

**CITY OF NEWPORT MUNICIPAL AIRPORT RUNWAY CULVERT REPAIR
GRANT CREEK
FISH PASSAGE WAIVER AGREEMENT
(W-18-0008)**

This Agreement is entered into on the date of last signature by and between State of Oregon through its Oregon Department of Fish and Wildlife, hereinafter referred to as "the Department", and the City of Newport Oregon, hereinafter referred to as "the Applicant".

PREAMBLE

The Applicant seeks authorization from the Department to waive fish passage requirements (ORS 509.585) at two existing culverts located underneath the City of Newport's Municipal Airport (waiver site) where it conveys Grant Creek, a direct tributary to Pacific Ocean in Lincoln County, Oregon. In exchange, the Applicant will replace the two existing Lincoln County owned and managed culverts situated at Mile Post 6.38 underneath Harlan-Burnt Woods Road where it crosses Lake Creek (mitigation site), a direct tributary of Sprout Creek, a tributary of the Big Elk River in the Yaquina River Basin with a full fish passage criteria new structure owned and managed by Lincoln County.



The applicant's Fish Passage Waiver Application # W-18-0008 (Attachment A) and the Oregon Department of Fish and Wildlife's (Department) benefit analysis (Attachment B), required by ORS 509.585(7)(b) are attached and hereby incorporated into this agreement.

The Applicant has authorized full funding for the project and has authorized its Airport Director to enter into this waiver agreement with the Department, as identified in Attachment A. The Applicant will enter into an Agreement with Lincoln County Public Works Department to implement and maintain the mitigation action.

PROVISIONS OF THE AGREEMENT

1. Pursuant to ORS 509.585 and OAR 635-412-0025(1), (9), and (10)(b)(A), the Department hereby waives the requirements for the artificial obstruction at the waiver location because it determines that the alternative mitigation the Applicant has agreed to results in a net benefit (Attachment B) to native migratory fish.
2. The location of the artificial obstruction and proposed mitigation site shall only be those specified in Attachments A and B.
3. The Applicant shall provide fish passage mitigation by implementing the culvert replacement action identified in Attachments A and B. The Applicant has authorized the financing that will cover the costs of the mitigation action of this Agreement.
4. Specific mitigation design plans for the proposed mitigation site shall meet Department fish passage criteria and guidelines and shall be approved by the Department prior to installation. The Applicant shall be responsible for obtaining all other necessary permissions and permits as appropriate for the implementation of the mitigation.
5. The mitigation identified in Attachments A and B shall not be used to comply with any other legal requirements of the Applicant or others, except as allowed in OAR 635-412-0040(3).
6. Mitigation action identified in this Agreement shall be completed by the end of 2020.
7. All in-water work associated with the mitigation action shall be completed during the appropriate ODFW in-water work period(s).
8. The Applicant shall maintain, monitor, evaluate the effectiveness of, and report on the mitigation as required under OAR 635-412-0040(8), and shall provide written status reports to the Department annually for five (5) years, or as determined by the Department. Reports shall include photographs from established photo-points as part of the evaluation and monitoring. Monitoring and evaluation of the mitigation shall be conducted annually unless problems are observed that may require additional analysis. These reports shall consist of visual observations and post-construction as-built design plan inspection to ensure the mitigation project was built according to plans and to ensure design fish passage criteria were achieved. Reports shall be submitted to the State Fish Passage Program Coordinator and Mid Coast Watershed District Fish Biologist. Electronic or hard copy submissions are acceptable.
9. For the duration of this Agreement, the Applicant shall be responsible for all project maintenance required such that the fish passage mitigation identified in Attachment A provides adequate volitional habitat access for native migratory fish. If monitoring by the Applicant or Department indicates that the mitigation is not functioning as designed, the Applicant, in consultation with the Department, shall determine the cause and, during an in-water work period approved by the Department, shall modify the mitigation site to rectify problems as necessary.

10. Failure to maintain fish passage at the mitigation site, required by ORS 509.910, for the duration of this Agreement shall constitute a violation of this Agreement and applicable fish passage laws (ORS 509.585). Such failure shall invalidate this fish passage waiver for the culvert at the waiver site and shall require the Applicant to provide fish passage at the artificial obstruction or seek alternative mitigation if not remedied in a reasonable amount of time or mitigated with some other project(s) acceptable to the Department. Department shall notify the Applicant of such violation and allow Applicant a reasonable amount of time to rectify such violation.
11. The Department shall be allowed to inspect the mitigation site at reasonable times for the duration of this Agreement with prior notice, appropriate property owner permission, and with a representative of the Applicant present. Unless prompted by emergency or other exigent circumstances, inspection shall be limited to regular and usual business hours, including weekends.
12. The Applicant may employ or contract with other parties to perform work under this Agreement but remains responsible for the successful implementation of the mitigation, monitoring and evaluation, and reporting.
13. This Agreement is solely for the purpose of fulfilling Oregon fish passage statutory requirements and responsibilities administered by the Commission or the Department and does not satisfy any other Department, federal, state, or local laws, rules, or regulations, including but not limited to State or Federal Endangered Species Acts, any applicable water rights, instream flow requirements, approvals, or certificates administered by Oregon Water Resources Department.
14. This Agreement in no way purports or authorizes take of a federally listed species.
15. This Agreement shall be valid and remain in effect until such time and so long as the Applicant fully implements and continues to provide the agreed-upon mitigation measures identified in Attachment A and until the waived artificial obstruction triggers (further construction, a fundamental change in permit status, or abandonment) fish passage laws again, as required in OAR 635-412-0025(3) and ORS 509.585.

Signature:		Date:	 02/20/2019
	City of Newport		Oregon Department of Fish and Wildlife
Name:	Spencer Nebel		Greg Apke
Title:	City Manager		Statewide Fish Passage Program Leader

Approved as to Form



 City Attorney