



United States Department of the Interior



FISH AND WILDLIFE SERVICE

911 NE 11th Ave
Portland, Oregon 97232-4181

In Reply Refer to:
FWS/R1/ABA/
EN/WR

DEC 3 2008

Tim Wallin, Water Rights Manager
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Dear Tim:

This letter is a petition for reconsideration of the Final Order approving R-87125 (Turtle Flats Pond). Fish and Wildlife Service (Service) requests reconsideration of the following language in the permit:

The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any inchannel obstruction.

If Muddy Creek is the subject stream, Turtle Flats Pond is an off-channel reservoir and does not create any dam or artificial obstruction the channel of the subject stream. This language is therefore inapplicable to Turtle Flats Pond, and potentially confusing for future users and regulators. The Service requests this language be removed from the permit. The Service also requests reconsideration of the following language in the permit:

Ensure adequate egress for native fishes from Turtle Flats.

Turtle Flats Pond was an existing area of depressions in a flood plain area adjacent to Muddy Creek. The Service, in consultation with Oregon Department of Fish and Wildlife (ODFW), developed the area as waterfowl habitat by deepening depressions and grading wide and shallow swales in the flood plain. The design of these swales was approved by ODFW and intended to enhance egress for native fishes that may be stranded during Muddy Creek flood events. While the swales increase the likelihood for Turtle Flats Pond to be inundated in Muddy Creek floods via backwater, they also improve fish egress over and above the natural condition.

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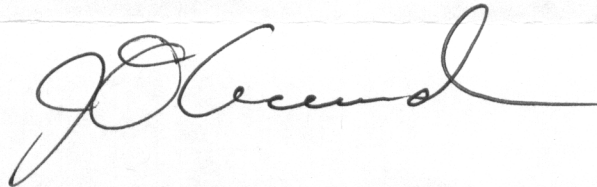
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SALEM, OREGON

The proposed language begs the question of what is adequate egress. Is an improvement in fish egress over natural conditions sufficient? Is escapement of some percentage of native fishes adequate? Must every fish be accounted for? Must all native fishes have continuous egress? More important, what agency determines adequacy, by what standard, and under what statutory authority?

The Service requests that this language be deleted from the permit. In the alternative, the Service suggests that the language of the condition precisely state the responsible state agency, its statutory authority, and an articulate standard for "adequate egress". This would give the Service specific and understandable notice of conditions that affect its development and management of this impoundment.

Sincerely,

A handwritten signature in black ink, appearing to read "J. O'Connell", written in a cursive style.

Chief, Water Resources Branch

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