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# MEMORANDUM

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**To:** *Natural Resources Subcommittee*

**From:** *Krista McDowell, Legislative Fiscal Office*  
(503) 986-1838

**Date:** June 17, 2013

**Subject:** *SB 837 – A4*  
Work Session Recommendations

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SB 837 – A4 relates to fish protection. The measure has an emergency clause and is effective on passage.

The measure, the original staff measure summary, preliminary Joint Committee on Ways and Means staff measure summary, amendment, and fiscal impact statement are available on the Oregon Legislative Information System (OLIS).

The measure previously had a public hearing and work session in the Environment and Natural Resources Subcommittee and was recommended as do pass with amendments to be referred to Ways and Means by prior reference.

The measure has a minimal fiscal impact and a projected revenue impact of \$7,000 Other Funds (OF) in the 2013-15 biennium and \$75,000 OF revenue in 2015-17.

## **Amendment**

There is an A4 amendment to the measure which clarifies that Federal Energy Regulatory Commission exemption is from licensing or similar qualification of another federal agency responsible for authorizing the project.

**Motion: Move the A4 amendment to SB 837.**

## **Measure as Modified**

The measure is recommended to be moved to the full Committee on Joint Ways and Means.

**Motion: Move SB 837 to the full committee with a “do pass” recommendation, as amended.**

## **Assignment of Carriers**

Full: \_\_\_\_\_  
2nd Chamber: \_\_\_\_\_

**PROPOSED AMENDMENTS TO  
A-ENGROSSED SENATE BILL 837**

1 On page 2 of the printed A-engrossed bill, delete lines 14 through 45 and  
2 delete pages 3 and 4.

3 On page 5, delete lines 1 through 30 and insert:

4 **“SECTION 4.** ORS 543.765 is amended to read:

5 “543.765. (1) Notwithstanding ORS 537.145 and ORS chapter 543, the  
6 holder of a water right may apply to the Water Resources Department for a  
7 certificate to use water for hydroelectric purposes within an artificial deliv-  
8 ery system under the applicant’s existing water right. If the proposed hy-  
9 droelectric project [*qualifies*] **meets the applicable capacity limitation**  
10 **under this subsection and meets either the qualifications** for a Federal  
11 Energy Regulatory Commission exemption **from licensing or similar qual-**  
12 **ifications of another federal agency responsible for authorizing the**  
13 **project**, the applicant may use the expedited application process under this  
14 section **regardless of which federal agency issues the authorization. To**  
15 **qualify under this subsection:**

16 **“(a) For a project that is to be built as part of an existing dam, the**  
17 **capacity may not exceed five megawatts. Subsection (5)(b) of this**  
18 **section does not apply to a project described in this paragraph.**

19 **“(b) For in-conduit projects, the capacity may not exceed 15 mega-**  
20 **watts for a nonmunicipal facility or 40 megawatts for a municipal fa-**  
21 **ility. Projects described in this paragraph must comply with**  
22 **subsection (5)(b) of this section.**

1       “(2) An application, which shall be on a form provided by the **Water**  
2 **Resources** Department, for a hydroelectric certificate under this section  
3 must include:

4       “(a) The certificate number, or decree reference if no confirming certifi-  
5 cate has been issued, of the applicant’s existing water right associated with  
6 the proposed hydroelectric project.

7       “(b) A copy of **either** a Federal Energy Regulatory Commission exemption  
8 application **or a similar application submitted to the federal agency**  
9 **responsible for authorizing the project**, if applicable.

10       “(c) A proposed schedule of annual water use and an estimate of the  
11 maximum power generation of the proposed hydroelectric project.

12       “(d) A statement by the applicant that the amount of water used by the  
13 proposed hydroelectric project will not exceed the amount authorized and  
14 used under the applicant’s existing water right for beneficial use without  
15 waste.

16       “(e) A statement that the applicant owns or otherwise controls the water  
17 conveyance system.

18       “(f) An application processing fee of \$500. The department shall deposit  
19 fees collected under this section into the Water Resources Department Hy-  
20 droelectric Fund established pursuant to ORS 536.015.

21       “(g) A map or drawing and all other data concerning the proposed hy-  
22 droelectric project, as may be prescribed by the department. The map or  
23 drawing must be of sufficient quality and scale to establish the location of  
24 the existing point of diversion and the proposed location of the hydroelectric  
25 [*facility*] **project**.

26       “(h) If the water to be used for the proposed hydroelectric project is de-  
27 livered by a public entity other than the applicant for a certificate under this  
28 section, a statement from that entity that the entity will be able to deliver  
29 water as described in the application.

30       “(i) Evidence that the water has been used over the past five years ac-

1 cording to the terms and conditions of the applicant's existing water right  
2 described in paragraph (a) of this subsection.

3 “(3) If an applicant provides the information required by subsection (2)  
4 of this section:

5 “(a) The Water Resources Department shall provide notice to both the  
6 State Department of Fish and Wildlife and the public, and provide a 30-day  
7 period for public comment.

8 “(b) The Water Resources Department may issue a final order and certifi-  
9 cate to use water for hydroelectric purposes upon making a final determi-  
10 nation that the proposed hydroelectric use does not impair, or is not  
11 detrimental to, the public interest in the manner provided in ORS 537.170 (8).

12 “(4) If the Water Resources Department determines that public interest  
13 issues have been identified, the department shall issue a final order denying  
14 the application. The department shall also issue a final order denying the  
15 application if the department identifies issues related to the public interest.  
16 If the applicant does not appeal the final order as provided in ORS chapter  
17 183 and, within one year of the department's final order denying the  
18 applicant's application, files an application with the department for a pre-  
19 liminary permit to operate a hydroelectric project as provided in ORS 537.130  
20 and 543.210, the applicant shall receive a credit toward the applicant's ap-  
21 plication fees in the amount of \$500.

22 “(5) At a minimum, a certificate issued under this section must contain  
23 the following conditions:

24 “(a) **Except as provided in paragraph (b) of this subsection,** fish  
25 screens, by-pass devices and fish passages as required by the State Depart-  
26 ment of Fish and Wildlife.

27 “(b) **If the application is for a hydroelectric project that is to be**  
28 **installed in or on a conduit delivery system, the certificate does not**  
29 **need to include a requirement for fish passage at the diversion point**  
30 **for the conduit delivery system if:**

1       **“(A) The hydroelectric generating equipment for the project is not**  
2 **located on a dam;**

3       **“(B) The hydroelectric generating equipment for the project is in-**  
4 **stalled within or at the end of a conduit delivery system;**

5       **“(C) The conduit delivery system is operated for the distribution of**  
6 **water for agricultural, municipal or industrial consumption; and**

7       **“(D) Except as provided in subsection (15) of this section, the cer-**  
8 **tificate includes a condition for the making of annual payments under**  
9 **subsection (14) of this section.**

10       ~~“(b)~~ (c) That use of water be limited to periods when the applicant’s  
11 existing water right is put to beneficial use without waste and that the  
12 amount used is not greater than the quantity of water diverted to satisfy the  
13 authorized specific use under the existing water right described in subsection  
14 (2)(a) of this section.

15       ~~“(c)~~ (d) That use of water be limited by rate, duty, season and any other  
16 limitations of the applicant’s existing water right described in subsection  
17 (2)(a) of this section.

18       ~~“(d)~~ (e) That the applicant measure and report the quantity of water  
19 diverted.

20       ~~“(e) Any other conditions the Water Resources Department deems necessary~~  
21 ~~to protect the public interest.]~~

22       “(f) That the restrictions established in ORS 543.660 shall apply as con-  
23 ditions of use to a certificate issued under this section to a district as de-  
24 fined in ORS 543.655.

25       “(g) That a certificate issued under this section shall be invalidated upon  
26 a change in the point of diversion of the existing water right described in  
27 subsection (2)(a) of this section.

28       ~~“(h) The Water Resources Department shall conduct a review of certificates~~  
29 ~~issued under this section and shall issue a final order and a superseding cer-~~  
30 ~~tificate that corresponds to any changes or adjustments made to the applicant’s~~

1 *existing water right described in subsection (2)(a) of this section.]*

2 “[*(i)*] **(h)** That the right to use water under a certificate issued under this  
3 section is invalidated if the [*Federal Energy Regulatory Commission ex-*  
4 *emption*] **federal exemption or authorization** related to the certificate is  
5 canceled or invalidated.

6 **“(i) Any other conditions the Water Resources Department deems**  
7 **necessary to protect the public interest.**

8 **“(6) The Water Resources Department shall conduct a review of**  
9 **certificates issued under this section and shall issue a final order and**  
10 **a superseding certificate that corresponds to any changes or adjust-**  
11 **ments made to the applicant’s existing water right described in sub-**  
12 **section (2)(a) of this section.**

13 **“(7) Subsection (5)(b) of this section does not affect any require-**  
14 **ment for fish passage applicable to a project that is otherwise required**  
15 **by law.**

16 **“(8) Upon request, the State Department of Fish and Wildlife and**  
17 **the Water Resources Department shall arrange a preapplication**  
18 **meeting with a person to discuss the requirements associated with the**  
19 **installation of a hydroelectric project in an artificial delivery system.**

20 “[*(6)*] **(9)** A certificate issued under this section may not have its own  
21 priority date. The **Water Resources** Department may not regulate for or  
22 against any certificate issued under this section based on the priority date  
23 of the certificate.

24 “[*(7)*] **(10)** A certificate issued under this section does not grant a right  
25 to divert water for hydroelectric purposes.

26 “[*(8)*] **(11)** A certificate issued under this section may not be included in  
27 the determination of injury to other water rights pursuant to ORS chapter  
28 540.

29 “[*(9)*] **(12)** A certificate issued under this section is subject to review 50  
30 years after the date of issuance and pursuant to the terms described in this

1 section.

2 “[10] (13) Failure to fully develop and put to use a certificate issued  
3 under this section within five years of issuance invalidates the hydroelectric  
4 certificate.

5 **“(14)(a) If a certificate contains a condition described in subsection  
6 (5)(b) of this section for annual payments, the payment shall be col-  
7 lected as provided in paragraph (c) of this subsection. Except as pro-  
8 vided in paragraph (b) of this subsection, the annual payment amount  
9 must be:**

10 **“(A) Except as provided in subparagraph (D) of this paragraph, for  
11 the first five years, four times the base hydropower fee amount as-  
12 sessed for the project under ORS 543.078 for the year.**

13 **“(B) Except as provided in subparagraph (D) of this paragraph, for  
14 the 6th through 10th years, eight times the base hydropower fee  
15 amount assessed for the project under ORS 543.078 for the year.**

16 **“(C) Except as provided in subparagraph (D) of this paragraph, after  
17 the 10th year, 15 times the base hydropower fee amount assessed for  
18 the project under ORS 543.078 for the year.**

19 **“(D) \$100 for any year in which the base hydropower fee amount  
20 assessed for the project under ORS 543.078 is less than \$100.**

21 **“(b) If the certificate is for a hydroelectric project that will operate  
22 on a partial-year basis, the fee shall be three-fifths of the amount es-  
23 tablished in paragraph (a) of this subsection.**

24 **“(c) The Water Resources Department shall collect the fee on behalf  
25 of the State Department of Fish and Wildlife and forward the fee  
26 moneys for crediting to the Fish Passage Restoration Subaccount  
27 created under section 1 of this 2013 Act.**

28 **“(15)(a) Notwithstanding subsection (14) of this section, a certificate  
29 for a project to install hydroelectric generating equipment as described  
30 in subsection (5)(b) of this section may provide for the termination of**

1 **annual payments being made under subsection (14) of this section if,**  
2 **after the date the project commences operation:**

3 **“(A) The project provides for fish passages;**

4 **“(B) There is an agreement between the applicant and the State**  
5 **Department of Fish and Wildlife providing for fish passages associated**  
6 **with the project; or**

7 **“(C) A waiver or exemption has been issued under ORS 509.585 for**  
8 **the project.**

9 **“(b) A certificate for a project to install hydroelectric generating**  
10 **equipment as described in subsection (5)(b) of this section does not**  
11 **need to include a condition for the making of annual payments under**  
12 **subsection (14) of this section if:**

13 **“(A) There is an agreement between the applicant and the State**  
14 **Department of Fish and Wildlife providing for the conduit delivery**  
15 **system to have fish passages associated with the project; or**

16 **“(B) A waiver or exemption has been issued under ORS 509.585 for**  
17 **the project.**

18 **“[(11)] (16) If a certificate under this section is issued, the certificate**  
19 **holder must pay fees consistent with the fees described in ORS 543.078.**  
20 **Failure to pay a required fee invalidates a certificate issued under this sec-**  
21 **tion.**

22 **“[(12)] (17) The **Water Resources** Department shall issue invoices for**  
23 **fees required under this section, and the state shall have a preference lien**  
24 **for delinquent fees, as provided in ORS 543.082.**

25 **“[(13)] (18) An applicant for a certificate issued under this section must**  
26 **provide evidence of a Federal Energy Regulatory Commission exemption **or****  
27 **approval under a similar process by the federal agency responsible for**  
28 **authorizing the project** before a certificate can be issued, if applicable.

29 **“[(14)] (19) Nothing in this section shall alter the preference of municipi-**  
30 **palities in ORS 543.260 (3) and 543.270.”.**



**FISCAL IMPACT OF PROPOSED LEGISLATION**

**Measure: SB 837 - A4**

Seventy-Seventh Oregon Legislative Assembly – 2013 Regular Session  
Legislative Fiscal Office

*Only Impacts on Original or Engrossed  
Versions are Considered Official*

Prepared by: Krista McDowell  
Reviewed by: Paul Siebert, Susie Jordan  
Date: 6/14/2013

**Measure Description:**

Creates Fish Passage Restoration Subaccount within Fish Passage Fund.

**Government Unit(s) Affected:**

Oregon Department of Fish and Wildlife (ODFW), Water Resources Department

**Summary of Expenditure Impact:**

See Analysis

**Local Government Mandate:**

This bill does not affect local governments' service levels or shared revenues sufficient to trigger Section 15, Article XI of the Oregon Constitution.

**Analysis:** The measure, as amended, creates the Fish Passage Restoration subaccount within the Fish Passage Fund and requires the Oregon Department of Fish and Wildlife (ODFW) to use the subaccount to fund priority fish passage restoration projects. The bill creates the Fish Passage Task Force to provide advice to ODFW regarding projects to be funded by the subaccount. Five years after the effective date of the act; the Water Resources Department (WRD) is required to work with ODFW to review the expenditures from the subaccount as well as review the adequacy of a fee described in ORS 543.765. The WRD shall collect the fee on behalf of ODFW and forward the fee moneys to the subaccount.

The fiscal impact to ODFW and WRD, associated with the passage of this bill, is expected to be minimal. All expenses are estimated to be absorbable within the existing parameters of the agencies budgets, including work associated with maintaining a record of monies in the subaccount and the creation of an annual report, review of certificates, and pre-application meetings with persons interested in the installation of hydroelectric projects with an artificial delivery system.

Revenues for the subaccount are assumed from 30 projects that are projected to reach commercial operation by the year 2016. The projected revenues are approximately \$7,000 Other Funds (OF) in the 2013-15 biennium and \$75,000 OF revenue in the 2015-17 biennium. Actual revenues will vary based on the timeframe projects are established, project base hydro power fee amounts, and project developers' option to install fish passage as an alternative to paying the annual fish passage fees.

Joint Committee on Ways and Means

Carrier – House: Rep.  
Carrier – Senate: Sen.

**Revenue:** Revenue Impact Statement Not Issued

**Fiscal:** Fiscal Impact Statement Issued

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**Action:**

**Vote:**

House

Yeas:

Nays:

Exc:

Senate

Yeas:

Nays:

Exc:

**Prepared By:** Krista McDowell, Legislative Fiscal Office

**Meeting Date:**

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**WHAT THE MEASURE DOES:** Creates Fish Passage Restoration Subaccount (Subaccount Fund) in Fish Passage Fund. Requires Department of Fish and Wildlife (ODFW) use Subaccount Fund to fund priority fish passage restoration projects. Requires ODFW to give priority to funding projects on statewide inventory of artificial obstructions with emphasis on statewide priority list projects that also pay fees for certificate to use water for hydroelectric purposes and projects that have ability to leverage matching funds. Directs Fish Passage Task Force to provide ODFW advice regarding funding projects. Requires Water Resources Department (WRD) and ODFW to jointly review adequacy of amount and structure of annual fee in achieving dual goals of in-conduit energy development and fish passage restoration and functionality. Requires WRD and ODFW to commence review five years after Act takes effect and report findings to Legislature no later than October 1, 2018. Authorizes holder of water right to apply for certificate to use water for hydroelectric purposes within artificial delivery system if proposed project meets applicable capacity limitation and qualifications for Federal Energy Regulatory Commission exemption from licensing. Stipulates water certificate does not need to include condition requiring fish passage if hydroelectric generating equipment is not located on dam; equipment is installed within or at end of conduit delivery system; conduit portion of system is operated for distribution of water for agriculture, municipal, or industrial consumption; and certificate includes condition for making annual payments.

**ISSUES DISCUSSED:**

- How the fee is administered
- Implications to irrigation districts
- ODFW priority list of fish passage and task force advisement of project selection

**EFFECT OF COMMITTEE AMENDMENT:** The A4 amendment clarifies that Federal Energy Regulatory Commission exemption is from licensing or similar qualification of another federal agency responsible for authorizing the project.

**BACKGROUND:** In-conduit hydropower projects use technology that is installed in a water delivery canal or pipeline to generate electricity using water that is already being diverted for an approved beneficial use. These projects do not use additional water beyond the amount that the water delivery system operator is already allowed to divert under its existing water right. Recent advances in hydropower technology have resulted in more viable options for agricultural, municipal, and industrial water suppliers and users to pursue in-conduit hydropower in Oregon.

Fish passage is a key component to many facets of fisheries resource management. Connectivity between aquatic habitats is an important part of garnering successful and healthy fish populations. In February, 2013, the Department of Fish and Wildlife released an updated fish passage priority list which includes 534 high priority fish passage barriers, with an additional 55 barriers characterized as significant but needing more data.