

House Bill 2164

Sponsored by Representatives SMITH DB, SCHARF (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**.

Exempts repair or replacement of artificial obstruction smaller than 15 feet across from fish passage mandates.

Exempts dam that provides hydropower, drinking water or irrigation water from fish passage mandates under certain circumstances. Removes requirement that State Fish and Wildlife Commission review exemptions from fish passage mandates. Removes requirement that certain commission determinations be submitted to Federal Energy Regulatory Commission.

A BILL FOR AN ACT

1
2 Relating to fish passage; and amending ORS 509.580 and 509.585.

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

4 **SECTION 1.** ORS 509.580 is amended to read:

5 509.580. As used in ORS 509.580 to 509.590, 509.600 to 509.645 and 509.910:

6 (1) "Artificial obstruction" means any dam, diversion, culvert or other human-made device
7 placed in the waters of this state that precludes or prevents the migration of native migratory fish.

8 (2)(a) "Construction" means:

9 [(a)] (A) Original construction;

10 [(b)] (B) Major replacement;

11 [(c)] (C) Structural modifications that increase storage or diversion capacity; or

12 [(d)] (D) For purposes of culverts, installation or replacement of a roadbed or culvert.

13 **(b) "Construction" does not include the repair or replacement of an artificial obstruction**
14 **that is smaller than 15 feet across.**

15 (3) "Emergency" means unforeseen circumstances materially related to or affected by an artificial
16 obstruction that, because of adverse impacts to a population of native migratory fish, requires
17 immediate action. The State Fish and Wildlife Director may further define the term "emergency"
18 by rule.

19 (4) "Fundamental change in permit status" means a change in regulatory approval for the op-
20 eration of an artificial obstruction where the regulatory agency has discretion to impose additional
21 conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the
22 granting of new water rights, but not including water right transfers or routine maintenance per-
23 mits.

24 (5) "In-proximity" means within the same watershed or water basin and having the highest
25 likelihood of benefiting the native migratory fish populations directly affected by an artificial ob-
26 struction.

27 (6) "Native migratory fish" means those native fish that migrate for their life cycle needs and
28 that are listed in the rules of the State Fish and Wildlife Director.

29 (7) "Net benefit" means an increase in the overall, in-proximity habitat quality or quantity that

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 is biologically likely to lead to an increased number of native migratory fish after a development
2 action and any subsequent mitigation measures have been completed.

3 (8) "Oregon Plan" means the guidance statement and framework described in ORS 541.898.

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

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

12 (2) Except as otherwise provided by this section or ORS 496.266 or 509.645, a person owning or
13 operating an artificial obstruction may not construct or maintain any artificial obstruction across
14 any waters of this state that are inhabited, or historically inhabited, by native migratory fish with-
15 out providing passage for native migratory fish.

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

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

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

43 (6) The department shall submit a proposed determination of the required fish passage or alter-
44 natives to fish passage to the commission for approval. The determination may be the result of the
45 negotiations described in subsection (5) of this section or, if no agreement was reached in the ne-

1 negotiations, a determination proposed by the department. If a protest is not filed within the time pe-
 2 riod specified in ORS 509.645, the proposed determination shall become a final order.

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

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

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

- 15 (A) The geographic scope in which alternatives must be conducted;
- 16 (B) The type and quality of habitat;
- 17 (C) The species affected;
- 18 (D) The status of the native migratory fish stocks;
- 19 (E) Standards for monitoring, evaluating and adaptive management;
- 20 (F) The feasibility of fish passage and alternatives to fish passage;
- 21 (G) Quantified baseline conditions;
- 22 (H) Historic conditions;
- 23 (I) Existing native migratory fish management plans;
- 24 (J) Financial or other incentives and the application of incentives;
- 25 (K) Data collection and evaluation; and
- 26 (L) Consistency with the purpose and goals of the Oregon Plan.

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

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

33 (9)[(a)] Artificial obstructions without fish passage are exempt from the requirement to provide
 34 fish passage if the commission:

- 35 [(A)] (a) Finds that a lack of fish passage has been effectively mitigated;
- 36 [(B)] (b) Has granted a legal waiver for the artificial obstruction; [or]
- 37 [(C)] (c) Finds there is no appreciable benefit to providing fish passage[.]; or

38 (d) **Finds that the artificial obstruction creates some fish habitat, that providing fish**
 39 **passage would be cost prohibitive for the person owning the artificial obstruction and that**
 40 **the artificial obstruction is a dam that provides hydropower, drinking water or irrigation**
 41 **water.**

42 [(b)] *The commission shall review, at least once every seven years, the artificial obstructions ex-*
 43 *empted under this subsection that do not have an exemption expiration date to determine whether the*
 44 *exemption should be renewed. The commission may revoke or amend an exemption if it finds that cir-*
 45 *cumstances have changed such that the relevant requirements for the exemption no longer apply. The*

1 *person owning or operating the artificial obstruction may protest the decision by the commission pur-*
2 *suant to ORS 509.645.]*

3 *[(10) If the fundamental change in permit status is an expiration of a license of a federally licensed*
4 *hydroelectric project, the commission's determination shall be submitted to the Federal Energy Regu-*
5 *latory Commission as required by ORS 543A.060 to 543A.410.]*

6 *[(11)] (10) To the extent that the requirements of this section are preempted by the Federal*
7 *Power Act or by the laws governing hydroelectric projects located in waters governed jointly by*
8 *Oregon and another state, federally licensed hydroelectric projects are exempt from the require-*
9 *ments of this section.*

10 *[(12)] (11) A person subject to a decision of the commission under this section shall have the*
11 *right to a contested case hearing according to the applicable provisions of ORS chapter 183.*

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