting waivers. This includes written approval from ODFW to remove, adjust, and/or maintain the fish passage structure generating credits. The draft protection agreement will also include a clear statement granting ODOT rights to all fish passage credits generated from the mitigation project. The draft protection mechanism shall be submitted to ODFW for review.

In a mitigation project plan, ODOT shall identify who is responsible for the long-term maintenance and monitoring of the mitigation project. As a default, ODOT will be responsible for long-term stewardship of a project unless other arrangements are made.

## **IV. Credit Accounting**

### **A. GENERATION OF CREDITS**

Credits are equal to the improvement in habitat quality and quantity measured. For this pilot, credits will be generated by providing native migratory fish access to previously inaccessible habitat. Habitat is quantified using the Net Benefit Analysis Tool (see User's Manual) and are calculated by subtracting the quality-weighted habitat quantity before the project from quality-weighted habitat available after the project is implemented. For each mitigation plan, ODFW will determine if any factors or ratios are needed to adjust the potential quantity of credits based on risk, location, special features of the site, etc. Best Professional Judgment may influence/adjust the final credit calculation. If that occurs, the change should be justified and the Net Benefit Analysis be adaptively managed to accommodate approved changes.

Mitigation projects that are eligible for collaborative funding from multiple sources are encouraged under the Instrument. Credits will be based solely on benefits to native migratory fish provided as a result of the mitigation plan, over and above those provided by funding programs identified as Public Resource Protection and Restoration Programs, in accordance with Oregon Interagency Recommendations (2008). ODFW will determine the amount of mitigation credit available to ODOT for collaboratively funded projects, based on the proportion of ODOT expenditures relative to the complete project cost. Credit apportionment may be modified by ODFW if, after a collaboratively-funded project is completed, an audit indicates that ODOT's actual financial contribution was substantially more or less than anticipated.

### **B. CREDIT RELEASE**

Credits may not be used or sold prior to approval of a mitigation project plan. Each mitigation project plan will include a credit release schedule referenced to project specific performance standards.

In general, credits from mitigation projects will be released according to the following schedule:

- ODFW can release a small proportion (up to 10%) of credits upon approval of a mitigation plan, which includes a 60% design for construction of the fish passage structure, an approved fish passage plan,

and documentation of dedicated funding for the project. As a default, no credits will be released prior to implementation.

- 75% of credits may be released incrementally (phased release) upon approval of the as-built project design (documenting project completion), as approved in mitigation plans.
- 15% will be released upon ODOT meeting all performance standards for the mitigation project, and upon ODFW approval of the long-term management plan with a protection and funding mechanism.

The actual number of credits available at any given point in the development of a mitigation project will be determined through site monitoring and reports.

Additional credits may be available as a result of increased native fish benefits that accrue over time. Release of additional credits are contingent on achievement of the performance standards over time and are at the discretion of ODFW. If restoration (e.g., riparian revegetation or instream work) is planned as part of a mitigation project to improve habitat quality, ODOT will need to take into account that improvement in its projected Net Benefit of future condition. To get credit for habitat restoration, ODOT needs to submit further detail in the stewardship section of its mitigation project plan (see Section III.D) on how ODOT plans to maintain that restoration over time.

Other conservation activities may be considered on a case-by-case basis by ODFW if the gain in habitat quality and quantity can be adequately quantified and there are clear and approved best practices for how to plan, install, and maintain those conservation activities over time. ODOT would need to provide a more detailed mitigation project plan if proposing activities outside of fish passage improvements.

## **V. Including mitigation credits as a condition of a waiver**

The following section outlines the steps an applicant would take to determine A) if they qualify for a waiver, B) what level of review is needed, and C) what options exist for mitigating fish passage. No activities that trigger fish passage requirements are excluded from seeking a waiver. However, projects that have the potential to provide significant habitat quality and quantity will likely need to provide passage on site. This section helps an applicant determine when a waiver and using credits may be appropriate.

## **A. WAIVER DECISION-MAKING TREE**

The decision tree outlined below (See Figure 5A) provides criteria that ODFW may use to determine when a waiver should be approved, when a waiver review can be expedited, and when a waiver requires more detailed review. When a waiver is granted, it is valid as long as the mitigation continues to function or until the next trigger event, whichever occurs first. Credits for a waiver must be purchased within the same service area as the waiver site location (See Section 3B above).



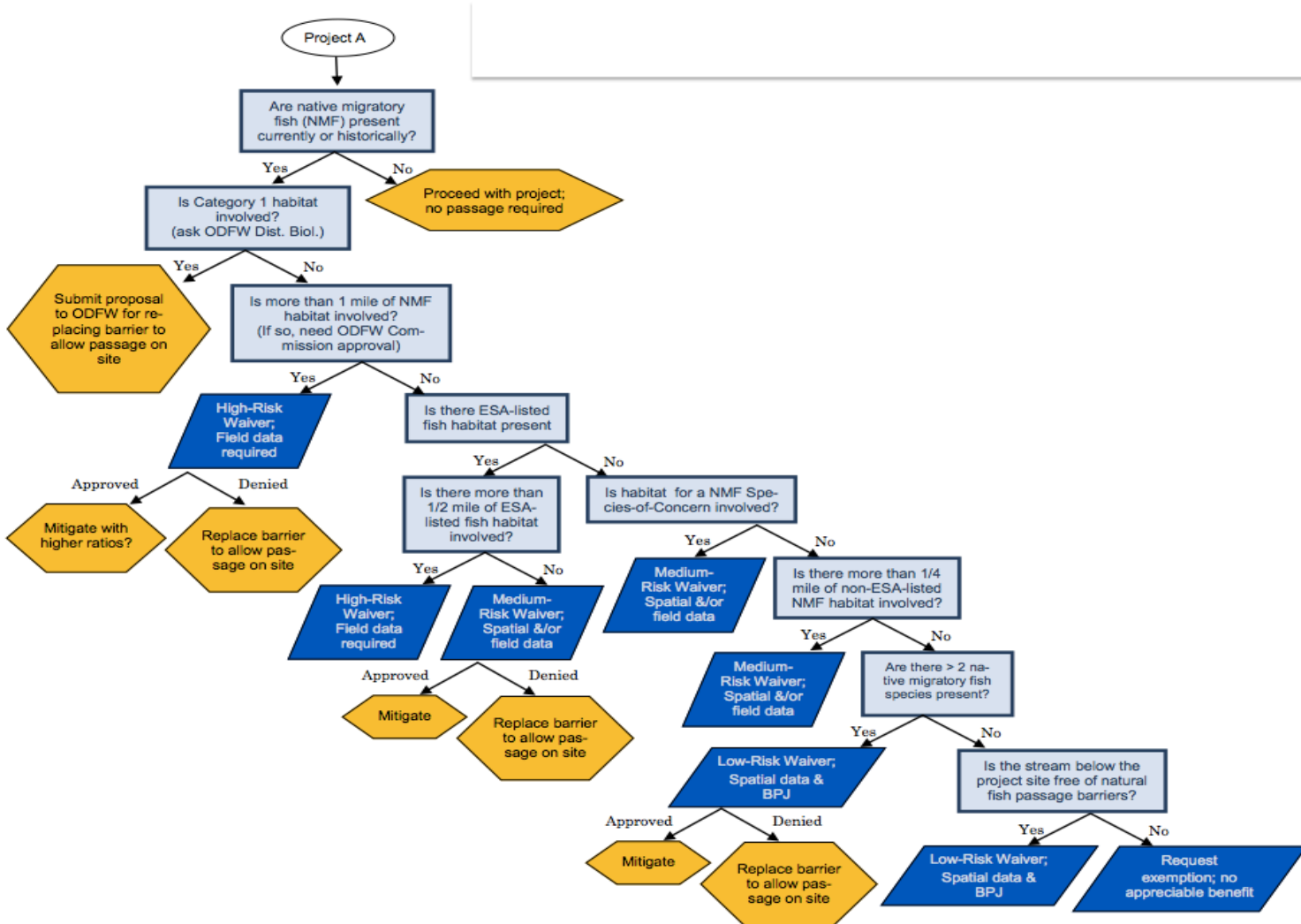


Figure 5A: Criteria for Determining Waiver Category from fish passage requirements

**B. MATCHING SPECIES AND LIFE STAGES BETWEEN A WAIVER SITE AND A MITIGATION SITE**

Habitat at the mitigation site needs to provide a net benefit over providing access to the habitat above a waiver site. For fish passage banking this includes providing benefits at the mitigation site for at least the same native fish species that would have benefited from opening passage at the waiver site.

**C. ODFW'S PROCESS FOR REVIEWING WAIVERS WITH MITIGATION CREDITS**

Activities subject to Oregon's Fish Passage Statutes may be eligible to use the Pilot Fish Passage Banking Program as compensatory mitigation for impacts covered under an ODFW waiver. ODFW retains authority to approve waivers, approve the purchase of credits from the Program, and determine the number of credits required for compensatory mitigation, on a case-by-case basis. This Instrument does not guarantee that ODFW will accept the use of Program credits for a specific waiver project.

The responsibility to provide compensatory mitigation remains with the applicant unless and until credits are purchased from the Program. Upon ODFW approval of purchase of credits from the Program, ODOT may secure the necessary amount of credits, as outlined in ODFW waiver conditions. Each waiver will include a special condition requiring that ODOT certify the transfer of mitigation credits via written communication to ODFW.

Certifications will document the ODFW waiver number and state the number of credits that have been used by ODOT (Exhibit F). A copy of each certificate will be retained in the administrative and accounting records for the Fish Passage Program Instrument. Debits will be reflected in annual accounting reports as outlined in Exhibit D.

ODOT is responsible for fulfilling mitigation requirements for authorized activities that utilize the Program. This responsibility will remain with ODOT for individual waivers until the next trigger event at the waiver site.

**VI. Program Reporting**

ODOT shall submit an annual report by December 1 to ODFW containing the following:

***Mitigation Project Reports***

The report shall contain the following information for each service area and mitigation project that has not been approved for closure:

- a. A report that includes the waivers, the amount of authorized impacts, and the amount of required mitigation;
- b. The balance of released credits at the end of the report period, and any changes in credit availability (including additional credits released).
- c. A project monitoring report (if the monitoring period has not ended) following the specifications as outlined by ODFW in Exhibit D.

## VII. Other Provisions

- A. Force Majeure: ODOT or its mitigation project partners will not be responsible for mitigation site failure that is attributed to natural catastrophes such as flood, drought, disease, or regional pest infestation, that ODFW determines is beyond the reasonable control of ODOT or its project partners to prevent or mitigate.
- B. Dispute Resolution: Resolution of disputes concerning the signatories' compliance with this Instrument shall be in accordance with those stated in Exhibit E. Disputes related to satisfaction of performance standards may be referred to independent review from government agencies or academia. ODFW will evaluate any such input and determine whether the performance standards have been met.
- C. Validity of the Instrument: This Instrument will become valid on the latter date of the signature of ODFW and ODOT. This Instrument may only be amended or modified with the written approval of ODFW and ODOT.
- D. Notice: Any notice required or permitted hereunder shall be deemed to have been given either (i) when delivered by hand or by email, or (ii) three (3) days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or (iii) sent by Federal Express or similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party):

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Oregon Department of Transportation  
ODOT Technical Leadership Center  
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Salem, OR 97302  
T: 503-986-3459  
E: [william.m.warncke@odot.state.or.us](mailto:william.m.warncke@odot.state.or.us)

- E. Invalid Provisions: In the event any one or more of the provisions contained in this Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this Instrument shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.
- F. Headings and Captions: Any paragraph heading or captions contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Instrument.
- G. Binding: This Instrument shall be immediately, automatically, and irrevocably binding upon ODOT and its successors, assigns and legal representatives upon signing by ODOT and ODFW.
- H. Liability of Regulatory Agencies: ODFW administers their programs to best protect and serve the public's interest in native fish, and not to guarantee the availability of credits to any entity, or ensure the financial success of mitigation projects, specific individuals, or entities. The public should not construe this Instrument as a guarantee in any way that ODFW will ensure sale of credits from the Program, or that ODFW will forgo other mitigation options that may also serve the public interest.
- I. Right to Refuse Service: ODFW's approval of purchase of credits from the Program does not signify ODOT's acceptance or confirmation of ODOT's offer to sell. ODOT reserves the right to refuse to sell credits from the Program for any reason.
- J. Notification of Modification: If any action is taken to void or modify a long-term management plan or protection mechanism, ODOT must notify ODFW in writing.

## VIII. Modifications

This Instrument may not be modified except by written agreement between ODOT and ODFW. Instrument modifications, including the addition or expansion of mitigation projects and expansion of the Program to include additional areas or creditable activities, will follow the process outlined in Exhibit B. ODFW may use a streamlined modification review process for changes reflecting adaptive management of the Program, credit releases, changes in credit releases and credit release schedules, and changes that ODFW determines are not significant (Exhibit B).

IN WITNESS WHEREOF, the parties hereto have executed this modified Pilot Fish Passage Banking Instrument on the date herein below last written by ODFW

_____	_____
NAME, TITLE	Date
Oregon Department of Transportation	

_____	_____
NAME, TITLE	Date
Oregon Department of Fish and Wildlife	

# Fish Passage Banking Pilot Instrument

## IX. EXHIBIT A: List of Priority Barriers

ODFW has completed analysis of priority fish passage barriers in the North Coast (Figure A-1). All mitigation projects need to address one of these priority barriers, or with approval from ODFW, apply the same prioritization criteria to demonstrate the proposed mitigation project is a priority.

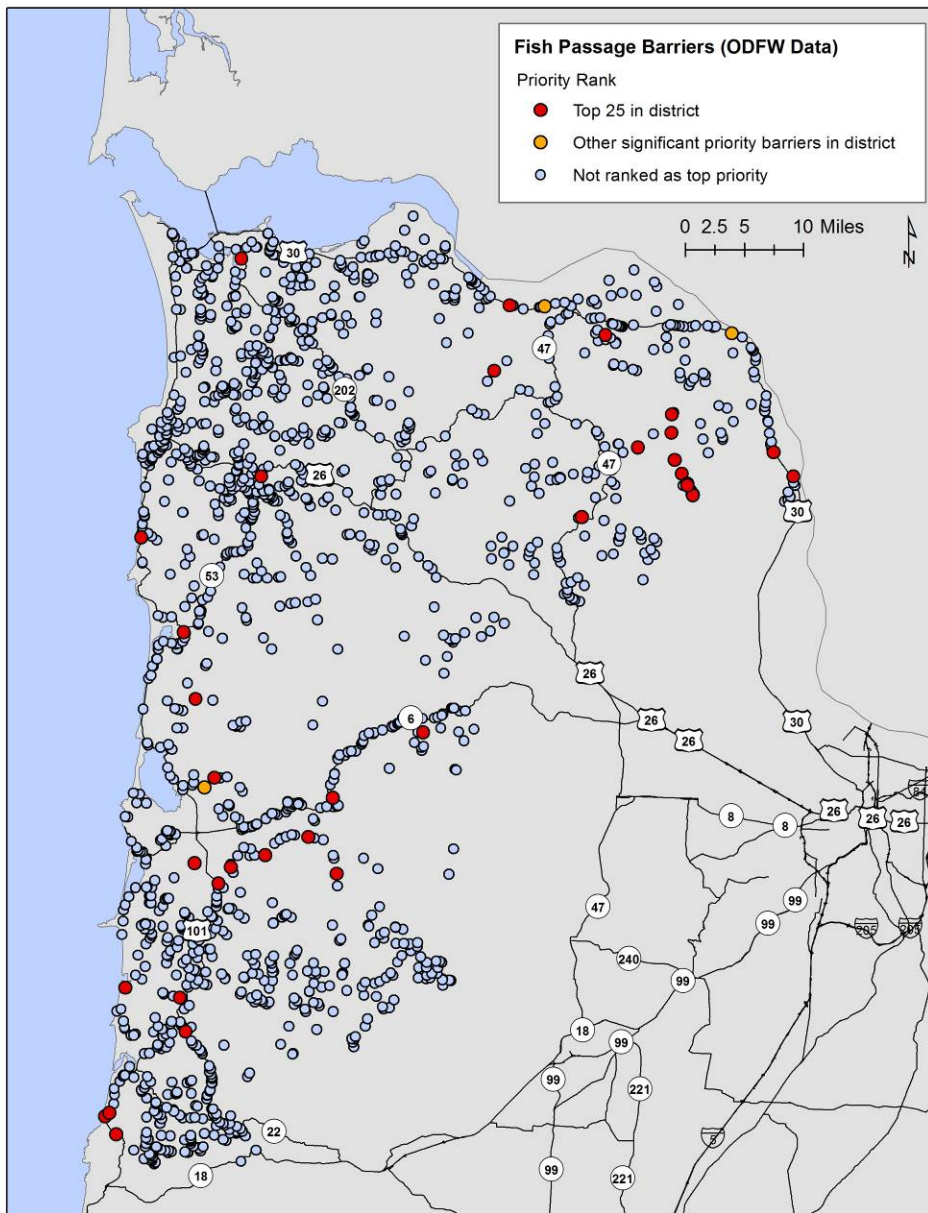


Figure A-1. Priority fish passage barriers in the North Coast

## Fish Passage Banking Pilot Instrument

### X. Exhibit B: Instrument Modifications

As mitigation projects are identified, ODOT will submit a written request to ODFW to modify the Instrument according to the process outlined in this Exhibit. Other forms of Instrument modifications, including expansion of pilot areas, inclusion of new creditable activities, and expansion of approved mitigation projects, will also follow the process outlined herein.

Requests for Instrument modifications will be accompanied by the appropriate supporting documentation as determined by ODFW. ODOT expects that requests for addition of a mitigation project will include the following information:

- The river basin and watershed (hydrologic unit code) of the site
- The goals and objectives of the site related to benefits for native fish
- Proposed service area
- Project area conditions and location
- Proposed preliminary concept plan and/or feasibility study (if complete/available)
- Demonstration the project is a priority as outlined in Exhibit A.
- Estimate of proposed native fish benefits by species and life stage
- Proposed long-term management strategy
- Other information as needed

ODOT may elect to ask for a preliminary review and consultation of a modification request. In this case, ODFW will provide comments back to ODOT within 30 days.

Within 30 days of receipt of ODOT's formal request for an Instrument modification, ODFW will notify ODOT whether the Instrument modification request is complete. Within 30 days of receipt of a complete modification request, ODFW will provide public notice of the request and make this information available to the public upon request. The comment period will be 30 days, unless otherwise determined and justified by ODFW. ODFW will provide copies of all comments to ODOT within 15 days of the close of the public comment period.

The minimum time periods outlined above do not take into account the amount of time that may pass if ODFW Commission approval is required for completing a request for Instrument modification or for modifications to the Instrument.

ODOT will prepare a draft amendment and submit it to ODFW for a completeness review. The draft amendment will include the following information as the mitigation plan:

- Information included in the initial modification request.
- Mitigation plan with a legend and scale
- Project budget
- Determination of credits and the credit release plan
- Maintenance plan
- Performance standards
- Monitoring requirements
- Long-term management plan
- Adaptive management plan
- Other information as needed

ODFW will notify ODOT within 30 days of receipt of the amendment whether it is complete, or will request additional information. Once any additional information is received and the amendment is complete, ODFW will notify ODOT. Within 90 days of receipt of the complete amendment, ODFW must indicate to ODOT whether the amendment is generally acceptable and what changes, if any, are needed.

ODOT will submit a final amendment to ODFW for approval, with supporting documentation that explains how the final amendment addresses the comments provided by ODFW and others. Within 30 days of receipt of the final amendment, ODFW will notify ODOT of their final decision, and if approved, arrange for signing by the appropriate parties.

#### *Streamlined Review Process*

ODFW may use a streamlined modification review process for changes reflecting adaptive management of the Program, credit releases, changes in credit releases and credit release schedules, and changes that ODFW determines are not significant.



## **Fish Passage Banking Pilot Instrument**

### **XI. Exhibit C: Mitigation Plans**

INSERT AS PREPARED FOR MITIGATION PROJECTS.

## Fish Passage Banking Pilot Instrument

### **XII. Exhibit D: Monitoring and Reporting Requirements**

Monitoring and reporting on the effectiveness of passage of fish is required. The Applicant shall monitor and report the effectiveness of fish passage during, throughout and after completion of the project, unless otherwise noted by this approval. This shall entail monitoring of the existing fishway during construction as well as channel bed stability throughout the project area(s) after construction and project completion. Monitoring standards may vary depending on the mitigation approach (i.e. culvert, fishway, habitat improvements, etc.)

Monitoring will be performed by a qualified fisheries biologist to determine whether or not the project is functioning as it was designed to function for fish passage. Fish passage monitoring reports shall report on the effectiveness of passage of native migratory fish species and at a variety of passage flows when these fish are migrating through the project areas. Monitoring and reporting shall coincide with the time of the year when native migratory fish species are migrating throughout the project areas. Monitoring and reporting shall consist of a summary of the fish passage conditions and fish passage performance with particular emphasis on flow velocities, water depths, and the volitional unimpeded passage of native migratory fish during the appropriate fish passage design (5% to the 95% exceedence) flows. Monitoring and reporting shall be based on visual observations, established photo points, flow velocity characteristics, or other means; particularly with regards to fish passage conditions and fish passage performance through the project areas during and after the completion of the projects.

Monitoring reports shall be completed and submitted by ODOT, or your designee, to the ODFW Statewide Fish Passage Program Coordinator and the District Fish Biologist annually for a period of 5-years after the completion of the projects.

If monitoring, by the Applicant, their designee, or ODFW indicates that volitional fish passage is questionable or not provided and/or and mitigation sites are not functioning as designed, the Applicant in consultation with the Department, shall determine the cause and, during a work period approved by the Department, shall modify the project to rectify fish passage problems as necessary. Failure to monitor fish passage for the duration of the ODFW fish passage approval shall constitute a violation of this approval and applicable fish passage laws (ORS 509.585 and 509.610).

ODFW shall be allowed to inspect the projects at reasonable times for the duration of this approval. Unless prompted by emergency or other exigent

circumstances, inspection shall be limited to regular and usual business hours, including weekends.

## Fish Passage Banking Pilot Instrument

### XIII. Exhibit E: Dispute Resolution

ODFW and ODOT staffs should work together in a collaborative manner, seeking to skillfully balance their roles in regulatory oversight and project advocacy.

ODFW and ODOT staffs are encouraged to learn and implement principles of effective communication, coordination, and negotiation to meet the mutual purpose and goals of this Agreement.

Observations of possible decision inconsistency or policy discrepancy by either agency should be collaboratively discussed during regular check-in meetings between the ODOT Fish Passage Program Coordinator and ODFW staff and, if warranted, brought to the attention of management during ODFW-ODOT quarterly meetings.

The Parties agree that, in the event of a dispute between the Parties regarding implementation of this Agreement (excluding any specific application/decisions) ODOT and ODFW shall use their best efforts to expeditiously resolve disputes in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the Parties. When staff level efforts cannot expeditiously resolve a dispute, ODFW and ODOT staff will prepare a summary of the dispute and elevate the dispute to a higher management level for resolution.

For conflicts that may arise between ODOT and ODFW staff, the first step is for staff to *constructively negotiate* their disputes; for conflicts that cannot be resolved after constructive negotiation is attempted, staff is advised to make use of *constructive elevation* protocols to elevate the decision to a higher management level for resolution.

Elevation should be used in the following situations:

- whenever participants feel the decision needs to be made at a higher level; or
- whenever participants feel the agreement is not being upheld; or
- whenever participants cannot concur with a proposed activity.

Elevation is a positive step in appropriately resolving issues.

## Fish Passage Banking Pilot Instrument

### XIV. Exhibit F: Statement of Sale of Credit

Greg Apke  
Fish Passage Coordinator  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97302  
503-947-6228

**Subject:** Statement of Sale for (Number of Credits) Mitigation Credits from the Project Name to Applicant Name

Date

The Oregon Department of Transportation (ODOT) has an approved Fish Passage Banking Pilot Instrument with the Oregon Department of Fish and Wildlife (ODFW) to establish and operate a Pilot Fish Passage Banking Program.

This letter confirms the sale of (Number of Credits) fish passage credits of (SpeciesType A), and (Number of Credits) credits of (Species Type B). These credits are being used as compensatory mitigation for debits of (SpeciesType A), and (Number of Debits) debits of (Species Type B) in the (Impact HUC) as authorized by ODFW waiver (ODFW waiver number).

By selling credits to the above applicant, ODOT is the party responsible for fulfilling the mitigation aspect of the waiver(s) listed above.