

Agenda Item Summary

BACKGROUND

It is a 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 owning or operating an artificial obstruction may not construct or maintain any artificial obstruction across waters of this state that are inhabited, or historically inhabited, by native migratory fish without obtaining fish passage approval. Projects that construct, replace, repair, or abandon artificial obstructions (dams, dikes, culverts, bridges, water diversion structures, tide gates or other hydraulic facilities) are triggers to Oregon's passage rules and regulations and invoke the Department's passage authority. Prior to these construction activities or "trigger events" 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. Between 1997 and 2013 ODOT has invested more than \$36 million of transportation funds in 142 fish passage projects around the state. These projects, completed by ODOT's Fish Passage Program, have improved access to over 461 miles of priority stream habitat for native migratory fish.

Over the past decade ODOT has deferred state highway culvert repairs due to the financial implications of the state's fish passage policy. Lack of or the deferral of culvert maintenance can result in catastrophic culvert failures which can lead to complete roadway wash outs, prolonged road closures, and very expensive emergency repairs. These emergency and subsequent repair conditions can occur immediately after winter or spring storm events and can be devastating to local communities, economies, public safety, interstate commerce, as well as spawning and rearing native fish and habitat. At the same time the increased need for culvert repairs and replacements are coming to light, Federal funds for highway projects have been drastically reduced (from \$740 million in 2011 to approximately \$300 million in 2015). State gas tax revenues are similarly decreasing, further reducing the funding source for ODOT's culvert maintenance and repair program. Repair costs associated with ODOT culverts typically range from \$50 to \$150 thousand as opposed to culvert replacement projects that meet fish passage criteria which can range from \$1.5 to \$5 million.

Continued reductions in state and federal transportation funds have resulted in ODOT's Highway Division executive management to initiate discussions with the Governor's Office regarding fish passage

statutory/rule changes to allow long-term permanent maintenance repairs. Subsequently, ODOT has been working with the Department's Fish Division Leadership and Passage Program, to seek creative solutions to allow temporary culvert repairs at failing culverts while still improving fish passage in strategic locations.

As a result of negotiations between the Department and ODOT, we have developed a culvert repair fish passage strategy that will allow ODOT to make specific culvert repairs during a 3-year pilot project. The proposed ODOT Culvert Repair Fish Passage Pilot Programmatic Agreement (Agreement) (Attachment 2) allows ODOT to make short-term culvert repairs during the next three in-water work windows (2015 – '17) in western Oregon (west of the cascades), excluding the Department's North Coast Watershed District (NCWD). The NCWD is excluded from this pilot project due to a new fish passage banking initiative presently underway between ODOT and the Department in the north coast. In conjunction with each culvert repair, ODOT will provide site-specific improved fish passage conditions. These improved passage conditions will inherently fall short of meeting full fish passage design criteria compliance, which is presently required under Oregon Policy. Culverts rated as high priorities for fish passage by the Department and those that provide access to Category 1 Habitat (irreplaceable and essential habitats) are ineligible for repairs under this pilot project. Each year, in advance of all culvert repairs, Department staff will have an opportunity to review the culvert repair list to ensure projects meet the eligibility requirements of the Agreement.

As compensation to offset the delay in full fish passage criteria at these culvert repair sites, ODOT will provide \$1.8 million to an ODFW fish passage account. These dedicated fish passage funds will be administered and managed by ODFW to fund and implement statewide fish passage priority projects. These future fish passage improvement projects will be located off of the ODOT state highway system and independent of geographic location of the culvert repair locations. Additionally, ODOT will provide funds for a new fish passage liaison biologist which will be hired and managed by the Department to assist with pilot project implementation, oversight, monitoring, and reporting. This 3-year term full time Department employee will work closely with ODOT and will have a vital role in identifying culvert repair sites to ensure appropriate site-specific fish passage improvements are constructed. This position also will help identify, monitor, and report on the passage improvements implemented through the \$1.8 million fund.

PUBLIC INVOLVEMENT

The Department and ODOT co-presented the conceptual culvert repair proposal as an informational agenda item at the June 13, 2014 public meeting of the Fish Passage Task Force (Task Force) in Tillamook. On July 31, 2014 the Department issued a 3-week news release to solicit public comment on the culvert repair proposal. The public comment solicitation described the proposed action and included a link to the Draft Agreement on the Department's Web site. This solicitation was distributed

to all the members of the Task Force, media venues, representatives for different conservation groups, and a list of individuals and organizations that have expressed interest in fish passage issues. Several members of the public provided written comment on the proposal and are attached (Attachment 6).

On August 6, 2014 ODOT presented an information briefing of the culvert repair pilot project to the Tribal Natural Resources Working Group, as part of the Legislative Commission on Indian Services.

On August 27, 2014 the Task Force met in special meeting to consider the Agreement. In advance of this meeting, Task Force members were provided copies of the draft Agreement and all public comments received through the Department's public comment solicitation. The Task Force requested a number of changes to the Agreement, primarily related to the scope and scale of the repair sites, program goals, monitoring, and reporting. Additionally the Task Force requested more information on the site selection process to implement the \$1.8 million fish passage fund and the potential precedent of this pilot project related to mitigation and future implementation requests by other entities (private, local, and county jurisdictions). After much discussion, collaboration, and a rewrite among Task Force Members, ODOT and Department staff, a new revised draft Agreement was unanimously supported by a 6-0 vote (Attachment 5). Through this endorsement, the Task Force recommends the Commission consider the Agreement.

Public review and comment on the final Commission draft of the Agreement will be accepted prior to, and during, October 10th, 2014 Commission meeting, when the Agreement will be presented to the Commission for final consideration.

ISSUE 1

ANALYSIS

APPROVAL OF ODOT CULVERT REPAIR FISH PASSAGE PILOT PROGRAMMATIC AGREEMENT

Oregon laws mandate fish passage at artificial obstructions and date back to before statehood. Oregon's existing fish passage legislation (ORS 509.580 - .901) signed into law in 2001 requires the installation of fish passage or alternatives at the owner/operator's expense at all artificial obstructions (in bodies of water in which native migratory fish are currently or have historically been present) 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 fish passage legislation passed in 2001 was to craft laws that were reasonable for owners/operators of passage obstructions (allow time to plan for the financial burden of future passage trigger events), provide benefits to fish that migrate for their lifecycle needs, and to

develop policy that has adequate flexibility for the Commission to waive passage requirements under appropriate circumstances. This Culvert Repair Agreement meets the intent of Oregon's fish passage policy while encouraging cooperation between the two agencies. This pilot project will minimize the financial burden of making short-term culvert repairs to ODOT while maintaining the integrity of Oregon's passage policy and the authority of the Commission to enforce this policy.

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 i.e., culverts. The subsequent subsections of this rule (A-E) provided the framework for this Culvert Repair Agreement. The Department through consultation with the Attorney General's Office believes this Agreement is consistent with and is permissible under Oregon's fish passage policy and rules. The underlying premise of this pilot project is to do no harm to fish and habitat, and provide benefits to native migratory fish, while providing ODOT a means to repair failing culverts. The Agreement provides ODOT the flexibility to manage the pending culvert crisis by allowing specific short-term culvert repairs while providing improved fish passage at each repair site and strategically targeting significant passage improvements at statewide fish passage priority locations using the \$1.8 million. This Agreement precludes culvert replacements and structural repairs that extend the culvert life beyond its original life expectancy, assuming routine maintenance.

The Agreement provides ODOT a fish passage trigger delay at culvert sites repaired during the 3-year pilot project. In lieu of providing "criteria" passage at these culvert repair sites, ODOT will improve fish passage conditions at each site. The Department will review the culvert repair list each year in advance of the construction season to ensure proposed repairs meet the eligibility requirements of the Agreement. Additionally, ODOT shall be responsible to monitor, track, 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.

Both ODOT and the Department will provide a final report to the Commission at the conclusion of the pilot project. The Department will provide a final pilot project analysis and report on the effects of the pilot project on fish passage. ODOT will provide a final project report on the effects of the pilot project on maintaining the highway infrastructure. These reports will be used to develop a strategy to address culvert infrastructure issues on the state highway system and the needs of native migratory fish.

The \$1.8 million fish passage fund, committed on behalf of ODOT as part of this Agreement, 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 on the ODFW 2013 Statewide Fish Passage Priority List located at <http://www.dfw.state.or.us/fish/passage/>. 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 funding entities to assist with project design and implementation. Unfortunately, demand is high for these limited funds and the frequency of these projects is limited. This new passage restoration fund will provide the Department a mechanism to expeditiously and efficiently make improvements at statewide high priority passage locations while providing a mechanism to allow ODOT to make short-term repairs at failing culverts.

The Department believes this Agreement is consistent with other programs and future initiatives of the Department, including The Coastal Multi-Species Conservation and Management Plan, recently adopted by the Commission.

This Agreement will provide a mechanism for ODOT to demonstrate the need for improved culvert inventories and data management systems. This information may help secure future transportation funds to better manage and maintain the highway system culvert infrastructure. We believe this Agreement is good governance between two state agencies with different missions. We also believe the 3-year pilot project will be a win-win for fish and the safety of the traveling public.

We believe this culvert repair pilot project will provide a net benefit to native migratory fish over the status quo through fish passage improvements at each culvert repaired under this Agreement and through the investments made by ODOT at statewide fish passage priority locations identified in the ODFW 2013 Statewide Fish Passage Priority List, previously approved by the Commission.

OPTIONS

1. Approve the Programmatic Agreement
2. Modify and approve the Programmatic Agreement
3. Deny the Programmatic Agreement - Status Quo

**STAFF
RECOMMENDATION**

Staff recommends the Commission approve the ODOT request for this 3-year Culvert Repair Fish Passage Pilot Programmatic Agreement in Western Oregon.

DRAFT MOTION	I move to approve the ODOT Culvert Repair Fish Passage Pilot 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.