

House Bill 2298

Sponsored by Representatives HELM, OWENS, Senators FINDLEY, DEMBROW (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Directs State Department of Fish and Wildlife to adopt by rule and administer program for authorizing voluntary projects for stream restoration and habitat improvement through construction of environmental restoration weirs.

Exempts authorized projects from removal-fill permit. Exempts authorized projects from fish passage requirements in certain circumstances. Authorizes department to require fish passage as part of authorized project in certain circumstances. Authorizes department to require modification of environmental restoration weirs if found to adversely impact transportation infrastructure or planned transportation infrastructure. Authorizes department to require third-party monitoring of authorized projects. Provides that certain riparian work as part of authorized project is not subject to riparian management requirements under Oregon Forest Practices Act.

Requires department to adopt rules establishing program in time for rules to become operative no later than one year after effective date of Act.

Requires department to submit, no later than December 31, 2027, report to interim committees related to environment and natural resources of Legislative Assembly on extent and impact of program.

Requires department to submit, no later than September 15, 2032, report to interim committees related to environment and natural resources of Legislative Assembly on assessments of conditions of qualifying streams affected by authorized voluntary projects and make recommendations for legislation.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to voluntary stream restoration; creating new provisions; amending ORS 196.921 and
3 509.585; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2 and 3 of this 2021 Act are added to and made a part of the wildlife**
6 **laws.**

7 **SECTION 2. The Legislative Assembly finds and declares that:**

8 **(1) Many small streams in eastern Oregon were historically inhabited by beaver popu-**
9 **lations and strongly influenced by beavers' unique ability to modify their physical sur-**
10 **roundings. Beaver dams had the effect of slowing the flow of water, allowing for natural**
11 **overflow onto surrounding ancient floodplains and providing many positive benefits to stream**
12 **ecosystems and to the hydrologic functioning of streams and adjacent water tables.**

13 **(2) Due, in part, to the near eradication of the once prevalent beaver populations, many**
14 **stream systems have become severely degraded during the past century, developing deeply**
15 **eroded and incised stream channels that have lost connectivity with the natural ancient**
16 **floodplain. These changes to the stream systems have resulted in adverse environmental and**
17 **economic impacts.**

18 **(3) The public policy of the State of Oregon is to encourage and support a program for**
19 **voluntary stream restoration actions by landowners that can help restore both environ-**
20 **mental and economic health to eastern Oregon through the construction of environmental**
21 **restoration weirs, provided that the voluntary stream restoration actions do not have sig-**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 **nificant adverse consequences for the environment or existing water rights.**

2 **(4) Environmental restoration weirs constructed pursuant to section 3 of this 2021 Act**
3 **may provide benefits to stream restoration that include:**

- 4 **(a) Improving habitat conditions;**
- 5 **(b) Slowing stream runoff;**
- 6 **(c) Decreasing the chance of catastrophic wildfire;**
- 7 **(d) Improving carbon sequestration; and**
- 8 **(e) Improving economic productivity of the adjacent ancient floodplain.**

9 **SECTION 3. (1) As used in this section and section 2 of this 2021 Act:**

10 **(a) "Ancient floodplain" means channel adjacent areas and surfaces constructed by**
11 **fluvial processes that functioned as floodplains or areas for overbank deposition prior to**
12 **channel incision.**

13 **(b) "Environmental restoration weir" means one or more structures that are con-**
14 **structed:**

15 **(A) For the purpose of delaying or slowing, but not preventing, streamflow to promote**
16 **restoration of stream and habitat conditions;**

17 **(B) Such that the structures do not store or appropriate water in a manner that would**
18 **require a permit from the Water Resources Department; and**

19 **(C) To be no larger than necessary to cause overbank flooding onto the lands constituting**
20 **the ancient floodplain during ordinary periods of high streamflow.**

21 **(c) "Healthy native migratory fish population" means a population of native migratory**
22 **fish that, as determined by the State Department of Fish and Wildlife:**

23 **(A) Demonstrates appropriate life stages throughout the year; and**

24 **(B) Reproduces at sufficient levels to be a self-sustaining population into the foreseeable**
25 **future.**

26 **(d) "Incised or eroded stream" means a stream that has been scoured by erosion to the**
27 **extent that the channel bed elevation has lowered relative to its ancient floodplain and the**
28 **stream has lost connectivity with the ancient floodplain, as characterized by:**

29 **(A) The loss of natural wetland, riparian or meadow conditions in the adjacent surfaces;**

30 **(B) The absence of overbank flooding or deposition during ordinary periods of high**
31 **streamflow;**

32 **(C) The loss of diversity of fish or other species; or**

33 **(D) The presence of invasive dry land species that have encroached from adjacent up-**
34 **lands, including but not limited to sagebrush, bunch grass, juniper and pine.**

35 **(e) "Native migratory fish" has the meaning given that term in ORS 509.580.**

36 **(f) "Qualifying stream" means an incised or eroded stream, a designated reach of an**
37 **incised or eroded stream or a designated set of adjacent reaches of an incised or eroded**
38 **stream that, prior to commencement of a project authorized pursuant to subsection (2) of**
39 **this section:**

40 **(A) Has an estimated median monthly natural streamflow of less than one cubic foot per**
41 **second during at least two months of the year;**

42 **(B) Has not had a healthy native migratory fish population for at least three years prior**
43 **to the time of authorization; and**

44 **(C) Is incised or eroded to the extent that the channel bed elevation has lowered by two**
45 **feet or more relative to the elevation of the ancient floodplain.**

1 (g) “Reach” means a section of a stream that is similar in flow topography and habitat
 2 characteristics and is between 50 and 500 feet in length.

3 (h) “Summit of the Cascade Mountains” has the meaning given that term in ORS 321.805.

4 (2) The State Department of Fish and Wildlife shall adopt by rule and administer a pro-
 5 gram for authorizing voluntary projects for stream restoration and habitat improvement
 6 through the construction of environmental restoration weirs. The department may only au-
 7 thorize a project under the program if:

8 (a) The project involves construction of environmental restoration weirs on one or more
 9 qualifying streams located in any closed basin:

10 (A) From which water does not flow to the Pacific Ocean; and

11 (B) That is located east of the summit of the Cascade Mountains;

12 (b) Construction of the environmental restoration weirs will be completed no later than
 13 July 1, 2031; and

14 (c) The project complies with local floodplain regulations if the project is located within
 15 an area subject to floodplain management.

16 (3) Rules adopted under subsection (2) of this section shall identify criteria for evaluating
 17 voluntary projects undertaken pursuant to the program.

18 (4) If the department determines that native migratory fish are present in a qualifying
 19 stream prior to the date of construction of environmental restoration weirs, the person en-
 20 gaging in the proposed voluntary project shall provide fish passage pursuant to ORS 509.585.

21 (5)(a) If the department determines that native migratory fish are not present in a
 22 qualifying stream prior to the date of construction of environmental restoration weirs, the
 23 person engaging in the proposed voluntary project is exempt from meeting the requirements
 24 of ORS 509.585.

25 (b) If, after construction of environmental restoration weirs, the department determines
 26 that native migratory fish have returned to the qualifying stream, the department may re-
 27 quire the person engaging in the authorized voluntary restoration project to:

28 (A) Provide fish passage that:

29 (i) Is economically practicable to the person engaging in the voluntary restoration
 30 project; and

31 (ii) Can be constructed from locally available natural materials; or

32 (B) Provide mitigation that, as determined by the department, provides a net benefit to
 33 native migratory fish.

34 (6) For a period of up to 10 years after construction of the environmental restoration
 35 weirs is complete, the department:

36 (a) Shall require the person that engaged in an authorized voluntary project to maintain
 37 the environmental restoration weirs for their stream restoration and habitat improvement
 38 values;

39 (b) May require the person to engage in photo monitoring of the environmental restora-
 40 tion weirs; and

41 (c) May, subject to subsection (9) of this section, require the person to allow a third party
 42 to engage in monitoring of the environmental restoration weirs.

43 (7) The department shall, in coordination with the Water Resources Department, require
 44 the person to modify the environmental restoration weirs if the environmental restoration
 45 weirs are found:

1 (a) By the Water Resources Department to result in injury to an existing water right;
2 or

3 (b) By the State Department of Fish and Wildlife to be having a significant detrimental
4 impact on native migratory fish.

5 (8)(a) Before authorizing a proposed voluntary project, the State Department of Fish and
6 Wildlife shall coordinate with the Department of Transportation to consider any potential
7 impacts of the project on transportation infrastructure or planned transportation
8 infrastructure, including but not limited to potential impacts on roads, culverts and bridges.

9 (b) The State Department of Fish and Wildlife, in coordination with the Department of
10 Transportation, may at any time require the person engaging in the authorized voluntary
11 restoration project to modify environmental restoration weirs if the environmental restora-
12 tion weirs are found to adversely impact transportation infrastructure or planned transpor-
13 tation infrastructure.

14 (9) If the State Department of Fish and Wildlife requires third-party monitoring of envi-
15 ronmental restoration weirs under subsection (6)(c) of this section:

16 (a) The third party must be chosen through mutual agreement between the person en-
17 gaging in the voluntary restoration project and the department;

18 (b) The person engaging in the voluntary restoration project may not unreasonably
19 withhold consent for the third party to engage in monitoring;

20 (c) The third-party monitoring may not result in a financial cost to the person engaging
21 in the voluntary restoration project; and

22 (d) The third party engaging in the monitoring must be covered by sufficient liability and
23 casualty insurance.

24 (10) Planting or removal of brush and trees from stream banks and riparian areas as part
25 of an authorized voluntary project are not subject to riparian management requirements
26 established under the Oregon Forest Practices Act.

27 (11) Nothing in this section creates any new requirement or exemption with respect to
28 obtaining a permit or certificate to use, store or appropriate water.

29 **SECTION 4.** ORS 196.921 is amended to read:

30 196.921. (1) Nothing in ORS 196.600 to 196.921 applies to filling the beds of the waters of this
31 state for the purpose of constructing, operating and maintaining dams or other diversions for which
32 permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which
33 preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.610.

34 (2) Nothing in ORS 196.600 to 196.921 applies to removal of materials from the beds or banks
35 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

36 (a) Such waterway or portion is situated within forestland; and

37 (b) Such removal or filling is directly connected with a forest management practice conducted
38 in accordance with ORS 527.610 to 527.770, 527.990 and 527.992.

39 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
40 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting,
41 cultivating, conventional crop rotation or harvesting.

42 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on lands zoned for
43 exclusive farm use as described in ORS 215.203 for the following activities:

44 (a) Drainage or maintenance of farm or stock ponds; or

45 (b) Maintenance of farm roads in such a manner as to not significantly adversely affect wetlands

1 or any other waters of this state.

2 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for subsurface
3 drainage by deep ripping, tiling or moling on converted wetlands that are zoned for exclusive farm
4 use pursuant to ORS 215.203.

5 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity
6 defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS
7 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by
8 the Natural Resources Conservation Service of the United States Department of Agriculture, or its
9 successor agency, so long as commercial agricultural production on the land has not been aban-
10 doned for five or more years.

11 (7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablish-
12 ment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as
13 in effect on January 1, 2010.

14 (8) The exemptions in subsections (3) to (7) of this section do not apply to any fill or removal
15 that involves changing an area of wetlands to a nonfarm use.

16 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
17 or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage
18 ditches, irrigation ditches and tile drain systems, provided that:

19 (a) The structure was serviceable within the past five years; and

20 (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or
21 other waters of this state to a greater extent than the wetlands or waters of this state were affected
22 as a result of the original construction of those structures.

23 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
24 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
25 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
26 ments or approaches.

27 (11) Nothing in ORS 196.600 to 196.921 applies to removal or filling, or both, within the beds or
28 banks of any waters of this state conducted as part of a surface mining operation, that is the subject
29 of a memorandum of agreement between the Department of State Lands and the State Department
30 of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries
31 is assigned sole responsibility for permitting as described in ORS 517.797.

32 (12) The Department of State Lands may adopt a rule that exempts from the requirement to
33 obtain a permit under ORS 196.800 to 196.900 voluntary habitat restoration projects that have only
34 minimal adverse impact on waters of this state.

35 (13) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the
36 point of diversion to withdraw surface water for beneficial use if the change in the point of diversion
37 is necessitated by a change in the location of the surface water and authorized by the Water Re-
38 sources Department.

39 (14) Unless otherwise provided in a proposed order or in a final order issued in a contested case,
40 nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, originally intended or sub-
41 sequently used for the establishment, repair, restoration, resumption or replacement of the following
42 uses, if the use was established on or before January 1, 2017, on lands zoned for exclusive farm use,
43 forest use or mixed farm and forest use:

44 (a) A dwelling:

45 (A) Described in ORS 215.213 (1) or (3) or 215.283 (1);

1 (B) Established subject to county approval under ORS 215.402 to 215.438; or

2 (C) Lawfully established on or before December 31, 1973;

3 (b) An agricultural building as defined in ORS 455.315; or

4 (c) Activities that:

5 (A) Are associated with a dwelling or agricultural building described in this subsection;

6 (B) Have received county approval, if necessary, under ORS 215.402 to 215.438; and

7 (C) Are located on the same lot or parcel as the dwelling or agricultural building.

8 **(15) Nothing in ORS 196.800 to 196.921 applies to removal or filling, or both, as part of a**
9 **voluntary project for stream restoration and habitat improvement authorized by the State**
10 **Department of Fish and Wildlife under section 3 of this 2021 Act.**

11 [(15)] (16) As used in this section:

12 (a) "Converted wetlands" means agriculturally managed wetlands that, on or before June 30,
13 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or
14 any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that
15 are managed for commercial agricultural purposes.

16 (b) "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any
17 other waters of this state that are located within or adjacent to a converted wetland area.

18 (c) "Replacement" means the construction of a new structure that is substantially similar in size,
19 sited in a substantially similar location and constructed in place of a previously existing structure.

20 **SECTION 5.** ORS 196.921, as amended by section 6, chapter 516, Oregon Laws 2001, section 13,
21 chapter 253, Oregon Laws 2003, section 4, chapter 342, Oregon Laws 2009, section 2, chapter 16,
22 Oregon Laws 2011, section 4, chapter 406, Oregon Laws 2011, and section 2, chapter 428, Oregon
23 Laws 2017, is amended to read:

24 196.921. (1) Notwithstanding the exemptions in subsections (3) to (8) of this section, a permit
25 under ORS 196.600 to 196.921 is required for any fill or removal of material in or from the waters
26 of this state when:

27 (a) The fill or removal is a part of an activity whose purpose is to bring an area of state waters
28 into a use to which it was not previously subject; and

29 (b)(A) The flow or circulation of the waters of this state may be impaired; or

30 (B) The reach of the waters may be reduced.

31 (2) Nothing in ORS 196.600 to 196.921 applies to removal of materials from the beds or banks
32 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

33 (a) Such waterway or portion is situated within forestland; and

34 (b) Such removal or filling is directly connected with a forest management practice conducted
35 in accordance with ORS 527.610 to 527.770, 527.990 and 527.992.

36 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
37 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting,
38 cultivating, conventional crop rotation or harvesting.

39 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on lands zoned for
40 exclusive farm use as described in ORS 215.203 for the following activities:

41 (a) Drainage or maintenance of farm or stock ponds; or

42 (b) Maintenance of farm roads, provided that:

43 (A) The farm roads are constructed and maintained in accordance with construction practices
44 designed to minimize any adverse effects to the aquatic environment;

45 (B) Borrow material for farm road maintenance does not come from waters of this state unless

1 authorized by the Department of State Lands; and

2 (C) Maintenance activities are confined to the scope of construction for the original project.

3 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity
4 defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS
5 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by
6 the Natural Resources Conservation Service of the United States Department of Agriculture, or its
7 successor agency, so long as commercial agricultural production on the land has not been aban-
8 doned for five or more years.

9 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablish-
10 ment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as
11 in effect on January 1, 2010.

12 (7) The exemptions in subsections (3) to (6) of this section do not apply to any fill or removal
13 that involves changing an area of wetlands or converted wetlands to a nonfarm use.

14 (8) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
15 or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage
16 ditches, irrigation ditches and tile drain systems, provided that:

17 (a) The structure was serviceable within the past five years; and

18 (b) Such maintenance or reconstruction would not significantly adversely affect wetlands or
19 other waters of this state to a greater extent than the wetlands or waters of this state were affected
20 as a result of the original construction of those structures.

21 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for temporary dams
22 constructed for crop or pasture irrigation purposes that are less than 50 cubic yards, provided the
23 following conditions are satisfied:

24 (a) The removal or filling is conducted during periods that minimize adverse effects to fish and
25 wildlife in accordance with guidance provided by the State Department of Fish and Wildlife;

26 (b) The removal or filling does not jeopardize a threatened or endangered species or adversely
27 modify or destroy the habitat of a threatened or endangered species listed under federal or state
28 law; and

29 (c) Temporary fills are removed in their entirety and the area is restored to its approximate
30 original elevation.

31 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
32 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
33 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
34 ments or approaches.

35 (11) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance
36 of access roads constructed to move mining equipment, subject to the following conditions:

37 (a) The access roads are constructed and maintained in accordance with construction practices
38 that minimize adverse effects to the aquatic environment;

39 (b) Borrow material for access road maintenance does not come from waters of this state unless
40 authorized by the Department of State Lands; and

41 (c) Maintenance activities are confined to the scope of construction for the original project.

42 (12) Nothing in ORS 196.600 to 196.921 applies to removal or filling, or both, within the beds or
43 banks of any waters of this state conducted as part of a surface mining operation that is the subject
44 of a memorandum of agreement between the Department of State Lands and the State Department
45 of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries

1 is assigned sole responsibility for permitting as described in ORS 517.797.

2 (13) The department may adopt a rule that exempts from the requirement to obtain a permit
3 under ORS 196.800 to 196.900 voluntary habitat restoration projects that have only minimal adverse
4 impact on waters of this state.

5 (14) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the
6 point of diversion to withdraw surface water for beneficial use if the change in the point of diversion
7 is necessitated by a change in the location of the surface water and authorized by the Water Re-
8 sources Department.

9 (15) Unless otherwise provided in a proposed order or in a final order issued in a contested case,
10 nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, originally intended or sub-
11 sequently used for the establishment, repair, restoration, resumption or replacement of the following
12 uses, if the use was established on or before January 1, 2017, on lands zoned for exclusive farm use,
13 forest use or mixed farm and forest use:

14 (a) A dwelling:

15 (A) Described in ORS 215.213 (1) or (3) or 215.283 (1);

16 (B) Established subject to county approval under ORS 215.402 to 215.438; or

17 (C) Lawfully established on or before December 31, 1973;

18 (b) An agricultural building as defined in ORS 455.315; or

19 (c) Activities that:

20 (A) Are associated with a dwelling or agricultural building described in this subsection;

21 (B) Have received county approval, if necessary, under ORS 215.402 to 215.438; and

22 (C) Are located on the same lot or parcel as the dwelling or agricultural building.

23 **(16) Nothing in ORS 196.800 to 196.921 applies to removal or filling, or both, as part of a**
24 **voluntary project for stream restoration and habitat improvement authorized by the State**
25 **Department of Fish and Wildlife under section 3 of this 2021 Act.**

26 [(16)] (17) As used in this section:

27 (a)(A) "Converted wetlands" means agriculturally managed wetlands that, on or before June 30,
28 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or
29 any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that
30 are managed for commercial agricultural purposes.

31 (B) "Converted wetlands" does not include any stream, slough, ditched creek, spring, lake or any
32 other waters of this state that are located within or adjacent to a converted wetland area.

33 (b) "Harvesting" means physically removing crops or other agricultural products.

34 (c) "Plowing" includes all forms of primary tillage, including moldboard, chisel or wide-blade
35 plowing, discing, harrowing or similar means of breaking up, cutting, turning over or stirring soil
36 to prepare it for planting crops or other agricultural products. "Plowing" does not include:

37 (A) The redistribution of soil, rock, sand or other surface materials in a manner that changes
38 areas of waters of this state into dry land; or

39 (B) Rock crushing activities that result in the loss of natural drainage characteristics, the re-
40 duction of water storage and recharge capability, or the overburdening of natural water filtration
41 capacity.

42 (d) "Replacement" means the construction of a new structure that is substantially similar in
43 size, sited in a substantially similar location and constructed in place of a previously existing
44 structure.

45 (e) "Seeding" means the sowing of seed or placement of seedlings to produce crops or other

1 agricultural products.

2 **SECTION 6.** ORS 509.585 is amended to read:

3 509.585. (1) It is the policy of the State of Oregon to provide for upstream and downstream
4 passage for native migratory fish and the Legislative Assembly finds that cooperation and collab-
5 oration between public and private entities is necessary to accomplish the policy goal of providing
6 passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native
7 salmonid populations, as envisioned by the Oregon Plan. Therefore, except as provided in ORS
8 chapter 509, fish passage is required in all waters of this state in which native migratory fish are
9 currently or have historically been present.

10 (2) Except as otherwise provided by this section or ORS 509.645 **or section 3 of this 2021**
11 **Act**, a person owning or operating an artificial obstruction may not construct or maintain any ar-
12 tificial obstruction across any waters of this state that are inhabited, or historically inhabited, by
13 native migratory fish without providing passage for native migratory fish.

14 (3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory
15 of artificial obstructions in order to prioritize enforcement actions based on the needs of native
16 migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of
17 the artificial obstruction on the native migratory fish, the biological status of the native migratory
18 fish stocks in question and any other factor established by the department by rule. The department
19 shall establish a list of priority projects for enforcement purposes. Priority artificial obstructions
20 are subject to the State Fish and Wildlife Commission's authority as provided in ORS 509.625. Unless
21 requested by persons owning or operating an artificial obstruction, the department shall primarily
22 direct its enforcement authority toward priority projects, emergencies and projects described in
23 subsection (4) of this section. The priority project list shall be subject to periodic review and
24 amendment by the department and to formal review and amendment by the commission no less fre-
25 quently than once every five years.

26 (4) A person owning or operating an artificial obstruction shall, prior to construction, funda-
27 mental change in permit status or abandonment of the artificial obstruction in any waters of this
28 state, obtain a determination from the department as to whether native migratory fish are or his-
29 torically have been present in the waters. If the department determines that native migratory fish
30 are or historically have been present in the waters, the person owning or operating the artificial
31 obstruction shall either submit a proposal for fish passage to the department or apply for a waiver
32 pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the
33 alternatives to fish passage must be obtained from the department prior to construction, permit
34 modification or abandonment of the artificial obstruction.

35 (5) Consistent with the purpose and goals of the Oregon Plan, the department shall seek coop-
36 erative partnerships to remedy fish passage problems and to ensure that problems are corrected as
37 soon as possible. The department and the person owning or operating the artificial obstruction are
38 encouraged to negotiate the terms and conditions of fish passage or alternatives to fish passage,
39 including appropriate cost sharing. The negotiations may include, but are not limited to, consider-
40 ation of equitable factors.

41 (6) The department shall submit a proposed determination of the required fish passage or alter-
42 natives to fish passage to the commission for approval. The determination may be the result of the
43 negotiations described in subsection (5) of this section or, if no agreement was reached in the ne-
44 gotiations, a determination proposed by the department. If a protest is not filed within the time pe-
45 riod specified in ORS 509.645, the proposed determination shall become a final order.

1 (7)(a) The commission shall waive the requirement for fish passage if the commission determines
2 that the alternatives to fish passage proposed by the person owning or operating the artificial ob-
3 struction provide a net benefit to native migratory fish.

4 (b) Net benefit to native migratory fish is determined under this subsection by comparing the
5 benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the
6 benefit to native migratory fish that would occur using the proposed alternatives to fish passage.
7 Alternatives to fish passage must result in a benefit to fish greater than that provided by the arti-
8 ficial obstruction with fish passage. The net benefit to fish shall be determined based upon condi-
9 tions that exist at the time of comparison.

10 (c) The State Fish and Wildlife Director shall develop rules establishing general criteria for
11 determining the adequacy of fish passage and of alternatives to fish passage. The general criteria
12 shall include, but not be limited to:

13 (A) The geographic scope in which alternatives must be conducted;

14 (B) The type and quality of habitat;

15 (C) The species affected;

16 (D) The status of the native migratory fish stocks;

17 (E) Standards for monitoring, evaluating and adaptive management;

18 (F) The feasibility of fish passage and alternatives to fish passage;

19 (G) Quantified baseline conditions;

20 (H) Historic conditions;

21 (I) Existing native migratory fish management plans;

22 (J) Financial or other incentives and the application of incentives;

23 (K) Data collection and evaluation; and

24 (L) Consistency with the purpose and goals of the Oregon Plan.

25 (d) To the extent feasible, the department shall coordinate its requirements for adequate fish
26 passage or alternatives to fish passage with any federal requirements.

27 (8) A person owning or operating an artificial obstruction may at any time petition the com-
28 mission to waive the requirement for fish passage in exchange for agreed-upon alternatives to fish
29 passage that provide a net benefit to native migratory fish as determined in subsection (7) of this
30 section.

31 (9)(a) Artificial obstructions without fish passage are exempt from the requirement to provide
32 fish passage if the commission:

33 (A) Finds that a lack of fish passage has been effectively mitigated;

34 (B) Has granted a legal waiver for the artificial obstruction; or

35 (C) Finds there is no appreciable benefit to providing fish passage.

36 (b) The commission shall review, at least once every seven years, the artificial obstructions ex-
37 empted under this subsection that do not have an exemption expiration date to determine whether
38 the exemption should be renewed. The commission may revoke or amend an exemption if it finds
39 that circumstances have changed such that the relevant requirements for the exemption no longer
40 apply. The person owning or operating the artificial obstruction may protest the decision by the
41 commission pursuant to ORS 509.645.

42 (10) If the fundamental change in permit status is an expiration of a license of a federally li-
43 censed hydroelectric project, the commission's determination shall be submitted to the Federal En-
44 ergy Regulatory Commission as required by ORS 543A.060 to 543A.410.

45 (11) To the extent that the requirements of this section are preempted by the Federal Power

1 Act or by the laws governing hydroelectric projects located in waters governed jointly by Oregon
 2 and another state, federally licensed hydroelectric projects are exempt from the requirements of this
 3 section.

4 (12) A person subject to a decision of the commission under this section shall have the right to
 5 a contested case hearing according to the applicable provisions of ORS chapter 183.

6 **SECTION 7. The State Department of Fish and Wildlife shall adopt rules under section**
 7 **3 of this 2021 Act in time for the rules to become operative no later than one year after the**
 8 **effective date of this 2021 Act.**

9 **SECTION 8. (1) No later than December 31, 2027, the State Department of Fish and**
 10 **Wildlife shall submit a report, in the manner provided by ORS 192.245, to the interim com-**
 11 **mittees of the Legislative Assembly related to environment and natural resources that pro-**
 12 **vides information summarizing the extent to which voluntary projects have been commenced**
 13 **and completed under the program established by the department pursuant to section 3 of this**
 14 **2021 Act, and any known preliminary impacts of the voluntary projects.**

15 (2) No later than September 15, 2032, the State Department of Fish and Wildlife shall
 16 submit a report, in the manner provided by ORS 192.245, to the interim committees of the
 17 Legislative Assembly related to environment and natural resources on voluntary projects
 18 authorized under the program established by the department pursuant to section 3 of this
 19 2021 Act. The report shall include:

20 (a) Assessments of the conditions of qualifying streams affected by authorized voluntary
 21 projects, which assess stream conditions prior to construction of environmental restoration
 22 weirs as well as after construction of environmental restoration weirs; and

23 (b) Recommendations, which may include recommendations for legislation, regarding
 24 potential amendment of section 3 (2) of this 2021 Act to allow the department to authorize
 25 voluntary projects in which construction of environmental restoration weirs will commence
 26 on or after January 2, 2036.

27 **SECTION 9. This 2021 Act being necessary for the immediate preservation of the public**
 28 **peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect**
 29 **on its passage.**

30 _____